

Michael C. Creamer (ISB No. 4030)
Preston N. Carter (ISB No. 8462)
Givens Pursley LLP
601 W. Bannock St.
Boise, ID 83702
Telephone: (208) 388-1200
Facsimile: (208) 388-1300
mcc@givenspursley.com
prestoncarter@givenspursley.com

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for SUEZ Water Idaho Inc.

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE JOINT
APPLICATION OF SUEZ WATER
IDAHO AND EAGLE WATER
COMPANY FOR THE ACQUISITION
OF EAGLE WATER COMPANY

Case Nos. SUZ-W-18-02/
EAG-W-18-01

SUEZ WATER IDAHO INC.'S REPLY
COMMENTS

SUEZ Water Idaho Inc. (“SUEZ” or “SUEZ Water Idaho”) respectfully submits these reply comments pursuant to Commission Order No. 35198.

INTRODUCTION

Eagle Water Company’s current circumstances are not sustainable. Robert DeShazo is over 80 years old and does not wish to shoulder the increasingly complex burden of operating a rapidly growing, modern water utility. Direct Testimony of Robert DeShazo (“DeShazo Testimony”) at 2-3. Eagle Water Company’s rates have not meaningfully increased since 1972, and commenting parties note that an average residential customer pays \$12.32 per month. *Id.* at 2; Eagle Water Customer Group Comments at 1.

Eagle Water Company’s system is currently deficient in several respects. Comments of the Commission Staff (“Staff Comments”) at 5 (identifying system deficiencies). Both short- and long-term investments are needed to address these deficiencies.

The transaction proposed in this case (“Transaction”), carried out in accordance with the Stipulation and Settlement (“Settlement Agreement”), provides a path forward for Mr. DeShazo and for Eagle Water Company customers.

By acquiring Eagle Water Company’s assets, SUEZ will avoid over \$11 million in investments to its own system. Staff Comments at 5 (concluding that, by purchasing Eagle Water Company’s assets, SUEZ would avoid approximately \$11.2 million in investments); Direct Testimony of Catherine Cooper (“Cooper Testimony”) at 8 (concluding that, by purchasing Eagle Water Company’s assets, SUEZ would avoid approximate \$11.2 million).

The Transaction will address several of the existing deficiencies in Eagle Water Company’s system. Staff Comments at 5-6. And SUEZ will provide the continuity in ownership, financial resources, and technical expertise required to address the remaining deficiencies and to provide high-quality water service into the future. *Id.* at 6.

Eagle Water Company has been a topic of considerable controversy over the years. A remarkable consensus has coalesced around the Settlement Agreement currently before the Commission. SUEZ, Eagle Water Company, and Commission Staff are signatories to the Agreement. The City of Eagle fully supports the Agreement. The City of Boise supports the key terms of the Agreement.¹

SUEZ respectfully submits that the Settlement Agreement provides the Commission with an opportunity to permanently resolve issues regarding Eagle Water Company that have plagued these parties, and the Commission, for decades.

¹ The City of Boise states its support for the key terms in the Agreement, but requests that the Commission impose obligations upon SUEZ related to public input and other issues that, in SUEZ’s view, do not directly relate to the Settlement Agreement. In any case the City of Boise does not request that the Commission disapprove the Settlement Agreement or the Transaction.

Two parties to this case, and some members of the public, have voiced opposition to the Settlement Agreement. But the objecting parties do not identify a viable alternative path forward. Instead, they urge the Commission to reject the Settlement Agreement (and, indeed, the Transaction as a whole) in favor of an untenable status quo without substantively addressing any of the concerns raised by Mr. DeShazo or Eagle Water Company's current system deficiencies.

SUEZ respectfully submits that the Settlement Agreement is fair, just, and reasonable, and is in the public interest. Accordingly, SUEZ respectfully requests that the Commission approve the Settlement Agreement without change or modification.

REPLY COMMENTS

1. The Settlement Agreement reflects a fair, just, and reasonable resolution of the issues presented in the Application.

SUEZ recognizes and appreciates the comments of the Commission Staff, which thoroughly describe the Settlement Agreement and the benefits it will provide. Staff Comments at 4-5. For the sake of brevity, SUEZ highlights aspects of the Settlement Agreement without repeating Staff's comments.

Acquisition adjustment. If approved, the Settlement Agreement would result in an acquisition adjustment of \$10.475 million. Absent the Settlement Agreement, SUEZ would seek recovery of the entire purchase price of \$10.5 million plus costs associated with the Transaction, for a total of over \$11 million.

No party disputes or opposes the amount of the proposed acquisition adjustment.

As noted in Staff's comments, the amount of this acquisition adjustment is justified. SUEZ will avoid at least \$11.2 million dollars by acquiring Eagle Water's assets as opposed to investing in its own infrastructure. Staff Comments at 5-6; *see also* Cooper Testimony at 8

(noting approximately \$11.2 million in avoided costs). This provides a definite and concrete benefit to current and future SUEZ customers.

The Settlement Agreement and Transaction also benefit Eagle Water Customers. In addition to the benefits identified by Staff,² the Transaction provides a path towards long-term viability of the system. Mr. DeShazo is over 80 years old, and he no longer has the desire to run the system. DeShazo Testimony at 2-3. If he cannot sell the system, Mr. DeShazo anticipates difficulties maintaining the system and obtaining financing for needed improvements. *Id.* at 2.

Providing a long-term path forward is a recognized and substantial benefit of water utility acquisitions, even when the acquisitions result in higher rates. As the Commission noted in the South County Case: “The regulatory, operational and personal reasons expressed by South County as prompting the decision to sell by its stockholders cannot be casually dismissed.” Case No. UWI-W-9802, Order No. 27798 at 3. The same holds true here.

SUEZ respectfully submits that the acquisition adjustment amount set forth in the Settlement Agreement reflects a fair, just, and reasonable compromise of the parties’ positions on this matter. Approving the agreed-upon acquisition adjustment will provide significant benefits to both SUEZ customers and Eagle Water Company customers.

7-Year Rate implementation. The Settlement Agreement proposes to implement SUEZ rates to existing Eagle Water Customers over a seven-year period. SUEZ originally proposed to implement rates over a three-year period, then five years after settling the City of Eagle’s lawsuit, and has now agreed to seven years.

² See Staff Comments at 4-5 (listing benefits to Eagle Water Company customers).

This seven-year period appears to be the longest transition period that the Commission has ever required or approved. The first-year increase will be further mitigated by the surcharge account refund to Eagle Water Company customers described below.

SUEZ recognizes that two of the parties to this case, and some members of the public, object to increased rates. However, there is no scenario in which Eagle Water Company's remarkably low rates—\$12.93 per month on average—remain the same. As Mr. DeShazo notes, Eagle Water Company's rates have remained largely unchanged since 1972. DeShazo Testimony at 2. As Staff notes, substantial investments are needed to address existing system deficiencies. Staff Comments at 6-7. A rate increase is inevitable. The seven-year implementation period reflects a fair, just, and reasonable manner in which to transition Eagle Water Company customers from their historically low rates to SUEZ's Commission-approved rates.

Surcharge account refund. As described by Staff, under the Settlement Agreement, Eagle Water Company will refund to existing customers the full amount that should have been set aside in a surcharge account. Staff Comments at 8-9. This amounts to approximately \$144 per customer. This refund will, among other things, mitigate the impacts of the first-year rate increase.

SUEZ submits that the existence and manner of providing a surcharge account refund is an important, tangible benefit of the Settlement Agreement.

One party objects to this process, arguing that it is inequitable because “[d]istribution based on customer status on the date of approval appears to be based only on convenience.” *See* Community Allied for Integrity and Accountability (“CAIA”) Comments at 5. This argument is not persuasive.

Distinguishing between customers based on the date of approval is commonplace in utility proceedings. For example, increased rates imposed through a general rate case are often effective either upon approval or shortly after approval, even when those increased rates are based on investments made during prior time periods.

Using CAIA's reasoning, it would be unjust to charge higher rates to a customer that joined a system right before a rate increase, since a prior customer received the benefits of the investments without paying higher rates. Conversely, under CAIA's argument, it would be inequitable not to charge higher rates to a customer that disconnected from the system just before the new rates were implemented, since that customer enjoyed the benefits of the investment but never paid higher rates for them.

CAIA does not provide an actual alternative proposal, but it seems to suggest that someone should track down former Eagle Water Company customers, no matter their current place of residence, and provide some portion of refund while denying some portion of the refund to recently connected customers. SUEZ submits that any proposal that would respond to CAIA's objections is unworkable. Indeed, CAIA's objections would lead towards a refund that would itself discriminate between customers based on the date they connected to the system.

SUEZ submits that the surcharge account refund is a reasonable compromise of positions that provides an immediate, quantifiable benefit to existing Eagle Water Company customers.

Process. The case has been pending for nearly three years. The amended Application has been pending for over four months. Members of the public have been provided with two separate opportunities to intervene. A wide number of parties, representing a wide range of interests, have intervened and participated in the case. All parties, including Commission Staff and Intervenors, have had the opportunity to engage in discovery. The parties participated in three settlement

conferences and an accounting workshop. The Commission has provided at least five notices to the public. The Commission convened a customer workshop, a customer hearing, and a comment period.

This case has been conducted in full compliance with the Commission's rules and procedures, and has provided a robust and transparent forum to analyze the issues raised in the Application. The process by which this case has proceeded does not provide a basis for disapproving the Settlement Agreement.

2. Reply to specific comments.

SUEZ provides the following additional replies to specific comments provided by parties and the public.

Commission Staff. SUEZ fully agrees with Staff's comments. SUEZ submits that Staff's comments provide a strong basis for the Commission to approve the Settlement Agreement.

City of Eagle. SUEZ recognizes and appreciates the City of Eagle's comments, which support approval of the Settlement Agreement.

The City of Eagle's support for the Settlement Agreement is particularly important given the City's prior opposition to the Transaction. The proposal currently before the Commission—which has the support of Commission Staff, SUEZ, Eagle Water Company, the City of Eagle, and the City of Boise—provides the Commission with an opportunity to resolve a number of disputed issues regarding Eagle Water Company that have spanned decades. SUEZ respectfully submits that it is reasonable, and in the public interest, to adopt this agreed-upon resolution rather than rejecting it in favor of an untenable status quo.

City of Boise. The City of Boise expressly supports the key components of the Settlement Agreement. City of Boise City's Formal Comments ("City of Boise Comments") at 2

(“It should be noted that Boise City generally supports the terms of the proposed Stipulation and Settlement . . . filed on October 8, 2021.”). The City of Boise does not request that the Commission deny the proposed Settlement Agreement or the Transaction. SUEZ recognizes and appreciates the City’s support for the key terms of the Agreement.

The City of Boise does, however, pose some questions and requests that the Commission impose upon SUEZ certain planning and reporting obligations. City of Boise Comments at 3-5.

SUEZ respectfully submits that the City of Boise’s requests are outside the scope of this proceeding. A thorough response to each of the City’s questions and calls for additional information would consume undue amount of resources in the context of considering the Settlement Agreement.³

As for the City’s request that the Commission impose planning and reporting obligations upon SUEZ, the Commission recently approved a settlement agreement—which the City of Boise joined—in which SUEZ agreed to broaden public outreach by providing community project updates, conducting in-person and virtual town hall listening sessions, expanded customer notifications on operational initiatives, and providing a water quality mailer to all customers regarding key projects and initiatives. Case No. SUZ-W-20-02, Stipulation and Settlement at ¶12.

³ The City of Boise had the power to engage in discovery throughout this proceeding but did not propound any discovery requests. SUEZ respectfully submits that a party cannot disregard the tools available to it and then, at the end of the process, call for more information when that very information would have been available to the party during the proceeding itself. In any case, the City’s questions and calls for more information appear to be posed in a manner—and in a forum—such that responses are not expected or even necessarily desired.

SUEZ also notes it has been engaged in ongoing, substantive, good faith discussions with the City of Boise regarding these matters for a number of years. One of the several letters exchanged on this topic is attached as Exhibit 1. SUEZ submits that the Commission should let the parties carry out these discussions without intervention in the context of this proceeding.

SUEZ also agreed to host annual workshops for all interested parties, including Commission Staff and staff from the Idaho Department of Environmental Quality and the Idaho Department of Water Resources, on a range of topics related to water conservation and resource planning. *Id.* at ¶13.

In addition, in conjunction with that case, Commission Staff established a task force to monitor water quality issues on the Boise Bench.

The parties are in the process of implementing these components of the general rate case settlement. The conditions that the City of Boise requests in this case appear to replace, duplicate, or potentially conflict with, the processes the City itself agreed to. It would be premature for the Commission to impose additional conditions before these processes run their course.

SUEZ also notes that some of the requested reports—such as reporting diversions from SUEZ’s wells—are already provided to the Commission in SUEZ’s annual reports.

In any case, the City does not actually argue that the Commission should disapprove the Settlement Agreement. The City also does not provide any legal basis for, and no compelling policy rationale for, imposing additional conditions upon SUEZ’s general operations in the context of this proceeding.

SUEZ respectfully submits that the Commission should decline to alter the terms of the Settlement Agreement to impose the additional obligations suggested by the City of Boise.

Eagle Water Customer Group (“EWCG”). EWCG objects to the settlement on two bases. SUEZ respectfully submits that neither is persuasive.⁴

⁴ EWCG objects not so much to the terms of the Settlement Agreement as to the Transaction itself.

Idaho Code § 61-328. As EWCG recognizes, Idaho Code § 61-328 does not directly apply to this proceeding. Eagle Water Customer Group’s Comments on Proposed Settlement (“EWCG Comments”) at 2 (quoting the Commission’s recognition that “Idaho statutes do not specifically address the acquisition of water companies”).

EWCG, and the Commission, are correct: Idaho Code § 61-328 applies to the transfer of ownership of certain electrical equipment, not to transfer of ownership of equipment owned by water companies. Idaho Code § 61-328 (requiring Commission approval of changes in ownership or control of “any property located in this state which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof”).

The Commission has, as a matter of discretion, applied the factors set forth in Idaho Code § 61-328 to some water utility acquisitions. In others, the Commission has applied the overall public-interest standard set forth in Idaho Code § 61-528. *See* South County Case, Case No. UWI-W-98-02, Order No. 27798; Barber Water Case, Case No. UWI-W-99-4, Order No. 28205; Case No. UWI-W-14-01, Order No. 33195, *In re: United Water Idaho Inc. ’s and Brian Water Users Association ’s Application*.

The South County case is particularly instructive. There, United Water proposed to acquire a water system owned and operated by South County Water Company, Inc. (“South County”). The owners of South County operated a low-cost water system and its customers were generally satisfied with their water service. *See* Order No. 27798 at 2. However, the owners were “reluctant to undertake the risks of continued operations arising from increasingly stringent water quality regulations, increasingly complex utility regulations, and increasingly complex operational and technical requirements.” *Id.* at 1.

The transaction provided benefits to South County and United Water customers: operational efficiencies through shared water supply and storage; improved technical ability to operate the South County system in the future, to make needed system improvements, plan for growth, to replace aging facilities and comply with regulatory requirements; and a revenue benefit to then-existing United Water customers. *Id.* at 2. The water would be chlorinated “to safeguard and improve water quality,” and South County customers would also have access to emergency backup systems, SCADA systems, and UWI resource experts. *Id.*

The Commission recognized that, while the transaction would increase rates for South County customers, “the mere difference in rates is insufficient to deny the transaction.” *Id.* at 3.

Supporting this conclusion, the Commission recognized that South County customers were likely to pay increased rates in the future, given “substantial required improvements.” Perhaps more importantly, the Commission recognized that “[t]he regulatory, operational and personal reasons expressed by South County as prompting the decision to sell by its stockholders cannot casually be dismissed.” *Id.* “South County customers have had the benefit for 24 years of continuous system management and ownership. The present ownership, many advanced in age, desire to sell and bring an end to their venture. The fact that their water system is a regulated entity should not preclude them from selling.” *Id.* (emphasis added).

The Commission reached a similar decision, using similar reasoning, in the Barber Water Case. *See* Order No. 28205 at 3-5.

The parallels between the South County case and this one are obvious and compelling. As in South County, here the current system operator is unwilling and unable to continue operating the water system. As in South County, here the transaction will provide benefits to customers of both the acquired and the acquiring utility. As in South County, here “the mere

difference in rates is insufficient to deny the transaction.” Order No. 27798 at 3. And as in South County, here Eagle Water customers have had the benefit for 47 years of continuous system management and ownership. The present owner, advanced in age, desires to sell and bring an end to his venture. The fact that the water system is a regulated entity should not preclude him from selling. *See id.*

SUEZ respectfully submits that, in light of all the circumstances, approval of the Settlement Agreement is in the public interest. Neither Idaho Code § 61-328 nor the decisions that have applied those factors, as a matter of discretion, to other water utility acquisitions prevent the approval of the Settlement Agreement.

In addition, SUEZ notes EWCG objects to the Settlement Agreement, and indeed to the Transaction, without proposing an alternate path forward. Mr. DeShazo’s testimony makes clear that, after forty-seven years of managing Eagle Water Company, he is no longer willing to continue. Mr. DeShazo Testimony at 2-3. Commission Staff has identified a number of deficiencies in Eagle Water Company’s system that need to be addressed. Staff Comments at 5.

The Commission is currently presented with a Settlement Agreement that enjoys the support of Commission Staff, SUEZ, Eagle Water Company, the City of Eagle, and the City of Boise. SUEZ respectfully submits that it is in the public interest to accept the Settlement Agreement, rather than reject the Agreement in favor of an untenable status quo.

Rate implementation. EWCG also asserts that new rates for existing Eagle Water Company customers should be implemented differently. EWCG Comments at 5-6. SUEZ disagrees. As noted above, an implementation period of seven years will be the longest period of rate implementation in Commission history. The surcharge refund will largely—or, for some customers, fully—offset the first-year implementation of new rates.

SUEZ respectfully submits that EWCG does not provide a persuasive legal or policy basis for altering the agreed-upon implementation schedule. EWCG refers to the South County case, arguing that an equivalent rate implementation here would result in a first-year increase of 30%, rather than the 53% agreed upon in the Settlement Agreement. *Id.* at 6. However, this comparison ignores the surcharge refund amount, which was not present in South County and which will largely or completely offset the first-year rate increase proposed here. EWCG's suggestion of a modest reduction in the first-year rate increase does not provide a sufficient basis to reject the Settlement Agreement and jeopardize the Transaction.

CAIA and public comments. Citizens Allied for Integrity and Accountability ("CAIA") provides comments that are substantially similar to those provided by members of the public. SUEZ responds to both here.

Rate increase and rate implementation. Similar to EWCG, CAIA argues that the Commission should deny the Settlement Agreement due to the increased rates to Eagle Water Company customers, and that the rate implementation period is inadequate. CAIA Comments at 3-4. SUEZ disagrees, for the same reasons discussed above. SUEZ incorporates its response to EWCG's comments as its response to CAIA's comments on rate implementation.

Water quality. CAIA argues that the acquisition may lead to decreased water quality for Eagle Water Company customers. CAIA Comments at 2. IDEQ regulates water quality in Idaho. SUEZ is in compliance with IDEQ standards. CAIA provides no evidence to the contrary.

CAIA attempts to argue that SUEZ might lead to decreased water quality because SUEZ uses chlorine. CAIA Comments at 3. But chlorine is a well-recognized method of *complying* with IDEQ's water quality regulations. *See* IDAPA 58.01.08.300.04 (setting chlorination requirements for disinfecting certain water sources); Order No. 27798 at 2 (approving United

Water's acquisition of South County Water System, recognizing that chlorination would "safeguard and improve water quality"). The methods SUEZ uses to ensure compliance with drinking water criteria does not present a "water quality issue." And the Commission will retain jurisdiction over SUEZ to address any complaints regarding chlorination. SUEZ's use of chlorine to disinfect drinking water does not provide a basis to disapprove the Settlement Agreement.

Local control. CAIA argues that "[a]llowing a multinational, for-profit entity to exercise full control over a precious, irreplaceable resource is not in the best interest of the public." CAIA Comments at 8. These concerns are off-base and overstated.

SUEZ Water Idaho, an Idaho company with Idaho-based personnel, operates the water system. Its offices are in Boise. SUEZ's water rights are regulated by the Idaho Department of Water Resources ("IDWR"). The terms and quality of service, rates, customer relations, and other matters are regulated by the Commission. Water quality is regulated by the Idaho Department of Environmental Quality ("IDEQ"). If it approves the Settlement Agreement, the Commission will not be granting "full control over a precious, irreplaceable resource." The Commission will instead be allowing one highly regulated, for-profit utility to assume operation of a water system when the current owner of the highly regulated, for-profit utility states that he no longer has the desire or ability to do so.

Transparency. CAIA argues that "[t]his transaction has been far from transparent and many important details remain obscure." CAIA Comments at 8. This is simply untrue. Indeed, CAIA itself sets forth the details of the transaction that it contends are "obscure." CAIA at 9 (describing the transaction).

CAIA has been a participant to this proceeding for nearly three years. CAIA has had the ability to utilize—and has utilized—the mechanism of discovery, which provides access to information and documents that would not have otherwise been available. CAIA’s recitation of the details of the transaction presumably flowed from information learned during CAIA’s participation in this case.

In any case, to the extent CAIA raises transparency concerns, those concerns relate to the Commission and its rules rather than this particular proceeding. This proceeding was conducted in accordance with the Commission’s rules, orders, and procedures. CAIA does not contend otherwise. SUEZ respectfully submits that CAIA’s stated concerns regarding transparency do not and cannot provide a basis to disapprove the Settlement Agreement.

Veolia. CAIA argues that, due to the proposed acquisition of SUEZ SA, SUEZ’s upstream, France-based parent company, by Veolia Environnement SA, another France-based entity, the acquisition of Eagle Water Company’s assets is “not a simple two-party transaction” but, rather, a “four party transaction or a dual, dual transfer.” CAIA Comments at 10. SUEZ submits that the acquisition by Veolia does not provide a basis to disapprove of the Settlement Agreement.

First and foremost, the proposed transaction between SUEZ’s upstream parent company—SUEZ SA and Veolia Environnement SA, both of which are based in France—is not properly before the Commission. CAIA’s comments regarding this proposed transaction are therefore not relevant.

Second, the Commission has recognized that the modern marketplace is increasingly international and, consequently, concerns about foreign companies’ involvement with Idaho utilities do not and cannot govern the Commission’s decisions:

With the increased globalization of economies and cultures, the concept of an “American” company is becoming more obscure. Today’s increasingly competitive markets require business to search far and wide for materials, labor, and business opportunities. Large businesses whose stock is publicly traded in this country are often owned, at least in part, by foreign interests. Similarly, U.S. corporations and individuals often engage in the acquisition of or partnership with foreign businesses. In short, corporate mergers make the news almost daily.

Case No. PAC-E-99-1, Order No. 28213 at 41. SUEZ respectfully submits that this statement by the Commission is correct: upstream ownership interests of utilities are in a near-constant state of flux to some degree or other. SUEZ Water Idaho is, and will remain, an Idaho-based water utility subject to the jurisdiction of the Commission and other Idaho agencies.

Third, CAIA does not identify any substantive issue with the proposed Veolia transaction that affects any of the on-the-ground facts of the case. CAIA does not—and cannot—dispute the benefits of the Settlement Agreement identified by Commission Staff. CAIA invites the Commission to reject the Settlement Agreement and its concrete benefits out of unsubstantiated fears or “concerns” about the future, related to a proposed transaction that is outside the Commission’s jurisdiction.

Finally, CAIA completely ignores Mr. DeShazo’s stated unwillingness and inability to operate Eagle Water Company on an ongoing basis. “The regulatory, operational, and personal reasons expressed by [a water company operator] as prompting the decision to sell by its stockholders cannot be casually dismissed.” Order No. 2798 at 3.

No matter how much CAIA—or any other party—wishes that Mr. DeShazo could continue to operate Eagle Water Company at the current rates for an indefinite period of time, that is simply not realistic. The status quo is not tenable. CAIA has expressed objections to the current proposal, but does not suggest any viable alternative path forward. SUEZ respectfully


submits that the Settlement Agreement provides a reasonable resolution to the issues presented in the Application and provides a path forward that will provide benefits to all parties.

CONCLUSION

For these reasons, SUEZ respectfully submits that the Commission should approve the Settlement Agreement without change or modification.

DATED this 8th day of November, 2021.

SUEZ Water Idaho Inc.

By: 

Michael C. Creamer
Preston N. Carter
Givens Pursley LLP
Attorneys for SUEZ Water Idaho Inc.

CERTIFICATE OF SERVICE

I certify that on 8th day of November, 2021, a true and correct copy of the foregoing was served upon all parties of record in this proceeding via electronic mail as indicated below:

Jan Noriyuki
Commission Secretary
Idaho Public Utilities Commission
P.O. Box 83720
Boise, Idaho 83720-0074
IPUC

by U.S. Mail
 by Personal Delivery (Original & 3 copies)
 by Facsimile
 by E-Mail secretary@puc.idaho.gov
jan.noriyuki@puc.idaho.gov

Dayn Hardie
Erick Shaner
Deputy Attorneys General
Idaho Public Utilities Commission
P.O. Box 83720
Boise, Idaho 83720-0074
Attorneys for IPUC

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail dayn.hardie@puc.idaho.gov
erick.shaner@puc.idaho.gov

Marshall Thompson
SUEZ Water Idaho Inc.
8248 W. Victory Road
Boise, Idaho 83709
SUEZ Water Idaho Inc.

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail marshall.thompson@suez.com

Molly O'Leary
BizCounselor@Law, PLLC
1775 W. State St. #150
Boise, ID 83702
Counsel for Eagle Water Company

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail molly@bizcounseloratlaw.com

Robert V. DeShazo, Jr.
Eagle Water Company, Inc.
P.O. Box 455
Eagle, ID 83616-0455
Petitioner

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail eaglewaterco@gmail.com

N. L. Bangle
H2O Eagle Acquisition, LLC
188 W. State Street
Eagle, ID 83616

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail nbangle@h2o-solutionsllc.net

Jason Pierce, Mayor
City of Eagle
660 E. Civil Lane
Eagle, ID 83616
Intervenor City of Eagle

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail jpierce@cityofeagle.org
tosborn@cityofeagle.org

B. Newal Squyres
Murray D. Feldman
Holland & Hart LLP
800 W. Main Street, Suite 1750
P.O. Box 2527
Boise, ID 83702-2527
Attorneys for Intervenor City of Eagle

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail nsquyres@hollandhart.com
mfeldman@hollandhart.com

Norman M. Semanko
Parsons Behle & Latimer
800 West Main Street, Suite 1300
Boise, Idaho 83702
*Attorneys for Intervenor Eagle Water
Customer Group*

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail NSemanko@parsonsbehle.com
ecf@parsonsbehle.com

Mary Grant
Scott B. Muir
Deputy City Attorney
Boise City Attorney's Office
150 N. Capitol Blvd.
P.O. Box 500
Boise, Idaho 83701-0500
Attorneys for Intervenor, City of Boise

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail boisecityattorney@cityofboise.org

James M. Piotrowski
Marty Durand
PIOTROWSKI DURAND, PLLC
P.O. Box 2864
1020 W. Main Street, Suite 440
Boise, ID 83701
*Attorneys for Intervenor Citizens Allied for
Integrity and Accountability*

by U.S. Mail
 by Personal Delivery
 by Facsimile
 by E-Mail James@idunionlaw.com
Marty@idunionlaw.com



Preston N. Carter

EXHIBIT 1

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GIVENS PURSLEY LLP

Attorneys and Counselors at Law

601 W. Bannock Street
PO Box 2720
Boise, ID 83701
Telephone: 208-388-1200
Facsimile: 208-388-1300
www.givenspursley.com

Christopher H. Meyer
208-388-1236
chrismeyer@givenspursley.com

Michael P. Lawrence
208-388-1294
mpl@givenspursley.com

Gary G. Allen
Charlie S. Baser
Christopher J. Beeson
Jason J. Blakley
Clint R. Bolinder
Jeff W. Bower
Preston N. Carter
Jeremy C. Chou
Michael C. Creamer
Amber N. Dina
Bradley J. Dixon
Thomas E. Dvorak
Debora Kristensen Grasham
Donald Z. Gray
Alex J. Gross
Brian J. Holleran

Kersti H. Kennedy
Neal A. Koskella
Michael P. Lawrence
Franklin G. Lee
David R. Lombardi
Kimberly D. Maloney
Kenneth R. McClure
Kelly Greene McConnell
Alex P. McLaughlin
Melodie A. McQuade
Christopher H. Meyer
L. Edward Miller
Judson B. Montgomery
Deborah E. Nelson
W. Hugh O'Riordan, LL.M.
Samuel F. Parry

Randall A. Peterman
Jack W. Relf
Blake W. Ringer
Michael O. Roe
Robert B. White

William C. Cole (Of Counsel)

Kenneth L. Pursley (1940-2015)
James A. McClure (1924-2011)
Raymond D. Givens (1917-2008)

July 8, 2021

Via email and U.S. Mail

Mary Grant, Esq.
Deputy City Attorney
Boise City Attorney's Office
PO Box 500
Boise, ID 83701-0500
mrgrant@cityofboise.org

Re: SUEZ's response to City's letter of 4/30/2021

Dear Ms. Grant:

Thank you for your letter of 4/30/2021.¹ We provide this response on behalf of SUEZ Water Idaho.

This dialog demonstrates that the City of Boise and SUEZ remain committed to building a strong relationship based on trust and transparency. Even where we have differing perspectives, our relationship is strengthened by honest dialog. That requires asking hard questions and providing direct answers. This is an iterative process requiring patience and perseverance. SUEZ believes it is already paying off.

Your letter and other communications have identified or implied a number of concerns. In this letter, we have attempted to compile them into a list of what we perceive to be the City's primary concerns. We set them out below, and provide a

¹ Prior communications in this ongoing discussion include our letter to Mr. Burgos of 9/25/2020, Mr. Parady's letter of 2/9/2021, and our letter to Mr. Parady of 3/5/2021.

response to each concern. We hope this is a helpful approach. If we have misunderstood or failed to address your concerns, this correspondence may help us sort that out. And we will keep trying.

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DISCUSSION

Concern #1 SUEZ's status as a private company is at odds with the long-term best interests of the City and the customers it serves.

We begin by addressing what appears to be the elephant in the room. SUEZ is a for-profit company, and the City is not. That is a fundamental difference that no one can change, short of purchase or condemnation of SUEZ's assets. But SUEZ is not just any private company. It is a regulated public utility, and that should provide a large degree of assurance to the City.

For well over a century, people across the country have relied on public utilities, operated as regulated monopolies, to provide essential public services. Allowing monopolies to operate is an intentional and important departure from the anti-monopoly underpinnings of our country's system of business regulation. It is compelled by the need for the enormous investment in infrastructure required to provide public services. On the other hand, monopolies are inherently dangerous, because they are not constrained by competitive market forces. The solution is to substitute intense regulatory control for market control. Accordingly, all states oversee, control, and constrain public utilities' business through their respective public utilities commissions. This trade-off (swapping market forces for PUC regulation) has enabled America to be served at low cost by some of the best public service infrastructure in the world.

It has achieved this not by eliminating the profit motive, but by regulating it. Because the company owns its infrastructure and its water rights, and derives revenue from it, SUEZ is highly motivated to keep that system in top form. Moreover, it can afford to do so, because it is allowed a return on its investment.

We also draw attention to the differing roles played by profit and risk in different sectors of the economy. From time to time, private companies are operated or even looted for short term investor gain. Fortunately, that model does not find a home in the highly regulated utility sector. Utilities are valued by a specific set of investors — those seeking the reliability of steady, moderate returns over the long term. Achieving such returns requires deliberate, risk-averse, and consistent planning, as well as provision of high-quality services to customers over the long run.

In sum, the expectations of the marketplace align SUEZ's interests with those of its customers, unlike other sectors, which may encourage speculation, incentivize risk-taking, and prioritize short-term growth over long-term value.

Concern #2 The City would be better off if it owned and operated the water system.

When a city controls the water system, it too operates as a monopoly with all the inherent risks. The difference is that the practical business decision-making structure and the regulatory oversight applicable to private utilities are replaced by political oversight and control. Outcomes vary.

Some cities own and operate excellent public water systems. Under a best-case scenario, a well-run city might operate a water system as efficiently as SUEZ. But it is hard to imagine a city running it any better, or at lower cost, than SUEZ.

But many city systems are failures. Among other things, private utilities are incentivized by profit to invest in their systems. When they seek a rate increase to recover a return on that investment, the company takes the heat and everyone benefits from the investment. In contrast, when a city is required to raise fees or taxes to pay for maintaining and improving city-owned water supply infrastructure, elected officials sometimes find it more appealing to postpone or do things on the cheap. The recent crisis in the City of Flint, Michigan, is an extreme example of what can go wrong.

Even successful city utilities are not necessarily more cost effective than private utilities. We note, without comment, that Boise's Water Renewal Utility has experienced annual rate increases of about five percent per year since 1979, in addition to increased connection fees.² By comparison, the average annual increase for SUEZ Water Idaho's rates is 3.29 percent from 1981 through 2021. Those figures are not meant to say that one utility is better or more efficient than the other. By all accounts, both are well and efficiently run. We offer this simply to say that SUEZ's track record on rates is good and one should not assume that a takeover by the City would result in lower operating costs or better service.

In sum, the City and its citizens are well served by SUEZ's efficiently run water system. The City should have no heartburn over the modest rate of return SUEZ is allowed on its investment. The City, in contrast, takes its cut from the ratepayers in the form of franchise fees without having made any investment.

² Memo from Public Works Director to Mayor and Council dated 8/19/2020 at page 3.

Concern #3 By allowing a private company to provide municipal water, the City is missing an opportunity to control growth outside the City.

Another motivation for city-operated water systems could be that the city would be able to leverage control of the water supply to serve extra-territorial policy goals. The City and County of Denver is an example of this. It has quite effectively used its control of water transported across the Continental Divide as leverage over the suburbs. It has not sought to stop or control suburban growth. But it has used its water supply to ensure that suburbs pay their fair share of the city-provided infrastructure and services (from art museums to stadiums) that benefit of the entire region.

If the City of Boise took over SUEZ, it might try to leverage its control of the water supply to exert some influence over suburban growth. But that would not likely succeed. The political climate in Idaho is far different from that in Colorado. Any attempt by Boise to exercise land use control beyond its borders would likely be met by a stern legislative response.

Moreover, the City could not just buy the “Boise portion” of SUEZ. There is no Boise portion. The entire system is integrated and can only operate in an integrated fashion. If the City bought SUEZ, it would necessarily become the water provider to areas of unincorporated Ada County and portions of other municipalities (Eagle and Meridian). The political implications are staggering. As is the cost of such a venture.

In sum, a City take-over of the municipal water system would not provide a viable opportunity for extending the City’s influence beyond its borders.

Concern #4 Because expansion of SUEZ’s service territory increases its revenue, SUEZ inherently promotes suburban growth.

It is undeniable that SUEZ is in the water business, and is going to provide water to new customers who ask to be served. SUEZ cannot use its regulated monopoly status to control or influence land use decisions made by cities and counties. Attempting to do so would be profoundly at odds with its duties as a public utility. SUEZ does not view this reality as a bad thing. Land use decisions are best made by governmental entities.

In any event, even if SUEZ (or a city taking over SUEZ) tried to control land use, it would fail. If SUEZ (or a city) declined to serve a proposed new development, the developer would obtain water elsewhere. SUEZ owns water rights, but it does not control other people’s access to the public water resource. Growth will continue, and if not served by SUEZ it will be served by someone else, including smaller, disconnected

water systems using their own wells. That is not a recipe for a stable, safe, and reliable regional water system. To the contrary, the inefficiencies and water quality dangers associated with numerous small and often less regulated water systems is widely recognized as a problem in the United States.

In sum, SUEZ does not and cannot use its water system to influence growth in the suburbs. SUEZ does not lead, but follows local planning and zoning decisions.

Concern #5 SUEZ will use its APODs to facilitate suburban growth.

Traditionally, the Idaho Department of Water Resources (IDWR) issued a new water right for every new municipal well throughout Idaho. SUEZ and its predecessors operated that way for a century. But this is an arcane practice no longer allowed by IDWR, which will no longer issue new municipal water rights absent a showing of need on a system-wide basis. Most notably, the old approach of having a separate water right for each well ignores the physical reality that the wells divert from a connected aquifer system.

APOD is an acronym for "alternate point of diversion." Every water right has at least one point of diversion (or POD). For a ground water right, the POD is location of the well. If a ground water right is authorized to divert from more than one well, those wells are called APODs.

See the attachment on page 17 (an excerpt from the *Idaho Water Law Handbook*) for a more complete discussion of APODs.

System-wide APODs (a network of wells serving the entire municipal delivery system) simplify daily administration by eliminating the administrative burden of tracing each diversion to an individual water right. And they provide needed flexibility in times of shortage. For example, APODs would enable SUEZ to lawfully rotate its senior rights to different wells to help the City facilitate lawn watering restrictions.

At the same time, SUEZ recognizes that IDWR must place conditions on water rights when new APODs are added. This is appropriate to ensure other water rights are not injured by local well pumping interference and that APODs are not used to circumvent localized administration (such as ground water management areas). We will not go into those intricacies here, but suffice to say the subject is well developed. (See the attachment on page 17.)

The key point is that APOD authority is not necessary for or intended to promote growth. SUEZ can expand service to new customers within or nearby its current service area with or without system-wide APODs. SUEZ already has water rights associated with every well it owns. If SUEZ were denied system-wide APOD authority, it would continue to operate just as it has before and file one-off transfer applications when it needs to "paper up" water rights for a new well. But that process is inefficient and a

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burden to SUEZ (and its ratepayers) and to IDWR (which presumably would like to avoid having to process multiple applications for transfer when it could simply approve APODs in one fell swoop).

In your letter at page 2 you asked for “a detailed summary of how the APOD provisions will be used if granted by IDWR, including which wells and water rights are currently anticipated to use the APOD provisions” The answer is SUEZ will use the flexibility provided by APODs on all of its wells and water rights. The whole point of APODs is to get away from worrying about which water rights are associated with which wells. At any given time, SUEZ can simply total up quantity of water available under all of its water rights then in priority, and divert that water from any well it wishes. Thus, operational decisions will be based on system-wide operational needs, not on the basis of which wells have water rights.

In short, APODs are not tools for growth. Instead, they provide flexibility, efficiency, and resiliency to areas that will be served in any event. Today, municipalities across the entire State are moving to bring system-wide APODs to their water right portfolios. There is no downside to this.

Concern #6 In times of shortage, APODs will enable SUEZ to send Boise water to suburbs rather than saving it for Boise citizens.

Jim Pardy’s letter of 2/9/2021 asked: “In the event of drought and potential water right calls, will all existing and future customers be curtailed equally?” Similarly, your letter of 4/30/2021 asked “how SUEZ intends to use the APODs to move water to other areas.”

The answer is simple. As described above, APODs allow water to be pumped where it is needed, without regard to which well is oldest or which water right is associated with it. In doing so, SUEZ will always treat all of its customers equally. For example, SUEZ could not sequester senior water rights historically associated with older Boise wells and use those rights to serve only Boise customers.

First, it would be physically impossible in SUEZ’s integrated delivery system. Second, it would be illegal. As a public utility, SUEZ may no more favor Boise customers to the disadvantage of its Eagle customers than the other way around.

This, of course, is a two-way street. For example, instead of a region-wide, drought-based curtailment, suppose there were a localized curtailment in a southeast Boise ground water management area. If that happened, APODs would allow SUEZ to

use non-curtailed water rights from outlying areas to serve Boise customers in the curtailment area.³ APODs improve flexibility and resiliency.

The bottom line is APODs will help all SUEZ customers, all of whom will be treated equally.

Concern #7 SUEZ is not motivated to protect water quality and cannot be trusted to deliver safe drinking water to its customers.

Before we delve into any economic motivators, it is important to remember that the main motivation for SUEZ to protect water quality and deliver safe drinking water is deeply personal. Just as those who work for the City care about what the City does, those who work for SUEZ care about its mission of bringing clean water to the people.

SUEZ is staffed by 130 Idahoans who live in the Valley. Treasure Valley residents maintain the system, answer customer calls, read meters, and plan for the future. Most of SUEZ's staff are SUEZ customers. Ensuring the water is safe is their number one priority, because it is personal. They and their families drink the water; their kids attend schools within SUEZ's service area; they are known in the community as the people responsible for the community's water. This commitment to the Valley's water services is far and away the greatest motivator in what SUEZ does.

That personal commitment goes hand in glove with the economic and the regulatory environment. For reasons discussed under Concern #2 on page 4, SUEZ has considerable financial incentive to maintain a safe and healthy water supply. Aside from the risk of lawsuits, SUEZ is subject to considerable and very effective oversight by both the Idaho Department of Environmental Quality (IDEQ) and the Idaho Public Utilities Commission (IPUC). The City's public servants share with SUEZ's employees the same high level of commitment to provide the highest water quality possible. Delivering safe drinking water and reliable fire protection are core missions of SUEZ's dedicated staff. The trust the community places in SUEZ is validated by state regulators who routinely give SUEZ high marks.

³ It would not do so by pumping "Eagle water rights" out of wells in the curtailment area. That would undermine IDWR's curtailment order and is prohibited by the so-called APOD condition. Instead, it would pump water under other water rights outside the curtailment area and deliver the water via pipes to customers within the curtailment area. See discussion under the heading "*Context 2: Geographically isolated curtailment*" on the attachment on page 17.

At the end of the day, SUEZ's corporate motivation and the regulatory regime in which it operates are both in sync with the deeply held motivation of its employees to assure that safe, clean drinking water is always provided to SUEZ customers.

Concern #8 SUEZ might sell its water rights to others for its own profit.

In your letter of 4/30/2021, you express concern that SUEZ's water rights might be "bought and sold on the international market." That is not possible for a variety of reasons. Aside from the fact that there is no international market for water rights, there are ample regulatory constraints on such sales.

RAFN water rights are essentially unsalable. If SUEZ were interested in selling its water rights, it would not have subjected them to RAFN constraints imposed through the IMAP. Nor would SUEZ's predecessor have worked with IDWR to draft and enact the Municipal Water Rights Act of 1996 that imposed these constraints. The 1996 Act removed the incentive for hoarding future needs water rights by making them literally unsalable. To our knowledge, Idaho is the only state in the nation to have enacted such a provision. Specifically, the Act prohibits the transfer of RAFN water rights by a municipal provider to a place of use outside its service area or to a new nature of use. Idaho Code §§ 42-219(1), 42-222(1).

RAFN is short for "reasonably anticipated future needs." Under Idaho law, only municipal water providers like SUEZ may hold RAFN rights. These rights are protected from forfeiture to allow municipal providers to secure a long-term water supply. But they are also subject to strict anti-speculative provisions that prohibit their sale to others. SUEZ voluntarily subjected itself to these constraints by seeking RAFN rights in its Integrated Municipal Application Package (IMAP).

Moreover, SUEZ is constrained by the Idaho Water Export Act, Idaho Code §§ 42-401 to 42-408. This act, which has limited out-of-state water sales since 1915, gives the Director of IDWR broad discretion to prohibit the transfer of water rights to out-of-state uses based on a six-factor test. Idaho Code § 42-401(3). The act would clearly protect existing Boise water users from an out-of-state water transaction aimed at SUEZ's water.

Such a transaction would also be blocked by Idaho's basin-of-origin legislation. That statute provides that when water is moved from one basin to another (even within the State), the Director must determine that the move "will not adversely affect the local economy of the watershed or local area in which the source of water originates" (i.e., the basin of origin). Idaho Code § 42-222(1). The movement of SUEZ's water to another basin would hardly pass that test.

All in-state and out-of-state transfers are also subject to local public interest review, which gives broad discretion to the Director of IDWR to reject a transfer based on “the interests of the people directly affected by a proposed water use” Idaho Code §§ 42-202B(3), 42-222(1). In sum, Idaho’s water statutes provide ample assurance that neither SUEZ nor any successor would ever be allowed to sell its water rights on the international market or any other water market.

If these IDWR-based constraints were not enough, the IPUC would also have to approve such a sale of SUEZ’s assets. Idaho law requires that utilities—including water utilities—receive from the IPUC a Certificate of Public Convenience and Necessity (CPCN). *See* Idaho Code §§ 61-526, 61-527. Utilities must provide satisfactory water service to customers within the boundaries of its CPCN. Actions that require amendment to a utility’s CPCN—such as conveyance of all or substantially all of its assets or amendment of its service area—requires IPUC approval. And actions that interfere with a utilities’ ability to serve its customers are prohibited. The PUC’s oversight of these areas provides yet another layer of protection.

The bottom line is the City need not fear that the water rights now serving Boise or those held for its future use will be sold off to the highest bidder.

Concern #9 The risk of SUEZ selling its water rights is enhanced because it is a foreign company.

The protections outlined in Concern #8 above are applicable to all public utilities in Idaho, including foreign corporations.

The fact that SUEZ is a subsidiary of a foreign corporation does not change or reduce that level of protection.

Concern #10 Although SUEZ holds an ample supply of paper water rights sufficient to meet long-term need, the physical water supply may be inadequate.

In your letter at page 1, you say that “the City is unable to agree that future water supply is not a concern.” SUEZ agrees. Future water supply must always be a concern. Challenges faced by cities across the West are real and serious. As we write this, parts of Idaho are heading into serious drought conditions, and IDWR is taking steps toward administration of water in certain areas, such as the Wood River Valley. And for years, communities in the Magic Valley faced requirements to mitigate for their ground water depletions.

The good news is that the Treasure Valley is uniquely situated and largely protected from these vicissitudes. Both ground and surface water supplies are more stable and reliable than found elsewhere in Idaho and far better than faced by cities in places like Nevada, California, and elsewhere that face chronic shortages.

That is no reason to be complacent. SUEZ has initiated steps to fund independent research to explore these questions. We hope that such work will confirm the optimism reflected in this letter. But, whatever the result, it will produce information that will shape the discussion and provide the basis for sound planning. We commend the City for asking these important questions. SUEZ will follow up with more detail on this effort.

In sum, SUEZ believes that the Treasure Valley is blessed with an unusually abundant water supply that is capable of meeting the long-term needs of its growing communities. But that assumption should be explored. Accordingly, SUEZ is moving forward to fund an independent evaluation of the character and circumstances of the Treasure Valley's water supply and its ability to reliably meet the current and future needs of all its people.

Concern #11 SUEZ's acquisition of surface water rights reflects the Company's concern that its ground water supply is unsafe or unreliable.

Your letter suggests on page 1 that SUEZ's acquisition of surface water supplies reflects the Company's concern that its existing portfolio is inadequate to meet long-term needs or is vulnerable to curtailment. This assumption is incorrect.

For reasons explored in response to Concern #10 above, we believe that the risk of ground water curtailment or a shortage of surface supply in the Treasure Valley is low. Nevertheless, acquisition of additional surface water rights will provide protection against risks that might exist. Diversity and redundancy in sources of supply provides protection against uncertainties.

Another driver for surface water acquisition is efficiency. SUEZ currently maintains and operates over 80 wells. Each well has different water chemistry, requiring differing approaches to ensure water quality. Surface water, in contrast, is treated on a centralized basis at either the Marden or Columbia Treatment Plants. The efficiencies of scale are significant.

In a typical year, SUEZ relies on a 70:30 split of ground and surface water to meet local demands. While ground water is widely available and backed by a strong portfolio of rights, surface water is typically preferred by customers for qualities of aesthetics and

hardness, and can be centrally produced at a far lower cost per unit. Surface water also requires considerably less energy to treat and deliver per unit. These benefits are passed along directly to customers.

In sum, SUEZ's ongoing surface water acquisition program is not driven by concern that it is running out of water. Its primary purpose is to capitalize on opportunities that maximize efficiency, reduce cost, and improve resiliency.

Concern #12 SUEZ should not buy new water rights, but lease them from Boise.

In your recent letter at page 2, you suggest that future acquisitions of surface water supplies could be made by the City, which would then lease them to SUEZ. SUEZ does not view this approach as beneficial or feasible.

First, for the reasons discussed in Concern #8 on page 9, the City's control over SUEZ's water rights is not necessary to protect those rights from a sale that would disadvantage SUEZ's customers. Second, water rights used in SUEZ's system do not serve just the citizens of Boise, but also serve portions of unincorporated Ada County and municipalities such as Meridian and Eagle. Undoubtedly, the City of Boise would not be comfortable if SUEZ entered into an agreement with one of those other jurisdictions by which they became the water right owner and lessor to SUEZ. SUEZ has a duty to manage, control, and protect its core water assets for the benefit of all of its customers regardless of political boundaries. Relinquishing control of some core assets to third parties does not enhance SUEZ's ability to perform that duty.

In sum, SUEZ has a responsibility to control and protect its own water supply to the extent possible. SUEZ's acquisitions of surface water rights are aimed at strengthening its portfolio and saving money. The City of Boise should support these efforts.

Concern #13 SUEZ and the City should work more closely on their respective conservation efforts.

Your letter reflects on page 3 the City's support for SUEZ's water conservation efforts, and suggests that we should be working more cooperatively toward that goal.

SUEZ shares the City's enthusiasm for greater cooperation on water conservation. SUEZ looks forward to further discussions of both its efforts and the City's.

Concern #14 SUEZ should provide more ground water data to the City

On page 2 of your letter, you welcome SUEZ's offer to provide ground water data. We believe much of what the City is seeking is already publicly available.

For instance, SUEZ provides a comprehensive annual report to the IPUC that includes withdrawal volumes per well and surface water output per plant. All water quality information is publicly available through IDEQ.

SUEZ recently entered into an agreement with the City of Eagle under which it agreed as follows: "Both Parties agree to maintain in perpetuity records of monthly withdrawal volumes and semi-annual (December and March) water levels for their respective wells within Eagle City limits and north of the Boise River, and to produce such records (including raw data) to the other Party upon request." *2001 City of Eagle – SUEZ Water Idaho Inc. – Water Management Agreement*, ¶ 10(a) at page 5.

In sum, in addition to publicly available information, SUEZ has entered into mutual cooperation agreements with other cities in which each agrees to share data concerning their respective wells and other diversions. SUEZ would welcome an opportunity to explore such a two-way agreement with the City of Boise.

Concern #15 SUEZ needs to provide more community outreach.

On pages 3-4 of your letter, you suggest that SUEZ's approach to outreach is mostly "one-directional information sharing."

SUEZ is committed to increasing and improving its citizen outreach. For the past two years, SUEZ has been steadily building its outreach program, starting with an intensive effort on the Bench. The pandemic necessarily paused some aspects of outreach in 2020, but now that restrictions are lifting, the efforts have resumed in earnest.

Recognizing the scope of the work ahead, SUEZ split off and elevated customer outreach into a new role within the company in March and hired a Capital Project and Consumer Engagement Manager. New outreach efforts include a monthly stakeholder email and numerous community meetings across SUEZ's service area. At these meetings, topics are proposed by the community, and ample time is included to hear from customers and answer questions.

As a regulated utility, SUEZ is also working with the IPUC to facilitate that outreach across all the communities it serves. On 3/17/2021, SUEZ entered into a *Stipulation and Settlement (IPUC Stipulation)* before the IPUC in which it made

extensive commitments to expand public outreach, some of which are set out in the footnote.⁴

⁴ In the *IPUC Stipulation*, SUEZ made the following commitments, among others:

The Company agrees to undertake a load study to provide calculated max-day and max-hour factors for the total system as well as by appropriate customer class. The Company will convene a discussion process with interested parties to take input on load study components including but not limited to customer class definitions, sampling methodologies for those classes, and data sources (i.e. AMI, SCADA, meters). Such discussions will be commenced by the Company soon after a decision in this rate case and will be completed within twelve months of that start date. After taking input from interested parties, the Company will make the final determination on how the load study shall be performed.

The Company shall present the results of such load study to the Commission in the first general rate case filing after the study's conclusion.

IPUC Stipulation, ¶ 11 at page 6.

Beginning in 2021, SUEZ Water agrees to broaden outreach efforts to members of the public within its service area. Such efforts shall include:

- a. Community project updates similar to the Bench Bulletin series.
- b. In-person and virtual town hall listening sessions.
- c. Expanded use of the Notify Reverse-911 system for customer notification on operational initiatives.
- d. A planned water quality mailer to all customers regarding key projects and initiatives.

IPUC Stipulation, ¶ 12 at pages 6-7.

SUEZ Water agrees to host annual workshops for all interested parties, with participation of the Commission Staff, the Idaho Department of Environmental Quality (“IDEQ”), and the Idaho Department of Water Resources (“IDWR”) on a range of topics related to water conservation and resource planning.

IPUC Stipulation, ¶ 13 at page 7.

SUEZ Water agrees to meet with CAPAI to examine the current status of SUEZ Water's low-income assistance program, the level of participation and effectiveness of the program, and to consider

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In short, SUEZ will continue to strengthen its commitment to community outreach.

CONCLUSION

We conclude by underscoring SUEZ's appreciation for the initiative taken by the City in pushing this discussion forward. SUEZ hopes that the approach taken in this letter is received in the good spirit in which it is offered. By identifying and addressing what SUEZ believes are the City's major concerns, SUEZ is under no misimpression that it has resolved those concerns. It may be that this letter shows that we do not yet fully understand the City's concerns. If so, we will appreciate your further feedback, and we will learn from it. SUEZ firmly believes that the continuation of this exercise will strengthen our relationship and allow SUEZ to better serve the community.

We look forward to hearing what next steps the City believes would be most useful. SUEZ would welcome additional written comments and questions from the City. Likewise, SUEZ officials are ready to meet in person to continue the discussion.

Sincerely,



Christopher H. Meyer



Michael P. Lawrence

Enclosure: Excerpt From the *Idaho Water Law Handbook* dealing with APODs

opportunities to improve SUEZ Water's assistance program for low-income customers.
IPUC Stipulation, ¶ 14 at page 7.

Mary Grant, Esq.

July 8, 2021

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cc (via email):

Steve Burgos, City of Boise, Public Works Director

James Pardy, City Engineer, Public Works Department

Haley Falconer, City of Boise Environmental Division Senior Director

John Roldan, Strategic Water Resources Manager, Boise Public Works Department

Chris Bromley, McHugh Bromley, PLLC

Marshall Thompson, Vice President and General Manager, SUEZ Water Idaho Inc.

Cathy Cooper, Director of Engineering, SUEZ Water Idaho Inc.

Jane Kreller, Manager, Capital Projects and Consumer Engagement, SUEZ Water Idaho Inc.

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EXCERPT FROM THE *IDAHO WATER LAW HANDBOOK* DEALING WITH APODS

ALTERNATE POINTS OF DIVERSION (APODS)

When a water right is allowed to divert from more than one point of diversion, it is said to have “alternate points of diversion” or “APODs” (or “alternative points of diversion”). APODs are used most commonly for a ground water right diverting from multiple wells. Surface rights also could have multiple points of diversion (e.g., different pumps out of a lake).

Operational advantages

The purpose of identifying APODs is to give the water user the flexibility to “move” its water rights from one well to another as needed. This may be useful in the following circumstances:

- If a well is shut down (permanently or temporarily for any reason), water under the water right associated with that well may be pumped from another well without seeking approval from IDWR.
- APODs also may be used to add a new well to an existing water right in order to authorize diversion from the new well without obtaining a new appropriation. This could be important, for instance, if a moratorium on new appropriations were in place. Of course, this approach would work only if there is sufficient authorized diversion authority in the existing water right to support adding the new APOD.
- Similarly, APODs coupled with a combined use limit may be employed at the time of licensing a non-RAFN municipal water right where the municipal provider is unable to demonstrate an additional increment of system capacity or beneficial use. The latter is referred to informally as the Tuthill Compromise (after former Director David Tuthill). See discussion in section 23.D(8)(e) on page 262.
- Most importantly, however, APODs provide flexibility to municipal providers in the context of future water right curtailments. If a city’s junior water rights were curtailed, APODs would allow it to employ its remaining non-curtailed rights in the most effective manner to provide some level of service under the circumstances. For instance, a city might restrict lawn irrigation on a rotating basis, moving its non-curtailed rights accordingly. See discussion below under scenarios 2 and 3 under the APOD condition.

Avoidance of injury

Any change in the point of diversion of a water right (including adding an APOD) requires a transfer approved by IDWR. The corresponding mechanism to add an APOD to a permit is an application for amendment of permit. In a general adjudication of water rights such as the Snake River Basin Adjudication (SRBA) or the North Idaho Adjudications (NIA), transfers that were never formally sought nonetheless may be recognized under a statutory provision authorizing “accomplished transfers.”

The transfer (or application for amendment of permit) will be approved only if the change injures no other water users, including juniors. This may require the addition of limiting conditions that avoid injury.

The Department will recognize alternate points of diversion for a water right only if the points of diversion are from the same source. *In re SRBA*, Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho,

Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).⁵

Historically, water rights (particularly for municipal supply systems) were often acquired one well at a time as the system expands, with a new water right obtained as each well was added. The result is that the municipal provider accumulates a portfolio of water rights with different priority dates, each associated with a different well. It is often desirable to integrate these points of diversion by making each well an APOD for every water right. Thus, for example, if there were 16 water rights associated with 16 wells, the rights could be transferred so that all 16 APODs were listed as points of diversion for each water right. This way, the water right holder may pump any water right from any well, as well as multiple water rights from a single well.

Ordinarily, conversion of single-well water rights to water rights with APODs must be accomplished through a formal transfer proceeding. In a formal transfer, other water users are put on notice and given an opportunity to protest on the basis of injury.

In the SRBA, many municipal providers held multiple one-well water rights that were used in integrated delivery systems in which water diverted from various wells was co-mingled. Thus, as a practical matter, these providers had accomplished an APOD transfer. Accordingly, they claimed “accomplished transfers” of their water rights (under Idaho Code § 42-1425) in which each ground water right was authorized to divert from every well in the integrated delivery system.⁶

The APOD condition

These accomplished transfer APODs were recommended for approval by the Department and ultimately decreed in virtually all cases, but with a condition. The condition recognized that, since there was no formal transfer proceeding with notice to the public and an opportunity to protest, the rights should be conditioned to allow senior users the right to allege well interference even after the APODs are approved.

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 from [name of well] located in [quarter-quarter description].

This condition was developed in the context of accomplished transfers—that is transfers accomplished by the water user simply putting them into effect on-the-ground without any review or

⁵ The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

⁶ In the SRBA, APODs were limited to those rights shown to have been used in an integrated delivery system. Otherwise, the municipal providers could not show an accomplished transfer. In a new appropriation or a formal transfer, however, APODs could be established at separate locations outside of an integrated system, so long as they all diverted from the same source (i.e., the same aquifer).

approval from the Department. But for Idaho Code § 42-1425, accomplished transfers would be illegal (at least since 1963 for ground water⁷ and since 1971 for surface water⁸). In *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.* (*Basin-Wide Issue 4*), 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996), the Idaho Supreme Court found the accomplished transfer statute was constitutional because it contained built-in protections that make it unavailable to transfers that result in injury or enlargement. The APOD condition is intended to effectuate this obligation to avoid injury.

The APOD condition was challenged by the City of Pocatello in the SRBA, which claimed that, in the absence of timely objections by other water users, the City's right to pump water from any well should be decreed without any limitation. However, the APOD condition was upheld 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) (Melanson, J.), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternate points of diversion in City of Pocatello municipal water rights litigation).⁹

The effect of the APOD condition language is that, where necessary for administration, the Department may look back to the original well location of the water right. Essentially, this allows the Department to roll the clock back, as if the accomplished transfer had not yet been approved, and evaluate whether injury would result if the transfer was sought now for the first time. This may arise in three contexts, each of which is discussed below.

These discussions employ the following hypothetical. Suppose Little City had two water rights, a 1920 right for 1 cfs out of Well A and a 1985 right for 1 cfs out of well B. In the SRBA these were decreed listing both wells as APODs for both rights, subject to the condition quoted above.

Context 1: Well interference

The first context in which the APOD condition might come into play is well interference. Let us suppose that neighbor Bob owns a water right with a 1970 priority that pumps out of Well C, which is near Little City's Well B. The 1 cfs pumped out of Well B has never interfered with Bob's water right. Then, in the year 2015, Little City decides to abandon Well A and improve Well B to pump the full 2 cfs. Bob now complains that the increased pumping from Well B is interfering with his water right. If there were no APOD condition, he would lose. But the APOD language allows the Department to take into account the fact that the city's first water right was originally associated only with Well A. The Department would then ask itself, in effect, will transferring the point of diversion to allow this water to be pumped of Well B result in injury? Under these facts, the answer is "yes" and Bob would prevail.

The same would be true if, for many years Little City pumped its 1985 water right out of Well B for eight hours a day without injury to Bob. Then the City began pumping the right 24 hours a day,¹⁰ thereby

⁷ The Ground Water Act was adopted in 1951, 1951 Idaho Sess. Laws, ch. 200. However, the application process for ground water rights did not become mandatory until the act was amended in 1963, 1963 Idaho Sess. Laws, ch. 216 (codified at Idaho Code § 42-229).

⁸ 1971 Idaho Sess. Laws, ch. 177 (codified at Idaho Code §§ 42-103, 42-201).

⁹ The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

¹⁰ Municipal water rights typically have no volume limitation. Thus, cities are allowed to grow into their rights over time, pumping them more and more as needed.

causing injury to Bob's right. In a contest between Bob's 1970 right and the City's 1985 right, Bob would win. But could the City, relying on its new APODs say that it was pumping its 1920 water out of the well and thus prevail over Bob? The APOD condition prevents this. Again, APOD language allows the Department to roll the clock back. If the accomplished transfer results in injury to Bob, then the City may not rely on the APOD.

Context 2: Geographically isolated curtailment

The APOD language would also preclude Little City from using its newly acquired APODs to circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area. For example, suppose the Department curtailed pumping of post-1980 junior wells in a Ground Water Management Area (GWMA) that included Little City's Well B. Suppose Little City's Well A was located outside of that area. Could Little City, relying on the APODs associated with its senior 1920 right declare that it was now going to pump its 1920 water from Well B, thereby defeating the effort to restrict pumping in the GWMA? If there were no APOD condition, it could do so. But, as in the well interference scenarios, the APOD condition allows the Department to roll the clock back and "undo" an accomplished transfer that is causing this sort of injury. Thus, the city would not be allowed to pump its 1920 water right from the well within the curtailment area because, at the time the 1920 right was issued it was not authorized to be diverted out of that well.

Note, however, that Little City would be allowed to pump its 1985 right from Well A located outside of the curtailment area. Pumping in that remote location does not stress the ground water in the Ground Water Management Area. Thus, it is not undermining or circumventing the curtailment. Consequently, the city would be allowed to take advantage of the APOD for the 1985 right by pumping it from a remote well just as if there were no curtailment.

Context 3: Broad regional curtailment

While the examples discussed above are important considerations for application of the APOD condition, those scenarios are not the driver for why municipal providers seek APODs. In addition to the other operational advantages listed in the bullet points above, the main advantage of APOD authority arises in the context of a broad regional curtailment.

Take this hypothetical. Suppose there is a call by a down-gradient senior surface user. As a result, the Department curtails pumping ground water rights throughout the valley that are junior to 1980. At this point, Little City can no longer pump its 1985 water right, but it can pump its 1920 right out of either well due to the APODs. In responding to the curtailment, the city's ability to move its most senior water rights to its most critical well may be beneficial. Since it makes no difference to the senior surface user whether the city pumps its water out of one well or the other, then the APOD condition does not restrict pumping the senior right out of the junior well. The city, of course, will still have to find make-up or mitigation water elsewhere, or just provide less water. But at least it is able to use those senior water rights that remain in priority in the most efficient manner.

In its approval of the APOD language, the Idaho Supreme Court did not include a detailed explanation of how the condition works. *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).¹¹ However, the SRBA decision affirmed by the high court expressly discussed and confirmed the understanding described above. The district court recited the three scenarios and

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concluded: "The Providers assert that the Special Master's determination could be read too broadly to preclude under any circumstances the use of alternate points of diversion any time priority administration is implicated. The court concurs that in a circumstance involving regional priority administration a municipal provider may still be able to exercise alternate points of diversion within the region undergoing administration so long as the well under which the original right was established is also located within the region subject to the administration."¹² Memorandum Decision at 16-18, *In re SRBA*, Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009) (Melanson, J.) (reproduced in Appendix S), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).¹³

Accomplished transfers vs. formal transfers

As noted above, the APOD language was developed in the context of accomplished transfers and the need to protect against injury embodied in Idaho Code § 42-1425. Whether similar APOD condition language is appropriate in the context of a formal transfer or a new appropriation is a different question. One could argue that that because the world is put on notice and all users have an opportunity to protest a transfer, failure to protest should result in approval of APODs without condition. On the other hand, if the Department had information showing that future injury was a real possibility, the Department might be justified in imposing conditional language along the lines of the APOD condition developed in the SRBA context.

Another question is which water users are intended to be protected by the APOD language? Plainly, it protects water uses whose rights predate approval of the APODs. The condition gives these users the ability to bide their time and complain later if and when they experience well interference. However, if a new water user begins an appropriation after APODs are established (whether they are established by decree recognizing an accomplished transfer, by a formal transfer, or by new appropriation), it would seem that the new user is on notice of the APOD holder's right to use those APODs. Consequently, the author contends that, even if an APOD condition is attached, it would not have any effect as to post-APOD juniors. In other words, looking back to the original points of diversion would not be "necessary for administration" because, being junior, the new user suffers no legal injury when a senior diverts water in accordance with the senior's water right.

¹² The Providers referenced in the quotation by the district court were three municipal providers (United Water Idaho, the City of Nampa, and the City of Blackfoot) who submitted an amicus curiae brief and were allowed to argue this point. The district court quoted extensively from the Provider's brief in describing the three scenarios. *In re SRBA*, Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (reproduced in Appendix S), *aff'd*, *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding the position of *amici curiae* regarding alternate points of diversion).

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