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DEPARTMENT OF
WATER RESOURCES

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 STATEMENT OF
ISSUES FOR JULY 24 STATUS
CONFERENCE**

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I. INTRODUCTION

This is Applicant United Water Idaho Inc.'s ("United Water") statement of issues for the July 24, 2012 status conference. This statement is submitted in response to the Director's *Notice of Status Conference* dated June 6, 2012, which instructs the parties attending the July 24 status conference to, among other things, "identify the issues they anticipate raising at the hearing to be conducted in this matter."

At the last status conference, on April 13, 2012, United Water provided a seven-page memorandum captioned "Informal notes for today's status conference." That document sought to answer questions about the IMAP and provide a better understanding of why United Water is proceeding with this matter now. Today's more detailed statement is submitted as part of United Water's continuing effort to be forthcoming with the Director and the parties.

United Water is gratified that, since the last status conference, some Protestants have now withdrawn or are in the process of withdrawing their protests. United Water believes that as the parties better understand the limited objectives of the IMAP, concerns will be alleviated and this proceeding may progress with greater efficiency.

II. THE IMAP IS A SET OF TRANSFER/AMENDMENT APPLICATIONS, NOT A REQUEST FOR A NEW APPROPRIATION.

The IMAP is a set of transfer and amendment applications seeking to change existing decreed, licensed, and permitted water rights. The applications seek alternative points of diversion ("APODs") for United Water's ground water rights that existed when the application was filed. The intent is to allow any of United Water's ground water rights to be pumped from any of United Water's wells. This will provide greater operational flexibility and efficiency, particularly in the event of shortage or curtailment.

Another purpose of the IMAP is to bring United Water's existing water rights under the Municipal Water Rights Act of 1996 ("1996 Act"). Although United Water's existing portfolio of municipal water rights is protected from forfeiture by the Growing Communities Doctrine and, for those rights with partial decrees, by *res judicata*, the 1996 Act provides more explicit statutory protection. Idaho Code § 42-223(2). This express statutory protection is provided only to those municipal providers who undertake the substantial planning exercise to establish a long term planning horizon and to quantify their reasonably anticipated future needs ("RAFN") during that time frame.

It bears emphasis that the IMAP is just a transfer process. It neither creates new water rights nor enlarges existing ones. Its effect is to add points of diversion authorized under United Water's existing water rights and to supplement the common law protection afforded to municipal rights with the explicit RAFN protection in the 1996 Act. It could also facilitate future acquisition of rights (by quantifying the need for them), but that would come in a separate proceeding subject to its own proofs and protests. As discussed below, however, it appears that United Water's existing portfolio will be largely if not entirely sufficient to meet its needs over its anticipated 50-year planning horizon. Thus, the primary purpose of the RAFN exercise is not to provide a basis for additional appropriations, but to more firmly protect United Water's existing portfolio.

This is a full disclosure exercise that will provide the Department, other water users, other governmental agencies and entities, the business community, and the public with a better understanding of the regional water supply picture. Identification of these long term needs and the rights supporting them will also better position the State of Idaho vis-à-vis other states in interstate conflicts over water rights. Indeed, failure to allow Idaho's municipal providers to do

so would directly undermine Idaho's position and play into the hands of those who want to take Idaho's water.

III. APOD CONDITION LANGUAGE ELIMINATES THE INJURY ISSUE.

The linchpin of the transfer and amendment applications is United Water's request to establish alternative points of diversion or "APODs" for each of United Water's ground water rights. This would allow United Water to pump any ground water right or combination of ground water rights from any well.

APODs, by the way, are not unique to municipal providers. Any water user with more than one diversion point from the same source—including irrigators and industrial users—can and should take advantage of them. Doing so, obviously, raises injury issues. Here, however, the injury issue is put to rest, because United Water is willing to accept a condition that absolutely protects other water users from injury.

There are different ways of approaching this. One approach, available only in formal transfers (as opposed to accomplished transfers),¹ is that the applicant puts the world on notice that it seeks APODs and requires other water users to step forward and show injury. If injury is not shown, the APODs may be approved without condition. In that case, both existing water users and future water users would not be able to assert legal injury based on use of the APODs, even as that pattern of use changes over time.

In the alternative, the injury analysis can be postponed via a condition allowing water users in existence at the time of the transfer to raise injury later, if and when changing patterns of APOD use are believed to cause or threaten injury. When that happens (in the context of administration between points of diversion for ground water, and between points of diversion for

¹ APODs may also be sought in new appropriations.

ground water and hydraulically connected surface sources) the Department would evaluate the injury claim based on the status of the water rights as they existed prior to the transfer. In other words, the water right holder would not be allowed to use the APOD approval to trump the injury claim in the context of traditional well interference. This is precisely the approach adopted by the Department in its SRBA recommendations. Indeed, it was necessary there, because APODs were sought as accomplished transfers in the SRBA. Thus, condition language was essential to avoid injury.

Accordingly, the following language became the standard APOD language for accomplished transfers:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right at [name of well] located in [quarter-quarter description].

This language was approved by the SRBA court and the Idaho Supreme Court. *In Re SRBA*, Case No. 39576, Subcase Nos. 29-00271 et al. (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (upholding the position of *amici curiae* regarding alternative points of diversion).

It should be noted that this is a two-way street. In well interference cases involving rights subject to the APOD condition, the Department (and any reviewing court) should look at the water right status of both parties prior to the transfer approval. Thus, a new water user who appears on the scene after the APOD conditions are approved is not entitled to any protection from this condition. This is implicit in the condition language (“to the extent necessary for administration”). It is a fundamental premise of the prior appropriation doctrine that a new

appropriator takes the water system and existing rights on that system as he or she finds them. Further clarity on this point may appropriately be identified as an issue in this proceeding.

United Water takes the position (as it did in the *City of Pocatello* litigation) that the APOD condition language discussed above is appropriate and necessary to avoid injury in the context of accomplished transfers. As alluded to above, formal transfers are a different matter. Thus, if it chose, United Water could take the position that it is entitled to APODs without any limiting condition language—in which case the IMAP proceeding would have to involve injury analysis. However, that is not the approach United Water has taken. United Water has consistently taken the position that water users should not be required to come forward now and document potential injury from hypothetical changes in diversions that might occur under the APOD authority. Nor does United Water wish to shoulder the burden of disproving injury in every hypothetical use of its APODs. Accordingly, United Water expressly reaffirms its willingness to accept the standard APOD condition language described above. This is in lieu of earlier proposed conditions, which are no longer operative in light of the Idaho Supreme Court's decision.

This is significant. What it means is that injury is off the table in this proceeding.

IV. RAFN QUANTIFICATION IS A FULL DISCLOSURE PROCESS BENEFITING EVERYONE.

The thing that makes the IMAP different from other transfer/amendment proceedings is the quantification of RAFN under the 1996 Act. In addition to and in conjunction with approving APODs, the Department is asked to evaluate United Water's RAFN over a long term planning horizon, thereby bringing all rights identified in the IMAP within the protection of the 1996 Act.

This will require (1) a determination of the duration of United Water’s planning horizon, which United Water believes must be 50 years, (2) delineation of United Water’s planning area (that is, the anticipated service area for which RAFN will be quantified), and (3) quantification of RAFN within that planning area over the planning horizon.

The RAFN quantification process itself is purely a planning exercise. RAFN quantification is unaffected by and has nothing to do with United Water’s portfolio of water rights. Once RAFN has been quantified, however, the next step is to compare United Water’s existing portfolio with its long term needs, that is, its RAFN.

It may turn out that the total quantity of water authorized for diversion in United Water’s portfolio is less than, equal to, or greater than its RAFN. If the RAFN is greater than or equal to United Water’s portfolio, then each of the rights identified in the IMAP proceeding would receive the additional protection from forfeiture during the planning horizon that is provided by the 1996 Act. There is a question as to whether water rights not included in the IMAP (e.g., those acquired more recently) should also receive protection under the 1996 Act. That is a relatively minor point, because United Water may follow up the IMAP with a “trailer” proceeding to transfer additional water rights and bring them under the protection of the act.

In any event, and this bears emphasis, United Water acknowledges and agrees that before providing any protection under the 1996 Act, the Department is obliged to evaluate United Water’s entire portfolio of water rights that serve the planning area—including any rights not included in the IMAP. The Department has made clear, and United Water agrees, that no water right is entitled to RAFN protection under the 1996 Act unless the applicant can show that its entire relevant portfolio is insufficient to meet its RAFN. This is consistent with the Department’s most recent guidance on RAFN. *Administrator’s Memorandum – Application*

Processing No. 18, Licensing No. 1 (Oct. 19, 2009). In short, there will be no “hide the ball.” In order to obtain the added forfeiture protection provided by the 1996 Act, the applicant must subject its entire portfolio to scrutiny (except for any rights not serving the planning area) and demonstrate that the portfolio is not in excess of RAFN.

V. NO NEW WATER RIGHTS WILL BE CREATED BY THE IMAP, AND NO NET INCREASE IN WATER RIGHTS IS ANTICIPATED TO BE REQUIRED IN THE NEXT 50 YEARS.

As noted, approval of the IMAP will not change any water rights (other than the APOD authority discussed above and other minor changes²) or create any new ones. Of course, quantification of RAFN could serve as a predicate for United Water (or any other municipal provider) to obtain additional water rights by appropriation or transfer as needed to serve unmet RAFN.

In United Water’s case, however, this is unlikely to be a major factor. United Water is still in the process of evaluating its RAFN. At this point, however, we anticipate that United Water’s RAFN over a 50-year planning horizon will be fairly close to its current portfolio of water rights. In other words, if United Water receives approval for RAFN over the full planning horizon it seeks, the practical effect will be to protect United Water’s existing water rights and ensure that it is able to grow into full use of those rights in the coming decades. At this point, we do not anticipate that RAFN approval will provide justification for expansion (except perhaps at the margin) of United Water’s existing portfolio. Indeed, it will have the effect of boxing in United Water and preventing it from acquiring any net increase in water rights (absent a showing of additional future need in some subsequent proceeding).

VI. UNITED WATER CONTINUES TO SEEK A 50-YEAR PLANNING HORIZON WITH AN APPROPRIATE REOPENER.

In enacting the 1996 Act, which sets no upper limit on the duration of the planning horizon, the Idaho Legislature has expressed its view that long term planning makes sense for Idaho. Other western states share the view that long term municipal water planning is a fundamental prerequisite to economic stability and growth. *E.g.*, Colorado has recognized a 71-year planning horizon for the City of Thornton (a medium-sized Front Range suburb, population 78,000) and a 50-year planning horizon for the much smaller Pagosa Springs area (population 9,500). *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 38 (Colo. 1996); *Pagosa Area Water and Sanitation Dist. v. Trout Unlimited* (“*Pagosa II*”), 219 P.3d 774 (Colo. 2009).

The Director has expressed his concern that planning projections of more than a few years are likely to be wrong. He is correct. Indeed, the 50-year projection that United Water seeks here is virtually certain to be wrong. But that is not a valid argument against long term planning. The response to the uncertainty inherent in planning is not to avoid long term planning altogether in Idaho, while other states move forward with their own long term planning. Rather, the Department should insist on the best possible planning and provide an appropriate mechanism to re-evaluate projections if conditions change.

Accordingly, an issue in this proceeding is the development of appropriate condition language that will allow United Water (and other municipal providers) to plan effectively for the long run while ensuring that, if the projection proves to be wrong, appropriate adjustments can be made before the expiration of the planning horizon.

² In addition to requesting APODs, the IMAP application (as amended on April 9, 2003) also requested changes to certain rights’ place of use, nature of use, season of use, and volume limitations. In most cases, these changes were accomplished through the SRBA, meaning they no longer need to be addressed in the IMAP. A few water rights in the IMAP still require these element changes, but they are relatively insignificant.

United Water is on record agreeing to appropriate reopener condition language, so long as that language is applied even-handedly to all municipal providers. Such a condition must strike a fair balance between the need for a reasonable measure of certainty and the need to take changed conditions into account. If there is to be a reopener, that reopener should also allow the municipal provider to extend its planning horizon (restarting it from the date of the reopener). The municipal provider's water rights would retain their priority dates and remain subject to protection from forfeiture to the extent justified under the revised RAFN quantification.

VII. THE DEPARTMENT HAS AMPLE AUTHORITY TO IMPOSE A REOPENER CONDITION.

The authority to condition water rights is expressly stated in the Water Code. The first applies to transfers:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

Idaho Code § 42-222(1) (emphasis supplied).

The second applies to permit amendments:

The director of the department of water resources shall give such notice to other affected water users as he deems appropriate and may grant the amendment, in whole or in part or upon conditions, or may deny same.

Idaho Code § 42-211 (emphasis supplied).

The third applies to licensing (which is not applicable to the IMAP but is included here for purposes of completeness):

A license may be issued to a municipal provider for an amount up to the full capacity of the system constructed or used in accordance with the original permit provided that the director determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area and otherwise satisfies the definitions and requirements specified in this chapter for such use. The director shall condition the license to prohibit any transfer of the place of use outside the service area, as defined in section 42-202B, Idaho Code, or to a new nature of use of amounts held for reasonably anticipated future needs together with such other conditions as the director may deem appropriate.

Idaho Code § 42-219(1) (emphasis supplied).

The bottom line is that the Director has ample authority to implement the 1996 Act in a manner that will facilitate long term water planning essential to the State's economic health while at the same time guarding against errors in prediction that could tie up more water than turns out to be needed. Indeed, our Supreme Court has left no doubt that where there is express statutory language (such as that quoted above), it controls. After all, in the *City of Pocatello* litigation, the court approved the Department's own condition language which essentially allows reopening of a matter to address injury issues that might occur decades after the right is established. If the Director nevertheless remains uncertain that he has the authority to include a reopener condition on a municipal water right transfer, then this should be an issue in this proceeding.

VIII. UNITED WATER WILL UPDATE INFORMATION ON ITS INDIVIDUAL WATER RIGHTS.

Some updating of the rights listed in the IMAP is now appropriate to bring them into line with recent events. This would include recently issued SRBA partial decrees, water rights that

have gone from permit to license, and rights that are no longer held by United Water. This is essentially a ministerial task necessary to allow the Department to apply the APOD provisions to the correct rights.

Likewise, in order to facilitate comparison of its RAFN and its existing portfolio, United Water will provide updated information about all water rights and permits not included in the IMAP application.

In any event, no new water rights or permits (that is, rights not previously identified in the IMAP) will be added to the transfer/amendment package. Thus the scope of the IMAP proceeding will remain unchanged.

IX. THE DIRECTOR SHOULD PROHIBIT WASTEFUL EXAMINATION OF IRRELEVANT ISSUES.

The IMAP's transfer applications are subject to the criteria in Idaho Code § 42-222(1). The permit amendment applications will be measured against the two criteria found in Idaho Code § 42-211. In many cases, examination of these issues involves complex factual discovery and proof. For the reasons discussed above, the IMAP is not one of those situations. Accordingly, the Director should prohibit parties that are hostile to the interests of United Water from turning this proceeding into a costly waste of time and money that would undermine the Legislature's mandate to promote sound municipal water planning.

The crux of the IMAP involves the determination of United Water's planning horizon, planning area, and RAFN. These components of the IMAP have changed somewhat since the application was stayed in 2003. Those changes, if anything, make the IMAP smaller and simpler than it was before.

Notably, United Water's service area has become more defined in many areas. The requested planning horizon remains at 50 years, but now runs from 2012 to 2062 (instead of

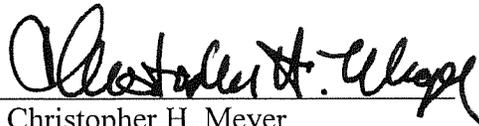
from 2001 to 2051). The population and water demands projected for United Water's service area at the end of the planning horizon also have changed—and have moved downward—which means that United Water's projected RAFN will be lower. These issues are front and center in the IMAP process, and United Water fully intends to provide the Department and the other parties with updated information on these matters.

On the other hand, enlargement and injury—while obviously germane to all transfer proceedings—are inconsequential to the IMAP because United Water is not seeking new or expanded rights and is prepared to stipulate to the standard APOD condition, as discussed above. The suggestion made at the April 13 status conference that the parties will need “a pretty substantial amount of time to conduct some discovery” concerning the hydraulic connection between ground and surface water rights is without foundation and reflects a fundamental misunderstanding of what the IMAP is about. United Water strongly urges the Director to preclude fishing expeditions into irrelevant matters that merely serve to lengthen the proceedings and increase the parties' expenses.

If the Department fails to do so, it will send a troubling message that will discourage other municipal providers from fulfilling the promise of the 1996 Act. In the 16 years since its enactment, only a handful of municipal water rights have been approved for RAFN use. If that is to change, the Department must make clear that RAFN proceedings will be limited to those issues and parties legitimately before it.

Respectfully submitted this 20th day of July, 2012.

GIVENS PURSLEY LLP

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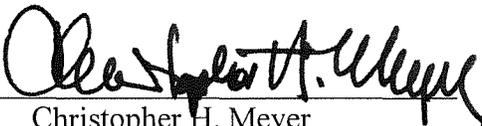
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