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DEPARTMENT OF
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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, <i>et al.</i> (see attached Exhibit A)
	)	
	)	
	)	STATE OF IDAHO'S TRIAL BRIEF
Case No. 39576	)	
	)	
	)	
_____	)	

COMES NOW, the State of Idaho, by and through the undersigned counsel, and submits this Trial Brief to the SRBA District Court. This memorandum outlines the issues for trial and discusses the legal standards applicable to the Court's determination of the disputed issues of fact.

The State of Idaho intends to rely upon the investigation performed by the Idaho Department of Water Resources, hereinafter the "IDWR," of the claims of the City of Pocatello, hereinafter the "City."

I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

This controversy relates to the determination of the City's water rights.

ii. Course of the Proceedings

The City filed thirty-eight claims to water rights acquired under state law. The IDWR recommended all thirty-eight claims to water rights. However, the City disagreed with the conditions imposed by the IDWR and filed objections to all of IDWR's Recommendations.

The State of Idaho filed a timely response to each of these objections.

The Surface Water Coalition filed a Joint Motion to Participate in March 2006. The Court granted this motion on April 25, 2006.

The IDWR filed a Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights on April 13, 2006, hereinafter referred to as "Supplemental Director's Report," which included a variety of maps and exhibits.

II. ISSUES PRESENTED FOR TRIAL

Because of the number of water rights involved, the relationship between the various water rights, the issues raised by the objections, the explanation provided by the IDWR in its Supplemental Director's Report, the elements at issue for each water right are confusing. The State of Idaho does not know whether the City intends to proceed with each issue stated in its objections or whether the City has acquiesced in any of the issues first raised in its objections. The following four groups of issues are believed to be before the District Court:

A. **Municipal purpose:** The IDWR recommended thirty-one water rights with a municipal purpose of use and the following seven water rights with an irrigation purpose of use: 29-2354, 29-7118, 29-7119, 29-7222, 29-7431, 29-7502, and 29-7770. The City's objections requested that all of its water rights have a municipal purpose of use. The Supplemental Director's

Report described this objection as applying to the following water rights: 29-7118, 29-7119, 29-7431, and 29-7770. The City acquired water right no. 29-7222 and the appurtenant land in 1992 for a public park in memory of the donor's deceased husband, Owen Ward. Supplemental Director's Report, at 6. The City acquired water right nos. 29-2354 and 29-7502 as part of the Restlawn Cemetery after 1987. The legal issues about application of Idaho Code § 42-1425 to these three water right differ from the other four water rights listed above.

B. **Alternative Points of Diversion for Certain Ground Water rights.** The IDWR recommended the following eighteen water rights as being interconnected and included a special provision to prevent injury. 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639. The City objects to the condition and seeks its deletion.

The IDWR recommended the following three water rights as being interconnected and included a special provision to prevent injury: 29-7450, 29-11344, and 29-13638. The City objects to the condition and seeks its deletion.

C. **Alternative Points of Diversion for Four Surface Water rights.** The IDWR recommended the four surface water rights with only the original point of diversion from the surface source. The City objected and would like the surface water rights to be diverted from its existing points of diversion from ground water.

D. **Separate Administration of Water Rights:** The IDWR recommended that all water rights within Basin 29 be administered as connected sources of water, except for three water rights not relevant to these proceedings in the Papoose Creek drainage. The City objected and requested that all of its water rights be administered separately. The difficulty with this issue is that the predicate facts that need to be established for such a conclusion are inconsistent with the City's

objections related to alternative points of diversion for its water rights. For this reason, it is difficult for a party other than the claimant to determine what matters will be disputed at trial.

III. CLAIMANTS BEAR BOTH THE BURDEN OF PRODUCTION AND THE BURDEN OF PROOF ON EACH DISPUTED ELEMENT OF EACH WATER RIGHT.

Idaho Code § 42-1411(5) “makes it clear that the claimant bears both the burden of production as well as the burden of proof as to each element of a claimed water right.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). Pursuant to Idaho Code § 42-1411(4), the Director’s Report “is prima facie evidence of the nature and extent of the water rights under state law.” *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). Claimants, as the objecting parties, have “the burden of going forward with evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director’s report.” Idaho Code § 42-1411(5); *see also State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1997) (“The director’s report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption.”). As a result, a claimant is “required to present substantial evidence . . . in order to overcome the presumption created by the director’s report.” *Clear Springs Foods, Inc.*, 136 Idaho at 764, 40 P.3d at 122; *see also Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986). Substantial evidence is defined “as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.” *Evans v. Hara’s, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

CONCLUSION

The trial of these thirty-eight water rights acquired under state law will present a major logistical challenge in sorting out the evidence as it applies to each of the disputed water rights.

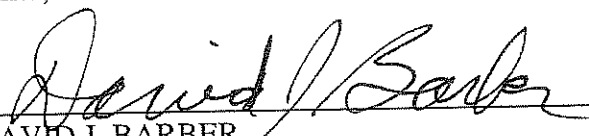
Since the City has both, the burden of producing evidence, and the ultimate burden of persuasion, any failure of proof dictates that the Court decree the specific water right in accordance with the Director's Recommendations.

RESPECTFULLY SUBMITTED this 14th day of February 2007.

STATE OF IDAHO

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EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
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29-13638
29-13639

CERTIFICATE OF SERVICE

I certify that on this 14th day of February 2007, I caused to be served the original and/or copy of the STATE OF IDAHO'S TRIAL BRIEF on each of the following persons by the indicated method:

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Not Applicable



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