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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	Subcase Nos. 29-2354, 29-2382, 29-7222,
	)	29-7431, 29-7502, 29-7782, 29-11344, and
Case No. 39576	)	29-13636
	)	BRIEF IN SUPPORT OF MOTION FOR
	)	RECONSIDERATION OF EIGHT (8)
	)	PARTIAL DECREES

INTRODUCTION

The City of Pocatello respectfully submits this *Brief in Support of Motion for Reconsideration of Eight (8) Partial Decrees*: 29-2354, 29-2382, 29-7222, 29-7431, 29-7502, 29-7782, 29-11344, and 29-13636.

As governed by SRBA Administrative Order 1,¹ this *Brief* is submitted pursuant to IRCP 7(b)(3)(C) which provides that a brief in support of a motion may be filed within fourteen (14) days of the Motion. The City of Pocatello's *Motion for Reconsideration of Eight (8) Partial Decrees* was served on July 30, 2007;² the 14-day deadline to file the brief is August 13, 2007.

¹ Administrative Order 1, Rule 1.a provides: "[t]he litigation of the SRBA will be governed by the Idaho Rules of Civil Procedure (I.R.C.P.), Idaho Rules of Evidence (I.R.E.), and the Idaho Appellate Rules (I.A.R.)."

² Pocatello submitted the *Motion for Reconsideration of Eight (8) Partial Decrees* pursuant to IRCP 59(e) which requires that the motion be served "not later than fourteen (14) days after entry of the judgment." The partial decrees for 29-2354, 29-2382, 29-7222, 29-7431, 29-7502, 29-7782, 29-11344, and 29-13636 were entered on July 16, 2007; the deadline for service of the Motion to Reconsider under IRCP 59(e) was July 30, 2007.

Pocatello filed the *Motion to Reconsider* because the pending appeal of Pocatello's federal law SRBA claim 29-11609 to the Idaho Supreme Court ³ may moot these 8 partial decrees or may require the 8 partial decrees to be modified to be consistent with the mandate in the appeal.

These 8 partial decrees arise from 8 of Pocatello's 38 state-law SRBA claims. On December 27, 2004, as part of the proceedings on all 38 state-law SRBA claims, Pocatello filed a *Motion and Memorandum to Stay its State Law-Based Claims* pending determination of the City's legal entitlement under its SRBA federal-law claim 29-11609.⁴ Special Master Bilyeu denied Pocatello's motion for stay by order of January 14, 2005. The other 30 state law SRBA claims are pending decision following a 2007 trial before SRBA Special Master Bilyeu.

**RULE 59 (e) IS AN APPROPRIATE STANDARD FOR
RECONSIDERATION OF THE EIGHT PARTIAL DECREES**

The purpose of IRCP 59(e) is to allow the court to correct errors of fact and law which have occurred in its proceedings in order to circumvent a later appeal.⁵ Due to the pending appeal of Pocatello's federal law SRBA claim 29-11609, Pocatello respectfully requests this court to reconsider the partial decrees for 29-2354, 29-2382, 29-7222, 29-7431, 29-7502, 29-7782, 29-11344, and 29-13636. Pocatello requests that this Court withdraw the entry of judgment and delay entry of judgment for these 8 water rights until after the mandate in the appeal.

³ Idaho Supreme Court No. 33669: IN RE: SRBA CASE NO. 39576, SUBCASE NO. 29-11609, CITY OF POCATELLO, *Appellants*, vs. STATE OF IDAHO, UNITED STATES OF AMERICA, and SHOSHONE-BANNOCK TRIBES, *Respondents*. The briefing in this appeal will be completed with the filing of Pocatello's Reply brief, due August 15, 2007.

⁴ Pocatello's *Motion to Stay* and *Memorandum in Support of Motion to Stay* are attached to this *Brief in Support of Motion for Reconsideration*. This court may take judicial notice of its own records in the case before it. *Larson v. State*, 91 Idaho 908, 909, 435 P.2d 248, 249 (1967).

⁵ *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977).

**POCATELLO'S STATE-LAW SRBA PROCEEDINGS
AS RELATED TO THE RULE 59(e) STANDARD**

The issue of the relationship between Pocatello's federal law claim 29-11609 and the City's state-law claims, addressed in the 2004 *Motion for Stay*, is common to all 38 state-law claims. Following denial of the City's *Motion for Stay* in January 2005, and prior to commencement of trial on February 26, 2007, objections were withdrawn or settlements entered for eight of the City's 38 state law subcases. These eight (8) partial decrees arise from those resolved subcases, but those subcases do not address or resolve the issue raised in Pocatello's 2004 *Motion for Stay*. The remaining 30 state-law claims were tried before Special Master Bilyeu.

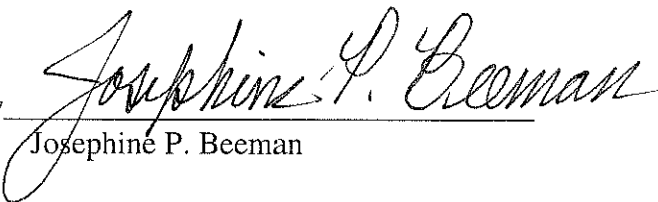
The City has always intended that the denial of its 2004 *Motion for Stay* would be presented to this Court upon review of the Special Master's proceedings as to all 38 state-law claims, following conclusion of the proceedings that went to trial. If the appeal of Pocatello's federal law claim is still pending at that time, the City anticipates that it will address that issue as appropriate under the circumstances.

CONCLUSION

Based on the foregoing, the City of Pocatello respectfully requests that its *Motion for Reconsideration of Eight (8) Partial Decrees* be granted.

Respectfully submitted this 13th day of August 2007.

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

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13TH day of August 2007, I caused a true copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF EIGHT (8) PARTIAL DECREES** be served by U.S. First Class Mail on:

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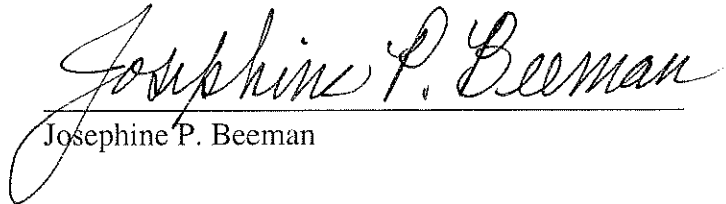
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DEC 28 2004

DEPARTMENT OF
WATER RESOURCES

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)
	)	
	)	
Case No. 39576	)	POCATELLO'S MOTION TO STAY ITS
_____	)	STATE LAW-BASED CLAIMS

Pocatello moves to stay its claims in the 38 subcases listed herein. These 38 state law-based claims are "dual-based" claims because the state law-based claims are for water¹ also claimed by Pocatello under federal law in subcase 29-11609. The state law-based claims should be stayed for at least two reasons:

1. The SRBA court in Basin-Wide Issue No. 12 (Subcase No. 91-00012) determined that the claims with the earlier priority date in a dual-claim should proceed first. Pocatello claims a June 14, 1867 priority date for its federal law-based claim, which is earlier than the priority dates named in its state law-based claims.

¹ Note 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. 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.

2. Prosecuting both the state law-based claims and the federal law-based claim at the same time frustrates judicial economy and is unnecessarily costly to the litigants in both cases. Pocatello would prefer to rely on its federally claimed right. Once the federal right decree enters, Pocatello will move to dismiss whatever part of its state-based claims is duplicative of its federal law-based claim.

Pocatello respectfully requests that its motion be granted.

DATED this 23rd day of December 2004.

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

By Josephine P. Beeman
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
29-11339
29-11344
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29-13558
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29-13560
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29-13637
29-13638
29-13639

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
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In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached)
	)	
	)	
Case No. 39576	)	POCATELLO'S MEMORANDUM IN SUPPORT OF
_____	)	MOTION TO STAY ITS STATE LAW-BASED
	)	CLAIMS

Pocatello seeks to stay the proceedings in its state law-based claims in the 38 subcases herein. These are "dual-based" claims, which the SRBA court defines as claims to the same water under separate legal theories. *See* Special Master's Amended Recommendation Re: Basin-Wide Issue 12, June 14, 1996 at 3 (hereinafter "Issue 12 Order") (*affirmed in its entirety* by Judge Hurlbutt's Order, April 25, 1997).¹ Here, Pocatello's federal law-based claim seeks entitlement under federal law for the water represented by its 38 state law-based claims. However, the federal law-based claim is also broader² because it claims sources consistent with the Act of September 1, 1888, and also complies with I.C. § 42-1409(1)(c)(ii).

¹ Judge Hurlbutt's Order at page 5 reads: "F. A Single Water Rights Cannot Be Decreed With Both a State and Federal Basis. This recommendation is adopted in its entirety."

² In its federal law-based claim, Pocatello has claimed water rights consistent with the Act of September 1, 1888 (*see* ¶4 and Remark #15 of Pocatello's federal claim.), *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." 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.

Although the federal law claim is broader than the state-based claims, where the federal claim and state claims overlap, they differ only by priority date. These are “dual-based” claims. Special Master Haemmerle framed the inquiry before the court when faced with a “dual-based” claim as follows:

(1) whether an implied or express reserved right exists when the same water source already has been appropriated under state grounds or (2) whether a state-based claim exists where the same water has been reserved.... In summary, for both express and implied reservations, the court concludes that a state-based claim for any purpose of use would preclude a federal reservation for the same water where the state-based claim has an earlier priority date. On the other hand, if a federal reservation predates a state-based claim, then the earlier federal reservation precludes the state-based claim....

The court goes on:

If the state-based half of a “dual-based” claim is objected to and has an earlier priority date, then the court should determine the state-based claim first. If the Court finds that a state-based right exists, then the federal reserved claim should be dismissed as a matter of law. On the other hand, if the federal reserved claim has an earlier priority date, then the federal reserved claim should be determined first. If the court finds that a federal reserved right exists, then the subsequent state-based claim should be dismissed as a matter of law.

Pursuant to SRBA court procedures, then, Pocatello’s state-based claims should be stayed until its federal law-based claim can be determined by the court. Pocatello intends to rely on its federal law-based right to the extent it is decreed; staying its state-based claims which it will be required to dismiss following the determination of its federal law-based claims promotes judicial economy and preserves the resources of the litigants.

For the reasons stated above, Pocatello respectfully requests that proceedings on state law-based claims be stayed until determination of its federal law-based claim. Such stay should be in force until 60 days following final determination of its federal law-based claim, including the expiration of the parties’ rights to appeal, when Pocatello must either file a motion to dismiss its state-based claims or set a status conference for the state-based claims.

DATED this 23rd day of December 2004.

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

By Josephine P. Beeman
Josephine P. Beeman