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DEPARTMENT OF
WATER RESOURCES

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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

	)	
	)	Subcase Nos.: EXHIBIT A
In Re SRBA	)	(City of Pocatello)
	)	
	)	SURFACE WATER COALITION'S REPLY TO THE
Case No. 39576	)	CITY OF POCATELLO'S RESPONSE TO THE
	)	SURFACE WATER COALITION'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	
_____	)	

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 submit this *Reply to the City of Pocatello’s Response Brief to the Surface Water Coalition’s Motion for Summary Judgment*, pursuant to AO1(6)(f) and IRCP 56(c). For the reasons set forth below, in addition to the reasons set forth in the briefing in response to Pocatello’s motion for summary judgment, this Court should grant the Coalition’s motion.

INTRODUCTION

Pocatello’s response brief misses the point. Instead of addressing the law which prohibits a claimant from using the accomplished transfer statute where there has been no change to any element of a water right, Pocatello spends much of its response addressing alleged factual errors in the Coalition’s brief. These alleged factual errors, however, do not impact this Court’s decision on summary judgment. Moreover, Pocatello’s failure to address the Presiding Judge’s *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* (Subcase No. 29-11609) is telling. Pocatello cannot use the SRBA to collaterally attack its prior decrees and licenses. Yet, that is exactly what Pocatello is attempting to do. In fact, for the first time, Pocatello is even going so far as to claim IDWR “erred” when it licensed Pocatello’s irrigation ground water rights. *Pocatello Response* at 3, 15. Apparently, after claiming and using these water rights for “irrigation” purposes on specific places of use (for over thirty years for certain rights), Pocatello has now decided that IDWR erred and that these rights should have been licensed as “municipal” rights with a place of use anywhere in the city’s municipal limits.

Despite this alleged “error”, it is undisputed that Pocatello did not appeal any of the licenses when they were issued, including the license for #29-07770 which was issued in January

2003. The desperation in Pocatello's arguments is becoming more obvious and the undisputed facts on the matter show that the Coalition is entitled to judgment as a matter of law.

In addition, Pocatello fails to address the real issue regarding its attempt to transfer the points of diversion for water rights #29-271, #29-272, and #29-273 via an SRBA objection. Again, Pocatello's failure to address the controlling law on this issue, this Court's Rule 4(d)(1)(b), is telling. Instead, Pocatello provides vague and unsupported statements about "a transfer to [] wells which began operating as APOD's before 1969." *Pocatello Response* at 10. This unsupported statement is irrelevant and is found nowhere in the *Notices of Claim* for these surface water rights. It is undisputed that Pocatello claimed these rights, in 1990, with surface water points of diversion only. It is also undisputed that Pocatello has not amended its claims for water rights #29-271, #29-272, and #29-273. Presumably, Pocatello was aware of its water delivery systems when it claimed these water rights. Furthermore, had Pocatello actually transferred these rights to a well prior to 1969, as its vague statement seems to infer, one would have to presuppose that Pocatello would have realized that "fact" before 1990. In addition, Pocatello's passing statement that its four surface water rights "are treated as a group" is without any factual or legal support. All four water rights were claimed separately. *See Ex. A to Aff. of Paul L. Arrington*; Exs. B.1, B.2, and B.3 to *Thompson Aff. in Support of Motion for Summary Judgment*.¹ Although Pocatello later amended water right claim #29-4222, it failed to do the same for #29-271, #29-272, and #29-273. Parties to the SRBA have not put been on notice of the changes to the claims Pocatello "believes" it has made. Idaho law, including this Court's rules, prohibits Pocatello from amending its claims by way of an objection.

¹ The documents attached to the *Affidavit of Paul L. Arrington* are already part of the record in these subcases and another subcase on file with the SRBA Court. However, for the convenience of the Court and the parties the Coalition submits them as exhibits for reference.

Finally, Pocatello is not entitled to receive attorneys' fees for drafting and filing its own summary judgment motion or in responding to the Coalition's motion. The Coalition did not force Pocatello to file a summary judgment motion in these subcases. In essence, Pocatello is arguing that the Coalition's refusal to recognize the city's twisted interpretation of the 2006 Supplemental Director's Report ("*706 Report*") justifies an award of attorneys' fees. As discussed in greater detail in the Coalition's *Response to the City of Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under 42-1425*, there is no legal or factual basis, in the *706 Report* or otherwise, to justify the objections raised by Pocatello. As such, any "extremely time-consuming ... research" simply follows from Pocatello's attempt to justify its own unsupportable objections or clarify its initial confusing and improper objections filed in these subcases.² Moreover, Pocatello's own motion alleges that its objections create "triable issues of fact". With that statement, if indeed the city believes it is true, Pocatello had no basis to move for summary judgment in the first place. Rule 56(c) is clear that summary judgment is only appropriate when there is no "genuine issue as to any material fact". The Court should disregard Pocatello's attempt to make someone else pay for its misdirected filings in these subcases. Accordingly, Pocatello's request for a sanction and attorneys' fees should be denied.

² Pocatello's alleged "time-consuming research" is confusing since the city's counsel is presumably in possession of the various water right files regarding Pocatello's claims in the SRBA, and the documents referenced in the Coalition's motion were submitted with an affidavit. The confusion of certain facts in this case surrounding Pocatello's objections, as explained in greater detail below, stems from Pocatello's multiple objections filed in each subcase on November 14, 2003. Pocatello apparently filed separate objections in each subcase entitled "Attachment A". Exs. B, C to *Arrington Aff.* These filings were apparently rejected by this Court. For example, *see SRBA Subcase Summary Report 29-07770*, docket entry "11-18-2003 ORIGINAL OBJ 1 SUBMITTED TO COURT 11/14/03 DID NOT CONFORM TO OBJ FORMAT." Ex. D to *Arrington Aff.* Accordingly, any objections filed by Pocatello on November 14, 2003 are apparently not "at issue" or relevant for resolving these motions since they were rejected by the Court.

ARGUMENT

I. Pocatello Ignores the Binding Effect of its Prior Decreed and Licensed Water Rights and the Presiding Judge's Decision in Subcase No. 29-11609.

Pocatello's *Response* completely ignores I.C. § 42-220 and the Presiding Judge's *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* (subcase no. 39-11609) ("*Order*"). Section 42-220 expressly states that a "license shall be binding upon the state as to the right of such licensee . . ." I.C. § 42-220. The Presiding Judge explained that licenses issued under this statute are "also binding on the license holder." *Order* at 12. The rule is necessary to prevent water right holders from collaterally attacking their own water rights "under a more favorable legal theory in a subsequent proceeding." *Id.* at 13. Other than claiming that its surface water rights can be "re-examined, and even modified" under an accomplished transfer theory, Pocatello does not address this decision as it relates to its licensed ground water rights. *Pocatello Response* at 11.

II. Since There has Never Been Any Change to the Use or Diversion of Water Rights 42-7770, 29-7431, 29-7118 and 29-7119, Section 42-1425 Does not Save Pocatello From the Requirement to File for a Transfer.

Although the "accomplished transfer" statute (I.C. § 42-1425) authorizes certain pre-1987 changes to a water right under certain conditions, the statute does not apply to Pocatello's licensed ground water rights. Indeed, Pocatello's own alleged facts demonstrate that Pocatello has "always used" water rights #29-7118, #29-7119, #29-7431, and #29-07770 for "irrigation" purposes. As explained in greater detail in the Coalition's response to Pocatello's summary judgment motion, the terms "manage the land" and "land application", the only uses Pocatello claims to have ever made, are indistinguishable from irrigation. Pocatello, without any facts to show a change in its use prior to 1987, is bound by its prior licenses in the SRBA.

Pocatello's own brief defeats its "municipal" purpose of use objection to its licensed irrigation water rights. Pocatello's entire argument hinges on the application of section 42-1425 – the accomplished transfer statute. According to that statute, any *change* in the purpose of use, place of use, or point of diversion, which occurred prior to 1987, can be effectuated without proceeding through the transfer application procedures of section 42-222, provided no other existing water right was injured at the time of the change. I.C. § 42-1425(1)(b). Any such changes occurring after 1987 must comply with the transfer application requirements of section 42-222. Section 42-1425 clearly states its most elemental requirement: *change*. The statute is not a vehicle for a water right holder – who applied for, claimed and used a water right, prior to 1987, for a specific purpose in a specific place with a specific point of diversion – to decide, on a whim, that the right should have been something else.

Pocatello's ad-hoc legal theories do not substitute the undisputed facts, namely, that Pocatello **has always used its licensed water rights for irrigation purposes**. Moreover, Pocatello's characterization of its water use (in its capacity and function as a city for the benefit of its inhabitants) does not effect a change to the elements of its licensed irrigation water rights.

Pocatello admits that there has never been any change to these water rights. *See Pocatello Response* at 3 ("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 unchanged for each water right."). In fact, Pocatello has never asserted that any change has occurred with regards to these water rights.³ Instead, Pocatello now for the first time

³ Pocatello attempts to justify its objections by addressing the recommendation for water right 29-2382. *Pocatello Response* at 3. According to Pocatello, since that right, purchased from a private owner and licensed for irrigation ***and domestic*** purposes, was recommended as "municipal," these rights should likewise be recommended as such. Pocatello is wrong. First, that subcase is not subject to the present summary judgment motions nor does it constitute some precedent or rule of law that applies to all of Pocatello's licensed water rights. Furthermore, none of the rights in question here were licensed for irrigation ***and*** domestic purposes. The Coalition is unaware of the historic use of the right by the private owner and whether or not the well still provides water for domestic purposes to the golf

accuses IDWR of making “an error of law” when the licenses were originally issued. *Pocatello Response* at 3. Even if IDWR did err, Pocatello, by not appealing the licenses to district court, waived any “error of law” and readily accepted the licensed “irrigation” purpose of use. Pocatello cannot use the SRBA as a means to collaterally attack a license for which it had every opportunity to appeal and change in the first place. The fact is IDWR did not err, it licensed the water rights for the very purpose Pocatello applied for, and proved up on by filing the beneficial use reports to IDWR. *See* Exs. K, L, and M to *706 Report*. Pocatello’s attempt to now blame IDWR for “errors” at the time of licensing is without merit and should be rejected.

Pocatello, however, barely addresses the applicable law and instead, spends much of its time addressing a perceived “broad” definition of the term “municipal” as well as the alleged shortcomings of the Coalition’s discovery responses. Such arguments should not distract the Court from the real issue at hand. The issue here, which Pocatello fails to address, is whether the elements of a water right, the use or diversion of which has *never been changed*, can be altered at the whim of the water right holder using the accomplished transfer statute? Surely, it cannot.

Instead of addressing the law, Pocatello argues that since its uses can conceivably fall within a broad definition of the term “municipal,” the rights should be changed. *Pocatello Response* at 4. This “broad” definition, however, does not mean that every right held by a city automatically qualifies as a municipal right or that IDWR makes an “error of law” every time it granted a license to a city with a nature of use other than “municipal.” A water right is defined by its elements and not by the status of the individual or entity holding that right. In fact, there are a number of instances throughout Idaho where a municipality holds a water right with a purpose of use other than “municipal.” *See* Ex. D to *Second Thompson Aff.* Moreover,

course facilities or some surrounding residences. Finally, if any errors have been made, it was IDWR’s error to recommend 29-2382 for “municipal” purposes instead of recommending the right as licensed.

“municipal” water rights are not held by cities alone, for example many private water companies hold “municipal” rights in Idaho.

Any attempt to subsequently alter the elements of irrigation water rights, without any actual change to the usage or diversion of those rights, would result in an abuse of process, *see* I.C. § 42-1425 & 42-222, and would allow cities to use more water in ways never contemplated under the original application. This is the case, even if the use of these rights may fall within the definition of “municipal” purpose as set forth in the 1996 amendments. Any such changes must be handled by IDWR through the appropriate administrative actions. Something Pocatello vehemently opposes for some unknown reason.

Pocatello has not shown that it can meet the requirements of section 42-1425. Regardless of when the city specifically objected to the recommendations,⁴ no change has ever occurred to any element of these water rights. Pocatello cannot subvert the administrative process by filing an objection in the SRBA. This is especially the case since Pocatello has already passed on its opportunity to challenge the “irrigation” purpose of use. IDWR licensed each of these water rights for “irrigation” purposes. Presumably, as the rights were licensed in the name of “City of Pocatello,” IDWR was aware that the licensee was a municipality. That notwithstanding, IDWR licensed these rights as they were claimed by the city in the various applications for permit – as “irrigation” rights. Once licensed, Pocatello had the chance to appeal the determination, but

⁴ In its *Brief in Support of Summary Judgment*, the Coalition did not discover certain facts surrounding Pocatello’s objections to these rights. This was due to the fact that Pocatello filed, in some cases, three separate objections on each individual water right on the same day, November 14, 2003. As such, some of the facts were confused by the Coalition. For example, in one Objection, filed on November 14, 2003, for water right 29-7770, Pocatello does not object to the purpose of use being Irrigation. *See* Ex. B to *Arrington Aff.* In a second Objection, filed the same day on the same right, Pocatello indicates that it was objecting to the purpose of use but failed to provide any explanation. *See* Ex. C. to *Arrington Aff.* Finally, in a third objection, filed the same day on the same right, Pocatello did object to the purpose of use and indicated that it should be “municipal.” *See* Ex. V to *Thompson Aff. in Support of Motion for Summary Judgment*. Regardless of these inadvertent errors, the *material* facts are undisputed – no change has ever occurred to any element of these water rights – and the law requires Pocatello to file a transfer application with IDWR.

refused that opportunity. Accordingly, the licenses became final and binding on the city. Now, Pocatello asserts that, notwithstanding its own claims, IDWR erred in licensing these rights. This “new” argument is without merit and is barred by *res judicata*. See *Union Pacific Land & Resources Corp. v. Shoshone Cty. Assessor*, 140 Idaho 528, 534, 96 P.3d 629, 635 (2004) (*res Judicata* “prohibits the ‘relitigation of any claims relating to the same cause of action which were actually made *or which might have been made*’”) (emphasis added). Since Pocatello failed to appeal the licenses at the time when they were issued, any “error” argument was waived and is barred by the doctrine of *res judicata*. Moreover, if IDWR “erred”, one would have expected Pocatello to have explained the same when it filed its original notices of claim in 1990. Regardless, Idaho law prohibits Pocatello from “appealing” its licenses now through the SRBA. Pocatello’s purpose of use objections to water rights #29-7118, #29-7119, #29-7431, #29-07770 should be dismissed as a matter of law.

III. Pocatello Has Not Created Alternate Point of Diversions for its Surface Water Rights.

Decrees “are binding on the parties to the decree and their privies.” *Order* at 12. Notwithstanding the binding nature, such a right does not prevent possible future examination of those water rights. Surely, a water right must be used or it may be lost to forfeiture or abandonment. Similarly, if an element of the right has changed, the right may be reexamined for a transfer – either an accomplished transfer or a section 42-222 transfer depending on the facts. What is clear from the law, however, is that this potential for reexamination does not mean a decree or license will be subject to ad hoc amendments to the rights at the whim of the right holder. Indeed, for a transfer to take place (either accomplished or administrative) the owner must meet the specific statutory requirements. Pocatello cannot do this.

Pocatello cannot show that they ever diverted their surface water through their groundwater wells. Apart from certain issues with respect to the source identified by IDWR in the *706 Report*, Pocatello would still have to demonstrate: (1) a decrease in surface water diversions; (2) an increase in groundwater diversions; and (3) that the increase in groundwater diversions results in water diversions which exceed the total cumulative diversion rates of all its groundwater rights and that the water diverted originated from the surface source. Absent such a showing, Pocatello would merely be diverting more water pursuant to its groundwater rights while, at the same time, using less or no water under its surface water rights. Pocatello has not made any such showing. Accordingly, Pocatello cannot show that it created an alternate point of diversion for its surface water rights.

IV. Pocatello's Request for Sanction and Attorneys' Fees Should be Denied.

Much like its *Brief in Support of Summary Judgment*, Pocatello argues that the Coalition's discovery responses were incomplete or otherwise inadequate. Pocatello has never contacted the Coalition to discuss the discovery requests or the claimed "inadequacies" in the Coalition's responses. Apparently, Pocatello expected the Coalition to admit and agree with every assertion the city put in its discovery request regardless of fact that much of the requests sought approval of conclusions drawn by Pocatello which are drastic departures from the law and facts of this case. If Pocatello had an issue with the Coalition's responses, standard practice in Idaho would suggest Pocatello's counsel would confer and try to resolve those differences with Coalition counsel. No effort has been made on Pocatello's part. Instead, Pocatello raises the issue with the Court in its response to the Coalition's summary judgment motion. Since the Coalition does not admit Pocatello's rendition of the law and facts, the city alleges the Coalition

should be sanctioned and awarded attorneys' fees. There is no basis for such a sanction or award.

Pocatello's attorneys' fees argument is drawn from the language of Civil Rule 37. That rule indicates that a party may be entitled to attorneys' fees if discovery requests are inadequate. However such awards will not be granted if "the party failing to admit had reasonable ground to believe the party might prevail on the matter" or there is "good reason for the failure to admit". Civil Rule 37(c). In addition, the moving party must "*prove* ... the truth of the matter." *Id.*; see also *Payne v. Wallace*, 136 Idaho 303, 309, 32 P.2d 695, 701 (App. Ct. 2001) ("By its plaint terms, Rule 37(c), authorizes sanctions only in favor of a party who ... '*proves* ... the truth of the matter'" (emphasis in original). Pocatello's request does not meet the standard of the rule.

First, the Coalition's motion for summary judgment provides a "reasonable ground" for which it "might" prevail on the matter. The Coalition has cited relevant law on the issues relating to Pocatello's prior decrees and licenses and has demonstrated why Pocatello cannot collaterally attack the same in the SRBA. Moreover, the claims filed by Pocatello, the recommendations issued by the Director, and the *706 Report* all support the Coalition's motion. On that basis alone Pocatello's request for sanction and fees should be denied. Pocatello has failed to demonstrate that the Coalition's motion is not a "reasonable ground" for which the Coalition "might" prevail on those matters.

In addition, merely disagreeing with a party's incorrect interpretation of the facts and law does not give rise to such attorneys' fees. This is especially the case when, as here, Pocatello, the moving party, has failed to prove any "truth of the matter." The Coalition had good reason for its responses to Pocatello's discovery requests. As discussed in greater detail in the Coalition's response to Pocatello's motion for summary judgment, the city's discovery requests

were full of generalizations and baseless assumptions which were not, in any way, supported by the *706 Report*. For example, Pocatello interprets IDWR's conclusions that the waters in Basin 29 are interconnected to mean that the city can automatically use groundwater wells as alternative points of diversion for its surface water rights without any analysis as to the actual hydrology of the specific area and the impact on surrounding water rights. The Coalition is unaware of any basis in law or fact for such a conclusion. Likewise, Pocatello would have this Court believe that any right held by a city, by necessity, qualifies as a "municipal" right, even though it may be recommended for "irrigation" purposes as originally claimed and previously licensed. Once again, there is no basis in law or fact for such a conclusion. Pocatello's own licensed "irrigation" water rights demonstrate otherwise.

In fact, Pocatello's objections and discovery requests were so full of factual and legal manipulations that it is no wonder the city was subject to "extremely time-consuming ... research." *Pocatello Response* at 14. Such research would be necessary when attempting to justify arguments without any supporting legal authority. Furthermore, any errors which may have been present in the Coalition's briefing dealt solely with the multitude of objections Pocatello filed for each water right. The fact Pocatello did not follow proper procedure and instead filed multiple, overlapping objections was cause for confusion with respect to the original objections filed on November 14, 2003. *See* Exs. B and C to *Arrington Aff.* Since the Court rejected Pocatello's multiple initial objections they are irrelevant now anyway. *See* Ex. D to *Arrington Aff.* Moreover, when or how the objections were filed does not change the fact that Pocatello cannot meet the requirements of the accomplished transfer statute and has no legal or factual basis to collaterally attack its own licensed irrigation water rights in the SRBA. As such,

even if the Coalition's responses were somehow deficient, Pocatello cannot "prove ... the truth of the matter."

Finally, Pocatello is seeking attorneys' fees for drafting and filing its own summary judgment motion. Yet, Pocatello's response claims that its objections "raise triable issues as to pre-1987 changes in its water rights." *Pocatello Response* at 15. If Pocatello truly believes that its objections raise "triable issues", then it had no basis to file a motion for summary judgment under Rule 56(c). Pocatello cannot have it both ways. The Court should not force other parties to pay for a motion Pocatello itself admits does not qualify under Idaho's civil rules. The Coalition has a "reasonable ground" for its motion for summary judgment and had a "good reason" to deny Pocatello's various requests for admission. Accordingly, no sanction is warranted under the Rule 37 standard and Pocatello's request for attorneys' fees should be denied.

CONCLUSION

Pocatello's response to the Coalition's summary judgment motion is devoid of discussion of the true issues in this case. The law is clear, a party cannot use the SRBA to collaterally attack its own licensed water right under some alternative legal theory. Pocatello applied for, was granted, and has always used, its licensed water rights (#29-7118, #29-7119, #29-7431, and #29-0770) for irrigation purposes. Moreover, Pocatello freely admits there has never been any change to uses of these "irrigation" rights. Accordingly, Pocatello's purpose and place of use objections should be dismissed as a matter of law.

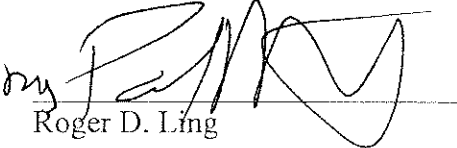
Next, this Court's rules of procedure prevent Pocatello from amending its claims by way of objections. Pocatello has not amended its original notices of claim for water rights #29-271, #29-272, and #29-273. A statement in a summary judgment motion that Pocatello considers its

surface water rights “as a group” does not excuse compliance with Idaho’s adjudication statutes and this Court’s rules of procedure. In addition, Pocatello cannot show that it created alternate points of diversion for its surface water rights. Accordingly, Pocatello’s point of diversion objections to water rights #29-271, #29-272, and #29-273 must be dismissed as a matter of law.

Finally, disagreeing with Pocatello’s unsupportable interpretation of the facts and law in this matter does not give rise to a claim for attorneys’ fees. The Coalition had good reasons to deny Pocatello’s assertions and the city has not proven any truth in its claims. Moreover, the Coalition’s motion for summary judgment is based upon a “reasonable ground”. As such, this Court should grant the Coalition’s motion for summary judgment and deny Pocatello’s motion for attorneys’ fees.

Dated this 21st day of December, 2006.

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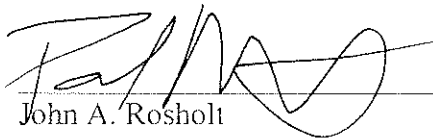
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2006, I served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT on the person(s) listed below, in the manner indicated:

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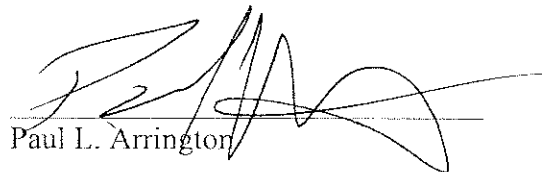

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EXHIBIT A

Subcase Nos.:

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