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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, et al. (see attached Exhibit A)
	)	
	)	CITY OF POCA TELLO'S BRIEF IN SUPPORT OF
Case No. 39576	)	MOTION FOR SUMMARY JUDGMENT ON
	)	MUNICIPAL PURPOSE OF USE, INTERCON-
_____	)	NECTION, AND INJURY UNDER I.C. § 42-1425

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate only where two conditions are met: (1) "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact;" and (2) "the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When those two conditions are satisfied, a motion for summary judgment is proper. *See Sorenson v. Saint Alphonsus Reg'l Med. Ctr.*, 141 Idaho 754, 758, 118 P.3d 86, 90 (2005) ("Summary judgment is proper where there are no genuine

issues of material fact and the moving party is entitled to judgment as a matter of law.”); *State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 349, 79 P.3d 707, 708 (2003) (“A summary judgment is properly granted when the moving party shows there is no genuine issue of material fact and is entitled to judgment as a matter of law.”).

Pocatello served identical discovery requests to the State and the SWC on July 21, 2006. The State and the SWC both relied upon the April 2006 Supplemental Director’s Report in answering Pocatello’s discovery requests.¹ Although the answers proffered by the State and SWC are far from identical, the answers of both parties result in the admission of facts supporting the factual bases for Pocatello’s motion for summary judgment.²

In responding to identical discovery questions, and although relying on the same information,³ the SWC refused to answer the majority of Pocatello’s discovery requests, stating that “[t]he Coalition has made reasonable inquiry and the information known or readily obtainable is insufficient to admit or deny the request . . .”⁴ even when the pertinent information was readily available in the April 2006 Supplemental Director’s Report upon which the SWC relies.

¹ See State’s Answers to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, pages 4, 28, 42, 64, 70, 76, 78, 80, 86, 93, 96, 100, 103, 113, 115, 120, 128, 129, 130, 133, 138, 139, 140, 143, 148, 149, 150, 159, 160, 162, 163, 184, 190, 196, 198, 199, 200, 208, 211, 223, 224, 225, 243, 256, 258, 266, 268, 276, 277, 278, 287, 288, 291, 296, 297, 298, 301, 307, 308, 311, 316, 317, 327, 328, 331, 336, 337, 338, 341, 347, 348. SWC’s Answers to Pocatello’s Discovery Requests, Exhibit E to Affidavit of Joyce Angell, pages 3, 4, 8, 9, 14, 15, 19, 20, 23, 24.

² This occurs in part because The SWC objections do not meet the requirements of Idaho Rule of Civil Procedure 36(a) which provides that “[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.”

³ The April 2006 Supplemental Director’s Report.

⁴ This answer is located throughout SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, (See pages 5, 6, 7, 8, 10, 11, 12, 17, 21, 22, 23, 26, 29, 30, 31, 38, 38, 44.)

Idaho Rule of Civil Procedure 37 provides:

- “an evasive or incomplete answer is to be treated as a failure to answer.” [I.R.C.P. 37(a)(3)]
- “[i]f a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.” [I.R.C.P. 37(c)]

The SWC’s failure to comply with discovery rules prejudices and limits Pocatello’s ability to develop its own case in support of its claims because Pocatello has to prove “the genuineness of the document or truth of the matter” that the SWC did not answer. The factual discussions that follow in Pocatello’s brief will address the SWC’s answers to Pocatello’s discovery as those answers relate to the determination and admission of material facts.

II. MUNICIPAL PURPOSE OF USE

Pocatello has four licensed water rights for irrigation which the City claimed as municipal water rights in the SRBA⁵ because each water right “is used by the City in its capacity and function as a municipality.”⁶ It now seeks summary judgment as to the municipal purpose of use for these rights based on the following undisputed facts:

1. Water right 29-7118 always has been used by the City of Pocatello in its capacity and function as a municipality to manage under long term lease municipal land at the Pocatello airport.⁷

⁵ SRBA claims 29-7118, 29-7119, 29-7770, and 29-7431.

⁶ The quoted language is from Pocatello’s SRBA objections to the irrigation purpose of use which IDWR recommended to the SRBA court for 29-7118, 29-7119, 29-7770, and 29-7431.

⁷ Farm Lease, Exhibit G to Affidavit of Joyce Angell; SRBA claim file and IDWR license file of 29-7118 and 29-7118, Exhibit K to April 2006 Supplemental Director’s Report.

2. Water right 29-7119 always has been used by the City of Pocatello in its capacity and function as a municipality to manage under long term lease municipal land at the Pocatello airport.⁸
3. Water right 29-7770 always has been used by the City of Pocatello in its capacity and function as a municipality for the land application of the City's biosolids under Pocatello's EPA-approved biosolids program and NPDES permit.⁹
4. Water right 29-7431 always has been used by the City of Pocatello in its capacity and function as a municipality to apply effluent from City's wastewater treatment plant to land in accordance with the Federal Water Pollution Control Act.¹⁰
5. The use of water by Pocatello to manage municipal land at the Pocatello airport, to land apply the City's biosolids under Pocatello's EPA-approved biosolids program and NPDES permit and to apply effluent from the City's wastewater treatment plant to private cropland, benefits the inhabitants of Pocatello.

The chart on the next page summarizes the IDWR¹¹, State¹², and SWC¹³ responses to Pocatello's objections.

⁸ *Id.*

⁹ The SRBA claim files and license files for water rights 29-7770 are also attached to the April 2006 Supplemental Director's Report as Exhibit M.

¹⁰ The SRBA claim files and license files for water rights 29-7431 are also attached to the April 2006 Supplemental Director's Report as Exhibit L.

¹¹ IDWR's information is based on the April 2006 April 2006 Supplemental Director's Report, pp. 19-21. The SRBA claim files and license files for water rights 29-7118, 29-7119, 29-7431, 29-7770 are also attached to the April 2006 Supplemental Director's Report as Exhibits K, L, and M, respectively.

¹² The State of Idaho's responses to Pocatello's objections are in the State's Standard Form 2 Response to Objection in the SRBA court files for 29-7118, 29-7119, 29-7431, and 29-7770.

¹³ SWC's responses to Pocatello's objections taken from the Standard Form 2 Response to Objection for Minidoka Irrigation District, A&B Irrigation District, Twin Falls Canal Company, American Falls Reservoir Dist. #2, North Side Canal Company, and Milner Irrigation District which can be found in the SRBA court files for water rights 29-7118, 29-7119, 29-7431, and 29-7770.

RESPONSES TO POCATELLO'S PURPOSE OF USE OBJECTIONS

	29-7118	29-7119	29-7431	29-7770
IDWR	Only purpose of use is to irrigate cropland at the city-owned airport; can't attack a license in the SRBA.	Only purpose of use is to irrigate cropland at the city-owned airport; can't attack a license in the SRBA.	[nothing]	Licensed for irrigation (biosolids well). Changing purpose of use would be a collateral attack on the license.
State of Idaho	**	**	**	**
Minidoka Irrigation District	Unaware of any basis for changing the purpose of use.	Unaware of any basis for changing the purpose of use.	**	Unaware of any basis for changing the purpose of use.
A & B / Burley Irrigation Districts	Pocatello submits no factual or legal basis by which an irrigation right, whether held by a city or any other entity can be changed to a municipal water right.	No factual legal basis by which an irrigation right, whether held by a city or any other entity can be changed to a 'municipal' water right.	This wastewater is used as a supplement to the irrigation water available to the lands described. It should be shown as a supplemental use. The City of Pocatello has provided no legal or factual basis upon which this water right may be described as a municipal use.	The fact that the City of Pocatello is a municipality does not alter the nature of the water right held by the City for irrigation. No basis upon which the purpose of use should be changed.
AFRD #2 Irrigation District	Unaware of any basis for changing the purpose of use.	Unaware of any basis for changing the purpose of use.	**	Unaware of any basis for changing the purpose of use.
Twin Falls and North Side Canal Co., and Milner Irrigation District	Unaware of any basis for changing the purpose of use.	Unaware of any basis for changing the purpose of use.	**	Unaware of any basis for changing the purpose of use.

** Only checked "purpose of use" box on Response; did not provide further explanation.

A. “Municipal” purposes of use as defined by common law and statute is recognized by this court.

Idaho Code § 42-202(B)(6) defines “municipal purposes” as “water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.”¹⁴

In 1997, in subcase 34-10030 (City of Arco), Special Master Bilyeu issued a master’s report that considered 42-202(B) in light of the common law. The report states that 42-202(B) codifies, but does not limit the common law. The report adopts a broad view of “municipal purpose of use”, stating that when used to describe the purpose of use of a water right, “municipal” means “a right used by a municipality for the benefit of its inhabitants. A ‘municipal’ right may be used for numerous purposes which benefit the city’s inhabitants. The court finds this definition of ‘municipal’ persuasive and adopts it here. Thus ‘municipal’ water rights encompass a broad range of uses to which such water rights are used for the benefit of the municipality’s inhabitants.” (Emphasis added.)¹⁵

B. Municipal purpose of use as admitted facts by the State and SWC.

Pocatello served identical discovery requests to the State and the SWC on July 21, 2006. The State and the SWC both relied upon the April 2006 Supplemental Director’s Report in

¹⁴ The actual pre-SRBA use was municipal for 29-7118, 29-7119, 29-7431, and 29-7770. Under 42-1425 the SRBA Court can decree this actual use without collaterally attacking the licenses for 29-7118, 29-7119, 29-7431, and 29-7770. For this reason, Judge Wood’s Facility Volume decision is distinguishable.

¹⁵ *In Re SRBA*, subcase 34-10030 Special Master’s Report April 8, 1997, at page 2.

answering Pocatello's discovery requests.¹⁶ The answers of both parties result in the admission of facts supporting a municipal purpose of use for 29-7118, 29-7119, and 28-7770.¹⁷

In its answers to Pocatello's discovery, the State admitted the following facts:

1. A municipal purpose of use "may include multiple uses such (sic) domestic, commercial, and other uses."¹⁸
2. "[A] municipal water right may be used for many uses including irrigation and airport safety."¹⁹
3. The "primary use" of water right 29-7118 "is to satisfy customer needs within the area served by Pocatello."²⁰
4. The water used under water right 29-7119 "is used within the corporate limits of Pocatello."²¹
5. Pocatello uses water right 29-7770 "for the land application of the City's biosolids under Pocatello's EPA-approved Biosolids program and NPDES permit . . ." and this land application of biosolids produced by Pocatello's waste water plant is performed "as a part of the City's municipal responsibility to treat and dispose of domestic sewage."²²

¹⁶ See State's Answers to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, pages 4, 28, 42, 64, 70, 76, 78, 80, 86, 93, 96, 100, 103, 113, 115, 120, 128, 129, 130, 133, 138, 139, 140, 143, 148, 149, 150, 159, 160, 162, 163, 184, 190, 196, 198, 199, 200, 208, 211, 223, 224, 225, 243, 256, 258, 266, 268, 276, 277, 278, 287, 288, 291, 296, 297, 298, 301, 307, 308, 311, 316, 317, 327, 328, 331, 336, 337, 338, 341, 347, 348. SWC's Answers to Pocatello's Discovery Requests, Exhibit E to Affidavit of Joyce Angell, pages 3, 4, 8, 9, 14, 15, 19, 20, 23, 24.

¹⁷ See footnotes 1-4 and text accompanying same.

¹⁸ Request for Admission No. 3, State's Answer to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, page 170.

¹⁹ Request for Admission No. 4, State's Answer to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, pages 170, 181.

²⁰ Request for Admission No. 1, State's Answer to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, page 168.

²¹ Request for Admission No. 1, State's Answer to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, page 179.

²² Request for Admission Nos. 1 and 2, State's Answer to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, page 240.

6. Pocatello requested IDWR to license water right 29-7770 as a “municipal” water right and that “Pocatello uses this water rights as part of its obligations as a municipality to treat and dispose of domestic sewage.”²³

Although, the State readily admitted to the purpose of use of water right 29-7770 (see footnotes 21, 22, and 23, and accompanying text), the SWC denied having sufficient²⁴ information²⁵ to formulate an answer.²⁶ However, the SWC and the State both relied upon the April 2006 Supplemental Director’s Report as a document which supports their responses to Pocatello’s objection. The April 2006 Supplemental Director’s Report specifically addressed 29-7770 and stated, in order “[t]o aid in the history and understanding of this water right, certified copies of the license and claim files are attached hereto as Exhibit M.”²⁷ Exhibit M is a substantial file from IDWR, containing numerous photos and maps of points of diversion and places of use for water right 29-7770. It also includes beneficial use field exam notes compiled by IDWR.

²³ Request for Admission Nos. 3 and 4, State’s Answer to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, page 241

²⁴ “The Coalition has made reasonable inquiry and the information known or readily obtainable is insufficient to determine how Pocatello uses this water right under which EPA approved programs and permits . . .” Request for Admission no. 1, SWC Answer to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, page 38.

²⁵ “It is impossible to determine what is meant by ‘municipal responsibility.’ The Coalition has made reasonable inquiry and the information known or readily obtainable is insufficient to determine how Pocatello applies ‘the biosolids produced by its water plant’ and therefore the request is denied.” Request for Admission No. 2, SWC Answer to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, page 38.

²⁶ “It is impossible to determine what is meant by ‘as a part of its obligations as a municipality.’ The Coalition has made reasonable inquiry and the information known or readily obtainable is insufficient to determine how Pocatello uses this water right.” Request for Admission No. 4, SWC Answer to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, page 39.

²⁷ April 2006 Supplemental Director’s Report, page 20.

Because the information supporting “the truth of the matter” was readily obtainable within the April 2006 Supplemental Director’s Report, the SWC’s responses should be construed as admissions.

III. INTERCONNECTION

A. **The Supplemental Director’s Report states that Basin 29 ground water and surface water sources are interconnected, and that Basin 29 water rights are connected sources with the Snake River Basin.**²⁸

The April 2006 Supplemental Director’s Report cites the interconnected sources provision in SRBA decision in Basin-Wide Issue 5: “[A]ll other water rights within Basin 29 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.”²⁹ Referring specifically to Basin 29, the Report states, “[s]urface and ground water sources in Basin 29 are interconnected.”³⁰ On the issue of Pocatello’s interconnected wells before November 19, 1987, the Report is unequivocally clear: “[t]he Department found that there were 22 interconnected wells that serve Pocatello for the ‘city proper’ as depicted on Map 1 before November 19, 1987.”³¹

²⁸ These statements are based on general provisions in the Director’s Report to the SRBA court for basin 29. Pocatello initially filed SRBA Objections as to general provisions on separate streams and separate administration in the Director’s Report for Basin 29, but those objections were later dismissed as described in the following documents of record in Pocatello’s SRBA Subcases 29-271 et seq. Stipulation and Agreement with the United States of America in Pocatello’s SRBA subcases 29-271 et seq. (April 24, 2006) Joint Motion to Accept Stipulation and Agreement Between the City of Pocatello and the United States. (May 31, 2006) Order Dismissing Portions of Objections and Responses with Prejudice (July 14, 2006)

²⁹ April 2006 Supplemental Director’s Report, page 9.

³⁰ *Id.* at 10.

³¹ *Id.* at 13. The Report then moved on to explain that “[a]s of 1987, the City had 22 interconnected wells that provided municipal water to the city system service area. See Map 1.

B. Interconnection as admitted facts by the State and the SWC.

The general provisions regarding interconnection, discussed above, are not at issue.

The discovery answers of both parties result in the admission of the facts supporting the interconnection of the LPRVA, Mink Creek, and Gibson Jack Creek, as well as the interconnection of the culinary wells serving Pocatello prior to November 19, 1987.

In its answers to Pocatello's discovery, the State does not dispute the existence of the LPRVA. The State proffered a Department of Environmental Quality report³² which specifically discusses the LPRVA in great detail. The State specified that the report illustrates the relationship between the corporate limits of Pocatello and the LPRVA.³³

The State readily admitted that "Mink Creek and the Lower Portneuf River Valley Aquifer are interconnected sources of water."³⁴ The State further admitted that "Gibson Jack Creek and the Lower Portneuf River Valley Aquifer are interconnected sources of water."³⁵

In response to identical discovery questions from Pocatello regarding interconnection, and although also relying on the April 2006 Supplemental Director's Report³⁶, the SWC refused

³² *Final Report: Economic Impacts of Enhanced Aquifer Protection for the LPRVA*. Prepared for the Department of Environmental Quality by BBC Research & Consulting on September 5, 2001. This report was submitted in State's Answers to Pocatello's Discovery Exhibit D to Affidavit of Joyce Angell, pages 10, 22, 36, 47, 58, 106, 108, 206, 208.

³³ Request for Admission no. 3, State's Answers to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, page 10. The State would not admit Pocatello's Request for Admission because the report "show that the corporate limits of Pocatello extend substantially beyond the Lower Portneuf River Valley Aquifer in the southwest and northeast portion of the City." *Id.* At 10. However, the State allowed that it would be able to respond to Pocatello's request if "the location of each of the twenty-two wells [is] . . . plotted on a map that illustrates the Lower Portneuf River Valley Aquifer and the corporate limits of the City of Pocatello, and the wells logs for each of the twenty two wells must be reviewed." *Id.* at 10, 22, 36, 48, 59, 107, 207.

³⁴ Request for Admission no. 1, State's Answers to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, pages 9 and 21.

³⁵ Request for Admission no. 1, State's Answers to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, page 105.

to answer the majority of Pocatello's discovery requests regarding interconnection. The SWC's repeated response to Pocatello's discovery requests was: "[t]he Coalition has made reasonable inquiry and the information known or readily obtainable is insufficient to admit or deny the request."³⁷ However, the pertinent information was readily available in the April 2006 Supplemental Director's Report, or the SWC's answers had no basis in fact (as discussed below.)

First, the SWC specifically objected to the term "Lower Portneuf River Valley Aquifer" stating that "[t]o the best of the Coalition's knowledge, the term 'Lower Portneuf River Valley Aquifer' is not, and has not been used by any other recognized water resource agency."³⁸ This term however, was repeatedly used in the State's proffered report by the Department of Environmental Quality,³⁹ several state and federal agency reports readily available to the public,⁴⁰ and is a common term used by environmental groundwater organizations.⁴¹

³⁶ See State's Answers to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, pages 4, 28, 42, 64, 70, 76, 78, 80, 86, 93, 96, 100, 103, 113, 115, 120, 128, 129, 130, 133, 138, 139, 140, 143, 148, 149, 150, 159, 160, 162, 163, 184, 190, 196, 198, 199, 200, 208, 211, 223, 224, 225, 243, 256, 258, 266, 268, 276, 277, 278, 287, 288, 291, 296, 297, 298, 301, 307, 308, 311, 316, 317, 327, 328, 331, 336, 337, 338, 341, 347, 348, and SWC's Answers to Pocatello's Discovery, Exhibit E to Affidavit of Joyce Angell, pages 3, 4, 8, 9, 14, 15, 19, 20, 23, 24.

³⁷ This answer is located throughout SWC's Answers to Pocatello's Discovery, Exhibit E to Affidavit of Joyce Angell, pages 5, 6, 7, 8, 10, 11, 12, 17, 21, 22, 23, 26, 29, 30, 31, 38, 38, 44.

³⁸ General Objection no. 5, SWC's Answers to Pocatello's Discovery, Exhibit E to Affidavit of Joyce Angell, page 5.

³⁹ *Final Report: Economic Impacts of Enhanced Aquifer Protection for the LPRVA*. Prepared for the Department of Environmental Quality by BBC Research & Consulting on September 5, 2001. This report was submitted in State's Answers to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, pages 10, 22, 36, 47, 58, 106, 108, 206, 208.

⁴⁰ Welhan, J., Meehan, C. and Reid, T., 1996, *The Lower Portneuf River Valley Aquifer: A Geologic / Hydrologic Model and Its Implication For Wellhead Protection Strategies*; Final Report, EPA Wellhead Protection Demonstration Project and City of Pocatello Aquifer Geologic Characterization Project.

⁴¹ The Portneuf Valley Groundwater Guardian Committee (PVGGC) is a not-for-profit organization promoting the protection and wise use of our local water resources, as part of it's 1996 enrollment with the National

The SWC would not admit that Mink Creek or Gibson Jack Creek were interconnected with the LPRVA, citing several reasons:

It is impossible to determine what Pocatello means by the term ‘interconnected.’ The Coalition has made a reasonable inquiry and information known or readily obtainable is insufficient to determine if groundwater flows to Mink Creek and the extent that Mink Creek contributes to ground water or to determine whether the ‘Lower Portneuf River Valley Aquifer’ exists or the extent that Mink Creek is a connected source of water and therefore denies the same. In addition, the Coalition has not been able to determine the locations of hydraulic interconnectivity, if any, or to quantify the hydraulic interconnectivity.⁴²

This response by the SWC makes several assertions which were readily ascertainable: (1) the definition of “interconnected”, (2) whether ground water flows to Mink Creek, and (3) whether the LPRVA exists.

The SWC Memorandum in Support of Joint Motion to Participate illustrates that the SWC clearly understands the definition of “interconnected” :

All water in the Snake River Basin is interconnected, unless a partial decree issued by the SRBA Court indicates the water derives from a separate source. *A&B Irrigation Dist. V. Idaho Conservation League*, 131 Idaho 411, 421-22 (1998). The SRBA Court plainly recognized the interconnection of tributary ground and surface water sources in the Snake River Basin in its Basin-Wide 5 decision issue in 2001. (Emphasis added.)⁴³

By relying on the Basin-Wide 5 decision, the SWC demonstrated its understanding of interconnection. In addition, the SWC’s own expert report further demonstrates this understanding: “[t]he hydrogeology of the lower Portneuf River and tributaries and the aquifer

Groundwater Foundation. PVGGC’s webpage includes a detailed map of the LPRVA, the water services area boundaries within and surrounding Pocatello, and the locations of Pocatello’s groundwater wells. http://www.idahogeology.org/Services/Hydrogeology/PortneufGroundWaterGuardian/my_drinking_water/cool_maps/level2_coolmaps/water_service_areas.html

⁴² Request for Admission no. 1, SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, pages 5 and 21.

⁴³ SWC’s Memorandum in Support of Joint Motion to Participate, March 2, 2006, page 3.

underlying the lower Portneuf area shows that these are interconnected sources.” (Emphasis added.)⁴⁴ The SWC’s expert report also implies there is a connection from Mink Creek and Gibson Jack Creek to the LPRVA:

If, in fact, ground water is pumped in lieu of a surface water diversion six miles away from the ground water extraction with the same early priority as the surface right, there will be significant differences in the timing and magnitude of both the Portneuf River flow and ground water underflow from the basin.⁴⁵

Finally, in addition to the plethora of documentation describing the LPRVA (see above) and Pocatello’s definition offered to the SWC in discovery,⁴⁶ the SWC’s own expert report acknowledges the LPRVA.⁴⁷

In addition to the April 2006 Supplemental Director’s Report, the only document produced by the SWC in support of its response to Pocatello’s objection was the citation to an Idaho Department of Reclamation (IDR) article from 1970.⁴⁸ As stated above, Pocatello explicitly defined the LPRVA in their Discovery Requests to the SWC.⁴⁹ However, the area of

⁴⁴ SWC Rebuttal Expert Report by Brockway Engineering Inc., Exhibit C to Affidavit of Joyce Angell, page 2.

⁴⁵ SWC Rebuttal Expert Report by Brockway Engineering Inc., Exhibit C to Affidavit of Joyce Angell, page 4.

⁴⁶ Pocatello’s Discovery Requests to SWC contained a “definitions” section which provided: “The ‘Lower Portneuf River Valley Aquifer’ means an alluvial valley-fill aquifer, situated in the Portneuf Valley beginning at the Portneuf Gap and merging into the Eastern Snake Plan Aquifer northwest to Tyhee.” (See page 4.)

⁴⁷ SWC Rebuttal Expert Report by Brockway Engineering Inc., Exhibit C to Affidavit of Joyce Angell, page 3.

⁴⁸ *Reconnaissance of The Water Resources in the Portneuf River Basin Idaho*, Water Information Bulletin No. 16, Idaho Department of Reclamation (R.F. Norvitch and A.L. Larson, June 1970).

⁴⁹ *Supra*.

study in SWC's 1970 IDR article does not encompass the area⁵⁰ explicitly defined as the LPRVA in Pocatello's Discovery Requests.

III. INJURY

A. IDWR's hypothetical injury in the future does not establish injury as of November 19, 1987 or the present.

The April 2006 Supplemental Director's Report does not address any actual 42-1425 injury to junior water rights.⁵¹ The Report addresses hypothetical injuries in the future that *could* occur to water rights as they were known to exist before November 19, 1987. The Report is silent on actual injury as of November 19, 1987 or at any subsequent time.

B. The State and the SWC also have no Independent Information about 42-1425 Injury.

The State admits that it has no tangible proof of 42-1425 injury to water rights. Other than the hypothetical injury addressed in the April 2006 Supplemental Director's Report, the State admitted that it has "no other documents alleging or claiming injury" from Pocatello's accomplished transfers at issue.⁵² The State specifically disclosed that:

[The State] has not identified any water rights that would be injured by an accomplished transfer of this water right. Idaho relies upon the determination in

⁵⁰ The Article states: "This report presents the results of a reconnaissance of the water resources in the part of the Portneuf River basin that lies upstream from the Portneuf Gap." (Emphasis added.) *Reconnaissance of the Water Resources in the Portneuf River Basin Idaho*, Water Information Bulletin No. 16, Idaho Department of Reclamation (R.F. Norvitch and A.L. Larson, June 1970), page 2.

⁵¹ The Report provides only speculative statements on injury such as: "If at some time in the future, the City increases the pumping capacity of a well . . ." and "Allowing the City to increase the diversion rate withdrawn from any particular well by listing multiple, alternate points of diversion on its water rights could cause injury to other surface and ground water users." (Emphasis added.) April 2006 Supplemental Director's Report, pages 14 and 15.

⁵² Request for Admission No.2, State's Answers to Pocatello's Discovery Requests, Exhibit D to Affidavit of Joyce Angell, pages 78, 85, 88, 118, 120.

the Director's Report, as supplemented in the Supplemental Director's Report that an injury would occur to existing water rights by a transfer of this water right.⁵³

The State further declared that it has no information on the cone of depression created by Pocatello's use of the wells located at the points of diversion recommended by IDWR, on water rights that withdraw from the LPRVA within the cone of depression, the maximum amount of water ever withdrawn by Pocatello at the wells at the points of diversion recommended by IDWR, or individual water rights "injured" by Pocatello's use of these wells located at the points of diversion recommended by IDWR.⁵⁴

In their Memorandum in Support of Joint Motion to Participate, the SWC moved under I.R.C.P. 24(a) to intervene, arguing Pocatello's objections "would significantly impair the Coalition's water rights by reducing the available water supply of the Snake River and American Falls Reservoir."⁵⁵ Or more explicitly, "the Coalition plainly has a 'direct interest' that will be 'impaired or impeded' if Pocatello is successful in avoiding future water right administration and is allowed to deplete the water sources that supply the Coalition member's rights⁵⁶ under a 'separate stream' theory."⁵⁷

⁵³ Answer to Interrogatory No. 10, SWC's Answers to Pocatello's Discovery, Exhibit E to Affidavit of Joyce Angell, pages 76, 86, 96, 118, 128, 138, 148, 159, 256, 266, 276, 286, 296, 306, 316, 326, 336, 346 .

⁵⁴ Interrogatory nos. 6, 7, 8, and 9, State's Answers to Pocatello's Discovery Requests, Exhibit D to Affidavit of Joyce Angell, pages 85, 86, 117, 118.

⁵⁵ SWC's Memorandum in Support of Joint Motion to Participate, page 2.

⁵⁶ SWC's Memorandum in Support of Joint Motion to Participate, page 9.

⁵⁷ In its March 2, 2006 Memorandum in Support of Joint Motion to Participate, the SWC repeatedly cited the 'separate stream' theory as grounds for its intervention in Pocatello's state-law SRBA subcases. Pocatello's 'separate stream' objections have since been dismissed. See footnote 28, *supra*. Although the SWC continues to participate in other issues in this proceeding (such as "municipal" purpose of use and 42-1425 injury) that were not addressed in its original Memorandum, the SWC has not provided any substantive information on these issues in its discovery answers.

To support its intervention under I.R.C.P. 24(a), the SWC alleged that its “water rights” and “direct interest” would be “impaired or impeded” by Pocatello’s objections. However, the SWC offered no proof of the alleged injury when specifically questioned in Pocatello’s Discovery Requests to the SWC. Instead, the SWC responded to injury questions with two answers: (1) “[t]he Coalition is without sufficient information to answer the interrogatory as this time”⁵⁸ and (2) “[t]he Coalition has made reasonable inquiry and the information known or readily available is insufficient to admit or deny the request . . .”⁵⁹ The SWC declared it was “without sufficient information” when asked to list any allegedly injured water rights under 42-1425.⁶⁰ When asked to describe any information regarding individual water rights “injured” by Pocatello’s use of the wells located at IDWR’s recommended points of diversion, the SWC declared it was “without sufficient information to answer the interrogatory completely....”⁶¹ Furthermore, the SWC could not proffer any information on the cone of depression created by Pocatello’s use of the wells located at the points of diversion recommended by IDWR or the ground water rights that withdraw water from the LPRVA within those cones of depression because, “no hydrologic analysis has been made.”⁶²

⁵⁸ SWC’s Answer’s to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, pages 17, 26, 44.

⁵⁹ This answer is located throughout SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, pages 5, 6, 7, 8, 10, 11, 12, 17, 21, 22, 23, 26, 29, 30, 31, 38, 38, 44.

⁶⁰ Answer to Interrogatory No. 10, SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, pages 17, 26, 44.

⁶¹ Answer to Interrogatory No. 8, SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, page 17.

⁶² Answers to Interrogatory Nos. 6 and 7, SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, pages 16, 17, 25, 43, 44.

The following example demonstrates how SWC answers to Pocatello's Discovery would avoid admitting the SWC did not have documents or other information alleging or claiming an injury to their water rights.

Request for Admission No. 2: Admit that YOU have no DOCUMENTS or other INFORMATION alleging or claiming an injury as described in your response to Interrogatory No. 11 to the water rights listed in your response to Interrogatory No. 7.

Answer to Request for Admission No. 2: Denied. See answer to Interrogatory No. 8.

Interrogatory No. 8: Please DESCRIBE any information you have regarding the individual water rights "injured" by POCATELLO'S use of the wells located as the points of diversion recommended by IDWR for this water right.

Answer to Interrogatory No. 8: See answer to Interrogatory No. 6. The Coalition is without sufficient information to answer the interrogatory completely at this time.

Interrogatory No. 6: Please DESCRIBE any information you have regarding the cone of depression created by POCATELLO'S use of the wells located at the points of diversion recommended by IDWR for this water right.

Answer to Interrogatory No. 6: None at this time. Information on timing and quantity of use from Pocatello's wells is not available, so no hydrologic analysis has been made.⁶³

The ultimate fact is that the SWC has no information of any 42-1425 injury to individual water rights.

⁶³ SWC's Answers to Pocatello's Discovery, Exhibit E to Affidavit of Joyce Angell, pages 16, 17, 18.

CONCLUSION

In conclusion, Pocatello respectfully requests that the Special Master grant summary judgment on the following:

1. Water rights 29-7119, 29-7118, 29-7770, and 29-7431 are to be decreed with a municipal purpose of use, consistent with their use by the City of Pocatello in its broad capacity and function as a municipality.
2. Mink Creek, Gibson Jack Creek, the LPRVA, the ESPA, and the Snake River as interconnected sources of water.
3. No 42-1425 injury has been proved for Pocatello's alternate points of diversion in operation for its interconnected culinary system as of November 19, 1987.

DATED this 30th day of November 2006.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By _____
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November 2006, I caused a true copy of the foregoing **CITY OF POCA TELLO'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON MUNICIPAL PURPOSE OF USE, INTERCONNECTION, AND INJURY** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

UNITED STATES OF AMERICA
REPRESENTED BY:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NAT'L RESOURCES
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STATE OF IDAHO
REPRESENTED BY:
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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
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