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Chas. F. McDevitt  
Dean J. (Joe) Miller

May 31, 2006

***Via Hand Delivery***

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 W. Washington St.  
Boise, Idaho 83720

Re: Case No. UWI-W-06-04

Dear Ms. Jewell:

Enclosed for filing in the above matter please find the original and seven (7) copies of Comments of United Water Idaho Inc.

An additional copy of the document and this letter is included for return to me with your file stamp thereon.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh  
Attach.

Dean J. Miller (ISB No. 1968)  
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FILED  
 AUG 31 2006  
 IDAHO PUBLIC UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION	)	<b>CASE NO. UWI-W-06-04</b>
OF UNITED WATER IDAHO INC., TO	)	
AMEND AND REVISE CERTIFICATE OF	)	<b>COMMENTS OF UNITED WATER</b>
CONVENIENCE AND NECESSITY NO 143	)	<b>IDAHO INC.</b>

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COMES NOW United Water Idaho Inc., ("United Water", the "Company"), pursuant to the Commission's Notice of Application dated May 8, 2006, and submits the following Comments:

**The Application**

The Application in this matter was filed on April 26, 2006, in response to a written request for service submitted to the Company by the project developer, Kastera Homes. Exhibit A attached to these Comments, depicts the location of the proposed service area addition, with the boundaries of the addition shown in red. Exhibit A also shows the existing City of Eagle Impact Area, as approved by the Ada County Commission. As is obvious from Exhibit A, the proposed service area addition is completely outside the City of Eagle Impact Area.

Exhibit B, attached to these Comments depicts facilities required to provide service to Trailhead—an approximate two-mile extension of 16 inch main line north from the Company's Floating Feather main line. These facilities would be installed pursuant to United Water's standard main line extension Rules.<sup>1</sup>

Also depicted on Exhibit B are the boundaries of the "Olsen Ranch," which is the property subject to development. As can be seen on Exhibit B, small portions of the southern boundaries of the Olsen Ranch are within the City of Eagle Impact Area. However, Kastera is not planning to develop these portions of the Olsen Ranch and water service has not been requested for these areas. (See Kastera's May 24, 2006 Letter to United Water, discussed below).

### **The Protest**

On May 10, 2006, the City of Eagle ("City") filed a Protest of the Company's Application in the form of a letter addressed to the Commissioners from the attorney for the City ("Protest"). The Protest generally alleges that the Trailhead area, or a part thereof, will be served by the City municipal water system. The Protest attaches an April 18, 2006, letter from Kastera Homes to the City inquiring whether Kastera could be invited to a work session to discuss the possibility of annexation.

### **Discussion**

#### **A. Notwithstanding its April 18, 2006, letter to the City, Kastera desires to be served by United Water.**

Following receipt of the City's protest, United Water communicated with Kastera, asking for a clarification of Kastera's desires and intentions. Attached, as Exhibit C, is a May 24, 2006 letter from Kastera to United Water's Construction Coordinator, Mr. John Lee. As noted in the

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<sup>1</sup> It is likely the developer will also be required to provide Special Facilities Advances for a booster station and storage reservoir although the location and cost of these facilities is yet to be determined.

letter, Kastera desires service from United Water because United Water has the ability to provide service immediately without extensive system upgrades. The letter notes that discussions of annexation with the City have been conceptual only, and relate to the other portions of the Olsen Ranch within the City's Impact area. Those areas are not included in this Application. As stated in the letter:

“At this point, it is undetermined if we will ever be annexed into the City of Eagle. Annexation may happen in the future...and it may not. However, one thing is certain, we need water service immediately and United Water is the only water service provider that can meet our time schedule. Therefore, we are requesting water service from United Water to serve our property outside of the Eagle Area Impact Boundary”.

While the desires of the persons requesting service are not always completely dispositive, they are entitled to weight and consideration. Here, the developer, sensibly, desires service from the provider capable of immediate extension of facilities—United Water. While the City's Protest states generally it will provide service to the area, or part of it, the Protest provides no information regarding the facilities required and when or if they could be physically extended.

**B. Because the proposed expansion area is outside its area of impact, the City does not have grounds for objection.**

The City's Protest asserts, “The defined area of expansion includes an area and a development that will be served by the City of Eagle municipal system.” As made clear above, United Water does not propose to provide service within the City's impact area. As a legal matter, municipalities may only provide domestic water service within their boundaries. (*See* Idaho Code 50-323). As stated recently by the Idaho Supreme Court in *Big Sky Paramedics v. Sagle*, 140 Idaho 435 (2004):

This Court has articulated this rule as a strict limitation when construing municipal powers: "municipalities may exercise only those powers granted to them or necessarily implied from the powers granted à [and i]f there is a fair, reasonable, substantial doubt as

to the existence of a power, the doubt must be resolved against the city." City of Grangeville, 116 Idaho at 538, 777 P.2d at 1211.

Notwithstanding this, in United Water's experience, it is not uncommon for municipalities to extend facilities into areas of impact in advance of, but in anticipation of, eventual annexation. A municipality, clearly however, has no authority to provide service outside its impact area. The City, therefore, does not have grounds for objection to the proposed addition.

C. Even if annexed by the City, United Water may be entitled to serve the area.

While United Water is not requesting that the Commission, in this case, engage in construction of a contract, the Company believes the Commission should be aware of a written Franchise Agreement between the City and United Water<sup>2</sup>. It is attached as Exhibit D.

Relevant portions of that Agreement are:

"In the case of annexation of property to the corporate limit, such area will be considered under this agreement, upon effective date of the annexation, subject to Section 9 hereof", (Section 1, Page 1).

"In the event the City annexes a new area into its corporate limits, the terms of Section 9 regarding franchise fees shall not apply to the annexed area until sixty (60) days after the City has supplied the Grantee with appropriate information for the identification of the Grantee's customers within the annexed area", (Section 10, Page 3).

"In consideration of Grantee's undertaking hereunder and as exists upon the effective date of ordinance 414, the City agrees not to engage in the business of providing water service during the life of this franchise or any extension thereof in the Grantee's certificated service area approved by the PUC as of September 10, 2002 and as subsequently amended by the PUC", (Section 14, Page 4).

A definitive interpretation of the Franchise Agreement would be premature until such time as the City actually attempted to annex the area, which may or may not come to pass.

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<sup>2</sup> The Franchise Agreement was also submitted to the Commission in May of 2003 when the Commission approved an amendment to United Water's tariff to permit recovery of the 1% franchise fee specified in the Agreement.

Nonetheless, the Commission should be aware of the possibility that the City, by contract, has relinquished the right to provide water service that it might otherwise enjoy.

**Conclusion**

For the reasons cited herein, United Water respectfully requests that the Application be granted and the Company be authorized to file an Amended Certificate of Public Convenience and Necessity to include the area described in the Application.

DATED this 24 day of May, 2006.

UNITED WATER IDAHO INC.

By: 

Dean J. Miller

Attorney for United Water Idaho Inc.

## CERTIFICATE OF SERVICE

I hereby certify that on the 31<sup>st</sup> day of May, 2006, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 West Washington Street  
P.O. Box 83720  
Boise, ID 83720-0074  
[jjewell@puc.state.id.us](mailto:jjewell@puc.state.id.us)

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

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☐  
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Bruce M. Smith  
MOORE SMITH BUXTON & TURCKE  
225 N. 9th Street, Suite 420  
Boise, ID 83702

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

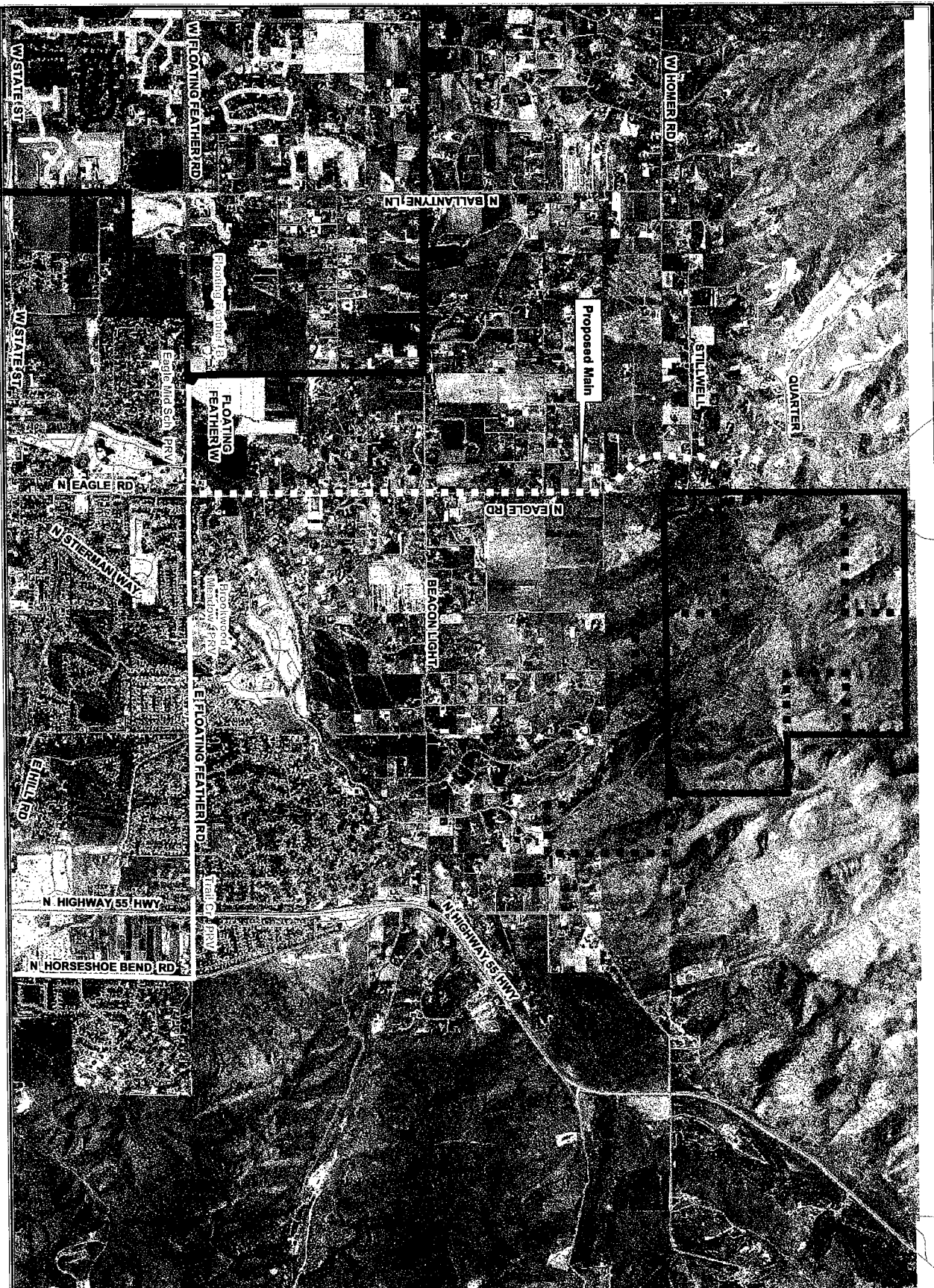
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Heather Houle, Legal Asst.

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# **EXHIBIT B** **TRAILHEAD COMMUNITY** **EXPANSION**



## **UWID Mains**

- 4 inch Main
- 6 inch Main
- 8 inch Main
- 12 inch Main
- 16 inch Main



## **Scale**

1 inch equals 2,000 feet

Revised Date: 05-15-06



May. 24. 2006 2:58PM Kastera

No. 5312 P. 2



24 May 2006

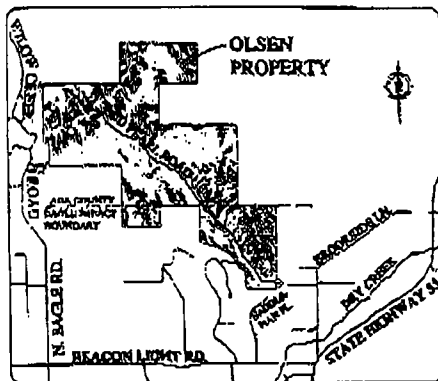
Mr. John Lee, Manager  
 United Water Idaho  
 8248 West Victory Road  
 Boise, Idaho 83719-0420

Regarding: Request for Water Service

Dear Mr. John Lee:

On behalf of Kastera Homes and Mr. Gregg Olsen, I am writing to formally restate our request for extension of water mains and water service facilities to serve our 660 acre property in the foothills north of Eagle, Idaho. It is our desire to have water service to our property via United Water Idaho facilities because United Water has the ability to provide immediate water service.

Because a portion of this property is within the Eagle Area of City Impact, we have conceptually discussed possible annexation of this property with Eagle City officials. No commitments have been made. (Please see vicinity map for reference.)



[At this point, it is undetermined if we will ever be annexed into the City of Eagle. Annexation may happen in the future...and it may not. However, one thing is certain, we need water service immediately and United Water is the only water service provider that can meet our time schedule. Therefore, we are requesting water service from United Water to serve our property outside of the Eagle Area of Impact Boundary.]

If you need any additional information from Kastera Homes or Gregg Olsen, please let me know. We appreciate your efforts to anticipate growth in the valley and implement your plans for water system expansion. Keep up your good work!

Respectfully;

A handwritten signature of Wayne S. Forrey in dark ink.

Wayne S. Forrey, AICP  
 Director of Planning and Development

ORIGINAL

## FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT is made and entered into between The City of Eagle, a political subdivision of the State of Idaho (hereinafter the "City") and United Water Idaho Inc., an Idaho corporation (hereinafter the "Grantee").

WHEREAS, the City has the authority to grant an exclusive franchise to the Grantee pursuant to Idaho Code Sections 50-328, 50-329, and 50-329A; and

WHEREAS, on or about September 10, 2002, the City adopted Eagle City Ordinance No. 414 granting an exclusive franchise to the Grantee for supplying water and water service within the City;

WHEREAS, on or about September 27, 2002, Gregory P. Wyatt, President of United Water Idaho Inc. signed the Acceptance of the franchise set forth in Eagle Ordinance 414, and

WHEREAS, the City and the Grantee believe it to be in their best interests to enter into this contract setting out the terms and conditions upon which the said franchise has been granted to Grantee.

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the parties do hereby agree as follows:

**SECTION 1:** The City of Eagle, Idaho hereby grants to United Water Idaho Inc., and to its successors and assigns, the right (subject to the rights of the City set forth in Section 14 hereof), privilege and franchise for a period of twenty (20) years from the effective date of this Ordinance, however, with the right to amend by mutual agreement in accordance with Section 15, to construct, extend, improve, maintain and operate in, upon and under the present and future streets, alleys, highways and other public places within the corporate limits of the City, water utility property and facilities for supplying water to the City, and the inhabitants thereof, and to persons and corporations beyond the limits of the City, including the nonexclusive right to physically locate and maintain water lines, pipes, equipment or other water facilities of the Grantee or other parties, (provided, that Grantee shall comply with the City's requirements for water system franchises) all subject to the terms and conditions hereinafter specified. [In the case of annexation of property to the corporate limit, such area will be considered under this agreement, upon effective date of the annexation, subject to Section 9 hereof.] All such water utility property and facilities now maintained by the Grantee within the streets, alleys, highways and other public places within the corporate limits of the City shall be deemed covered by this ordinance as provided herein.

**SECTION 2:** All of the Grantee's water property and facilities in, upon and under the present and future streets, alleys, highways and public places within the corporate limits of the City shall be constructed and at all times maintained in good order and condition and in accordance with including all applicable state and federal regulations and all construction standards presently in effect by the Idaho Public Utilities Commission (PUC) or adopted by that Commission during the term of this franchise agreement.

**SECTION 3:** Upon request of the City, the Grantee shall relocate its facilities as necessary within the present and future streets, alleys, highways and other public places owned by the City. The City shall have no responsibility for the costs of such relocations. The Grantee shall bear the cost of relocating its facilities at the City's request, unless the facilities are to be relocated for the benefit of a third party, in which case the third party shall pay the costs of relocation. In the event federal, state or other funds are available in whole or in part for utility relocating purposes, the City shall apply for such funds and the Grantee will be reimbursed to the extent any such funds are actually obtained.

**SECTION 4:** The Grantee may make all needful or convenient excavations and/or installations in any of the present and future streets, alleys, highways subject to the requirements of the Ada County Highway District (ACHD) or the Idaho Transportation Department (ITD) depending upon the location of such work, and other public places within the corporate limits of the City for the purpose of maintaining and operating pipes, lines, conduits, vaults and wire and other equipment and appurtenances for the purpose aforesaid, or to repair and improve such water system and to extend the same; provided that when the Grantee or any person or corporation under the authority of this franchise, shall disturb any of said streets, alleys, highways or other public places for the purposes aforesaid, he, it or they shall restore the same to good order and condition as soon as practicable and without unnecessary delay and failing to do so after ten days' notice from the City, ACHD or ITD depending upon the location of such work, or its duly authorized officer or officers, then the City, ACHD or ITD may place said street, alley, highway, or public place in such condition at the cost and expense of the Grantee, and said Grantee will forthwith pay the full cost and expense thereof upon demand of the City, ACHD or ITD. All facilities constructed under this ordinance shall be placed and maintained at such places and positions in or upon such public ways and public places as shall not interfere with the passage of traffic and shall conform to all applicable laws, rules and regulations.

**SECTION 5:** The City, through the chief of its fire department or other properly authorized officer, may use water from the fire hydrants for extinguishing fires, washing or flushing drains, gutters, and sewers, in its streets, avenues, alleys and other public places and for sprinkling the public streets, whenever the City Council and Mayor or board of health deem it necessary. The water so used by the City shall be without additional compensation to Grantee. In consideration for the privileges and benefits of this use of water and the covenants contained in this ordinance, the City covenants that this franchise and the plant and all property now or hereafter acquired, owned, constructed, maintained and operated under this franchise by Grantee, shall be exempt from the payment of all municipal taxes and assessments which are or may be assessed by City during the term of this franchise. When the franchise or other property of Grantee is not exempted by the City, then the City covenants to pay Grantee, as rental, a sum equal to the amount Grantee pays or is required to pay to the City as they accrue and become due, out of the general revenues of City. The Grantee's performance of the covenants contained in this ordinance and the granting to City of the privileges and benefits above are in effect a payment of the taxes and assessments which are or may be assessed by the City during the term of this franchise. In all other cases not specified in this ordinance where Grantee supplies the City with, or the City uses, water, it shall be paid for by the City out of its general revenues at rates in place and as established by the PUC.

**SECTION 6:** The City shall have the right and privilege to install and maintain lines and pipes for its own use for its fire, police, airport and other services adjacent to lines and other facilities erected and maintained by the Grantee hereunder, subject to the Rules and Regulations of the Idaho Public Utilities Commission. The City shall install, maintain and operate such lines and

pipes at its own expense, risk and responsibility, and in accordance with all legal requirements and good engineering practices and in such manner as not to impose any additional expense upon Grantee of its said conduits and facilities. Any such lines of the City shall be subject to interference by the Grantee only when necessary in the maintenance, operation or repair of the Grantee's own fixtures, lines, facilities and appurtenances.

**SECTION 7:** The Grantee shall at all times indemnify and hold the City, its officers, employees and agents, harmless from any and all expenses or liability arising from or by reason of any negligent act or omission of the Grantee, its representatives or employees, in the construction, operation or maintenance of any of the Grantee's water utility property or facilities.

**SECTION 8:** Upon acceptance of this franchise by Grantee and before Grantee should have any rights hereunder, Grantee shall file with the City Clerk a Certificate of Insurance evidencing General Liability Insurance which covers claims for Bodily Injury, Property Damage and Personal Injury. Such insurance shall have minimum limits of \$1,000,000.00 per occurrence. The City of Eagle shall be named as an "Additional Named Insured" under Grantee's insurance policy. Should the minimum limits of insurance as set forth herein be increased above \$1,000,000, pursuant to the Idaho Tort Claims Act (Idaho Code Section 6-901 et. seq.) or any similar legislation, the Grantee shall be required to provide the City with a new Certificate of Insurance evidencing the higher limits upon the City's request.

**SECTION 9:** The water service to be furnished to the public hereunder, and all rates and charges therefore, and all regulation of the Grantee hereunder, shall at all times be subject to all rules, regulations and order that may be lawfully prescribed by the Idaho Public Utilities Commission or by any other governmental authority now or hereafter having jurisdiction over such matters. During the terms of this franchise, Grantee shall at all times assure that customers within the City have access to customer service from the Grantee as required by the Idaho Public Utilities Commission.

**SECTION 10:** As compensation for the right, privilege and franchise hereby granted, Grantee agrees to pay to the City on or before the 30th day of January, April, July and October, an amount equivalent to one percent (1%) of Grantee's "gross revenues" for the preceding calendar quarter. For purposes of this Section, "gross revenues" shall mean the amount of money billed by the Grantee for the water it sells within the corporate limits of the City to customers, less uncollectibles. The City shall provide appropriate information to the Grantee to allow the Grantee to identify which of its customers are located within the corporate limits of the City for purposes of paying franchise fees. Grantee shall not be responsible for any failure to pay franchise fees which results from deficiencies in such information provided by the City. [In the event the City annexes a new area into its corporate limits, the terms of Section 9 regarding franchise fees shall not apply to the annexed area until sixty (60) days after the City has supplied the Grantee with appropriate information for the identification of the Grantee's customers within the annexed area.]

The Grantee's franchise fee payment obligations hereunder shall commence with the start of the Grantee's first full billing cycle following the effective date of this ordinance; provided, that the Grantee must first receive approval from the Idaho Public Utilities Commission for the collection of the franchise fee in the rates charged by Grantee.

**SECTION 11:** The City shall have the right during the term of this franchise agreement to increase the franchise fee hereunder up to three percent (3%), by obtaining approval of a majority of voters of the City voting on the question at an election held in accordance with Chapter 4, Title 50, Idaho Code. Any such vote to increase the franchise fee hereunder shall provide that the increased franchise fee will apply to any water service provider (other than the City) who utilizes the City's streets, alleys or other public places to provide water service within the City, during the term of this franchise agreement.

**SECTION 12:** The Grantee shall keep accurate books of account for the collection of the franchise fees hereunder and the City shall have the right to inspect the same at all times during business hours, and from time to time audit the same for the purpose of determining gross revenues under this Section 9 above.

**SECTION 13:** The franchise fees paid by the Grantee hereunder will be in lieu of and as payment for any tax or fee imposed by the City on the Grantee by virtue of its status as a public utility including, but not limited to, taxes, fees or charges related to easements, franchises, rights-of-way, utility lines and equipment installation, maintenance and removal during the term of this franchise agreement.

**SECTION 14:** In consideration of Grantee's undertaking hereunder and as exists upon the effective date of ordinance 414, the City agrees not to engage in the business of providing water service during the life of this franchise or any extension thereof in the Grantee's certificated service area approved by the PUC as of September 10, 2002 and as subsequently amended by the PUC. Nothing herein contained shall be construed or deemed to prevent the City from exercising at any time any power of eminent domain granted to it under the laws of the State of Idaho. The City shall not grant a franchise to another water service provider during the terms of this franchise agreement unless the water service provider has received approval to provide water service within the City from the Idaho Public Utilities Commission, and the City has imposed the same franchise fee on the water service provider as paid by the Grantee.

**SECTION 15:** In the event of an amendment to the laws, rules or regulations of the City of Eagle, the State of Idaho, or the Public Utilities Commission of Idaho applicable to their franchise, or for periodic review of any section of this agreement, the terms of this franchise and the rights and privileges hereby conferred may be changed, altered, amended or modified upon mutual agreement between the City and the Grantee. In all cases, sixty (60) days notice shall be required on the part of the City or Grantee to reopen the agreement pursuant to this section.

**SECTION 16:** Any violation by the Grantee of the provisions of this ordinance, franchise and grant or any material portions thereof or the failure promptly to perform any of the provisions thereof shall be cause for the forfeiture of this franchise and grant all rights hereunder by the City after sixty (60) days' written notice to the Grantee and the continuance of such violation, failure or default; however, this provision shall not prevent the Grantee from submitting such question of violation or forfeiture to the appropriate forum (which may include the district court having jurisdiction or the Idaho Public Utilities Commission) for determination.

**SECTION 17:** Sale, assignment or lease of this franchise is prohibited without prior written consent of the City. The City's consent under this Section shall not unreasonably be denied.

SECTION 18: The City shall assume the cost of publication of this franchise; as such publication is required by law.

SECTION 19: Inasmuch as the Grantee has constructed and now is maintaining and operating the water utility property and facilities in, upon and under the streets, alleys, highways, and public places in the City, it is hereby adjudged and declared that this ordinance is necessary for the preservation of the public peace, health and safety, and therefore this ordinance shall take effect upon its passage, approval and publication.

Section 20: Miscellaneous.

a. Entire Agreement. This Agreement and all exhibits hereto embody the entire Agreement of the parties. There are no promises, terms, conditions, or obligations other than those contained herein, and this Agreement supercedes all previous and contemporaneous communications, representations, and agreements, either written or verbal, between the parties.

b. Severability. If any of the provisions of this Agreement or the related Ordinance shall be held to be unenforceable, the remaining provisions shall nevertheless be enforceable and carried into effect, unless elimination of the unenforceable provisions shall materially frustrate the intent of the parties.

c. Successors and Assigns. This Agreement shall be binding upon the parties hereto and their respective administrators, employees, successors and assigns.

d. Controlling Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of Idaho and the ordinances of the City of Eagle. No term or omission of language in this Agreement shall be construed to amend or waive any provision of the regulations or ordinances of the City of Eagle. The venue for any claim, litigation or cause of action between the parties shall be the Fourth Judicial District Court, Ada County, Idaho.

e. Force Majeure. Neither party hereto shall be liable for its failure to perform hereunder, in whole or in part, due to contingencies beyond its reasonable control, including but not limited to acts of God or the public enemy, fire, floods, epidemics, earthquakes, quarantine restrictions, and strikes not created by Grantee, whether now existing or hereafter created.

f. Notice. Notices required or contemplated under this Agreement shall be in writing and shall be deemed received when mailed by certified mail, postage prepaid, return receipt requested, to the respective parties at the following addresses:

City:

City of Eagle  
ATTN: City Clerk  
310 East State Street  
Eagle, Idaho 83616

Grantee:

United Water Idaho Inc.  
ATTN: General Manager  
P.O. Box 190420  
Boise, Idaho 83719-0420

g. Amendment: No amendment, alteration or modification of this Agreement shall be effective unless made in writing and duly executed by the parties.

h. Counterparts: This Agreement may be executed in counterparts, the combination of which shall be deemed an original.

i. Waiver: The waiver by either party of any breach of any term, covenant, or condition contained in this Agreement shall not be deemed a waiver of such term, covenant, or condition or any subsequent breach of the same or any other term, covenant or condition contained in this Agreement.

j. Attorney Fees. In the event either party is required to enforce the terms or provisions of this Agreement, the prevailing party in any litigation arising therefrom shall be entitled to recover a reasonable attorney fee for the prosecution thereof.

IN WITNESS WHEREOF, the parties have executed this Agreement and made it effective as of 5-13, 2003.

City of Eagle

By Nancy L. Merrill  
Nancy Merrill, Mayor

ATTESTED:

Sharon K. Moore  
Sharon K. Moore, City Clerk



United Water Idaho Inc.

By Gregory P. Stupple  
President