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December 1, 2006

Diana Delaney
Case Administrator
Snake River Basin Adjudication Court
253 Third Avenue North
P.O. Box 2707
Twin Falls ID 83303-2707

RECEIVED
DEC 04 2006
DEPARTMENT OF
WATER RESOURCES

Re: City of Pocatello - SRBA *Subcase 29-00271 et al.*

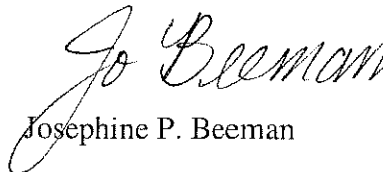
Dear Diana,

Enclosed are additional copies of the City of Pocatello's Brief in Support of Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. Section 452-1425 for SRBA *Subcase 29-00271 et al.* These copies have the corrected pages 3, 4, and 15. Also enclosed are replacement pages for copies of the brief provided to the court yesterday, November 30.

Thank you.

Sincerely,

BEEMAN & ASSOCIATES, P.C.


Josephine P. Beeman

Enclosures

cc: US Department of Justice
Environmental & Nat'l Resources
Idaho Attorney General's Office
Natural Resources Division
Director of IDWR
C. Tom Arkoosh
W. Kent Fletcher
Roger D. Ling
John A. Rosholt

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.

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.