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DEPARTMENT OF
WATER RESOURCES

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	CITY OF POCATELLO'S REPLY BRIEF IN
	)	SUPPORT OF THE CITY'S NOVEMBER 30, 2006
Case No. 39576	)	MOTION FOR SUMMARY JUDGMENT ON
	)	MUNICIPAL PURPOSE OF USE, INTERCON-
_____	)	NECTION, AND INJURY UNDER I.C. § 42-1425

INTRODUCTION

On November 30, 2006, Pocatello moved for Summary Judgment on the issues of (1) municipal purpose of use, (2) interconnection, and (3) injury under §42-1425.¹ The Idaho Rules of Civil Procedure provide that summary judgment is appropriate only "if the pleadings,

¹ Pocatello moved for summary judgment under I.R.C.P. 56 that Mink Creek, Gibson Jack Creek, Lower Portneuf River Valley Aquifer (LPRVA), the Snake River, and the Eastern Snake Plain Aquifer (ESPA) are interconnected sources of water, and there is no 42-1425 injury from the alternate points of diversion in operation for the City's interconnected culinary system and the water rights it served as of November 19, 1987. Page 3, *Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. §42-1425*.

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 SWC and the State have submitted two very complex responses to Pocatello’s November 30th *Motion for Summary Judgment*. Although both responses raised a variety of arguments, the undisputed truth still remains that (1) “municipal purposes” comprise a wide variety of water uses, not just the provision of drinking water, (2) Pocatello’s use of its water rights to comply with federal laws fits within the purview of this broad definition of “municipal purposes”, (3) Mink Creek, Gibson Jack Creek, the ESPA, and the LPRVA are interconnected sources of water, and (4) neither the State nor the SWC has proffered any proof of Section 42-1425 injury to their water rights as a result of Pocatello’s accomplished transfers claimed in the SRBA; and Pocatello’s expert reports provide foundation for this Court’s determination that no demonstrable Section 42-1425 injury as of November 19, 1987, from Pocatello’s accomplished transfers.

For the purposes of this reply, Pocatello’ will address the issue of injury first, then interconnection, and then municipal purpose of use.

I. STATEMENT OF THE CASE

A. Nature of the proceedings.

This controversy relates to the determination of Pocatello’s thirty-eight state law SRBA claims.

B. Course of the proceedings related to the issue of injury.

Special Master Bilyeu issued an *Order on Summary Judgment* on August 18, 2006. The Special Master summarized the arguments as follows:

Pocatello argues that the condition placed on its accomplished transfer is improper. Pocatello’s argument is twofold. First, Pocatello argues that the condition is improper because these subcases were not “remanded” to IDWR as set for in I.C. § 42-1425(2)(a).

Second, Pocatello argues that the condition is improper as a matter of law because it seeks to prevent **potential** injury rather than actual injury.

* * * * *

Pocatello assert[ed] that its accomplished transfers did not injure water rights existing on the date of the change. IDWR concluded that water rights existing on the date of the change were injured. . . .

Pocatello reads the 706 *Report* language as improperly looking at prospective, not actual injury. . . . The injury IDWR discusses is to the priority of rights on a given source. . . . Depending on conditions such as precipitation and weather, the damages may not appear immediately.

(Emphasis in original.)

Pocatello's subcases were then remanded to IDWR for the purpose of allowing Pocatello to present additional evidence and information regarding the condition and the Special Master retained concurrent jurisdiction. The remand has been stayed by order of the court, at the joint request of IDWR and Pocatello to facilitate negotiation and settlement. (*Order Granting Pocatello's Motion to Stay Deadlines in Summary Judgment Order*, granted September 1, 2006) The governing trial schedule has not been stayed and Pocatello seeks to narrow the matters for trial by obtaining judgment on certain factual and legal matters clarified through the discovery process. Specific discovery information is set forth below.

Pocatello served the Surface Water Coalition (SWC) and the State with the First Set of Discovery Requests on July 21, 2006. On the issue of Idaho Code §42-1425 injury, Pocatello asked the following interrogatories, requests for production, and requests for admission to both the SWC and the State:

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

Interrogatory No. 10: List any water rights YOU allege to be injured by an accomplished transfer of this water right pursuant to Idaho Code §42-1425.

Interrogatory No. 11: Describe the nature of the injury you allege occurred because of the accomplished transfer of this water right pursuant to Idaho Code §42-1425.

Request for Production No. 8: Produce any DOCUMENTS related to YOUR response to Interrogatory No. 11.

Request for Admission No. 1: Admit that this water right has never been administered by the STATE in response to the injury alleged in Interrogatory No. 11.

Interrogatory No. 12: If YOU DENY Request for Admission No. 1, please STATE THE BASIS for YOUR DENIAL.

Interrogatory No. 13: Please IDENTIFY each PERSON who has information that RELATES TO YOUR CONTENTION that is the subject of Interrogatory No. 12.

Request for Production No. 9: Produce any DOCUMENTS related to YOUR response to Interrogatory No. 12.

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

Interrogatory No. 14: If YOU DENY Request for Admission No. 2, please STATE THE BASIS for YOUR DENIAL.

Interrogatory No. 15: Please IDENTIFY each PERSON who has information that RELATES TO YOUR CONTENTION that is the subject of Interrogatory No. 14.

Request for Production No. 10: Produce any DOCUMENTS related to YOUR response to Interrogatory No. 14.

The State served Pocatello with the State's *First Set of Discovery Requests* on July 21, 2006. In its *First Set of Discovery Requests*, the State did not make any specific inquiries on Idaho Code § 42-1425 injury in the discovery it served to Pocatello.

The SWC did not serve discovery requests to Pocatello or the State.

The State served its *Response to Pocatello's First Set of Discovery Requests* on September 25, 2006. The State provided the following answer to Pocatello's questions on injury from accomplished transfers:

[The State] has not identified any water rights that would be injured by an accomplished transfer of this water right. Idaho relies upon the determination in the Director's Report, as supplemented in the Supplemental Director's Report that an injury would occur to existing water rights by a transfer of this water right.

Specifically, the State admitted the following:

- Other than the hypothetical injury addressed in the April 2006 Supplemental Director's Report, the State admitted that it has "no other documents alleging or claiming injury" from Pocatello's accomplished transfers at issue.
- The State has no information on the cone of depression created by Pocatello's use of the wells located at the points of diversion recommended by IDWR, on water rights that withdraw from the LPRVA within the cone of depression.
- The State has no information on the maximum amount of water ever withdrawn by Pocatello at the wells at the points of diversion recommended by IDWR.
- The State has no information on individual water rights "injured" by Pocatello's use of these wells located at the points of diversion recommended by IDWR.

The SWC provided its *Response to Pocatello's First Set of Discovery Requests* on September 25, 2006. The SWC provided the following answers to Pocatello's questions on injury:

- The SWC responded to injury questions with two answers: (1) "[t]he Coalition is without sufficient information to answer the interrogatory as this time" and (2) "[t]he Coalition has made reasonable inquiry and the information known or readily available is insufficient to admit or deny the request . . ."
- The SWC declared it was "without sufficient information" when asked to list any allegedly injured water rights under 42-1425.
- When asked to describe any information regarding individual water rights "injured" by Pocatello's use of the wells located at IDWR's recommended points of diversion, the SWC declared it was "without sufficient information to answer the interrogatory completely...."

- The SWC could not proffer any information on the cone of depression created by Pocatello's use of the wells located at the points of diversion recommended by IDWR or the ground water rights that withdraw water from the LPRVA within those cones of depression because, "no hydrologic analysis has been made."

Pocatello served *Spronk Water Engineer Expert Report* to the State and the SWC on September 29, 2006. The report provided the following conclusions on injury:

- "[I]t is unlikely that Pocatello's alternative point of diversion operations had an significant impact to neighboring wells prior to November 19, 1987.
- "[D]iversion of the City's surface water rights at the City wells does not adversely affect other water users, the City's claim for alternate points of diversion for its surface water rights should be approved."
- "[T]here is no material difference in the depletions to surface water from when the City is pumping its senior priorities first or when the City is pumping using its alternate points of diversion."

The SWC served its *Rebuttal Expert Report* on November 3, 2006. The report considered the conclusions of Pocatello's *Spronk Water Engineer Expert Report* and determined the following:

- "[A]ll of the City of Pocatello's ground water and surface water rights should be administered as interconnected sources."
- "[T]here would likely not be negative impacts to the ESPA resulting just from the changes in diversion points."

Pocatello served its *Rebuttal Report* on December 1, 2006. The report considered the conclusion of the SWC's *Rebuttal Expert Report* and determined the following:

- "[T]here is no disagreement that the ground water and surface water sources of the Snake River and the Portneuf River and its tributaries are interconnected."
- "The Surface Water Coalition claims there is a change in '*timing and magnitude of both Portneuf River flow and ground water underflow from the basin*', but provides no evidence or analysis to quantify the alleged changes or that the changes result in injury to the Surface Water Coalition water rights."

II. INJURY

A. **The August 18th Order on Summary Judgment does not preclude summary determination of 42-1425 injury as of November 19, 1987.**

In addressing whether to strike IDWR's conditions that were the object of Pocatello's May 5th *Motion for Summary Judgment on IDWR's Authority Under 42-1425*, this Court's August 18 *Order on Summary Judgment* stated the following concerning injury:

- Immediate injury to priority resulting in future damages appears to be just what IDWR was trying to prevent with the condition.
- The 706 Report raises genuine issues of material fact on the injury issue.
- IDWR apparently recommended conditions to prevent injury to existing water rights.

On the issue of the conditions, the Court ruled, "[w]hether IDWR's conclusion on injury is correct is a matter for trial."²

Following the August 18 order and as a result of the discovery discussed *supra* at pages 3-6, Pocatello's motion for summary judgment on the issue of 42-1425 injury is limited to the time frame ending November 19, 1987. Pocatello believes this is an appropriate limitation based on the absence of facts demonstrating any injury (and/or damages) as of November 19, 1987.

B. **Pocatello is not required to comply with the legal "standards" promulgated by the Transfer Processing Memo to address injury.**

The State alleged that Pocatello must address the "standards set forth in the Transfer Processing Memorandum"³ in order to show "whether a proposed transfer will injure other water rights."⁴ The State cites the Memo as the "correct legal standard" for determining Section 42-

² *Order on Summary Judgment*, Special Master Bilyeu, August 18, 2006, pages 5-6.

³ "Transfer Processing Policies and Procedures," IDWR Administrator's Memorandum, October 30, 2002. (Interim Policies and Procedures Currently Applicable for Applications to Transfer Ground Water in the Eastern Snake River Plain Only ("Transfer Processing Memo").

⁴ State's *Response Memorandum in Opposition to Pocatello's Motion For Summary Judgment*, page 7.

1425 injury, but this argument is flawed on three levels. First, the Memo explicitly states that it does not apply to transfers under Section 42-1425. Second, the Memo's "rules" have not been adopted under the Idaho Administrative Procedures Act (IAPA) and therefore cannot be enforced as law. Third, even assuming *arguendo* that the Memo were applicable to Pocatello's accomplished transfers under 42-1425, the State's response and the April 2006 Supplemental Director's Report each misapply the "immediate and direct connection" language to Pocatello's SRBA claims.

1. The Transfer Processing Memo explicitly states that it does not apply to transfers under §42-1425.

The State's argument fails because the Memo explicitly states that it does not apply to transfers under Section 42-1425.⁵ Instead, the Memo applies to transfers of rights pursuant to Section 42-222.⁶ Under the heading "When a Transfer is not Required," the Memo specifically states:

an application for transfer is not needed when an accomplished change to a water right or an enlargement of a right has been claimed in an adjudication in accordance with the provisions of Sections 42-1425 or 42-1426, *Idaho Code*.⁷

Thus, because Pocatello has effectively transferred its rights via an accomplished transfer under Section 42-1425, the Memo explicitly does not apply, and Pocatello does not need to show congruence with the Memo.

⁵ Transfer Processing Memo, pages 3 and 4.

⁶ Transfer Processing Memo, pages 1 and 4.

⁷ Transfer Processing Memo pages 3 - 4.

2. The Transfer Processing Memo outlines administrative rules that have not been adopted under the Idaho Administrative Procedure Act and therefore cannot be enforced as law.

The State referred to the “standards”⁸ set forth in the Memo as the “correct legal standard”⁹ or “test”¹⁰ which Pocatello must apply in order to disprove any showing of injury. The Memo itself calls the standards “policies and procedures [which] are to be followed . . .”¹¹ As a matter of law, the Memo cannot be applied because “an agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law.”¹² Put another way, if the State wants the dictates of the Memo to be applied as the “correct legal standard,” those dictates must first be properly adopted in compliance with the IAPA.¹³ Because the Memo has not been adopted in compliance with the IAPA, (and explicitly does not apply to 42-1425 transfers), the State’s requirement of “an immediate and direct connection between the surface source and the well”¹⁴ cannot be enforced as law.

In 2003,¹⁵ the Idaho Supreme Court addressed this necessary compliance with the IAPA when it struck down Idaho’s Total Maximum Daily Load Standards (TMDL’s) because the

⁸ State’s Response Memorandum in Opposition to Pocatello’s Motion For Summary Judgment, page 6, 7, and 8.

⁹ State’s Response Memorandum in Opposition to Pocatello’s Motion For Summary Judgment, pages 5, 6.

¹⁰ State’s Response Memorandum in Opposition to Pocatello’s Motion For Summary Judgment, page 7.

¹¹ Transfer Processing Memo, page 1.

¹² *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003).

¹³ Section 67-5231 of the IAPA declares administrative rules “void unless adopted in compliance with the IAPA.” *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003) citing Idaho Code Section 67-5231.

¹⁴ See State’s Response Memorandum in Opposition to Pocatello’s Motion For Summary Judgment page 5, 7, and 8 quoting the April 2006 Supplemental Director’s Report at page 11.

¹⁵ *Asarco v. State of Idaho*, 138 Idaho 719, 69 P.3d 139 (2003)

TMDL's were a "rule," and the TMDL's could only be valid if the Idaho Department of Environmental Quality (DEQ) had promulgated them "in accordance with the IAPA."¹⁶ The *Asarco* analysis is directly on point for IDWR's Transfer Processing Memo.

The *Asarco* decision first determined that the statutory definition of a "rule" was "too broad to be workable,"¹⁷ and set forth six (6) specific characteristics that indicate when agency action amounts to a rule:

- wide coverage
- applied generally and uniformly
- operates only in future cases
- prescribes a legal standard or directive not otherwise provided by the enabling statute
- expresses agency policy not previously expressed
- is an interpretation of law or general policy¹⁸

The Court then applied these 6 "characteristics" to the facts and held that "the establishment of the TMDL involved 'rulemaking.' Furthermore, because the TMDL is properly considered a rule, it is invalid pursuant to the IAPA."¹⁹

Just like DEQ's TMDL's, the "standards" in IDWR's Memo are agency rules which are invalid pursuant to the IAPA. First, the Memo has "wide coverage" and explicitly applies to all Section 42-222 transfers.²⁰ Second, the Memo's "fifty percent depletion" requirement is "generally applicable" as a "numerical [interconnection] limit or budget for a given water

¹⁶ *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003).

¹⁷ *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003).

¹⁸ *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003), citing *Woodland Private Study Group v. State of New Jersey*, 533 A.2d 387 (N.J. 1987).

¹⁹ *Asarco v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003).

²⁰ See, *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003), and Transfer Processing Memo page 1.

body.”²¹ Third, the Memo “operates only in future cases” evaluating prospective injury to other water rights from proposed transfers.²² Fourth, the Memo’s “fifty percent depletion” requirement is a “quantitative legal standard” not provided by any enabling statute.²³ Fifth, even if the Memo is “nothing more than a planning tool” or interim guidelines, the “fifty percent depletion” requirement is still an “expression of agency policy not previously addressed.”²⁴ And finally, the Memo’s standards for evaluating transfers is really an interpretation of existing law: it evaluates whether a transfer will run afoul of the Prior Appropriation Doctrine within the Idaho Constitution.²⁵ Thus, just as in *Arasco*, IDWR’s Memo is an example of agency “rulemaking” which is unenforceable as a matter of law because it was not adopted pursuant to the IAPA.

In sum, the Transfer Processing Memo is NOT the “correct legal standard” to be applied to Pocatello or to any other accomplished transfer in the SRBA. Pocatello does not need to show congruence with the dictates of the Transfer Processing Memo.

3. Even if the Transfer Processing Memo were applicable law, the State’s Response and April 2006 Supplemental Director’s Report misapply its language to Pocatello’s SRBA claims.

Both the State’s *Response Memorandum in Opposition to City of Pocatello’s Motion for Summary Judgment (Response)* and the April 2006 Supplemental Director’s Report include a block quote that “an immediate and direct connection between the surface source and the well”

²¹ See, *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003), and Transfer Processing Memo page 20.

²² See, *Asarco v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003), and Transfer Processing Memo page 1.

²³ See, *Asarco v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003).

²⁴ See, *Asarco v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003), and Transfer Processing Memo page 1.

²⁵ See, *Asarco v. State of Idaho*, 138 Idaho 719, 725, 69 P.3d 139, 145 (2003), and Transfer Processing Memo page 1.

must exist before a transfer is allowed.²⁶ The actual phrase is found in the Memo's requirements for a change of source, as from a surface water source to a ground water source:

5c. Injury to Other Water Rights

(6) Change of Source. Whether the source would be changed from ground water to surface water, or from surface water to ground water.

An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day). The existing point of diversion and proposed point of diversion must be proximate such that the diversion and use of the water from the proposed point of diversion would have substantially the same effect on the hydraulically-connected source as diversion and use of water from the original point of diversion. (emphasis added.)

Two comments are appropriate. First, this is a change of source standard. The City is not changing its source from surface water to ground water.²⁷ Pocatello is claiming both sources: the ground water is an alternate source and the City's wells are alternate points of diversion, when the water is physically and legally available. Second, since there was no IAPA rulemaking, the 50% depletion reference has no foundation.

III. INTERCONNECTION

A. The issue of interconnection remains undisputed by both the SWC and the State.

The State's *Response*, the SWC's *Response to the City of Pocatello's Motion for Summary Judgment (Response)*, and the April 2006 Supplemental Director's Report all address the issue of interconnection. These submissions offer a variety approaches to the issue of

²⁶ See State's *Response Memorandum in Opposition to Pocatello's Motion For Summary Judgment* page 5, 7, and 8 quoting the April 2006 Supplemental Director's Report at page 11.

²⁷ The State argues Pocatello is attempting "to transform an unreliable surface water supply to a ground water supply that will always be there." State's *Response Memorandum in Opposition to the City of Pocatello's Motion for Summary Judgment*, page 9.

interconnection. The State and the April 2006 Supplemental Director's Report have consistently maintained that the waters are interconnected. The SWC's approach comes full circle: first the SWC quotes the Basin-Wide 5 decision on interconnection in its *Joint Motion to Participate*, but then during discovery the SWC claims to not understand the meaning of "interconnected," and finally alleges in its *Response* that the issue of interconnection is moot because Basin-Wide 5 established that all water rights are administered as interconnected.

Since Pocatello seeks summary judgment on interconnection as a part of its claim that the City's interconnected wells are alternate points of diversion for its surface water rights, it is easy to become confused by the SWC's statements that interconnection is "moot" because all water rights are administered as interconnected. Pocatello is already aware of the administration of interconnected sources that occurs outside of the SRBA; but at the SRBA, the issue of interconnection relates to the definition of source. When interconnected sources such as the LPRVA and Mink Creek have both served as sources for a water right, the water right should be decreed with that information.²⁸ These are adjudicatory claims in the SRBA. They involve sources whose interconnection is without dispute: Gibson Jack Creek, Mink Creek, the LPRVA, and the ESPA are interconnected.²⁹

1. The April 2006 Supplemental Director's Report states the waters are interconnected.

The April 2006 Supplemental Director's Report cites the interconnected sources provision in SRBA decision in Basin-Wide Issue 5: "[A]ll other water rights within Basin 29 will be administered as connected sources of water in the Snake River Basin in accordance with the

²⁸ Spronk Report, pages 17-19.

²⁹ These are adjudicatory claims in the SRBA. They involve sources whose interconnection is without dispute.

prior appropriation doctrine as established by Idaho law.”³⁰ Referring specifically to Basin 29, the Report states, “[s]urface and ground water sources in Basin 29 are interconnected.”³¹ On the issue of Pocatello’s interconnected wells before November 19, 1987, the Report is unequivocally clear: “[t]he Department found that there were 22 interconnected wells that serve Pocatello for the ‘city proper’ as depicted on Map 1 before November 19, 1987.”³²

2. The State admits the waters are interconnected.

In discovery, the State readily admitted that “Mink Creek and the Lower Portneuf River Valley Aquifer are interconnected sources of water.”³³ The State further admitted that “Gibson Jack Creek and the Lower Portneuf River Valley Aquifer are interconnected sources of water.”³⁴ Now in its *Response*, the State still does not contest the issue of interconnection. Specifically, the State highlights the conclusion of Pocatello’s *Expert Report* (The Spronk Report) that the waters are interconnected.³⁵ The State does not argue that the Spronk Report is wrong about interconnection, but rather, the State criticizes Pocatello for not applying the “correct legal standard” to address the issue of interconnection. (See discussion of Transfer Processing Memo

³⁰ April 2006 Supplemental Director’s Report, page 9.

³¹ April 2006 Supplemental Director’s Report at 10.

³² April 2006 Supplemental Director’s Report at 13. The Report then moved on to explain that “[a]s of 1987, the City had 22 interconnected wells that provided municipal water to the city system service area. See Map 1.

³³ Request for Admission no. 1, State’s Answers 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 9 and 21.

³⁴ Request for Admission no. 1, State’s Answers 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 105.

³⁵ State’s *Response Memorandum in Opposition to Pocatello’s Motion For Summary Judgment*, pages 4 and 5.

supra pages 7-11) Nowhere in its response does the State contradict its admissions in discovery that the waters are interconnected.

3. The SWC admits the waters are interconnected.

Throughout these proceedings, the SWC has repeatedly changed its position on interconnection. This quixotic chronology requires clarification: At first, the SWC submitted a *Memorandum in Support of Joint Motion to Participate* which stated:

All water in the Snake River Basin is interconnected, unless a partial decree issued by the SRBA Court indicates the water derives from a separate source. A&B Irrigation Dist. V. Idaho Conservation League, 131 Idaho 411, 421-22 (1998). The SRBA Court plainly recognized the interconnection of tributary ground and surface water sources in the Snake River Basin in its Basin-Wide 5 decision issue in 2001. (emphasis added.)³⁶

Then, during discovery, the SWC refused to admit that Mink Creek or Gibson Jack Creek were interconnected with the LPRVA, citing several reasons:

It is impossible to determine what Pocatello means by the term ‘interconnected.’ The Coalition has made a reasonable inquiry and information known or readily obtainable is insufficient to determine if groundwater flows to Mink Creek and the extent that Mink Creek contributes to ground water or to determine whether the ‘Lower Portneuf River Valley Aquifer’ exists or the extent that Mink Creek is a connected source of water and therefore denies the same. In addition, the Coalition has not been able to determine the locations of hydraulic interconnectivity, if any, or to quantify the hydraulic interconnectivity. (emphasis added)³⁷

The SWC’s refusal in discovery to admit to any level of hydraulic interconnection is at odds with the Basin-Wide 5 decision which the SWC relied on in its Motion to Participate and again in its Response to Pocatello’s second Motion for Summary Judgment:

³⁶ SWC’s *Memorandum in Support of Joint Motion to Participate*, March 2, 2006, page 3.

³⁷ Request for Admission no. 1, 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 and 21.

the [issue of] 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. (emphasis added)³⁸

During discovery, the SWC relied (almost exclusively) on the April 2006 Supplemental Director's Report,³⁹ but would not answer any discovery questions pertaining to interconnection. However, in response to Pocatello's current Motion for Summary Judgment on interconnection, the SWC now states that the Report "clearly indicates that the surface water and groundwater sources in Basin 29 are interconnected . . ." (emphasis added)⁴⁰

The SWC admits the interconnection, and the City's Motion For Summary Judgment should be granted.

4. The Spronk and Brockway Reports concur that the sources are interconnected.

The SWC's expert *Rebuttal Report* (The Brockway Report) demonstrates an understanding of interconnection and concurs that the sources are interconnected:

[t]he hydrogeology of the lower Portneuf River and tributaries and the aquifer underlying the lower Portneuf area shows that these are interconnected sources and are tributary to the Snake River and/or the Eastern Snake Plain aquifer. " (Emphasis added.)⁴¹

³⁸ SWC Response to the City of Pocatello's Motion for Summary Judgment, page 3.

³⁹ SWC's Answers to Pocatello's Discovery Requests, 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 3, 4, 8, 9, 14, 15, 19, 20, 23, and 24.

⁴⁰ SWC Response to the City of Pocatello's Motion for Summary Judgment, page 14.

⁴¹ SWC Rebuttal Expert Report by Brockway Engineering Inc., Exhibit C 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 2.

The SWC's *Rebuttal Report* also implies there is a hydraulic connection from Mink Creek and Gibson Jack Creek to the LPRVA:

If, in fact, ground water is pumped in lieu of a surface water diversion six miles away from the ground water extraction with the same early priority as the surface right, there will be significant differences in the timing and magnitude of both the Portneuf River flow and ground water underflow from the basin.⁴²

Furthermore, Pocatello's *Rebuttal Report* considered the statements in the SWC's *Rebuttal Report* and determined that "there is no disagreement that the groundwater and surface water sources of the Snake River and Portneuf River and its tributaries are interconnected. (emphasis added)⁴³ Thus, both expert reports concur that the sources are interconnected.

B. Pocatello is not required to comply with the legal "standards" promulgated by the Transfer Processing Memo to address interconnection.

In its *Response*, the State argues that the Memo requires Pocatello to show "an immediate and direct connection between the surface source and well" in order to address the issue of interconnection. However, the Transfer Processing Memo does not have the force and effect of law as explained earlier in this Reply. (See discussion of Transfer Processing Memo, *supra*, pages 7-11.)

IV. MUNICIPAL PURPOSE OF USE

A. Idaho Code § 42-1425 authorizes changes for water rights that pre-date the November 19, 1987 SRBA deadline.

The SWC argues that Pocatello "cites no legal authority that would allow this Court to change licensed irrigation water rights into municipal water rights" and that "Pocatello cannot

⁴² SWC *Rebuttal Expert Report* by Brockway Engineering Inc., Exhibit C 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 4.

⁴³ *Sprong Water Engineers Expert Rebuttal Report*, page 2, attached as Exhibit C to the Affidavit of Celeste Thaine.

collaterally attack its licenses in the SRBA.”⁴⁴ Instead, Pocatello must “file an application for transfer with IDWR under Idaho Code § 42-222.”⁴⁵ This assertion is wrong. Section 42-1425 allows for the transfer of water rights that predate the SRBA cutoff date of November 19, 1987.

I. All water rights pre-date the SRBA cutoff date of November 19, 1987.

The priority dates for water rights 29-7118, 29-7119, 29-7431, and 29-7770 pre-date the SRBA cutoff date.⁴⁶

B. **Pocatello’s use of water rights 29-7118, 29-7119, 29-7431, and 29-7770 fits within the broad definition of “municipal purposes.”**

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 SRBA⁴⁷ because each water right “is used by the City in its capacity and function as a municipality.”⁴⁸ As also cited by the State in its response brief, 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)⁴⁹

⁴⁴ SWC’s *Response to the City of Pocatello’s Motion for Summary Judgment*, page 2.

⁴⁵ SWC’s *Memorandum in Support of Summary Judgment*, page 7.

⁴⁶ The priority dates are as follows: 29-7118 is April 11, 1973. 29-7119 is April 11, 1973. 29-7431 is December 29, 1977. 29-7770 is May 21, 1984.

⁴⁷ SRBA claims 29-7118, 29-7119, 29-7770, and 29-7431.

⁴⁸ 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.

⁴⁹ 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)⁵⁰

Therefore, both the statute⁵¹ and common law⁵² 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. Sandy Downs Rodeo Arena: an example of how broadly "municipal purposes" is applied to water rights.

Not only does statutory law and the common law broadly define "municipal purpose" but the definition has been applied liberally as well. There are water rights held by Idaho municipalities that are used for a wide array of purposes, all of which are described as "municipal" purposes. For example, the City of Idaho Falls owns ground water right 25-7009 with an August 7, 1970 priority date. The *Notice of Claim* for this water right states that it is used to manage "Sandy Downs Rodeo Arena, Restrooms, Drinking Fountains, Etc." However, the water right is licensed for "municipal" purposes, and recommended by IDWR for "municipal"

⁵⁰ *In Re SRBA*, subcase 34-10030 Special Master's Report April 8, 1997, at page 2. The SF5 cited by the SWC was entered in 1995 regarding withdrawal of objections by the United States in this subcase.

⁵¹ Idaho Code Section 42-202(b).

⁵² *In Re SRBA*, subcase 34-10030 Special Master's Report April 8, 1997

purposes.⁵³ Thus, even the management of a rodeo arena has been categorized as fitting the definition of a water right held for “municipal” purposes.

3. Pocatello’s use of water rights 29-7118, 29-7119, 29-7431, 29-7770 fits the broad definition of “municipal purposes.”

It is undisputed that “municipal purposes” has been broadly defined by statute and the common law. (See discussion *supra* pages 17-18) However the State alleges in its *Response* that Pocatello “has made no effort to demonstrate that the uses under water right nos. 29-7118, 29-7119, and 29-7431 come within this definition of municipal purposes.”⁵⁴ The State then refers to the April 2006 Supplemental Director’s Report to conclude that these water rights are only used for “the traditional irrigation of a cropland” and the “traditional land disposal of sewage sludge.”⁵⁵ These statements are contradicted by the State’s own admissions and the April 2006 Supplemental Director’s Report. They must be clarified.

In its answers to Pocatello’s discovery,⁵⁶ the State readily admitted the following facts:

1. A municipal purpose of use “may include multiple uses such (sic) domestic, commercial, and other uses.”⁵⁷
2. “[A] municipal water right may be used for many uses including irrigation and airport safety.”⁵⁸

⁵³ See *Notice of Claim, License, and Recommendation* for water right no. 25-7009, attached as Exhibit C to Affidavit of Celeste Thaine.

⁵⁴ State’s *Response Memorandum in Opposition to the City of Pocatello’s Motion for Summary Judgment*, page 10.

⁵⁵ State’s *Response Memorandum in Opposition to the City of Pocatello’s Motion for Summary Judgment*, page 10.

⁵⁶ In the 76 pages of discovery questions 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. 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.

⁵⁷ 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.

3. The “primary use” of water right 29-7118 “is to satisfy customer needs within the area served by Pocatello.”⁵⁹
4. The water used under water right 29-7119 “is used within the corporate limits of Pocatello.”⁶⁰

In its *Response*, the State further agreed that “a municipal water right may include irrigation” and that “the City is a municipality that may exercise a municipal water right.”⁶¹ The State even quoted Section 42-202(b)’s broad definition of “municipal purposes”.

The April 2006 Supplemental Director’s Report states that water rights nos. 29-7118 and 29-7119 are used “to irrigate cropland at the city-owned airport.”⁶² Water right 29-7431 is used by the City “to apply effluent from its wastewater treatment plant to cropland . . .”⁶³ Exhibit L to the April 2006 Supplemental Director’s Report also includes an IDWR *Memorandum Decision and Order* on 29-7431 which states:

[T]he Federal Water Pollution Control Act [FWPCA] was passed by Congress. This act required that the best practicable control technology be implemented by July 1, 1977, to control the discharge of pollutants into the navigable waters of the United States.

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ 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.

⁶¹ State’s *Response Memorandum in Opposition to the City of Pocatello’s Motion for Summary Judgment*, page 9.

⁶² April 2006 Supplemental Director’s Report, page 19.

⁶³ April 2006 Supplemental Director’s Report, page 20.

After extensive review of the available control technology, the City of Pocatello and the J.R. Simplot Company determined that the land application of their waste effluent would be the most practical and least costly alternative.⁶⁴

Pocatello also provided the State with a copy of the Farm Lease between Pocatello and Edward Alvin Smith which stated that water rights nos. 29-7118 and 29-7119 were used to irrigate the airport in compliance with Federal Aviation Administration (FAA) laws.⁶⁵ Thus, it is undisputed that Pocatello uses water right nos. 29-7118, 29-7119, and 29-7431 to irrigate airport land in compliance with FAA laws, and for the land application of wastewater effluent in compliance with the FWPCA. It is further undisputed that usage of these water rights to comply with federal law fits within this broad statutory and common law definition of “municipal,” as well as the broad application of the term “municipal.”

C. Because water rights 29-7118, 29-7119, 29-7431, and 29-7770 are used for “municipal purposes,” they can be changed under Idaho Code § 42-1425 to a more appropriate description of their uses.

Just like the Highlands Golf course water right (29-2382), Pocatello’s water rights can be changed from irrigation to municipal.⁶⁶ In the present case, Pocatello is not arguing a change in use for 29-7118, 29-7119, 29-7431, and 29-7770. Instead, Pocatello is arguing the use has always been within the broad definition of “municipal”, and that legally these rights must be

⁶⁴ September 8th, 1978 IDWR *Memorandum Decision and Order*, Attached as Exhibit L to the April 2006 Supplemental Director’s Report.

⁶⁵ Farm Lease, Exhibit G 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*; SRBA claim file and IDWR license file of 29-7118 and 29-7119, Exhibit K to April 2006 Supplemental Director’s Report.

⁶⁶ See discussion of this water right on pages 3 and 4 of *Pocatello’s Response Brief to the Surface Water Coalition’s Motion for Summary Judgment*.

changed to a more appropriate descriptor. To the extent this corrects an error of law in the licenses IDWR issues for these rights, IDWR is not estopped to correct its errors of law.⁶⁷

The SWC's makes an enlargement argument in their response brief, stating that 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 unquestioningly expands the nature and scope of this right."⁶⁸ While it is true that some municipal rights are decreed for year-round use, the Highlands Golf Course water right 29-2382 demonstrates that this is not always the case. This water right was changed from irrigation to a municipal purpose of use under an accomplished transfer theory, but retained a volume limitation and a seasonal period of use.⁶⁹

1. Water Right 29-7770 has a 1984 priority date, and a 1984 date of application, thus making a §42-1425 transfer appropriate.

The State argues that water right 29-7770 was licensed "too late" to qualify for a change in purpose of use under Section 42-1425.⁷⁰ The SWC argues that the only "truth of the matter" revealed by the April 2006 Supplemental Director's Report is that "Pocatello's water right #29-7770 was licensed for irrigation purposes on January 2, 2003." (emphasis in SWC

⁶⁷ 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).

⁶⁸ *SWC Response to the City of Pocatello's Motion for Summary Judgment*, page 9.

⁶⁹ See discussion of this water right on pages 3 and 4 of *Pocatello's Response Brief to the Surface Water Coalition's Motion for Summary Judgment*.

⁷⁰ *State's Response Memorandum in Opposition to the City of Pocatello's Motion for Summary Judgment*, page 11.

original)⁷¹ Both the State and the SWC argue that changing this water right will thus constitute an impermissible “collateral attack.”⁷² These arguments are mistaken in fact as well as law.

The April 2006 Supplemental Director’s Report reveals the following information on water right 29-7770: (1) The priority date for 29-7770 is May 21st, 1984. (2) The *Application* for this permit was filed on May 10th, 1984. (3) The *Notice of Application* was filed on May 21st, 1984. (4) An *Interim Water Permit Request* was filed on March 27th, 1987, stating that the water permit was used for the irrigation of farmland, for the purpose of utilizing and applying domestic sewage sludge as crop nutrient and soil conditioner.⁷³ The municipal use began before November 19, 1987, and is appropriately claimed under Section 42-1425 and alternatively as a correction of legal error. The date the license was issued, January 2, 2003, is not relevant. Thus, water right 29-7770 was not licensed “too late”⁷⁴ to be changed under Section 42-1425.

As discussed above (see *supra* 19-21), it is undisputed that Pocatello’s usage of its water rights to comply with federal law fits within this broad statutory and common law definition of “municipal,” as well as the broad application of the term “municipal.” The following facts relating to water right 29-7770 are not in dispute:⁷⁵

1. 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

⁷¹ *SWC Response to the City of Pocatello’s Motion for Summary Judgment*, page 5.

⁷² *State’s Response Memorandum in Opposition to the City of Pocatello’s Motion for Summary Judgment*, page 11; and *SWC Response to the City of Pocatello’s Motion for Summary Judgment*, page 2.

⁷³ See Exhibit M to the April 2006 Supplemental Director’s Report.

⁷⁴ The State argued: “Since the date of the license post dates the commencement date of the adjudication, any claimed change in purpose of use after the issuance of a license was too late.” See, *State’s Response Memorandum in Opposition to City of Pocatello’s Motion for Summary Judgment*, page 11.

⁷⁵ For a discussion of these admission, see *Pocatello’s Brief in Support of Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury*.

waste water plant is performed “as a part of the City’s municipal responsibility to treat and dispose of domestic sewage.”⁷⁶

2. 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.”⁷⁷

Thus, Pocatello’s use of 29-7770 is also for “municipal purposes” and may be changed pursuant to Section 42-1425.

CONCLUSION

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

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

⁷⁶ 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.

⁷⁷ 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

DATED this 21st 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 21st day of December 2006, I caused a true copy of the foregoing **CITY OF POCA TELLO'S REPLY BRIEF IN SUPPORT OF THE CITY'S NOVEMBER 30, 2006 MOTION FOR SUMMARY JUDGMENT ON MUNICIPAL PURPOSE OF USE, INTERCON-NECTION, AND INJURY UNDER I.C. § 42-1425** 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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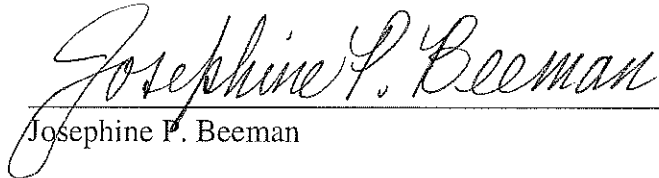
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EXHIBIT A

Subcase Numbers

29-00271
29-00272
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29-02382
29-02401
29-02499
29-04221
29-04222
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