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DEPARTMENT OF
WATER RESOURCES

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 29-00271, <i>et al.</i> (see attached Exhibit A)
	)	
	)	
	)	
Case No. 39576	)	RESPONSE MEMORANDUM IN OPPOSITION
	)	TO CITY OF POCA TELLO'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	
_____	)	

This memorandum responds to the arguments made by the City of Pocatello, hereinafter referred to as the "City," in support of the *City of Pocatello's Motion For Summary Judgment on IDWR's Authority Under I.C. § 42-1425*, hereinafter the "*City's Motion*." The City moves for summary judgment on the following two issues: (1) The Idaho Department of Water Resources, hereinafter referred to as the "IDWR", has no authority to recommend conditions for transferred water rights unless it complies with the procedures set forth in Idaho Code § 41-1425.

(2) Compliance with the procedures of Idaho Code § 42-1425 does not allow IDWR to re-open transfers formally determined by IDWR. *City's Motion*, at 1-2. The City asserts that IDWR imposed conditions on its water rights in excess of its authority.

The State of Idaho and the City agree on one matter here. The issues raised by the City are legal issues that the District Court may resolve on summary judgment.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and admissions of records show that there was no genuine issue of material fact. In making that determination of whether an issue of material fact exists, all disputed facts are liberally construed in favor of the non-moving party and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Garner v. Bartshi*, 139 Idaho 430, 432 80 P.3d 1031, 1034 (2003). Substantive law defines as material those factual disputes that affect the outcome. Disputes about irrelevant matters do not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. IDAHO CODE § 42-1425 DOES NOT LIMIT THE DISCRETION OF THE DIRECTOR TO IMPOSE THE CONDITIONS THAT THE CITY CHALLENGES IN ITS OBJECTIONS.

Idaho Code § 42-1425 addresses an issue that arose in the Snake River Basin Adjudication, hereinafter the "SRBA." How should the IDWR and the district court respond to a change in an established water right that occurred without following the mandatory procedures of Title 42, Idaho Code. The Act of March 27, 1969, ch. 303, 1969 Idaho Sess. Laws 905, made compliance with the administrative procedures in Title 42, Idaho Code, mandatory for changes in the purpose of use, place of use, and point of diversion. Those procedures required a person who

desired to make such a change in an existing water right to file an application with IDWR; IDWR then published notice of the application. If any person filed a written protest, then IDWR conducted an administrative hearing, which was subject to court review.

When the SRBA began, the Legislature enacted Idaho Code §§ 42-1416 and 42-1416A, which were commonly referred to as the “amnesty or presumption statutes.” These statutes were understood to address the issue of changes without compliance with the mandatory procedures contained in Title 42, Idaho Code. However, the district court later entered on February 4, 1994 its *Memorandum Decision and Order on Basin-Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, as Written*, which held that these statutes were unconstitutional. The Legislature responded to this decision by enactment of the Act of April 12, 1994, ch. 454, § 31, 1994 Idaho Sess. Laws 1443, 1474, which added Idaho Code § 42-1425 among many other changes in the adjudication procedures. Subsection (2) of Idaho Code § 42-1425 allowed claimants in the SRBA to claim changes in their water rights without compliance with the mandatory procedures contained in Title 42, Idaho Code, upon the occurrence of three conditions: (1) the change occurred prior to November 19, 1987, which was the date of commencement of the SRBA; (2) “no other water rights existing on the date of the change were injured”; and (3) “the change did not result in an enlargement of the original right.” The existence of those three conditions constituted a complete waiver of the requirements of sections 42-108 and 42-222, except for the consent provisions that are not relevant here. Since Idaho Code § 42-1425 waived mandatory requirements regarding changes in water rights, it only applies to changes occurring from the effective date of the Act of March 27, 1969 to the date of November 18, 1987. Or stated another way, prior to the effective date of the Act of

March 27, 1969, there was no requirement to file an application for approval of a transfer; thus, there was nothing for Idaho Code § 42-1425 to waive.¹

The City then makes a convoluted argument regarding the alleged ambiguity of Idaho Code § 42-1425. Under either a narrow or a broad interpretation of Idaho Code § 42-1425, the City argues that IDWR did not have the authority to condition the accomplished transfers. *City of Pocatello's Brief In Support Of Motion For Summary Judgment On IDWR's Authority Under I.C. § 42-1425*, hereinafter "*City's Brief*," at 6. The City has interpreted Idaho Code § 42-1425 through a myopic lens that ignores the remaining provisions of the Act of April 12, 1994. These other changes in the Act of April 12, 1994 specifically provided: "The director shall determine **the following elements, to the extent the director deems appropriate and proper**, to define and administer the water rights under state law." Idaho Code § 42-1411(2) (emphasis added).² Thus, the director of IDWR was granted discretion to define the elements of a water right under state law. Subdivision (j) of subsection (2) applies directly to the conditions opposed by the City and specifically authorizes the director to impose "**conditions on the exercise of any water right** included in any decree, license, or approved transfer application." The City's conclusion that IDWR is without authority to condition the accomplished transfers ignores the rest of the Act of April 12, 1994 that authorizes the IDWR to determine the elements of a water right. The scope of that discretion to define the elements is described, as "the extent the director deems appropriate and proper." The City has not demonstrated that IDWR has abused that discretion in making the determination of the elements of City's water right.

¹ The City argues that some of its changes occurred in the 1940s. *City's Brief*, at 5. Those changes are not properly before the district court as accomplished transfers.

² The author of this brief was the author of this language in Idaho Code § 42-1411.

III. THE DIRECTOR HAD THE AUTHORITY TO IMPOSE THE CONDITIONS UPON FORMAL TRANSFERS DECIDED UNDER IDAHO CODE § 42-222.

The City states:

In 1999, Pocatello transferred the water rights associated with 29-2274, 29-2338, and 29-7375 to allow well 44 to be added to the City's interconnected culinary system. . . .

IDWR seeks to impose the same condition on these transferred rights that it has imposed on transfers claims by the City under 42-1425. Whatever the scope of IDWR's authority under 42-1425 to condition accomplished transfers, it does not allow a re-opening of transferred rights that were decided under 42-222.

City's Brief, at 9 (emphasis added). This argument is without merit because the "problem condition" identified by the City is not in the recommendations for these three water rights. The City identified the following condition as the problem condition:

To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No __, located in [legal description] on [date] in the amount of __ cfs.

City's Brief, at 3. Attached as Exhibit B are pages 716, 717, 797, 798, 967, 968, 1579, and 1580 of the Director's Report for Basin 29. Pages 967 and 968 contain the Director's recommendation for water right no. 29-2499, which contains the "problem condition" identified by the City. The remaining pages of Exhibit B contain the Director's Recommendation for water right nos. 29-2274, 29-2338, and 29-7375. A cursory review of these pages indicates that those recommendations do not contain the "problem condition."³ The City's argument is without merit.

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³ Even if the Director had recommended this "problem condition" for water right nos. 29-2274, 29-2338, and 29-7375, Idaho Code § 42-1411(2)(j) specifically authorizes the director to impose "conditions on the exercise of any water right included in any . . . approved transfer application."

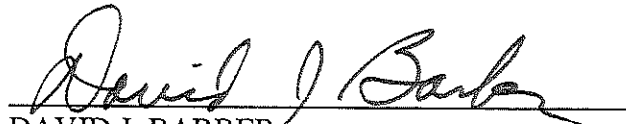
CONCLUSION

The Act of April 12, 1994 amended Idaho Code § 42-1411 and granted the IDWR broad discretion to determine and condition water rights under state law. IDWR had the authority to impose the conditions challenged here.

RESPECTFULLY SUBMITTED this 25th day of May 2006.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION

A handwritten signature in dark ink, appearing to read "David J. Barber", is written over a horizontal line.

DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
29-07431
29-07450
29-07502
29-07770
29-07782
29-11339
29-11344
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13636
29-13637
29-13638
29-13639

EXHIBIT B

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-2274

NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 9.690 CFS

PRIORITY DATE: 06/15/1948

POINT OF
DIVERSION:

T06S R33E S10 NESE Within POWER County
T06S R33E S12 NESE Within POWER County
T06S R33E S15 SWNE Within POWER County
T06S R34E S15 NWSW Within BANNOCK County
T06S R34E S26 NENW Within BANNOCK County
T06S R34E S27 NWSE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T07S R34E S1 SESE Within BANNOCK County
T07S R35E S16 SWSW Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
MUNICIPAL

PERIOD OF USE
01/01 12/31

QUANTITY
9.690 CFS

PLACE OF USE:

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

EXHIBIT B

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-2338

NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 9.530 CFS

PRIORITY DATE: 09/01/1953

POINT OF

DIVERSION:

T06S R33E S10 NESE Within POWER County

T06S R33E S12 NESE Within POWER County

T06S R33E S15 SWNE Within POWER County

T06S R34E S15 NWSW Within BANNOCK County

T06S R34E S26 NENW Within BANNOCK County

T06S R34E S27 NWSE Within BANNOCK County

T06S R34E S35 SENE Within BANNOCK County

T06S R34E S35 SENE Within BANNOCK County

T06S R34E S35 NWSE Within BANNOCK County

T06S R34E S35 NWSE Within BANNOCK County

T06S R34E S35 NWSE Within BANNOCK County

T07S R34E S1 SESE Within BANNOCK County

T07S R35E S16 SWSW Within BANNOCK County

PURPOSE AND

PERIOD OF USE:

PURPOSE OF USE

MUNICIPAL

PERIOD OF USE

01/01 12/31

QUANTITY

9.530 CFS

PLACE OF USE:

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

EXHIBIT B

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-2499

NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 4.100 CFS

PRIORITY DATE: 12/10/1964

POINT OF
DIVERSION:

T06S R34E S14 NWNW Within BANNOCK County
 T06S R34E S15 NWNE Within BANNOCK County
 T06S R34E S15 NENW Within BANNOCK County
 T06S R34E S15 NESE Within BANNOCK County
 T06S R34E S15 NESE Within BANNOCK County
 T06S R34E S16 NENE Within BANNOCK County
 T06S R34E S23 NWNE Within BANNOCK County
 T06S R34E S23 SWNE Within BANNOCK County
 T06S R34E S23 SENW Within BANNOCK County
 T06S R34E S23 NESW Within BANNOCK County
 T06S R34E S26 NENW Within BANNOCK County
 T06S R34E S26 SWSE Within BANNOCK County
 T06S R34E S35 NWNE Within BANNOCK County
 T06S R34E S35 SENE Within BANNOCK County
 T06S R34E S35 NWSE Within BANNOCK County
 T07S R34E S1 NWNE Lot 2 Within BANNOCK County
 T07S R34E S1 SWNE Within BANNOCK County
 T07S R34E S1 NESE Within BANNOCK County
 T07S R34E S1 SESE Within BANNOCK County
 T07S R35E S6 NWSE Within BANNOCK County
 T07S R35E S7 NESW Within BANNOCK County
 T07S R35E S18 SENE Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
MUNICIPAL	01/01 12/31	4.100 CFS

PLACE OF USE:

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

To the extent necessary for administration, water was first appropriated or used from:

Pocatello Well No. 2 located in T07S, R34E, S01, NWNE, on 12/31/1926 in the amount of 3.12 cfs

Pocatello Well No. 3 located in T07S, R34E, S01, SWNE, on 12/31/1926 in the amount of 4.23 cfs.

Pocatello Well No. 7 located in T06S, R34E, S35, NWNE, on 12/31/1940 in the amount of 4.46 cfs.

Pocatello Well No. 10 located in T06S, R34E, S26, NENW, on 6/15/1948 in the amount of 5.35 cfs.

Pocatello Well No. 12 located in T06S, R34E, S35, SENE, on 9/1/1953 in the amount of 6.20 cfs.

Pocatello Well No. 13 located in T07S, R34E, S01, SESE, on 9/1/1953 in the amount of 2.22 cfs, and on 10/16/1958 for an additional amount of 0.89 cfs.

Pocatello Well No. 14 located in T07S, R35E, S07, NESW, on 12/31/1955 in the amount of 0.22 cfs.

Pocatello Well No. 15 located in T07S, R35E, S06, NWSE, on 9/1/1953 in the amount of 1.11 cfs, and on 2/24/1977 for an additional amount of 2.23 cfs.

Pocatello Well No. 16 located in T06S, R34E, S26, SWSE, on 10/16/1958 in the amount of 6.67 cfs.

Pocatello Well No. 18 located in T06S, R34E, S15, NENW, on 10/16/1958 in the amount of 4.66 cfs.

Pocatello Well No. 21 located in T06S, R34E, S23, SWNE, on 9/15/1955 in the amount of 3.89 cfs.

Pocatello Well No. 22 located in T06S, R34E, S23, SENW, on 10/22/1952 in the amount of 3.68 cfs.

Pocatello Well No. 23 located in T06S, R34E, S23, NWNE, on 8/15/1956 in the amount of 4.44 cfs.

Pocatello Well No. 26 located in T06S, R34E, S15, NWNE, on 6/1/1945 in the amount of 2.67 cfs.

Pocatello Well No. 27 located in T06S, R34E, S14, NWNW, on 12/10/1964 in the amount of 4.10 cfs.

Pocatello Well No. 28 located in T07S, R34E, S01, NESE, on 8/31/1951 in the amount of 4.90 cfs.

Pocatello Well No. 29 located in T06S, R34E, S23, NESW, on 11/6/1972 in the amount of 6.20 cfs.

Pocatello Well No. 30 located in T06S, R34E, S35, NWNE, on 4/25/1976 in the amount of 5.57 cfs.

Pocatello Well No. 31 located in T06S, R34E, S15, NESE, on 4/25/1976 in the amount of 8.02 cfs.

Pocatello Well No. 32 located in T06S, R34E, S16, NENE, on 4/25/1976 in the amount of 3.45 cfs.

Pocatello Well No. 33 located in T07S, R35E, S18, SENE, on 10/1/1962 in the amount of 0.21 cfs.

Pocatello Well No. 34 located in T06S, R34E, S15, NESE, on 2/18/1985 in the amount of 7.00 cfs.

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION
PURSUANT TO SECTION 42-1425, IDAHO CODE.

EXHIBIT B

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-7375

NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 2.230 CFS

PRIORITY DATE: 02/24/1977

POINT OF
DIVERSION:

T06S R33E S10 NESE Within POWER County
 T06S R33E S12 NESE Within POWER County
 T06S R33E S15 SWNE Within POWER County
 T06S R34E S15 NWSW Within BANNOCK County
 T06S R34E S26 NENW Within BANNOCK County
 T06S R34E S27 NWSE Within BANNOCK County
 T06S R34E S35 SENE Within BANNOCK County
 T06S R34E S35 SENE Within BANNOCK County
 T06S R34E S35 NWSE Within BANNOCK County
 T06S R34E S35 NWSE Within BANNOCK County
 T06S R34E S35 NWSE Within BANNOCK County
 T07S R34E S1 SESE Within BANNOCK County
 T07S R35E S16 SWSW Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
MUNICIPAL

PERIOD OF USE
01/01 12/31

QUANTITY
2.230 CFS

PLACE OF USE:

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

CERTIFICATE OF SERVICE

I certify that on this 25th day of May 2006, I caused to be served the original and/or copy of the RESPONSE MEMORANDUM IN OPPOSITION TO CITY OF POCA TELLO'S MOTION FOR SUMMARY JUDGMENT on each of the following persons by the indicated method:

1. One Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
☒ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
☒ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

City of Pocatello
c/o Josephine P. Beeman
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

Jeanette Wolfley
Attorney at Law
202 North Arthur
Pocatello, ID 83204

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID J. BARBER
Deputy Attorney General