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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE ("IMAP") OF UNITED WATER IDAHO INC., BEING A COLLECTION OF INDIVIDUAL APPLICATION FOR TRANSFERS OF WATER RIGHTS AND APPLICATIONS FOR AMENDMENT OF PERMITS	)	**BOISE PROJECT BOARD OF CONTROL, BIG BEND IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT AND BOISE-KUNA IRRIGATION DISTRICT'S STATEMENT OF ISSUES AND REQUEST FOR CLARIFICATION**

The Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District and Boise-Kuna Irrigation District ("Boise Project Parties") submit this Statement of Issues, and Request for Clarification in response to the Director's August 8, 2012, Order Affirming Party Status and Notice of Status Conference. The Boise Project Parties general concerns, as explained in more detail below are 1) that the "relaunch" of the Integrated Municipal Application Package does not meet the application standard to be applied by the

Director in a "formal transfer and amendment process[,]"[1] 2) that the relief sought by the Applicant, United Water, is precluded by *City of Pocatello v. State of Idaho*, 152 Idaho 830, 275 P.3d 845 (2012), and 3) that the data relied upon by United Water to define its planning area and Reasonably Anticipated Future Needs, needs to be updated.

STATEMENT OF ISSUES

1) The Original Transfer Applications Do Not Represent the Current Portfolio of Changes Proposed by United Water:

The original IMAP transfer applications prepared and submitted to IDWR, which are presumably the same applications that United Water seeks to have granted in this proceeding, no longer represent the original relief requested by United Water. While United Water has gone to considerable effort to explain in its changed position in its "Statement Updating and Explaining the IMAP Relaunch" that does not alleviate the burden of actually amending the applications themselves.

The decrees issued for the water rights in the SRBA have granted a number of the alternative points of diversion sought for the individual water rights. The individual applications should be amended to reflect these changes. In the backfiles for the water rights at the IDWR website, and also for the SRBA subcases, there are few references to 2009 correspondence between IDWR and the SRBA court that identified discrepancies in the original director's reports that resulted in revisions to the partial decrees ultimately issued, however, counsel for the Boise Project Parties has been unable to locate those August 2009 communications. It would be helpful to know what analysis the Department used to whittle the 86 or 89 initially claimed

[1] See United Water's Statement Updating and Explaining the IMAP Relaunch, p. 28.

alternative points of diversion down to the 41 or 42 ultimately decreed. All of this data would presumably be provided in the amended transfer application for the individual water rights.

Basically, United Water's explanation of decommissioned wells, wells still in operation but no longer claimed, wells already partially decreed, and those that still require a transfer does not provide sufficient information to be able to determine whether the proposed transfer and amendments requested meet the requirements of I.C. § 42-222. Updated applications that reflect the current conditions of the partially decreed water rights, and those that remain in claim status, must be provided before this proceeding is properly before the Department for determination.

2) The Proposed Relief that United Water Seeks as a Result of the Transfer, to Include the Additional Points of Diversion not Granted in the SRBA Proceedings, Will Not Provide the Relief that United Water Seeks:

United Water has described the relief that it seeks through the inclusion of the additional alternative points of diversion not granted in the SRBA proceedings. It claims:

> By obtaining alternate points of diversion, UWID does not seek to reallocate water rights among its wells to the detriment of other aquifer pumpers. UWID simply seeks authorization to move licensed quantities around to the most efficient well where this can be done without injury. With this in mind, UWID expects that each existing well will retain the priority date associated with the well for purposes of well interference claims.[2]

United Water states that it affirms the concept that the remarks appended to its decrees water rights protected senior appropriators because the alternative points of diversion cannot be pumped out of priority, according to the earliest priority of any of its water rights, to the detriment of senior water rights. However, there is still the issue of the quantity to be pumped from any well.

[2] *See* Statement Explaining Relaunch, p. 29, *citing* 2003 IMAP at 15-16.

In *Pocatello*, Pocatello and the objectors in that case, the Surface Water Coalition, had "already stipulated with the Surface Water Coalition to not increase the volumes beyond historical amounts in use at the time the accomplished transfers were established in 1987."[3] Based on counsel for the Boise Project Parties review of the record in the IMAP proceeding, it appears that United Water is not taking the same position that United Water would be limited to pumping only the historical quantity established under each well as of either the date of its accomplished transfer, or any subsequent transfer that might be granted through this proceeding. Rather it appears that the relief sought by United Water would allow it to pump any licensed volume from any well that serves as alternative point of diversion, and only the priority date would limit the administration of the right. This is expressly not allowed by the Supreme Court's analysis of the Pocatello case.

United Water has been very adamant in these proceedings that no injury analysis by the Director is appropriate or necessary in the context of the relief that United Water is seeking in these proceedings, presumably because it has already agreed to the remark that was at issue in *Pocatello*, however, the remark does not address the volume and quantity issue that the Supreme Court placed on equal footing with the priority issue in that case. There the Court stated:

> Pocatello claims that the district court erred in requiring the condition in order to prevent injury to any existing water rights, where no actual injury to any other water right was shown. According to Pocatello, '[N]o injury analysis should even be triggered under § 42-1425 unless there has been a third party objection filed to a claim,' and 'Future injury is also not a proper concern under the terms of § 42-1425, as only injuries to the other water right holders on the date of the change could justify denial of a claim.' Pocatello is wrong on both counts.
>
> Pocatello's water distribution system consists of twenty-two wells that each pump water into an interconnected distribution system, allowing the entire distribution system to be the place of use for each well. When each well began diverting water, it had an associated water right with a specific priority date and a specific quantity of water that could be pumped from the well. Idaho code section

[3] See United Water's Statement Updating and Explaining the IMAP Relaunch, Ex. E, p. 107.

> 42-1425 does not permit Pocatello to change the priority date of the water right associated with any well or the quantity of water that can be pumped from the well. It validates '[a]ny change of place of use, point of diversion, nature or purpose of use or period of use of any water right...[that was accomplished] prior to November 19, 1987,...and provided no other water rights existing on the date of the change were injured and the change did not result in enlargement of the original right.' I.C. § 42-1425(2). 'Proceeding under section 42-1425 a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water right existing on the date of the change.' *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996).
>
> 'An increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42-1425.' *Id.* Likewise, 'there is per se injury to junior water rights holders anytime an enlargement receives priority.' A*&B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 idaho 746, 753, 118 P.3d 78, 85 (2005).[4]

The same legal limitations apply to an application for transfer pursuant to Idaho Code § 42-222, and the Director is bound to find *per se* injury in the event of enlargement of a water right. An enlargement would occur anytime United Water were granted an alternate point of diversion whose underlying water right exceeds the amount of the original right, and anytime United Water attempted to pump more that the originally authorized quantity from any particular well.

Given these limitations on both the quantity and priority to be pumped from each well, United Water needs to clarify what relief it seeks to accomplish through the IMAP proceeding. If the alternative points of diversion will not allow United Water to exceed the originally authorized quantity and volume[5] of water to be pumped from the well, and will not allow the well to be administered under the most senior water right belonging to United Water, then what relief do the alternative points of diversion provide to United Water? If United Water is seeking relief already preempted by the Supreme Court in *Pocatello v. State* and forcing the parties to

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[4] See *City of Pocatello v. State of Idaho*, 152 Idaho 830, 835, 275 P.3d 845, 850 (2012).

[5] United Water represents that two of its 16 water rights that contained annual volume limitations were decreed without the limitations "because continuous, year-round pumping at their authorized diversion rates would not exceed the annual volume limitation." If the transfer applications are granted, and the alternative points of diversion awarded, then the volume limitation question will be an essential element of the rights.

continue to participate in this matter, then the Boise Project Parties reserve their right to seek attorney's fees and costs.

Furthermore, any proposed change in the nature of use for water right nos. 63-10945 and 63-12362 will need to undergo injury analysis pursuant to I.C. § 42-222. The guidance cited by Mr. Peppersack concerning the proposed change in use from a fire protection right, to a municipal right is applicable whether the right be for a RAFN purpose or any other change in nature of use.

3) The 2000 Church Study Relied Upon by United Water is Outdated and A New Study Should be Conducted to Determine Planning Area and Reasonably Anticipated Future Needs and a Fifty Year Planning Horizon is Unprecedented and Unwarranted:

The economic landscape of the Treasure Valley, and the corresponding predictions about the future growth of the Treasure Valley, has changed significantly since 2000. United Water recognizes that the Church study relied upon by United Water in the 2003 IMAP proceedings needs to be up-dated in order to provide any meaningful predictions concerning the future needs of United Water. Even when those updated calculations are provided, it is unclear why United Water is seeking such a long planning horizon. As the Director pointed out at the April 13, 2012, status conference, a fifty year municipal planning horizon is unprecedented in municipal planning in Idaho, especially where United Water has already recognized that the twelve year old study completed by Mr. Church is no longer representative of even the current planning circumstances in the valley.

Importantly, additional information is required from both United Water and the Department concerning the criteria that must be applied in order to make a determination concerning an appropriate planning horizon. Until some criteria can be provided to guide a

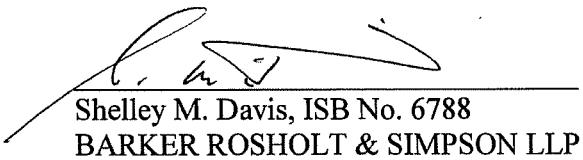
determination of a planning horizon, and until an updated study can be provided that more accurately predicts future growth based on the changed circumstances of the Treasure Valley, it is unclear how the parties can meaningfully participate in this discussion.

CONCLUSION

Until the Boise Project Parties have answers to the preliminary questions and issues raised above, it is not possible for the Boise Project Parties to suggest any timeframes for prehearing schedules, motions, or discovery matters. The Boise Project parties request that an interpretation of the remark language attached to the United Water decreed rights be provided by United Water if it interprets that remark language other than the manner in which it has been interpreted by the Supreme Court. If United Water does not interpret the limitation imposed by the remark language differently than the Supreme Court, then some explanation of the utility of seeking the alternate points of diversion is requested. Additionally, the Boise Project Parties request that the Director require United Water to submit amended applications for transfer for the water rights that includes the alternate points of diversion decreed in the SRBA, and those that are still sought in the IMAP process. Lastly, the Boise Project Parties request that the Director provide some guidance concerning the criteria and process to be undertaken in order to determine an appropriate planning horizon pursuant to the Municipal Water Rights Act of 1996.

Dated this 15th day of October, 2012.

BARKER ROSHOLT & SIMPSON LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of October, 2012, I served a true and correct copy of the foregoing **BOISE PROJECT BOARD OF CONTROL, BIG BEND IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT AND BOISE-KUNA IRRIGATION DISTRICT'S STATEMENT OF ISSUES AND REQUEST FOR CLARIFICATION**, upon the following persons via the method indication below:

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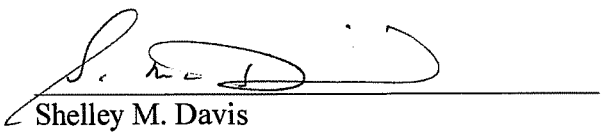

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