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DEPARTMENT OF
WATER RESOURCES

Attorneys for the City of Pocatello

**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 Attachment A)
	)	
Case No. 39676	)	
	)	
_____	)	CITY OF POCATELLO'S BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND

**1. THE SPECIAL MASTER'S ORDER ON RECONSIDERATION
INCORRECTLY CHARACTERIZED LEGAL ARGUMENTS IN CASES THAT HAVE
GONE TO THE IDAHO SUPREME COURT AS "ADDITIONAL EVIDENCE".
POCATELLO'S MOTION FOR RECONSIDERATION WAS IMPROPERLY DENIED.**

In a recent District Court decision involving the Idaho Ground Water Appropriators (IGWA)¹, District Judge John Melanson, noted that "IGWA has taken one position in one proceeding [referring to IGWA's legal position in AFRD#2, an Idaho Supreme Court proceeding²] and then adopted the exact opposition position in a similar proceeding involving similar issues [referring to IGWA v. IDWR]". In accordance with IGWA's original legal position in AFRD#2, Judge Melanson dismissed IGWA's application for TRO, Complaint for Declaratory Relief and Writ of Prohibition and Preliminary Injunction in IGWA v. IDWR.

This court has the same authority regarding parties' changes in legal position in similar proceedings. As Pocatello stated in its Motion for Reconsideration, "Pocatello's overarching legal issue is that the State and IDWR have changed their position with respect to I.C. 42-1425 accomplished transfers in the SRBA and have done so counter to their arguments and the decision in Idaho Supreme Court cases." This is not a matter of evidence; it has to do with

¹ Idaho Ground Water Appropriators v. IDWR (Fifth Judicial District No. CV 2007-526) (IGWA v. IDWR). See June 12, 2007 Order (Affidavit of Josephine Beeman, December 13, 2007, Exhibit 1.)

² AFRD#2 refers to the Idaho Supreme Court decision in AFRD#2 et al. v. IDWR, et al, No. 33249/33311/33399, Slip Op. 40 (Idaho, Mar. 5, 2007).

Pocatello's right to make a legal argument that the State and IDWR took one position in proceedings at the Idaho Supreme Court (AFRD#2 and Fremont-Madison cases), and then adopted the exact opposition position in a similar proceeding involving similar issues (Pocatello's accomplished transfers at the SRBA court).

2. THE SPECIAL MASTER'S RECOMMENDATION INCORRECTLY CONCLUDED THAT I.C. § 42-1425'S PROVISION FOR CHANGES IN POINT OF DIVERSION "DOES NOT PROVIDE FOR A CHANGE IN THE SOURCE ELEMENT".

Pocatello respectfully disagrees with the Master's statement that I.C. 42-1425 does not provide for a change in the source element. *Master's Report*, at 10. Pocatello refers the Master to the recommendations and partial decrees for 29-00071, 29-02219, and 29-10341 as examples where the source element of the water right was specifically recommended and decreed with the following statement: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO SECTION 42-1425, IDAHO CODE." Pocatello understands that I.C. 42-1425 is routinely applied to changes in source because the source element is a descriptive aspect of the point of diversion element.

Idaho Code 42-1425 is not a legal basis to deny Pocatello's claims that its interconnected wells are alternate points of diversion for the city's surface water rights.

3. THE SPECIAL MASTER'S RECOMMENDATION DENIED ALTERNATE POINTS OF DIVERSION FOR POCATELLO'S SURFACE WATER RIGHTS BECAUSE IT RELIED ON AND USED A STANDARD OF "CONNECTION" WHEN DETERMINING "WHETHER MINK CREEK AND GIBSON JACK CREEK ARE CONNECTED CLOSELY ENOUGH TO THE PROPOSED GROUNDWATER WELLS TO BE CONSIDERED THE SAME SOURCE." THE STANDARD APPLIED WAS BASED ON AN IMPROPER ADMINISTRATIVE RULEMAKING.

The Master's Report uses a "same source" analysis to examine Pocatello's claims that its interconnected wells are alternate points of diversion for the City's surface water rights. The City's claims are based on I.C. 42-1425, the accomplished transfer statute, which specifically applies to the SRBA. The Master's "same source" analysis relies on a standard where "the connection . . . would have to be so close that" the alternate points of diversion "were essentially diverting the same water" as the surface water rights. *Id.* at 12. The "same water" standard is not articulated in 42-1425, but is found in IDWR's Transfer Processing Memo #4 (October 30, 2002) (Exhibit 1, Supplemental Director's Report, Attachment 6) (Transfer Memo). However, the Transfer Memo explicitly states that it applies **only** to "processing applications for transfers of water rights pursuant to Section 42-222, Idaho Code . . ."; in contrast, the legislature

expressly stated that 42-1425 was to avoid the “impractical and unduly burdensome” procedures of 42-222.

IDWR’s Transfer Memo is an internal document of the Department and does not provide a binding legal standard for evaluating alternate points of diversion established prior to November 19, 1987. Further, these internal policies and procedures of the Department have not been subjected to the process for formal administrative rulemaking under the Idaho Administrative Procedures Act (Idaho Code § 67-52), and their application here to Pocatello directly contradicts 42-1425.

It was error for the Department to apply the Transfer Memo to Pocatello’s claim for alternate points of diversion under 42-1425. And, it was error for the Master’s Report to defer to the Department’s misapplication of the Transfer Memo to Pocatello’s alternate points of diversion.

In an **adjudicative proceeding** for the water rights for the City of Pocatello, it is inappropriate to apply standards for interconnection based on an unpromulgated 2002 Transfer Memo developed as a guideline for a statute that is expressly inapplicable to Pocatello’s alternate points of diversion established prior to November 19, 1987.

4. THE SPECIAL MASTER’S RECOMMENDATION ERRED BY USING A “NO INJURY” STANDARD TO CONCLUDE THAT THE ALTERNATIVE POINTS OF DIVERSION WERE NOT “ACCOMPLISHED TRANSFERS”.

In analyzing the City’s §42-1425 accomplished transfer of alternate points of diversion for its surface water rights, the *Master’s Report* states that “even though the ground and surface sources are connected, the city could not transfer its point of diversion to ground water without injuring junior ground water pumpers who appropriated prior to the city establishing its well.” *Id.* at 12. This conclusion is incorrect for two reasons. First, the analysis incorrectly applies the “no injury” restriction contained in §42-1425 by looking to **possible** future injuries rather than **actual** and **identifiable** injuries as contemplated by §42-1425. Second, the analysis of complex factual circumstances required to attempt to identify possible future injuries is not appropriate in the SRBA and comes within the expertise of the Department in **administering** the rights, an exercise that requires examinations and hearings to be conducted first in the Department’s administrative forum.

The *Master’s Report* applies a similar “no injury” analysis to the limiting condition for Pocatello’s interconnected ground water rights. In the interests of space and the convenience of the Court, a fuller critique of the *Report’s* analysis appears below.

5. THE SPECIAL MASTER'S RECOMMENDATION ADOPTS IDWR'S LIMITING CONDITION ON THE GROUND WATER RIGHTS SERVING THE CITY'S INTERCONNECTED WELL SYSTEM DESPITE THE FACT THAT THE CONDITION IS UNNECESSARY FOR THE ADJUDICATION OF THE RIGHTS AND ADDRESSES CONCERNS THAT ARE PROPERLY DETERMINED BY THE DEPARTMENT IN THE ADMINISTRATION OF THE RIGHTS.

The *Special Master's Report* concludes that, although recommending the alternate points of diversion for Pocatello's interconnected well system is appropriate, "recognizing those alternate points of diversion **would not be possible** without a condition such as that recommended in the *Director's Report*." (Emphasis added.) *Id.* at 23. The Director's SRBA and administrative practices are counter to this conclusion.

The SRBA process requires only such remarks as are necessary for the administration of the right by the Director. *Idaho Code* § 42-1411(2)(j). In addition, the SRBA adjudication process decrees water rights based on a "snapshot in time" as of the commencement of the SRBA on November 19, 1987. In this context, and consistent with IDWR SRBA practices until 2003, the cities of Aberdeen, Jerome, and Rupert had the water rights serving their interconnected culinary water systems recommended and decreed with alternate points of diversion without such a condition. The Notices of Claim, IDWR Recommendations, and SRBA Partial Decrees are in Pocatello Exhibits 172, 173, 174, 176, 177, 178, and 179. These are uncontroverted adjudicated facts.

In 2007, IDWR testified that a condition on such interconnected water rights is necessary because of the Department's evolving understanding of conjunctive water administration. (David Tuthill's testimony, at 9-10, Appendix A, Pocatello's Post-Trial Brief.) However, 20 years have already elapsed since 1987, and there is no record before the court that the Cities of Aberdeen, Jerome, Rupert, or Pocatello have been administered by the use of such a condition. There is no basis in the record for decreeing the adjudicated facts of Pocatello's interconnected well system differently from the adjudicated facts for the Cities of Aberdeen, Jerome, and Rupert.

Further, the Master's Report correctly notes that "IDWR must be protecting against an injury which is real, identifiable, and material. A **theoretical** or **speculative** injury is insufficient." *Master's Report & Recommendation* at 19, citing *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944) (emphasis added). However, the Master's Report only identifies two of the three criteria from *Beecher*, and then only conditionally: "Where a change or transfer **would** undermine a priority date, the injury is real and material even if the damage is

not immediately manifest.” *Ibid.* (emphasis added). The word “would” expresses a possibility that a change **might** undermine a priority date. However, there is no record that Pocatello’s operation of its interconnected well system **did** undermine a priority date as of 1987, or even as of 2007. *Beecher* expressly limits the type of injuries that may be protected against to those that are (1) real, (2) identifiable, and (3) material. The three terms together contemplate a present injury to an identifiable water right. The Master’s Report finds no “identifiable” injury because there is no evidence of injury.

The complex realities of the conjunctive management of water must be recognized. The evolving understanding of both the scientific physical realities of the waters of the state and the best practices for conjunctively administering water rights must be encouraged in order to promote the highest and best use of the waters of the State of Idaho. However, those complex factual matters are appropriately left to the expertise of the Department in **administering** the waters of the state. In *American Falls Reservoir District No. 2 v. IDWR (AFRD#2)*, the Supreme Court of Idaho (relying on the State’s assertions) recognized “the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior’s water right will indeed provide water to a senior.” *AFRD#2 et al. v. IDWR, et al, No. 33249/33311/33399, Slip Op. 40* (Idaho, Mar. 5, 2007) at 16. The *AFRD#2* court recognized that “water rights adjudications neither address, nor answer, the questions presented in delivery calls,” and that “a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source.” *Id.* at 18-19.

IDWR’s interest in future conjunctive administration is entirely appropriate, but *AFRD#2* correctly instructs this court why the condition on Pocatello’s interconnected ground water rights “need not” be included in the adjudication.

6. THE SPECIAL MASTER’S RECOMMENDATION MISTAKENLY CONCLUDED THAT CORRECTING THE DEPARTMENT’S ADMINISTRATIVE ERROR OF LAW - LICENSING WATER RIGHT 29-7770 WITH AN IRRIGATION PURPOSE OF USE - WOULD CONSTITUTE A “COLLATERAL ATTACK”. IT DOES NOT.

Water Rights 29-7118, 29-7119, and 29-7770 have all been used to carry out Pocatello’s biosolids program to treat the City’s sewage waste, and as to two of these rights – 29-7118 and 29-7119 – the Master’s Report concluded as a matter of law that because “Pocatello grew the

crops to absorb municipal biosolid waste . . . water was applied and used for municipal purpose.” Master’s Report and Recommendation and Order on Motion to Reconsider, at 20.

The Master’s Report also found that 29-7770 “was used for the biosolids program” but then erred as a matter of law in reporting 29-7770 with an irrigation purpose of use based on IDWR’s previous license of 29-7770 with an irrigation purpose of use. This was a legal error by the Department because application of water to municipal biosolids sewage waste treatment program is a municipal use as a matter of law.

Courts are not bound by errors of law committed by administrative agencies. *Kelso v. State Ins. Fund*, 997 P.2d 591, 134 Idaho 130, 138 (2000). If this were not so, administrative agencies could make and/or change law. The Special Master has already concluded as a matter of law that the application of water to carry out the City’s biosolids program is a municipal use. The Special Master is not barred, but rather has a duty to correct the Department’s error of law.

Since these three rights have only been used for Pocatello’s biosolids program,³ it is not necessary to use the accomplished transfer statute in the analysis. The accomplished transfer statute applies only to changes in use.

7. THE SPECIAL MASTER’S RECOMMENDATION FAILED TO APPLY THE “REASONABLE EVIDENCE” STANDARD TO THE EVIDENCE PRESENTED AT TRIAL IN SUPPORT OF POCATELLO’S CLAIMED PRIORITY DATE FOR WATER RIGHTS 29-13558 AND 29-13639. ADDITIONALLY, PURSUANT TO I.R.C.P. 52(B), THE CITY RESPECTFULLY REQUESTS THAT THE SPECIAL MASTER AUGMENT HER FINDINGS OF FACT WITH NEWLY DISCOVERED EVIDENCE.

Pocatello offered evidence from multiple sources that would “lead a reasonable mind to conclude” that the wells associated with water rights 29-13558 and 29-13639 were in place and diverting water by the dates claimed by the City (June 30, 1905 and December 31, 1940, respectively). The *Special Master’s Report* erred in recommending the dates in accordance with the recommendation of the Department.⁴

While it is well established that the Director’s Report constitutes *prima facie* evidence, “the ‘*prima facie*’ status accorded to the Director’s Report in I.C. § 42-1411(4) constitute[s] a rebuttable evidentiary presumption.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho

³ The uncontroverted testimony is discussed at footnote 90, p. 40, *Pocatello’s Post-Trial Brief*.

⁴ The *Special Master’s Report* recommended 29-13558 with a priority date of 7/16/1924, as recommended in the *Director’s Report*, and 29-13639 with a priority date of 10/21/1952, one day earlier than recommended in the *Director’s Report*. The one day advancement of 29-13639 was based upon the change in position of the Department at trial.

736, 745, 947 P.2d 409 (1997); quoting *State v. United States*, 128 Idaho 246, 255-256, 912 P.2d 614 (1995). The rebuttable presumption in favor of the Director's Report means that "the facts contained therein are presumed to be correct until such time as a water claimant produces **sufficient** evidence to rebut that presumption." *Hagerman* at 746 (emphasis added). *Bongiovi v. Jamison* explains that evidence sufficient to rebut the presumption must rise to the level of "substantial evidence". 110 Idaho 734, 718 P.2d 1172 (1986). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934 (1993).

At trial, the Department (Carter Fritschle)⁵ indicated that the Director's Report recommendations in 2003 for 29-13558 and 29-13639 did not include review of the additional evidence that Pocatello presented at trial:

Pocatello Exhibit 147: "A Scant Supply in 1924" article

Pocatello Exhibit 148: Pocatello Tribune article, dated 07/17/1924

Pocatello Exhibit 150: Alameda Enterprise article, dated 07/20/1952

Pocatello Exhibit 151: Polk's Pocatello City Directory 1962

Pocatello Exhibit 153: City of Alameda Application for Permit

The evidence was submitted to support priority dates earlier than 7/16/1924 for 29-13558 and earlier than 10/21/1952 for 29-13639.

The Department (Carter Fritschle) stated that it required evidence of the date the wells were drilled and put into service.⁶ However, the evidence provided by the City reasonably supports the conclusion that the water rights in question were operating before the dates the Department recommended, particularly considering population growth, the functioning villages that formed Alameda, and the sworn statements in Alameda's 1952 application for permit.⁷

The evidence provided by the City in support of its priority date claims for 29-13558 and 29-13639 is sufficient to rebut the presumption in favor of the Department's recommendations. "Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant." *Hagerman* at 746, quoting MCCORMICK, EVIDENCE § 345, at 823 (1972).

⁵ Tr. p. 196, line 16-19.

⁶ Definitive as to when the well was drilled and when it was put into service (Tr. p. 199, lines 7-9).

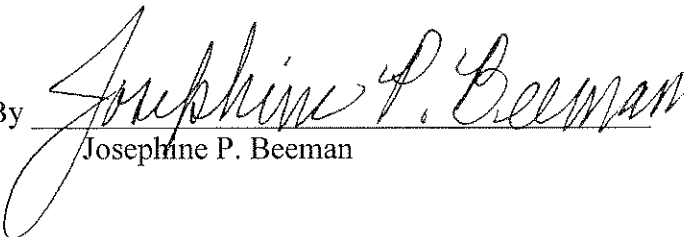
⁷ See timeline in Pocatello's Post-Trial Brief, pp. 44 and 45.

In addition to the evidence presented at trial, the City has recently discovered two maps of the City of Pocatello depicting municipal water facilities and describing the municipal water systems. These maps were created by the Sanborn Map Company and are dated September of 1892 and May of 1921.

The standard for allowing the introduction of additional evidence in conjunction with a motion to alter or amend the report of a special master is discussed in *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcases 36-2708 *et al.*, (December 29, 1999) ("*Facility Volume*"), citing *In Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order on Challenge* (September 27, 1999). Pursuant to I.R.C.P 52(b), a court may augment its findings of fact on four grounds: (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and/or (4) to supplement or amplify its findings. "*Facility Volume*" at 20-21. Pocatello has newly discovered evidence. The "*Facility Volume*" decision explains two limitations for consideration of newly discovered evidence. First, "the movant may not introduce evidence that was available at trial but not proffered." *Id.* at 21. The late 19th/early 20th century Sanborn maps were not known to the City, and not discovered until July 2007. Second, "It is improper for a party to move to amend in order to advance new theories based on evidence that was proffered at trial or to reassert arguments already rejected by the court." *Ibid.* Pocatello meets both tests. Further, the City is not advancing a new theory but is providing newly discovered evidence in support of priority dates that it has claimed throughout the SRBA proceedings.

DATED this 13th day of December 2007.

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

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

On this 13th day of December 2007, I caused a true and correct copy of the foregoing document to be deposited in an official U.S. Post Office receptacle with proper First Class postage affixed, addressed to the following:

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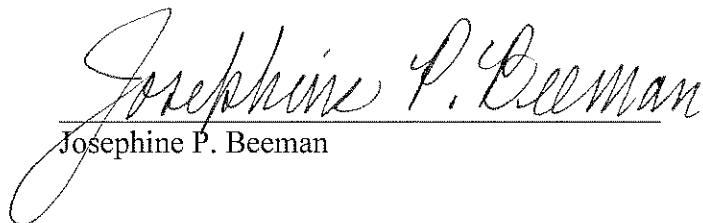
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Josephine P. Beeman

Attachment A (30 subcases)

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
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29-07322
29-07375
29-07450
29-07770
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