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DEPARTMENT OF
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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.	**UNITED WATER'S ANSWER TO BOISE PROJECT PARTIES' MOTION TO DISMISS**

Pursuant to Idaho Department of Water Resources Rule of Procedure 270.02, IDAPA 37.01.01.270.02, this is Applicant United Water Idaho Inc.'s ("United Water") answer ("*Answer*") to the *Motion to Dismiss Integrated Municipal Application Package, Memorandum in Support Thereof, and Response to Initial Statements* ("*Motion*") filed by the Boise Project Parties[1] on November 14, 2012. The Director should deny the *Motion* for the reasons described herein.

United Water already has addressed the issues raised in the *Motion* in earlier filings, particularly in *United Water's Statement Updating and Explaining the IMAP Relaunch* ("*Update*

[1] The "Boise Project Parties" include Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District, and Boise-Kuna Irrigation District.

Statement") (Aug. 14, 2012), and in *United Water's Response to Initial Statements* ("*Response*") (Nov. 14, 2012), which are incorporated herein by this reference. The following sections further address the two grounds for dismissal asserted in the *Motion*.

I. THE ALLEGED INSUFFICIENCY OF THE *UPDATE STATEMENT* IS NOT GROUNDS FOR DISMISSING THE IMAP.

A. United Water has met, and will continue to meet, its obligations with respect to updating the IMAP.

The Boise Project Parties argue that the IMAP should be dismissed because "the applications for transfer that the IMAP is based upon contain incorrect and outdated information, and, therefore, cannot be processed . . . ." *Motion* at 1. This issue is addressed in United Water's *Response* at 5-7 (incorporated herein by this reference).

The Boise Project Parties' argument ignores the fact that United Water produced correct and updated information through the *Update Statement* at the protestants' request and the Director's instruction, and that no party provided United Water with comments or feedback that would allow it to clarify whatever misunderstandings might remain. It also ignores the fact that the Director has not instructed United Water to submit anything else to update the IMAP. United Water will comply with any reasonable instructions the Director provides if he decides additional documentation is necessary to update the IMAP.

United Water's *Update Statement* describes in detail the changes to the IMAP's water rights and proposed alternative points of diversion ("APODs") that have occurred since this proceeding was stayed in 2003 over United Water's objection by then-Director Karl Dreher. In short, the IMAP today contains fewer water rights and fewer requested APODs than it did in 2003. The authorized diversion quantities did not change in most cases, although diversion rates were reduced for four rights (Nos. 63-02892, 63-04395, 63-10945, and 63-12139). In no case has a water right's authorized diversion rate or volume increased since 2003. Accordingly, as

explained in the *Update Statement,* "the developments since the stay result in an IMAP Relaunch that is smaller and simpler than the 2003 IMAP." *Update Statement* at 6.

United Water believes the *Update Statement* sufficiently updates the IMAP's contents, and that little, if anything, will be gained by submitting further documentation, such as new application forms for each water right as suggested by the Boise Project Parties. *Motion* at 6 ("United Water is required to file new applications . . . ."). Indeed, in 2003, Hearing Officer Peter Anderson rejected this method. *Order Regarding New IMAP Applications* (Apr. 2, 2003). It is in this context that United Water stated that it "opposes filing individual transfer application forms for each water right." *Response* at 6 n. 4. Nevertheless, to be perfectly clear, United Water is willing to comply with any reasonable instructions the Director provides if he decides additional documentation is necessary to update the IMAP.

The Boise Project Parties do not contend that they misunderstand the contents of the IMAP or what changes are requested in the applications. In fact, it is apparent from the *Motion*—wherein the Boise Project Parties summarize the main changes to the IMAP water rights and the APOD list, *Motion* at 2-3—that the *Update Statement* succeeded in explaining the course of events and the changes to the IMAP since 2003. That was United Water's goal with the *Update Statement*. Indeed, it appeared that goal was met when United Water did not receive any feedback from any party during the two months following submission of the *Update Statement*, during which period the Director anticipated the parties would "talk back and forth . . . so that everybody is satisfied" with United Water's submission. *Audio of Status Conference* at 1 hr. 36-37 mins. (July 24, 2012). The Boise Project Parties and Pioneer Irrigation District ("Pioneer") submitted "statements" at the end of those two months on the eve of the October 16, 2012 status conference, but the two minor points of clarification mentioned in those submissions

were easily explained during the October 16 status conference, if not in the *Update Statement* itself.[2] In any case, neither parties' October 15 submission suggests there is any real misunderstanding about the IMAP's contents.

Nevertheless, the Boise Project Parties' contend that the entire IMAP must be dismissed because United Water's *Update Statement* was not the proper method to make changes to the IMAP. Dismissal is unwarranted, especially where, as here, no party appears confused by the IMAP's contents or the *Update Statement*, and the Director has not instructed United Water to submit anything else. At this point in this decade-long proceeding, due process at least requires that the Director provide United Water with instructions on how to correct whatever might be lacking in the applications, and to provide United Water with notice that failure to comply could result in dismissal.

This sort of process is supported by the Department's Water Appropriation Rules, IDAPA 37.03.08, which the Boise Project Parties cite as governing transfer applications, *Motion* at 5-6, even though the rules expressly apply only to new appropriations.[3] Rule 35.01.e requires

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[2] The Boise Project Parties and Pioneer's October 15 filings mainly raised issues unrelated to the *Update Statement*. In its October 15 filing, at 2-3, the Boise Project Parties' sole request for clarification of the *Update Statement* concerned the "analysis the Department used to whittle the 86 or 89 initially claimed alternative points of diversion down to the 41 or 42 ultimately decreed." As explained in the *Update Statement* at 14-17, and again at the October 16 status conference, this was the result of the SRBA Court decreeing as APODs only the wells owned and operated by United Water in 1987 (i.e. the SRBA's "1987 snapshot"). Pioneer's sole question about the *Update Statement* in its October 15 filing, at 14, concerned the removal of the Marden well as a proposed APOD and the status of associated water right 63-10386, but this is already explained in the *Update Statement* at 21-22. United Water has considered these issues resolved since neither party responded to United Water's invitation to revisit matters raised at the last status conference or in their October 15 filings. *See United Water's Reply in Compliance with the Initial Statement Order* at 2-3 (Nov. 21, 2012).

[3] The Boise Project Parties incorrectly suggest that the Department's Water Appropriation Rule 35.04.a governs transfer applications. *See, e.g., Motion* at 5 ("Rule 35.04.a states that a transfer application . . . ."). The Department's Water Appropriation Rules, including Rule 35.04.a, apply to applications for new appropriations. *See* IDAPA 37.03.08.001.b. The Department has no rules specifically governing transfer applications. Contrary to the Boise Project Parties' assertion, *Motion* at 5, the Department's transfer guidance does not wholly apply the new appropriation procedures to transfer proceedings. *See Transfer Processing Memo No. 20* ("*Transfer Memo 20*") at 2 (Jan. 12, 2000) ("For the most part, the department should treat . . . applications for transfer . . . the same as it does applications for permit." (emphasis added)).

the Department to "correspond with the applicant concerning applications which have been accepted for filing by the department which require clarification or correction of the information . . . ," and to provide the applicant with an opportunity to supply additional or corrected information. IDAPA 37.03.08.035.01.e. Thus, if the Water Appropriation Rules govern transfer applications as the Boise Project Parties contend, they require that United Water be given a chance to provide additional documentation to update the IMAP if the Director determines it is necessary. That, of course, is exactly what United Water already has done in providing the *Update Statement.* At this point the Director has not indicated that United Water needs to submit anything else to update the IMAP to reflect the changes that occurred during the stay.

It bears emphasis that United Water did not ask for or create this situation. United Water vigorously opposed the stay in 2003, but the Director imposed it because "the protestants assert[ed] that it would be better to have a clear picture of UWID's existing water right 'portfolio' before moving forward with a determination of the appropriate planning horizon and the reasonably anticipated future needs of UWID as a municipal provider under the 1996 Act." *Order re Motion for Stay* (Dec. 18, 2003).[4] In sum, the Boise Project Parties got exactly what they asked for when they advocated for the stay in the first place. It is not reasonable for them to oppose resuming the IMAP now that the stay is over.

B. Although the *Update Statement* comports with the Department's rules and guidance, United Water is willing to provide more documentation at the Director's instruction.

The Boise Project Parties' argument that the IMAP must be dismissed now—before the Director asks for additional documentation to update the IMAP or United Water has an

[4] In their motion requesting the stay, the protestants (including the Boise Project Parties) urged that proceedings be stayed "until all water rights can be adjudicated and then the administrative portion of the case can go forward based upon a clear record of what water rights exist." *Motion to Stay and Memorandum in Support* at 2 (Mar. 28, 2003) (agreeing with and quoting SRBA Presiding Judge Burdick) (quotation marks omitted).

opportunity to comply with such a request—hinges upon their assertion that "the changes sought to the applications for transfer meet the 'substantial changes' definition requiring the filing of new applications, and . . . United Water opposes filing such a document." *Motion* at 5. This leap in logic is wrong in two fundamental ways.

First, as already discussed, although United Water opposes filing new transfer applications for each water right, it will do so if that is the Director's instruction. In addition, while United Water also opposes hand marking changes to the existing IMAP, it will do so if that is the Director's instruction. As explained in United Water's *Response* at 6 n.4, United Water opposes these additional steps because the *Update Statement* adequately updated the IMAP, because filing individual transfer applications to reflect changes in the IMAP already was rejected by the Hearing Officer once, and because hand marking changes would be cumbersome and would achieve no greater clarity than is provided in the *Update Statement*. United Water's opposition to spending time and resources on these additional steps is not a "my way or the highway" position. It simply is United Water saying that it does not think these are good ways to efficiently or effectively move this process forward.

Second, the Boise Project Parties misconstrue the Department's rules and guidance policies on changes to transfer applications. Because it does seem to be a waste of time to quibble over whether the changes described in the *Update Statement* represent "significant" or "substantial" changes to the IMAP that warrant the filing of new transfer applications, United Water is reluctant to accept the Boise Project Parties' invitation to debate the issue. Nevertheless, the Boise Project Parties' arguments on that subject contain errors of law and fact, so we include the following discussion.

The Boise Project Parties contend that the Department's rules and guidance require the filing of a new transfer application whenever there is any "significant" or "substantial" change to an element of a water right included in the application. *Motion* at 5 (citing IDAPA 37.03.08.035.04.a, and quoting *Transfer Processing Memorandum No. 24* at 15 ("*Transfer Memo 24*") (Dec. 21, 2009)). The Department's rules and guidance, however, do not define "significant" or "substantial." Obviously, with respect to applications for new appropriations, the focus is on changes to the "proposed" water right elements since none yet exist. *See* IDAPA 37.03.08.035.04.a (stating that applications for permit must be amended whenever there are "significant changes to the place, period or nature of the intended use, method or location of diversion or proposed use or uses of the water . . . ." (emphasis added)). Similarly, the Department's transfer guidance appears to focus on changes to the "proposed" use in determining whether a change is "significant" or "substantial" enough to warrant filing a new application. *Transfer Memo 24* at 15 ("Significant changes to the place, period, or nature of the proposed use, amount of water, method or location of diversion, or other substantial changes from those shown on a pending application for transfer, will require filing a new application for transfer to replace the original application." (emphasis added)).

United Water's changes to the IMAP described in the *Update Statement* mainly concern its existing "pre-transfer" water rights portfolio, and do not significantly change any of the applications' proposed "post-transfer" elements. In fact, the only notable change to the proposed post-transfer elements in the IMAP is a reduction in the number of APODs requested (81 instead of 89). Although in the aggregate the *Update Statement* describes many changes to United Water's water right portfolio and list of proposed APODs, they are not "substantial" in the sense that they change the essence of the IMAP or anything fundamental to the applications' requests.

United Water still seeks uniform APODs for the rights included in the IMAP (albeit, fewer APODs than in 2003), and still seeks the statutory forfeiture protection afforded by the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws ch. 297 ("1996 Act").[5] Again, if anything, the IMAP today is smaller and simpler than the IMAP in 2003 because of these changes.

In any case, although United Water does not believe there have been any "significant" or "substantial" changes warranting new application forms for every right included in the IMAP, or that anything material will be gained by submitting such forms, it will comply if the Director instructs it do so.[6]

II. THE 1996 ACT AUTHORIZES CHANGES FROM NON-RAFN TO RAFN MUNICIPAL RIGHTS.

The Boise Project Parties argue that United Water cannot seek the 1996 Act's statutory forfeiture protection because it "is not seeking to change the nature of use of any of its water rights to municipal purposes, because its water rights are already designated for municipal purposes." *Motion* at 7. This appears to be the same issue raised by Pioneer in its initial statement, which United Water addressed in its *Response* at 7-10 (incorporated herein by this reference).

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[5] The update to United Water's "Pink Line Map" does not "constitute[] a substantial change to the place of use," as argued by the Boise Project Parties. *Motion* at 6. The Pink Line Map does not depict United Water's proposed place of use. Rather, it depicts the "planning area," which is United Water's anticipated service area at the end of its proposed 50-year planning horizon. *See Update Statement* at 47-48 (further noting that the planning area "is simply a planning tool employed in quantifying RAFN"). As in 2003, the proposed place of use requested for all of the rights included in the IMAP today is "the service area of United Water Idaho as provided for under Idaho law," *Update Statement* at 34-35, or "UWID['s] Service Area" for short, as used in the spreadsheet attached as Exhibit C to the *Update Statement*, and in Tabs H and I of the 2003 IMAP.

[6] Although re-advertisement of the IMAP is not addressed in the *Motion*, United Water suspects that it may be the Boise Project Parties' ultimate goal in arguing for the filing of new application forms. As stated in United Water's *Response* at 6-7, which is incorporated herein by this reference, United Water objects to any suggestion that the IMAP must be re-advertised. If any party or the Department formally proposes re-advertisement, United Water requests additional briefing to address why it is unnecessary and how it would violate United Water's fundamental rights.

In summary, United Water's request to transfer its non-RAFN[7] municipal water rights to RAFN municipal water rights under the 1996 Act was initiated pursuant to the instructions provided by the Department's Director in 1999, which have been adopted by the Department as guidance in *IDWR Administrative Memorandum, Application Processing No. 63* ("*Memo 63*") (June 15, 1999). The Director's instructions in *Memo 63* expressly cite Idaho Code § 42-222(1) as the statutory mechanism that United Water could use to "initiate the process through which a determination can be made whether a portion of the water rights held by United Water could be considered necessary to provide for reasonably anticipated future needs . . . ." *Memo 63* at 1-2.[8] Thus, for over a decade, the Department has interpreted section 42-222 as authorizing the transfer of non-RAFN municipal water rights to RAFN municipal water rights. This interpretation is reasonable and should not be questioned. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 734, 947 P.2d 400, 407 (1997), *citing J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991).

Nothing in the 1996 Act's legislative history suggests that the legislature intended to exclude non-RAFN municipal water rights from transfers to RAFN rights under section 42-222. The legislative history's only reference to the 1996 Act's effect on existing municipal rights is

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[7] Here, as in United Water's prior filings, the term "non-RAFN" is intended to mean that a municipal water right has not been formally recognized as being held by a municipal provider to serve reasonably anticipated future needs under the 1996 Act. It is not intended to mean that a municipal right is not in fact already held for future needs, or that the right is subject to forfeiture for nonuse. United Water's municipal water rights, although not yet formally recognized as "RAFN" under the 1996 Act, already are protected from forfeiture under the common law "Growing Communities Doctrine," which recognizes that the prior appropriation doctrine can accommodate the need for municipal providers to hold water rights for long periods before they are put to use.

[8] It is not true that, "[i]n this instance, no transfer or change in the water right is sought to be accomplished," or that "United Water wishes to establish a planning horizon and demonstrate its reasonably anticipated future needs in a vacuum." *Motion* at 8. The IMAP follows the instructions in *Memo 63* to the letter, by requesting alternative points of diversion and a uniform service area description for the rights under section 42-222. United Water believes that Section 42-222 also allows the Department to determine a municipal provider's reasonably anticipated future needs without changing any other water right elements, but that is not what is reflected in the IMAP today.

contained in the Statement of Purpose, which says: "The statute does not address those licensed and decreed water rights now held by municipal providers, and the legislation intends no change in the common law with respect to such rights." Statement of Purpose, R.S. 06104, which became, S.B. 1535, enacted as the Municipal Water Rights Act of 1996, 1996 Idaho Sess. Laws ch. 297. The most reasonable interpretation of this statement is that enactment of the 1996 Act was not, by itself, intended to change existing municipal water rights or the common law applicable to such rights. It cannot reasonably be read to mean that the 1996 Act was intended to preclude municipal providers with existing municipal rights from using the transfer mechanism created by the Act.

In arguing that "United Water is not seeking to change the nature of use of any of its water rights," the Boise Project Parties seem to say that there is no material difference between non-RAFN rights protected by the Growing Communities Doctrine and RAFN rights with statutory forfeiture protection under the 1996 Act. United Water appreciates the Boise Project Parties' apparent confidence in the Growing Communities Doctrine, and would agree that the doctrine presently and absolutely protects United Water's portfolio from forfeiture protection. Unfortunately, however, common law doctrines are not as secure in the long-term as statutory protections. Thus, to ensure the continued protection of its water rights portfolio—the life-blood of a municipal water supplier—United Water is compelled to obtain the statutory protection afforded by the 1996 Act.

In short, transferring an existing municipal right to a municipal right subject to the express protections and obligations of the 1996 Act is a change in nature of use within the meaning of section 42-222(1). The Department should not depart from its longstanding

recognition of this interpretation. Doing so would fundamentally undermine, if not destroy, the important legislative goals embodied in the 1996 Act.

Respectfully submitted this 28th day of November, 2012.

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By _____ FOR
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of November, 2012, the foregoing was filed, served, and copied as follows:

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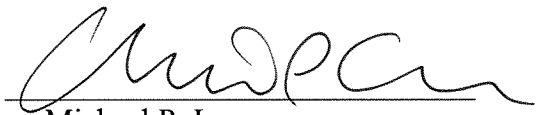

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