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

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general and submits the STATE OF IDAHO'S POST-TRIAL BRIEF in the above-entitled matter in accordance with the ORDER SETTING DEADLINE AND CLOSING ARGUMENT entered on March 13, 2007.

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I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

This controversy relates to the determination of the water rights of the City of Pocatello, hereinafter the “City,” acquired under state law.

ii. Course of the Proceedings

The City filed 38 claims to water rights acquired under state law. Eighteen of the claims requested that each of their points of diversion be recognized as an alternate point of diversion for the other eighteen claims, because they were part of an interconnected well system. In addition, the City requested that two other claims at the airport be recognized as an alternate point of diversion for the other claim. Later, the City amended three other claims to add them to the list of water rights that were part of the interconnected well system. These three claims were changed in 1999 in Transfer No. 5452.

The Director, hereinafter the “Director,” of the Idaho Department of Water Resources recommended each of the thirty-eight claims and included a condition restricting the diversion of water for those claims for which an alternate point of diversion had been claimed. The Director revised this condition several times since the filing of the Director’s Report. The most recent version is found in the Amended Director’s Reports filed on February 27, 2007.

The City filed an *Objection* to the Director’s Recommendation for each of these thirty-eight state water right claims. The State of Idaho filed a timely *Response* to each of these objections.

The Director 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. The Supplemental Director’s Report stated in part as follows:

Three water rights, 29-2274, 29-2338, and 29-7375, located within the city proper have 12 points of diversion recommended because transfer no. 5452 dated June 28, 1999, only recognized 12 points of diversion for those three water rights. Because there was a post-1987 final administrative action on these three water rights, the Department recommended them as transferred.

Supplemental Director's Report at 13.¹

The Surface Water Coalition, hereinafter referred to as the "SWC," filed a *Joint Motion to Participate* in March 2006. The district court granted this motion on April 25, 2006.

The district court entered its *Seventh Amended Trial Scheduling Order* on September 11, 2006 and set this matter for five days of trial commencing on February 26, 2007.

The City filed the *City of Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury under I.C. § 42-1425* with supporting papers on November 30, 2006.

The SWC filed the *Surface Water Coalition's (SWC) Motion for Summary Judgment* with supporting papers on November 30, 2006.

The State of Idaho filed its *Response Memorandum in Opposition to City of Pocatello's Motion for Summary Judgment* on December 12, 2006.

The district court entered its *Second Order on Summary Judgment* on February 16, 2007.

The Court stated:

This water right [referring to water right 29-7770] was licensed in 2003 for irrigation purposes. Pocatello seeks a municipal purpose and a place of use as the city's 'service area.'

Licenses are persuasive proof of the elements of a water right, but are not conclusive proof. Changes occurring after the license may provide evidence to support a change in the elements. Typically, the post-licensing changes are a valid transfer or accomplished transfer. There is no evidence of record that an administrative transfer occurred. In order to overcome the licensed elements, Pocatello must show a valid accomplished transfer under I.C. § 42-1425.

¹ The Supplemental Director's Report states that 12 points of diversion were recognized in Transfer No. 5452. My review of Transfer No. 5452 indicates that thirteen points are listed. Thirteen points are listed in the recommendations for these three water rights.

The statute allows SRBA claimants to assert water rights with changes to elements if three factors exist:

1. The change was made prior to November 19, 1987;
2. No other water rights existing on the date of the change were injured; and
3. The change did not result in an enlargement of the right.

Under the unique procedural history of this case, Pocatello cannot show a valid accomplished transfer. . . . Since the license was issued in 2003, any change after the license would not comply with the statutory deadline of 1987. A valid accomplished transfer could not be alleged.

Therefore summary judgment is granted as to 29-7770.

Id. at 11.

The Surface Water Coalition and the City filed on February 26, 2007, a *Stipulation and Agreement Between Pocatello and the Surface Water Coalition in Pocatello's SRBA Subcases 29-271 et seq.*, hereinafter "*SWC Stipulation*," which was introduced into evidence as IDWR Exhibit 41. Paragraphs 1 through 3 of the *SWC Stipulation* stated as follows:

1. Water Right No. 29-7118: SWC and Pocatello agree that the water right shall be changed and conditioned as described on Exhibit B attached.
2. Water Right No. 29-7119: SWC and Pocatello agree that the water right shall be changed and conditioned as described on Exhibit C attached.
3. Water Right No. 29-7770: SWC and Pocatello agree that the water right shall be changed and conditioned as described on Exhibit D attached.

IDWR Exhibit 41, at 1. Exhibits B and C changed the season of use from the irrigation season to the entire year.

The *SWC Stipulation* also included two remarks in Exhibit E to the *SWC Stipulation* that related to the issue of alternate points of diversion for the City's water rights. The first remark related to the ground water alternate points of diversion and stated in part:

The exercise of this water right at any of the 23 alternate points of diversion listed below, by itself or in combination with the other listed water rights, will not exceed the respective rate of diversion at each diversion listed below, unless pursuant to an approved administrative action, including, but not limited to, a section 42-222 transfer.

IDWR Exhibit 41, Exhibit E, at 1. The second remark was proposed to be included in the four surface water rights and stated in part:

Exercise of this water right from October 1 through September 30 at the 23 alternate points of diversion will be limited to the amount of water delivered from these surface water sources to the Portneuf River after that water has been diverted in priority, at the original point of diversion (on Mink Creek or Gibson Jack Creek) and which is delivered past any intervening water users during the period from October 1 through September 30. Pursuant to the settlement in the SRBA proceedings on these subcases, the City, conditioned upon and pursuant to an agreement between the parties and IDWR, could implement an administrative mechanism that would permit the City's diversion entitlement to be measured in Mink Creek or Gibson Jack Creek and delivered past other water users on those creeks.

IDWR Exhibit 41, Exhibit E, at 2.

The trial began on February 26, 2007 before the district court. When the trial did not conclude on the scheduled date of March 2, 2007, the district court set this matter for an additional day of trial on March 8, 2007. The trial concluded on that date. The transcript of the trial exceeds 1,100 pages.

The district court entered its *Order Setting Deadline and Closing Argument* on March 13, 2007, which set the date of April 27, 2007 for lodging of Post-Trial Briefs and the date of May 4, 2007 for oral argument.

iii. Statement of Facts

The following four issues were unresolved at the time of the commencement of trial: (1) the purpose of use for water right nos. 29-07118, 29-07119, and 29-07770; (2) the priority date for water right nos. 29-13558 and 29-13639; (3) alternative points of diversion for four surface water rights; (4) issues related to ground water rights with alternative points of diversion for the inter connected well system. The State will summarize the evidence presented regarding each issue.

Purpose of Use for Water Nos. 29-7118, 29-7119, and 29-7770

David Tuthill, the Director of the IDWR, testified about IDWR's response to the resolution proposed in the SWC Stipulation regarding water right nos. 29-7118, 29-7119, and 29-7770. He stated that "[t]o the extent that biosolids had been applied on the subject property prior to the commencement of the adjudication, November 19, 1987, we would agree with this stipulation" for water right no. 29-7118. Tr. Vol. II, p. 277, L. 20 through p. 278, L. 5. He repeated that statement for water right no. 29-7119. He further testified that the IDWR would not agree to the resolution described in the SWC Stipulation for water right no. 29-7770, because the IDWR had issued the license for water right no. 29-7770 after the commencement of the adjudication. Tr. Vol. II, p. 279, L. 5 through p. 280, L. 15.

Mr. John Herrick was the City's primary witness regarding operation of the wastewater treatment plant by the City of Pocatello. He began working for the City in 1981. Tr. Vol. II, p. 365, L. 11 through L. 1981. He testified that the two wells associated with water right nos. 29-7118 and 29-7119 have been used for biosolids application since he began working in 1981. Tr. Vol. II, p. 401, L. 22 through 24. However, Mr. Herrick provided no details about the operation of the biosolids program prior to November 19, 1987. Specifically, he did not describe the season of use of the water for the bio-solids program. Tr. Vol. II, p. 365, L. 7 through p. 413, L. 2.

The City offered City Exhibits 106, 157, 158, 159, 168 and 169 into evidence regarding its biosolids land application program. City Exhibit 106 is a map that illustrates location of the biosolids facilities and water rights. City Exhibit 157 is a copy of the New Sludge Rules, dated November 25, 1992. City Exhibit 158 is the City's Biosolids Management Plan, dated February 2, 1998. City Exhibit 159 is the City's Crop Management Plan. Exhibits 168 and 169 are copies of two different farm leases applicable to its biosolids program. City Exhibit 158 states:

III. LAND APPLICATION CONSIDERATIONS

...

G. Management Practices

The following management practices shall apply to Pocatello's land applied biosolids:

1. Biosolids shall not be applied to flooded, frozen, or snow covered ground so that sewage sludge enters wetlands or other waters of the U.S. unless authorized by the permitting authority.
2. Biosolids shall not be applied at rates above agronomic rates, with the exception of reclamation projects when authorized by the permitting authority.

...

H. Land Application of Biosolids

Although biosolids are produced on a daily basis year-round by the wastewater treatment process, the handling and processing of biosolids follows a seasonal cycle. Pocatello has a large sludge storage lagoon that is capable of storing six months of accumulated biosolids. In late summer (usually about August 15th), after the contract farmers complete their crop harvest, an intensive biosolids hauling and application period begins that typically lasts no more than eight weeks. . . .

A second intensive application period occurs for up to eight weeks beginning in early May.

Priority Date for Water right Nos. 29-13558 and 29-13689

The City identified City Exhibits 146 through 154 as being relevant to the issue of the correct priority date for water right numbers 29-13558 and 29-13689. Tr. Vol. I, p. 177, L. 21 through p. 178, L. 19. City Exhibit 147 is an excerpt from an early history of Pocatello. It recounts the fact that the year of 1924 was a very dry year and that "[i]ndirect pressure was placed on the villages of North Pocatello and Fairview immediately north of Pocatello. The two villages consolidated, effective July 31, to form the village ___ Alameda. The principal purpose at that time ___ to secure means to purchase the Fairview water system, owned by the Pocatello Realty and Investment Company." *Id* at Bates number 1624. City Exhibit 148 is a copy of a newspaper article from the Pocatello Tribune dated July 17, 1924. The normal and enlarged copies of the article are both difficult to read. The article appears to confirm the consolidation of the villages of North

Pocatello and Fairview on July 31, 1924. The transcription of the article provided by the City describes the effective date of the consolidation as being July 21, 1924. If the City's transcription is correct, then City Exhibit 147 conflicts with City Exhibit 148. City Exhibit 150 is a copy of a newspaper article from the Alameda Enterprise, dated July 20, 1952, which describes the history of the City of Alameda's water system as follows: "[T]he speaker [Mr. A. Y. Satterfield] pointed out that the first well was dug to the depth of 65 feet, providing a good supply of water, but during the term of Mr. Freckleton, Alameda's first mayor, the well was dug down to 100 ft. and another 65 ft well was dug later." The newspaper article concluded by stating: "Mr. Satterfield, who came to the area in 1905, was introduced by his son, Homer Satterfield."

City Exhibit 154 is a copy of License file 29-2324, which is in the name of the City of Alameda. The application for a permit to appropriate ground water, which is dated October 22, 1952, describes the water supply for the City of Alameda as "three wells, drilled and in use for varying periods of time past, all in corporate limits of Alameda and serving as source of supply for the City owned and operated municipal water system, and constitute the only sources of supply for said system." *Id.* at unnumbered page 7 of City Exhibit 154. City Exhibit 154 describes the amount of water produced from the three wells as 6 c.f.s. City Exhibit 151 is an excerpt from Polk's Pocatello City Directory 1962, and it describes the growth of the City of Alameda as follows: "The population in 1940 was 2,100. By 1950 it had increased to 4,705. The present population, from the census of 1960, is 10,587. The rate of growth has been about 12 per cent per year, or over 125 per cent over ten years. Alameda is presently the ninth largest city in the State of Idaho." *Id.* at 1.

Ms. Beeman examined Mr. Carter Fritschle, IDWR water agent, regarding the information contained in City Exhibits 148 through 154.

Q. So there is nothing in these documents that you feel would lead to your reconsideration of the recommendation of the priority dates? I can withdraw the question if the Department would like to take a look at these materials.

A. Based on what you had me read, I did – the only thing I can say at this point was instead of October 22nd, the date of the license, since the wells were in place at the date of October 22nd, 1952, I believe, that yes, I could probably go the day ahead of that. I could recommend October 21st, 1952, for – well, I'm not going to remember the number. But anyway, the water right that was recommended with the October 22nd, 1952 priority date.

Tr. Vol. I, p. 196, L. 14 through p. 197, L. 3.

Alternative Points of Diversion for Four Surface Water Rights

The City's primary witnesses concerning the surface water system was Tommie Dekker and Harold Gene Hargreaves. Mr. Dekker began working as an Engineering Tech with the City's water department in 1969-1970; he was promoted to Water Superintendent in about 2001. He retired in 2002. Tr. Vol. III, p. 423, L. 8 through p. 424, L. 20. Mr. Dekker authenticated the water diversion records for the City contained in City Exhibit 111. City Exhibit 111 described the amounts diverted by the City for selected months as follows:

Month and Year	Amount diverted and used in gallons per month from City Exhibit 111	Amount diverted and used converted to cubic feet per second
April 1985	326, 044, 000	16.8
May 1985	470, 617, 000	23.5
June 1985	726, 157, 000	37.4
March 1986	248, 126, 000	12.4
April 1986	239, 878, 000	12.4
May 1986	424, 916, 000	21.2

²

Mr. Hargreaves started with the City's water department in 1988. Tr. Vol. IV, p. 646, L. 5-

10. Mr. Hargreaves described the interconnected water system of the City as follows:

Q [DEAN TRANMER]. Would you describe for the Court how Pocatello's water distribution is set up?

A. It's rather complex . . . As far as we have multiple wells in the valley floor which supply our water, they all enter in to a connected distribution system.

² The third column and the conversions to cubic feet per second were added by the author.

Within that distribution system we have other connections, booster stations, which are connected that supply the tanks on our benches.

As demand requires, tank levels drop, boosters are activated. When they're activated, they withdraw water from that interconnected distribution system to supply the tanks.

But they also – we have wells on the valley floor that remain running continuously to supply the demand in the valley floor also.

We kind of have two systems. We have the areas that supply the benches, which do not run down – with one exception – into the valley floor. So they're closed systems. Each tank supplies a closed system.

Q. And would you estimate what percentage of the City citizens are supplied with the closed system?

A. I would say an estimate between 40 to 50 percent, because of the expansion on the benches.

Tr. Vol. IV, p. 649, L. 25 through p. 650, L. 25. He provided history about the addition of wells to the interconnected system. He testified that the City added well no. 34 in 1988 and added well nos. 36 and 44 in that same time frame. Tr. Vol. IV, p. 691, L. 4 through 12. He later testified that the present source of the water for the City's water system was all well water. He further stated that the use of surface water supplies ceased in March of 1993 because of regulatory requirements. Tr. Vol. IV, p. 664, L. 23 through p. 665, L. 8; Tr. Vol. IV, p. 672, L. 19 – L. 22.

Although culinary use of the surface water sources has ceased, some use of surface water sources continues to the present for irrigation of golf courses. Tr. Vol. IV, p. 665, L. 21 through p. 666, L. 2. The infrastructure for the surface water diversions still exists and could continue diverting water with minor modifications. If the City did not divert the water from Gibson Jack Creek and Mink Creek, the waters from those creeks would flow into the Portneuf River. Tr. Vol. IV, p. 671, L. 3 through p. 676, L. 25.

Alternative Points of Diversion for Ground Water Rights

The City has claimed three different groups of its rights to divert ground water as having interconnected wells as follows:

Group No.	Water Right Numbers	Interconnected Wells In Use	Interconnected Wells Not In Use	Abandoned Wells
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1	29-02401	13, 16, 18		
1	29-02499	27		
1	29-04221	26		
1	29-04223		33	
1	29-04224	21		
1	29-04225		23	
1	29-04226	14		
1	29-07106	29		
1	29-07322	31, 32	30	
1	29-11339			Alameda 6 Alameda 7
1	29-11348	28		
1	29-13558			Alameda 1
1	29-13559			Alameda 2
1	29-13560	2, 3		1
1	29-13561			4
1	29-13562			6
1	29-13637		7	
1	29-13639	22		
2	29-02274	10, 44		8 9
2	29-02338	12, 13	15	
2	29-07375		15	
3	29-07450	35		
3	29-13638	39		

City Exhibits 118 and 181; Tr. Vol. III, p. 513, L. 12 through p. 515, L. 22.

The first group involves eighteen water rights with eighteen interconnected wells. Some of the water rights in this first group, such as water right no. 29-2401 have three wells originally developed for this water right. Other water rights in this first group, such as water right no. 29-11339, have no original wells in service. The City seeks to remove the condition described in the Amended Director's Reports filed on February 27, 2007. The City also requests the addition of well No. 44 as an alternate point of diversion for all eighteen water rights. Currently, well no. 44 is listed as a point of diversion for only water right nos. 29-02274, 29-2338, and 29-7375.

The second group involves three water rights that were the subject of Transfer No. 5452. The City's objection requests that the eighteen interconnected wells in the first group be added to this second group.

The third group involves two water rights with two interconnected wells that serve the

airport. The City seeks to remove the condition described in the Amended Director's Reports filed on February 27, 2007. City Exhibit 118.

The City presented evidence regarding the conditions imposed on alternative points of diversion for two inter-connected ground water rights at the Pocatello airport, and on alternative points of diversion for eighteen inter-connected ground water rights. The City's evidence was intended to show its compliance with the provisions of accomplished transfer statute, Idaho Code § 42-1425. More specifically, the evidence addressed the primary disputed factual issue: Would the accomplished transfer for the ground water rights injure other water users, if the water rights did not include the condition imposed by IDWR?

The City's primary expert witness was Mr. Gregory K. Sullivan, P.E. He was qualified as an expert in the fields "[w]ater resource, water resources engineering, and water rights engineering." Tr. Vol. IV, p. 643, L. 21 through p. 644, L. 10. Mr. Sullivan does not claim to be an expert, however, with respect to the subject of geology. He had only one basic geology course during his college. Tr. Vol. IV, p. 774, L. 8 through p. 776, L. 7.

Mr. Sullivan relied, in part, on papers authored by Professor John A. Welhan with the Idaho Geologic Survey for his understanding of the geology of the Lower Portneuf River Valley Aquifer, hereinafter referred to as the "LPRVA." City Exhibit 131, Welhan, J.A. Meehan, C, and Reid, T., 1996, *The Lower Portneuf River Valley Aquifer: A Geologic/Hydrologic model and Its Implications for Wellhead Protection Strategies*; City Exhibit 132, Welhan, John, 2006, Idaho Geologic Survey Staff Report, 5-6, *Water Balance and Pumping Capacity of the Lower Portneuf River Valley Aquifer*. Mr. Sullivan described these reports as follows:

MR BARBER: Do you have any disagreement with the conclusions reached by Mr. Welhan in this document?

THE WITNESS: Well, I – I – I can't say that I have gone back and reviewed every single part of this report. I mean, there are certain things in this

report about wellhead protection and various subjects that were not the focus of my studies, so I wasn't reviewing the report from that standpoint.

But I was looking at it more from the description of the aquifer, the sources of water for the aquifer, some water balance work that he did in looking at the sources of the aquifer. So I have no reason to disagree with those parts of the report.

MR BARBER: Okay. And when you say you have no reason to disagree, let me turn that around.

Do you agree with his conclusions with respect to those aspects that you rely – that you looked at this report for?

THE WITNESS: Yes. Yes. I find them reliable. **I think they're the best available information on those subjects.**

...
MR. BARBER. Mr. Sullivan, do you – I'm going to ask you the same questions.

Do you agree with all the conclusions of Mr. Welhan in Exhibit 132?

WITNESS: Again, it's – it's – I think it's reasonably reliable. It's the best available information. . . . But it's the only work that I'm aware of on the water balance and water supply of the Portneuf River Valley Aquifer.

MR. BARBER: **And with respect to that subject area, it's the best information available, sir?**

THE WITNESS: Yes.

Tr. Vol. IV, p. 778, L. 20 through p. 779, L. 16; Tr. Vol. IV, p. 780, L. 19 through p. 781, L. 8
(emphasis added).

City Exhibit 132, Welhan, John, 2006, *Idaho Geologic Survey Staff Report, 5-6, Water Balance and Pumping Capacity of the Lower Portneuf River Valley Aquifer*, summarized its conclusions as follows:

A detailed water balance of the southern portion of the lower Portneuf River valley (LPRV) aquifer, completed in 1993-94, has been updated to reflect new information on potential recharge sources, to evaluate recharge potential in the northern valley, and to provide a baseline for evaluating the aquifer's future response to drought conditions and increased demand.

The water balance results, derived from a period spanning 510 days in 1993 and 1994, reflect near-normal hydrologic conditions. . . .

These results indicate that total demand was already at 100-115 percent of system capacity more than a decade ago. During 1993-94, municipal pumping (Pocatello and Chubbuck) accounted for 6.5 billion gallons of total demand, with the remaining 0.8 Bgal per year tapped for non-municipal uses. Agricultural withdrawals accounted for 5-10 percent of total demand, with domestic and self-supplied industrial withdrawals each at about 5 percent; non-metered golf course irrigation accounted for 2 percent.

Aquifer recharge in a below-normal year may be as much as half that of a normal water year. Storage (water level) in the southern aquifer has declined by more than 10 feet since about 1975, and represents direct evidence that long-term demand has exceeded long-term capacity for more than two decades.

Id. at 1-2. This report further describes the LPRVA as follows:

Because the LPRV is a geographically small watershed its principal aquifer, which supplies all municipal water needs, is prone to large annual pumping-induced storage fluctuations (i.e., large seasonal swings in ground-water level).

Id. at 3.

The City submitted City Exhibit 116, *Spronk Water Engineers, Inc. Expert Report Dated September 29, 2006 Prepared for the City of Pocatello*, which was prepared by Gregory K. Sullivan. This report addresses the factual issues as follows:

2.3 Well-to Well Interference Impacts

...

Water Level Measurements

...

Average pumping and static water levels were calculated for each well for the period of record through 1987.

...

Average Measured Pumping Drawdown

As of 1987

City of Pocatello Wells

0-4 feet	4-10 feet	10-19 feet	No Data
Well 10	Well 2	Well 29	Well 13
Well 12	Well 7	Well 31	Well 14
Well 21	Well 16		Well 15
Well 22	Well 18		Well 23
Well 28	Well 26		Well 33
Well 30	Well 27		Well 34
Well 31			Well 39
Well 35			Well 44

Hydrogeology

...

The City Wells, with the exception of Well 32, withdraw water from the LPRVA [Lower Portneuf River Valley Aquifer], which extends from the Portneuf Gap, through the City to the City of Chubbuck.

...

The LPRVA within and north of the City is comprised of multiple, confined silty gravel and sand layers, and appears to consist of a least two major water-bearing zones which include a shallow, confined gravel aquifer and a deep confined gravel aquifer.

...

The LPRVA is considered to have little direct hydraulic connection to the Portneuf River in the reach extending through the City during periods of normal and low flows. The lack of direct hydraulic connection is attributed to the approximately 50 feet thick layer of clayey silt underlying the bed of the Portneuf River. In addition, the Portneuf River flows in a concrete lined channel through portions of the City.

3.4 Hydraulic Connection between Surface Water Sources and the LPRVA

...

In addition, information reviewed indicates that the LPRVA [Lower Portneuf River Valley Aquifer] is in hydraulic connection with the surface water system at two locations: (1) generally along the Bannock Range, where tributaries to the Portneuf River, including Mink Creek and Gibson Jack Creek, emerge from the foothills and comprise a source of recharge to the LPRVA, and (2) north of the City. Based on that information, it is my opinion that the City's surface water diversions and ground water diversions are from the same water source.

3.5 Effect on Other Water Rights

...

Portneuf River and Snake River Water Rights

The City's use of the surface water rights diverted at the City's interconnected municipal wells will be generally the same as it was historically, except that water will be diverted from the interconnected City Wells rather than from the diversion structures on Mink and Gibson Jack Creeks.

Local Impacts

It is unlikely that Pocatello's municipal wells had any significant impact to neighboring wells prior to November 19, 1987 as a result of diverting its surface water rights at alternate points of diversion for the same reasons as described in section 2.

City Exhibit 116, at 7-19. Mr. Sullivan described the extent of his field work for preparation of City

Exhibit 116 as follows:

Q [MR. BARBER]. Okay. So when were you up in Mink Creek before September 29, 2006?

A. I don't recall the exact date, but, you know, we have been working for the City since the early '90s. And I've had occasion to go examine the flow of those creeks, you know, as I looked around the city.

Q. Okay. So is it fair to characterize these visits that were undertaken prior to September 29, 2006, as windshield visits out of an automobile?

A. Well I got out of the car on occasion to look – to look around. But some of the observations were made from within the car.

Q. Okay. Did you make any measurements of stream flows during those visits?

A. I did not?

Q. Okay. Do you have any estimates of how many windshield visits you undertook prior to September 29, 2006?

A. Two or three.

Q. Okay. And what was the duration of these – of each visit, approximately?

A. A few hours.

...

Q. Okay. So if I understand your answer, you're essentially saying that this report is more than just an editorial summary, it reflects your independent analysis of other documents and data that you have collected; is that a fair statement, then?

A. Yes, that's generally fair.

Tr. Vol. VI, p. 1076, L. 4 through p. 1077, L. 21. Mr. Sullivan drew during cross-examination a diagram, which was introduced as State Exhibit 303. This diagram depicts (1) the ground surface, labeled GS; (2) a City well; (3) two private wells, labeled as PW1 and PW2, and two static water levels, labeled as SW1 and SW2. Tr. Vol. VI, p. 1083, L. 8 through p. 1093, L. 12. He explained that private well, PW1, was being interfered with by the City well, because it was within the cone of depression of the City well. Tr. Vol. VI, p. 1088, L. 12 through L. 22. He further explained that private well, labeled PW2, is completely dried up if the static water level is at static water level 2. Tr. Vol. VI, p. 1093, L. 13 through L. 19. State Exhibit 303 is copied in Figure I on the next page.

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29-27648
(Subcase No.)
EXHIBIT
State 303
Date: 3/8/07

ADMITTED

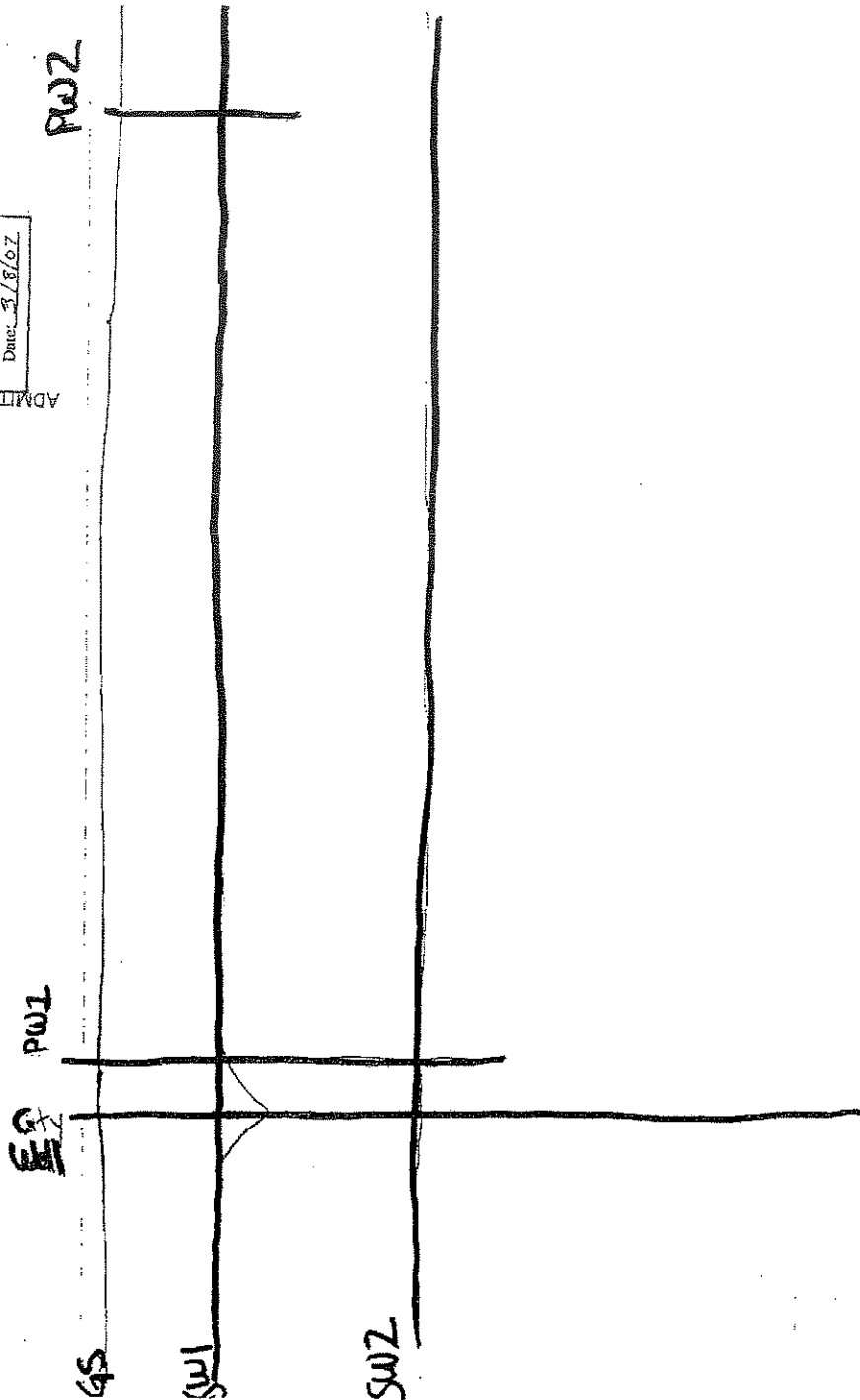


Figure I

State Exhibit 304 was offered and admitted into evidence. State Exhibit 304 consists of a more legible copy of Table 4 and Figure 5 from City Exhibit 133: CH2M-Hill, 1994, *Hydrogeology and Assessment of TCE Contamination in the Southern Portion of the Pocatello Aquifer – Phase I Aquifer Management Plan*. Mr. Barber examined Mr. Sullivan about Table 4, which is a domestic well inventory. He was not aware of the inventory prior to Mr. Barber's examination. Tr. Vol. VI, p. 1114, L. 7 through L. 9. Table 4 identifies domestic wells that have been abandoned provides information about the depth to the static water level. Mr. Barber asked Mr. Sullivan whether he knew why the well was abandoned. He did not know. Tr. Vol. VI, p. 1117, L. 18 through p. 1118, L. 3. Mr. Barber asked whether he knew the present depth to static water level for several of the wells. He did not. Tr. Vol. VI, p. 1118, L. 4 through p. 1119, L. 14.

David Tuthill, Director of the IDWR, testified about IDWR's concerns regarding alternate points of diversions as follows:

Q [GARRICK BAXTER]. So why was the condition created specifically here?

A. . . .

So our understanding of our responsibility through the adjudication is to appropriately condition a water right so that it cannot be expanded over time inappropriately. . . .

Q. So, Mr. Tuthill, when you say 'expanded inappropriately,' do you mean injury?

A. That's correct.

The two areas that we were concerned about were, number one, well interference that could happen in the future as a result of increased pumping at wells and, **secondly, conjunctive administration** concerns relative to diversion from one location as compared with diversion from another location.

Tr. Vol. II, p. 231, L. 24 through p. 232, L. 25 (emphasis added). David Tuthill explained the concerns about well interference as follows:

Q [GARRICK BAXTER]. Are there specific examples under which that you think – you can think that injury could arise with regards to alternate points of diversion as recommended here in the – in the Department's recommendation here and as to neighboring water rights?

...
A. Yes. As an example, if this is a municipal well, let's say, for example, the priority date of this well is June 1st, 1970, as an example, and let's say, for an example, historically this well was pumped for an average of 12 hours per day. And let's say, for example, that this well is – has been drilled next to another existing domestic well with a priority date of 1950. And let's say, for example, that the history of this municipal well is to have been pumped for 12 hours per day without problem and the system has reached an equilibrium in the area and the domestic well has never been injured as a result of pumping of this junior municipal well.

Let's say, for example, that this well is combined through the adjudication process with another well, which it's interconnected with, that has a priority date of 6/1/1930. And this well is pumping 12 hours per day.

As the city is small, say, in the year 2006, this has not been a problem for the domestic user. All of these wells are in a system where they've reached equilibrium. There has been no local interference problem. Each well has – creates its own draw-down of the aquifer. But with the existing pumpage, there's really – we have never seen a problem with local interference.

Let's say in the year 2010 the pumpage of this well increases to 24 hours per day. As the system has – as the city has grown, there's a greater need for water, and this change from 12 hours per day to 24 hours per day has increased the draw-down in this well.

And for the first time now the domestic user experiences a local interference problem. And the domestic user historically in experiencing this problem would have had an option to go to the City and to say, 'Hey, your 1970 well is interfering now. It hasn't historically. But now that you're pumping 24 hours per day and there's no recovery of the system, this well now is interfering with my 1950 well.'

So the domestic user might say, 'Help me out, provide some remedy municipal well.' Which if this well were by itself and not interconnected to other wells, it would have a 1970 priority date. The 1950 could possibly seek some compensation, could seek some help.

However, if through the adjudication process we've identified another well that's – that's on this system, what the municipal well provider could say is, 'Well, wait a minute, We're actually not diverting our 1970 priority date at this location. We're diverting our 1930 priority date at this location. So actually, domestic user, while you have a 1950 priority date, we're declaring that we're diverting our 1930 priority date from this location so we're senior relative to well interference.'

So the condition that we crafted was, in part, to address this situation. In part the condition states – the intended statement is that relative to local interference, as in this situation, the priority date for this well would be 6/1/1970, and not 6/1/1930.

Tr. Vol. II, p. 236, L. 5 through p. 239, L. 12. David Tuthill explained his concerns about conjunctive administration as follows:

Q [GARRICK BAXTER]. Mr. Tuthill, the Department's concern about conjunctive administration, currently does the Department have a boundary for the Eastern Snake Plain Aquifer?

A. Yes.

Q. ...

Does the City of Pocatello have wells outside the boundary of the Eastern Snake Plain Aquifer?

A. Yes.

...

Q. Okay. Can you describe a situation in which you see injury arising, given the one well inside the ESPA boundary and series of wells outside the ESPA boundary?

A. Yes. As an example, in the example I've depicted here, if -- depending on at any given time where that line is drawn -- and that line can change -- if there's a well inside the line -- and there is one right now on where it has drawn -- that has a junior priority date, then -- and if there are wells outside the line with senior priority dates, then the City of Pocatello -- for example, in this case -- could argue that they could continue to pump the well that's inside the boundary under a senior priority date water right, thus not being equitable to other wells that are within the ESPA boundary, wherever that is drawn.

Q. Mr. Tuthill, can you explain that? I don't --

A. In other words, I'll state it another way. Within the Eastern Snake Plain Aquifer there might be a call on water rights of a certain date. Let's say, for example -- let's say, for example there's a call for water rights prior to 1975.

If this call were to occur within this area, then water rights junior to 1975 would have to either cease pumping or be part of a mitigation plan. Water rights senior to 1975 wouldn't be curtailed in the same way.

So if the City of Pocatello were able to say, 'Well, the priority date that we're using today at well No. 1 is 1960,' then that well could continue pumping even though it was originated as a 1975 priority water right.

...

MS. BEEMAN: Yeah.

Mr. Tuthill, the 706 report refers to the ESPA transfer guidelines.

Is your statement about injury at all related to an analysis under an existing rule-making or is it, as you represent in your 706 report, that it's the ESPA guidelines? What is the foundation?

THE WITNESS: I identified the ESPA as an example of what might come in the future. Our -- the reason for the condition is not for the ESPA. It's for any kind of conjunctive administration that might occur in the future, whether it be on the Portneuf River, on tributaries of the Portneuf River, on the ESPA.

Tr. Vol. II, p. 244, L. 14 through p. 245, L. 4; Tr. Vol. II, p. 250, L. 19 through p. 252, L. 2; Tr. Vol. II, p. 255, L. 20 through p. 256, L. 10.

Mr. Sullivan testified near the end of the trial and responded to the concerns identified in the Supplemental Director's Report and in the Director's testimony as follows:

Q [MS. BEEMAN]. How do you interpret the revised condition for purposes of water right administration?

A. Well, I – it's my opinion that the condition essentially neuters the City's claim, because during times of water rights administration that the City would most – it's most important that the City be able to exercise its alternate points of diversion.

...
Q. Yes. If you could on Exhibit 119 turn to page 14. This is the Department's 706 report.

A. Okay.

Q. At the middle of the page, two lines up from the final paragraph on page 14, could read the language beginning with 'Other wells'? I believe the sentence begins, 'This description.'

A. Yes. 'This description is important because many other wells could have been drilled nearby before or after the City-owned well was drilled or used.'

...
Q. Has IDWR provided any evidence to the Court on the existence of wells near the City's interconnected wells?

A. No, they have not.

...
Q. If I may, Mr. Sullivan, what you're referring to, in your prior testimony you indicated that one of the 23 interconnected wells does divert from the ESPA, is that correct?

A. Yes. . . .

A. Right. And so as I understood Mr. Tuthill's concern – and the City had a junior well – well, the City had a junior well located inside the boundary, and it was attempting to exercise different priority, a more senior priority, from one of its interconnected wells as it's claimed under the alternate-points-of-diversion theory, just as we've described.

...
I think that would – that type of operation by the City would be entirely legitimate, and the neighbor should have not concern about that. . . .

We're just talking about a situation where the neighbor looks over his fence and sees that the City's pumping a well and its not being shut off while his well is being shut off because he doesn't have any senior priorities.

Tr. Vol. V, p. 900, L. 7 through p. 904, L. 8; Tr. Vol. V, p. 990, L. 10 through p. 993, L. 6.

ARGUMENT

I. THE CITY BEARS THE BURDEN OF PRODUCTION AS WELL AS THE ULTIMATE BURDEN OF PROOF FOR EACH ELEMENT OF A CLAIMED WATER RIGHT.

A 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 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.”)

II. THE CITY’S WELLS DO NOT QUALIFY AS ALTERNATE POINTS OF DIVERSION FOR ITS SURFACE WATER RIGHTS FROM MINK CREEK AND GIBSON JACK CREEK IN ACCORDANCE WITH IDAHO CODE § 42-1425.

Idaho Code § 42-1425 (2006) (2) states in part as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, [1] prior to November 19, 1987, . . . may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided [2] no other water rights existing on the date of change were injured and [3] the change did not result in an enlargement of the original right.

Id. (emphasis added). The City’s claim for alternate points of diversion for its surface water rights fails for the following three reasons: (1) the change in the point of diversion occurred after

November 19, 1987; (2) the change in point of diversion as it was implemented by the City injured other water users, and (3) the change is an impermissible change in source.

The evidence regarding the timing of the change in point of diversion is straight forward. Mr. Hargreaves testified that the City ceased using the surface water sources for culinary water in March 1993 because of regulatory requirements. Statement of Facts, hereinafter "SOF," at 10.

Notwithstanding these facts, the City claims that the change from the surface water sources to wells occurred for short periods prior to November 19, 1987. The two periods claimed are from April 1985 through June 1985 and from March 1986 through May 1986. City Exhibit 116 at 16. City Exhibit 111, a compilation of monthly water reports, confirms the factual statement that the City did not divert any surface water during the two short periods of time. However, the total diversion by the City was in all cases less than 38 c.f.s during this period and at least half of the time it was less than 18 c.f.s. SOF at 9. City Exhibit 125 tabulates the cumulative rate of diversion from the City's various ground water rights. The City has ground water rights with 18 c.f.s of water with a 1936 or earlier priority date and 38.6 c.f.s of water with a 1948 or earlier priority date. There was no need for the City to divert its surface water rights from the City's wells. The City had sufficient water rights for its diversion of ground water from its wells. Therefore, the record fails to establish a change in point of diversion for the surface water rights prior to 1987.

State of Idaho Exhibit 301 is a compilation of partial decrees entered for persons who divert surface water from the Mink Creek watershed, and from the Gibson Jack Creek watershed. This compilation shows that junior users exist on both water courses. If the City diverted the entire surface water flows of Mink Creek and Gibson Jack Creek as the senior water user, downstream junior surface water users on Mink Creek and Gibson Jack Creek would have no

source of surface water supply until the watershed increased sufficiently in area to provide surface water flow in the respective watercourses. If the City did not divert its surface water rights, that water would be left in the respective streams and diverted by persons who otherwise may not have had a sufficiently senior water right to divert the water. Obviously, it is a benefit to the junior water right holders on Mink Creek and Gibson Jack Creek, but it is also a big detriment. If we look at the entire water system, we have added a water demand that the priority system would have otherwise cut-off during the drought. That additional demand will operate to the injury of some water user downstream of the City.

This same concern may also be analyzed as an impermissible change in source. Idaho law has long held that “junior appropriators have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights.” *Crockett v. Jones*, 47 Idaho 497, 504, 277 P. 550, 552 (1929). The City’s water rights from Mink Creek and Gibson Jack Creek have early priority dates back to before 1900. Much has happened since those rights were initially developed. Mink Creek and Gibson Jack Creek are small surface water tributaries of the Portneuf River. Small surface watersheds may have widely fluctuating flows during each year, and from year to year as droughts come and go. What the City is attempting to do by this request is to transform an unreliable surface water supply to a ground water supply that will always be there. Junior water rights were developed with the impact of a very early and large water right now held by the City from an unreliable water supply. If the change is allowed, those water rights will then divert from a very reliable water supply. The total volume of water diverted will thus increase and operate to the injury of other water users.

Even Assuming the City actually did divert its surface water rights from the City's various wells prior to November 19, 1987, the *SWC Stipulation* must still be processed as a transfer. The settlement agreement provides:

Exercise of this water right from October 1 through September 30 at the 23 alternate points of diversion will be limited to the amount of water delivered from these surface water sources to the Portneuf River after that water has been diverted in priority, at the original point of diversion (on Mink Creek or Gibson Jack Creek) and which is delivered past any intervening water users during the period from October 1 through September 30. Pursuant to the settlement in the SRBA proceedings on these subcases, the City, conditioned upon and pursuant to an agreement between the parties and IDWR, could implement an administrative mechanism that would permit the City's diversion entitlement to be measured in Mink Creek or Gibson Jack Creek and delivered past other water users on those creeks.

Statement of the Case, hereinafter "SOC," at 5. The objective of this provision is to eliminate injury issue by requiring the continued diversion of surface water and its injection into the Portneuf River channel within the City, which would prevent the identified problem, or by providing for delivery of this water past the existing diversions on Mink Creek and Gibson Jack Creek and for the injection of water into the Portneuf River at the confluence of the respective creeks and the Portneuf River.³ This provision of the settlement agreement was not implemented prior to November 19, 1987. Therefore, injury occurred as explained above. If the City wishes to pursue this proposal described in the *SWC Stipulation*, it needs to file a transfer application and let the IDWR evaluate it.

Accordingly, the City's claim that the interconnected ground water wells should be recognized as alternate points of diversion for the four surface water rights fails for three independent reasons: The change in point of diversion occurred after November 19, 1987; the

³ The first alternative of continuing to divert the water and injecting the water into the Portneuf River channel within the City probably creates its own injury problems. The problem is that City Exhibit 116 concludes that the Portneuf River channel is disconnected from the LPRVA in this reach of the Portneuf River. What you are doing is imposing another demand on the LPRVA by diverting the surface water rights from those interconnected wells. The diverted surface water does not replenish the LPRVA because of the disconnection. Further comment on this proposal is unnecessary because IDWR would have jurisdiction to evaluate it in a transfer proceeding. It is not properly before the district court.

change would have caused injury to downstream water users; the change is an impermissible change in source.

III. THE CITY DID NOT ESTABLISH FACTS SUFFICIENT FOR ENTRY OF JUDGMENT FOR WATER RIGHT NOS. 29-7118 AND 29-7119 AS SET FORTH IN EXHIBITS B AND C OF THE SWC STIPULATION.

Exhibits B and C of the *SWC Stipulation* changed the season of use for these two water rights from the irrigation season to the entire year. David Tuthill testified that “[t]o the extent that biosolids had been applied on the subject property prior to the commencement of the adjudication, November 19, 1987, we would agree with this stipulation.” SOF at 6. He repeated this statement for water right no. 29-7119. SOF at 6. Thus, the resolution of water right nos. 29 718 and 29-7119 is dependent upon what the City proved. Mr. Herrick testified that the biosolids program had been in place since he began working for the City in 1981. But, the City offered no specific information about the season of use for the biosolids program prior to November 19, 1987. SOF at 6-7.

The City did offer exhibits about the present management of the biosolids program. The present biosolids management plan prohibits the application of sludge to the ground when it is flooded, frozen or snow covered. In addition, it describes the two primary application periods as beginning in early May for eight weeks and in late summer around August 15th for no more than eight weeks. SOF at 7.

Accordingly, the City is entitled to judgment for water right nos. 29-7118 and 29-7119 as described in Exhibits B and C, except that the season of use should be the irrigation season.

IV. THE SECOND ORDER ON SUMMARY JUDGMENT CONCLUDED THAT THE IDAHO CODE § 42-1425 DID NOT AUTHORIZE THE PROPOSED CHANGES IN PURPOSE OF USE FOR WATER RIGHT NO. 29-7770.

The *Second Order on Summary Judgment* concluded as follows:

Under the unique procedural history of this case, Pocatello cannot show a valid accomplished transfer. . . . Since the license was issued in 2003, any change after the license would not comply with the statutory deadline of 1987. A valid accomplished transfer could not be alleged. Therefore summary judgment is granted as to 29-7770.

Id. at 11. The City presented nothing at trial that changes this conclusion.

V. THE DIRECTOR CORRECTLY DETERMINED THE ELEMENTS FOR WATER RIGHT NOS. 29-2274, 29-2338 AND 29-7375.

The City wants all points of diversion for the interconnected well system to be listed as an authorized point of diversion for water right nos. 29-2274, 29-2338, and 29-7375, since the points of the diversion for these three water rights are part of the interconnected well system. The City argues that they are authorized under Idaho Code § 42-1425.

The *Second Order on Summary Judgment* concluded as follows:

Licenses are persuasive proof of the elements of a water right, but are not conclusive proof. Changes occurring after the license may provide evidence to support a change in the elements. Typically, the post-licensing changes are a valid transfer or accomplished transfer. . . .

This right was licensed in 2003. Pocatello may not collaterally attack that license in the SRBA. The only way to change the elements from the license would require a valid post-licensing change to the water right.

Id. at 11.

Here, Transfer No. 5452 was issued in 1999 for water right nos. 29-2274, 29-2338 and 29-7375. The Director's recommendation here followed Transfer No. 5452. City Exhibit 163. Simply put, if the City cannot collaterally attack a license in the SRBA, it cannot also attack a valid transfer of those water rights either. The Director correctly applied Transfer No. 5452 in the definition of water right nos. 29-2274, 29-2338 and 29-7375.

VI. THE EVIDENCE PRESENTED JUSTIFIES ONLY A MINOR CHANGE IN THE PRIORITY DATE FOR WATER RIGHT NOS. 29-13558 AND 29-13689.

The IDWR recommended a priority date of July 16, 1924 for water right no. 29-13558 and a priority date of October 22, 1952 for water right no. 29-13689. The evidence presented

justifies advancing the priority date for water right no. 29-13689 to October 21, 1952. The evidence does not justify any other changes.

The City claimed a 1905 priority date for water right no. 29-13558. This claim was based on the following facts: A Mr. A. Y. Satterfield moved to the Pocatello area in 1905. Subsequently, Mr. Satterfield recited in speech about the early history of Pocatello that the first well was dug, at an unstated time, to the depth of 65 feet and that it was deepened during the term of the first mayor of the City of Alameda. SOF at 8. The City also presented newspaper articles that explained that the City of Alameda was formed from the consolidation of the Villages of North Pocatello and Fairview, which were located north of the City of Pocatello. The article explained that the primary purpose of the consolidation was to provide the financial ability to purchase the Fairview water system owned by the Pocatello Realty and Investment Company. The date of newspaper article was July 17, 1924. IDWR recommended a priority date of July 16, 1924 for water right no. 29-13558. Mr. Fritschle did not consider the approximate date of 1905, when someone moved to the Pocatello area, as being sufficiently specific to recommend a water right with that priority. SOF at 9.

The City claimed a priority date of December 31, 1940 for water right no. 29-13639. The City presented evidence that the City of Alameda grew from a population of 2,100 persons to 4,705 persons in 1950. The City also presented License file no. 29-2324, which included the application for permit to appropriate water. The application described the water system as “three wells, drilled and in use for varying periods” SOF at 8. Mr. Fritschle concluded that he could advance the priority date one day to October 21, 1952, since the wells were in existence at the time of the filing of the application. SOF at 9. He concluded that the information was not

sufficient to make any other changes in the priority date for water right no. 29-13639. The population figures offered by the City do not justify any further change in priority date.

VII. THE DIRECTOR HAD THE AUTHORITY TO IMPOSE THE CONDITION ON THE EXERCISE OF THE ALTERNATE POINTS OF DIVERSION CHALLENGED BY THE CITY UNDER THE PROVISIONS OF IDAHO CODE § 42-1411.

Idaho Code § 42-1411(2) (2003) states, in part, as follows:

(2) The director shall determine the following elements, **to the extent the director deems appropriate and proper**, to define and administer the water rights acquired under state law:

...

(j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

(3) The director may include such general provisions in the director's report, **as the director deems appropriate and proper**, to define and to administer all water rights.

Id. (emphasis added). Thus, the statute grants the director discretion in defining water rights acquired under state law, as necessary to provide for proper administration.

Here, the Director outlined two major concerns about the proposed alternate points of diversion. First, the Director was concerned about well interference that could occur between a shallow domestic user and a City well. He posed the situation where a change in operation of a City well in the future, such as increasing the number of hours per day that the well was diverting water, caused a nearby shallow domestic well to dry up. The alternate points of diversion would allow the City to claim it was exercising an earlier priority date than was originally associated with a specific city well. This claim would preclude any remedy for the domestic water user. SOF, at 18-19. Second, the Director was also concerned about a similar claim by the City for a well that was subject to a priority call in the Eastern Snake Plain Aquifer, hereinafter the "ESPA." The City could claim an earlier priority date when call was made than was originally associated with the specific well. This claim under the alternate points of diversion provision would thus avoid the ESPA call.

SOF at 20.

The City's response was two-fold. First, the City stated that IDWR had not provided any evidence on the existence of wells near the City's interconnected wells. SOF at 21. Second, the City argued that it was a legitimate exercise of its water rights. SOF at 21. The City offered a general conclusion that no injury would occur to other water users. Exhibit 116 at 11, 13.

Ultimately, the Court is left with Director's Report, the Supplemental Director's Report, and the testimony of David Tuthill and of Carter Fritschle that the inclusion of the alternate points of diversion for these water rights would cause injury in the absence of the condition recommended by the Director. The Court also has the opposing documentary and testimonial evidence of the City that the condition recommended by the Director impairs the legitimate exercise of their water rights. The Director is granted discretion to determine the elements of water rights, "to the extent the director deems appropriate and proper." Idaho Code § 42-1411(2). The Director's recommendations for the City's water rights are within this grant of discretion.

VIII. THE DIRECTOR HAD THE AUTHORITY TO IMPOSE THE CONDITION ON THE EXERCISE OF THE ALTERNATE POINTS OF DIVERSION CHALLENGED BY THE CITY UNDER THE PROVISIONS OF IDAHO CODE §§ 42-1425.

- A. The City failed to provide sufficient proof to analyze the claimed accomplished transfer.

Idaho Code § 42-1425 (2006) (2) states in part as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, [1] prior to November 19, 1987, . . . may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided [2] no other water rights existing on the date of change were injured and [3] the change did not result in an enlargement of the original right.

Id. (emphasis added). The *prima facie* elements for an accomplished transfer under Idaho Code

§ 42-1425 are as follows: (1) the change was made prior to November 19, 1987, (2) no other water rights existing on the date of the change were injured, and (3) the change did not result in an enlargement of the right.

Here, the description of change, i.e. the addition of alternate points of diversion, is poorly defined by the evidence presented at trial. The lack of evidence makes a meaningful analysis most difficult. A hypothetical example should suffice in explaining the problem. Assume that water right no. 29-4225 with a priority date of August 15, 1956 historically diverted water from well no. 23 for a period two hours a day for each day of the year and that a close-by senior domestic well user has a priority date of August 31, 1953. The City then created its interconnected water system with various storage facilities, and the City begins using well no. 23, originally developed under water right no. 29-4225, for a total of three hours a day by November 19, 1987 and diverts this water under water right no. 29-11348 with a priority date of September 1, 1953. No well interference occurs to the close-by domestic well user, and the domestic well user remains the senior water user in this area. The City grows in population, and some of its existing wells go off line. The City then begins using well no. 23, originally developed under 29-4225, for 24 hours a day, 7 days a week and diverts this water under water right no. 29-2274 with a priority date of June 15, 1948. Well interference to the close-by domestic well user occurs; the domestic well dries up. The City's position in this matter is that the domestic well user is the junior water user, since the City was diverting under the June 15, 1948 priority date. The difficulty for this domestic well user is that he had no information on November 19, 1987 that a well interference problem would occur under the City's alternate points of diversion. The domestic well user had no basis to complain under Idaho Code § 42-1425, and even if he did, the complaint would have been denied for lack of proof of injury

on November 19, 1987. If you examine what the City actually did, it would be entitled to recognition of alternate points of diversion to the extent that it occurred on November 19, 1987, which would have been a diversion under a September 1, 1953 priority date with a total of three hours a day of total diversion. It would not be entitled to divert from well no. 23 twenty-four hours a day under a priority date of June 15, 1948.

Here, the City has not identified the date or dates that the interconnected water system was constructed, other than to claim that it occurred prior to November 19, 1987. The City has not described for its beneficial use water rights the use from each well prior to incorporation into the interconnected water system. The City has not identified what occurred at each well after incorporation into the interconnected water system and prior to November 19, 1987. The parties and the Court needed that information to evaluate this claim and to determine whether there was a basis to recognize the alternate points of diversion without the condition imposed by IDWR. Since the City did not offer that information, the Court does not have the information to evaluate this claim by the City. The Court should deny the City's request regarding alternate points of diversion because of failure of proof.

B. The evidence before the District Court establishes that the City did not investigate whether injury would occur to domestic private wells that divert from the LPRVA.

The State of Idaho began the regulation of ground water in 1951, except that "[t]he excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be in any way affected by this act." Ground Water Act of 1951, 1951 Idaho Sess.Laws, ch. 200, § 2, p. 423. The Ground Water Act was soon modified in 1953 to make a significant modification of the prior appropriation doctrine as it applied to ground water. Section 1 of the Ground Water Act was amended to add the following: "[W]hile the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic

development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer.” Act of March 12, 1953, 1953 Idaho Sess.Laws, ch. 182, § 1, p. 278. In 1978, the Ground Water Act was again amended to change the exemption for domestic well users by making them subject to the reasonable ground water pumping levels but by retaining the exemption from the permit requirement. Act of March 29, 1978 Idaho Sess.Laws, ch. 324, p. 819. Therefore, domestic well users whose priority date precedes March 29, 1953, are not subject to the determinations by IDWR of reasonable ground water pumping level. Rather, they are protected in the ground water pumping level when they developed their water right. *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

The State of Idaho introduced into evidence State Exhibit 303, which is reproduced as Figure I, *supra*. It illustrates a City well that is interfering with the diversion of water from a private well, labeled PW1, because the private well is located in the cone of depression of the City well. State Exhibit 303 also depicts a second private well, labeled PW2, and two different levels of the static water level, SW1 and SW2. When the static water level falls from SW1 to SW2, Mr. Sullivan testified that the second private well is dried up. SOF at 16. Mr. David Barber, deputy attorney general, examined Mr. Gregory K. Sullivan about his on-the-ground investigation for his expert report. City Exhibit 116. Mr. Sullivan testified that he made 2-3 auto tours of the City of Pocatello and vicinity, that each tour lasted a few hours, and that he got out of the vehicle some of the time on the tours. SOF at 15-16. Nonetheless, he described his report as more than just an editorial summary of various scientific journals. Rather, it reflected his independent analysis of other documents and data. SOF at. 16.

Mr. Sullivan was asked to review the domestic well summary that is contained in City

Exhibit 133. He stated that he was unaware of the summary, and had no knowledge about a number of the domestic wells listed in the domestic well summary. SOF at 18. Nonetheless, Mr. Sullivan concluded in his expert report that “it is unlikely that Pocatello’s alternate point of diversion operations had any significant impact to neighboring wells prior to November 19, 1987.” SOF at 15, City Exhibit 116 at 11.

The City’s own exhibits provide plenty of warning about potential problems from lowering of static water levels. City Exhibit 132, Welhan, John, 2006, *Idaho Geologic Survey Staff Report, 5-6, Water Balance and Pumping Capacity of the Lower Portneuf River Valley Aquifer*, summarized its conclusions as follows:

A detailed water balance of the southern portion of the lower Portneuf River valley (LPRV) aquifer, completed in 1993-94, has been updated to reflect new information on potential recharge sources, to evaluate recharge potential in the northern valley, and to provide a baseline for evaluating the aquifer’s future response to drought conditions and increased demand.

The water balance results, derived from a period spanning 510 days in 1993 and 1994, reflect near-normal hydrologic conditions. . . .

These results indicate that total demand was already at 100-115 percent of system capacity more than a decade ago. During 1993-94, municipal pumping (Pocatello and Chubbuck) accounted for 6.5 billion gallons of total demand, with the remaining 0.8 Bgal per year tapped for non-municipal uses. Agricultural withdrawals accounted for 5-10 percent of total demand, with domestic and self-supplied industrial withdrawals each at about 5 percent; non-metered golf course irrigation accounted for 2 percent.

Aquifer recharge in a below-normal year may be as much as half that of a normal water year. **Storage (water level) in the southern aquifer has declined by more than 10 feet since about 1975, and represents direct evidence that long-term demand has exceeded long-term capacity for more than two decades.**

. . .

Because the LPRV is a geographically small watershed its **principal aquifer**, which supplies all municipal water needs, is **prone to large annual pumping-induced storage fluctuations (i.e., large seasonal swings in ground-water level).**

SOF at 13-14, City Exhibit 132, at 1-3. Mr. Sullivan described this report as “the best information available.” SOF at 13. Mr. Sullivan also documented that the City’s wells cause substantial pumping drawdown, as stated in the following table from his expert report:

Average Measured Pumping Drawdown
As of 1987
City of Pocatello Wells

0-4 feet	4-10 feet	10-19 feet	No Data
Well 10	Well 2	Well 29	Well 13
Well 12	Well 7	Well 31	Well 14
Well 21	Well 16		Well 15
Well 22	Well 18		Well 23
Well 28	Well 26		Well 33
Well 30	Well 27		Well 34
Well 31			Well 39
Well 35			Well 44

SOF at 14, City Exhibit 116 at 9. The ten foot drop in static water levels described above in City Exhibit 132 and the pumping drawdown documented by Mr. Sullivan suggest that an examination of the impact of the City’s diversions on domestic wells was warranted. This is especially true when pre-1978 domestic well users are protected in the pumping levels existing on the date that the water right was developed. Despite the existence of a domestic well summary, the City did no such examination. The City’s response was simply that the IDWR had not identified any domestic wells of concern. SOF at 21. The City forgets that the City bears the ultimate burden of persuasion. It was the City’s responsibility to make a showing of lack of injury. That showing required the City to at least look at domestic wells. Because it did not do so, the Court should reject the City’s challenge to the condition on alternate points of diversion for ground water.

CONCLUSION

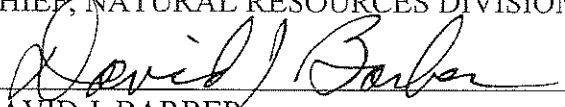
For all the reasons stated, the district court should enter a judgment for the City of Pocatello

for water right nos. 29-7118 and 29-7119 in conformance the description in the *SWC Stipulation*. In addition, the district court should also enter a judgment that advances the priority date for water right no. 29-13639 to the date of October 21, 1952. In all other respects, the district court should affirm the recommendations of the Director for the 38 water rights acquired under state law.

RESPECTFULLY SUBMITTED this 27th day of April 2007.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION



DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 27th day of April 2007, I caused to be served the original and/or copy of the STATE OF IDAHO'S POST-TRIAL BRIEF on each of the following persons by the indicated method:

1. One Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

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- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

City of Pocatello
c/o Josephine P. Beeman
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
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- ☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

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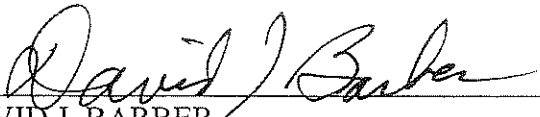
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Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID J. BARBER
Deputy Attorney General

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
29-07119
29-07222
29-07322
29-07375
29-07431
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