

Josephine P. Beeman #1806
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
office@beemanlaw.com

RECEIVED
JUN 08 2009

DEPARTMENT OF
WATER RESOURCES

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**

In Re SRBA	)	Subcase Nos. 29-271 et al. (see Attachment A)
	)	
	)	CITY OF POCATELLO'S
Case No. 39576	)	OPENING BRIEF ON CHALLENGE
_____	)	

In response to the Special Master's rulings in the above captioned subcase,¹ including the May 28, 2008 *Order Denying Motion to Alter or Amend*, the City of Pocatello (Pocatello, or the City), by and through its counsel of record, Beeman & Associates, P.C., submits this Opening Brief in Support of Challenge.²

STATEMENT OF THE CASE

Pocatello's Challenge is both factually and legally complicated; but at heart, it is a relatively simple story. Pocatello is responsible for providing water to its municipal customers and citizens, who depend on the water for purposes ranging from drinking water to fire

¹ Pocatello challenges the following rulings or orders issued by the Special Master: (in chronological order) (1) *Order on Summary Judgment*, entered August 18, 2006; (2) *Second Order on Summary Judgment*, entered February 16, 2007; (3) 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*, issued May 4, 2007; (4) the *Special Master's Report and Recommendation and Order on Motion to Reconsider*, filed October 2, 2007; (5) the *Amended Master's Report and Recommendation and Order on Motion to Reconsider*, filed October 30, 2007; (6) the *Second Amended Master's Report and Recommendation and Order on Motion to Reconsider*, filed November 30, 2007; and finally, (7) the *Order Denying Motion to Alter or Amend*, entered May 28, 2008.

² The Opening Brief on Challenge will refer to Pocatello's extensive post trial briefing for detailed factual and legal analyses that are summarized here.

protection. To ensure reliable daily operations and to respond to emergencies, Pocatello's water delivery system is both interconnected and redundant. Interconnected wells serve the entire culinary delivery system and can replace each other's operation when a well fails or is under repair.

This operation enables Pocatello to provide uniformly for the public health and safety needs of its customers/citizens within the City's service area. All parts of the service area – from the oldest to the newest -- share equally in the right to water delivery to meet public health and safety needs and as benefited by the City's senior priority water rights.

STATEMENT OF THE ISSUES

A. Consideration of Complex Factual Matters in Pocatello's Trial Below.

1. Was it error as a matter of law for the Special Master to approve IDWR's condition on ground water rights for Pocatello's interconnected well system when consideration of the condition required proceedings counter to the processes endorsed by the Idaho Supreme Court decisions in *Fremont-Madison*³ and *American Falls*?⁴

B. Conditions on the Water Rights for the Interconnected Well System.

1. Was it error as a matter of law for the Special Master to conclude that Pocatello could not have its interconnected wells decreed as alternate points of diversion for its municipal groundwater rights under the accomplished transfer statute unless the decree included a condition to protect junior water rights?
2. Did the Special Master commit error and impermissibly constrain Pocatello's exercise of its water rights by recommending several of Pocatello's groundwater rights claimed under the accomplished transfer statute with condition language that identifies nonexistent wells?

³ *Fremont-Madison Irr. Dist. & Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996)(hereinafter *Fremont-Madison*).

⁴ *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007)(hereinafter *American Falls*).

3. Was it an error as a matter of law for the Special Master to conclude that the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* submitted additional evidence in violation of pre-trial orders?
4. Was it an error as a matter of law for the Special Master to conclude that placing a restrictive condition on five wells claimed as alternate points of diversion for Pocatello's interconnected groundwater rights under the accomplished transfer statute did not amount to a collateral attack on Pocatello's approved Formal Transfer No. 5452, which listed the same five wells as alternate points of diversion without the condition?

C. Wells as Alternate Points of Diversion for Surface Water Rights.

1. Was it error as a matter of law for the Special Master to conclude that in order to obtain an SRBA decree for an accomplished transfer claim of groundwater points of diversion for surface water rights, the City of Pocatello must first meet a burden of proof that its surface and groundwater points of diversion draw from the "same source" within these hydraulically connected sources?
2. Did the Special Master err as a matter of law by using incorrect standards of law to determine whether Pocatello's surface water rights on Mink Creek and Gibson Jack Creek were closely connected enough to Pocatello's interconnected groundwater wells to be considered the same source?
3. Did the Special Master incorrectly apply the "substantial evidence" standard of review to conclude that Pocatello did not begin using its interconnected groundwater wells as alternate points of diversion for its surface water rights until after November 19, 1987?

D. Municipal Purpose of Use for Water Right 29-7770.

1. Was it an error as a matter of law for the Special Master to conclude that changing the purpose of use for water right No. 29-7770 from "irrigation" to "municipal" would constitute a collateral attack on a prior license?

E. Priority Dates for Alameda Wells.

1. Did the Special Master incorrectly apply the "substantial evidence" standard of review to conclude that Pocatello's offer of evidence in support of the City's claimed priority dates for water right Nos. 29-13689 and 29-13558 was insufficient to overcome the prima facie evidence in the Director's Report.?

PROCEDURAL BACKGROUND

The City of Pocatello filed 39 claims in the SRBA to confirm and protect the water rights that the City owns and operates for the benefit of its citizens, and to satisfy attendant public health and safety requirements.⁵ Pocatello's federal law claim was denied;⁶ eight of the City's state law claims have been issued partial decrees⁷; and the remaining 30 state law claims⁸ are at issue in this challenge in which Pocatello seeks the following dispositions:

1. The removal of a condition on 18 ground water rights⁹ for the interconnected well system that serves the City's culinary delivery system in-town and on 2 ground water rights¹⁰ for the interconnected well system that serves the City's culinary delivery system for the airport. The condition reads as follows:

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 [description] in the amount of ____ cfs.

2. The decree of 23 alternate points of diversion for 4 surface water rights¹¹ and 21 ground water rights¹² associated with the City's interconnected culinary delivery system;

⁵ The City of Pocatello filed 38 state-law SRBA claims and one federal law SRBA claim to document and obtain a judicial decree for the City's municipal water right(s) as of November 19, 1987, the date of the commencement of the Snake River Basin Adjudication (SRBA).

⁶ The federal law claim 29-11609 which had the potential to moot the City's 38 state-law claims was disallowed in 2008. Idaho Supreme Court No. 33669: In re SRBA Case No. 39576, Subcase No. 29-11609, City of Pocatello, *Appellants*, v. State of Idaho, United States of America, and Shoshone-Bannock Tribes, *Respondents* (February 19, 2008)(rehearing denied April 3, 2008; cert. denied USSC docket 08-135, December 8, 2008).

⁷ Prior to commencement of trial on February 26, 2007 for the City's 38 state law claims, objections were withdrawn or settlements entered for eight of the City's 38 state law subcases: 29-02354, 29-02382, 29-07222, 29-07431, 29-07502, 29-07782, 29-11344, and 29-13636. Partial decrees for these eight subcases became final following final disposition of the Pocatello's federal law claim 29-11609.

⁸ 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, and 29-13639.

⁹ 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.

¹⁰ 29-7450 and 29-13638.

¹¹ 29-271, 29-272, 29-273, and 29-4222.

3. A municipal purpose of use designation for water right 29-7770; and
4. A 1905 priority date for Water Right 29-13558; and a December 31, 1940 priority date for Water Right 29-13639.

STATEMENT OF FACTS

Pocatello provides a population of over 50,000 residents with water.

As of the start of the SRBA, a large amount of the water to supply Pocatello's current population came from the City's large, interconnected well system which has been in operation since before November 19, 1987. The 22 wells integrated in the City's in-town system as of November 19, 1987, are associated with 23 water rights.¹³ A smaller well system supplies water to the municipal airport.¹⁴

No groundwater users in the area of Pocatello's well system or elsewhere filed objections to the City's accomplished transfer claims for its interconnected wells. As of the conclusion of trial in February /March 2007, IDWR had not investigated whether the existing ground water users in the area of Pocatello's well system (which are hydraulically connected to Pocatello's wells) have already sustained damage due to Pocatello's exercise of its alternate points of diversion."¹⁵ The surface water users who participated in the proceedings settled with Pocatello and the City has offered this settlement as an effective resolution of all of the City's objections.

¹² 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.

¹³ The Special Master's report lists the 22 wells (2, 3, 7, 10, 12, 13, 14, 15, 16, 18, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, and 34) that were interconnected to the City's culinary system as of November 19, 1987. It is undisputed that well 44 has been part of the interconnected system since 1999 to replace compromised function due to ground water contamination of some of the 22 wells. The City's concern about the water rights associated with the interconnected wells is limited to the 21 water rights listed in footnote 12, of which 18 (listed in footnote 9) have the condition Pocatello seeks to remove.

¹⁴ *Id.* at 7.

¹⁵ *Special Master's Report & Recommendation and Order on Motion to Reconsider* at 17-18 (October 2, 2007).

The earliest water supplied to the City of Pocatello, since before 1900, came from Mink Creek and Gibson Jack Creek, two major tributaries of the Portneuf River. The Lower Portneuf River Valley Aquifer which is hydraulically connected to Mink Creek and Gibson Jack Creek provided additional supply for the City's interconnected delivery system for culinary water as the City developed municipal wells. From above ground, the Creeks are located between a ¼ mile to a mile from Pocatello's nearest well.¹⁶

The SRBA court has already determined that all sources of water in basin 29 (the Portneuf Drainage) will be administered as connected sources of water within the Snake River Basin, and that all sources of water in basin 29 (except "Spring tributary to Papoose Creek") will be administered as connected sources of water within basin 29.

In making its recommendation (confirmed by the Master) that the City's groundwater wells should not be alternate points of diversion for the City's surface water rights in Mink Creek and Gibson Jack Creek, IDWR referred to its administrative Transfer Processing Memo No. 24 (October 30, 2002).

STANDARD OF REVIEW

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure (I.R.C.P.) and the Idaho Appellate Rules (I.A.R.).¹⁷ The Special Master's conclusions of law are not binding upon the district court, although they are expected to be persuasive.¹⁸ The Court shall adopt the

¹⁶ See Statement of Facts in *Special Master's Report and Recommendation and Order on Motion to Reconsider* at 5-9, (October 2, 2007).

¹⁷ *Administrative Order 1* (AO1), § 1(a).

¹⁸ *North Snake Ground Water District v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002)(citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409 (1997).

Special Master's findings of fact unless they are clearly erroneous.¹⁹ The court must carefully consider objections to the Special Master's report. Where the findings of fact are clearly erroneous, the court may, in whole or in part, adopt the report, modify it, reject it, receive further evidence, or remand the report with instructions.²⁰

A Director's Report for a water right claim is prima facie evidence of the nature and extent of a water right.²¹ An 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.²² Generally, an objector must present "substantial evidence" to overcome the rebuttable presumption established by the Director's Report.²³ 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."²⁴

ARGUMENT

A. It was error as a matter of law for the Special Master to require proceedings that violated the mandates of the Idaho Supreme Court decisions in Fremont-Madison and American Falls.

1. It was improper for the Special Master to hold a trial on injury and interconnection because, according to the American Falls decision, questions involving issues such as conjunctive management and interconnection should be dealt with by IDWR in administration and are not properly dealt with in the SRBA.

¹⁹ AO1, § 13(f); I.R.C.P. 53(e)(2).

²⁰ *Id.*

²¹ I.C. § 42-1411(4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002).

²² *Id.*

²³ *Clear Springs Foods, Inc.*, 136 Idaho 761 at 764, 40 P.3d at 122.

²⁴ *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

The condition imposed by IDWR has improperly focused attention on factual matters that do not belong in the SRBA according to the Idaho Supreme Court's decision in *American Falls*. Indeed, IDWR took the position in the *American Falls* case that it is only later "in subsequent conjunctive administration of individual rights in response to a delivery call" that the Director should determine the highly complex facts that relate to the specific interrelationships or the degree of connectivity between specific water rights.²⁵ Pocatello agrees, as did the Idaho Supreme Court, when it stated that "water rights adjudications neither address, nor answer, the questions presented in delivery calls."²⁶ These questions include "information on how each water right on a source physically interacts or affects other rights on that same source."²⁷ They also include "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources."²⁸ The Court's conclusion in *American Falls* was, "[t]hat is precisely the reason for the conjunctive management rules and the need for analysis and administration by the Director."²⁹ IDWR's position as to the accomplished transfers for

²⁵ See Brief of Defendant-Appellant at 32, *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, Nos. 33249, 33311, and 33399 (Idaho Nov. 20, 2006) ("Adjudicating a water right is not the same as administering a water right, and while the presumption of interconnection applies to adjudicating water right claims in the SRBA, it does not provide a sufficient factual basis for the subsequent conjunctive administration of individual rights in response to a delivery call, as the SRBA court recognized.").

²⁶ *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

²⁷ *American Falls*, 143 Idaho at 862, 154 P.3d 433, 448 (citing *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997)).

²⁸ *Id.*

²⁹ *Id.*

Pocatello's SRBA state law claims is directly opposite to IDWR's position and the decision in *American Falls*, and should be disallowed.³⁰

B. The Court should reverse the Special Master and recommend Pocatello's in-town culinary groundwater rights free of the limiting condition imposed by IDWR.

1. Because the Idaho accomplished transfer statute limits inquiries into injury to those situations where a party objects to the accomplished transfer based on a specific injury, and no such parties objected to Pocatello's accomplished transfer, IDWR did not have the authority impose an injury-related condition on Pocatello's water rights.

No injury analysis should have been triggered in the review of Pocatello's accomplished transfers based on a plain reading of I.C. § 42-1425 and *Fremont Madison*. As the claimant under I.C. § 42-1425, Pocatello was not required to prove by a preponderance that the change did not injure any other water right which was in existence as of the date of the change because the court in *Fremont-Madison* specifically rejected this interpretation as counter to the plain language of I.C. § 42-1425.³¹ Instead, someone other than the claimant must first come forward and object to the accomplished transfer. The procedure for opposition to an accomplished transfer requires at least two parties: the claimant and an objector, specifically an objector claiming injury. Only at that point, with two parties, could there be an assignment of the burden of proof.³² Because there was never an objector claiming injury from Pocatello's state-law claims for accomplished transfers, Pocatello was never in a position to have the burden of proof

³⁰ See Brief of Defendant-Appellant at 32, *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, Nos. 33249, 33311, and 33399 (Idaho Nov. 20, 2006).

³¹ *Freemont-Madison*, 129 Idaho at 461-462.

³² *Id.*

to show whether its accomplished transfer “injured a water right existing on the date of the change.”³³

Even if an injury analysis had been appropriate, the Special Master erred in concluding that other water right holders would be injured by Pocatello’s accomplished transfer because Pocatello’s Settlement with the Surface Water Coalition nullifies IDWR’s concerns about injury. Furthermore, IDWR is primarily concerned with future injury, which is not a proper concern under the terms of I.C. § 42-1425.³⁴ Pocatello’s interconnected well system has been in operation since before the commencement of the SRBA and for more than 20 years following the commencement of the SRBA, and the City and has been operating some of its wells since the early 1900s. Injury as manifest as IDWR’s concerns would be evident by now, considering how long Pocatello has operated its interconnected well system. No one did come forward to assert injury, so it is not unreasonable to assume that there has been none that was not dealt with in the Stipulation with the Surface Water Coalition, or cannot be better dealt with in administration, rather than by the use of a restrictive condition.

2. The condition language inaccurately identifies nonexistent wells and should be removed because it prevents proper and effective operation of Pocatello’s interconnected system of wells.

The Special Master’s Report notes that, “[t]he 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.”³⁵ On the contrary, IDWR’s condition

³³ I.C. § 42-1425.

³⁴ See, *Stipulation and Agreement Between Pocatello and the Surface Water Coalition in Pocatello’s SRBA Subcases 29-271 et seq.* (February 26, 2007).

³⁵ *Special Master’s Report & Recommendation and Order on Motion to Reconsider* at 19 (October 2, 2007).

language lists several wells that no longer exist, specifically: Alameda well 6 and Alameda well 7 (listed in the condition for water right 29-11339 which has a priority of December 31, 1961), Pocatello well 4 (listed in the condition for water right 29-13561 which has a priority of August 31, 1931), Pocatello well 5 (listed in the condition for water right 29-13560 which has a priority of December 31, 1926), and Pocatello well 6 (listed in the condition for water right 29-13562 which has a priority of December 31, 1936).³⁶ In times of priority administration, when the City is most dependent on its senior water rights, the portion of the water rights associated with these wells would not be able to be diverted because the wells no longer exist; the water right amount associated with the non-operable well would be unusable.

As it is written, the condition prevents full use of Pocatello's recommended water rights, and so should be removed.

3. The Special Master's Order on Reconsideration incorrectly characterized legal arguments as impermissible additional evidence.

The Special Master improperly struck Exhibits 1, 2, and 3 to the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief*³⁷ in her Oral Order issued on May 4, 2007.³⁸ Throughout the SRBA proceedings related to its state law claims, Pocatello has repeatedly raised the overarching issue that IDWR changed its position regarding accomplished transfers under I.C. § 42-1425. The exhibits were not "new evidence" constituting a "trial by ambush" as described in *Shelak v. White Motor Co.*³⁹ Rather, Pocatello simply called the court's attention to

³⁶ See Pocatello's Post Trial Brief at 33-35, *In re SRBA Case No. 39576*, Subcase Nos. 29-00271 et al. (April 30, 2007)(discussing the testimony of Harold Hargreaves and Jay Ulrich).

³⁷ See *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* at 1 (Apr. 30, 2007).

³⁸ See *Special Master's Report and Recommendation and Order on Motion to Reconsider* at 3 (Oct. 2, 2007).

³⁹ See *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978).

prior pleadings submitted by the State and IDWR to illustrate discrepancies between those prior pleadings and the State's and IDWR's legal positions with respect to Pocatello's I.C. § 42-1425 accomplished transfers in these subcases.

4. The restrictive condition placed on Pocatello's interconnected groundwater rights should be removed because it constitutes an impermissible collateral attack on Pocatello's approved Formal Transfer No. 5452.

It is extremely important that the city's water rights be treated and administered uniformly. Uniform treatment is not possible with the condition. To illustrate, under Pocatello's Formal Transfer 5452, completed in 1999, several wells were listed as alternate points of diversion for the three water rights at issue in that transfer.⁴⁰ Specifically, Wells 7, 10, 12, 13, and 44 do not have the condition when they are listed as points of diversion for 29-2274, 29-2338, and 29-7375.⁴¹ These wells are conditioned, however, in the Special Master's Recommendation issued on October 2, 2007.⁴² What this means in terms of properly administering the water rights in times of a call is confusion. The same wells have the condition in relation to some water rights but not others. This can only confuse and complicate administration and illustrates the fact that the condition is inappropriate and that the issues involved should not be dealt with in the SRBA, but in an administrative setting, as pointed out in the *American Falls* case. Furthermore, by adding the condition to wells that were approved without the condition in a Formal Transfer, IDWR impermissibly collaterally attacks the Formal Transfer.

⁴⁰ Formal Transfer No. 5452 makes up the last two pages of IDWR's Exhibit 11; see *Pocatello's Post Trial Brief* at 33.

⁴¹ In addition, well 39, which is one of the wells used for the airport culinary system is unconditioned in Transfer No. 5452 but does include the condition in the *Special Master's Report and Recommendation and Order on Motion to Reconsider* (Oct. 2, 2007).

⁴² See *Special Master's Report and Recommendation and Order on Motion to Reconsider* (Oct. 2, 2007).

C. It was error for the Special Master to find that Pocatello's groundwater wells were not properly points of diversion for its surface water rights because the issue of interconnection was not properly considered under *American Falls*, the Special Master applied incorrect standards to determine interconnection, and the Special Master incorrectly determined that a request for the alternate points of diversion amounted to a change in source.

It was error of law as a matter of law for the Special Master to conclude that in order to obtain an SRBA decree for an accomplished transfer claim of groundwater points of diversion for surface water rights, that the City of Pocatello must first meet a burden of proof that its surface and groundwater points of diversion draw from the "same source" within these connected sources. The SRBA court has already determined that all sources of water in basin 29 will be administered as connected sources of water within the Snake River Basin, and that all sources of water in basin 29 (except "Spring tributary to Papoose Creek") will be administered as connected sources of water within basin 29. Furthermore, the *American Falls* decision prohibits judicial intervention into matters statutorily entrusted to IDWR and specifically identifies the issue of interconnection as one that should be dealt with administratively rather than in the SRBA.⁴³

Furthermore, when evaluating whether the surface and groundwater sources were sufficiently interconnected to be the same source, an inquiry which should not have been undertaken according to the Court in *American Falls*, the Special Master applied standards which should not have been applied to Pocatello's accomplished transfers. The Special Master applied the law from the *Clear Springs* case, but *Clear Springs* dealt with the degree of interconnection between two surface sources, not to the interconnection of surface and groundwater.⁴⁴ Because the two

⁴³ See Brief of Defendant-Appellant at 32, *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, Nos. 33249, 33311, and 33399 (Idaho Nov. 20, 2006), supra note 2625.

⁴⁴ See *Clear Springs Foods*, supra note 22; Special Master's Report and Recommendation and Order on Motion to Reconsider at 10-13 (Oct. 2, 2007).

situations are highly distinguishable, the standard should not be applied to Pocatello's request for accomplished transfers.

The Special Master also discussed IDWR's Transfer Processing Memo No. 24, and used it as a standard by which to judge the proper degree of interconnection between the two alleged sources.⁴⁵ Because the Special Master applied the standard from TPM No. 24, which is a guidance document and which has not been approved under the proper procedures set out in the Administrative Procedures Act, the Special Master erred as a matter of law. Furthermore, it was an error of law for the Special Master to conclude that the sources were not interconnected because Pocatello's expert testimony sufficiently rebutted IDWR's prima facie evidence regarding interconnection under the substantial evidence standard.

D. It was error as a matter of law for the Special Master to conclude that changing the purpose of use for water right No. 29-7770 from "irrigation" to "municipal" would constitute a collateral attack on a prior license because the SRBA can review and correct an agency's errors of law in this proceeding.

Water Right 29-7770 has only been used for the City's biosolids program. It has the same use as Water Rights 29-7118 and 29-7119, which IDWR stipulates both have municipal purposes of use. By stipulating to this, IDWR admits that legally the wells associated with Pocatello's biosolids program have municipal purposes of use.⁴⁶ Mr. Herrick's testimony established that water rights associated with the biosolids program have always exclusively been used for land application of biosolids.⁴⁷ This application is quite distinct from irrigation of the land. Jay Ulrich's testimony establishes that at the time 29-7770's application for permit was submitted,

⁴⁵ *Special Master's Report and Recommendation and Order on Motion to Reconsider* at 10-13 (Oct. 2, 2007).

⁴⁶ See *Pocatello's Post-Trial Brief* at 40-41 (discussing Mr. Herrick's and Mr. Ulrich's testimony regarding water right No. 29-2770).

⁴⁷ *Id.*

the biosolids plant was already in operation. Pocatello requested the irrigation designation in order to expedite the long-overdue licensing of 29-7770.

Pocatello is not arguing a change in use for water right 29-7770. Instead, Pocatello is arguing the use has always been within the broad definition of "municipal", and that legally this right must be changed to a more appropriate descriptor. To the extent this corrects an error of law in the license IDWR issued for this right, IDWR is not estopped to correct its errors of law.⁴⁸ The Department, by its administrative actions, cannot perpetuate mistakes of law or fact.⁴⁹ It is an error of law for the purpose of use to be listed as municipal because the purpose of use for water right 29-7770 is exactly the same as that of water rights 29-7118 and 29-7119, which the Special Master and IDWR have agreed are municipal. It is appropriate for the court to correct this mistake of law, despite the way in which the license was obtained.

E. The Special Master incorrectly applied the "substantial evidence" standard of review to conclude that Pocatello's offer of evidence in support of the City's claimed priority dates for water right Nos. 29-13689 and 29-13558 was insufficient to overcome the prima facie evidence in the Director's Report.

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.⁵⁰

⁴⁸ See *Pocatello's Post-Trial Brief* at 39-42..

⁴⁹ See, *Kelso & Irwin, P.A. v. State Insurance Fund*, 134 Idaho 130, 138 (2000).

⁵⁰ 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.

Municipal rights must be proved by the same quantum of evidence as other water rights: substantial evidence.⁵¹ IDWR did not base its priority recommendation on the substantial evidence provided by Pocatello and the Special Master did no thorough analysis of the evidence offered.⁵²

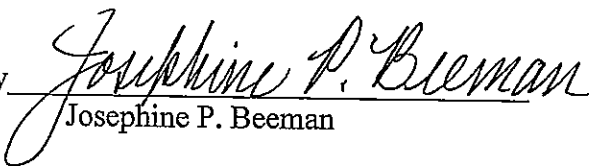
CONCLUSION

Pocatello respectfully requests this court to reverse the Special Master's decision and enter:

- Partial decrees without condition for 18 ground water rights for the interconnected well system that serves the City's culinary delivery system in-town and 2 ground water rights for the interconnected well system that serves the City's culinary delivery system for the airport;
- Partial decrees for 23 alternate points of diversion for 4 surface water rights and 21 ground water rights associated with the City's interconnected culinary delivery system;
- A partial decree for municipal purpose of use designation for water right 29-777; and
- Partial decrees with a 1905 priority date for Water Right 29-13558; and a December 31, 1940 priority date for Water Right 29-13639.

Dated this 5th day of June 2009.

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

By 
Josephine P. Beeman

⁵¹ See *Clear Springs Foods, Inc.*, 136 Idaho 761 at 764, 40 P.3d at 122., cited at page 6 of this Brief (Standard of Review).

⁵² See Timeline of water rights 29-13558 and 29-13639 at page 44 of *Pocatello's Post-Trial Brief*.

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 5th day of June 2009, I caused a true and correct copy of the foregoing document 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
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

Via U.S. Mail

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 U.S. Mail

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
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

Via U.S. mail

MINIDOKA IRRIGATION DISTRICT

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

Via U.S. Mail

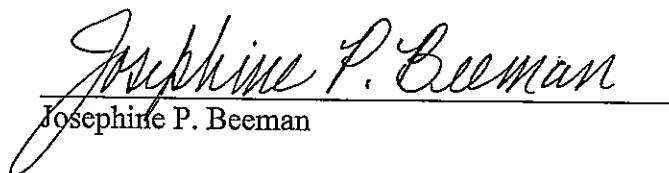
MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 207-733-0700

Via U.S. Mail

Christopher H. Meyer
John M. Marshall
Givens Pursley LLP
P. O. Box 2720
Boise, ID 83701-2720

Via U.S. Mail


Josephine P. Beeman