

MAY 01 2007
DEPARTMENT OF
WATER RESOURCES

successful outcomes in the 1996 Idaho Supreme Court decision addressing “accomplished transfers” and the March 2007 Idaho Supreme Court decision upholding the conjunctive management rules.³ Pocatello respectfully notes that IDWR’s change in position bears the indicia of an unlawful rulemaking.

priority.” Tr. Vol. V, p. 904. Mr. Sullivan testified that “All of the City’s wells would be subject to administration under a downstream call from a surface water user.” Tr. Vol. V, p. 920; Pocatello Exhibit 125.

The condition also constrains the use of some of the City’s recommended water rights. Harold Hargreaves testified that part of the reason for Pocatello’s interconnected system is to be able to handle continued water delivery when any of the City’s interconnected wells must be taken offline for contamination or collapse. Tr. Vol. IV, p. 677. Jay Ulrich testified that the “redundancy and backup” in Pocatello systems guarantees that “[i]f you lose a well for whatever reason - power outages, maintenance, contamination, what have you, that you can still supply the entire town with the rest of the operating wells.” Tr. Vol. III, p. 488.

Instead of approving these claims, IDWR conditioned these claims in a manner which does not protect the historic practice and in fact nullifies the historic practice. The alternate point of diversion claim would confirm how Pocatello has operated its water system. Pocatello has wells that pump into a central distribution system and it can operate its water rights in their order of priority regardless if a particular well is out of service; therefore, Pocatello is able to operate its interconnected water system to provide a dependable supply to its citizens. In addition, Pocatello’s oldest water rights are its most valuable water rights because those are the water rights that would be more protected from a potential delivery call. Thus it is important that Pocatello be able to continue to exercise those priorities even if the original well under which that appropriation was developed is out of service. Tr. Vol. V, pp. 882-883 (Gregory Sullivan Testimony). Moreover, IDWR identified wells that are no longer in existence, specifically Alameda well 6 (29-11339) and well 7 (29-11339), Pocatello well 4 (29-13561), well 5 (29-13560), and well 6 (29-13562), and under the condition these water rights would not be able to be diverted because the wells do not exist. Tr. Vol. III, pp 517-519 (Jay Ulrich). The condition would prevent other interconnected wells in times of administration from pumping the nonoperable well’s water; thus, the water right amount associated with the non-operable well would not be usable. Tr. Vol. III, pp. 504-505 (Jay Ulrich).

³First, for the claimant of an accomplished transfer under Idaho’s accomplished transfer statute, 42-1425, there is no automatic assignment of the burden of proof as to injury. This was the state’s position, and the decision in the 1996 Idaho Supreme Court upholding the constitutionality of 42-1425. Both IDWR and the State now maintain that Pocatello has the burden of proof to disprove injury. Second, the March 2007 Idaho Supreme Court decision in AFRD#2 specifically rejected the presumption of injury from exercise of junior priority ground water use. IDWR’s position as to Pocatello’s accomplished transfer claims presumes injury. Third, IDWR’s consistent position (in its briefing and the decision in AFRD#2) is that the SRBA proceedings do not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights; however, these complex factual determinations were exactly what Pocatello addressed at trial as a result of IDWR’s “change of position” in the recommendation of Pocatello’s accomplished transfers for the water rights for the City’s culinary systems.

I. STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

A. STATEMENT OF THE CASE.

The City of Pocatello filed 39 SRBA claims to confirm and protect the water rights that the City owns and operates for the benefit of its citizens and to satisfy attendant public health and safety requirements.⁴ The SRBA court considered, but declined, a stay of the City's 38 state-law claim proceedings pending determination of Pocatello's legal entitlement under the City's federal law claim.⁵ Pocatello's state-law SRBA claims for the water rights serving the City's integrated culinary system⁶ and the water rights serving the City's Biosolids Program were the focus of

⁴ The City of Pocatello filed 38 state-law SRBA claims and one federal law SRBA claim to document and obtain a judicial decree for the City's municipal water right(s) as November 19, 1987, the date of the commencement of the Snake River Basin Adjudication (SRBA). The federal law claim is an alternative to the 38 state-law claims. A decree of the federal law claim would replace the City's state-law priority water rights with a single senior priority federal law water right. In this respect, the federal law claim and the 38 state-law claims overlap; however, they are not claims for "the same water" because the federal law claim includes more sources and more water than the state-law claims.

Pocatello's Motion to Stay Its State Law Claims (dated December 23, 2004) explained that the 38 state law-based claims are "dual-based" claims because the state law-based claims are for water also claimed by Pocatello under federal law in subcase 29-11609. The motion also stated that the federal claim (29-11609) is broader than the state-based claims, because Pocatello has claimed its federal water right consistent with the Act of September 1, 1888, e.g., from "the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation in the vicinity of said town [of Pocatello]...as may be necessary to provide said town with proper water and sewerage facilities." See ¶4 and Remark #15 of Pocatello's federal claim 29-11609. *See* Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief, Exhibit 4. These sources include, without limitation, the Blackfoot River, Portneuf River, Snake River, Bannock Creek, Jeff Cabin Creek, Mink Creek, Lincoln Creek, Rattlesnake Creek, Ross Fork Creek, Sand Creek, and Toponce Creek. Another difference, cited in Pocatello's memorandum in support of the motion for stay, is that the federal law claim was filed in compliance with I.C. § 42-1409(1)(c)(ii) which requires that the quantity of water claimed for water rights established under federal law shall describe for each and every purpose the rate of present and future water diversion or, in the case of an instream flow claim the rate of flow in cubic feet per second or annual volume of present and future diversion in acre-feet per year or both.

⁵ Litigation and trial of the Pocatello's 38 state-law claims has proceeded on a parallel track with the federal law claim, which is presently on appeal to the Idaho Supreme Court. Issues common to the City's federal law appeal and the trial of the state-law claims are noted in the post-trial briefing.

⁶ The "integrated culinary system" is a reference to the City's two culinary systems. The City has two distinct service areas to which it supplies municipal water. The larger service area is for the 'city

Pocatello's recent six-day trial at the SRBA court.⁷

The trial addressed the operation of the City's culinary supply systems (a larger one in town and a smaller one at the Pocatello airport),⁸ the municipal purpose of the City's Biosolids Program, and the priority dates of two water rights which serve the City's main culinary system in town.⁹

Ultimately, Pocatello's claims for its integrated culinary system show the City's knowledge of and compliance with the SRBA's "accomplished transfer" statute, Idaho Code 42-1425.¹⁰ However, IDWR's recommendation of these accomplished transfers with a

proper' which is often referred to as the 'city system.' The other smaller service area is for the municipal use at the noncontiguous city-owned airport, which is in the city limits and is often referred to as the 'airport system.' IDWR April 2006 Supplemental Director's Report (IDWR Exhibit I), pp. 5-6.

⁷ The "elements disputed at trial" [Pocatello Exhibit 181] document the settlement of numerous issues prior to trial: The Bureau of Land Management objections to Pocatello's place of use were dismissed in Order on Joint Motion to Dismiss Objections issued on November 22, 2004; Pocatello's objections seeking remarks related to storage were settled based on a stipulation filed on September 21, 2006; Pocatello's objections as to general provisions on separate streams / separate administration were withdrawn and dismissed with prejudice in Order Dismissing Objections and Responses with Prejudice, dated July 14, 2006. Pocatello's Swan Falls objections were incorporated into the SRBA's ongoing Basin-Wide Issue 91-13 (see SRBA District Court Order Designating Basin-Wide Issue RE: To What Extent, if any, Should the Swan Falls Agreement be Addressed in the SRBA or Memorialized in a Decree, dated August 23, 2004). In addition, on the first day of trial, February 26, 2006, the City of Pocatello and the Surface Water Coalition filed a Stipulated Settlement with the Court [IDWR Exhibit 43], and the Surface Water Coalition did not participate in the trial. The Settlement addressed the water rights and points of diversion for the City's integrated culinary systems, and the municipal purpose of use for three water rights serving the City's Biosolids Program.

⁸ The following issues are included in the operation of the City's integrated culinary systems: the conditioning of the City's accomplished transfers, the specific water rights and wells that serve the intown culinary system, and whether the City's interconnected system of wells serving the intown culinary system are alternate points of diversion for the City's surface water rights which also serve the intown culinary system.

⁹ Water rights 29-13558 and 29-13639 were initiated by the City of Alameda prior to Alameda's annexation by the City of Pocatello in 1962.

¹⁰ On April 25, 2003, Pocatello filed 32 amended SRBA claims; Pocatello amended 22 of these claims to include additional points of diversion. (See Timeline in Appendix to Pocatello's post trial brief. See discussion *infra* page 10.

"condition"¹¹ is inapposite to the State's position in the 1994 Idaho Supreme Court briefing and decision which affirmed the constitutionality of the accomplished transfer statute.¹² Also, during the trial of Pocatello's state-law claims, IDWR obtained a favorable decision from the Idaho Supreme Court in *American Falls Reservoir Dis. No. 2 v. The Idaho Dept. of Water Resources* 2007 Idaho (33249), ____ P.3d ____ (March 5, 2007). (AFRD #2) What IDWR argued in obtaining that favorable decision is consistent with what Pocatello has argued and is inapposite to what IDWR has recommended for Pocatello and testified at trial regarding Pocatello.¹³ What the Idaho Supreme Court decided is exactly opposite to what IDWR is seeking here.

The "municipal" nature of the City's Biosolids Program and the identification of the four

¹¹ IDWR has changed the remark for this condition three times. On July 11, 2003, IDWR issued its Basin 29 Directors Report for Irrigation and Other Uses, which included the recommendation of Pocatello's 38 state-law SRBA claims, 20 of which were recommended with the condition language. The condition language in the first director's report stated "to the extent necessary for administration, water was first appropriated or used from:" listing wells with priority dates and cfs. IDWR submitted its Supplemental Director's Report regarding the City of Pocatello's Basin 29 state-law SRBA claims on April 13, 2006. The condition was revised to account for replacement wells and modify the administrative language to state "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from:" listing wells with priority dates and cfs. See IDWR Exhibit 1. During the recent trial IDWR filed amended director's reports for 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, 29-13367, and 29-13639. The 2007 amended report revised the conditioning language to state "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello Well" listing wells and cfs. See IDWR Exhibits 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 9, 25, 26, 27, 28, 29, and 10. The potential impact of the condition on the use of Pocatello's interconnected system, the lack of facts to support the condition, and the changes in how IDWR administers the accomplished transfers, 42-1425, which did not to comply with the Administrative Procedure Act, will be discussed later in this brief.

¹² *Freemont-Madison Irrigation District v. Idaho Ground Water Appropriators*, 129 Idaho 454; 926 P.2d 1301(1996). This case is also referred to as the SRBA Basin-Wide 4 Decision. See discussion *infra* pages 20-25.

¹³ See discussion *infra* pages 20-25.

ground water rights that serve the Biosolids land application sites are not in dispute.¹⁴ It is also not in dispute that three of these water rights were developed for and have only been used in the City's Biosolids Program and that IDWR licensed each right for irrigation, rather than a municipal purpose of use.¹⁵ The irrigation purpose of use is an error of law that the SRBA court can correct.

The priority dates for the two Alameda water rights are subject to the reasonable evidence standard and should be decreed as claimed.

B. COURSE OF PROCEEDINGS AND SUMMARY OF EVIDENCE.

The water rights at issue are owned by the City of Pocatello, a municipal corporation. The City filed its initial SRBA claims in April 1990.¹⁶ The recommendations of the City's state-

¹⁴ The four biosolids water rights are 29-7118, 29-7119, 29-7770, and 29-11344. Dave Tuthill testified that to the extent that biosolids water rights 29-7118 and 29-7119 were applied to the land prior to the commencement of the SRBA on November 19, 1987, he would agree with the stipulations entered into by Pocatello and the Surface Water Coalition. Tr. Vol. II pp.276-280. Those stipulations include a municipal purpose of use for 29-7118 and 29-7119. Regarding water right 29-7770, Dave Tuthill testified that IDWR did not agree with the proposed language in the stipulations because "[t]he license for this water right was issued after the commencement of the adjudication." Tr. Vol. II p 280. However, the evidence shows that water rights 29-7118, 29-7119, and 29-7770 are exercised for identical purposes of use. John Herrick testified that water rights 29-7118 and 29-7119 have always exclusively been used for biosolids applications. Tr. Vol. II p.401. Water right 29-7770 has also been used for a long period of time for the biosolids application. Tr. Vol. II p. 403. Jay Ulrich testified that 29-7770 has always been used for biosolids. Tr. Vol. III p. 563. See IDWR Exhibits 1, 6, 7, 8, and 38; Pocatello Exhibit 106.

¹⁵ See IDWR Exhibits 1, 6, 7, 8, Pocatello Exhibit 106. Mr. John Herrick's testimony established that the water rights associated with the biosolids program have always exclusively been used for land application of biosolids. Pocatello's biosolids program is a requirement under the EPA National Pollutant Discharge Elimination System (NPDES) and is subject to other federal regulations under C.F.R. 40 §503. The primary purpose of these water rights is not for irrigation. Irrigation would imply that the crops are being watered. The biosolids are not directly applied as food for the plants. They are applied to break down Pocatello's municipal waste as a part of the federal requirements. Sometimes, crops cannot be grown for over a year after application. The purpose of irrigation is to supply water to growing plants, so this fact alone makes Pocatello use of the biosolids incongruous with irrigation. Tr. Vol. II, pp. 375-380.

¹⁶ Water right numbers: 29-00271, 29-00272, 29-00273, 29-02274A, 29-02274B, 29-02274C, 29-02324, 29-2354, 29-02382, 29-2401 (split and recommended as 29-2401 and 29-13636), 29-02499, 29-04221, 29-04222, 29-04223, 29-04224, 29-04225, 29-04226, 29-02499, 29-07106, 29-07118 (split and recommended as 29-7118 and 29-07119), 29-07222, 29-07322, 29-07375, 29-07431, 29-07450,

law claims to the SRBA court occurred in July 2003.¹⁷ In the 13 years between the City's initial SRBA filings and the recommendation of the City's water rights to the SRBA court, a number of broadly significant events occurred that also affected the City's claims and their ultimate recommendation to the SRBA court. The adjudication statutes were revised,¹⁸ the Idaho Supreme Court issued 32 decisions on matters arising from the SRBA,¹⁹ and the State of Idaho

29-07770, 29-11339, 29-11342, 29-11343 (split and recommended as 29-11367, 29-11368, and 29-11369), 29-11344, and 29-11348.

¹⁷ On July 11, 2003, IDWR issued its Basin 29 Directors Report for Irrigation and Other Uses, which included the recommendation of Pocatello's 38 state-law SRBA claims. On April 13, 2006, IDWR submitted its Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights. IDWR Exhibit 1. The third and final version of the Director's Report for Pocatello 38 state-law SRBA claims is represented by IDWR's Exhibits 2-39 at trial.

¹⁸ I.C., 42-1401A am 1994, ch. 454, Sec 2, p. 1443; am. 1996, ch. 186, Sec 1, p. 584; am. 1997, ch. 374, Sec 2, p. 1192. 42-1402 am. 1994, ch. 454, Sec 5, p. 1443. 42-1403 am. 1994, ch. 454, Sec 6, p. 1443. 42-1404 am. 1994, ch. 454, Sec 7, p. 1443. 42-1405 am. and redesign. 1994, ch. 454, Sec 10, p. 1443. 42-1406 am. 1994, ch. 454, Sec 12, p. 1443. 42-1407 am. and redesign. 1994, ch. 454, Sec 13, p. 1443. 42-1408 am. and redesign. 1994, ch. 454, Sec 14, p. 1443. 42-1409 am. 1994, ch. 454, Sec 12, p. 1443; am. 1994, ch. 455, Sec 1, p. 1478; am. 1997, ch. 374, Sec 3, p. 1192. 42-1409A am. 1994, ch. 454, Sec 16, p. 1443. 42-1410 am. 1994, ch. 454, Sec 17, p. 1443. 42-1411 am. 1994, ch. 454, Sec 18, p. 1443; am. 1994, ch. 455, Sec 2, p. 1478; am. 1996, ch. 186, Sec 2, p. 584; am. 1997, ch. 374, Sec 4, p. 1192; am. 2002, ch. 12, Sec 1, p. 14; am. 2002, ch. 13, Sec 1, p. 17; am. 2002, ch. 306, Sec 3, p. 870; am. 2003, ch. 167, Sec 1, p. 472. 42-1411A added 1994, ch. 454, Sec 19, p. 1443; am. 1994, ch. 455, Sec 3, p. 1478; am. 1996, ch. 186, Sec 3, p. 584. 42-1412 am. 1994, ch. 454, Sec 20, p. 1443; am. 1994, ch. 455, Sec 4, p. 1478; am. 1997, ch. 374, Sec 5, p. 1192; am. 2002, ch. 13, Sec 2, p. 17. 42-1413 am. 1994, ch. 454, Sec 21, p. 1443; am. 2003, ch. 167, Sec 2, p. 472. 42-1414 am. 1994, ch. 454, Sec 22, p. 1443; am. 1994, ch. 455, Sec 5, p. 1478; am. 1996, ch. 186, Sec 4, p. 584. 42-1415 1994, ch. 454, Sec 23, p. 1443. 42-1417 1994, ch. 454, Sec 25, p. 1443. 42-1420 am. 1994, ch. 454, Sec 26, p. 1443; am. 1996, ch. 186, Sec 5, p. 584. 42-1421 am. 1994, ch. 454, Sec 27, p. 1443; am. 1996, ch. 186, Sec 6, p. 584. 42-1422 am. 1994, ch. 454, Sec 28, p. 1443. 42-1423 added 1994, ch. 454, Sec 30, p. 1443. 42-1424 am. and redesign. 1994, ch. 454, Sec 8, p. 1443; am. 1997, ch. 374, Sec 6, p. 1192. 42-1425 added 1994, ch. 454, Sec 31, p. 1443; am. 1996, ch. 186, Sec 6, p. 584. 42-1426 added 1994, ch. 454, Sec 32, p. 1443; am. 2000 ch. 311, Sec. 1, p. 1048. 42-1427 added 1994, ch. 454, Sec 33, p. 1443; am. 1994, ch. 455, Sec 6, p. 1478. 42-1428 am. and redesign. 1994, ch. 454, Sec 29, p. 1443.

¹⁹ Idaho Department of Water Resources v. United States, 122 Idaho 116 (1992); Musser v. Higginson, 125 Idaho 392 (1994); Idaho Conservation League, Inc. v. State, 128 Idaho 155 (1995); State v. United States, 128 Idaho 246 (1995); Twin Falls Canal Co. v. Idaho Department of Water Resources, 127 Idaho 688 (1995); Fort Hall Water Users Ass v. United States, 129 Idaho 39 (1996); Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators, 129 Idaho 454 (1996); State v. Hagerman Water Right Owners, 130 Idaho 718 (1997); State v. Hagerman Water Right Owners, Inc., 130 Idaho 727 (1997); State v. Hagerman Water Right Owners, Inc., 130 Idaho 736 (1997); A & B Irrigation District v. Idaho

began conjunctive administration of ground water and surface water rights.²⁰ The City of Pocatello participated actively in these developments²¹ and has consistently supported the state's

Conservation League, 131 Idaho 411(1997); State v. Nelson, 131 Idaho 12 (1998); United States v. State, 131 Idaho 468 (1998); State v. Idaho Conservation League, 131 Idaho 329 (1998); Riley v. Rowan, 131 Idaho 831 (1998); United States v. City of Challis, 133 Idaho 525 (1999); State v. United States, 134 Idaho 106 (2000); State v. United States, 134 Idaho 940 (2000); Potlatch Corp. v. United States, 134 Idaho 912 (2000); Potlatch Corp. v. United States, 134 Idaho 916 (2000); McCrary v. Rosenkrance, 135 Idaho 509 (2001); United States v. State, 135 Idaho 655 (2001); Clear Springs Foods Inc. v. Clear Lakes Trout Co., 136 Idaho 761 (2002); North Snake Ground Water Dist. v. Gisler, 136 Idaho 747 (2002); U.S. v. State, 137 Idaho 654 (2002); Lu Ranching Comp v. United States, 138 Idaho 606 (2003); Clear Lake Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117 (2003).

²⁰ Musser v. Higginson, 871 P.2d 809 (1994), 11/01/1994, IDWR adopted the Rules for Conjunctive Management of Surface and Ground Water Resources. 37-0311-9302, Final Rule, Bulletin Vol. 94-10, 12/03/1997 Water Management Rules 37-0313-9701, Negotiated Rulemaking Bulletin Vol. 97-12, 10/07/1998 Proposed Water Management Rules 37-0313-9701, Proposed Rule, Bulletin Vol. 98-10, 10/25/2000 IDWR published notice of intent to promulgate rules for the Eastern Snake Plain Aquifer Water Management Rules 37-0315-0001, Negotiated Rulemaking, Bulletin Vol. 00-12.

²¹ During the 1990 to 2003 period, Pocatello participated in the following SRBA cases and conjunctive management matters.

SRBA cases: State v. Hagerman Water Right Owners, 130 Idaho 718 (1997), State v. Hagerman Water Right Owners, Inc., 130 Idaho 727 (1997), State v. Hagerman Water Right Owners, Inc., 130 Idaho 736 (1997), A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411(1997), United States v. City of Challis, 133 Idaho 525 (1999), Potlatch Corp. v. United States, 134 Idaho 916 (2000), and United States v. State, 135 Idaho 655 (2001).

Conjunctive Management Rulemakings: Comments to the Idaho Department of Water Resources for Docket No. 37-0311-9301: Negotiated Rulemaking Governing Conjunctive Management of Interrelated Water Sources within the Snake River Basin, November 8, 1993, submitted by the City of Pocatello and Basic American Foods, Comments to the Idaho Department of Water Resources for Docket No. 37-0311-9301: Negotiated Rulemaking Governing Conjunctive Management of Interrelated Water Sources within the Snake River Basin, July 15, 1994, submitted by the Water Resource Coalition, which includes the City of Pocatello.

Conjunctive Management Plans filed at IDWR: In the Matter of the Application of the City of Pocatello for Approval of a Mitigation Plan, June 23, 1995; Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36, October 12, 2001; Interim Stipulated Agreement for Processors and Municipalities Areas Within and Near IDWR Administrative Basins 35 and 36, March 27, 2002; Interim Stipulated Agreement for Processors and Municipalities Areas Within and Near IDWR Administrative Basins 35 and 36, May 21, 2003; Interim Stipulated Agreement for Processors and Municipalities Areas Within and Near IDWR Administrative Basins 35 and 36, December 30, 2004.

Safe Harbor Agreements: Interim Stipulated Agreement for Areas Within and Near IDWR Administrative Basin 36, October 12, 2001; Interim Stipulated Agreement for Processors and Municipalities Areas Within and Near IDWR Administrative Basins 35 and 36, March 27, 2002; Interim Stipulated Agreement for Processors and Municipalities Areas Within and Near IDWR Administrative Basins 35 and 36, May 21, 2003; Interim Stipulated Agreement for Processors and Municipalities Areas Within and Near IDWR Administrative Basins 35 and 36, December 30, 2004.

conjunctive administration of ground water and surface water rights within the prior appropriation doctrine.²²

During this period from 1990 to 2003, the City of Pocatello, which has state-law ground water rights that are junior in priority to surface water rights downstream on the Snake River,²³ engaged in further examination of its water use²⁴ and filed additional SRBA claims and also amended its initial SRBA claims²⁵ to document more accurately the priority dates for the City's

²² SWC delivery call at IDWR (In the Matter of Distribution of Water to Various Water Rights Held By or For the Benefit of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (Water Districts No. 120 and No. 130), January 14, 2005); Water Resource Coalition (which included the City of Pocatello) Amended Application for Approval of a Mitigation Plan, May 5, 2005. Challenge to the Conjunctive Management Rules: American Falls Reservoir District #2 v. Idaho Department of Water Resources, Gooding County, Case No. CV 2005-600, and American Falls Reservoir Dis. No. 2 v. The Idaho Dept. of Water Resources, Idaho Supreme Court Docket Nos. 33249/33311/33399 (2007).

²³ Pocatello's expert Greg Sullivan testified that "All of the City's wells would be subject to administration under a downstream call from a surface water user." Tr. Vol. V, p. 920; Pocatello Exhibit 125.

²⁴ Tom Dekker testified that the City of Pocatello produces monthly water production reports which are kept as official records. Tr. Vol. III, p. 425. Jay Ulrich testified that (1) every well has a flow meter, (2) the City uses the meters to take daily records of withdrawals in order to monitor well efficiency, output, and changes over time, (3) these measurements are used as a planning tool for the city, (4) the City wells are routinely taken offline for routine testing and maintenance, and (4) water quality testing is conducted bimonthly. Tr. Vol. III, pp. 487-489.

²⁵ On April 25, 2003, the City of Pocatello filed both additional SRBA claims and amended SRBA claims for its ground water and surface water rights: Water right numbers: 29-02274 (amended), 29-02338 (amended), 29-02354 (new), 29-02382 (amended), 29-2401 (amended), 29-02499 (amended), 29-04221 (amended), 29-04222 (amended), 29-04223 (amended), 29-04224 (amended), 29-04225 (amended), 29-04226 (amended), 29-07106 (amended), 29-07118 (amended), 29-07119 (amended), 29-07222 (amended), 29-07322 (amended), 29-07375 (amended), 29-07431 (amended), 29-07450 (amended), 29-07502 (new), 29-07770 (amended), 29-07782 (new), 29-11339 (amended), 29-11343 (amended – Recommended as 29-11367, 29-11368, and 29-1136), 29-11344 (amended), 29-11348 (amended), 29-13558 (amended), 29-13559 (amended), 29-13560 (amended), 29-13561 (amended), and 29-13562 (amended). See IDWR Exhibits 11, 12, 32, 33, 14, 15, 16, 5, 17, 18, 19, 20, 21, 6, 7, 34, 22, 13, 35, 30, 36, 8, 37, 23, 29, 31, 10, 38, 9, 25, 26, 27, and 28

water use.²⁶ The investigation also documented that the City's integrated culinary system has always been operated as a single delivery system with sufficient "redundancy and backup" to guarantee fire protection and the delivery of drinking quality water throughout the City even when the City was not able or is not able to divert from some of its ground water wells or surface water sources that supply the culinary system.²⁷ The City has done this by always operating its culinary system so that water from every point of diversion can be delivered anywhere in the system. In other words, each well which supplies water to the City's integrated culinary system operates as a point of diversion for each of the water rights for the City's culinary system.

The City amended its SRBA claims to list each of these wells as points of diversion for the 21 ground water rights and four surface water rights that, as of November 19, 1987, were providing water for the City's integrated culinary system in town.²⁸ These claims for "alternate points of diversion" were filed in accordance with the accomplished transfer statute, Idaho Code 42-1425.²⁹

²⁶ Only the priority dates for two Alameda water rights remain at issue.

²⁷ Jay Ulrich testified that the "redundancy and backup" in Pocatello systems guarantees that "[i]f you loose a well for whatever reason - power outages, maintenance, contamination, what have you, that you can still supply the entire town with the rest of the operating wells." Tr. Vol. III, p. 488.

²⁸ Pursuant to I.C. 42-1425, the City of Pocatello claimed alternate points of diversion for 21 ground water rights and four surface water rights that serve the City's culinary uses in town. The alternate points of diversion include 22 wells that were interconnected as of November 19, 1987 and one replacement well. The City of Pocatello also claimed alternate points of diversion for two ground water rights that serve the Airport's culinary uses under I.C. 42-1425. The alternate points of diversion include two wells that were interconnected as of November 19, 1987. At trial it was established that this is still the operation of the system in 2007.

²⁹ Pocatello's expert Greg Sullivan testified about the necessary elements of an accomplished transfer under 42-1425. In his opinion, Pocatello has not enlarged its water rights through operation of alternate points of diversion. Tr. Vol. V, page 890. Furthermore, Pocatello has stipulated with the SWC that the City will ensure that there will be no enlarged use of its water rights by operation of the alternate points of diversion. Tr. Vol. V, p. 892. Mr. Sullivan analyzed the potential for injury as a result of the City's alternate points of diversion and found no claims of injury raised by other water users as of

In accordance with the accomplished transfer statute and IDWR's prior practice in the SRBA for municipal water rights with alternate points of diversion,³⁰ Pocatello's alternate points of diversion should have been recommended as claimed. Instead, IDWR changed its position and recommended the alternate points of diversion with a condition that nullifies the accomplished transfer statute and is detrimental to the City's operation of its integrated culinary system.³¹ At trial, IDWR explained that it purposefully changed its position in 2003 because the Department had evolved in its understanding of conjunctive administration since the

November 19, 1987. Tr. Vol. V, p. 894-896. Mr. Sullivan's injury analysis was completed in light of the fact that IDWR has not developed any standards or criteria by which potential injury to local ground water rights can be evaluated and has not quantified the amount of aquifer water level drawdown that is injurious. Tr. Vol. V, pp. 925 - 928. His ultimate conclusion provided: "In my opinion, there would have been no injury as of 1987 or even as of [2007] based on the operation of these wells." Tr. Vol. V, p. 960.

³⁰ See Director's Report for 36-7115, Director's Report for 36-7656, Director's Report, for 36-7862 Director's Report, for 36-15488 Director's Report, Director's Report for 36-15489 (City of Rupert), and Director's Report for 36-2518 (City of Jerome). Pocatello Exhibits 174-179. These recommendations prior to IDWR's recommendation of Pocatello's accomplished transfers are consistent with the plain language of Idaho Code § 42-1425 which anticipates that IDWR will initially recommend the accomplished change if no injury is apparent. A hearing is necessary if, after the Director's recommendation, an objection as to injury is filed by another party who is not the claimant of the accomplished transfer. The burdens of proof in an objection under 42-1425 are clear and unambiguous. The statutory language "envision that the party aggrieved by the Director's recommendation after the hearing, whether that be the party claiming an accomplished transfer or the party claiming injury, has the burden of proof." *Fremont Madison Irrigation District v. Idaho Ground Water Appropriators*, 926 P.2d 1301 (1996).

³¹ The problem with the condition language is threefold: First, IDWR's condition language has changed three times. See footnote 10 *infra*; See Spronk Water Engineers Comparison of "Other Provisions Necessary" Language in appendix to Pocatello's post trial brief. Second, the condition constrains the use of certain Pocatello wells. Pocatello's expert Greg Sullivan testified that "it's my opinion that the condition essentially neuters the City's claim, because it's during times of water rights administration that . . . it's most important that the City be able to exercise its alternate points of diversion. . . . divert its water rights in the order of priority that that they were established from any of its interconnected wells." Tr. Vol. V, p. 900. During times of administration, "the City needs to be able to operate that priority out of the other wells in its interconnected system in order to exercise that priority." Tr. Vol. V, p. 904. Third, the condition constrains the use of some of the City's recommended water rights. Harold Hargreaves testified that part of the reason for Pocatello's interconnected system is to be able to handle continued water delivery when any of the City's interconnected wells must be taken offline for contamination or collapse. Tr. Vol. IV, p. 677.

mid-1990s.³²

This change of IDWR's position, supported by the State, involves positions that are in apposite to the 1996 decision regarding the accomplished transfer statute, the 2007 Idaho Supreme Court decision upholding the Conjunctive Management Rules, and the State/IDWR briefing that successfully supported each of those decisions. Two points are important here. First, AFRD#2 specifically rejected the District Court's decision that a presumption of injury was necessary as to junior ground water use. IDWR's position as to Pocatello's accomplished transfer claims presumes injury. Second, IDWR's consistent position (in its briefing and the decision in AFRD#2) is that the SRBA proceedings do not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights.³³ IDWR specifically identified the highly complex factual issues, "that are necessary for determining specific interrelationships and connectivity in administration and are not adjudicated in the SRBA."³⁴ IDWR's basis for the condition on Pocatello's accomplished transfers for its culinary system water rights involves these same complex factual questions that IDWR maintains are

³² Pocatello first learned of the condition when on July 11, 2003, IDWR issued its Basin 29 Director's Report for Irrigation and Other Uses, which included the recommendation of Pocatello's 38 state-law SRBA claims, 20 of which were recommended with the condition. See Timeline in Pocatello's Appendix to Post Trial brief. On April 13, 2006, IDWR submitted its Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights with a revision to the condition. See Timeline in Pocatello's Appendix to Post Trial Brief and IDWR Exhibit 1. During the trial IDWR filed with the Court amended Director's Reports that contained the third revision of the condition, See IDWR Exhibits 9, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29. These final amended Director's Reports were formally served on Pocatello on March 20, 2007.

³³ "The scope of these proceedings should not include a factual determination of the specific interrelationships of the degree of connectivity between specific water rights . . ." The Idaho Department of Water Resources' *Reply Brief*, dated November 20, 2006, in the case of *American Falls Reservoir District #2, et al. and Rangen, Inc., et al. v. IDWR and IGWA*, Sup. Ct. Nos. 33249/33311/33399, pp. 26-27.

³⁴ The Idaho Department of Water Resources' *Reply Brief*, dated November 20, 2006, in the case of *American Falls Reservoir District #2, et al. and Rangen, Inc., et al. v. IDWR and IGWA*, Supreme Court Nos. 33249/33311/33399, p. 16.

necessary for administration and not to be adjudicated in the SRBA: “the timing and amount of impacts, distances, local hydrology, aquifer characteristics, spatial variation, ground water levels, hydraulic gradients, aquifer boundaries, confining layers, stream bed hydraulic connectivity, and the timing and amount of return flows.” *See* Tr. Vol. I, pp. 79-80, 88; Tr. Vol. II, pp. 230, 237, 240, 259, 244-247, 252, 288-289, 294, 328-329, 347-348; Tr. Vol. III, pp. 485-486, 603-609; Tr. Vol. IV, pp. 624-629, 672, 731-737, 747-752, 778-787, 792-797, 803-805; Tr. Vol. V, pp. 845-847, 899-904, 945-952, 959-961, 971-987; Tr. Vol. VI, pp. 1045-1057, IDWR Exhibit 1, and Pocatello Exhibits 116 and 117. IDWR invoked these factual matters without investigation and without any basis in fact.³⁵

Following its objections³⁶ to these conditions and other matters, also addressed at trial,

³⁵ *See* Tr. Vol. I, pp. 79-80, 88; Tr. Vol. II, pp. 230, 237, 240, 259, 244-247, 252, 288-289, 294, 328-329, 347-348; Tr. Vol. III, pp. 485-486, 603-609; Tr. Vol. IV, pp. 624-629, 672, 731-737, 747-752, 778-787, 792-797, 803-805; Tr. Vol. V, pp. 845-847, 899-904, 945-952, 959-961, 971-987; Tr. Vol. VI, pp. 1045-1057.

³⁶ On November 18, 2003, the City of Pocatello filed objections to all 38 state-law water right recommendations contained in the Basin 29 Director’s Report for Irrigation and Other Uses, and filed amended objections on November 19, 2003. Pocatello’s objections included objections that pertained generally to all the recommendations to all 38 water rights and also included objections that pertained to specific-fact based elements on a small number of the 38 water rights. These are summarized in Pocatello’s objection chart that is attached to Pocatello Exhibit 116: the Spronk Water Engineers Report Dated September 29, 2006, prepared for the City of Pocatello.

On November 13, 2003 the United States of America acting through the Department of the Interior, Bureau of Land Management (BLM) filed objections that were later dismissed.

On January 15, 2004, the State of Idaho filed responses to Pocatello’s Objections. And, on January 16, 2004, the BLM filed Responses to Pocatello’s Objections.

On January 16, 2004 Pocatello filed responses to the BLM’s Objections.

On April 25, 2006, the Court issued Order Granting Motion to Participate, which granted the Surface Water Coalition’s (SWC) Joint Motion to Participate. Following their admission as parties, the members of the SWC filed responses to Pocatello’s objections. The SWC members are A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, And Twin Falls Canal Company.

Pocatello filed two summary judgment motions during 2006 directed to IDWR's conditioned recommendation of water rights for the City's integrated culinary systems.³⁷ The State of Idaho and the Surface Water Coalition participated in both summary judgment proceedings. Discovery was completed. The issues remaining at the time of trial were:

- The 'OTHER PROVISIONS NECESSARY' remark recommended for 20 ground water rights associated with the City's interconnected culinary system.
- The recommended denial of the City's interconnected culinary wells as

³⁷ On May 4, 2006, Pocatello filed *City of Pocatello's Motion for Summary Judgment on IDWR's Authority Under I.C. § 42-1425*.

On May 25, 2006, the SWC filed Joint Response to City of Pocatello's Motion for Summary Judgment. On the same day, IDWR filed a Response Memorandum in Opposition to the City of Pocatello's Motion for Summary Judgment.

On August 18, 2006, *Order on Summary Judgment* was issued. The Order granted Pocatello's Motion for Summary Judgment, in part, and ordered that certain subcases are "remanded" to IDWR for the purpose of allowing Pocatello to present additional evidence and information regarding the condition. A stay was entered.

On January 26, 2007, the parties filed Parties' Stipulation Regarding Idaho Code § 42-1425 Remand in which the parties agreed to waive any and all objections to the hearing, or lack thereof, required by Idaho Code § 42-1425 and that the determination of Idaho Code § 42-1425 issues would proceed in accordance with the existing trial schedule.

On November 30, 2006, Pocatello filed *City of Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*. This second summary judgment request was based on the discovery completed among the parties. Also on November 30, 2006, the SWC filed *Surface Water Coalition's (SWC) Motion for Summary Judgment*.

On December 11, 2006, the State of Idaho filed *Response Memorandum in Opposition to City of Pocatello's Motion for Summary Judgment*.

On December 12, 2006, the SWC filed *Response to the City of Pocatello's Summary Judgment on Municipal Purpose of Use, Interconnection, & Injury Under I.C. § 42-1425*.

On February 16, 2007, *Second Order on Summary Judgment* was issued. Special Master Bilyeu granted summary judgment on the issue of interconnection, and on the issue of an accomplished transfer under water right 29-7770. All other summary judgment motions were denied.

alternate points of diversion for the Mink Creek and Gibson Jack Creek surface water rights.

- The irrigation purpose of use recommended for Water Rights 29-7118, 29-7119, and 29-7770.
- The priority dates for Water Rights 29-13558 and 29-13639.

A six-day trial was held on the disputed elements in Twin Falls, Idaho on February 26 through March 2, 2007 and March 8, 2007. The State of Idaho and the City of Pocatello were the only parties who participated in the trial. IDWR functioned in its statutory capacity as the expert for the SRBA court.

II. STANDARD OF REVIEW

The District Court has free review over the special master's conclusions of law,³⁸ and the Court shall accept the master's findings of fact unless they are clearly erroneous.³⁹ Under 42-

³⁸ When reviewing the special master's decision the Idaho Supreme Court held, "the special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive." *North Snake Ground Water District v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002) (citing *State v. Hagerman Water Right Owners Inc.*, 130 Idaho 736, 740, 947 P.2d 409 (1997)). To the extent the district court adopts the special master's conclusions of law and findings of fact they are considered to be the conclusions and findings of the district court. *A & B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P.3d 78 (2004). See I.R.C.P. 52(a).

³⁹ When reviewing the special master's 'findings of fact' the Court held, in an action to be tried without a jury the court shall accept the master's findings of fact unless they are clearly erroneous. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409 (1997). See I.R.C.P. 52(a). The trier of fact has the primary responsibility for weighing the evidence and determines whether the required burden of proof on an issue has been met. *Sowards v. Rathbun*, 134 Idaho 702, 706, 8 P.3d 1245 (2000). It is the province of the trier of fact to weigh conflicting evidence and testimony and to judge the credibility of witnesses. *State v. Hart*, 142 Idaho 721, 723, 132 P.3d 1249 (2006).

Challenges to the special master's findings in nonjury actions are governed by I.R.C.P. 53(e). See I.C. 42-1422. Rule 53(e)(2) provides that in an action to be tried without a jury the court shall accept the master's findings of fact unless they are clearly erroneous. To determine whether the special master's findings are clearly erroneous, the court must independently review the evidence to determine whether the findings were supported by substantial evidence. *McCrary v. Rosenkrance*, 135 Idaho 509, 515, 20 P.3d 693 (2001) (citing *Secombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276 (Ct.App.1989)). The trial court's findings of fact in a

1411, the claimant bears both the burden of production as well as the burden of proof as to each element of a claimed water right.⁴⁰ The prima facie status given to the director's report in I.C. § 42-1411(4) constitutes a rebuttable presumption.⁴¹ When rebutted the presumption disappears and the party with the benefit of the presumption retains the burden of persuasion on the issue. The objector must present substantial evidence to overcome the presumption. However, the burdens of proof applicable to the determination of injury in an accomplished transfer are determined by the procedures of I.C. 42-1425 addressed by the Idaho Supreme Court in *Fremont-Madison* and discussed *infra* pages 20-25.

court tried case will be upheld if they are supported by substantial and competent evidence, even if the evidence is conflicting, and will be liberally construed in favor of the judgment entered. *Hart* at 723.

⁴⁰ The weight to be given a director's report is set forth in Idaho Code § 42-1411, which provides: The director shall file the director's report with the district court, and the director's report shall be a part of the record. Upon filing with the court, the director's report, except for the explanatory material....shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law.

I. C. § 42-1411(4).

Additionally, Idaho Code provides:

Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right. Since the director's report is prima facie evidence...., a claimant of a water right acquired under state law has the burden of going forward with the evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report. Any party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection.

I.C. § 42-1411(5).

⁴¹ As the Court explained in *Hagerman*, the director's report is prima facie evidence and the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut the presumption. The director's findings may be rebutted with the party objecting to the recommendation bearing the burden of proof that the recommendation is in error. *Hagerman* at 745-46; *A & B Irrigation* at 750. The objector is required to present substantial evidence in order to overcome the presumption created by the director's report. *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172 (1986). In this regard, substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a

III. ARGUMENT

A. IN ACCORDANCE WITH IDAHO CODE 42-1425, THE “ACCOMPLISHED TRANSFER” STATUTE, THE CITY OF POCATELLO APPROPRIATELY CLAIMED ALTERNATE POINTS OF DIVERSION FOR THE GROUND WATER RIGHTS AND SURFACE WATER RIGHTS SERVING THE CITY’S MUNICIPAL CULINARY SYSTEMS AS OF NOVEMBER 19, 1987.

The procedures under I.C. 42-1425 were established by the legislature and confirmed by the Idaho Supreme Court in 1995.⁴² Pocatello fits the legislative intent behind these procedures.⁴³ Pocatello followed those procedures and met its burden of proof under the plain language of 42-1425 and the Idaho Supreme Court’s 1995 “plain language” interpretation of 42-1425.⁴⁴

Pocatello complied with I.C. 42-1425 when it filed SRBA claims seeking alternate points of diversion for its ground water rights that serve the city’s intown culinary system, the surface

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 (1993).

⁴² *Fremont Madison Irrigation District v. Idaho Ground Water Appropriators*, 926 P.2d 1301 (1996), the decision on Basin-Wide Issue 4 arising from the SRBA court. The case is referred to as *Fremont-Madison* or the Basin-Wide 4 decision.

⁴³ The legislature’s intent was to allow the SRBA District Court to decree current water use patterns without worrying about compliance with the mandatory transfer statute unless an objection is filed. IDWR’s condition thwarts that intent. The SRBA court has decreed many accomplished transfers without the proposed condition. It belies the notion of settled real property rights and equal treatment in the SRBA if IDWR can now start adding new condition on water rights differently than other recommendations that the court has decreed.

⁴⁴ “The [accomplished transfer] 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.”

Second Order on Summary Judgment, at 11.

water rights that serve the intown culinary system, and the ground water rights that serve the airport culinary system.⁴⁵

The City's SRBA claims represent a reasonable mechanism to reflect the historical operation of the City's central distribution system for delivery of culinary water. Water for this central distribution system came initially from only surface water supplies in the 1800s, but has been supplied by both surface water and ground water since early in the 20th Century. The City's surface water culinary rights and the City's ground water culinary rights have provided water to the City's central distribution system from which water is provided throughout the City's service area. Tr. Vol. IV, pp. 650-652, 660-663, Tr. Vol. V, pp. 882, 873-874, Tr. Vol. VI, pp. 1020-1021, 1050-1051.

The City appropriately claimed its interconnected culinary wells as alternate points of diversion for the ground water rights that supply the culinary system. The City has operated the interconnected well system from early in the 20th Century through today. Each time a new well was drilled and added to the interconnected system, this resulted in a new alternate point of diversion for the City's existing ground water rights for its culinary system. This operation of an interconnected system has resulted in the City using water from its various interconnected wells to meet all the uses of its culinary system. Water pumped from the City's interconnected wells goes into a central distribution system and is used by all the City's customers. Each time the City constructed a new well or added capacity to an existing well, this resulted in a claim for a new water right for the increase in pumping capacity that was added to the system. Tr. Vol. II, pp.

⁴⁵ Twenty-one (21) ground water rights and four surface water rights for the intown system with 23 wells as alternate points of diversion; two ground water rights for the airport culinary system with two wells as alternate points of diversion.

Pocatello also appropriately claimed its wells as alternate points of diversion for the City's four surface water rights in the Lower Portneuf River Valley Aquifer, Mink Creek, and Gibson Jack Creek because the surface waters are hydrologically the same source.⁴⁶ Most of the ground water in the Lower Portneuf River Valley Aquifer originates as surface water from the Bannock Range, and most of that surface water comes from Mink Creek and Gibson Jack Creek.⁴⁷ The alternate points of diversion are also appropriate because prior to November 19, 1987, the City had to replace some of its surface water supply with ground water that otherwise would not have been pumped had the surface water been available.⁴⁸

⁴⁶ The Basin Wide 5 decision relied on by the Idaho Supreme Court in AFRD#2 and by IDWR in its briefing in AFRD#2 provide that interconnection is presumed for purposes of the SRBA. The following discussions by this Court and IDWR in Pocatello's state-law claims are appropriate subject to reexamination based on AFRD#2. The standards IDWR seeks to apply are also subject to reexamination based on indicia of unlawful rulemaking. "The degree of the interconnectedness is what is significant. In these subcases, for example, the crux of the disagreement is whether the surface water rights (Mink Creek and Gibson Jack Creek) are so closely connected to groundwater sources, such as the Eastern Snake Plan (sic) Aquifer, that wells may be added as alternative points of diversion. A determination of general connectedness is insufficient to support such a finding." *Second Order on Summary Judgment*, at 6. "In addition, IDWR declined to add the wells because it requires a showing of an 'immediate and direct hydrological connection' between the source and the wells. *Id.* at 11-12; IDWR Transfer Processing Memo No. 24 (Oct. 30, 2002). IDWR also requires the existing point of diversion (surface) and the proposed point of diversion (groundwater) to be so closely connected that "diversion and use of water from the proposed point of diversion would have substantially the same effect on hydrologically connected source as diversion and use of water from the original point of diversion." *Supplemental Director's Report* at 12." *Second Order on Summary Judgment* at 6.

⁴⁷ Under AFRD#2 and IDWR's briefings in AFRD#2, Pocatello has shown a sufficient interconnection for a decree. The issues of injury and ultimate points of diversion under 42-1425 are addressed by the precedent in *Fremont-Madison* which affirms the procedure and criteria from which IDWR deviated in Pocatello's recommendation. Pocatello notes that the statutes plain language, *Fremont-Madison*, and AFRD#2 support Pocatello on the injury issue and the alternate points of diversion for the City's surface water rights. "It is understood that this general interconnectedness does not resolve the issue of injury or prove the Pocatello wells may be added as alternate points of diversion." *Second Order on Summary Judgment*, at 12. "That is because I.C. § 42-1425 does not authorize an accomplished change of source." *Second Order on Summary Judgment* at 6.

⁴⁸ Pocatello agrees with this statement and proved this at trial. "Therefore, Pocatello may provide

The alternate points of diversion claimed for each water right serving Pocatello's interconnected culinary systems exemplify the express legislative findings in the accomplished transfer statute.⁴⁹ The legislative findings have been in place since the statute's enactment in 1994⁵⁰ and were cited in the Idaho Supreme Court's 1995 decision upholding the

evidence of a pre-1969 transfer, a valid I.C. § 42-222 transfer of a valid I.C. § 42-1425 accomplished transfer showing a change occurred after the *Smith Decree*." *Second Order on Summary Judgment*, at 9.

⁴⁹ 42-1425. ACCOMPLISHED TRANSFERS. (1) Legislative findings regarding accomplished transfers and the public interest.

(a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, and the northern Idaho adjudications, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.

(b) The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.

(c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.

⁵⁰ Amendments to I.C. 42-1425 following its enactment in 1994, have only addressed to clarify that purpose of use and nature of use refer to the same water right element, am. 1996, ch. 186, Sec. 7, p. 584, and the Northern Idaho Adjudication, am. 2006, ch. 222, Sec. 3, p. 661.

constitutionality of 42-1425 and 42-1426. After a review of these legislative findings, the Idaho Supreme Court concluded that the purpose of the accomplished transfer statute is to streamline the adjudication process and to protect existing water rights which were the result of past transfers.⁵¹

Pocatello's evidence shows that its accomplished transfer claims meet the stated legislative intent of 42-1425 and the procedural requirements of the plain language of 42-1425.

An examination of the evidence shows that the changes in point of diversion occurred with notice to other water users;⁵² (2) the water has been distributed through the alternate points of diversion;⁵³ (3) the continuation of the historic water use patterns resulting from these changes is in the local public interest;⁵⁴ (4) no other existing water right was injured at the time of the

⁵¹ "The purpose of I.C. Section 42-1425 is to streamline the adjudication process by providing a substitute for the transfer process required by I.C. Section 42-222 and to protect existing water uses which were the result of past transfers, regardless of compliance with statutory mandates." *Freemont Madison Irrigation District v. Idaho Ground Water Appropriators*, 129 Idaho 454, 458; 926 P.2d 1301, 1305 (1996).

⁵² See Pocatello Exhibit 147

⁵³ The City's alternate points of diversion for ground water claims were operated prior to 1987. Tr. Vol. V, p. 887. As Pocatello's expert Greg Sullivan testified: The water pumped from a particular well is not used in a particular area of the city. Once water is pumped into the interconnected distribution system, "there's no real way to control which of those molecules pumped out of a particular well - where they will go. They just go in response to the demands in the various parts of the system." Tr. Vol. V, p. 889. As further explained by Jay Ulrich: "We have 18 active wells. They are essentially all interconnected through piping and valves. You can describe our water system as this: as a network of piping that is all looped and interconnected." Tr. Vol. III, p. 487.

⁵⁴ As a municipal water supplier serving over 50,000 residents, the City has an obligation to the public to provide potable water on demand 24 hours a day, 365 days a year. Pocatello has developed an interconnected water system "to provide a dependable supply to its citizens," including fire protection. Tr. Vol. 5 p. 882. (Testimony of Greg Sullivan) Instead of protecting the water rights that have these accomplished transfers, IDWR's condition hurts the very public interest that is served by the historic operation of the City's alternate points of diversion for the ground water and surface water rights that serve its interconnected culinary system.

change;⁵⁵ (5) approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim;⁵⁶ (6) examination of these changes by the director through the [statutory transfer procedures of I.C. 42-222] would be impractical and unduly burdensome;⁵⁷ and (7) the more limited examination of these changes is a reasonable procedure for an expeditious review by the director.⁵⁸

⁵⁵ There were no objectors to the City's claims which included these alternate points of diversion. The Bureau of Land Management (BLM) objected to the place of use of these water rights and whether or not this designation includes federal lands. These objections were ultimately rejected.

⁵⁶ Instead of approving these claims, IDWR conditioned these claims in a manner which does not protect the historic practice and in fact nullifies the historic practice. The alternate point of diversion claim would confirm how Pocatello has operated its water system. Pocatello has wells that pump into a central distribution system and it can operate its water rights in their order of priority regardless if a particular well is out of service; therefore, Pocatello is able to operate its interconnected water system to provide a dependable supply to its citizens. In addition, Pocatello's oldest water rights are its most valuable water rights because those are the water rights that would be more protected from a potential delivery call. Thus it is important that Pocatello be able to continue to exercise those priorities even if the original well under which that appropriation was developed is out of service. Tr. Vol. V, pp. 882-883 (Gregory Sullivan Testimony). Moreover, IDWR identified wells that are no longer in existence, specifically Alameda well 6 (29-11339) and well 7 (29-11339), Pocatello well 4 (29-13561), well 5 (29-13560), and well 6 (29-13562), and under the condition these water rights would not be able to be diverted because the wells do not exist. Tr. Vol. III, pp 517-519 (Jay Ulrich). The condition would prevent other interconnected wells in times of administration from pumping the nonoperable well's water; thus, the water rights amount associated with the non-operable well would not be usable. Tr. Vol. III, pp. 504-505 (Jay Ulrich).

⁵⁷ Instead of using the accomplished transfer procedure, IDWR used the same examination as it does for 42-222 transfers. The Supplemental Director's Report also recommended that the condition remark language be applied to rights claimed under 42-1425 and 42-222. See IDWR Exhibit 1. However, Section 42-1425 explicitly states that "all requirements of section 42-108 and 42-222, Idaho code are hereby waived in accordance with the following procedures: If an objection is filed to a claim for accomplished change of...point of diversion the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement." IDWR used its 42-222 procedures counter to the express intent of the legislature. Whatever the scope of IDWR's authority under 42-1425 to condition accomplished transfers, it does not allow a re-opening of transferred rights that were decided under 42-222. See Order on Challenge (consolidated issues) of "facility volume" issue and "additional evidence" issue, SRBA subcase nos. 36-02708 et al. (December 29, 1999).

⁵⁸ This reasonable procedure was not used. IDWR's 706 report and its testimony at trial confirm that IDWR examined Pocatello's accomplished transfers for its culinary systems pursuant to the more burdensome standards it uses for 42-222 transfers and pursuant to standards it has explicitly identified as necessary for conjunctive administration and not appropriate for examination or recommendation of water rights in the Snake River Basin Adjudication.

Pocatello also met the procedural requirements of 42-1425. It claimed the alternate points of diversion in the SRBA and demonstrated that the alternate points of diversion were in operation prior to November 19, 1987. It also demonstrated that the claims do not constitute an enlargement of any of the water rights serving the City's two culinary systems. Pocatello specifically agreed to limit pumping of its interconnected wells to the well capacities that existed in 1987. *See Stipulation and Agreement between Pocatello and Surface Water Coalition in Pocatello's SRBA subcases 29-271 et seq*, February 26, 2007.

Finally, no other claimant objected to Pocatello's alternate points of diversion, and IDWR testified that it could identify no injury as of November 19, 1987, as of the time it recommended Pocatello's state-law claims in 2003, or as of the time of trial in 2007.⁵⁹ No injury was apparent.

Pocatello met its burden of proof under 42-1425. As the claimant of accomplished transfer under 42-1425, it did not have to "prove by a preponderance of the evidence that the change . . . did not injure any other water right which was in existence as of the date of the change."⁶⁰ The court in *Fremont-Madison* specifically rejected this interpretation as counter to

⁵⁹ IDWR's testimony at trial confirmed that IDWR intended for the condition to operate only in the future. Dave Tuthill's testimony: '[T]he reason for the condition is . . . for any kind of conjunctive administration that might occur in the future, whether it be on the Portneuf River, on tributaries to the Portneuf River, [or] on the ESPA.' Tr. Vol. II page 256. Page 233 of the transcript discusses how municipal water rights are unique in their ability to expand over time. IDWR inserted the condition because 'our responsibility through the adjudication is to appropriately condition a water right so that it cannot be expanded over time inappropriately. Tr. Vol. II, p. 233. The condition is inserted because 'the full impact of that accomplished transfer might not be seen for many years. And that's unique really, to municipal wells.' Tr. Vol. II, p. 240. 'If at some time in the future, the City increases the pumping capacity of a well within the City's interconnected system and it reduces that amount of water available to another water user, this condition preserves that ability of a water user to protect their water rights.' Tr. Vol. II, p. 291.

⁶⁰ The 1995 Idaho Supreme Court decision in *Fremont-Madison* specifically rejected this part of the SRBA Court's decision on the recently passed 42-1425 statute.

the plain language of 42-1425.⁶¹ Instead, someone other than the claimant must first come forward and object to the accomplished transfer. The procedure for opposition to an accomplished transfer requires at least two parties: the claimant of the accomplished transfer and an objector to the accomplished transfer, specifically an objector claiming injury. This is what the State argued in *Fremont-Madison*⁶² and the Idaho Supreme Court agreed: Only at that point,

⁶¹ VII. Burden of Proof Under the Amnesty Statutes.

The district court concluded that a party claiming entitlement to a transfer under section 42-1425 or an enlarged use under section 42-1426 bears the burden of proof to show the transfer or the enlargement will not cause injury. Once again, where a statute is clear and unambiguous the Court must follow the law as written. Sweeny, 119 Idaho at 138, 804 P.2d at 311. It is the Court's duty to effectuate the legislature's intent when interpreting statutes.

Section 42-1425(2)(a) of the Idaho Code states that if an objection is filed to a claim for an accomplished transfer "the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right." I.C. Section 2-1425(2)(a). The statute provides that a hearing will then be conducted, and the director shall submit a supplemental report to the district court setting forth his findings or conclusions. *Id.* The statute then provides that, "[i]f the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court." *Id.* (emphasis added).

This language envisions that the party aggrieved by the director's recommendation, whether that be the party claiming an accomplished transfer or the party claiming injury, has the burden of proof under section 42-1425.

Fremont-Madison, at 461-462.

⁶² The State of Idaho got the decision that it wanted; this is a quote from the State's brief] "The SRBA was incorrect to interpret 42-1425 as requiring the party claiming an accomplished transfer to "prove by a preponderance of the evidence that [the accomplished transfer] did not injure any other water right in existence as of the date of the [transfer]." R. Vol. III, p. 475. Rather than assigning burdens of proof to specific parties, section 42-1425 anticipates that IDWR will initially recommend the change if no injury is apparent. . . . Thus a hearing is necessary only if an objection is filed." Further, the objection must be by another claimant: "The only procedure actually contemplated by 1425 is the procedure to be followed when there is an objection to the accomplished transfer of another claimant. The court must adhere to the procures in 42-1425(2)(a)." Again, from the State's brief in this case, "[T]he district court's interpretation of section 42-1425 . . . assigns burdens of proof that are inconsistent with the plain language of the statute."

with two parties, could there be an assignment of the burden of proof.⁶³ There was never an objector claiming injury because of Pocatello's state-law claims for accomplished transfers for the points of diversion of its culinary water rights. Thus, Pocatello was never in a position to have the burden of proof to show whether its accomplished transfer "injured a water right existing on the date of the change."⁶⁴ Nevertheless, Pocatello demonstrated an absence of injury.

When IDWR recommended Pocatello's state law claims in 2003, it added condition language to every water right recommended with alternate points of diversion under the accomplished transfer statute. IDWR's inclusion of the condition provision is a change in position that it instituted in 2003.

From 1994 until Pocatello's recommendations in 2003, IDWR complied with the "plain language" procedure of the accomplished transfer statute I.C. 42-1425. See footnotes 30 and 31 and accompanying text. Pocatello's SRBA claims were IDWR's first recommendations under this new procedure. IDWR attached the condition to the 20 accomplished transfer claims that it

⁶³ The two parties are: "The party claiming an accomplished transfer" and "the party claiming injury." *Fremont-Madison* at 462.

⁶⁴ The context of the statute and the limited inquiry allowed by the Legislature, as confirmed by *Fremont-Madison*, provide that the only objections that can result in initiation of 1425(2)(a) burden of proof procedures are objections to the accomplished transfer claim on the basis of injury or enlargement of use. Such injury objections were not filed to Pocatello's accomplished transfers for the interconnected points of diversion for its culinary water rights. Pocatello had no burden of proof on the injury issue. IDWR was without authority to condition the accomplished transfers. In *Memorandum Decision and Order, allowing presentation of additional evidence regarding enlargement, etc* (SRBA subcase 65-5033C, March 24, 2005), SRBA Special Master Booth states that IDWR may investigate any 42-1425(a) issues as part of its initial Director's Report. However, if the statute's plain language was interpreted otherwise in *Fremont-Madison*, especially as to the burden of proof regarding injury. The recent decision in AFRD#2 underscored that the investigation in the adjudication does not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights. Although IDWR did not actually investigate these facts, it raised them as the basis for conditioning Pocatello's culinary water rights.

recommended for Pocatello because IDWR wanted to address conjunctive administration. IDWR's examination and recommendation of these accomplished transfers did not follow the procedures set out by the legislature, affirmed by the Idaho Supreme, and supported by the State in Fremont-Madison (the basin-wide 4 decision). Instead, because IDWR was engaged in rulemakings that were not completed, it appears that IDWR used the substance of the uncompleted rulemakings to change its procedure and recommendation of accomplished transfers in the SRBA.⁶⁵

As a result of IDWR's change in position, and its detrimental impact to Pocatello's accomplished transfers, the City filed objections to the condition language. Ultimately, counter to the "plain language" provisions of 42-1425, and despite the City's two summary judgment motions and a settlement with the senior priority Snake River diverters, Pocatello proceeded to trial where it proved "lack of injury" for its accomplished transfers for the City's culinary systems.

In its expert reports tendered during discovery and admitted following extensive expert testimony and documentary evidence at trial, Pocatello's showed by its analysis of potential injury from ground water alternate points of diversion that Pocatello's alternate point of diversion pumping as of November 19, 1987 was not causing injury either in the local⁶⁶ or regional areas.⁶⁷

⁶⁵ The timeline in the appendix to the brief illustrates that subsequent to the adoption of the Rules for Conjunctive Management of Surface and Ground Water Resources in 1994 IDWR was engaged in further rulemakings regarding conjunctive administration. The rulemakings were not completed.

⁶⁶ The analysis of potential well-to-well interference (local) impacts showed that it was unlikely that Pocatello's operation of the alternate points of diversion for the ground water rights serving the City's culinary systems had any significant impact to neighboring wells prior to November 19, 1987. Thus, the City's pumping of its culinary ground water rights at these alternate points of diversion in 1987 was not causing injury.

Pocatello also provided evidence before and during trial that the exercise of Pocatello's surface water rights at alternate points of diversion (the City's 23 interconnected wells) did not cause injury to other water rights.⁶⁸

There was no evidence of injury prior to trial nor was any evidence of injury adduced at trial. In fact, IDWR testified that it could identify no injury as of November 19, 1987, as of the time it recommended the condition in 2003, or as of the time of trial in 2007. The State's cross-examination of Pocatello's expert related to the water balances and hydrogeology of the Lower Portneuf River Valley Aquifer are not relevant to the issue of injury and are an example of the facts which are not for determination in the adjudication process in Idaho. There were no objectors.

Pocatello's accomplished transfers should be decreed as claimed, without IDWR's conditioning language: Twenty-one (21) ground water rights and four surface water rights for the intown system with 23 wells as alternate points of diversion; two ground water rights for the

⁶⁷ The analysis of potential regional impacts to downstream surface water users showed there is no material difference in the depletions that would occur with the City's pumping at its original well locations versus pumping at the alternate points of diversion. With no significant change in the City's depletions, there would not be potential injury to downstream senior surface water rights during a priority call.

⁶⁸ The decision in AFRD#2 contradicts the presumption of injury discussed in both of the Special Master's Summary Judgment orders: "The injury IDWR discusses is to the priority of rights on a given source. Injury to a water right would occur when another right takes precedence. For example, if a change in the point of diversion of Pocatello's wells allows a portion of its water rights to be delivered before existing water rights, those existing water rights are injured. Depending on conditions such as precipitation and weather, the damages may not appear immediately. Immediate injury to priority resulting in future damages appears to be just what IDWR was trying to prevent with the condition." *First Order on Summary Judgment*, at 5.

"It should be pointed out that if there are intervening rights appropriated by other users from the same source after Pocatello appropriated its surface right but before drilling its wells for the alternate points of diversion, injury to junior rights is presumed." *Second Order on Summary Judgment*, at 8.

airport culinary system with two wells as alternate points of diversion.

B. THE “OTHER PROVISIONS NECESSARY” LANGUAGE LISTED ON THE RECOMMENDATION OF 20 OF POCATELLO’S SRBA CLAIMS ASSOCIATED WITH THE CITY’S DELIVERY OF CULINARY WATER MUST BE STRICKEN AS A MATTER OF LAW.

In 2003, IDWR changed its 42-1425 procedure, counter to the plain language of I.C.

42-1425 and the decision of the Idaho Supreme Court in Basin-Wide 4. This change in position is also counter to the favorable Idaho Supreme Court decision which IDWR received during the trial of Pocatello’s state law claims. The change in position also bears the indicia of an unlawful rulemaking, counter to the requirements of Idaho’s Administrative Procedures Act. Pocatello’s SRBA claims were IDWR’s first recommendations under this new procedure. IDWR conditioned 20 of Pocatello’s SRBA claims for the City’s interconnected culinary systems.

Pocatello filed objections to the condition language. It also filed two summary judgment motions to address the legal and factual infirmities of the condition. Prior to trial, Pocatello also settled with the major water user parties consistent with the City’s legal and factual arguments presented before and during trial. Pocatello maintained in its trial brief that the imposition of the condition was an administrative action that does not belong in the SRBA. This was confirmed by AFRD#2 which was decided just before Pocatello’s last day of trial. At trial, and although it was not the City’s burden under 42-1425, Pocatello proved “lack of injury.” In doing so, Pocatello had to engage in the manner of cumbersome proceeding which 42-1425 was passed to avoid, and the City had to address the complex facts which IDWR and the AFRD#2 court agreed belong with the conjunctive administration of water rights and not the adjudication of water rights.

This could have been avoided had IDWR complied with the “plain language” of 42-1425 and recommended Pocatello’s accomplished transfers consistent with IDWR’s position and favorable result in AFRD#2. IDWR’s actions in recommending the condition also are problematic under Idaho’s Administrative Procedures Act.

1. The Condition Is Counter To the Plain Language of Idaho Code § 42-1425.

IDWR lacked the authority under 42-1425 to include the condition.⁶⁹ The language was included on IDWR’s recommendation for 20 water rights which Pocatello claimed appropriately with multiple points of diversion under the accomplished transfer statute, IC 42-1425. The 20 water rights should be recommended without the condition.

These actions by IDWR are counter to the procedure from *Fremont-Madison*: The accomplished transfer statute “establishes a procedure for evaluating claims based on an

⁶⁹ This issue was addressed in Pocatello’s first motion for summary judgment. The State’s reliance on § 42-1411 does not withstand analysis. By its terms, Pocatello’s claims under § 42-1425 are not “decrees, licenses, or approved transfer applications,” but instead are informal transfers made outside of the formal transfer process. If the legislature had intended for the Director to have the same broad authority to condition accomplished transfers, it would not have adopted the amnesty statute under § 42-1425 which, by its terms, limits the discretion of the Director to condition accomplished transfers. Although licensed, the wells Pocatello claims under § 42-1425 do not reflect the changes in point of diversion made informally prior to November 19, 1987. To treat them as any other licensed rights, and ignore the effect of § 42-1425 to provide “amnesty” to what otherwise would have been informal and unapproved transfers, frustrates the purpose of the accomplished transfer statutes.

Furthermore, nowhere in the language of § 42-1411 is there mention of the Director’s authority to condition amnesty rights under § 42-1425. This absence isn’t surprising: § 42-1425 establishes specific limitations on the Department’s ability to approve, deny, or condition accomplished transfers. In other words, § 42-1425 is a specific statute vis-à-vis the broad authority provided to the Director under § 42-1411. Under rules of statutory construction, specific statutes control over general statutes. See *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 149, 879 P.2d 1078, 1082 (1994) (stating that when there are specific statutes addressing an issue, those statutes control over more general statutes); *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968). See also *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 28, 89 P.3d 863, 868 (2004).

accomplished transfer: 'If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose or use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights.'" (Emphasis added by Special Master Bilyeau). *First Order on Summary Judgment*, at 4.

Idaho Code 42-1425 requires that a water user allege injury from Pocatello's accomplished transfer; IDWR's recommendation of the "other provisions necessary" language for 20 of Pocatello's SRBA claims does not change that requirement under I.C. 42-1425. There were no allegations of injury from other water users, including the State of Idaho; In fact the SWC settled with Pocatello based on the only concern expressed in the 706 report. Neither IDWR nor the State of Idaho produced any evidence of injury as of November 19, 1987 or even as of the time of trial, almost 20 years beyond the date that Pocatello proved its alternate points of diversion. IDWR admitted that it did not investigate the very bases for the condition and only relied on possible future events.

IDWR's 706 report identified "increase in rate of diversion" at the City's interconnected wells as the basis for IDWR's concern of injury from the City's accomplished transfers for its two culinary systems. Pocatello addressed this concern in its stipulation with the Surface Water

Coalition to maintain November 1987 pumping rates for all of its interconnected wells. At trial, and counter to its 706 report and the established precedent in *Fremont-Madison*, IDWR claimed that its concerns about injury were based on enlargement of the City's culinary water rights. IDWR explained that enlargement meant an increase in volume without an increase in rate of diversion. This is directly counter to the Idaho Supreme Court decision in *Fremont-Madison* and the State's briefing in support of the decision. In its briefing, the State argued that, "Ultimately, if the legislature had intended to include annual diversion volume as prohibited conduct under 42-1426, it would have done so."⁷⁰ The Idaho Supreme Court decision concluded, "42-1426 does not touch on an increase in the volume diverted. The court cannot engraft a provision that does not exist in the legislation."⁷¹

⁷⁰ The State is looking beyond 42-1425 in the Pocatello recommendations. This is counter to its position specifically with respect to its position on 42-1425 and 42-1426 in the BW4 decision: "The legislature did not use the term 'expanded use' or 'expansion of use' in 42-1426. It is the legislature's job to define the terms that it uses. By looking beyond the amnesty statutes, the district court contradicted its own emphasis on reading statutes in their statutory context." Opening Brief of Respondent-Cross Appellant State of Idaho in *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators*, p. 17.

The district court looked to "expanded use" found in the 1986 Adjudication Code's critical ground water area provision. By equating "enlargement" of water rights with "expanded use," the district court fundamentally changed the meaning of the amnesty statutes. The legislature did not use the term 'expanded use' or 'expansion of use' in 42-1426. It is the legislature's job to define the terms that it uses. By looking beyond the amnesty statutes, the district court contradicted its own emphasis on reading statutes in their statutory context. The district court's analysis destroys the meaning of the word 'enlargement.' 42-1426 grants amnesty for certain enlargements provided those enlargements do not (1) constitute an increase in rate of diversion, or (2) cause injury. There is no authority for inserting an increase in the annual volume of a given diversion. Opening Brief of Respondent-Cross Appellant State of Idaho in *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators*, pp. 16-18. IDWR's recommendation of the condition on the ground that "we have evolved" interferes with the legislature's definitions and the plain meaning of the statute successfully advocated by the state in BW4: "Historically, most water rights are not quantified in annual diversion volume. Quantification by rate is sufficient. Ultimately, if the legislature had intended to include annual diversion volume as prohibited conduct under 42-1426, it would have done so." Reply Brief of Respondent-Cross Appellant State of Idaho in *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators*, p. 9.

⁷¹ Quotes from the Basin Wide 4 Idaho Supreme Court Decision:

"Under 42-1426(1)(a), enlargement refers to any increase in the beneficial use to which an existing water

IDWR maintains that the ‘condition is necessary to prevent future injury’ but we are already 20 years into the future. Furthermore, the alternate points of diversion have already occurred under 42-1425. Thus, Pocatello has already been implementing the alternate points of diversion for more than 20 years. During this time, Idaho has experienced years of unparalleled drought. But yet, even with such a drastic water shortage, there is still no injury. There are no complaints for other users. There is no evidence of unavailable water.

IDWR’s condition found in its 706 Report that it recommends be applied to rights claimed under 42-1425 and 42-222, is in excess of its authority under 42-1425:

To the extent necessary for administration between points of diversion for ground water and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from:

This condition does not deal with avoiding injury to rights at the time of the transfer.⁷² Instead, it is a prospective condition: “Without the condition, the Department would not have recommended the multiple, alternate points of diversion because injury to other water rights was

right has been applied, through water conservation and other means. (ie: an increase in the # of acres irrigated, an increase in the rate of diversion or duration of diversion.)” *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators*, 129 Idaho at 458.

“42-1426 is clear and unambiguous. There are only 2 limitations on obtaining a waiver for an enlargement: (1) the rate of diversion for the original water right cannot increase, (2) no injury as of the date of enlargement.” *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators*, 129 Idaho at 460.

“42-1426 does not touch on an increase in the volume diverted. The court cannot engraft a provision that does not exist in the legislation.” In *Freemont Madison*, the State’s briefing on ‘enlargement’ and burdens of proof contradicts what IDWR has argued in the Pocatello SRBA proceedings.” *Id.*

⁷² In its 706 report and in its testimony at trial, IDWR never alleged 42-1426 enlargement of use as to the City’s accomplished transfers.

likely.” Furthermore, the condition effectively nullifies the accomplished transfer: the City may operate its wells at the transferred location under the earlier priority date, but if a delivery call is placed or administration is otherwise required, IDWR will use the date when water was first appropriated or used from each well (a junior date) to determine whether depletions from the wells are causing injury to senior rights.

Finally, the “other provisions necessary” language is an impermissible collateral attack on Pocatello’s 1999 approved transfer and an unlawful constraint on Pocatello’s exercise of its water rights at the points of diversion recommended to this Court.

The condition imposes a restraint on IDWR’s 1999 administrative action. Dean Tranmer questioned Harold Hargreaves regarding the 1999 Transfer No. 5452. Water rights 29-2274, 29-2338, and 29-7375 were affected by the transfer. IDWR Exhibit 11 was reviewed by Mr. Hargreaves to establish which City wells correlate with the points of diversion set forth in the transfer. IDWR Exhibit 11 is a copy of 29-2274, including the director’s report that lists 13 points of diversion. Those same 13 points of diversion are reflected in the transfer, which are the last two pages of IDWR Exhibit 11.

The chart below is the list of City wells associated with the points of diversion identified by Mr. Hargreaves. Mr. Hargreaves also noted if the wells were part of the City’s interconnected well system and if they were still in operation.

Point of Diversion	Well Number	Notes
T6S R33E S10 NESE Power County	35	Part of the Airport System
T6S R33E S12 NESE Power County	11	Currently not owned by Pocatello
T6S R33E S15 SWNE Power County	39	Part of the Airport System Wells 35 and 39 are interconnected only with each other
T6S R34E S15 NWSW Bannock County	8	Not active Not part of interconnected system
T6S R34E S26 NENW Bannock County	10	Part of interconnected system
T6S R34E S27 NWSE Bannock County	9	Not in operation and is discontinued
T6S R34E S35 SENE Bannock County	12	Part of interconnected system
T6S R34E S35 SENE Bannock County	12	POD is the same as # 7 th POD. According to Mr. Hargreaves there are two PODs but not different wells See condition 11 of transfer
T6S R34E S35 NWSE Bannock County	4	No longer in existence. Not part of interconnected system
T6S R34E S35 NWSE Bannock County	6	Not in operation and is discontinued Not part of interconnected system
T6S R34E S35 NWSE Bannock County	7	Part of interconnected system
T7S R34E S1 SESE Bannock County	13	Part of interconnected system
T7S R35E S16 SWSW Bannock County	44	Part of interconnected system

Five of the points of diversion, wells 7, 10, 12, 13, and 44, listed in the transfer are part of the City's interconnected well system in town , as denoted by the bold font. Accordingly, these five wells are points of diversion for the 21 water rights for the City's intown culinary system; 18 of those water rights were recommended with conditioning language.⁷³ Wells 7, 10, 12, 13, and 44 do not

⁷³ 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. "If other subcases relating to Transfer No. 5452 are identified at trial, the court may consider facts and

have the condition when they are listed as points of diversion for 29-2274, 29-2338, and 29-7375. Also, well 39, which is one of the two wells for the airport culinary system, is unconditioned in transfer 5452, but is conditioned on the recommendation for the two water rights for the airport culinary system, 29-7450, 29-11344, and 29-13638. “Pocatello points out that adding a material change to a water right subject to a formal transfer decision is an impermissible collateral attack on an administrative decision. The SRBA disfavors such collateral attacks.” *First Order on Summary Judgment*, at 3.

Finally, the condition also contradicts IDWR’s recommendation of 22 alternate points of diversion for the 18 water rights. Thus, although each of the 18 rights has the same 22 alternate points of diversion, in times of priority administration, the condition language does not list all 22 wells and in fact lists other wells that Pocatello has not used in years and cannot use. Specifically, in times of priority administration, IDWR’s condition language lists the following wells that are no longer in existence, specifically Alameda well 6 (listed in the condition for 29-11339) and Alameda well 7 (listed in the condition for 29-11339), Pocatello well 4 (listed in the condition for 29-13561), Pocatello well 5 (listed in the condition for 29-13560), and Pocatello well 6 (listed in the condition for 29-13562). The portion of these water rights associated with those wells would not be able to be diverted because the wells do not exist. Tr. Vol. III, pp 517-519 (Jay Ulrich). In times of administration, the condition would prevent other interconnected wells from pumping the non-operable well’s water; thus, the water right amount associated with the non-operable well would not be usable. Tr. Vol. III, pp. 504-505 (Jay Ulrich).⁷⁴

argument relating to Transfer No. 5452 at that time. However, there are insufficient facts of record supporting a summary judgment ruling pertaining to Transfer No. 5452.” *First Order on Summary Judgment*, at 6.

⁷⁴ See Appendix to Pocatello’s Post-Trial Brief, Section C - Spronk Water Engineers Comparison of “Other Provisions Necessary” Language.

2. The Language Is Counter To Idaho Supreme Court Precedent (And IDWR/State Positions In Obtaining That Precedent).

The “other provisions necessary” language invokes presumptions that are counter to the Idaho Supreme Court decisions in *Fremont-Madison* and *AFRD#2*, and to the positions of the State and IDWR in obtaining both favorable decisions. The condition also invokes factual matters that IDWR and the Idaho Supreme Court agree do not belong in the SRBA.

IDWR has just obtained a favorable decision from the Idaho Supreme Court in which it argued the following in obtaining that favorable decision:

On the issue of interconnection, IDWR’s position in the *AFRD#2* case is that interconnection is presumed for purposes of the adjudication.⁷⁵ This is precisely Pocatello’s position. IDWR opposed the interconnection of Pocatello’s surface water sources and its ground water sources, as did the State on behalf of IDWR.

On the issue of highly complex factual issues not appropriate for the SRBA, IDWR’s position in *AFRD#2* is that it is only later “in subsequent conjunctive administration of individual rights in response to a delivery call” that the Director must determine the highly complex facts that relate to the specific interrelationships or the degree of connectivity between specific water rights. [This is precisely Pocatello’s position.] The Idaho Supreme Court agreed, stating that “water rights adjudications neither address, nor answer, the questions presented in delivery calls.”⁷⁶ These questions include “information on how each water right on a source physically interacts or affects

⁷⁵ “Adjudicating a water right is not the same as administering a water right, and while the presumption of interconnection applies to adjudicating water right claims in the SRBA, it does not provide a sufficient factual basis for the subsequent conjunctive administration of individual rights in response to a delivery call, as the SRBA court recognized.” IDWR Reply Brief in *AFRD#2*, p. 32.

⁷⁶ Order, p. 18.

other rights on that same source.” They also include “how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources. *A & B Irrigation Dist. V. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).” The Court’s conclusion was, “That is precisely the reason for the CM rules and the need for analysis and administration by the Director.”⁷⁷

IDWR’s position as to the accomplished transfers for Pocatello’s SRBA state law claims is directly opposite to IDWR’s position and the decision in AFRD#2.⁷⁸

3. The Language Is Counter To Idaho’s Administrative Procedures Act And Bears The Indicia Of An Unlawful Rulemaking.

The Department testified that the imposition of the condition language arises from IDWR’s “evolution” regarding conjunctive administration. In describing its evolution and the

⁷⁷ “Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls.” P. 18, Order For example, the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use. I.C. 42-1411(2)(a)-(j). *** Moreover, a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.”(opinion p. 19) “Conjunctive administration ‘requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.’” *A & B Irrigation Dist. V. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). That is precisely the reason for the CM rules and the need for analysis and administration by the Director. (opinion p. 19)

⁷⁸ IDWR’s position, based on the decision in Basin-Wide Issue 5, is that the SRBA proceedings do not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights. IDWR’s condition raises these highly complex factual questions that IDWR itself asserts should not be adjudicated in the SRBA. However, IDWR did not investigate these facts, nor did it develop any standards for evaluating these facts in the SRBA. Tr. Vol. I, pp. 79-80, 88; Tr. Vol. II, pp. 230, 237, 240, 259, 244-247, 252, 288-289, 294, 328-329, 347-348; Tr. Vol. III, pp. 485-486, 603-609; Tr. Vol. IV, pp. 624-629, 672, 731-737, 747-752, 778-787, 792-797, 803-805; Tr. Vol. V, pp. 845-847, 899-904, 945-952, 959-961, 971-987; Tr. Vol. VI, pp. 1046-1065, 1080-1081, 1096-1133, 1146-1152. For example, Pocatello’s expert, Greg Sullivan, explained that IDWR has not developed any standards or criteria by which potential injury to local ground water rights can be evaluated and has not quantified the amount of aquifer water level drawdown that is injurious. Tr. Vol. V, pp. 925 - 928.

bases for the condition, IDWR testified about criteria that were part of uncompleted rulemakings that followed IDWR's 1994 adoption of Rules for Conjunctive Management of Surface and Ground Water Resources.⁷⁹ Counter to Idaho's Administrative Procedures Act, IDWR began using the ESPA transfer guidelines to evaluate accomplished transfers in the SRBA, instead of completing the rulemaking it had begun. As a result of the summary judgment motion Pocatello filed on November 30, 2006, and the SRBA hearing on summary judgment January 17, 2007, IDWR and the State have acknowledged that the guidelines are not applicable law.⁸⁰

The Transfer Guidelines are a guidance document, unadopted pursuant to the Idaho APA, that the Department has used since October 2002 to make determinations on applications for formal transfers under Idaho Code § 42-222. To the extent that has informed the Department's change in practice regarding conditioning of accomplished transfers in the SRBA, there is no basis for the Court to grant any deference to the agency. In addition to being an unadopted guidance document, the Transfer Guidelines are—by their terms—devoted to determinations regarding *formal transfers under I.C. 42-222* and are unrelated to I.C. 42-1425 accomplished transfers.⁸¹

⁷⁹ A timeline of the uncompleted rulemakings is included in the appendix to Pocatello's post-trial brief. The timeline also includes IDWR's filings and IDWR's testimony regarding Pocatello's state-law claims.

⁸⁰ On January 17, 2007 hearing on summary judgment before Special Master Bilyeu, David Barber made the following statements regarding the applicability of the Transfer Processing Memo: "The transfer processing memo is not a regulation. It's not enforceable like a regulation . . . they're [Pocatello] is certainly right, the memo by its own terms does not directly apply to an accomplished transfer under 42-1425." (Hearing Tr. p. 48) "My perception of that memo is that it provides a more lenient standard than what the common law provides in the state of Idaho. And I was simply cutting the City of Pocatello some slack here." (Hearing Tr. p. 49) "The City of Pocatello in its brief said or argued that the Transfer Processing Memo was not a rule or regulation adopted in accordance with I.D.A.P.A., and I agreed with that." (Hearing Tr. p. 75) Garrick Baxter further stated that "the transfer memo is guidance" and these rules are "intended to guide agency actions." Hearing Tr. p.74.

⁸¹ The Transfer Processing Memo expressly states that it applies to formal transfers under I.C. Section 42-222. IDWR Exhibit 1, Exhibit E, page 1.

The change in procedure requires a rulemaking under the APA. As a matter of law, IDWR's ESPA transfer guidelines, nor any of the other uncompleted rulemakings of the Department [included in the timeline in the appendix], can be applied in the SRBA 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."⁸² *Asarco* listed six specific characteristics that indicate when agency action amounts to a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy.⁸³

IDWR has applied the standards in the Transfer Processing Memo and the condition remark language as a rule under *Asarco*. First, the condition has wide coverage - IDWR "now [applies] this condition to other municipal water rights as they are recommended in the SRBA."⁸⁴ The condition applies generally and uniformly to all municipalities.⁸⁵ The condition operates only in future cases because "the full impact of the accomplished transfer might not be seen for many years."⁸⁶ The condition prescribed a legal standard that is not otherwise provided by enabling

⁸² *Asarco v. State of Idaho*, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003).

⁸³ *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).

⁸⁴ Testimony of Dave Tuthill, Tr. Vol. II p. 295.

⁸⁵ Dave Tuthill testified to the following: (1) IDWR's intent is to apply the condition "uniformly in the SRBA beginning with Pocatello." Tr. Vol. II p. 303, and (2) the condition "has now become IDWR's standard condition for municipalities that request alternate points of diversion on groundwater rights under 42-1425 or 42-222." Tr. Vol. II p. 304.

⁸⁶ Testimony of Dave Tuthill, Tr. Vol. II p. 240.

statute, and expresses agency policy not previously expressed.⁸⁷

C. MUNICIPAL PURPOSE OF USE FOR WATER RIGHT 29-7770.⁸⁸

Water Right 29-7770 is appropriately claimed in the SRBA pursuant to I.C. 42-1420.⁸⁹

Water Right 29-7770 has only been used for the City's biosolids program. It has the same use as Water Rights 29-7118 and 29-7119, which IDWR stipulates are municipal purposes of use. This is an admission that legally the wells associated with Pocatello's biosolids program have municipal purposes of use.

Mr. Herrick's testimony established that water rights associated with the biosolids program have always exclusively been used for land application of biosolids. This application is quite distinct from irrigation of the land.⁹⁰

⁸⁷ Dave Tuthill testified that the policy of imposing the condition language has "evolved over time" and is a part IDWR's "evolution on how it handles claims under the accomplished transfer statutes." Tr. Vol. II pp. 269, 294.

⁸⁸ These rights have never changed from their original municipal purpose of use. "It is possible that the water use relating to 29-7118 and 29-7119 could fit within the broad statutory and common law definitions of 'municipal use,' since the rights are owned by a municipality and because the definition of municipal use is fairly broad. Pocatello may offer proof at trial that the purpose of use changed after the rights were licensed." *Second Order on Summary Judgment* at 4.

⁸⁹ Under *Kelso*, this statement is wrong as a matter of law. "In order to overcome the licensed elements, Pocatello must show a valid accomplished transfer under I.C. § 42-1425." *Second Order on Summary Judgment* at 11.

⁹⁰ Specifically, the following information was established by Mr. Herrick's testimony:

- a. Mr. Herrick is very familiar with the history of the plant.
- b. The biosolids plant was already fully operational when he arrived in 1981. Water rights 7118 and 7119 have always been exclusively used for biosolids application since he arrived.
- c. The airport wells and application sites were subject to pre-approval by the EPA – which was passed after a public notice and hearing period. These sites were specifically selected for the Biosolids program.

Jay Ulrich's testimony establishes that at the time 29-7770's application for permit was submitted, the biosolids plant was already in operation. Pocatello requested the irrigation designation in order to expedite the long-overdue licensing of 29-7770.⁹¹

A review of the EPA online NPDES database revealed several documents discussing the early operation of the Pocatello wastewater treatment plant and (therefore) usage of 29-7118, 29-7119, and 29-7770. These documents establish that Pocatello's biosolids plant was operational well before the

-
- d. The plant is federally regulated by the EPA and state-regulated by DEQ. Pocatello submits annual reports for compliance and is subject to inspections.
 - e. The 'primary purpose' of these water rights is NOT for irrigation. Irrigation would imply that the crops are being watered. The biosolids are not directly applied as 'food' for the plants – they are applied to break down the waste. Sometimes, crops cannot be grown for over a year after application. This is incongruous with the very definition of 'irrigation,' which is, 'the artificial application of water to sustain growing plants.'
 - f. The primary purpose of these rights is for the biosolids program.
 - g. Pocatello does not irrigate the land. The farmers are the ones who actually irrigate the crops. The farmers also sell the crops.

The City works with the farmers in select the type of crops that will accommodate the City's biosolids program and the city monitors the land to ensure the farmers are not adding additional fertilizers which will hinder the program or contaminate the ground water.

⁹¹ Specifically, the following information was established by Mr. Ulrich's testimony:

- h. Water right 29-7770 was put into operation in the 'mid 1980's' for the biosolids program.
- i. Water rights 29-7118 and 7119 were used for the land application of biosolids prior to 1987.
- j. At the time of 29-7770's application for permit was submitted, the biosolids plant was already up and running. The well for 29-7770 was already dug and in use. It has always been used for biosolids.
- k. The long delay in licensing 29-7770 was caused by Swan Falls and the moratorium on groundwater wells.

Pocatello ultimately requested the 'irrigation' designation because 'IDWR twisted its arm' and the delay in licensing had been so long that Pocatello 'was not going to fight' with IDWR any longer.

November 19, 1987 SRBA commencement.⁹²

IDWR's error of law in licensing 29-7770 for irrigation use is not binding on the SRBA court or the City of Pocatello. The state and its agencies cannot be estopped by the mistakes of law or fact of its agents.⁹³ Furthermore, "a prior decree is not considered 'conclusive' because it cannot insulate the water right from re-examination of subsequent use."⁹⁴ Because a prior decree or license is not conclusive evidence of the first use of a water right, this court is not estopped from correcting an error of law in a license.⁹⁵

⁹² This information is publicly available on the EPA website at the following link. http://oaspub.epa.gov/enviro/pes_det_reports.detail_report?npdesid=ID0021784. Pocatello's biosolids plant NPDES permit number is ID0021784. This link to the EPA's official website contains a published compilation of all the data collected by the EPA during site visits and compliance sampling of the biosolids plant. Internet publications of governmental documents and reports on an official website constitute an "official publication" within Federal Rule of Evidence 902(5) (official publications are self-authenticating.) See *Sannes vs. Jeff Wyler Chevrolet, Inc.*, 107 Ohio Misc.2d 11, 736 N.E.3d 116 (1999); *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.R.D. 116, 121 (S.D.N.Y. 2000).

Here is a brief timeline predating the SRBA.

- a. August 2, 1974: The original NPDES permit was issued for the plant.
- b. June 21, 1978: The EPA commences annual compliance sampling of the facility.
- c. November 15, 1984: The EPA conducts a pretreatment audit of the facility.
- d. April 18, 1985: The NPDES permit was modified.
- e. November 13, 1985: Pocatello submits its first annual report for the facility.
- f. November 14, 1985: An enforcement plan is drafted for the facility.

September 15, 1987: The first pretreatment performance summary is completed.

⁹³ 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).

⁹⁴ *Memorandum Decision and Order On Challenge and Order Disallowing Water Right Based on Federal Law* at 12-13, subcase 29-11609 (October 6) (emphasis added); citing *State v. Hagerman Water Right Owners*, 130 Idaho 736, 741-42, 947 P.2D 409, 414-15 (1997).

⁹⁵ "Prior decrees have long been treated in the SRBA as persuasive evidence of the elements of a water right. The court has repeatedly ruled that the SRBA is not an appropriate forum for collaterally attacking a license or prior decree. The appropriate forum for asserting a prior decree is in error is an

I.C. 42-1425 applies to accomplished transfers not to errors of law. The operation of Pocatello's biosolids plant, the municipal purpose of use for the other three wells associated with this biosolids plant (29-7118, 29-7119, 29-113??), and the corroboration that 29-7118, 29-7119, and 29-7770 have never been used for any other purpose, demonstrates that the municipal purpose of use is correct as a matter of law and is not a function of Pocatello having changed the use of these wells under an accomplished transfer theory.⁹⁶

D. THE PRIORITY DATES FOR ALAMEDA WELLS #1 AND #3.

Municipal rights must be proved by the same quantum of evidence as any other water right: substantial evidence.⁹⁷ Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion."⁹⁸ Reviewing courts defer to an agency determination so long as

appeal of that decree. However, prior decrees are not conclusive proof of the elements of a water right. The SRBA court has consistently recognized that change of use or failure to use a water right can sometimes change a right after it is decreed. *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* (Subcase No. 29-11609) (Oct. 6, 2006). For example, a decree can be forfeited or abandoned. The elements of a right can be changed by an administrative transfer under I.C. § 42-222 or an accomplished transfer under I.C. § 42-1425." *Second Order on Summary Judgment* at 9.

⁹⁶ 29-7770 is distinguished from *River Grove Farms* because the issue raised in *River Grove* did not address an acknowledged error of law; here, IDWR acknowledges the municipal purpose of use for 29-7770. *River Grove* addressed a condition (subordination remark) attached to licenses and the claimant in the SRBA and IDWR did not agree about the condition. Correction of an error of law is not a collateral attack on the license. 29-7770 is appropriately claimed under 42-1420, and IDWR's error of law is not binding on this Court or Pocatello. The filing of an SRBA claim for 29-7770 pursuant to Idaho Code 42-1420 and the established law in *Kelso*, etc provide for this Court's authority to decree 29-7770 with a municipal purpose of use, thereby correcting the error of law in 29-7770.

⁹⁷ The Idaho Supreme Court has held that an appellate court will not disturb a lower court's finding in respect to a water right priority where there is 'substantial evidence' in the record to support the lower court's finding. *Muir v. Allison*, 33 Idaho 146, 191 P. 206 (1920). *See also, Peck v. Sharrow*, 96 Idaho 512, 531 P.2d 1157 (1975), (requiring proof of water right priority by 'substantial and competent evidence.')

⁹⁸ Black's Law Dictionary 7th Ed. 1999

upon examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision.⁹⁹

Pocatello provided substantial evidence that would allow a reasonable person to conclude that the wells in question were undeniably in existence prior to the dates recommended by IDWR. Pocatello has met its burden of proof by providing substantial evidence on priority. Carter Fritschle's testimony shows that IDWR did NOT base its priority recommendation on the substantial evidence provided by Pocatello. Pocatello provided substantial evidence that would allow a reasonable person to conclude that the wells in question were undeniably in existence prior to the dates recommended by IDWR. The evidence in the timeline below constitutes substantial evidence that a reasonable person would conclude (and Carter Fritschle did conclude) that each well had been in existence prior to IDWR's recommended dates. Everything in the timeline is taken directly from the evidence and was admitted by Mr. Fritschle in cross-examination.

Timeline of water rights 29-13558 and 29-13639. (29-13558 claimed 1905 priority date; IDWR recommended 7/16/1924. 29-13639 claimed 12/31/1940; IDWR recommended 10/22/1952)

1. **1905:** Mr. A. Y. Satterfield, a pioneer resident of Alameda, settles in town.

(Alameda Enterprise, Pocatello Exhibit 150)

⁹⁹ Under the Substantial Evidence Rule, "a reviewing court should uphold an administrative body's ruling if it is supported by evidence on which the administrative body could reasonably base its decision." Black's Law Dictionary 7th Ed. 1999, *see also State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 1997.

2. **Before July 17th 1924:** The 'first well' was dug to a depth of 65 feet and provided a good supply of water. (*Alameda Enterprise*, Pocatello Exhibit 150)
3. **July 17th, 1924:** North Pocatello and Fairview consolidate to form Alameda. The Fairview water system was already in existence at this time and was already extensively developed because it was purchased for \$30,000 in the consolidation. (*Pocatello Tribune*, Pocatello Exhibit 148)
4. **after July 17th, 1924:** The 'first well' was drilled an additional 35 feet and 'another well' was dug to 65 feet. All of this was done during the term of the first mayor of Alameda. Alameda was consolidated on July 17th, 1924. (*Alameda Enterprise*, Pocatello Exhibit 150)
5. **1940:** Alameda's population was 2,100. (*Pocatello City Directory, 1962*, Pocatello Exhibit 151)
6. **1950:** Alameda's population was 4,705. (*Pocatello City Directory, 1962*, Pocatello Exhibit 151)
7. **October 22nd, 1952:** The water right application covers three wells which were already 'completed and in use' on the date of application. These wells were 'drilled and in use for varying periods of time in the past, all in corporate limits of Alameda.' (*City of Alameda Application for Permit*, Pocatello Exhibit 153)

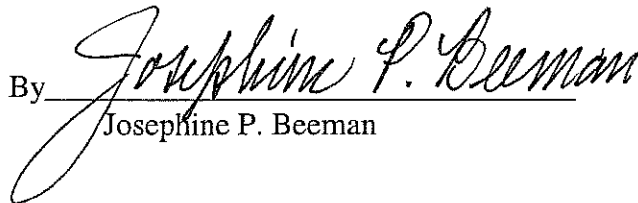
Water Right 29-13558 should be decreed with a priority date of 1905. Water Right 29-13639 claimed should be decreed with a priority date of 12/31/1940.

V. CONCLUSION

The Surface Water Coalition, whose members unquestionably have significant numbers of water rights senior to many of Pocatello's state-law water rights, settled because they had no fear that Pocatello's wells would injure their water rights. The settlement with the SWC is in accordance with the facts and legal principles set forth in this Post-Trial Brief. Pocatello respectfully requests that the decree of this Court accord with that settlement. The only remaining issue is the 1905 priority date for 29-13558 and the 1940 priority date for 29-13639 which are supported by the substantial evidence before this Court.

RESPECTFULLY SUBMITTED this 30th day of April 2007.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April 2007, I caused a true copy of the foregoing **POCATELLO'S POST-TRIAL BRIEF** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

UNITED STATES OF AMERICA

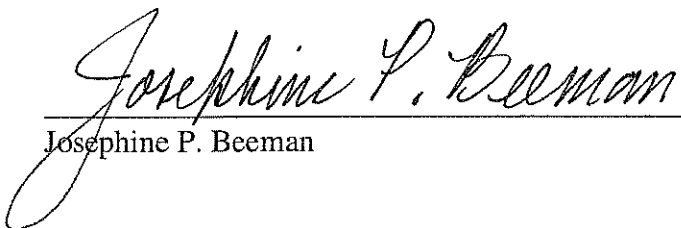
REPRESENTED BY:
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ENVIRONMENT & NAT'L RESOURCES
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BY HAND DELIVERY

STATE OF IDAHO

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Josephine P. Beeman

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EXHIBIT A

Subcase Numbers

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