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

In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	Appendix to
	)	Pocatello's Post-Trial Brief
Case No. 39576	)	
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TABLE OF CONTENTS

A	Timeline
B	Pocatello's Proposed Findings of Fact
C	Spronk Water Engineers Comparison of "Other Provisions Necessary" Language

A Timeline

TIMELINE

DATE	DESCRIPTION
04/06/1989	City of Aberdeen files notices of claim for 35-0471 and 35-7808. Each water right claims 4 points of diversion (wells). Water right 35-0471 is a statutory claim. Water right 35-7808 claims are consistent with those on the license. (Pocatello Exhibits 172, 173)
08/31/1989	City of Rupert files notices of claim for 36-7115 and 36-7862. Each water right claims 4 points of diversion (wells). Water Right 36-7115 claims 1 point of diversion consistent with the license and 3 additional points of diversion. (Pocatello Exhibits 174, 176)
02/03/1990	City of Jerome files notice of claim 36-02518. The claim lists one point of diversion that services 5 water rights. This is consistent with the license. (Pocatello Exhibit 179)
04/19/1990	City of Pocatello files notices of claim for 29-271, 29-4222, 29-272, 29-273, 29-2274A, 29-2274B, 29-11343, 29-11344, 29-4221, 29-2274C, 29-11348, 29-11342, 29-2324, 29-11339, 29-4224, 29-4226, 29-4225, 29-2382, 29-2401, 29-4223, 29-2499, 29-7106, 29-7118, 29-7119, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7770. <i>See Exhibit 6, Affidavit of Josephine Beeman.</i> Water right numbers 29-2274A and 29-2274B were claimed with multiple points of diversion that were consistent with the license. Water right 29-7106 claimed a single point of diversion that was consistent with the license in addition to 2 other points of diversion that were not consistent with the license. Water right 29-7322 claimed a single point of diversion consistent with the license plus one additional point of diversion that was not consistent with the license.
11/02/1992	IDWR issues a recommendation for 36-2518 (City of Jerome) for 6 points of diversion (wells) with NO condition remark. (Pocatello Exhibit 179)
02/04/1994	The SRBA court declares Idaho Code 42-1416 and 42-1416A (the "presumption" statute and the "accomplished transfer" statute) unconstitutional. <i>Memorandum Decision and Order on Basin-Wide Issue No. 1</i> , February 4, 1994.
02/28/1994	The Idaho Supreme Court holds that IDWR's director has no discretion regarding carrying out the laws relative to the distribution of water in accordance with rights of prior appropriation. <i>Musser v. Higginson</i> , 871 P.2d 809 (1994).
04/12/1994	In response to the Idaho Supreme Court's February 4, 1994 decision, the Idaho State Legislature repeals Idaho Code 42-1416 and 42-1416A (the "presumption" statute and the "accomplished transfer" statute) and enacts Idaho Code sections 42-1425, 42-1426, 42-1427 I.C. 1994 Idaho Session Laws, ch. 454 §-§ 31-33, p. 1443.
11/01/1994	IDWR adopts the <i>Rules for Conjunctive Management of Surface and Ground Water Resources</i> . 37-0311-9302, Final Rule, Bulletin Vol. 94-10.

12/07/1994	The SRBA court enters <i>Order Designating Basin-Wide Issue No. 4</i> to address the constitutionality of Idaho Code sections 42-1425, 42-1426, 42-1427 as written.
05/17/1995	The SRBA court issues a <i>Revised Memorandum Decision and Order on Basin-Wide Issue No. 4</i> declaring 42-1425, 42-1426, and 42-1427 constitutional as interpreted by the court.
10/02/1996	The Idaho Supreme Court affirms the constitutionality of 42-1425, 42-1426, and 42-1427, but it applies a different standard than the SRBA court. <i>Freemont Madison Irrigation District v. Idaho Ground Water Appropriators</i> , 926 P.2d 1301 (1996).
12/03/1997	IDWR publishes notice of intent to promulgate rules for <i>Water Management Rules</i> . 37-0313-9701, Negotiated Rulemaking Bulletin Vol. 97-12.
04/01/1997	City of Rupert files notices of claim for 36-15488 and 36-15489. Each water right claims 4 points of diversion (wells). Both are beneficial use claims. (Pocatello Exhibits 177, 178)
10/30/1997	IDWR issues a recommendation for 36-7115, 36-7862, 36-15488, and 36-15489 (City of Rupert) with NO condition remark. Each water right claims 4 points of diversion (wells). (Pocatello Exhibits 174, 176, 177, 178)
12/05/1997	The SRBA issues a partial decrees for 36-7115, 36-7862, 36-15488, and 36-15489 (City of Rupert) with NO condition remark. Each water right claims 4 points of diversion (wells). (Pocatello Exhibits 174, 176, 177, 178)
03/18/1998	IDWR publishes notice of negotiated rulemaking for water right transfers. 37-0314-9801, Negotiated Rulemaking Bulletin Vol. 98-5.
06/02/1998	SRBA issues a partial decree for 36-02518 (City of Jerome) with NO condition remark. The water right includes 6 points of diversion (wells). (Pocatello Exhibit 179)
10/07/1998	IDWR published <i>Proposed Water Management Rules</i>. 37-0313-9701, Proposed Rule, Bulletin Vol. 98-10. The proposed rules contain the following language: <u>Definition of "Enlargement"</u>: "Any increase in one or more elements of a water right." (page 169) <u>Enforcement of Diversion Rate and Volume</u>: "Diversion and use of water shall not exceed the diversion rate and annual diversion volume authorized under the water right." (page 172) <u>Enforcement of Point of Diversion</u>: "the diversion from points other than the point or points authorized by the water right will not be regulated to prevent diversion if the following conditions are satisfied: the new point of diversion is claimed on an accomplished transfer and there is no information available to show that the claim is erroneous or that such use will cause injury to other water rights or is an enlargement." (page 172) <u>Enforcement of the Use of Water Rights from Surface Water Sources Prior</u>

	<u>to Using Water From Ground Water Sources</u>: “Water shall not be diverted and used under a ground water right unless the amount of water available for use from a natural flow surface water right for the same beneficial use is physically or legally unavailable under the right for the beneficial use authorized under the rights.” (page 173)
01/26/1999	IDWR issues a recommendation for 35-4071 and 35-7808 (City of Aberdeen) with NO condition remark. Each water right includes 4 points of diversion (wells). (Pocatello Exhibits 172, 173)
09/25/2000	IDWR publishes notice of continuation of negotiated rulemaking for <i>Water Management Rules</i> . 37-0313-9701, Negotiated Rulemaking (2 nd Notice), Bulletin Vol. 00-11.
10/25/2000	IDWR publishes notice of intent to promulgate rules for the <i>Eastern Snake Plain Aquifer Water Management Rules</i> . 37-0315-0001, Negotiated Rulemaking, Bulletin Vol. 00-12.
11/17/2000	The SRBA issues partial decrees for 35-04071 and 35-7808 (City of Aberdeen) with NO condition remark. Each water right claims 4 points of diversion (wells). (Pocatello Exhibits 172, 173)
07/11/2001	IDWR distributes notice of continued negotiation for the <i>General Water Management Rules</i>. See Exhibit 3, <i>Affidavit of Josephine Beeman</i>. The rules include the following provisions: <u>Definition of “Elements” of a Water Right</u>: “The elements of a water right include the source of water, date of priority, the maximum quantity of water that may be diverted, point of diversion, purpose of use, place of use, extent of use, period of use, and conditions on the exercise of the water right included in any decree, license, or approved transfer application.” (Exhibit 3, page 3) <u>Definition of “Expansion” of a Water Right</u>: “Any increase in one or more of the elements of water right that increases the extent of beneficial use defined and authorized under a valid water right.” (Exhibit 3, page 3) <u>Definition of “Injury”</u>: “When water diverted under a junior priority water right diminishes the amount of water that otherwise would have been: (1) physically and legally available under the senior water right; (2) diverted without waste; and (3) applied without waste to the beneficial use authorized under the senior water right.” (Exhibit 3, page 3) <u>Definition of “Presumptive Depletion”</u>: “The quantity of water depleted from a surface water source resulting from the diversion and use of water from a hydraulically connected ground water source . . .” (Exhibit 3, page 4)

	<u>Definition of "Presumptive Injury"</u>: "Injury presumed by the Director to occur to a senior priority water right because of the diversion and use of water under a junior priority water right . . ." (Exhibit 3, page 4) <u>Establishment of Presumptive Injury</u>: "The Director may establish a presumption of injury to one or more senior priority water rights resulting from the diversion and use of surface or ground water under a junior priority water right." (Exhibit 3, page 8) <u>Establishment and Use of Presumptive Depletions</u>: "The Director may establish presumptive depletions in a surface water source resulting from the diversion and use of hydraulically connected ground water, or in a ground water source resulting from the diversion and use of hydraulically connected surface water." (Exhibit 3, page 8) <u>Enforcement of the Use of Water Rights From Surface Water Sources Prior to Using Water From Ground Water Sources</u>: "Water shall not be diverted and used for irrigation under a ground water right unless the amount of water available for use from a natural flow surface water right for the same irrigation use is physically or legally unavailable under the right." (Exhibit 3, page 12)
Nov 2001	Public comments are submitted for the <i>Proposed Water Management Rules</i> . See Exhibit 4 to <i>Affidavit of Josephine Beeman</i> .
06/24/2002	IDWR publishes the <i>Update on the Water Management Rules</i> for the Conjunctive Administration Workshop hosted by the Idaho Water Users Association. See Exhibit 4, <i>Affidavit of Josephine Beeman</i>. By this time the proposed rules contain the following provisions: <u>Definition of "Elements" of a Water Right</u>: "The elements of a water right include the source of water, date of priority, the maximum quantity of water that may be diverted, point of diversion, purpose of use, place of use, extent of use, period of use, and conditions on the exercise of the water right included in any decree, license, or approved transfer application." (page 3) <u>Definition of "Expansion" of a Water Right</u>: "Any increase in one or more of the elements of water right that increases the extent of beneficial use defined and authorized under a valid water right." (page 3) <u>Definition of "Hydraulically Connected Ground and Surface Water"</u>: "A ground water source and a surface water source physically interconnected such that a portion of the ground water can become surface water, or a portion of the surface water can become ground water, and changes in water levels within the ground water source affect the amount of water exchanged between the ground water source and the surface water source." (page 3) <u>Definition of "Injury"</u>: "When water diverted under a junior priority water

	right diminishes the amount of water that otherwise would have been: (1) physically and legally available under the senior water right; (2) diverted without waste; and (3) applied without waste to the beneficial use authorized under the senior water right.” (page 4) <u>Definition of “Presumptive Depletion”</u>: “The quantity of water depleted from a surface water source resulting from the diversion and use of water from a hydraulically connected ground water source . . .” (page 4) <u>Definition of “Presumptive Injury”</u>: “Injury presumed by the Director to occur to a senior priority water right because of the diversion and use of water under a junior priority water right . . .” (page 4) <u>Establishment of Presumptive Injury</u>: “The Director may establish a presumption of injury to one or more senior priority water rights resulting from the diversion and use of surface or ground water under a junior priority water right.” (page 8) <u>Establishment and Use of Presumptive Depletions</u>: “The Director may establish presumptive depletions in a surface water source resulting from the diversion and use of hydraulically connected ground water, or in a ground water source resulting from the diversion and use of hydraulically connected surface water.” (page 8) <u>Enforcement of the Use of Water Rights From Surface Water Sources Prior to Using Water From Ground Water Sources</u>: “Water shall not be diverted and used for irrigation under a ground water right unless the amount of water available for use from a natural flow surface water right for the same irrigation use is physically or legally unavailable under the right.” (page 12) Included in this <i>Update on the Water Management Rules</i> were all of the commentaries that IDWR received in response to the <i>Proposed Water Management Rules</i>. See Exhibit 4, <i>Affidavit of Josephine Beeman</i>.
10/30/2002	IDWR issues the <i>ESPA Transfer Processing Memo</i> which states, ‘these policies and procedures are to be followed until rescinded or amended, or superseded by statute or rule or court decision.’ Exhibit E, <i>Supplemental Director’s Report</i>, page 1, IDWR Exhibit 1. The memo contains the following language: <u>Interconnection</u>: “An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from depletion at proposed point of diversion in one day.)” (page 20) <u>Factors For Considering Injury</u>: “Reduction in the quantity of water available to other water rights.” (page 19) <u>Additional Consideration For Evaluating Injury</u>: “Location of nearby wells.

	The location of the nearest production well, including domestic wells, to the proposed point of diversion, and if different, the nearest production well down gradient from the proposed point of diversion.” (page 21) <u>Enlargement</u>: “Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer.” (page 21) <u>Factors For Considering Enlargement</u>: “Diversion rate, annual diversion volume, and number of acres licensed or decreed.” (page 22)
02/18/2003	IDWR issues a preliminary recommendation for Pocatello’s state law SRBA claims: 29-271, 29-4222, 29-272, 29-273, 29-11343, 29-11344, 29-4221, 29-2274, 29-11348, 29-2324, 29-11339, 29-2338, 29-4224, 29-4226, 29-4225, 29-2382, 29-2401, 29-4223, 29-2499, 29-7106, 29-7118, 29-7119, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7770. See Exhibit 7, <i>Affidavit of Josephine Beeman</i>. The preliminary recommendations have NO condition remark for 29-7106 and 29-7322, the City’s SRBA claims water with multiple points of diversion which differ from the City’s licenses 29-7106 and 29-7322. Licenses 29-7106 and 29-7322 were provided during discovery and are exhibits 8 and 9 to the <i>Affidavit of Josephine Beeman</i>.
04/25/2003	Pocatello files new and amended SRBA claims for 29-4222, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-11343, 29-11344, 29-4221, 29-2274, 29-11348, 29-11339, 29-2338, 29-2354, 29-4224, 29-4226, 29-4225, 29-2382, 29-2401, 29-4223, 29-2499, 29-7106, 29-7118, 29-7119, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7502, 29-7770, 29-7782. 22 of the amended claims include additional alternate points of diversion.
07/11/2003	IDWR issues its Basin 29 Directors Report for Irrigation and Other Uses, which included the recommendation of Pocatello’s 38 state-law SRBA claims: 29-271, 29-4222, 29-272, 29-13558, 29-273, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, 29-11344, 29-4221, 29-2274, 29-11348, 29-13639, 29-11339, 29-2338, 29-2354, 29-4224, 29-4226, 29-4225, 29-2382, 29-2401, 29-13636, 29-4223, 29-2499, 29-7106, 29-7118, 29-7119, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7502, 29-7770, 29-7783. Rights recommended with alternate points of diversion include condition remark language.
04/13/2006	IDWR issues <i>Supplemental Director’s Report</i> which expressly relies on the <i>ESPA Transfer Processing Memo</i> by stating, “IDWR’s Transfer Processing Memo No. 24 (October 30, 2002) provides guidance to agents when evaluating a request to change in source from surface water to ground water or to add a well as an alternative point of diversion for a surface water right.”(page 11) The <i>Supplemental Director’s Report</i> also contains the following language:

	<u>Interconnection</u>: IDWR applies the entire interconnection standard for change of source that is stated in the <i>Transfer Processing Memo</i>. (page 11) <u>Presumed Future Injury</u>: “This condition is necessary in order to avoid injury and to assist in the administration and definition of the water rights.” (page 13) “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 user, this condition preserves the ability of the water users to protect their water right.” (page 14) “Without the condition, the Department would not have recommended the multiple, alternate points of diversion because injury to other water rights was likely.” (page 14) <u>Neighboring Well Interference</u>: The condition remark “is again a necessary parameter when evaluating possible well-interference issues.” (page 15) “When the City pumps water from a well at a different location, it may cause interference with a different surface water source, or another water user’s well.” (page 15) The remark “is important because many other wells could have been drilled nearby before or after the City-owned well was drilled or used.” (page 15)
12/11/2006	The State submits <i>Response Memorandum in Opposition to City of Pocatello’s Motion for Summary Judgment</i>. The State calls the <i>Transfer Processing Memo</i> the “correct legal standard” that must be applied by Pocatello in order to determine injury and interconnection. (page 5) “The standards set forth in the Transfer Processing Memorandum assist in identifying whether a proposed transfer will injure other water right. (sic) The City should be required to address these standards instead of ignoring them.” (page 7) “The requirement from the Transfer Memo that an ‘immediate and direct connection between the surface source and the well’ exist before a transfer is allowed would have prevented this additional demand. If the City continues to request this change in its water right, the City should be required to address at trial the standards stated in the Director’s Transfer Processing Memo.” (page 8)
01/17/2007	The State of Idaho participates in the SRBA summary judgment hearing before Special Master Bilyeu. During the hearing, the State made the following statements: <u>Transfer Processing Memo</u>: “The transfer processing memo is not a regulation. It’s not enforceable like 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. page 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. page 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. page 75) <u>Injury</u>: “Injury, whether it’s under 42-222 or section 42-1425, that legal issue is exactly the same.” (Hearing Tr. page 53) <u>Presumption of Injury</u>: “All you have to do when you have this issue of an unreliable supply versus a reliable supply on injury, all you have to do is look at under the original right, how much water would you be able to take and under the revised right how much water would they be able to take. And if the amount of water you’re able to take under the proposed transfer is more, then there’s injury and it should be precluded.” (Hearing Tr. page 54)
02/21/2007	Pocatello amends its claims for surface water rights 29-271, 29-272, and 29-273 to include alternate points of diversion consistent with the City’s prior amendment of surface water right claim 29-4222 and consistent with the City’s statements in its 2003 objections to the recommendations for its four surface water right claims: 29-271, 29-272, 29-273, and 29-4222.
02/26/2007	Carter Fritschle testifies at trial that the <i>Transfer Processing Memo</i> “guided” his analysis in determining whether Pocatello’s APOD claims were admissible. IDWR’s position is that the condition remark language is necessary for municipal APOD administration. Mr. Fritschle’s testimony also includes the following language from earlier failed rulemaking: <u>Definition of ‘Hydraulically Connected Ground and Surface Water’</u>: Hydrological connection means showing “that the same water that was in Gibson Jack Creek or Mink Creek was actually being diverted from one of the wells” or that “that the surface water is available at the alternate point of diversion.” (Tr. Vol. II page 326) <u>Standard for Evaluating Interconnection</u>: There must be “the physical connection and the immediate connection.” Physical connection is a proximity standard where “a diversion from the well would have an impact on the stream.” “We look to see if the location of the alternate point of diversion is taking water out of the same source.” “We need to see an immediate effect from the diversion at the alternate point of diversion.” The connection must be immediate because “this will go to the issue of injury.” (Tr. Vol. 11 pages 325-331) <u>Establishment of Presumptive Injury</u>: Injury is “the primary issue when we recommend an alternate point of diversion; we look for injury.” Although, “we have not conducted an investigation as to which other water rights might be injured . . . it is a concern of future injury.” “Without the condition, the Department would not have recommended the multiple alternate points of diversion because of injury to other water rights was

	likely.” (Tr. Vol. 11 pages 331-335)
02/27/2007	Dave Tuthill testifies at trial that he relied on the <i>Transfer Processing Memo</i>, the proposed <i>Water Management Rules</i>, and the proposed <i>ESPA Water Management Rules</i> in evaluating Pocatello’s alternate point of diversion claims. IDWR changed its procedures to this “conditioning of the rights” because the condition was “necessary for the purpose of administration.” This conditioning is now applied “to other municipal water rights as they are recommended in the SRBA.” (Tr. Vol. II page 299) Mr. Tuthill’s testimony also includes the following language from earlier failed rulemaking by IDWR: <u>“Elements” of water rights</u>: The number of hours per day that a water right operates is an element “in most water rights, as presented by acre feet produced, but is not an element for a municipal water right.” “Generally, the limitation on number of hours is limited by the cap on volumetric diversion for the year.” (Tr. Vol. II, pages 289-290) <u>Definition of “Expansion” of Water Rights</u>: “My use of the word ‘enlargement’ doesn’t refer to the statutory definition, but rather to the increased volumetric pumping.” Pocatello “might increase the duration of pumping of its interconnected wells.” However, a “limitation to the historical diversion rate does address one aspect of enlargement from my perspective.” “So our understanding of our responsibility through the adjudication is to appropriately condition a water right so that is cannot be expanded over time inappropriately.” (Tr. Vol. II pages 292-294) <u>Definition of “Hydraulically Connected Ground and Surface Water”</u>: “The Pocatello claims are a bit different in terms of proximity to surface sources as compared with other cities.” (Tr. Vol. II page 308) <u>Definition of “Injury”</u>: When a water right “is expanded over time inappropriately.” As to groundwater, when “there’s no recovery of the system” and this “interferes” with the availability of senior rights. (Tr. Vol. II pages 232 and 238) <u>Establishment of Presumptive Injury</u>: The injury Mr. Tuthill testifies about is “hypothetical.” He admits to “presuming injury at some point in the future.” “It very well could occur. It has occurred this way in my experience in other locations. I have looked specifically at the City of Pocatello, but this type of injury has occurred in my experience.” (Tr. Vol. II page 286-288) <u>Standard for Using Presumptive Injury</u>: “We needed to provide some protection from local interference due to conditions that might change in the future.” “The full impact of that accomplished transfer we might not see for many years.” The condition is necessary because “there were multiple groundwater users in the area of the City’s interconnected wells that could

	be affected by Pocatello's alternate points of diversion." This necessity is presumed because IDWR has not identified any well users, well locations that would be injured. IDWR "neither inquired of" or is aware of "any specific claims of injury from other well owners in the vicinity of the City of Pocatello." (Tr. Vol. II pages 239, 286-288) <u>Neighboring Well Interference</u>: "We needed to provide some protection from local interference due to conditions that might change in the future." "The two areas that we were concerned about were, number one, well interference that could happen in the future as a result of increased pumping at wells and, secondly, conjunctive administration concerns relative to diversion from one location as compared with diversion from another location." Mr. Tuthill then provides a lengthy hypothetical fact situation to illustrate that "the condition that we crafted was, in part, to address this situation" where "for the first time now the domestic user experiences a local [well] interference problem." (Tr. Vol. II pages 232-233, 236-240)
03/05/2007	The Idaho Supreme Court issues opinion in <i>American Falls Reservoir District No. 2 v. Idaho Department of Water Resources</i>, finding that the <i>Rules for Conjunctive Management of Surface and Ground Water Resources</i> are facially constitutional. The Court overrules the District Court opinion that "the <i>Rules</i> were fatally defective in <u>not</u> containing a presumption that 'when a junior diverts or withdraws water in times of a water shortage, it is presumed that there is injury to a senior.'" (Emphasis added.) (page 19)

B Pocatello's Proposed Findings of Fact

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

	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
In Re SRBA	)	
	)	Pocatello's Proposed Findings of Fact
	)	
Case No. 39576	)	
	)	

The City of Pocatello, by and through its counsel of record, Beeman & Associates, P.C.,
hereby submits its Proposed Findings of Fact.

THE CITY OF POCATELLO'S MUNICIPAL CULINARY WATER SYSTEM

1. The City of Pocatello is a municipal water supplier serving a population of over 50,000 residents in a service area of approximately 34 square miles. The City has an obligation to its customers to provide potable water on demand 24 hours a day, 365 days a year.
2. As of November 19, 1987, the City of Pocatello's surface water supply for culinary uses within the City consisted of diversion works on Mink Creek and Gibson Jack Creek, and the City's associated interconnected delivery system.
3. As of November 19, 1987, the City of Pocatello's ground water supply for culinary uses within the City consisted of a system of the following 22 interconnected wells and the City's associated interconnected delivery system: Wells 2, 3, 7, 10, 12, 13, 14, 15, 16, 18, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, and 34.
4. The City's interconnected system for culinary water delivers its surface water and ground water rights throughout the City's culinary service area.
5. The City has operated an interconnected system for culinary uses beginning in the late 1880s with its surface water rights from Mink Creek and Gibson Jack Creek.

6. Since the early 20th century, the interconnected wells which serve as alternate points of diversion also developed ground water rights to supply the City its interconnected culinary system. Each time a new well was drilled and added to the interconnected system, it resulted in a new alternate point of diversion for the City's ground water rights. Culinary water use from its surface water sources on Mink Creek and Gibson Jack Creek began declining in 1985 and ceased completely in 1993 as a result of changing water quality regulations.
7. As surface water diversions declined, the water rights were diverted through the culinary wells.
8. Well #44 was drilled in 1999 as a replacement well for the compromised function due to ground water contamination of some of the 22 interconnected wells that served the City's culinary uses as of November 19, 1987.
9. Some of the 22 wells that were interconnected to the City's culinary system as of November 19, 1987 include: Alameda #1, Alameda #2, Alameda# 6, Alameda #7, Well #1, Well #4, and Well #6. The wells that are "off line" but may be rehabilitated include: Well #1. The wells that have been replaced include: Alameda #1 and Alameda #2 were replaced by Well #29, and Well #1 was replaced with Well #5.
10. The ground water rights that provided the water supply to the City's interconnected culinary system prior to November 19, 1987 and continue to provide a water supply include the following 21 water rights: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.
11. The surface water rights that provided the water supply to the City's interconnected culinary system prior to November 19, 1987 include the following four water rights: 29-271, 29-272, 29-273, and 29-4222.
12. The source of water supply for the City's 23 interconnected culinary wells is ground water pumped from the Lower Portneuf River Valley Aquifer (LRPVA). The source of water supply for one of the 23 City's interconnected wells (Well #32) is ground water pumped from the Eastern Snake Plain Aquifer (ESPA).
13. The Lower Portneuf River Valley Aquifer is a highly prolific aquifer.
14. A large portion of the recharge to supply the aquifer comes from the Bannock Range, primarily from Gibson Jack and Mink Creeks.
15. The Lower Portneuf River Valley Aquifer, Mink Creek, and Gibson Jack Creek are interconnected sources of water and are considered the same source of water for purposes of the SRBA decree.
16. The Eastern Snake Plain Aquifer is a large regional aquifer that extends across much of southern Idaho.

17. The Lower Portneuf River Valley Aquifer and the Eastern Snake Plain Aquifer are hydrologically connected.

THE CITY OF POCATELLO'S MUNICIPAL AIRPORT CULINARY WATER SYSTEM

18. The City provides a water supply for culinary, commercial, and industrial uses in and around the Pocatello Municipal Airport through a system of interconnected wells (Airport Interconnected Wells).
19. The City of Pocatello's Airport Interconnected Wells as of November 19, 1987 consisted of Wells #35 and #39.
20. The source of water supply for the two Airport Interconnected Wells is ground water pumped from the ESPA.

THE CITY OF POCATELLO'S SRBA CLAIM FOR ALTERNATE POINTS OF DIVERSION FOR GROUND WATER UNDER I.C. § 42-1425

21. The City of Pocatello's claimed alternate points of diversion under *I.C. § 42-1425* for the following 21 ground water rights serving the City's culinary uses are: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.
22. The alternate points of diversion claimed for the 21 ground water rights serving the City's culinary uses are 22 wells that were interconnected as of November 19, 1987, as listed in paragraph 3, and Well #44. Well #44 is a replacement well for the compromised function of some of the 22 pre-1987 interconnected City culinary wells as a result of ground water contamination.
23. The City of Pocatello's claimed alternate points of diversion under *I.C. § 42-1425* for the following two water rights serving the Pocatello Municipal Airport: 29-7450 and 29-13638.
24. The alternate points of diversion claimed for the two ground water rights serving the Pocatello Municipal Airport are two wells that were interconnected as of November 19, 1987.
25. The claim for alternate points of diversion for ground water rights allows each of the interconnected culinary wells to be alternate points of diversion for water rights delivered through the interconnected system. This allows the City to maintain physical delivery of water even when some of its wells are not operating. From an administrative perspective, it allows the City to withdraw and deliver water by priority, beginning with its most senior rights, notwithstanding the well from which the water is pumped.

26. Diversion of the 21 ground water rights serving the City's culinary system and the two ground water rights serving the Pocatello Municipal Airport through alternate points of diversion occurred prior to November 19, 1987.
27. The water rights were claimed in a general adjudication.
28. No water right holder alleged injury as a result of Pocatello's operation of its alternate points of diversion for its ground water rights either at the time of the change of point of diversion or subsequently in these proceedings.
29. At trial, neither IDWR nor the State of Idaho presented evidence that injury to individual water rights had occurred as a result of Pocatello's operation of its alternate points of diversion for its ground water rights.
30. At trial, IDWR alleged that prospective injuries may occur as a result of Pocatello's operation of its alternate points of diversion for its ground water rights under *I.C. § 42-1425*, but IDWR did not prove any injury as of November 19, 1987 or as of the time of trial in 2007.
31. IDWR included the following remark under "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT" in the recommendation for the water rights associated with the accomplished transfer of point of diversion to address the prospective injury contemplated in the future:

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 diverted under this right from Pocatello Well No. [___], located in [legal description].
32. At trial, Pocatello's expert testified, and this Court agrees, that the condition nullifies the City's claim for alternate points of diversion for its ground water rights by rendering it useless during periods that priority administration is necessary and when the City would most benefit from exercising its alternate points of diversion.
33. At trial, Pocatello's expert testified, and this Court agrees, that no water rights existing on the date of the change were injured as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving the City's culinary uses, or Pocatello's diversion of its two ground water rights at the two alternate points of diversion serving the Pocatello Municipal Airport.
34. Pocatello's expert analyzed the magnitude of drawdown in the City's interconnected culinary wells that existed prior to November 19, 1987 and determined that due to the prolific nature of the LPRVA and the relatively small magnitude of drawdown measured at the wells, Pocatello's alternate point of diversion operations had no significant impact to neighboring wells.

35. At trial, Pocatello's expert testified, and this Court agrees, that there was no enlargement of the 21 ground water rights serving its culinary system, or the two ground water rights serving the Pocatello Municipal Airport, prior to 1987 as a result of Pocatello's diversion of its ground water rights at the alternate points of diversion.

**THE CITY OF POCATELLO'S SRBA CLAIM FOR ALTERNATE
POINTS OF DIVERSION FOR SURFACE WATER UNDER IDAHO CODE § 42-1425**

36. The City of Pocatello's claimed 23 wells as alternate points of diversion for the City's four surface water rights: 29-271, 29-272, 29-273, and 29-4222.
37. The 23 alternate points of diversion claimed for the four surface water rights serving the City's culinary uses are 22 wells that were interconnected as of November 19, 1987, as listed in paragraph 11, and Well #44. Well #44 is a replacement well for the compromised function of some of the 22 pre-1987 interconnected City culinary wells resulting from ground water contamination.
38. Diversion of Pocatello's surface water rights at the 23 alternate points of diversion occurred prior to November 19, 1987.
39. At trial, Pocatello's expert testified, and this Court agrees, that no water rights existing on the date of the change were as a result of Pocatello's diversion of its surface water rights at the 23 alternate points of diversion serving the City's culinary uses.
40. At trial, Pocatello's expert testified, and this Court agrees, that there was no enlargement of the surface water rights as a result of Pocatello's diversion of its surface water rights at the 23 alternate points of diversion.
36. Pursuant to a settlement agreement with the Surface Water Coalition, the City has further agreed to limit the annual volume of diversions under the surface water right priorities at the ground water alternate points of diversion to no more than the amount of water determined to be physically and legally available at the original surface water points of diversion.

**POCATELLO FILED AN APPLICATION FOR TRANSFER 5452
REGARDING WATER RIGHTS 29-2274, 29-2338, AND 29-7375.
IDWR EXAMINED AND APPROVED THE TRANSFER ON JUNE 28, 1999**

37. On June 28, 1999, Transfer 5452 was issued approving 13 wells as alternate points of diversion for Pocatello's water rights 29-2274, 29-2338 and 29-7375.
38. The approved transfer did not include any remarks to limit the use of the water rights at the 13 alternate points of diversion or to limit the use of the 13 wells as alternate points of diversion.
39. The 13 alternate points of diversion included five wells that were connected to the municipal culinary system (four wells already connected as of November 19, 1987; and a

fifth well, Well #44, added in 1999 as a replacement well for pre-1987 interconnected culinary wells), and one well connected to the airport culinary system. The other seven wells listed as alternate points of diversion are not part of the interconnected municipal culinary system or the interconnected airport culinary system.

40. Pocatello claimed the three ground water rights (29-2274, 29-2338 and 29-7375) as part of the 21 ground water rights served by the City's interconnected culinary system of 23 wells; the 23 wells include replacement Well #44. IDWR did not recommend the three water rights as part of the City's interconnected culinary system, nor did IDWR recommend the alternate points of diversion which Pocatello claimed for these three rights.
41. The three water rights were appropriately claimed in the SRBA by Pocatello under *I.C. § 42-1425* with 23 alternate points of diversion.
42. The three water rights are included in the list of 21 water rights for which Pocatello's expert testified that no water rights existing on the date of the change were injured as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving the City's culinary uses.
43. The three water rights are included in the list of 21 water rights for which Pocatello's expert testified that no enlargement of the water rights as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving the City's culinary uses.

THE CITY OF POCATELLO'S BIOSOLIDS PROGRAM

43. The Biosolids Program is a municipal operation regulated by the State of Idaho and the federal government as part of public health and safety responsibilities.
44. The Biosolids Program disposes of the solids generated in the City's wastewater treatment process and requires water use in the process. The solids are used as fertilizer on fields owned by the City and located in the vicinity of the wastewater treatment plant. The crops grown on the fields that are fertilized with biosolids receive water from four water rights owned and operated by Pocatello specifically for the Biosolids Program.
45. The use of water in a Biosolids Program is a municipal use.
46. The four water rights for the City's Biosolids Program are 29-7118, 29-7119, 29-11344, and 29-7770. The well associated with 29-7118 is known as Well #42. The well associated with 29-7119 is known as Well #41. The well associated with 29-11344 is Well #43. The source of water for 29-7770 is wastewater.
47. The City of Pocatello claimed a municipal purpose of use for the four water rights that serve the City's Biosolids Program: 29-7118, 29-7119, 29-11344, and 29-7770.

48. The source of water supply for each of the wells that serve the water rights for the City's Biosolids Program is ground water pumped from the ESPA.
49. Water rights 29-7118, 29-7119, and 29-7770 were developed specifically for the Biosolids Program and have not been used for other purposes. IDWR licensed each right with an irrigation purpose of use.
50. The irrigation purpose of use in licenses 29-7118, 29-7119, and 29-7770 is an error of law.
51. Water right 29-7770 has a priority date of May 21, 1984 and is properly claimed in the SRBA. *I.C. § 42-1420*.

WATER RIGHTS 29-13558 AND 29-13639:
PRIORITY DATES FOR ALAMEDA WELL #1 AND ALAMEDA WELL #3

52. A priority date of 1905 was claimed by Pocatello in the SRBA for Water Right 29-13558 (Alameda Well #1). IDWR recommended a priority date for the water right of July 7, 1924.
53. A priority date of December 31, 1940 was claimed by Pocatello in the SRBA for water right 29-13639 (Alameda Well #3). IDWR recommended a priority date for the water right of October 22, 1955.
54. At trial, Pocatello demonstrated that water was beneficially used from water right 29-13558 (Alameda Well #1) in 1905.
55. At trial, Pocatello demonstrated that water was beneficially used from water right 29-13639 (Alameda Well #1) on October 22, 1955.

DATED this 30th day of April 2007.

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

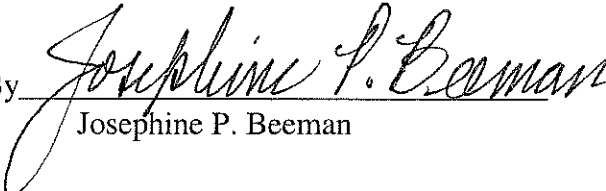
By 
Josephine P. Beeman

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
29-07431
29-07450
29-07502
29-07770
29-07782
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C Spronk Water Engineers Comparison of “Other Provisions Necessary” Language

**IDWR Recommendations
Focattello's Alternate Points of Diversion (APOD) Claim for Interconnected City Groundwater Rights
Comparison of "Other Provisions Necessary" Language**

[illegible]

Notes:

- (1) Water right elements contained in IDWR Recommendations for each Water Right. Each version of IDWR's recommendation for Pocatello's claim for alternate points of diversion for City culinary interconnected wells consists of 18 water rights diverted through 22 interconnected City wells as alternate points of diversion.
- (2) Alternate Points of Diversion (APOD) listed for each water right. These points of diversion include the wells that were interconnected in 1987 and provided water for the City's culinary uses.
- (3) Condition Language contained in each of the three versions of IDWR's recommendations under "Other Provisions Necessary".
- (4) Description of listing that follows the Condition Language described in row (3) for each of the three versions of IDWR's recommendations under "Other Provisions Necessary".
- (5) Well 10 is associated with Water Right 29-2274; Wells 12, 13, and 15 (priority 9/1/1953) are associated with Water Right 29-2238; Well 15 (priority 2/24/1977) is associated with Water Right 29-7375. These water rights are the subject of the 1999 Transfer and were not recommended with 22 alternate points of diversion by IDWR.
- (6) Water Right No. 29-7782 is associated with Well 34. Well 34 is recommended as an APOD, however, it's Water Right 29-7782 is claimed with only one point of diversion at Well 34.
- (7) Wells that are not longer in use at their original decreed locations are shown in *blue*. Replacement wells referenced in recommendation shown in *(parenthesis)*.
- (8) In 2003, IDWR recommended a priority of 6/1/1945 for water right 29-4221.
- (9) The February 2007 version of the Condition is contained in the final version of the Director's Report presented at trial and Exhibit 181, the Court's List of Individual Claims Listed With Circled Elements That Are In Dispute. This version of the Condition is also the same Condition provided to parties on November 19, 2006.
- (10) Total diversion rate of 68.44 cfs is the total rate for only the active wells. The total does not include the wells that can no longer be diverted at their original points of diversion. The total does include wells that are temporarily out of service to due contamination issues.

CERTIFICATE OF SERVICE

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

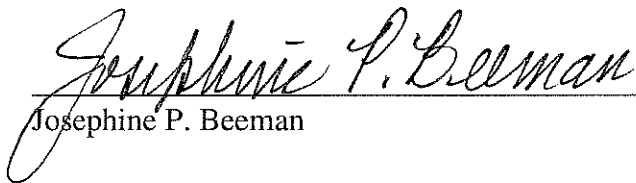
UNITED STATES OF AMERICA

REPRESENTED BY:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NAT'L RESOURCES
550 WEST FORT STREET, MSC O33
BOISE, ID 83724

STATE OF IDAHO

REPRESENTED BY:
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STATE OF IDAHO
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BOISE, ID 83711-4449

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098



Josephine P. Beeman

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EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
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29-02401
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