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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)	REPLY TO UNITED WATER'S
MUNICIPAL APPLICATION)	ANSWER TO BOISE PROJECT
PACKAGE ("IMAP") OF UNITED)	BOARD OF CONTROL, BIG BEND
WATER IDAHO INC., BEING A)	IRRIGATION DISTRICT, WILDER
COLLECTION OF INDIVIDUAL)	IRRIGATION DISTRICT AND BOISE-
APPLICATION FOR TRANSFERS OF)	KUNA IRRIGATION DISTRICT'S
WATER RIGHTS AND)	MOTION TO DISMISS INTEGRATED
APPLICATIONS FOR AMENDMENT)	MUNICIPAL APPLICATION
OF PERMITS)	PACKAGE
)	
)	
)	

COMES NOW, Protestants, Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District, and Boise-Kuna Irrigation District, and hereby file this Memorandum in Reply to United Water's Answer to Boise Project Parties' Motion to Dismiss.

I. ARGUMENT

A. The Insufficiency of United Water's Transfer Applications Is Grounds for Dismissal

of the IMAP:

In its Answer United Water reversed its previous representation that it would not consider filing amended or new transfer applications in order to correct the defects in the existing

portfolio of transfer applications filed in 2001 and amended in 2003. United Water's Response to Initial Statements, p. 6, fn. 4. *Also see* United Water's Answer to the Boise Project Parties Motion to Dismiss (hereinafter "Answer"), p. 3, and p. 6. Nevertheless, United Water still represents that it believes that the Update Statement "adequately updated the IMAP[.]" Answer, p. 6. This is plainly incorrect under the Department's rules and Idaho Code § 42-222.

United Water has implicitly admitted that in their present form, the transfer applications on file with the Department in this proceeding, do not "describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed[.]" as required by Idaho Code § 42-222. The Department's forms provide an important resource for the public to be advised of the Department's processing of water right appropriation applications and transfer applications. A review of the history of this proceeding, in the context of the review of an individual water right among the portfolio of United Water's IMAP rights, would not reveal United Water's Update Memo filed eleven years after the original transfer application was filed with the Department as the appropriate document reflecting the proposed changes to the elements of that transfer application. In order to comply with Idaho law, and to protect the Department's interest in proper record keeping and administration of water rights, the applications should be dismissed and re-filed containing the accurate data reflecting the actual elements of the post-decree water rights.

United Water's argument that the Boise Project parties' misconstrue the Department's Rules and Guidance as it applies to transfer applications overlooks the Boise Project Parties' citation to Transfer Memo 20 that states unequivocally that "the department should treat other kinds of water right applications, including applications for transfer and applications to amend

permits, the same as it does applications for permit.”¹ Transfer Memo 20, Jan. 12, 2000, p. 2.

This means that Department’s appropriation rules apply, requiring a transfer application to be amended “whenever significant changes to the place, period or nature of the use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended.” Water Appropriation rule, 37.03.08.35.04.

United Water then takes the position that the changes to its water rights that occurred as a result of the SRBA adjudication “mainly concern its existing ‘pre-transfer’ water rights portfolio, and do not significantly change any of the applications’ proposed ‘post-transfer’ elements.” Answer, p. 7.

Rule 35.04.a states that a transfer application “shall be amended whenever significant changes to the place, period or nature of the use, method or location of diversion or proposed use or uses of the water or other substantial changes from that shown on the pending application are intended.” United Water argues that this rule emphasizes the ‘proposed’ elements of a water right, and that “significant changes to the place, period, or nature of use, method or location of diversion...from that shown on the pending application” should not be interpreted as requiring amendment. IDAPA 37.03.08.35.04.a, also see Answer, p. 9. The plain language of the rule belies United Water’s proposition, and here, the record is clear that the changes made to United Water’s water rights contained in the IMAP constitute significant changes to the place, period, method and location of diversion for every one of the rights claimed by United Water in the adjudication. *See* United Water’s Update Statement. The applications must either be significantly

¹ In this same argument United Water alleges that “the Boise Project Parties’ arguments contain errors of law and fact,” but then fail to identify any such errors. Answer, p. 7. United Water’s subjective determination that its changes to the IMAP do not constitute significant changes to the elements of the water rights does not implicate the Boise Projects’ opposite proposition as an error of law or fact. Similarly, United Water’s overly restrictive interpretation of the Department’s rules does not implicate the Boise Projects’ interpretation of the meaning of the plain language of the rules and statutes as an error of law.

amended, or more appropriately, because of the quantity of changes to each right, dismissed and re-filed at the appropriate time.

B. The Municipal Water Rights Act of 1996 Does Not Authorize the Transfer of a Municipal Water Right to a Municipal Water Right to Obtain RAFN Protection:

The Department's decade old interpretation of Idaho Code § 42-222(1) does not comport with the plain language of the statute. While the Director in 1999 instructed that United Water should file a transfer application under I.C. 42-222(1) to "determin[e]...whether a portion of the water rights held by United Water could be considered necessary to provide for reasonably anticipated future needs....," his interpretation of the statute does not make the process immune from challenge. United Water misapplied the 'law of the case doctrine' when it alleged in its Response to Initial Statements that the Director's 1999 statement allows it to rely on that statement. United Water's Response to Initial Statements, p. 8. The law of case doctrine provides that "where an appellate court states a principal of law in deciding a case, that rule becomes the law of the case and is controlling in both the lower court and on subsequent appeals so long as the facts are substantially the same." *Sun Valley Ranches, Inc. v. Prairie Power Co-Op, Inc.*, 124 Idaho 125, 129, 856 P.2d 1292, 1296 (Ct.App. 1993), citing *Frazier v. Nielsen*, 118 Idaho 104, 106, 792 P.2d 1160, 1162 (Ct.App. 1990). No such determination or review has been made in this case and the prior Director's statement is subject to challenge.

The statute plainly states that "when the nature of the use of the water right is to be changed to a municipal provider," then it is subject to analysis regarding reasonably anticipated future needs and a planning horizon determination. I.C. § 42-222(1). The 'nature' of a water right is the type of beneficial use that it will be applied to, i.e. irrigation, or municipal, or fire suppression, as opposed to the point of diversion, or quantity, or other element of a water right.

The plain language of the statute requires that a transfer be intended to change the “nature” of the use, and here, United Water’s transfer applications do not intend to change the nature of the use.

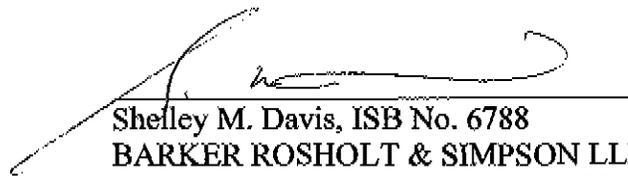
United Water also cites to the legislative history of the statute which states that it is not intended to “address those licensed and decreed water rights now held by municipal providers[.]” Answer, p. 10, *citing* Statement of Purpose, R.S. 06104. While United Water interprets this to mean that the statute was not intended to change the common law that applied to the water rights, that is exactly what the statute did. Under the current status of the law, United Water’s applications cannot be processed pursuant to Idaho Code § 42-222(1) and this Director is without authority at present to determine a planning horizon for United Water’s current water rights portfolio.²

II. CONCLUSION

For the reasons state above, United Water’s Integrated Municipal Application Package must be dismissed.

Dated this 5th day of December, 2012.

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Bend Irr. Dist., Wilder Irr. Dist. and Boise-Kuna Irr.
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² Two competing pieces of legislation have been circulated amongst interested parties and that are available at the Department’s web-link for the IMAP proceeding, which may provide United Water the ability to seek such protection at some time in the future if the law is changed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2012, I served a true and correct copy of the foregoing, **REPLY TO UNITED WATER'S ANSWER TO BOISE PROJECT BOARD OF CONTROL, BIG BEND IRRIGATION DISTRICT, WILDER IRRIGATION DISTRICT AND BOISE-KUNA IRRIGATION DISTRICT'S MOTION TO DISMISS INTEGRATED MUNICIPAL APPLICATION PACKAGE** upon the following persons via the method indication below:

Filed via Facsimile with the Department of Water Resources.

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FACSIMILE COVER SHEET

DATE: December 5, 2012

TO: Idaho Department of Water Resources

RECIPIENT'S FAX #: (208) 287-6700

FROM: Shelley M. Davis / Heather Rice

RE: IMAP

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 9

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MESSAGE: Please file the attached Boise Project Reply in Support of Motion to Dismiss. Thank you.

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