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

REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT TO LIMIT
PLANNING HORIZON

I. INTRODUCTION

The Boise Project Board of Control ("Boise Project") filed this Motion for Summary
Judgment seeking a determination on a straightforward question of law which requires this
hearing officer to construe the plain meaning of the statutes that govern the permissible planning
horizon for the reasonably anticipated future needs of a municipal water provider, and then
determine whether the planning horizon requested by Suez conforms to the law. Suez agrees that
this is purely a question of law. For this reason, it is appropriate for this hearing officer to decide the matter now, prior to final resolution of the contested case, of whether Suez's requested 50 year, rolling, planning horizon conforms to the requirements of Idaho law governing the Idaho Municipal Water Rights Act.

II. ARGUMENT


Idaho Code § 42-202(2) sets forth the requirements that must be met by a municipal provider when making an application for water rights seeking to appropriate the water for reasonably anticipated future needs. Here, Suez Integrated Municipal Application Package ("IMAP") admittedly does not seek to appropriate new water rights, but rather:

1. It seeks alternative points of diversion ("APODs") for 101 of its ground water rights and permits and one additional point of diversion ("POD") for surface water permit no. 63-12055.
2. It secures protection for forfeiture under the Municipal Water Rights Act of 1996 during the 50-year planning horizon for all rights included in the IMAP.

2017 Update, pp. 4-5. It also seeks to “tid[y] up various other aspects of the rights and permits.”

Id. Nevertheless, Suez contends that its IMAP is subject to the Municipal Water Rights Act, and therefore 42-202(2) applies to the IMAP. Therefore:

An application proposing an appropriation of water by a municipal provider for reasonably anticipated future needs shall be accompanied by sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter.

---

1 See Suez's Response Memo, p. 8, n. 3, and p. 10. Additionally, for this reason, the voluminous affidavits largely consisting of conclusory opinions, prepared and filed by Suez are unnecessary to this hearing officer's determination of the issue presented in this Motion for Summary Judgment. "Where an affidavit merely states conclusions and does not set out facts, such supporting affidavit is inadmissible to show the absence of a genuine issue of material fact." Casey v. Highlands Ins. Co., 100 Idaho 505, 508, 600 P.2d 1387, 1390 (1979).
I.C. § 42-202(2). The definitions and descriptions are set out in Idaho Code § 42-202B.

Importantly, planning horizon, reasonably anticipated future needs, and service area are all defined there.

(7) “Planning horizon” refers to the length of time that the department determines is reasonable for municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider.


(8) “Reasonably anticipated future needs” refers to future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

I.C. § 42-202B(8), (emphasis added). Additionally, “Service area’….For a municipal provider that is not a municipality, the service area shall correspond to the area that it is authorized or obligated to serve, including changes therein after the permit or license is issued.” I.C. § 42-202B(9). Therefore, it follows that the planning horizon assigned to Suez’s IMAP must be reasonable in order to provide its’ anticipated future needs, and not inconsistent with comprehensive land use planning documents approved by the municipalities within its service area.

The Idaho Department of Water Resources has also issued guidance explaining how it should evaluate municipal applications for reasonably anticipated future needs. The guidance states that in order to determine whether a proposed planning horizon is reasonable, the Department should look to:

- The customary standards of practice for water infrastructure planning
- The planning period identified in any applicable Comprehensive Plan
- Planning periods identified by other applicable planning documents
Regional planning studies

RAFN Municipal Water Right Handbook ("Handbook"), pp. 7-8. The service area, and/or planning area, for Suez largely encompasses the City of Boise, with Garden City located therein, some small area of now unincorporated Ada County, as well as a small area of the cities of Meridian and Eagle. Master Water Plan for the Years 2015 to 2065, pp. 7-8, and 43.

Accordingly, the land use planning documents and comprehensive plans that the hearing officer may look at to determine an applicable reasonable planning horizon, are those that have been adopted by the cities of Boise, Meridian, Eagle and Ada County. The longest planning horizon associated with any of those comprehensive plans incorporates an end-date in the year 2040. See Suez’s Response Brief on Motion for Summary Judgment, pp. 31-47.

This date corresponds to the date that the Boise Project suggested represented the most generous length of time adopted by a land use planning document or regional planning study, that adopted by the COMPASS plan. Suez’s three experts who participated in the development and peer review of the Master Water Plan For the Years 2015 to 2065, relied upon the population projection methodology employed in the COMPASS study, and then extrapolated those findings to the year 2065. Master Water Plan, pp. 75-109, and 113-117. Because the COMPASS plan has the most generous planning horizon of any currently adopted comprehensive land use study, or regional planning document, and because it was expressly relied upon as the basis for Suez’s experts to form the basis of their population projections, the Boise Project proposed that the hearing officer apply a planning horizon to the year 2040, in order to conform to the requirements of I.C. § 42-202B.

2 The planning horizons adopted by other states and municipalities are irrelevant to this hearing officer’s analysis as Idaho Code § 42-202B is unambiguous in its description how to ascertain an appropriate reasonable planning horizon for Suez’s reasonable anticipated future needs.
Alternatively, Suez suggests that this hearing officer look to the very plan that is at issue in this proceeding to form the basis for establishing a reasonable planning horizon. The Master Water Plan that accompanies Suez’s IMAP, and that has not been adopted nor approved by the Department as part of the IMAP contested case, cannot be used as an example to bolster its claim that its’ own planning horizon is reasonable. Similarly, the Treasure Valley Comprehensive Aquifer plan that has not been finalized nor adopted, and that does not represent a comprehensive land use planning document as required by I.C. § 42-202B(8), cannot inform this hearing officer’s determination of what constitutes a reasonable planning horizon for Suez’s reasonably anticipated future needs.³

Suez also argues that it is the quantity of water issue rather than the duration of a planning horizon that should control the evaluation of the IMAP proceeding. Nothing in the Municipal Planning Act suggests that this is the case. In fact, if Suez’s argument were taken as truth then the inquiry of what is a reasonable planning horizon for a municipal water right application would always be ‘how long does the existing portfolio of water rights last to serve the needs of the municipality?’ and the planning horizon would always correspond to the date at which additional water may be needed. That is not what the statute requires. The statute requires that the planning horizon “not [be] inconsistent with comprehensive land use plans approved by each municipality.” I.C. § 42-202B(8). Here, Suez argues that the quantity element should control because its’ own analysis demonstrates that its’ water right portfolio as of this date is sufficient to serve Suez’s planning area until peak times in August 2058, and then sufficient for most periods of time through 2065. A fifty year planning horizon is not consistent with any

³ The Boise Project refers the hearing officer back to its statement of facts at page 3 of its Memorandum in Support of Motion for Summary Judgment citing Suez’s representations that it has no future needs until peak demand in the month of August in the year 2058.
comprehensive land use plans approved by the municipalities within its’ planning area and the planning horizon here should not extend past the year 2040, the most generous planning horizon adopted for any of the municipal or regional land use planning documents.

B. Suez’s Licensed and Decreed Water Rights that Pre-Date 1996 Are Not in Jeopardy of Forfeiture:

Suez contends that certain language in the statement of purpose which accompanied the adoption of the Municipal Water Rights Act of 1996, could serve to jeopardize Suez’s licensed and decreed water rights which pre-date 1996. Response Memorandum, pp. 13-14. By approving the alternative points of diversion sought in the IMAP, Suez may pump any of the groundwater rights included in that package of water rights from any alternative point of diversion, and therefore, the resumption of use defense could be used to any future potential claim of forfeiture.

In Idaho forfeiture is disfavored. Barnes v. Jackson, 163 Idaho 194, 198, 408 P.3d 1266, 1270 (2018), citing Aberdeen-Springfield Canal Co. v. Peiper, 133 Idaho 82, 87, 982 P.2d 917, 922 (1999). Given the many barriers in Idaho law to the declaration of forfeiture, and the fact that courts are very reluctant to impose such a finding, it seems implausible that a court would read a statement of purpose to an unambiguous statutory framework and declare that any decreed or licensed water right pre-1996 is not subject to the protections intended to be afforded by the Municipal Water Rights Act.

Additionally, if Suez is granted the alternative points of diversion sought by the IMAP, then any of its water rights may be pumped from any of the groundwater wells within its service area, meaning that the resumption-of-use doctrine would apply to protect any of its licensed or decreed water rights. Id., citing Sagewillow, Inc. v. IDWR, 138 Idaho 831, 836, 70 P.3d 669, 674

Reply Memorandum in Support of Motion for Summary Judgment
(2003). There is simply no plausible threat that Suez’s decreed and licensed water rights will be subject to forfeiture simply because the priority date of such groundwater rights pre-dates 1996. In fact, protecting that portfolio of water rights appears to be one of the primary goals of this IMAP proceeding.

III. CONCLUSION

For the foregoing reasons, the Boise Project Board of Control respectfully requests that this hearing officer grant summary judgment in its’ favor, and limit the planning horizon applicable to Suez’s IMAP to the year 2040, so that it complies with the Municipal Water Rights Act of 1996, and the statutes adopted therewith.

Dated this 16th day of April, 2018.

BARKER ROSHOLT & SIMPSON LLP

Shelley M. Davis
Attorneys for Boise Project Board of Control
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2018, I served a true and correct copy of the foregoing, BOISE PROJECT BOARD OF CONTROL'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT TO LIMIT PLANNING HORIZON upon the following persons via the method indication below:

Filed via Hand-Delivery with the Department of Water Resources.

Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, ID 83720-0098
Facsimile: (208) 287.6700

James Cefalo
Hearing Officer
Idaho Department of Water Resources
900 North Skyline drive, Suite A
Idaho Falls, ID 83402-1718
james.cefalo@idwr.idaho.gov

Christopher H. Meyer
Michael P. Lawrence
Givens Pursley, LLP
P.O. Box 2720
Boise, ID 83701-2720
chrismeyer@givenspursley.com
mpl@givenspursley.com

For Suez Water Idaho, Inc., Applicants

Steven L. Burgos
Abigail Germaine
City of Boise
150 N. Capitol Blvd., City Hall #1
P.O. Box 500
Boise, ID 83701-0500
sburgos@cityofboise.org
agermaine@cityofboise.org

For the City of Boise, Intervenor in Support

___ U.S. Mail, postage prepaid
X Hand Delivery
___ Facsimile
___ Overnight Mail
___ Email

___ U.S. Mail, postage prepaid
X Hand Delivery
___ Facsimile
___ Overnight Mail
X Email

___ U.S. Mail, postage prepaid
X Hand Delivery
___ Facsimile
___ Overnight Mail
X Email

___ U.S. Mail, postage prepaid
X Hand Delivery
___ Facsimile
___ Overnight Mail
X Email

Reply Memorandum in Support of Motion for Summary Judgment
Chris M. Bromley  
McHugh Bromley, PLLC  
380 S. 4th Street, Ste. 103  
Boise, ID  83702  
cbromley@mchughbromley.com  

For the City of Boise, Intervenor in Support  

Warren Stewart, P.E.  
Kyle Radek, P.E.  
City of Meridian  
33 E. Broadway Ave., Ste. 200  
Meridian, ID  83642  
wstewart@meridiancity.org  
kradek@meridiancity.org  

For the City of Meridian, Intervenor in Support  

Charles Honsinger  
Honsinger Law, PLLC  
P.O. Box 517  
Boise, ID  83701  
honsingerlaw@gmail.com  

For the City of Meridian, Intervenor in Support  

Brent Orton, P.E., MSC  
Public Works Director, City Engineer  
City of Caldwell  
621 East Cleveland Blvd.  
Caldwell, ID  83605  
borton@cityofcaldwell.org  

For the City of Caldwell, Intervenor in Support  

Christopher E. Yorgason  
Middleton City Attorney  
Yorgason Law Offices, PLLC  
6200 N. Meeker Pl.  
Boise, ID  83713  
chris@yorgasonlaw.com  

For the City of Middleton, Protestant  

---  

Reply Memorandum in Support of Motion for Summary Judgment  

9
Richard Roats  
City Attorney  
City of Kuna  
P.O. Box 13  
Kuna, ID 83634  
rroates@kunaid.gov

For the City of Kuna, Interested Party

Cherese D. McLain  
Moore, Smith, Buxton & Turcke, Chtd.  
950 W. Bannock St., Ste. 520  
Boise, ID 83702  
cdm@msbtlaw.com

For the Star Water & Sewer District, Protestant  
and for the City of Eagle, Interested Party

S. Bryce Farris  
Andrew J. Waldera  
Sawtooth Law Offices, PLLC  
1101 W. River St., Ste. 110  
P.O. Box 7985  
Boise, ID 83707  
bryce@sawtoothlaw.com  
andy@sawtoothlaw.com

For Nampa & Meridian Irrigation District and Settlers  
Irrigation District, Protestants

Shelley M. Davis

Reply Memorandum in Support of Motion for Summary Judgment