

FAX COVER SHEET

5/14, 2007

TO:

Ray Williams - IDWK

FAX:

287-6700

FROM:

Beeman & Ass.

FILE NO.:

1776.100

MESSAGE:

per your request -
copies of Poratello's Explanator of
Effect of IDWK Condition and Motions
for Reconsideration of Order

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Attorneys for City of Pocatello

DISTRICT COURT-SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY 11 2007	
By _____	Clerk
_____	Deputy Clerk

**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)
	)	
Case No. 39576	)	CITY OF POCATELLO'S EXPLANATION OF
	)	EFFECT OF IDWR CONDITION RECOMMENDED
	)	FOR 20 OF THE CITY'S CULINARY WATER
	)	RIGHTS

At the outset of closing arguments on May 4, 2007, Special Master Bilyeu asked counsel to explain the effect of the condition that IDWR has recommended be included in the "other provisions necessary" for 20 of the City's culinary water rights.¹ Specifically, the Court referred

¹ The condition states, "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. . . ."

The condition is included under "Other provisions necessary for definition or administration of this water right" on 18 water rights recommended for the City of Pocatello's culinary system in town: 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639. The condition also is included under "Other provisions necessary for definition or administration of this water right" on two water rights recommended for Pocatello's airport culinary system: 29-7450 and 29-13638. Pocatello filed SRBA objections seeking removal of the condition from all 20 water rights.

to Pocatello's expert testimony that the condition "neuters" the City's claims for alternate points of diversion under the accomplished transfer statute, Idaho Code 42-1425.² At the conclusion of the May 4 hearing the Court allowed the parties to file written explanations (not to exceed five pages) by May 11, if any party wished to do so. This is Pocatello's explanation of the effect of the IDWR condition.

The condition contradicts and nullifies IDWR's recommendation that 18 of the City of Pocatello's intown culinary water rights can be diverted at any of the 22 alternate points of diversion listed for each of those 18 water rights.

For the City's intown culinary system, IDWR has recommended 18 water rights, each with the same 22 points of diversion.³ The recommendations acknowledge without dispute that the 22 points of diversion correspond to 22 individual wells, that each well is part of an interconnected system that delivers water from any of the 22 wells to any point of the City's intown culinary system⁴, and that since before November 19, 1987, the City has used all 22 wells to exercise each of these 18 culinary water rights. IDWR's recommendation allows the lawful continuation of Pocatello's use of these wells as alternate points of diversion for the 18 water rights. This is consistent with Idaho Code 42-1525, the "accomplished transfer" statute.

² 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 they were established from any of its interconnected wells." Tr. Vol. V, p. 900. [from page 1 of Pocatello's post trial brief].

³ The City's objections and evidence at trial maintain there are 21 water rights and 23 points of diversion.

⁴ All 22 wells are not always in service and many of the City's original wells are no longer in existence.

The condition lists one or at most three points of diversion (wells) for each of the 18 water rights; none of the 18 water rights have common points of diversion; and the points of diversion listed by the condition include seven wells that do not exist and leave out four of the City's active wells.⁵

The condition by its terms operates when "necessary for administration." At those times when the condition operates as "necessary for administration", the City would not be able to operate its alternate points of diversion to exercise its water rights in order of priority.

Pocatello's expert used the City's Exhibit 125 to demonstrate the impact this would have on the City's interconnected system.⁶ Moreover, IDWR identified wells that are no longer in existence,

⁵ This is discussed in Pocatello's post-trial brief and the appendix to the brief.

⁶ Pocatello Exhibit 125 is a table that lists the City's alternate points of diversion claim and is titled "City of Pocatello Groundwater Alternate-Points-of-Diversion-Claim (APOD), with Cumulative Rate of Diversion, Example Illustrating APOD Operation". In the table the water rights are listed in order of priority, which was done purposely and is essential to why the table was created. The earliest water rights are listed on the top and then in order of an increasing priority date they go down the list to the last, 29-7375 with a priority date of 1977. The third column lists the diversion rate in cfs for each of the water rights and the fourth column (the cumulative rate column) is an accumulation of those rates as you go down the column. The last column in the table is an example pumping scenario, which is intended to illustrate how the alternate points of diversion operates and how it differs from what would happen if the City was not exercising its alternate points of diversion. The figures in the example column were made up for purpose of illustration. They represent amounts that the City might be pumping on a particular day from the wells connected to its interconnected system. In the example, the City would be pumping nine wells, including wells 31, 32, 34, and 44, and there is a curtailment order in effect with a priority date of 1970 and the City's wells are subject to administration. We assumed IDWR determined that wells with priorities after 1970 would have to either curtail or mitigate their pumping. The red line on the table is where the curtailment would fit – the cut off line. So without the alternate points of diversion operation, due to the condition remark, the wells above the red line could continue to operate because they are senior to the curtailment date and wells below the red line would have to be curtailed because they are junior to the curtailment date. Therefore, the pumping of wells 31, 32, 34, and 44 (all are below the red line) would have to be curtailed for a total of 19.9 cfs, which is shown in the last column of the table. The total amount the City could pump would be reduced from 43.26 cfs minus 19.9 cfs to 23.36. This example shows what would occur if the City could not operate its alternate points of diversion.

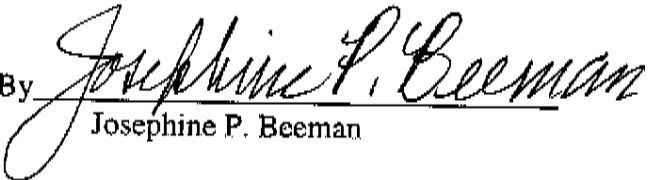
Under the same scenario, if the City could operate its alternate points of diversion the City would be able to operate its rights in order of priority. The alternate points of diversion operation allows the City to exercise any of its water rights, priority dates, at any of its interconnected wells, and; therefore, the City could continue to pump a total of 43.26 cfs. Using that total, 43.26 cfs, from the cumulative rate column starting at the top we can determine out of which water rights the City would need to exercise in order to add up to a total of 43.26 cfs. If you added up the rates of the first ten rights in that list (listed in

specifically Alameda well 1 (29-13558), Alameda well 2 (29-13559), Alameda well 6 (29-11339), Alameda well 7 (29-11339), Pocatello well 4 (29-13561), Pocatello well 5 (29-13560), and Pocatello 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). *See* Spronk Water Engineers Comparison of "Other Provisions Necessary" Language in appendix to Pocatello's post trial brief. The condition would prevent other interconnected wells in times of administration 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).

The same analysis applies to the airport culinary wells and water rights.

DATED this 11th day of May 2007.

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

By 
Josephine P. Beeman

order of priority date) they add up to 43.51 cfs. So if the City on a particular day was pumping 43.26, as in this example, then the City under its alternate points of diversion claim could assign that pumping to its first ten priorities. The City would be operating priorities ranging in dates from 1905 to 1951. Therefore, under its alternate points of diversion operation, which is the way the City always has operated, in this example the City's pumping would be safe from curtailment because it was exercising water rights that were senior to the curtailment priority date. Tr. Vol. V, pp. 904-923 (testimony of Gregory K. Sullivan, a witness for the City)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of May 2007, I caused a true copy of the foregoing **CITY OF POCA TELLO'S EXPLANATION OF EFFECT OF IDWR CONDITION RECOMMENDED FOR 20 OF THE CITY'S CULINARY WATER RIGHTS** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

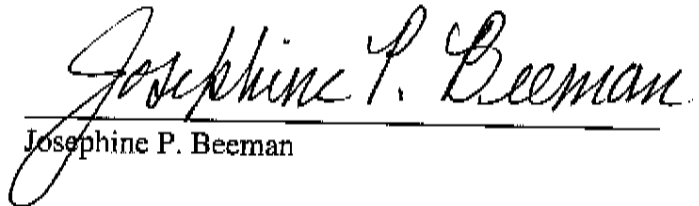
UNITED STATES OF AMERICA

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EXHIBIT ASubcase Numbers (30)

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
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29-04221
29-04222
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