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**DEPARTMENT OF  
WATER RESOURCES**

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this is purely a question of law.<sup>1</sup> 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

### A. Suez's Requested Planning Horizon Does Not Conform to the Requirement of I.C. § 42-202B(8):

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. Its 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.

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<sup>1</sup> 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.

I.C. § 42-202B(7).

(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.<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>3</sup>

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

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<sup>3</sup> 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


(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 16<sup>th</sup> 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 16<sup>th</sup> 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.

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

  
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