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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)
	)	
	)	
Case No. 39576	)	CITY OF POCATELLO'S RESPONSE BRIEF TO
	)	THE SURFACE WATER COALITION'S MOTION
	)	FOR SUMMARY JUDGMENT
	)	

INTRODUCTION

Summary judgment is appropriate only "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." I.R.C.P. 56(c). The Surface Water Coalition's (SWC) November 30th *Motion For Summary Judgment* must be dismissed because: (1) The accomplished transfer statute 42-1425 allows Pocatello to confirm changes to its water rights, negating the need to file a transfer under 42-222. This is true whether the change to be confirmed is to purpose of use, place of use, or

point of diversion; (2) summary judgment of dismissal is inappropriate where Pocatello's SRBA objections raise triable issues as to pre-1987 changes in its water rights and the objections were brought in conformance with applicable SRBA procedure; and (3) further, as a matter of law, IDWR is not estopped to correct its prior errors of law.¹

The SWC's *Memorandum in Support of SWC Motion For Summary Judgment* has numerous inaccurate statements,² which can easily confuse and obfuscate the issue of municipal use. However, it is still undisputed that the purpose of use of Pocatello's water rights is municipal, and therefore the City's motion for summary judgment on purpose of use is appropriate, despite the SWC's confusing rendition of the issues.

I. MUNICIPAL PURPOSE OF USE

A. Pocatello does not need to file for a transfer under Idaho Code § 42-222.

In its *Motion for Summary Judgment*, the SWC alleges that (1) "Pocatello cannot use the SRBA as a way to evade the requirement to file an application for transfer with IDWR under Idaho Code § 42-222" and (2) "Pocatello cannot change its licensed irrigation groundwater and wastewater rights into 'municipal' water rights to be used anywhere in Pocatello's service area."³

These assertions overlook the fact that the SRBA court can appropriately decree a municipal purpose of use because the beneficial use of the right, though initially described as "irrigation," has always been municipal. This is not a "collateral attack" on Pocatello's water rights, but rather an accomplished transfer as provided under Idaho Code § 42-1425. To the

¹ The State and its agencies cannot be estopped by the mistakes of law or fact of its agents. See *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 138, 997 P.2d 591, 599 (2000). See also *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 845, 70 P.3d 669, 683 (2003).

² These inaccuracies are clearly demonstrated by the SWC's own exhibits. See pages 8, 9, 10, and 12 of this brief for a discussion of the discrepancies between the SWC's exhibits and statements in the SWC *Memorandum in Support of SWC Motion For Summary Judgment*.

³ *Memorandum In Support of SWC Motion For Summary Judgment*, pages 7 and 2.

extent the irrigation purpose of use was an error of law by IDWR, in the licensing process, IDWR is not estopped from correcting that error and recommend the municipal purpose of use to the SRBA court. This is what Pocatello seeks for 29-7770, 29-7431, 29-7118, and 29-7119.

1. Highlands Golf Course: An example of an accomplished transfer of a licensed purpose of use from “irrigation” to “municipal.”

The City acquired water right 29-2382 from a private owner to use the water to irrigate the Highland Golf Course in Pocatello. This water right was originally licensed for “irrigation and domestic use” to be used on 320 acres.⁴ On April 19, 1990, Pocatello filed a *Notice of Claim* for this water right which also stated that it was used for the irrigation of 320 acres.⁵ On April 25, 2003, Pocatello filed an *Amended Notice of Claim*, stating the purpose of use for this water right was “municipal.”⁶ This accomplished transfer from “irrigation” to “municipal” was reconfirmed in the April 2006 Supplemental Director’s Report: “the nature of the use has changed under the accomplished transfer theory from irrigation to municipal use. . . .”⁷ Thus, pursuant to § 42-1425, IDWR has the authority to recommend that the purpose of use for a water right be changed to “municipal” even when it was licensed for “irrigation” and historically used for irrigation.

Pocatello initiated and obtained each of the four “irrigation” licenses for which it seeks municipal purpose of use in the SRBA. It is undisputed that the nature of the use remains

⁴ See *License* within Exhibit G to April 2006 Supplemental Director’s Report.

⁵ See *Notice of Claim* within Exhibit G to April 2006 Supplemental Director’s Report.

⁶ See *Amended Notice of Claim* within Exhibit G to April 2006 Supplemental Director’s Report.

⁷ April 2006 Supplemental Director’s Report, page 17. In addition , the July 2003 Director’s Report recommendation for 29-2382 stated this water right “[i]ncludes accomplished change in purpose of use pursuant to section 42-1425 Idaho Code. Right includes accomplished change in place of use pursuant to section 42-1425, Idaho Code.”

unchanged for each water right. The law supports the same result at the SRBA court for these four rights as for the Highlands Golf Course water right: a municipal purpose of use.

B. Pocatello's objections to the purpose of use for 29-7770, 29-7431, 29-7118, and 29-7119 are based on undisputed facts and supported by Idaho Law. Summary dismissal of these objections is inappropriate.

Pocatello's objections and subsequent motion for summary judgment to confirm the municipal purpose of use for water rights 29-7770, 29-7431, 29-7118, and 29-7119 are appropriate because (despite the SWC's attempts to confuse and obfuscate the purpose of use issue) there are still no genuine issues of fact as to (1) the broad definition of "municipal" purpose of use and (2) whether Pocatello's use of these four water rights fits within this broad definition of "municipal".

1. "Municipal" purpose of use is broadly defined and includes many uses such as irrigation.

Pocatello has four licensed water rights for irrigation which the City claimed as municipal water rights in the SRBA⁸ because each water right "is used by the City in its capacity and function as a municipality."⁹ 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. (emphasis added)¹⁰

⁸ SRBA claims 29-7118, 29-7119, 29-7770, and 29-7431.

⁹ 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.

¹⁰ 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.

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.)¹¹ Therefore, both statute and common law in Idaho recognize that "municipal" purposes encompass a broad array of uses that can include, but are not limited to, irrigation and requirements for compliance with federal laws.

2. Pocatello's use of 29-7770, 29-7431, 29-7118, and 29-7119 fits within this broad definition of "municipal".

It is undisputed that Pocatello's use of these water rights for irrigation, in order to comply with federal laws, fits within this broad definition of "municipal." In its answers to Pocatello's discovery,¹² the State readily admitted the following facts:

1. A municipal purpose of use "may include multiple uses such (sic) domestic, commercial, and other uses."¹³

¹¹ *In Re SRBA*, subcase 34-10030 Special Master's Report April 8, 1997, at page 2.

¹² In the 76 pages of discovery that Pocatello sent out to the SWC and the State, Pocatello did not ask these specific questions regarding 29-7431. However, Pocatello believes the answers would have been the same had it included 29-7431. Additionally, Pocatello does not contest the April 2006 Supplemental Director's Report findings that 29-7431 "allows the City to apply effluent from its wastewater treatment plant to cropland. . . ." April 2006 Supplemental Director's Report, page 20.

¹³ Request for Admission No. 3, State's Answer to Pocatello's Discovery, Exhibit D to Affidavit of Joyce Angell, in support of *Pocatello's Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, page 170.

2. “[A] municipal water right may be used for many uses including irrigation and airport safety.”¹⁴

3. The “primary use” of water right 29-7118 “is to satisfy customer needs within the area served by Pocatello.”¹⁵

4. The water used under water right 29-7119 “is used within the corporate limits of Pocatello.”¹⁶

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.”¹⁷

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.”¹⁸

In responding to identical discovery questions, and although relying on the same information,¹⁹ 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

¹⁴ Request for Admission No. 4, State’s Answer to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, in support of *Pocatello’s Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, pages 170, 181.

¹⁵ Request for Admission No. 1, State’s Answer to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, in support of *Pocatello’s Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, page 168.

¹⁶ Request for Admission No. 1, State’s Answer to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, in support of *Pocatello’s Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, page 179.

¹⁷ Request for Admission Nos. 1 and 2, State’s Answer to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, in support of *Pocatello’s Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, page 240.

¹⁸ Request for Admission Nos. 3 and 4, State’s Answer to Pocatello’s Discovery, Exhibit D to Affidavit of Joyce Angell, in support of *Pocatello’s Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, page 241.

¹⁹ The April 2006 Supplemental Director’s Report.

insufficient to admit or deny the request . . .”²⁰ even when the pertinent information was readily available in the April 2006 Supplemental Director’s Report upon which the SWC relied. Because the information supporting “the truth of the matter” was readily obtainable within the April 2006 Supplemental Director’s Report, the SWC’s responses are construed as admissions pursuant to Idaho Rule of Civil Procedure 37.²¹ Thus, it is undisputed that Pocatello’s use of the water rights fits within the broad definition of “municipal” purposes.

C. Pocatello timely objected to the purpose of use.

In its *Memorandum in Support of Motion For Summary Judgment*, the SWC placed great emphasis on Pocatello’s alleged failure to initially object to the purpose of use recommendation, for 29-7118, 29-7119, and 29-7770. The SWC further alleged that Pocatello only filed purpose of use objections four days after the City’s initial objections were filed.²² Pocatello must clarify these wholly inaccurate statements about the record at the SRBA court.

In discussing the SRBA record for 29-7118 and 29-7119, the SWC claimed that Pocatello “filed an *Objection* on November 14, 2003, only disagreeing with the place of use element”²³ and that “four days later, Pocatello filed an *Amended Objection*, objecting to the purpose of use and the place of use....”²⁴ To support this claim, the SWC submitted Pocatello’s

²⁰ This answer is located throughout SWC’s Answers to Pocatello’s Discovery, Exhibit E to Affidavit of Joyce Angell, in support of *Pocatello’s Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, pages 5, 6, 7, 8, 10, 11, 12, 17, 21, 22, 23, 26, 29, 30, 31, 38, 38, 44.

²¹ Idaho Rule of Civil Procedure 37 provides:

November 14th *Objections* as Exhibits J.1 and J.2. However, these November 14th *Objections* submitted by the SWC, clearly state the opposite - Pocatello objected to purpose of use stating that it “[s]hould be: municipal”.²⁵ As reasons supporting these *Objections* to purpose of use and place of use, Pocatello stated: “Purpose of Use: This water right is used by the City of Pocatello in its capacity and function as a municipality. Place of use: This municipal right is used within the municipal service area of the City of Pocatello.” (Emphasis in original.)²⁶

As to 29-7770, the SWC claimed that Pocatello “filed an *Objection* on November 14, 2003 but did not object to the ‘irrigation’ purpose of use. . . .”²⁷ To support this claim, the SWC submitted Pocatello’s November 14th *Objection* as Exhibit V. However, the November 14th *Objection* submitted by the SWC, clearly states the opposite - Pocatello objected to purpose of

“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)]

²² There is an easy explanation for the re-submission of Pocatello’s *Amended Objections*: Pocatello submitted a letter to the SRBA on November 18, 2003 explaining that Pocatello was re-submitting 38 separately numbered Amended Standard Form 1 *Objections* pursuant to the SRBA’s notification to Pocatello that each claim must be separately numbered and individually filed. Pocatello’s letter also stated that a chart, listing all of Pocatello’s general and individual objections was submitted with the November 14th filing as well as the November 18th filing. The chart and letter are automatically included with the *Objections* available to print off IDWR’s website. The chart and letters are also missing from SWC’s Exhibits to the Affidavit of Travis L. Thompson. See Exhibits B and C to Affidavit of Celeste Thaine.

²³ SWC’s *Memorandum in Support of SWC Motion for Summary Judgment*, page 5.

²⁴ SWC’s *Memorandum in Support of SWC Motion for Summary Judgment*, page 5.

²⁵ Exhibit J.1 and J.2 to Affidavit of Travis L. Thompson.

²⁶ Exhibit J.1 and J.2 to Affidavit of Travis L. Thompson

²⁷ SWC’s *Memorandum in Support of SWC Motion for Summary Judgment*, page 6.

use stating that it “[s]hould be: municipal”.²⁸ As reasons supporting this *Objection* to both purpose of use and place of use, Pocatello stated: “Purpose of Use: This water right is used by the City of Pocatello in its capacity and function as a municipality. Place of use: This municipal right is used within the municipal service area of the City of Pocatello.” (Emphasis in original.)²⁹

II. POCATELLO’S PLACE OF USE OBJECTIONS TO THE RECOMMENDATIONS FOR 29-7118, 29-7119, AND 29-7770.

A. Pocatello does not need to file a transfer under Idaho Code § 42-222.

The SWC moved for summary judgment stating, “Pocatello cannot change its licensed irrigation groundwater and wastewater rights into ‘municipal’ water rights to be used anywhere in Pocatello’s service area.”³⁰ Pocatello has already addressed its right to seek these changes pursuant to the accomplished transfer statute, and that IDWR is not estopped by its prior errors of law to recommend the appropriate elements for these municipal water rights. (See discussion *supra* pages 2-7) For these reasons, Pocatello is not required to file a transfer under 42-222. Again, the recommendation for the Highland Golf Course water right 29-3282, demonstrates that under Section 42-1425, IDWR may conform a place of use for a water right. This negates the need to file a transfer under 42-222.

B. Pocatello timely objected to the place of use.

The SRBA court record demonstrates that, Pocatello timely filed objections to place use. (See discussion *supra* pages 7-8)

²⁸ Exhibit V to Affidavit of Travis L. Thompson.

²⁹ Exhibit V to Affidavit of Travis L. Thompson

³⁰ SWC’s *Memorandum in Support of SWC Motion for Summary Judgment*, page 2.

III. ALTERNATE POINTS OF DIVERSION

The April 2006 Supplemental Director's Report that IDWR refused to recommend wells as alternate points of diversion (APOD) for surface water rights because, "the change, if any, on how the water was diverted occurred after 1987 . . . there is no factual basis for recognizing the wells as alternate sources for the surface water diversions."³¹

A. Legal issue: Pocatello's claim to alternate points of diversion for its 4 surface water rights.

The SWC stated that, "the SRBA's Rules of Procedure prohibit Pocatello from attempting to change an element of its water right claims by way of an objection."³² To the extent that the SWC maintains this issue is not before the court, it overlooks IDWR's basis for not recommending the APOD's, which basis is unrelated to whether Pocatello amended all 4 of these SRBA claims to list the APOD's. The factual and legal issues related to Pocatello's inclusion of wells as alternate points of diversion for its surface water rights are not subject to a summary judgment of dismissal.

Pocatello has four surface water rights: 29-271, 29-272, 29-273, and 29-4222. They are collectively discussed by IDWR as Pocatello's "surface water rights".³³ All four water rights have priorities before 1969, and under the common law are therefore not required to file a transfer to any wells which began operating as APOD's before 1969. In its objections about the APOD's, Pocatello stated its intent to amend its surface water claims.³⁴ The SWC moved for summary judgment on 29-271, 29-272, and 29-273 but not for 29-4222, perhaps because

³¹ April 2006 Supplemental Director's Report, page 11.

³² SWC's *Memorandum in Support of SWC Motion for Summary Judgment*, page 2.

³³ See April 2006 Supplemental Director's Report.

³⁴ Pocatello gave notice of its intent to amend the SRBA claims for all 4 of these surface rights, even when it had already amended 29-4222.

Pocatello had already amended 29-4222 to reflect the alternate points of diversion. These four water rights are treated as a group,³⁵ and Pocatello provided notice repeatedly of its intent to amend all four water rights.

1. “A prior decree is not considered ‘conclusive’ because it cannot insulate the water right from re-examination of subsequent use.”

In their *Memorandum in Support of Summary Judgment*, the SWC cited the “binding effect” of prior decrees when it quoted Judge Melanson stating:

Although decrees issued in a prior adjudication are not conclusive as to the proof of existence of a water right, *prior decrees are binding on the parties to the decree and their privies*. *State v. Hagerman Water Rights Owners*, 130 Idaho 736, 741-42, 947 P.2d 409, 414-15 (1997)³⁶

However, the following sentence was omitted from within the block quote: “A prior decree is not considered ‘conclusive’ because it cannot insulate the water right from re-examination of subsequent use.”³⁷ *Hagerman* was a water rights forfeiture case, but the point of the *Hagerman* opinion was that decreed water rights “are not insulated from re-examination by the court.”³⁸ They are not frozen in time for all future use. Instead, water right decrees can be modified, or in the case of *Hagerman*, they can be reduced or even lost. Thus, Pocatello’s surface water rights can be re-examined, and even modified to acknowledge accomplished transfers in points of diversion.

B. Factual issue: Pocatello’s amended claims.

³⁵ See April 2006 Supplemental Director’s Report.

³⁶ SWC *Memorandum in Support of SWC Motion For Summary Judgment*, page 9; citing, *Memorandum Decision and Order On Challenge and Order Disallowing Water Right Based on Federal Law* at 12-13, subcase no. 29-11609 (October 6) (emphasis added by SWC).

³⁷ *Memorandum Decision and Order On Challenge and Order Disallowing Water Right Based on Federal Law* at 12-13, subcase no. 29-11609 (October 6) (emphasis added); citing *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741-42, 947 P.2D 409, 414-15 (1997).

³⁸ *State v. Hagerman Water Rights Owners*, 130 Idaho at 742, 947 P.2d at 414 (1997).

The SWC moved for summary judgment on Pocatello's objections to the point of diversion for water rights 29-271, 29-272, and 29-273 stating that "these previously decreed irrigation surface water rights do not include Pocatello's municipal wells as an 'alternate' point of diversion."³⁹ In the SWC's *Memorandum in Support of SWC Motion For Summary Judgment*, the statement of facts for 29-271, 29-272, 29-273 is riddled with inaccuracies that must be clarified by Pocatello.

The SWC alleged that when Pocatello filed its *Objection* on November 14th, 2003, the City only objected to the point of diversion for 29-272, and "apparently *agreed*" with the point of diversion recommendations for 29-271 and 29-273 (emphasis by SWC).⁴⁰ To prove this statement, the SWC attached what look like Pocatello's November 14th *Objections* as Exhibits D.1, D.2, and D.3, stating they are "true and correct copies" of the *Objections*.⁴¹ However, these documents are NOT complete copies of Pocatello's objections. Several important pages are missing from the SWC's exhibits, and this creates the false impression that Pocatello only objected to 29-272 when really, Pocatello clearly objected to the points of diversion for all four surface water rights.⁴²

³⁹ SWC's *Memorandum in Support of SWC Motion for Summary Judgment*, page 2.

⁴⁰ SWC's *Memorandum in Support of SWC Motion for Summary Judgment*, page 3.

⁴¹ Affidavit of Travis. L. Thompson, page 2.

⁴² Upon reasonable belief and inquiry, the SRBA court and the IDWR website are the only places where the SWC could obtain Pocatello's *Objections* to the surface water rights. Pocatello's *Objections* were filed to the SRBA court (and made publicly available on IDWR's website) with the following documents attached to them: (1) "Attachment A" which lists the four surface water rights to which the point of diversion objection applies, (2) a November 14th Letter from Jo Beeman to IDWR explaining the four point of diversion *Objections*, and (3) a chart denoting every single *Objection* filed by Pocatello (INCLUDING the 4 point of diversion objections for the surface water rights.) ALL of these attachments are missing from the exhibits submitted by the SWC. Compare Standard Form 1 Objection as Exhibit D.2 to Affidavit of Travis L. Thompson with the Standard Form 1 Objection as Exhibit B to Affidavit of Celeste Thaine.

For example, the first page of Pocatello's November 14th *Objection* states that "Attachment A" will list the "surface water rights" to which this objection applies.⁴³ However, the SWC's allegedly "true and correct" copy of the *Objection* does NOT contain Attachment A, whereas the *Objection* publicly available on IDWR's website DOES contain Attachment A, as does the *Objection* Pocatello filed with the SRBA court.⁴⁴ Similarly, the SWC's allegedly "true and correct" copy of the *Objection* does NOT contain the chart listing all of Pocatello's November 14th objections (INCLUDING point of diversion objections to all four surface water rights), whereas the *Objection* publicly available on IDWR's website DOES contain the chart, as does the *Objection* filed with the SRBA court.⁴⁵

IV. ATTORNEYS FEES

Under Idaho Rules of Civil Procedure 37 and 54 the Special Master is authorized to award sanctions against the SWC for its failure to comply with the Idaho Civil Rules. Specifically, Rule 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)]

⁴³ See both Standard Form 1 Objection as Exhibit D.2 to Affidavit of Travis L. Thompson and the Standard Form 1 Objection as Exhibit B to Affidavit of Celeste Thaine.

⁴⁴ Compare Standard Form 1 Objection as Exhibit D.2 to Affidavit of Travis L. Thompson with the Standard Form 1 Objection as Exhibit B to Affidavit of Celeste Thaine.

⁴⁵ Compare Standard Form 1 Objection as Exhibit D.2 to Affidavit of Travis L. Thompson with the Standard Form 1 Objection as Exhibit B to Affidavit of Celeste Thaine.

In addition, Rule 54(e)(1) permits attorney's fees for cases pursued "frivolously, unreasonably, or without foundation" ⁴⁶

During discovery, the SWC dragged their heels and 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" ⁴⁷ even when the pertinent information was readily available in the April 2006 Supplemental Director's Report upon which the SWC relied. As discussed in Pocatello's *Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under 42-1425*, "the truth of the matter" was always readily obtainable within the April 2006 Supplemental Director's Report upon which the SWC's allegedly relied.

With the submission of its summary judgment motion, the SWC has incorrectly stated "the truth of the matter(s)" plead and filed by the City of Pocatello in 2003. As Pocatello has shown in this brief, the SWC's *Memorandum in Support the SWC's Motion For Summary Judgment* contains numerous errors and factual inaccuracies that are extremely time-consuming for Pocatello to research. The SWC's failure to comply with discovery rules, and failure to submit factually accurate documents to this court prejudices and limits Pocatello's ability to develop its own case because Pocatello must invest time and resources parsing and correcting the SWC's factually muddled briefs.

⁴⁶ Idaho Rule of Civil Procedure 54(e)(1).

⁴⁷ This answer is located throughout SWC's Answers to Pocatello's Discovery, Exhibit E to Affidavit of Joyce Angell, in support of *Pocatello's Motion For Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, pages 5, 6, 7, 8, 10, 11, 12, 17, 21, 22, 23, 26, 29, 30, 31, 38, 38, 44.

As a sanction for the SWC's dilatory behavior, Pocatello respectfully requests that the Special Master require the SWC to pay Pocatello's attorneys fees and costs related to the drafting and filing of the *Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under 42-1425*, and *Response Brief to the Surface Water Coalition's Motion For Summary Judgment*.

CONCLUSION

In conclusion, Pocatello respectfully requests that the Special Master DENY the SWC's Motion for Summary Judgment because (1) the accomplished transfer statute 42-1425, allows Pocatello to confirm changes to its water rights, negating the need to file a transfer under 42-222, (2) Pocatello's objections raise triable issues as to pre-1987 changes in its water rights and the objections were brought in conformance with applicable SRBA procedure, and (3) as a matter of law, IDWR is not estopped to correct its prior errors of law.

Pocatello also respectfully requests that the Special Master GRANT Pocatello's motion for summary judgment because it is still undisputed that the purpose of use of Pocatello's water rights is municipal, and therefore the City's motion for summary judgment of purpose of use is still appropriate, despite the SWC's confusing rendition of the issues.

In addition, Pocatello respectfully requests that the Special Master GRANT attorneys fees to Pocatello pursuant to I.R.C.P. 37(C) and 54(e)(1).

DATED this 12th day of December 2006.

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

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of December 2006, I caused a true copy of the foregoing **CITY OF POCA TELLO'S RESPONSE BRIEF TO THE SURFACE WATER COALITION'S MOTION FOR SUMMARY JUDGMENT** 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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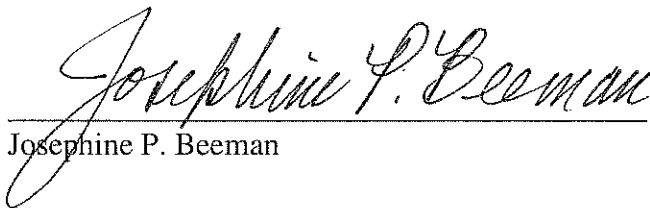
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Josephine P. Beeman

Z:\1776\100\LIT\DISC\SN7442

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
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