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June 25, 2008

RECEIVED

JUN 27 2008

**DEPARTMENT OF
WATER RESOURCES**

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550 West Fort Street, MSC O33
Boise, ID 83724

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Travis L Thompson
113 Main Ave W, Ste 303
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Twin Falls, ID 83303-0485

Director Of IDWR
PO Box 83720
Boise, ID 83720-0098

Judge John Melanson
SRBA District Court
P. O. Box 2707
Twin Falls, ID 83303

Re: *Notice of Errata for Pocatello's June 11, 2008 Notice of Challenge*

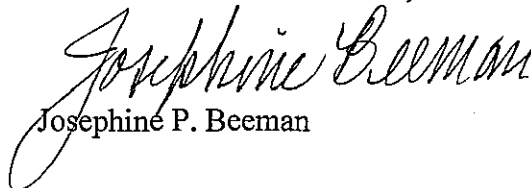
Dear Court and Counsel:

The "errors" corrected by the Notice of Errata for Pocatello's June 11, 2008 Notice of Challenge were the result of: (1) unintended inclusion of unedited material when counsel's work was interrupted by her daughter's emergency hospitalization during the night and morning of June 10/11; and (2) statements regarding transcript preparation that did not properly account for the simultaneous filing of Pocatello's Motion for Stay.

To show the corrected "errors", a copy of the June 11, 2008 Notice of Challenge in tracked format is enclosed with this letter.

Sincerely,

BEEMAN & ASSOCIATES, P.C.


Josephine P. Beeman

Enclosures

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Attorneys for 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**

	)	Subcase Nos. 29-271 et al. (see Attachment A)
In Re SRBA	)	
	)	<u>NOTICE OF ERRATA FOR</u>
Case No. 39576	)	<u>CITY OF POCATELLO'S</u>
	)	<u>NOTICE OF CHALLENGE</u>

I. INTRODUCTION

City of Pocatello, and by and through its counsel of record, pursuant to Administrative Order 1, subpart 13, hereby gives notice of challenge to the Special Master's Order Denying Motion to Alter or Amend dated May 28, 2008. The affected subcases are state law-based SRBA claims filed by Pocatello.

The Special Master's *Order Denying Pocatello's Motion to Stay its State Law-Based Claims* pending determination of the City's federal law claim 29-11609 was entered on January 14, 2005. The Special Master's *Order on Summary Judgment*, entered on August 18, 2006, granted in part and denied in part the City of Pocatello's Motion for Summary Judgment on IDWR's Authority Under 42-1425. The Special Master's *Second Order on Summary Judgment*, entered on February 16, 2007, granted in part and denied in part the City of Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. 42-1425. The Special Master's oral Order granting the State's Motion to Strike Affidavit of

Josephine P. Beeman in Support of Pocatello's Post-trial Brief was issued May 4, 2007. The Special Master's REPORT AND RECOMMENDATION and ORDER on MOTION TO RECONSIDER¹ was filed on October 2, 2007.² The City of Pocatello's Motion to Alter or Amend was filed on November 28, 2007. A hearing on the Motion to Alter or Amend was held on February 27, 2008. The Special Master's *Order Denying Motion to Alter or Amend* was filed on May 28, 2008.

II. ISSUES ON CHALLENGE

Pocatello raises the following issues on challenge as they may arise in the Order denying Motion for Stay, the Orders Granting in part and Denying in part Summary Judgments, the Special Master's Report and Recommendation, the Order on Motion to Reconsider, and the Order Denying Motion to Alter or Amend:

1. Because SRBA subcases are tried before the SRBA court without a jury, the appropriate legal standard for Motions for Summary Judgment is the summary judgment standard in non-jury trial cases (the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences) -- not the summary judgment standard for cases to be tried by jury (all facts are to be liberally construed for the non-moving party and any reasonable inferences drawn in that party's favor). It was error to decide Pocatello's Motions for Summary Judgment using the summary judgment standard for cases to be tried by jury.

¹ This Order denied Pocatello's Motion to Reconsider the May 3, 2007 oral Order Granting State's Motion to Strike Affidavit of Josephine P. Beeman in Support of Pocatello's Post-trial Brief.

² An AMENDED MASTER'S REPORT AND RECOMMENDATION and ORDER ON MOTION TO RECONSIDER was filed October 30, 2007 which made no changes to the October 2, 2007 Special Master's Report and Recommendation "other than describing the place of use for Pocatello's municipal rights as 'Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law' and deleting references to quarter-quarter legal descriptions in the place of use." This uncontested correction affected 27 of the 30 subcases in the October 2, 2007 Special Master's Report and Recommendation: 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, 29-07322, 29-07375, 29-07450, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, and 29-13639.

A SECOND AMENDED MASTER'S REPORT AND RECOMMENDATION and ORDER ON MOTION TO RECONSIDER was filed November 30, 2007, making uncontested clerical corrections to 29-02401, 29-04221, 29-07450, and 29-13638.

2. Pocatello is not aware of any rule of evidence or principle of law that precludes one party from pointing out as part of its legal arguments the opposing party's legal inconsistencies or changes in position.

3. The Special Master incorrectly characterized legal arguments in cases that have gone to the Idaho Supreme Court as "additional evidence". The Special Master's oral Order granting the State's Motion to Strike Affidavit of Josephine P. Beeman in support of Pocatello's Post Trial Brief (May 4, 2007) and Report and Recommendation and Order on Motion to Reconsider (Oct. 2, 2007; amended Oct. 30, 2007; amended Nov. 30, 2007) incorrectly characterized the exhibits attached to the Affidavit of Josephine P. Beeman in Support of Pocatello's Post Trial Brief as impermissible additional evidence.

4. The Court incorrectly adheres to the analysis that I.C. §42-1425, the accomplished transfer statute, does not provide for a change in source. For the purpose of transfers of water rights, the "source" element of a water right is simply an aspect of the "point of diversion".

5. The Court applies an incorrect test, whether Pocatello's senior surface water rights were "closely connected enough" to the ground water wells proposed as alternate points of diversion "to be considered the same source", when evaluating Pocatello's alternate points of diversion for its senior surface water rights.

10. There is no mention of the APA legal standards with respect to IDWR's unpromulgated rules (the transfer guidelines). Court relies on the guidelines in its decision.

~~6. The Court improperly weighed the evidence and expert testimony presented at trial regarding the degree of interconnection within the aquifer.~~

~~7. The Court incorrectly concluded that any change to how water was diverted from Mink Creek and Gibson Jack Creek occurred after 1987.~~

8. The Court improperly required the condition imposed on Pocatello's interconnected well system. ~~This condition was inserted after the licensing stage. The dispute over the condition forces the court to undertake the exact type of complex technical analysis that is properly left for IDWR in administering the water right and is an inappropriate determination at the decree stage for SRBA proceedings.~~

20. Idaho Code § 42-1425 is the applicable law. The "injured" water user has to raise that issue. Those that did settle with Pocatello and the Court cannot base a decision on IDWR's unpromulgated rules to defeat that settlement.

9. The Special Master's decisions do not reference the Idaho Supreme Court decision in *Fremont Madison* which is controlling as to 42-1425.

13. Agencies' errors of law are not subject to collateral estoppel. This is in error as a matter of law

~~10. There is no mention of the APA legal standards with respect to IDWR's unpromulgated rules (the transfer guidelines). Court relies on the guidelines in its decision.~~

11. The decisions do not discuss a standard for review of evidence at trial.

14. The Court's Findings of Fact address IDWR's *prima facie* evidence, with no mention of Pocatello's evidence, except for comments that "no evidence was presented" ... as to various matters.

15. There are no findings about the nature of water system from which Pocatello diverts its water.

7. The Court incorrectly concluded that any change to how water was diverted from Mink Creek and Gibson Jack Creek occurred after 1987.

6. The Court improperly weighed the evidence and expert testimony presented at trial regarding the degree of interconnection within the aquifer.

21. The Court allowed in IDWR testimony counter to the Director's Report, over the objection of Pocatello. This is an error of law on that grounds and also on the grounds that the testimony is counter to the legal standards which attach to 42-1425.

17. The decisions as to the priority dates for the Alameda wells are counter to the reasonable evidence standard. There was evidence about population growth and number of wells from which priority can be inferred under the reasonable evidence standard.

~~12. This is not a standard at the SRBA court, and the only one I am Pocatello is aware of is in IDWR's statements that are based on its unpromulgated guidelines regarding transfers. The court Court should not legitimize what is counter to the APA.~~

~~13. Agencies' errors of law are not subject to collateral estoppel. This is in error as a matter of law.~~

~~14. This section appears to address IDWR's *prima facie* evidence, with no mention of Pocatello's evidence, except for comments that "no evidence was presented" ... as to various matters—which may be a reference to the Master's factual conclusions regarding the totality of the evidence.~~

~~15. No findings about nature of water system from which Pocatello diverts its water.~~

~~16. The Court has an obligation to consider the evidence before it which includes Pocatello's trial evidence. The decisions do not consider Greg Sullivan's testimony (Spronk Water Engineers) and the interconnection of the sources. IDWR did no investigation. This is the standard from IDWR's transfer guidelines which can't cannot be applied because they have not been promulgated under the APA.~~

~~17. The decisions as to the priority dates for the Alameda wells are counter to the reasonable evidence standard. There was evidence about population growth and number of wells from which priority can be inferred under the reasonable evidence standard.~~

~~18. Pocatello's evidence burst the *prima facie* bubble and IDWR had no countering evidence. testimony Testimony is only part of the evidence in the record. Error of law?~~

~~19. The different source conclusion is unsupportable. If supportable, then this decision stands for the proposition that the wells are not connected to the surface water system either upstream or downstream from the LPRVA.~~

~~20. Idaho Code § 42-1425 is the applicable law. The "injured" water user has to raise that issue. Those that did settled with Pocatello, and the court Court cannot base a decision on IDWR's unpromulgated rules to defeat that settlement.~~

~~21. The court Court allowed in the testimony counter to the Director's rReport, in over the objection of Pocatello. Assign tThis an is an error of law on that grounds and also on the grounds that this is counter to the legal standards which attach to 42-1425.~~

III. TRANSCRIPTS

Transcripts of the following proceedings have already been prepared and provided to the parties and to the Court:

- January 12, 2005: Hearing on Pocatello's Motion for Stay its State Law-Based Claims pending determination of the City's federal law claim 29-11609;
- January 17, 2007: Hearing on Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. 42-1425;
- February 26-March 1, March 8, 2007: Trial

In accordance with Administrative Order 1, § 13(d), Pocatello intends to request Aa
transcript of the hearing on Pocatello's Motion to Alter or Amend, held February 27, 2008, is
being requested and will be and to provided the transcript to the parties and the SRBA court.
under separate cover. Due to Pocatello's pending proceedings before the United State Supreme

Court reflected in the City's Motion for Stay, filed with the Notice of Challenge and discussed below. Pocatello intends to wait until a decision is issued on the Motion for Stay before proceeding further with the formal transcript request and the accompanying fee No other hearing transcript is requested for purposes of Pocatello's Notice of Challenge.

IV. MOTION FOR STAY

A Motion to Stay accompanies this Notice of Challenge. The Motion explains that Pocatello's federal-law SRBA claim 29-11609 is now pending proceedings before the United States Supreme Court. That appeal may moot the recently concluded proceedings before Special Master Bilyeu for these thirty (30) state-law claims or may require the Special Master's Report & Recommendation to be modified to be consistent with the mandate on appeal.

Dated this 11th day of June 2008.

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

By _____
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
29-07119
29-07322
29-07375
29-07450
29-07770
29-11339
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13637
29-13638
29-13639

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of June 2008, I caused a true and correct copy of the foregoing **CITY OF POCA TELLO'S NOTICE OF CHALLENGE** to be served on the following by the method indicated:

AMERICAN FALLS RESERVOIR DIST #2

Represented by:
C THOMAS ARKOOSH
DAVID HEIDA
301 MAIN ST
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GOODING, ID 83330
Phone: 208-934-8872

Via email

STATE OF IDAHO

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

Via U.S. mail

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT

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

Via email

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

Via U.S. mail

UNITED STATES OF AMERICA

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NAT'L RESOURCES
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BOISE, ID 83724

Via U.S. mail

MINIDOKA IRRIGATION DISTRICT

Represented by:
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Phone: 208-678-3250

Via email

MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY

Represented by:
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Via email

Josephine P. Beeman