

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     | ) | PARTIAL DECREE PURSUANT TO |
|                | ) | I.R.C.P. 54(b) FOR         |
| Case No. 39576 | ) |                            |
| _____          | ) | Water Right 29-02499       |

NAME AND ADDRESS: CITY OF POCA TELLO  
PO BOX 4169  
POCA TELLO, ID 83205

SOURCE: GROUND WATER

QUANTITY: 4.10 CFS

PRIORITY DATE: 12/10/1964

|                     |                     |         |                       |
|---------------------|---------------------|---------|-----------------------|
| POINT OF DIVERSION: | T06S R34E S14       | NWNW    | Within Bannock County |
|                     | S15                 | NENW    |                       |
|                     |                     | NWNE    |                       |
|                     |                     | NESE    |                       |
|                     |                     | NESE    |                       |
|                     | S16                 | NENE    |                       |
|                     | S23                 | SWNE    |                       |
|                     |                     | SENW    |                       |
|                     |                     | NWNE    |                       |
|                     |                     | NESW    |                       |
|                     | S26                 | NENW    |                       |
|                     |                     | SWSE    |                       |
|                     | S35                 | NWSE    |                       |
|                     |                     | SENE    |                       |
|                     |                     | NWNE    |                       |
|                     | T07S R34E S01 LOT 2 | (NWNE ) |                       |
|                     |                     | SWNE    |                       |
|                     |                     | SESE    |                       |
|                     |                     | NESE    |                       |
|                     | R35E S06            | NWSE    |                       |
|                     | S07                 | NESW    |                       |
|                     | S18                 | SENE    |                       |

|                |                |                |          |
|----------------|----------------|----------------|----------|
| PURPOSE AND    |                |                |          |
| PERIOD OF USE: | PURPOSE OF USE | PERIOD OF USE  | QUANTITY |
|                | Municipal      | 01-01 TO 12-31 | 4.10 CFS |

|               |               |      |                     |
|---------------|---------------|------|---------------------|
| PLACE OF USE: | Municipal     |      | Within Power County |
|               | T06S R33E S02 | NESW | NWSW                |
|               |               | SWSW | SESW                |
|               | S03           | SWSW | SESW                |
|               |               | SWSE | SESE                |
|               | S04           | NESW | SWSW                |
|               |               | SESW | NWSE                |
|               |               | SWSE | SESE                |
|               | S09           | NENE | NWNE                |
|               |               | SWNE | SENE                |
|               |               | NENW | NWNW                |
|               |               | SWNW | SENW                |
|               |               | NESW | NWSW                |
|               |               | SWSW | SESW                |
|               |               | NESE | NWSE                |
|               |               | SWSE | SESE                |
|               | S10           | NENE | NWNE                |
|               |               | SWNE | SENE                |
|               |               | NENW | NWNW                |
|               |               | SWNW | SENW                |
|               |               | NESW | NWSW                |

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

|          |  |      |                       |
|----------|--|------|-----------------------|
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S11      |  | NENW | NWNW                  |
|          |  | SWNW | SESW                  |
|          |  | NESW | NWSW                  |
|          |  | SWSW | SESW                  |
| S14      |  | NENW | NWNW                  |
| S15      |  | NENE | NWNE                  |
|          |  | SWNE | SENE                  |
|          |  | NENW | NWNW                  |
|          |  | SWNW | SESW                  |
|          |  | NESW | NWSW                  |
| S16      |  | NENE | NWNE                  |
|          |  | SWNE | SENE                  |
|          |  | NENW | NWNW                  |
|          |  | SWNW | SESW                  |
|          |  | NESW | NWSW                  |
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE |                       |
| S17      |  | SWNE | SENE                  |
|          |  | SWNW | SESW                  |
|          |  | NESW | NWSW                  |
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S20      |  | NENE |                       |
|          |  |      | Within Bannock County |
| R34E S08 |  | NESE | SESE                  |
| S09      |  | NESW | NWSW                  |
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S10      |  | SENE | SWSW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S11      |  | SWNE | SWNW                  |
|          |  | SESW | NESW                  |
|          |  | NWSW | SWSW                  |
|          |  | SESW | NWSE                  |
|          |  | SWSE | SESE                  |
| S12      |  | NENE | NWNE                  |
|          |  | SWNE | SENE                  |
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S13      |  | NENE | NWNE                  |
|          |  | SWNE | SENE                  |
|          |  | NENW | NWNW                  |
|          |  | SWNW | SESW                  |
|          |  | NESW | NWSW                  |
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S14      |  | NENE | NWNE                  |
|          |  | SWNE | SENE                  |
|          |  | NENW | NWNW                  |
|          |  | SWNW | SESW                  |
|          |  | NESW | NWSW                  |
|          |  | SWSW | SESW                  |
|          |  | NESE | NWSE                  |
|          |  | SWSE | SESE                  |
| S15      |  | NENE | NWNE                  |

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

|     |      |      |
|-----|------|------|
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NESE | NWSE |
| S16 | SWSE | SESE |
|     | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NESE | NWSE |
|     | SWSE | SESE |
| S17 | NENE | SENE |
|     | NESE |      |
| S21 | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | NESE | SESE |
| S22 | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NESE | NWSE |
|     | SWSE | SESE |
| S23 | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NESE | NWSE |
|     | SWSE | SESE |
| S24 | NWNE | SWNE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NWSE | SWSE |
|     | SESE |      |
| S25 | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NESE | NWSE |
|     | SWSE | SESE |
| S26 | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |
|     | NESW | NWSW |
|     | SWSW | SESW |
|     | NESE | NWSE |
|     | SWSE | SESE |
| S27 | NENE | NWNE |
|     | SWNE | SENE |
|     | NENW | NWNW |
|     | SWNW | SENW |

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

|                     |       |        |       |        |
|---------------------|-------|--------|-------|--------|
|                     |       | NESW   |       | NWSW   |
|                     |       | SWSW   |       | SESW   |
|                     |       | NESE   |       | NWSE   |
|                     |       | SWSE   |       | SESE   |
| S28                 |       | NENE   |       | SESE   |
| S33                 |       | NENE   |       | SENE   |
| S34                 |       | NENE   |       | NWNE   |
|                     |       | SWNE   |       | SENE   |
|                     |       | NENW   |       | NWNW   |
|                     |       | SWNW   |       | SENW   |
|                     |       | NESW   |       | NWSW   |
|                     |       | NESE   |       | NWSE   |
|                     |       | SESE   |       |        |
| S35                 |       | NENE   |       | NWNE   |
|                     |       | SWNE   |       | SENE   |
|                     |       | NENW   |       | NWNW   |
|                     |       | SWNW   |       | SENW   |
|                     |       | NESW   |       | NWSW   |
|                     |       | SWSW   |       | SESW   |
|                     |       | NESE   |       | NWSE   |
|                     |       | SWSE   |       | SESE   |
| S36                 |       | NENE   |       | NWNE   |
|                     |       | SWNE   |       | SENE   |
|                     |       | NENW   |       | NWNW   |
|                     |       | SWNW   |       | SENW   |
|                     |       | NESW   |       | NWSW   |
|                     |       | SWSW   |       | SESW   |
|                     |       | NESE   |       | NWSE   |
|                     |       | SWSE   |       | SESE   |
| R35E S07            |       | NENW   | LOT 1 | (NWNW) |
|                     | LOT 2 | (SWNW) |       | SENW   |
|                     |       | NESW   | LOT 3 | (NWSW) |
|                     | LOT 4 | (SWSW) |       | SESW   |
| S18 LOT 1           |       | (NWNW) |       |        |
| S19                 |       | NESW   | LOT 3 | (NWSW) |
|                     | LOT 4 | (SWSW) |       | SESW   |
|                     |       | SWSE   |       | SESE   |
| S30                 |       | NENE   |       | NWNE   |
|                     |       | SWNE   |       | SENE   |
|                     |       | NENW   | LOT 1 | (NWNW) |
|                     | LOT 2 | (SWNW) |       | SENW   |
|                     |       | NESW   | LOT 3 | (NWSW) |
|                     | LOT 4 | (SWSW) |       | SESW   |
| S31                 |       | SWNE   |       | NENW   |
|                     | LOT 1 | (NWNW) | LOT 2 | (SWNW) |
|                     |       | SENW   |       | NESW   |
|                     | LOT 3 | (NWSW) | LOT 4 | (SWSW) |
|                     |       | SESW   |       | NESE   |
|                     |       | NWSE   |       | SWSE   |
|                     |       | SESE   |       |        |
| T07S R34E S01 LOT 1 |       | (NENE) | LOT 2 | (NWNE) |
|                     |       | SWNE   |       | SENE   |
|                     | LOT 3 | (NENW) | LOT 4 | (NWNW) |
|                     |       | SWNW   |       | SENW   |
|                     |       | NESW   |       | NWSW   |
|                     |       | SWSW   |       | SESW   |
|                     |       | NESE   |       | NWSE   |
|                     |       | SWSE   |       | SESE   |
| S02 LOT 1           |       | (NENE) | LOT 2 | (NWNE) |
|                     |       | SWNE   |       | SENE   |
|                     | LOT 3 | (NENW) | LOT 4 | (NWNW) |
|                     |       | SWNW   |       | SENW   |
|                     |       | NESW   |       | NWSW   |
|                     |       | SWSW   |       | SESW   |

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

PLACE OF USE (continued)

|                |        |              |
|----------------|--------|--------------|
|                | NESE   | NWSE         |
|                | SWSE   | SESE         |
| S12            | NENE   | NWNE         |
|                | SWNE   | SENE         |
|                | NENW   | NWNW         |
|                | SWNW   | SENW         |
|                | NESW   | NWSW         |
|                | SESW   | NESE         |
|                | NWSE   | SWSE         |
|                | SESE   |              |
| S13            | NENE   | NWNE         |
|                | SWNE   | SENE         |
|                | NENW   |              |
| R35E S06 LOT 1 | (NENE) | LOT 2 (NWNE) |
|                | SWNE   | SENE         |
| LOT 3          | (NENW) | LOT 4 (NWNW) |
| LOT 5          | (SWNW) | SENW         |
|                | NESW   | LOT 6 (NWSW) |
| LOT 7          | (SWSW) | SESW         |
|                | NESE   | NWSE         |
|                | SWSE   | SESE         |
| S07            | NENE   | NWNE         |
|                | SWNE   | SENE         |
|                | NENW   | LOT 1 (NWNW) |
| LOT 2          | (SWNW) | SENW         |
|                | NESW   | LOT 3 (NWSW) |
| LOT 4          | (SWSW) | SESW         |
|                | NWSE   | SWSE         |
|                | SESE   |              |
| S08            | NWNW   | SWNW         |
|                | NWSW   | SWSW         |
| S17            | SWNE   | NENW         |
|                | NWNW   | SWNW         |
|                | SENW   | NESW         |
|                | NWSW   | SESW         |
| S18            | NENE   | NWNE         |
|                | SWNE   | SENE         |
|                | NENW   | LOT 1 (NWNW) |
| LOT 2          | (SWNW) | SENW         |

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

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 No. 27 located in T06S, R34E, S14, NWNW.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

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John M. Melanson  
Presiding Judge of the  
Snake River Basin Adjudication

RECEIVED

OCT 03 2007  
DEPARTMENT OF  
WATER RESOURCES

|                                                                                         |                       |
|-----------------------------------------------------------------------------------------|-----------------------|
| DISTRICT COURT-SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |                       |
| OCT - 2 2007                                                                            |                       |
| By _____                                                                                | Clerk<br>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     | ) | Subcases: See Attached Exhibit A |
|                | ) |                                  |
|                | ) | MASTER'S REPORT AND              |
| Case No. 39576 | ) | RECOMMENDATION and ORDER         |
| _____          | ) | ON MOTION TO RECONSIDER          |

**I. PROCEDURAL BACKGROUND**

The City of Pocatello (hereinafter "Pocatello") filed 38 claims to its state-based water rights. *Objections* to the *Director's Report* were filed by Pocatello. The State of Idaho filed *Responses* to Pocatello's *Objections*.<sup>1</sup> Several parties referred to collectively as the Surface Water Coalition participated in earlier proceedings. The Surface Water Coalition settled with Pocatello on the opening day of trial. The trial went forward with Pocatello and the State of Idaho as parties.

During the first day of the trial, the parties stipulated that there were no issues remaining on eight subcases. (These subcases are 29-7431, 29-2354, 29-7502, 29-11344, 29-2382, 29-7222, 29-7782, and 29-13636.) *Master's Reports and Recommendations* were previously issued on those subcases. At trial, 30 subcases remained with four major issues in dispute.

**A. Alternative Points of Diversion for Surface Water Rights (29-271, 29-272, 29-273, 29-4222)**

The first issue is whether Pocatello's city wells qualify as alternative points of diversion for its senior surface water rights. Pocatello's oldest water rights are the surface water rights

<sup>1</sup> The United States Bureau of Land Management also filed *Objections* and the United States Bureau of Indian Affairs, Bureau of Reclamation, and Fish & Wildlife Services filed *Responses* which were resolved prior to trial.

from Mink Creek (29-271, 29-272, and 29-273) and Gibson Jack Creek (29-4222). The *Director's Report* for these four rights did not recommend Pocatello's wells as alternative points of diversion for the surface water rights. Pocatello objected, seeking to add 23 alternative points of diversion for the Mink Creek and Gibson Jack Creek rights.

**B. Condition on Interconnected Well System (29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-7450, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, 29-13639)**

The second issue is whether a descriptive condition should be placed on Pocatello's groundwater rights if the rights are decreed with the city's wells as alternative points of diversion. Pocatello has a large, interconnected well system which implicates multiple groundwater rights. The interconnected well system supplies the city with water. Pocatello claimed each right with the other wells as alternative points of diversion. The *Director's Report* also recommended the wells as alternative points of diversion. However, the *Director's Report* recommended a condition for each right:

To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello well [description] in the amount of \_\_\_\_ cfs.<sup>2</sup>

Pocatello objected, asserting that it is entitled to the alternative points of diversion without a condition because it completed a valid accomplished transfer.

**C. Biosolids Purpose of Use (29-7118, 29-7119, 29-7770)**

The third issue is whether the purpose of use for three water rights should be "irrigation" or "municipal." Pocatello claimed a municipal purpose for three rights relating to the city's biosolids program. These water rights were once used solely for irrigating crops. The water is still applied to growing crops, but since 1981 the crops have been planted in conjunction with Pocatello's biosolids program. The *Director's Report* recommended an irrigation purpose of use for the irrigation season. Pocatello asserts that purpose should be municipal and season of use should be year-round.

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<sup>2</sup> IDWR's proposed condition was slightly different in earlier versions of the *Director's Report*. This version is from the *Amended Director's Report* (Feb. 27, 2007).

#### **D. Priority Dates (29-13558, 29-13639)**

The final issue at trial is the correct priority dates for water rights 29-13558 and 29-13639. Pocatello claimed earlier priorities than those recommended in the *Director's Report*.<sup>3</sup>

#### **E. Order Denying Motion to Reconsider**

After the trial in this matter was concluded and after closing arguments were presented by counsel, the parties submitted post-trial briefs. In conjunction with those filings, Pocatello submitted the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post Trial Brief*. The *Affidavit* attached additional evidence. The State of Idaho filed *State of Idaho's Motion to Strike Affidavit of Josephine P. Beeman in Support of Pocatello's Post Trial Brief*. A hearing on the motion to strike was held May 4, 2007. The Special Master **granted** the motion to strike on the grounds that the *Affidavit* improperly submitted evidence after Pocatello had rested its case and in contravention of the court's pre-trial orders. Pocatello requested that the Special Master reconsider the ruling in *Pocatello's Motion for Reconsideration of Order Granting State's Motion to Strike*. In *Pocatello's Motion for Reconsideration*, Pocatello apparently agreed that it should not submit additional evidence, but asked the court to consider its legal arguments. The Special Master agrees that Pocatello's arguments may be considered even though the post-trial evidence should remain stricken from the record. Therefore, the court's earlier oral order striking the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post Trial Brief* remains, and the motion to reconsider is **denied**.

## **II. STANDARD OF REVIEW**

#### **A. Director's Reports**

A *Director's Report* for a water claim is *prima facie* evidence of the nature and extent of a water right. I.C. § 42-1411(4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). The objecting party has the "burden of going forward" with evidence to establish any element which is in addition to or inconsistent with the description in the *Director's Report*. *Id.*

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<sup>3</sup> The two water rights with a priority dispute also have a dispute regarding the condition for the alternative points of diversion.

## B. Source

The Idaho Supreme Court analyzed whether rights were from the “same source” in *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 40 P.3d 119 (2002). The Court emphasized the requirement that an objector who disagrees with the *Director's Report* determination of source has the burden of going forward with evidence in support.

In prior proceedings in *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761 (2002), the SRBA District Court discussed whether water rights were from the “same source.” The Court explained that it is imperative to examine the context in which the term “source” is applied:

Clearly, “source” may have different meanings in different situations. As Mr. Hardy noted, the Snake River Aquifer is the source (singular) for all relevant springs and stream flows (plural) involved in these subcases. The springs are discharged at various points across the north rim or wall of the Snake River Canyon. But because the springs that feed the Brailsford Stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different “source.” It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

***Memorandum Decision and Order on Challenge*** (Subcase 36-02708) (July 9, 1999). In determining whether the two channels constituted separate sources, the Court held that evidence on which particular springs fed each channel would be crucial to a finding of separate source.

To even begin to make an argument for independent sources, Clear Lakes would first have to establish which springs fed the particular channel from which Clear Lakes was diverting. The record would not support the conclusion that only certain springs fed a particular channel, the evidence is to the contrary. Since the water co-mingled prior to, and contemporaneously with, the formation of the two channels, the respective channels more accurately constitute different points of diversion along a common source as opposed to independent sources.

*Id* at 10.

To make a case that water rights are from the same source, the evidence would be essentially the reverse of that required to show a separate source. Thus, a party proposing that water rights are from the same source would have to show that both the first right and the second right are diverting the same water. The connection between the water of the two rights would have to be so close that the two rights are diverting from the **same source**.

### **C. Accomplished Transfer Statute**

Idaho's accomplished transfer statute, I.C. § 42-1425, allows certain changes in established water rights even if the changes violate the mandatory transfer procedures. The statute establishes:

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

I.C. § 42-1425(2). The statute does not provide for changes in the source or priority elements. The statute allows water users to claim water rights with changes to the allowable elements if three prerequisites are met:

1. The change was made before 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.

### **D. Purpose of Use/Licenses**

Idaho Code § 42-202B(6) defines "municipal purposes" as "residential, commercial, industrial, irrigation of parks and open space, and related purposes." The water rights claimed for "municipal purposes" here are based on prior licenses. The licenses list "irrigation" as the purpose of use. (Ex. 1, *Supp. Dir. Report*)

The SRBA Court disfavors collateral attacks on licenses. *See Order on Challenge of "Facility Volume" Issue and Additional Evidence Issue*, 3 SRBA 18, 18.15 (Dec. 29, 1999)

## **III. FINDINGS OF FACT**

### **A. Wells as Alternative Points of Diversion for Surface Water Rights**

The earliest water supplied to Pocatello came from Mink Creek and Gibson Jack Creek, two major tributaries to the Portneuf River. The two creeks provided surface water to Pocatello since before 1900. The *Director's Report* recommended Pocatello's surface water rights on Mink Creek and Gibson Jack Creek, but rejected the city's groundwater wells as alternative

points of diversion. The *Supplemental Director's Report* concluded that: 1) Water from the creeks is not used for culinary purposes and, thus, the creek water is not part of the interconnected well system; 2) The wells are a significant distance from the creeks; 3) Any change in how water was diverted occurred after 1987; and 4) There is no evidence the wells and the creeks are on the same source. Having wells as alternative points of diversion would improperly allow the withdrawal of water from wells using the earlier priority of the surface water rights. (Ex. 1, *Supp. Dir. Report* at 11).

IDWR does not usually recognize wells as alternative points of diversion for surface water sources. However, IDWR will recognize a well as an alternate point of diversion for a surface water source if the two are very closely connected. For example, IDWR recognized a well as an alternate point of diversion near the Salmon River. In that case, a point of diversion on an abandoned ditch was changed in favor of a nearby well. IDWR determined that the two points of diversion were close to each other and the well was so shallow that the ditch and the well essentially withdrew the same water. Thus, IDWR recommended a change in point of diversion from the ditch to the shallow well. (Testimony of Carter Fritschle, Tr., Vol. I, p. 78, L. 16 – p. 79, L. 10)

The *Supplemental Director's Report* indicated that IDWR referred to IDWR's Transfer Processing Memo No. 24 (Oct. 30, 2002) as guidance in evaluating the wells as proposed alternative points of diversion. (Ex. 1, *Supp. Dir. Report* at 11, Attach. 6) The Transfer Processing Memo No. 24 explains that IDWR will recommend a change from surface water to groundwater if there is an "immediate and direct connection" between the surface source and the well. The Memo also requires that such changes require the groundwater and surface water sources to have "a direct and immediate hydraulic connection." The Memo requires that "[t]he existing point of diversion and proposed point of diversion must be proximate such that diversions and use of water from the proposed point of diversion would have substantially the same effect on the hydraulically connected sources as diversion and use of water from the original point of diversion."

IDWR referred to Transfer Processing Memo No. 24 in making its recommendations. IDWR concluded that Mink Creek and Gibson Jack Creek do not have a close enough hydraulic connection to be considered the same sources as the city wells. IDWR found no evidence that creek water is diverted from the wells. In addition, the wells are located some distance from the

creeks. The creeks are located between a quarter mile to a mile from Pocatello's nearest well. (Testimony of Carter Fritschle, Tr., Vol. I, p. 79, L. 11 – p. 80, L. 3; Ex. 11)

### **B. Interconnected Well System**

Pocatello provides a population of over 50,000 residents with water. A large amount of the water comes from a large, interconnected well system which supplies groundwater to the "city proper."<sup>4</sup> Pocatello claimed each of the water rights related to the interconnected well system with the other wells as alternative points of diversion. Pocatello asserted the alternative points of diversion pursuant to the accomplished transfer statute.

By November 19, 1987, Pocatello's interconnected well system included 22 wells connected via an integrated pipe and pumping system. (Ex. 1, *Supp. Dir. Report*, attach. Map 1)

The *Director's Report* recommended the water rights from the interconnected system and recognized 22 wells as alternative points of diversion. Thus, the *Director's Report* recognized that the interconnected system served Pocatello prior to November 19, 1987. (Ex. 1, *Supp. Dir. Report* at 12, 13.) IDWR did not recommend wells that were not part of the interconnected system as of 1987.

The wells integrated in the city's system are associated with water right numbers 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-7450, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, and 29-13639. These are groundwater rights which pump water primarily from an aquifer identified as the Lower Portneuf River Valley Aquifer (hereinafter "LPRVA"). The LPRVA forms a finger off of the larger Eastern Snake Plain Aquifer. (Testimony of Greg Sullivan, Tr., Vol. IV, p. 772, Ll. 12-25; Ex. 101, 102) One of the city's wells (Well 32) is located in the Eastern Snake Plain Aquifer (hereafter "ESPA").

The *Director's Report* recommended the 22 alternative points of diversion with a condition it deemed necessary to prevent injury to other water rights. IDWR would not have recommended the alternative points of diversion without the condition. (Ex. 1, *Supp. Dir. Report* at 13). IDWR did not recommend the condition in three water rights, 29-2274, 29-2338, and 29-7375, because the condition was not added in previous administrative transfer No. 5452.

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<sup>4</sup> A smaller well system supplies water to the municipal airport.

### **C. Purpose of Use for Biosolids (29-7118, 29-7119, 29-7770)**

Pocatello has three wells relating to water rights 29-7118, 29-7119, and 29-7770. All three rights were licensed with “irrigation” as the purpose of use because the land was previously used by farmers to grow agricultural crops. These wells were originally used to irrigate crops on land now owned by the city. Pocatello now uses the water rights in the city’s biosolids program. Pocatello asserted an accomplished transfer changed the use on all three rights to municipal.

The *Director's Report* for all three water rights concluded that these rights have an irrigation purpose rather than a municipal purpose. (Ex. 1, *Supp. Dir. Report* attach. K)

#### **1. Irrigation and Biosolids**

The evidence at trial showed that these three water rights are still used to grow crops. The city leases its land to farmers who cultivate the land and apply water to growing crops. The crops are harvested. However, since 1981, Pocatello has pursued a biosolids program to treat the city’s sewage waste. Since that time, Pocatello has closely monitored its leases and has limited the types of crops grown.

The biosolids generated by homes and industries in Pocatello are absorbed as fertilizer by the growing crops. Pocatello’s leases now require the farmers to grow crops in a way that promotes the biosolids program. The farmers are required to grow the specific crops used in the program. (Testimony of John Herrick, Tr., Vol. II, p. 834, Ll. 7-25) The farm leases provide that Pocatello may discharge biosolids onto the soil. (Ex. 168, 169)

#### **2. Licenses**

Water rights 29-7118 and 29-7119 were licensed for irrigation purposes in 1975. (Ex. 1, *Supp. Dir. Report*, attach. K) A valid change in purpose occurred in 1981 after the city’s biosolids program was implemented. Since 1981, the application of water has been on growing crops, but the purpose of growing the crops has changed to municipal because the crops are specifically grown to absorb biosolid waste.

Water right 29-7770 was licensed much later. (Ex. 1, *Supp. Dir. Report*, attach. M) This right was licensed in 2003 with an irrigation purpose of use. IDWR did not recommend changing the purpose of use to “municipal” for 29-7770 because that right was licensed with “irrigation” as the purpose after the commencement of the adjudication. (Testimony of Dave Tuthill; Ex. 1, *Supp. Dir. Report* at 20-21)

#### **D. Priority Date (29-13558 and 29-13639)**

Pocatello disputes the priority for two of its rights. Water right **29-13558** was recommended in the *Director's Report* with a priority of **July 26, 1924**. Pocatello claimed a priority of **June 30, 1905**. Water right 29-13558 relates to the first well used by the City of Alameda. The right was developed by a predecessor to the City of Alameda. Pocatello claimed the right based on beneficial use. (Ex. 1, *Supp. Dir. Report* at 22)

Pocatello bases its claim of a 1905 date on several newspaper articles. (Exs. 146, 147, 148, 150) Exhibit 150 contains an excerpt of an early history of the City of Pocatello. The document describes the history of early Pocatello resident A.Y. Satterfield who moved to Pocatello in 1905. The article does not establish a date for the first well, but indicates that the well was deepened during the term of the first mayor of the City of Alameda. The City of Alameda was formed from the consolidation of North Pocatello and Fairview on July 17, 1924. (Ex. 1, *Supp. Dir. Report* at 22) Based on the date of consolidation reported in the newspaper article, IDWR recommended a priority date of July 16, 1924 (one day prior to the formation of Alameda) for water right 29-13558. IDWR recommended that date because the well appeared to be in existence when Alameda was founded. (Ex. 1, *Supp. Dir. Report* at 22, attach. O)

Water right **29-13639** was recommended with a priority of **October 22, 1952**. Pocatello claimed a priority of **December 31, 1940**. Water right 29-13639 was claimed based on a beneficial use right relating to Alameda Well No. 3. The application for permit on which this right is based is dated October 22, 1952. (Ex. 154; Ex. 1, *Supp. Dir. Report* at 22, attach. P) Exhibit 154, the license file, included an application describing the water right with "three wells, drilled and in use for varying periods. . . ." The date of the application was October 20, 1952. Since the application referred to wells which were already in place on October 20, 1952, IDWR recommended the priority as one day earlier, October 21, 1952. (Testimony of Carter Fritschle, Tr., Vol. I, p. 196, L. 14 – p. 197, L. 8). Despite the date on the application, Pocatello asserted a date of December 31, 1940. Pocatello presented evidence that the City of Alameda grew from a population of 2,100 people to 4,705 people in 1950. There was no evidence, however, relating to a priority date of December 31, 1940.

## IV. ANALYSIS

### A. Alternative Points of Diversion for Surface Water Rights

Pocatello asserted its wells as alternative points of diversion to its senior surface water rights pursuant to I.C. § 42-1425, the accomplished transfer statute. This statute allows for changes in several elements of a water right. The statute provides that:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987 . . . may be claimed in a general adjudication.

I.C. § 42-1425(2). Therefore, a claimant may not change or add points of diversion from surface water to groundwater unless the two points of diversion are drawing from the same source. The statute does not provide for a change in the source element. Therefore, the trial correctly focused on the threshold question of whether Mink Creek and Gibson Jack Creek are connected closely enough to the proposed groundwater wells to be considered the same source.

Pocatello's expert witness Greg Sullivan provided an extensive and well-reasoned analysis of the small aquifer from which the wells draw water. The aquifer is called the Lower Portneuf River Valley Aquifer (LPRVA). Mr. Sullivan described the inflow of water into the LPRVA and the outflow of water from this aquifer. In that analysis, Mr. Sullivan explained that both Gibson Jack Creek and Mink Creek contribute significantly to the water supply for the LPRVA. In Mr. Sullivan's opinion, Gibson Jack Creek and Mink Creek have a direct hydraulic connection to the LPRVA. Mr. Sullivan stated that the connection between the creeks and the aquifer is so close that he considers them "essentially" the same source.

That testimony was contrasted by the expert opinion of IDWR's investigators. Senior Water Agent Carter Fritschle oversees recommendations in the SRBA as Manager of the Adjudication Technical Section. Mr. Fritschle is also experienced as a farmer.

Mr. Fritschle found no indication that Mink Creek water was diverted from Pocatello's wells. (Tr., Vol. I, p. 75, Ll. 12-23; p. 709, Ll. 14-24) Mr. Fritschle does not consider Pocatello's wells closely connected enough to the creeks to be from the same source. His conclusion is based on the distance between the wells and the surface sources. The wells are about ¼ mile to 1 mile from the creeks. (Tr., Vol. I, p. 79, L. 22 – p. 80, L. 3)

Mr. Fritschle testified that IDWR has recognized a well as an alternative point of diversion for a surface source where the well was essentially diverting the same water. One water right on the Salmon River involved a ditch that was abandoned in favor of a nearby shallow well. The well was so close to the ditch and was so shallow that IDWR concluded the well was a valid alternative point of diversion. (Testimony of Carter Fritschle, Tr., Vol. I, p. 78, L. 16 – p. 79, L. 10) “[I]n this case, they’re taking the same water at the groundwater or at the well that’s along the river banks as they were taking at the ditch that was upstream on the river.” *Id.* There IDWR concluded that the ditch and the shallow well drew the same water from the same source. In the case of Pocatello’s wells, Fritschle concluded the groundwater source was not close enough to the creeks to conclude that the wells pumped from the same source as the creeks. Therefore, IDWR did not recommend the wells as alternative points of diversion.

This Special Master concurs with the conclusion found in the *Director’s Report* that Pocatello’s groundwater wells are not alternative points of diversion for its surface water rights. Pocatello based its assertion of the wells as alternative points of diversion on the accomplished transfer statute, I.C. § 42-1425(2). The statute does not provide for changes in the source element. Thus, if Pocatello’s groundwater wells do not withdraw from the same source as Mink Creek and Gibson Jack Creek, it seems the alternative points of diversion are not acceptable under I.C. § 42-1425(2). IDWR essentially concluded that the city’s wells in the LPRVA do not withdraw from the same source as Mink Creek and Gibson Jack Creek. IDWR’s reasoning is consistent with the analysis used by the SRBA District Court and the Idaho Supreme Court in *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.* In *Memorandum Decision and Order on Challenge* (Subcases 36-02708 and 36-07218) (July 9, 1999) the dispute was over whether Clear Springs’ rights were from a separate source than Clear Lakes’ rights.

In determining whether the two channels constituted separate sources, the Court found that evidence on which springs fed each channel would be crucial to a finding of separate source.

To even begin to make an argument for independent sources, Clear Lakes would first have to establish which springs fed the particular channel from which Clear Lakes was diverting. The record would not support the conclusion that only certain springs fed a particular channel; the evidence is to the contrary. Since the water co-mingled prior to, and contemporaneously with, the formation of the two channels, the respective channels more accurately constitute different points of diversion along a common source as opposed to independent sources.

*Id.* at 10. A showing that two water rights have independent sources or are fed by different springs supports a finding of a separate source.

In the instant case, Mr. Sullivan testified that Mink Creek and Gibson Jack Creek contribute to the LPRVA. Thus, the creeks and the aquifer are hydraulically connected. However, aquifers and nearby creeks or rivers are often connected. A close connection between two water supplies is different than a showing they are the same source. To be considered the same source, the connection between Pocatello's wells and the surface diversions on Mink Creek and Gibson Jack Creek would have to be so close that the two were essentially diverting the same water. Both Mr. Sullivan and Mr. Fritschle presented as knowledgeable and forthright. Each expert came to a different conclusion, however, on whether the wells draw from the same source as the creeks.

Having considered all the testimony, this Special Master is persuaded that the city wells, though closely connected to the surface creeks, derive water from a different source when they draw from the LPRVA. Although the LPRVA derives a large portion of its water from the two creeks, it derives a significant portion of water from other sources. Additionally, there is no evidence that the city wells actually pump water from the creeks. Although the creeks and the LPRVA are hydraulically connected, they are not the same source.

Finally, even though the ground and surface sources are connected, the city could not transfer its point of diversion to groundwater without injuring junior groundwater pumpers who appropriated prior to the city establishing its wells. The significance of the connection between the groundwater and surface water is not such that groundwater pumping results in depletions to surface flow. Accordingly, in times of shortage to surface flows, the city could not initiate a delivery call against prior groundwater pumpers. However, allowing the city to transfer its alternative source to groundwater would allow the city, in times of shortage, to initiate a call against groundwater pumpers based on the priority for its surface rights. This results in injury to junior groundwater pumpers. Under the "no injury rule" juniors are entitled to the conditions as they existed at the time of appropriation. *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). A senior may not change an element of its right, including a point of diversion, if the change would result in injury to a junior. *Id.* This is exactly what would occur if the city were permitted to treat its wells as alternative points of diversion for its senior surface rights instead of treating the wells as new appropriations. The

injury is to the priorities of the juniors because it would essentially cause an abrogation of the juniors' priority date, even if the damage is not manifest for many years.

In the *Clear Springs Foods* case, Judge Wood explained that merely because two water rights are on the same source, a senior seeking to change a point of diversion is not immune from injuring a junior on the same source.

An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel.<sup>5</sup> Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. See *Malad Valley Irr. Co. v. Campbell*, 2 Idaho 411, 415, 18 P.52, 56 (1888)(rights of prior appropriator from natural streams also extend to tributaries); *Scott v. Watkins*, 63 Idaho 506, 517, 122 P.2d 220, 231 (1942)(particular source supplying natural water course is immaterial). However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be "futile." Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. See *United States v. Haga*, 276 F. 41, 43 (D. Idaho 1921)(holding appropriator on main channel can complain of diversion from tributary when tributary, if not interfered with, would make contribution to main channel). Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. See e.g., *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 9-10, 154 P.2d 507, 515-16 (1944)(citing *Crockett v. Jones*, 47 Idaho 497, 277 P.550; *Morris v. Bean*, 146 F.42)(holding a subsequent appropriator has a vested right to a continuance of conditions as they existed when he made his appropriation). In essence, the junior is protected by the respective location of the diversion works on the common source.

***Memorandum Decision and Order on Challenge*** (Subcase 36-02708)(July 9, 1999)

The same reasoning applies in this case. As such, the city's wells must be recognized as separate appropriations rather than alternative points of diversion for its surface sources in order to protect existing conditions for junior water right holders.

## **B. Conditions on Interconnected Well System**

Pocatello disputes whether a descriptive condition should be placed on its groundwater rights. Pocatello claimed all of its wells as alternative points of diversion for each groundwater right. IDWR placed a condition or description on the rights because it agreed to include all of Pocatello's wells as alternative points of diversion for each water right. As of 1987, Pocatello had 22 interconnected wells which provide water to the city's service area. (Ex. 1, *Supp. Dir. Report*, attach. maps 1, 2) IDWR favorably considered the alternative points of diversion because Pocatello's well system was interconnected prior to 1987. But IDWR included a description of the background for each water right to prevent the alternative points of diversion from displacing existing water rights with senior priorities. IDWR explained this reasoning in the *Supplemental Director's Report*:

By listing all of its points of diversion for all of its water rights [without the condition], the City would be allowed to withdraw water under its most senior priority water right from any well location.

The State of Idaho operates under the priority system. Water rights which are "first in time" are also "first in right." Therefore, it seems that IDWR could not allow a 1968 water right to utilize a 1917 priority date. That scenario seems contrary to Idaho law. To allow Pocatello the flexibility of using its different wells and to comply with the priority system, IDWR recognized the alternative points of diversion, but defined each right with the following condition:

To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface sources, groundwater was first diverted under this right from Pocatello well (legal description) in the amount of \_\_\_\_\_ cfs.

Pocatello and the State of Idaho each presented evidence regarding the condition. Pocatello argued that its groundwater rights should be recommended without the condition. Pocatello asserted that the interconnected system was in place prior to 1987 and that no other water rights were injured by adding alternative points of diversion. Three issues relate to the proposed provision: 1) What does the provision mean? 2) Are existing water rights injured without the provision? and 3) Is the provision necessary to administer the water rights? Thus, the evidence at trial focused on the injury issue.

## **1. Meaning of the Provision**

For a water right originating with Well No. 7, the condition would read:

To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface sources, groundwater was first diverted under this right from Pocatello Well No. 7 located in T06S, R34E, S35, NWSE, on 12/31/1940 in the amount of 4.46 cfs.

The condition provides four pieces of information: identification of the well, date of the well, quantity and explanation of administration.

### **a. Identification of Well**

“Pocatello Well No. 7 located in T06S, R34E, S35, NWSE.” This portion of the condition is provided to identify the well and provide a legal description by quarter-quarter of where the well was drilled. The description was included by IDWR to locate the relevant city well, which is important when determining how the use of a city well is impacting other nearby wells. “This description is important because many other wells could have been drilled nearby before or after the city-owned well was drilled or used.” (Ex. 1, *Supp. Dir. Report* at 14)

### **b. Date of Well**

The information stating “on 12/31/1940” explains when groundwater was first diverted from the well or water right in question. IDWR included the well date information for comparison with other water rights.

The date associated with the well is the date water was first appropriated from that well. This date is important when addressing well-interference issues and mitigation requirements for aquifer-wide regulation. 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 the amount of water available to another water user, the condition preserves the ability of a water user to protect their right.

(Ex. 1, *Supp. Dir. Report* at 14) IDWR explained that retaining information on the date of the well is important so the use of alternative points of diversion does not result in changes to priority dates.

For example, if a well developed by Pocatello in 1990 causes interference with a neighbor’s well that was drilled in 1960, the City’s well will be treated as junior to the 1960 well even though the City, on occasion, could be diverting a quantity from that well that is associated with a 1950 well owned elsewhere by the City.

*Id.*

### **c. Quantity**

IDWR included the quantity of water for each well to identify the amount of water appropriated from that well under its priority date. IDWR explained:

This quantity is again a necessary parameter when evaluating possible well-interference issues. Allowing the City to increase the Diversion rate will draw from any particular well by listing multiple, alternative points of diversion on its water rights could cause injury to other surface and groundwater users.

(Ex. 1, *Supp. Dir. Report* at 15)

The *Supplemental Director's Report* explained that retaining the information on well quantity is important:

For example, if a senior surface water user makes a call and the Department determines that the City's use of groundwater is causing injury to that senior surface water user from a certain well, the City has the flexibility to obtain that quantity from different well locations to supply its residents with water. However, the City is still responsible for mitigating any injury associated with the withdrawal of that quantity for its wells.

*Id.*

In a nutshell, IDWR included the well location and quantity to “maintain the historical relationship between various water users.”

### **d. Administrative Language**

The remaining portion of the condition explains that IDWR will maintain the information relating to well locations, priority, and quantity for reference during times of shortage to appropriately respond to calls. The language is:

To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface sources, water was first appropriate at \_\_\_\_\_

This language has become IDWR's standard condition where municipalities have interconnected well systems and request the flexibility of alternative points of diversion for groundwater rights.

*Id.* at 16.

## **2. Injury to Existing Water Rights**

Because Pocatello asserted the alternative points of diversion under the accomplished transfer statute, the experts sharply disagreed on whether existing water rights would be injured without the condition. At trial, IDWR Director David Tuthill testified that the provision is

necessary to protect the priority dates of existing wells<sup>5</sup> and therefore protect those wells from well interference. Mr. Tuthill gave an example where an increase by Pocatello in the number of hours pumped per day at a city well would cause existing shallow wells to dry up. Mr. Tuthill testified that without the condition, the alternative points of diversion could allow Pocatello to pump from a well using another well's early priority, but preclude an existing domestic well from seeking appropriate protection.

### **3. Necessary for Administration**

IDWR concluded that the condition is necessary to maintain the existing system of priority and therefore to protect existing users during a priority call. Without the condition, IDWR concluded that Pocatello could assert a priority date earlier than the date associated with the specific well actually pumping and would inappropriately avoid a priority call. Mr. Tuthill concluded that the condition is necessary to allow the alternative points of diversion and to define Pocatello's water rights:

Q. So why was the condition created specifically here?

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

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

A. That's correct.

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

(Testimony of David Tuthill, Tr., Vol. II, p. 231, L. 24 – p. 232, L. 25)

The descriptive condition was added so that adding alternative points of diversion did not allow Pocatello's more junior rights to essentially jump ahead in priority. Mr. Tuthill concluded that allowing the alternative points of diversion without including the condition would injure existing water rights.

There are existing groundwater users in the area of Pocatello's well system which are hydrologically connected to Pocatello's wells. However, IDWR has not investigated whether

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<sup>5</sup> Existing wells are those wells which existed prior to the formation of the interconnected system and operation of alternative points of diversion.

these water users have already sustained damage due to Pocatello's exercise of its alternative points of diversion. (Testimony of David Tuthill).

Pocatello's expert Greg Sullivan disagreed with Mr. Tuthill's testimony. He concluded that the condition unfairly weakens Pocatello's rights:

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

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

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

A. Okay.

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

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

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

A. No, they have not.

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

A. Yes. . . .

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

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

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

(Testimony of Greg Sullivan, Tr., Vol. V, p. 900, L. 7 – p. 904, L. 8; Tr., Vol. V, p. 990, L. 10 – p. 993, L. 6.)

Thus, Mr. Sullivan concluded that operating the alternative points of diversion does not injure existing rights. Additionally, Mr. Sullivan concluded that Pocatello's rights should be decreed without a condition to maximize Pocatello's rights.

IDWR included the condition to protect against injury to junior rights in order to allow all the wells as alternative points of diversion. However, IDWR must be protecting against an injury which is real, identifiable, and material. A theoretical or speculative injury is insufficient. *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944). Pocatello argues that the condition does not address actual injury, but improperly focuses on speculation about future injury. This Special Master disagrees.

Where a change or transfer would undermine a priority date, the injury is real and material even if the damage is not immediately manifest. In a prior appropriation system, undermining a priority date is a seminal injury. Thus, the condition appears to correctly protect juniors from injury to their priorities. The descriptive language found in the condition identifies the well associated with the water right and appropriately identifies the quantity of water associated with that well and its priority date. The *Director's Report* recognized the other wells as alternative points of diversion, assuring Pocatello the flexibility necessary for a municipality with many wells, some of which may fail. But the *Director's Report* identifies the quantity and priority associated with the original right so that Pocatello is not inappropriately insulated from calls by intervening pumpers. If, as Pocatello argues, the alternative points of diversion cause no injury to juniors, then the condition should not affect Pocatello's rights. Therefore, this Special Master concludes that the condition recommended in the *Director's Report* is appropriate and necessary.

#### **4. Transfer No. 5452 (29-2274, 29-2338, 29-7375)**

Three of Pocatello's water rights, 29-2274, 29-2338, and 29-7375, were recommended without the condition and with only 12 points of diversion. (Ex. 1, *Supp. Dir. Report* at 13) IDWR did not recommend the condition or the additional points of diversion because these three rights were subject to a previous administrative transfer. Transfer No. 5452 dated June 28, 1999, did not include the condition. In addition, Transfer No. 5452 recognized only 12 points of diversion for these three rights. Because Transfer No. 5452 occurred after 1987, IDWR recommended these rights as they were determined in the transfer.

This Special Master concludes that there is not a valid accomplished transfer for these three rights under I.C. § 42-1425. Since Transfer No. 5452 was issued in 1999 with only 12 points of diversion, Pocatello cannot meet the requirement of a pre-1987 change established by I.C. § 42-1425. Accordingly the points of diversion should be as recommended.

**C. Biosolids Purpose of Use (29-7118, 29-7119, 29-7770)**

The three water rights near the Pocatello Municipal Airport were licensed for irrigation purposes with an irrigation season. Pocatello asserted a municipal purpose based on a change of purpose of use when the city started its biosolids program in 1981.

Pocatello's key witness on these rights was Jon Herrick, a senior employee for Pocatello's wastewater treatment plant. Mr. Herrick testified that the wells associated with 29-7118 and 29-7119 were used for the biosolids program since 1981. (Testimony of Jon Herrick, Tr., Vol. II, p. 401, Ll. 22-24) Pocatello Exhibits 106, 158, 149, 168, and 169 show the location of the biosolids facilities, the city's biosolids management plan, crop management plan, and farm leases relating to the program.

Pocatello changed the purpose of use for 29-7118 and 29-7119 when it began using its water rights for the biosolids program in 1981. Crops were still grown on the land as they had been for irrigation purposes, and farmers still leased the land from the city. However, after 1981 Pocatello grew the crops to absorb municipal biosolid waste, not to merely grow and market crops. Thus, water was applied and used for municipal purposes. There was no evidence which showed a season of use for 29-7118 and 29-7119 outside the irrigation season. Thus, **purpose of use is municipal** for 29-7118 and 29-7119, but **season of use remains the irrigation season**.

Evidence also showed that water right 29-7770 was used for the biosolids program. Unfortunately, the legal impact of the biosolids program for this right is different than for the other two rights because this right was licensed in **2003 for irrigation purposes**. In the licensing process, IDWR considered a municipal purpose but rejected that. (Ex. 1, *Supp. Dir. Report* at 21) In the licensing decision, IDWR considered Pocatello's 1987 request to define purpose of use as domestic, commercial, municipal, and industrial or "DCMI." IDWR declined to label the purpose of use for 29-7770 as DCMI. (Ex. 1, *Supp. Dir. Report* at 20-21)

The license of a water right claimed in the SRBA is persuasive proof of the elements of the right. However, a license is not conclusive proof. Changes occurring after the license may

provide evidence to support a change in the elements. Typically, the post-licensing changes are either a valid administrative transfer or an accomplished transfer.

There was no evidence offered to show an administrative transfer of 29-7770 occurred. Therefore, in order to change the licensed elements, Pocatello must show a valid accomplished occurred under I.C. § 42-1425.

The statute allows changes to a water right if three factors exist:

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

Under the unusual procedural history of this case, Pocatello cannot show a valid accomplished transfer. This right was licensed in 2003. Pocatello cannot make a valid case for an accomplished transfer under I.C. § 42-1425 because accomplished changes to elements of a right are required by statute to have occurred prior to November 19, 1987. The license was issued in 2003 and, therefore, any change after the license does not comply with the statutory deadline of 1987. A valid accomplished transfer cannot be alleged. Therefore, **the purpose of use is irrigation** as originally claimed by Pocatello, as licensed in 2003, and as set forth in the *Director's Report*.

#### **D. Priority Dates**

##### **1. 29-13558**

Water right 29-13558 was claimed by Pocatello for the first well used by the City of Alameda. (Ex. 1, *Supp. Dir. Report* at 22) Pocatello's *Objection* sought a **June 30, 1905** priority date.

The *Director's Report* recommended **July 16, 1924**, as the priority for **29-13558**. To support its contention of a 1905 date, Pocatello offered Exhibit 150, an excerpt of an early newspaper article. The article established that Mr. A.Y. Satterfield moved to Pocatello in 1905. The article said that Mr. Satterfield gave a speech about the early history of Pocatello and said Alameda's first well was dug to a depth of 65 feet and was deepened during the term of Alameda's first mayor.

Pocatello also offered Exhibit 148, a newspaper article regarding the formation of the City of Alameda (now part of Pocatello). Exhibit 148 establishes the formation of Alameda on July 31, 1924. The date of the newspaper article was July 17, 1924. The only evidence

connected to 1905 appears to be a showing that an early resident moved to the area in that year. Although that evidence has some probative value, by itself it does not rebut the *Director's Report* conclusion that priority is July 16, 1924. Therefore, this Special Master concludes that the evidence at trial supports the finding of **July 16, 1924** as the priority date for 29-13558.

## **2. 29-13639**

Water right 29-13639 was recommended in the *Director's Report* based on a license. This water right relates to Alameda Well No. 3. IDWR determined that a prior license (numbered 29-2324) covered Alameda Well Nos. 1, 2 and 3. The license gave a priority date of October 22, 1952. (Ex. 1, *Supp. Dir. Report* at 22, attach. P; Ex. 153, permit; Ex. 154 license) The *Director's Report* recommended **October 22, 1952**.

Pocatello claimed an earlier date than the permit and license, asserting a priority based on beneficial use of **December 31, 1940**. Pocatello offered evidence to show that Alameda grew from a population of 2,100 to over 4,700 by 1950. However, that does not rebut the *Director's Report* recommendation of October 22, 1952, or provide sufficient evidence of a priority of December 31, 1940. On the other hand, the *Director's Report* priority of October 22, 1952, is supported by the permit (Ex. 153) and the license (Ex. 154). Since both the permit and the license indicate that the wells existed on October 22, 1952, the priority should be advanced to one day prior or October 21, 1952. This Special Master concludes that the priority for 29-13639 is **October 21, 1952**.

## **V. CONCLUSION**

After considering the pleadings, evidence, testimony, and legal arguments of counsel, this Special Master concludes as follows:

### **A. Alternative Points of Diversion for Surface Water Rights (29-271, 29-272, 29-273, 29-4222)**

Pocatello's surface water rights on Mink Creek and Gibson Jack Creek are among the oldest rights of the city. These rights should be confirmed. However, the evidence presented at trial was insufficient to rebut the *Director's Report* conclusion regarding the city's groundwater wells as alternative points of diversion. Therefore, these rights are recommended with the elements as set forth in the *Director's Report*. Accordingly, the city's groundwater wells should not be included as alternative points of diversion.

**B. Conditions on Interconnected Well System (29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-7450, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, 29-13639)**

Most of Pocatello's well system was interconnected prior to 1987. Therefore, the other wells recommended in the *Director's Report* as alternative points of diversion are appropriate. However, recognizing those alternative points of diversion would not be possible without a condition such as that recommended in the *Director's Report*. Without a condition which identifies the location, date, and quantity of the original right, it seems that the city could pump from a well using an earlier priority date. If using that earlier date undermined the priority of an existing water right, the alternative points of diversion would impermissibly subvert the priority system. Therefore, these rights are recommended with the alternative points of diversion and including the condition set forth in the *Director's Report*.

**C. Biosolids Purpose of Use (29-7118, 29-7119, 29-7770)**

Pocatello established a biosolids program in 1981. That program resulted in the use of water for 29-7118 and 29-7119 which satisfies a change of purpose of use to "municipal." However, the period of use established in the *Director's Report* for these rights was unrebutted. Therefore, those rights are recommended with a municipal purpose, but no change to the period of use.

Water Right 29-7770 was licensed for irrigation purposes in 2003. Thus, the legal conclusion is different than that for 29-7118 and 29-7119.

For 29-7770, the licensed purpose of use in 2003 was irrigation. No valid accomplished transfer can now occur under I.C. § 42-1425 since the change must be post license and prior to the statutory deadline of 1987. Therefore, no valid accomplished transfer occurred for 29-7770. Additionally, no administrative transfer was filed after the 2003 license. Accordingly, purpose of use for 29-7770 is irrigation.

**D. Priority Dates (29-13558, 29-13639)**

Pocatello alleged earlier priorities for 29-13558 and 29-13639 than those recommended in the *Director's Report*. Considering the pleadings, testimony, and evidence, this Special Master concludes that the priority date for 29-13558 is July 16, 1924 as recommended in the *Director's Report*. The priority date for 29-13639 should be one day earlier than the date recommended in the *Director's Report*, or October 21, 1952.

THEREFORE, considering the pleadings, evidence at trial, and arguments of counsel IT IS RECOMMENDED that these water rights be decreed with the elements set forth in the attached *Special Master's Recommendations for Partial Decree*.

DATED: Oct. 1, 2007.

  
BRIGETTE BILYEU  
Special Master  
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

29-00271  
29-00272  
29-00273  
29-02274  
29-02338  
29-02401  
29-02499  
29-04221  
29-04222  
29-04223  
29-04224  
29-04225  
29-04226  
29-07106  
29-07118  
29-07119  
29-07322  
29-07375  
29-07450  
29-07770  
29-11339  
29-11348  
29-13558  
29-13559  
29-13560  
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29-13637  
29-13638  
29-13639

(Subcase list: BEEMANGP )  
10/02/07



|                                                                                         |                       |
|-----------------------------------------------------------------------------------------|-----------------------|
| DISTRICT COURT-SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |                       |
| OCT - 2 2007                                                                            |                       |
| By _____                                                                                | Clerk<br>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                                 )  
                                                      )  
Case No. 39576                             )  
                                                      )  
\_\_\_\_\_  
                                                      )

NOTICE OF ISSUANCE OF  
SPECIAL MASTER'S  
RECOMMENDATION

Water Right(s): 29-00271  
(SEE ATTACHED EXHIBIT A)

On October 02, 2007, Special Master BRIGETTE BILYEU  
issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s)  
pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party  
to the adjudication including parties to the subcase, may file a Motion  
to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate  
in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION  
shall constitute a waiver of the right to challenge it before the  
Presiding Judge.

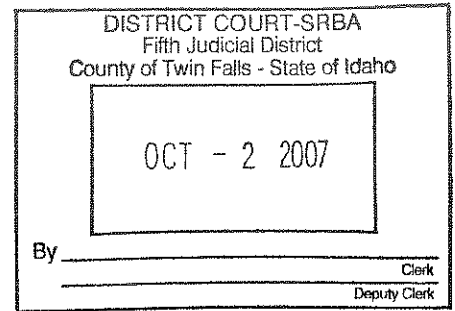
DATED October 02, 2007.

  
\_\_\_\_\_  
JANET CONNELL  
Deputy Clerk

Exhibit A

Subcase Nos:

29-00271  
29-00272  
29-00273  
29-02274  
29-02338  
29-02401  
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29-04222  
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29-07106  
29-07118  
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29-07322  
29-07375  
29-07450  
29-07770  
29-11339  
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29-13558  
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29-13637  
29-13638  
29-13639



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 )  
Case No. 39576 )  
\_\_\_\_\_ )

CERTIFICATE OF MAILING

Water Right(s): 29-00271  
(SEE ATTACHED EXHIBIT A)

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on October 02, 2007, with sufficient first-class postage prepaid to the following:

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

AMERICAN FALLS RESERVOIR

Represented by:  
C THOMAS ARKOOSH  
301 MAIN ST  
PO BOX 32  
GOODING, ID 83330  
Phone: 208-934-8872

AMERICAN FALLS RESERVOIR

Represented by:  
DAVID HEIDA  
301 MAIN ST  
PO BOX 32  
GOODING, ID 83330  
Phone: 208-934-8872

CITY OF POCATELLO

Represented by:  
JOSEPHINE P BEEMAN  
409 W JEFFERSON ST  
BOISE, ID 83702  
Phone: 208-331-0950

STATE OF IDAHO

Represented by:  
NATURAL RESOURCES DIV CHIEF  
STATE OF IDAHO  
ATTORNEY GENERAL'S OFFICE  
PO BOX 44449  
BOISE, ID 83711-4449

A & B IRRIGATION DISTRICT  
BURLEY IRRIGATION DISTRICT

Represented by:  
ROGER D LING  
615 H ST  
PO BOX 396  
RUPERT, ID 83350-0396  
Phone: 208-436-4717

CITY OF POCA TELLO

Represented by:  
SARAH A KLAHN  
WHITE & JANKOWSKI LLP  
KIT TREDGE BUILDING  
511 16TH ST STE 500  
DENVER, CO 80202  
Phone: 303-595-9441

MILNER IRRIGATION DISTRICT  
NORTH SIDE CANAL COMPANY  
TWIN FALLS CANAL COMPANY

Represented by:  
TRAVIS L THOMPSON  
113 MAIN AVE W, STE 303  
PO BOX 485  
TWIN FALLS, ID 83303-0485  
Phone: 208-733-0700

UNITED STATE OF AMERICA  
UNITED STATES OF AMERICA

Represented by:  
US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATL' RESOURCES  
550 WEST FORT STREET, MSC 033  
BOISE, ID 83724

MINIDOKA IRRIGATION DISTRICT

Represented by:  
W KENT FLETCHER  
1200 OVERLAND AVE  
PO BOX 248  
BURLEY, ID 83318  
Phone: 208-678-3250

UNITED STATES OF AMERICA  
US DEPT OF JUSTICE, ENRD  
550 W FORT ST MSC 033  
BOISE, ID 83724

  
\_\_\_\_\_  
JANET CONNELL  
Deputy Clerk

Exhibit A

Subcase Nos:

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