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IN THE COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos.: EXHIBIT A
	)	(City of Pocatello)
Case No. 39576	)	
	)	RESPONSE TO THE CITY OF POCA TELLO'S
	)	SUMMARY JUDGMENT MOTION ON MUNICIPAL
	)	PURPOSE OF USE, INTERCONNECTION, &
	)	INJURY UNDER I.C. § 42-1425
	)	
	)	

COMES NOW, American Falls Reservoir District #2, A&B Irrigation District, Burley
 Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal
 Company and Twin Falls Canal Company (collectively "Surface Water Coalition" or

“Coalition”), by and through their undersigned attorneys of record, and submits this *Response to the City of Pocatello’s Motion for Summary Judgment on Municipal Purpose of Use, Interconnection & Injury Under I.C. § 42-1425*, pursuant to AO1(6)(f) and IRCP 56(c). This *Response* further supported by the *Second Affidavit of Travis L. Thompson* filed together herewith. For the reasons set forth below, in addition to the reasons set forth in the *Motion for Summary Judgment*, and supporting memorandum, filed by the Coalition on November 30, 2006, this Court should deny Pocatello’s motion.

INTRODUCTION

Pocatello seeks summary judgment on three categories of its objections: 1) a municipal purpose of use for four previously licensed irrigation water rights; 2) a finding that certain waters in Basin 29 are interconnected with other waters in the Snake River Basin; and 3) that no I.C. § 42-1425 injury has been proven with respect to Pocatello’s alternate points of diversion for its interconnected culinary system. Summary judgment can only be granted when there is no “genuine issue as to any material fact” **and** the moving party is entitled to judgment “as a matter of law.” I.R.C.P. 56(c); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514 (1991). Pocatello’s motion should be denied because it is based on disputed facts and is completely lacking with respect to supporting legal authority for the theories behind its objections.

A. Pocatello’s Lack of Legal Authority to Support its Motion.

First, Pocatello cites no legal authority that would allow this Court to change licensed irrigation water rights into municipal water rights. As described in the Coalition’s *Motion for Summary Judgment*, Pocatello cannot collaterally attack its licenses in the SRBA. Therefore, its objections to the purpose of use for water rights #29-7118, #29-7119, #29-7431 and #29-07770 should be dismissed as a matter of law.

Second, Pocatello's motion as to the interconnection of certain waters is moot pursuant to the Presiding Judge's decision in the *Basin-Wide 5* proceedings and this Court's order dismissing Pocatello's "separate streams" objections with prejudice on July 14, 2006. As determined by the Presiding Judge in the *Basin-Wide 5* proceedings, "all 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." *See* Ex. A to *Second Thompson Aff.* (*Memorandum Decision and Order of Partial Decree* and Exhibit A (Subcase No. 91-00005, February 27, 2002)). Since Pocatello's "separate streams" objections were dismissed by this Court, the above general provision will apply to Pocatello's water rights and an order on summary judgment that Mink Creek, Gibson Jack Creek, the so-called LVPR, the ESPA, and the Snake River are interconnected sources of water is unnecessary and moot.

Finally, Pocatello seeks summary judgment that there is no 42-1425 injury to other water rights by reason of Pocatello's operation of alternate points of diversion for its interconnected culinary system. Pocatello essentially reargues its first summary judgment that was denied by the Court's *Order on Summary Judgment* issued August 18, 2006. The "injury" issue was remanded to IDWR with the Special Master retaining concurrent jurisdiction. Neither IDWR nor Pocatello has provided any information that these additional proceedings have occurred or are likely to occur in the near future. In other words, the additional conclusions that the Court required IDWR to make with respect to the 42-1425 injury question have not been made (to the best of the Coalition's knowledge). Despite the above ruling, Pocatello attempts to take another summary judgment bite at the injury apple with its present motion. The Court has already decided this issue and determined summary judgment was not appropriate. The Court's prior order requires a denial of Pocatello's motion, again.

B. Pocatello's Misuse of Discovery Responses.

In support of its various theories outlined above, Pocatello offers a misleading recitation of the Coalition's discovery responses and concludes that the "answers ... result in the admission of facts supporting the factual basis for Pocatello's motion for summary judgment." *Pocatello Br.* at 2. Even if this were true, which it is not, Pocatello's motion must still be denied since it has no legal basis to warrant summary judgment. In other words, Pocatello's "undisputed facts", standing alone, do not justify summary judgment without proper legal authority and support. As set forth below, Pocatello's argument is devoid of any supporting legal theory based on statute, rule, or caselaw.

Furthermore, as evidenced by the discovery responses themselves (and not Pocatello's mischaracterization of those answers), the Coalition disputes Pocatello's factual assertions. While some of this is due to a lack of readily available information, much of it is a result of Pocatello's misinterpretation and misuse of the 2006 Supplemental Director's Report ("*706 Report*"). For example, Pocatello has construed a determination in the *706 Report* that Basin 29 surface waters and groundwaters are interconnected to somehow mean that Pocatello can automatically divert surface water rights through its groundwater wells. The Coalition is unaware of the basis for this claim and indicated so in its responses.

In sum, Pocatello's efforts to collaterally attack and redefine its licensed irrigation water rights should be rejected. In addition, the interconnection of all waters in Basin 29 with the rest of the Snake River Basin has already been determined in the SRBA through the Presiding Judge's *Basin-Wide 5* order. Finally, the 42-1425 "injury" question has been remanded to IDWR for further proceedings. Consequently, Pocatello's motion should be denied.

ARGUMENT

I. The Coalition Denies Pocatello's Factual Assertions.

The main thrust of Pocatello's motion for summary judgment is that certain discovery responses by the Coalition must be construed as an admission of certain factual evidence which, Pocatello concludes, makes their "municipal use" and "42-1425 injury" issues ripe for summary judgment. *See Pocatello Br.* at 1-2. Yet, Pocatello's mischaracterizations of the Coalition's responses to certain discovery requests, as well as its misinterpretation of information contained in the Director's *706 Report*, do not somehow render Pocatello's facts "undisputed". The discovery responses and the *706 Report* speak for themselves. As the Court can readily determine for itself, the facts Pocatello offers in support of its motion are plainly in dispute.¹

Notably, Pocatello does not even allege that the Coalition's responses to the discovery requests for water rights #29-7118 and #29-7119 constitute an admission. *See Pocatello Br.* at 7-9 (addressing perceived admissions by the State only). Pocatello does allege, however, that the Coalition's response to requests relative to water right #29-7770 were inadequate, and therefore "should be construed as admissions," because the "'truth of the matters' was readily obtainable within the [*706 Report*]." *Id.* at 9. The only "truth of the matter" revealed in the *706 Report* is that Pocatello's water right #29-07770 was licensed for irrigation purposes on January 2, 2003. *See Ex. B to Second Thompson Aff.* Pocatello did not appeal this license and thereby accepted the "irrigation" purpose of use. The *706 Report* does not establish that Pocatello's water right is or has ever been used for "municipal" purposes.

¹ On the other hand, the facts presented in the Coalition's *Motion for Summary Judgment* are not in dispute, therefore the Court can grant the Coalition's motion.

For example, a review of Exhibit N to the *706 Report* supports the Coalition's motion, not Pocatello's.² Specifically, Pocatello filed an application for permit for water right #29-07770 on December 7, 1989. *See Ex. C to Second Thompson Aff.* In the application (filed two years after the commencement of the SRBA), Pocatello indicates that the "water from the well will be necessary to irrigate the various yearly crops" at the city's "proposed sludge management site." *See id.* Pocatello represented that the water right would be used for "irrigation." *See id.* Likewise, when Pocatello filed its notice of a claim to a water right with this Court in 1990, it once again claimed that the use would be for "irrigation." *See Ex. R to Thompson Aff.* Accordingly, notwithstanding a review of the "license and claim files," the Coalition is unaware of any basis in fact or law, or any change in fact or law which would cause this right, originally claimed as an irrigation right, and licensed for the same purpose in 2003, to now be a "municipal" water right.

Furthermore, the Coalition's objection to Pocatello's vague and undefined phrases such as "municipal responsibility", "as part of its obligations as a municipality", and "airport security", as they relate to the use of Pocatello's irrigation water right #29-07770, is no basis for construing those objections as an admission. *See Pocatello Br.* at 9.

In sum, Pocatello's claim that the Coalition has "admitted" certain facts with respect to the four licensed irrigation water rights in question is nothing more than a misrepresentation of the facts to this Court. The Coalition did not admit that Pocatello used its licensed irrigation water rights for "municipal" purposes. The *706 Report* does not suggest that Pocatello used its licensed irrigation water rights for "municipal purposes". Pocatello's ambiguous word games in its discovery requests do not change the elements of its licensed irrigation water rights. At the

² Information regarding water right #29-07770 is contained in Exhibit N to the Director's *706 Report*. (mistakenly under claim file for water right #29-7382 in the copy served on the Coalition).

least, Pocatello's offered facts are in dispute warranting a denial of its summary judgment motion regarding "municipal use".

Notwithstanding the disputed facts, the Court can deny Pocatello's motion due to a missing legal basis to support its novel theory that licensed irrigation water rights can somehow turn into "municipal" water rights in the SRBA. As described below, the fact Pocatello, a city, owns "irrigation" water rights does not transform them into "municipal" water rights.

II. There is No Legal Basis to Change Pocatello's Licensed Irrigation Water Rights into "Municipal" Water Rights.

Pocatello's motion with respect to the "municipal" purpose of use for its licensed irrigation water rights, #29-7118, #29-7119, #29-7431, and #29-07770 fails as a matter of law. As explained in the Coalition's *Motion for Summary Judgment*, such an effort equates to an impermissible collateral attack on the licensing proceeding before IDWR. In other words, if Pocatello believed that its water rights were used for "municipal" purposes, it could have filed the appropriate applications for permit, or appealed the licenses when they were issued. Instead, Pocatello expressly applied for and accepted the water rights as licensed by IDWR, for "irrigation" purposes. IDWR recommended the same to this Court through the Director's recommendations for the water rights. As discussed in greater detail in the Coalition's *Motion for Summary Judgment*, filed in this matter on November 30, 2006, Pocatello is attempting to do, through an objection in the SRBA, what can only be done through an administrative transfer process before IDWR. Pocatello cannot change the point of diversion or purpose of use via an objection to a Director's recommendation in the SRBA, particularly when the water rights in question were recommended (1) as they were previously licensed; *and* (2) as they were originally claimed by Pocatello in 1990. Accordingly, Pocatello's motion should be denied and the relevant objections must be dismissed with prejudice.

A. Pocatello's "Capacity and Function" and the Use of the Water Rights to "Benefits Its Inhabitants" Does Not Alter the Rights' Purpose of Use.

Pocatello alleges that the Court should transform its prior licensed irrigation water rights into "municipal" water rights as a matter of law on the basis that these rights are "used by the City in its capacity and function as a municipality" and that the use "benefits its inhabitants". Pocatello claims "[a]s a matter of law, municipal water rights are defined by their use for purposes which benefit the City's inhabitants." *Pocatello Motion* at 2. Pocatello then cites I.C. § 42-202B and a Special Master's Report in subcase no. 34-10030 for support. Neither the statute nor the City of Arco's settled recommended partial decree establish the rule of law Pocatello seeks.³

At first glance, Pocatello's so-called legal basis for summary judgment is just a statement of fact, not a rule of law. After all, in what other "capacity and function" can a city use a water right other than as a municipality? A city is a municipality, a municipality is a city. Moreover, who else does a city's water use "benefit" other than its inhabitants? Stating what appears to be obvious, without any valid legal authority, is insufficient to change a water right's element as a matter of law in the SRBA.

Notwithstanding Pocatello's lack of legal support for its theory, and assuming for argument's sake that Pocatello uses the water rights "in its capacity and function as a municipality" for the "benefit of its inhabitants", such a qualifier does not somehow alter the elements of its previously licensed water rights. In other words, a water right's purpose of use element does not identify that it is used by a water right holder in the holder's particular

³ The elements of the City of Arco's water right #34-10030 were stipulated to through a Standard Form 5. *See* Ex. F to *Second Thompson Aff.* Pocatello was a respondent in that subcase, the Coalition is unaware of the basis of Pocatello's response. The purpose of use at issue in the subcase, "municipal", was claimed by Arco and recommended by IDWR. The parties stipulated to the purpose of use as being "municipal" and that element was unchanged in the *Special Master's Report Findings of Fact; Conclusions of Law* entered on April 8, 1997. Contrary to Pocatello's insinuations, there was no disputed issue as to the claimed "municipal" use, and the report did not establish any rule of law for the SRBA.

“capacity and function”, whatever that “capacity and function” may be, as a city, a water company, a farmer, a rancher, a business, or as any other entity. Cities can own water rights for a variety of purposes apart from a municipal use, including for irrigation, domestic, recreation, hydropower, and commercial purposes. *See* Ex. D to *Second Thompson Aff.* (Examples of irrigation and other rights held by cities). The purpose of use is an element defined by the terms of the water right, not by the water right holder’s status or what the right holder thinks the purpose of use should be. In other words, the water right, not the water right holder, defines the purpose for which it may be used.

A water right’s elements, including the purpose of use, define how and when a right may be used. An irrigation water right typically contains a season of use and specific place of use. For example, Pocatello’s water right #29-7119 can be used between April 1st and November 1st for 300 acres in Sections 9 and 16, Township 6 South, Range 33 East, Power County. A municipal water right is typically defined for a year-round season of use, and can be used for a variety of purposes within a city’s service. Transferring an irrigation water right into a municipal right unquestionably expands the nature and scope of the right. Indeed, Pocatello readily argues for such an expansion in its motion by alleging “[t]hese necessary municipal functions, which require the use of water may include, but are not limited to, maintenance of parks and green spaces, airport safety, and EPA-approved biosolids programs to treat and dispose of domestic sewage.” *Pocatello Motion* at 2 (emphasis added).

Furthermore, a water right’s purpose of use does not change just because “it benefits the city’s inhabitants.” For example, just because a city may own and use a non-consumptive hydropower right “in its capacity and function as a municipality”, does not transform that right into a consumptive “municipal” water right to be used for a host of other purposes. In addition,

even though a city's hydropower right "may benefit its inhabitants" by providing electricity or a source of revenue for the city, such a fact does not transfer the right into a "municipal" water right. If a city owns a consumptive use water right, such as a licensed irrigation water right (that defines a specific place and season of use), and the city wants to change that right to a "municipal" purposes of use (with an enlarged place and season of use), the city has the right to file an application for transfer with IDWR pursuant to I.C. § 42-222. The SRBA does not provide a substitute for that process.

B. The City of Arco's Stipulated Water Right (#34-10030) Does Not Establish a Rule of Law That a City's Licensed Irrigation Water Rights Can Transform Into Municipal Water Rights.

In addition, although a water right for "municipal purposes" acquired after 1996 is now defined as water for "residential, commercial, industrial, irrigation of parks and open space, and related purposes . . .", such a definition does not alter a city's water right that is licensed for a specific purpose of use, like irrigation. I.C. § 42-202B(6); *see also Special Master's Report for Water Right No. 34-10030* at 2, n. 1 ("the 1996 statutes did not alter pre-1996 rights held by municipalities."). All of the water rights at issue in this proceeding were acquired by Pocatello prior to 1996 (except #29-7770 which was licensed for irrigation purposes in 2003).

Pocatello's reliance upon the proceedings involving the City of Arco's beneficial use claim is inapposite and is of no relevance for these subcases. First, Arco filed a *beneficial use claim* for a "municipal" water right. The Director *recommended* the water right with a "municipal" purpose of use (unlike the facts here). *See* Ex. E to *Second Thompson Aff.* The parties to the Arco subcase then *stipulated* to the "municipal" purpose of use through a *Standard Form 5*. *See* Ex. F to *Second Thompson Aff.* The subcase is clearly distinguishable since it did not involve a previously *licensed* irrigation water right. Moreover, here the respondents and

IDWR do not agree that Pocatello's use is "municipal". No *SF5s* have been entered into stipulating to the use Pocatello believes it makes. Finally, the Court in the Arco subcase found that "'municipal' water rights encompass a broad range of uses to which such water rights are used for the benefit of the municipality's inhabitants." *See Subcase 34-0030 Report* at 2. This statement further describes Arco's "municipal" water right, nothing more. It does not, as Pocatello implies, create a rule of law that any water rights owned by a city, including licensed irrigation water rights, somehow become "municipal" water rights in the SRBA. It is well established that cities can own irrigation water right rights. *See Ex. D to Thompson Aff.*

C. Pocatello Has Failed to Provide Any Facts Demonstrating an Accomplished Transfer for Its Licensed Irrigation Water Rights.

Pocatello alleges in a footnote that the "actual pre-SRBA use was municipal for water rights #29-7118, #29-7119, #29-7431, and #29-7770" and that under I.C. § 42-1425 the Court "can decree this actual use without collaterally attacking the licenses." *Pocatello Br.* at 6, n. 14. Although Pocatello insinuates an "accomplished transfer" argument as to the purpose of use for its water rights (without any supporting information), its own alleged facts admit no other use other than irrigation:

1. Water right 29-7118 always has been used . . . to manage . . . municipal land . . .;
2. Water right 29-7119 always has been used . . . to manage . . . municipal land . . .;
3. Water right 29-7770 always has been used . . . for the land application . . .;
4. Water right 29-7431 always has been used . . . to apply effluent from the City's wastewater treatment plant to land . . .;

See Pocatello Br. at 3, 4.

The terms "manage land" and "land application" are simply another way to describe "irrigation use". Moreover, the terms "manage land" and "land application" are not recognized

“purposes of use” for water rights. *See* Ex. G to *Second Thompson Aff.* (List of “Water Uses” used by IDWR, “manage the land” and “land application” as not listed as a recognized purpose of use). Regardless, Pocatello does not claim that it actually used the water under these licensed water rights for any “residential, commercial, industrial, or other related purposes”. Finally, Idaho Code § 42-1425 only applies to a change of place of use, point of diversion, nature or purpose of use, or period of use. *See* I.C. § 42-1425(2). Pocatello has not made any showing of any change of the water rights at issue. The fact that Pocatello derives benefits from irrigation does not change the fact that the water rights are used for irrigation as previously licensed. There being no showing of a change in the nature or purpose of use, Pocatello cannot rely upon Idaho Code § 42-1425 in order to obtain approval of an accomplished transfer.

Accordingly, assuming the above facts are undisputed, they do not support Pocatello’s theory to change its licensed irrigation water rights into municipal water rights as a matter of law. Just the opposite, they support the Coalition’s motion and the dismissal of Pocatello’s objections to the same.

In addition, the facts in these subcases reveal quite a different story than that claimed in Pocatello’s summary judgment motion. First, all of the licensed water rights were originally claimed as “irrigation” water rights by Pocatello in 1990. *See* Exs. G.1, G.2, M, and R to *Thompson Aff.* If the use being made prior to 1987 was “municipal” one would have expected Pocatello to claim that use in 1990. Moreover, with respect to water right #29-7770, Pocatello submitted proof of beneficial use on April 5, 1990, swearing to the “irrigation” of 286 acres as the extent of use of the water right. *See* Ex. Q to *Thompson Aff.* These sworn statements made on behalf of Pocatello contradict the facts alleged in its summary judgment motion.

In summary, Pocatello fails to identify any legal basis for its summary judgment claim that licensed irrigation water rights can transform into municipal water rights by way of the SRBA. Pocatello readily accepted these licenses when they were issued by IDWR in 1975, 1987, and 2003. The licenses identify an “irrigation” purpose of use and are binding upon Pocatello. The fact that Pocatello uses the water for irrigation “in its capacity and function as a municipality” and that it “benefits the inhabitants of Pocatello” does not change the water rights’ licensed purpose of use. Pocatello cannot use the SRBA as an “end-around” the licensing proceeding before IDWR. The Court should deny Pocatello’s motion regarding “municipal” purpose of use.

III. Pocatello’s Summary Judgment Request Relative to “Interconnection” is Moot.

Pocatello’s second request for summary judgment seeks a ruling as a matter of law that “Mink Creek, Gibson Jack Creek, the LPRVA,⁴ the ESPA, and the Snake River [are] interconnected sources of water.” *Pocatello Br.* at 18. This request is moot. Since Pocatello’s “separate streams” objections have been dismissed with prejudice, the general “connected sources” provision established by the Presiding Judge in the *Basin-Wide 5* proceedings applies to Pocatello’s water rights. *See Ex. A to Second Thompson Aff.* In other words, there is nothing for this Court to decide on that issue.

The Idaho Supreme Court has held that an issue becomes moot when “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome,” or if the issue “presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.” *Idaho Schools for Equal Educational Opportunity v. Idaho State Board of Education*, 128 Idaho 276, 281 (1996). Pocatello’s “interconnection” issue is no longer “live” given the general provision that will apply to its partial decrees. Moreover, any summary

⁴ See below for a discussion regarding the Coalition’s objection to Pocatello’s continued use of this phrase.

judgment decision by this Court on the issue “will have no practical effect upon the outcome.” Any decision that the waters in Basin 29 are “interconnected” will not change the “connected sources” general provision decreed by the Presiding Judge. Accordingly, such a decision will have no practical effect upon Pocatello’s water rights and therefore is moot.

Finally, even if this Court were to grant Pocatello’s motion as to this point, Pocatello would not receive the benefit it seeks. A determination by this Court that these water sources are interconnected does not mean that Pocatello can unilaterally change the points of diversion for certain water rights (#29-271, #29-272, #29-273, #29-4222) from surface water to groundwater sources. Pocatello cannot use the SRBA as a way to evade the requirement to file an application for transfer with IDWR pursuant to I.C. § 42-222. For the reasons described above, Pocatello’s motion regarding the “interconnected” issue is moot and therefore should be denied.

A. Pocatello’s Mink Creek and Gibson Jack Creek Surface Water Rights are not Interconnected to the Extent that the Points of Diversion can be Transferred to Groundwater Wells Via an SRBA Objection.

The Coalition rejects Pocatello’s attempts to unduly expand the scope of the *706 Report* as it relates to interconnectedness in Basin 29. While the report clearly indicates that the surface water and groundwater sources in Basin 29 are interconnected, such an admission does not mean that surface water right can simply be transformed into groundwater rights. Accordingly, the Coalition denied any attempt by Pocatello to expand the scope of its surface water rights via answers to interrogatories and requests for admission.

Any attempt to divert surface water rights through groundwater wells implicates a number of potential issues which cannot be addressed through discovery requests. The Coalition’s response addresses some of these issues:

The claimant has not provided any information to support its objection that these surface water rights are sufficiently interconnected with an aquifer nor

has the claimant provided any information on the effects of the timing or time lags of flow in the aquifer on water availability to allow the right to be converted to a ground water right and diverted through Pocatello's system of municipal wells. Surface water has not been diverted to ground water under a right to recapture it from a well. Water from the creeks in question that seeps into the ground becomes ground water that was subject to appropriation and any senior water rights to the ground water and surface water to which the ground water flows.

See SWC Response to Pocatello's Discovery Requests at 4; Ex. E to *Angell Aff.*

Pocatello asserts that the Coalition was evasive in its answers relative to the alleged interconnectedness of these water rights. In fact, this is incorrect. It is unclear what exactly Pocatello means when it uses the phrase "interconnected." Given Pocatello's attempt to expand the scope of the *706 Report* by allowing the diversion of surface water rights via groundwater wells, apparently Pocatello's definition of "interconnected" is much broader than that used by this Court and understood by the Coalition. Thus, "It is impossible to determine what Pocatello means by the term." *See id.* at 5; Ex. E to *Angell Aff.*

The Coalition objects to Pocatello's use of the term "Lower Portneuf River Valley Aquifer" ("LPRVA") as though it were a commonly recognized name for a separately defined groundwater source in Basin 29. Such a term, when used as liberally as Pocatello, could arguably depict a water source that is hydrologically independent from the Eastern Snake Plain Aquifer ("ESPA"). Yet, Pocatello provides no evidence support such a contention. In fact, to the best of the Coalition's knowledge, the term "has not been used by any other recognized water resource agency." SWC Response to Pocatello's Discovery Requests at 5; Ex. E to *Angell Aff.*

Pocatello's response to the Coalition's objection is confusing and without merit. First, Pocatello counters by citing to reports prepared by private consulting firms, *Pocatello Br.* at 11 n.39, reports prepared for other state and federal agencies (none of which are alleged to have any authority involving water), *id.* at n.40, and to the website of a certain environmental group, *id.* at

n.41. Recognition by these entities does not constitute recognition by IDWR or a water district that the aquifer underlying Pocatello is a separate hydrologic feature from the ESPA. In fact, with all its citations to the *706 Report* regarding interconnectedness and the aquifer, Pocatello fails to show that the Department or the Director have ever acknowledged this term.

Pocatello further contends that “the SWC’s own expert report acknowledges the LPRVA.” *Pocatello Br.* at 13. Such an assertion is a blatant mischaracterization of the Coalition’s rebuttal expert report (“Rebuttal Report”). In fact, instead of acknowledging the LPRVA, the Rebuttal Report reinforces the fact that the phrase “Lower Portneuf River Aquifer” is not a recognized term:

The designation of the aquifer underlying the Portneuf river at Pocatello and downstream as the “Lower Portneuf River Valley Aquifer” by Welhan in the July 2006 report⁵ and earlier reports and by Sullivan in the Spronk Water Engineers September 29, 2006 report ***is apparently for geographic definition only and not to define this region of the aquifer as independent hydrologically from the [ESPA] and the Snake River.***

See Rebuttal Report at 3; Ex. C to *Angell Aff.* (emphasis added). Any attempt by Pocatello to construe this language in the Rebuttal Report as an admission by the Coalition is wrong.

The Coalition has rejected Pocatello’s attempt to expand the findings of the *706 Report* and to ignore established IDWR procedures. Now, Pocatello is attempting to fill the legal and factual gaps in its objections by construing the Coalition’s responses as legally insufficient – and therefore, admissions. In fact, its objections are legally and factually unsupportable. Therefore, Pocatello’s motion should be denied.

⁵ This Wehlen report is the same report cited to by Pocatello as support for its contention that the LPRVA is a recognized term. *Pocatello Br.* at 11 n.40.

IV. Summary Judgment on the 42-1425 “Injury” Question Was Already Denied and Remanded For Proceedings Before IDWR.

Finally, Pocatello seeks summary judgment that there is no 42-1425 injury to other water rights by reason of Pocatello’s operation of alternate points of diversion for its interconnected culinary system. Pocatello essentially reargues its first summary judgment that was denied by the Court’s *Order on Summary Judgment* issued August 18, 2006. In that decision the Court found:

However, construing the language in favor of the non moving party shows that it addresses actual injury. The injury IDWR discusses is to the priority of rights on a given source. Injury to a water right would occur when another right takes precedence. . . . ***The 706 Report raises genuine issues of material fact on the injury issue.*** Therefore, this Special Master declines to strike the condition under the summary judgment standard.

* * *

Whether IDWR’s conclusion on injury is correct is a matter for trial.

Order at 5, 6 (emphasis added).

Given the Court’s prior decision, Pocatello’s present motion is barred and should be denied. Consistent with the language of 42-1425, the subcases were remanded to IDWR with the Court retaining concurrent jurisdiction. Neither IDWR nor Pocatello has provided any information that these additional proceedings have occurred or are likely to occur in the near future. In other words, the additional conclusions that the Court required IDWR to make with respect to the 42-1425 injury question have not been made (to the best of the Coalition’s knowledge). The Court has already decided this issue and determined summary judgment was not appropriate. The Court’s prior order on this issue requires a denial Pocatello’s motion on the “injury” question, again.

CONCLUSION

Pocatello's motion for summary judgment fails as a matter of law. As outlined above, the facts Pocatello offers are not "undisputed." Next, Pocatello fails to offer any supporting legal authority for its motion. Pocatello cannot transform licensed irrigation water rights into municipal water rights through the SRBA. Finally, the "interconnected" issue and the 42-1425 "injury" issue have already been decided by the Presiding Judge in the *Basin-Wide 5* proceedings and this Court through the first summary judgment order. The Court should deny Pocatello's motion.

Dated this 12th day of December, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2006, I served a true and correct copy of the foregoing SURFACE WATER COALITION'S RESPONSE TO POCA TELLO'S SUMMARY JUDGMENT MOTION ON MUNICIPAL PURPOSE OF USE, INTERCONNECTION & INJURY UNDER I.C. § 42-1425 on the person(s) listed below, in the manner indicated:

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EXHIBIT A

Subcase Nos.:

- 29-00271
- 29-00272
- 29-00273
- 29-07118
- 29-07119
- 29-07431
- 29-07770