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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	Subcase Nos. 29-00271, <i>et al.</i> (see attached Exhibit A)
	)	
	)	
	)	
Case No. 39576	)	STATE OF IDAHO'S RESPONSE TO CITY OF
	)	POCATELLO'S OPENING BRIEF ON CHALLENGE
	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general and submits the STATE OF IDAHO'S RESPONSE TO THE CITY OF POCATELLO'S OPENING BRIEF ON CHALLENGE in the above-entitled matter.

INTRODUCTION

This controversy relates to the determination of the water rights of the City of Pocatello, hereinafter ("Pocatello") acquired under state law. In its Opening Brief on Challenge ("Opening Brief"), Pocatello seeks the following dispositions: (1) removal of a condition on 21 ground water rights for the Pocatello's interconnected well systems; (2) the decree of 23 alternate points of diversion for the afore-mentioned 21 ground water rights as well as 4 surface water rights; (3)

a municipal purpose of use designation for water right 29-7770; and (4) priority dates of 1905 and 1940 for water rights 29-13558 and 29-13639, respectively. Based upon the arguments set forth herein, the State respectfully requests that Pocatello's challenge be denied.

ARGUMENT

1. The condition on Pocatello's water rights is necessary to prevent injury to other water rights and was correctly investigated and analyzed by the Special Master.

A. The condition on Pocatello's water rights is necessary to prevent injury to other existing water rights.

In the matter at hand, Pocatello claimed all of its wells as alternative points of diversion for each of its groundwater rights. The Idaho Department of Water Resources ("IDWR") recommended the water rights as Pocatello claimed them, but included a condition stating:

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

Pocatello objected to the condition, stating that there was no injury to other water users as a result of Pocatello's interconnected well system, in place prior to 1987. Contrary to Pocatello's assertion, the record demonstrates that the condition is necessary to avoid injury. The Director of IDWR at the time, Dave Tuthill, testified as to the necessity for the recommendation as follows:

Our understanding of our responsibility through the adjudication is to appropriately condition a water right so that it cannot be expanded over time inappropriately... 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 compared with diversion from another location.

Tr. Vol. II, p. 231, L. 24 through p. 232 L. 25.

David Tuthill explained the concerns about well interference as follows:

Q [GARRICK BAXTER]. Are there specific examples under which that you think – you can think that injury could arise with regards to alternate points of diversion as recommended here in the – in the Department's recommendation here and as to neighboring water rights?

...

A. Yes. As an example, if this is a municipal well, let's say, for example, the priority date of this well is June 1st, 1970, as an example, and let's say, for an example, historically this well was pumped for an average of 12 hours per day. And let's say, for example, that this well is – has been drilled next to another existing domestic well with a priority date of 1950. And let's say, for example, that the history of this municipal well is to have been pumped for 12 hours per day without problem and the system has reached an equilibrium in the area and the domestic well has never been injured as a result of pumping of this junior municipal well.

Let's say, for example, that this well is combined through the adjudication process with another well, which it's interconnected with, that has a priority date of 6/1/1930. And this well is pumping 12 hours per day.

As the city is small, say, in the year 2006, this has not been a problem for the domestic user. All of these wells are in a system where they've reached equilibrium. There has been no local interference problem. Each well has – creates its own draw-down of the aquifer. But with the existing pumpage, there's really – we have never seen a problem with local interference.

Let's say in the year 2010 the pumpage of this well increases to 24 hours per day. As the system has – as the city has grown, there's a greater need for water, and this change from 12 hours per day to 24 hours per day has increased the draw-down in this well.

And for the first time now the domestic user experiences a local interference problem. And the domestic user historically in experiencing this problem would have had an option to go to the City and to say, 'Hey, your 1970 well is interfering now. It hasn't historically. But now that you're pumping 24 hours per day and there's no recovery of the system, this well now is interfering with my 1950 well.'

So the domestic user might say, 'Help me out, provide some remedy municipal well.' Which if this well were by itself and not interconnected to other wells, it would have a 1970 priority date. The 1950 could possibly seek some compensation, could seek some help.

However, if through the adjudication process we've identified another well that's – that's on this system, what the municipal well provider could say is, 'Well, wait a minute, We're actually not diverting our 1970 priority date at this location. We're diverting our 1930 priority date at this location. So actually, domestic user, while you have a 1950 priority date, we're declaring that we're diverting our 1930 priority date from this location so we're senior relative to well interference.'

So the condition that we crafted was, in part, to address this situation. In part the condition states – the intended statement is that relative to local interference, as in this situation, the priority date for this well would be 6/1/1970, and not 6/1/1930.

Tr. Vol. II, p. 236, L. 5 through p. 239, L. 12. I

David Tuthill also testified as to his concerns about conjunctive administration:

Q [GARRICK BAXTER]. Mr. Tuthill, the Department's concern about conjunctive administration, currently does the Department have a boundary for the Eastern Snake Plain Aquifer?

A. Yes.

Q. ...

Does the City of Pocatello have wells outside the boundary of the Eastern Snake Plain Aquifer?

A. Yes.

...

Q. Okay. Can you describe a situation in which you see injury arising, given the one well inside the ESPA boundary and series of wells outside the ESPA boundary?

A. Yes. As an example, in the example I've depicted here, if -- depending on at any given time where that line is drawn -- and that line can change -- if there's a well inside the line -- and there is one right now on where it has drawn -- that has a junior priority date, then -- and if there are wells outside the line with senior priority dates, then the City of Pocatello -- for example, in this case -- could argue that they could continue to pump the well that's inside the boundary under a senior priority date water right, thus not being equitable to other wells that are within the ESPA boundary, wherever that is drawn.

Q. Mr. Tuthill, can you explain that? I don't --

A. In other words, I'll state it another way. Within the Eastern Snake Plain Aquifer there might be a call on water rights of a certain date. Let's say, for example -- let's say, for example there's a call for water rights prior to 1975.

If this call were to occur within this area, then water rights junior to 1975 would have to either cease pumping or be part of a mitigation plan. Water rights senior to 1975 wouldn't be curtailed in the same way.

So if the City of Pocatello were able to say, 'Well, the priority date that we're using today at well No. 1 is 1960,' then that well could continue pumping even though it was originated as a 1975 priority water right.

Tr. Vol. II, p. 244, L. 14 through p. 245, L. 4; Tr. Vol. II, p. 250, L. 19 through p. 252, L. 2.

In their Amicus Brief filed April 13, 2009, United Water Idaho, City of Nampa and City of Blackfoot also described factual scenarios in which the condition recommended by the Director would be necessary to protect other water users from injury or to preserve the Director's ability to administer the rights. The State concurs with the analysis therein of how the condition

would affect administration of Pocatello's water rights under the various scenarios. The condition simply functions to protect other water users when Pocatello's use of its wells as alternative points of diversion would cause injury. The condition is necessary to ensure that alternative points of diversion are not used as a mechanism for avoiding administration on the basis of priority and historical use. In determining whether the condition should be included in the partial decrees, therefore, the Special Master was obliged to investigate whether the condition was necessary to the exercise of the right to avoid injury to existing water rights.

- B. The Special Master properly addressed the issue of injury in analyzing the condition recommended by the Director for Pocatello's water rights.

Pocatello claims that the Special Master erred as a matter of law by holding a trial on the issue of injury in determining whether the condition recommended on Pocatello's water rights was necessary to administer the water rights. Pocatello cites *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2006), as prohibiting the Special Master from hearing evidence regarding injury and interconnection of water rights. Contrary to the City of Pocatello's contention, there was no discussion by the Court in *American Falls* about what the SRBA can or should consider in issuing a partial decree; the Court in *American Falls* merely stated 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." 143 Idaho at 877, 154 P.3d at 448. In this case, where Pocatello was protesting a condition recommended by the Director, it was appropriate for the Special Master to review the issue of injury in determining whether the condition was necessary.

- C. The Special Master properly analyzed the issue of injury in determining the necessity of the condition.

Pocatello also argues that the Court should reverse the Special Master and recommend Pocatello's rights without the limiting condition recommended by the Department because the statute authorizing accomplished transfers limits inquiry into injury to situations where a party objects to the transfer. This is an incorrect reading of the accomplished transfer statute. Idaho Code § 42-1425 states that certain changes to a water right may be claimed in a general adjudication "provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right." The statute goes on to outline the procedure for dealing with objections to a change under the statute, but does not *limit* inquiry into injury to only those cases where there has been an objection.

The Director is authorized to include in his report on a water system "(i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." Idaho Code § 42-1411. In the matter at hand, the Director provided testimony that use of alternative points of diversion without a condition limiting diversion by priority and diversion rate could be injurious to other existing water rights. Furthermore, the Special Master noted that "[w]here 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." Amended Master's Report and Recommendation and Order on Motion to Reconsider, issued October 30, 2007 ("Amended Report"), p. 19.

The language in the condition serves to maintain the priority associated with each of Pocatello's wells while allowing the flexibility and efficiency of an interconnected well system.

----- This is a necessary protection of other existing water users and for the Director's administration -----
of the water right, and does not affect Pocatello's rights adversely. In fact, the condition merely ensures that Pocatello will divert its water in accordance with the prior appropriation doctrine. Finally, as noted in the Special Master's Amended Report, IDWR would not have recommended the alternative points of diversion without the condition. Amended Report, p. 7.

The Special Master's findings with regard to the necessity of the condition are well supported in the Amended Report. The Court shall adopt the Special Master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2). Pocatello has presented no evidence that the Special Master erred in recommending that the condition be included on the Pocatello's water rights, therefore the Court should uphold the Special Master's recommendation. Alternatively, should the Court determine that the water rights should be decreed without the condition, the State respectfully asks that the rights not be decreed as alternative points of diversion.

- D. The condition as it exists on water rights for which certain wells do not exist does not preclude Pocatello from diverting under those water rights.

The condition recommended by IDWR does not prevent Pocatello from using this water right, but protects other water rights from injury. To explain this, it is helpful to examine a hypothetical scenario. First, assume a municipality has Water Right #1, which was developed at Well A in 1955 for 2.0 cfs. Next, assume you have a domestic water user with Water Right #2, which was developed at Well B in 1970, several miles away from Well A. Now assume that the municipality has Water Right #3, which was developed in 1980 at Well C for 1.5 cfs and Well C is near Well B. Further assume that the municipality's water delivery system is interconnected and Water Right #1 lists both Well A and Well C as points of diversion. Finally, assume Well A

is eventually abandoned by the municipality and the municipality now wants to divert the full 3.5 cfs through Well C.

Absent IDWR's recommended condition on interconnected rights with accomplished transfers of the points of diversion, there would be no record of the original development for interconnected water rights. IDWR's recommended condition protects other water users by identifying how much water was developed under each water right at each original well. Without this history, it would be difficult, if not impossible, for IDWR to evaluate injury to other water rights if a municipality consolidates its water rights at fewer wells. Under the above hypothetical, if the increase in pumping from Well C from 2.0 cfs to 3.5 cfs causes well interference for owner of Well B, the owner would have a difficult time getting relief from that injury without IDWR's recommended condition in the water rights. A municipality could argue that they are entitled to withdraw the full 3.5 cfs of their water rights without concern for the historical diversion rate. And while the increase in pumping in the hypothetical scenario above is small, the impact of consolidation could be much greater for municipalities who hold a large portfolio of interconnected water rights. The condition recommended by IDWR ensures that consolidation of water rights at individual wells will not injure other water rights.

The original legal description for the wells also comes into play in times of small geographically limited administration. The original legal description is important so that water rights developed outside the area of administration are not transferred into the area of administration. If Water Right #1 was developed outside the current area of administration but Water Right #3 was developed inside the area of administration, the Department would view the use of Water Right # 1 at Well C as injury to water right rights within the area of administration that have a priority date between Water Right #1 and Water Right #3, such as Water Right #2. In

conclusion, it is appropriate for municipalities to have flexibility in their delivery systems, but that flexibility should not come at the expense of injury other water users.

2. The Special Master properly struck exhibits of the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* that constituted impermissible additional evidence.

Pocatello asserts that IDWR has changed its position with regard to accomplished transfers. Following trial, the Pocatello filed an affidavit in which it submitted as exhibits prior pleadings submitted by the State and IDWR. Pocatello states that the exhibits were "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." Opening Brief, p. 12. Pocatello claims that the Special Master incorrectly characterized the exhibits as evidence, when they were, in fact, legal arguments.

The affidavit accompanying the exhibits contained no legal arguments. As the exhibits themselves were prior pleadings submitted by the State and IDWR, they can not be characterized as Pocatello's "legal arguments." Rather, Pocatello submitted the exhibits as evidence of the its contention that the State and IDWR have changed position on accomplished transfers. Thus, the exhibits were offered by Pocatello as evidence. Pocatello itself says that the exhibits were provided to "illustrate" discrepancies on the part of IDWR. Thus, the Court should affirm the Special Masters order striking the affidavit and post trial brief (? I don't have the order to check this edit).

3. The Special Master's Amended Report recommends that water rights 29-2274, 29-2338 and 29-7375 be decreed as recommended by IDWR—in accordance with Transfer No. 5452.

Three of the Pocatello's water rights are subject to a formal transfer dated June 28, 1999, which designated 12 alternative points of diversion, and did not include the condition discussed

above. Because the transfer was issued in 1999, the Special Master concluded that Pocatello could not meet the pre-1987 change requirement necessary for an accomplished transfer under Idaho Code § 42-1425. Therefore, the Special Master's Amended Report states that the points of diversion for those water rights should remain as recommended, and that the water rights should be decreed as in the transfer, without the condition.

Pocatello claims that the Special Master has collaterally attacked Transfer No. 5452 "by adding the condition to *wells* that were approved without the condition in a Formal Transfer." Opening Brief, p. 12 (emphasis added). This argument is based on the fact that the twelve alternative points of diversion listed in the transfer for these three *unconditioned* water rights include wells that are also listed as alternative points of diversion for water rights which have been recommended with the condition. Pocatello states that this creates confusion and constitutes a collateral attack of the transfer because "[t]he same wells have the condition in relation to some water rights, but not to others." Opening Brief, p. 12.

This argument is without merit, because it is *water rights* that are conditioned in the SRBA, not wells. A water user can divert water under multiple water rights using the same well. Those water rights may have different priority dates as well as different uses. The fact that three of Pocatello's water rights do not have the condition does not create any confusion, as IDWR administers water by water right, not by conditions placed on individual wells. Pocatello's argument that conditioning other water rights constitutes a collateral attack on Transfer No. 5452 is untenable, given that the Amended Report recommends that the water rights subject to the transfer be recommended as determined therein—without the condition. Thus, the Court should uphold the Special Master's recommendation.

4. The Special Master properly determined that Pocatello's ground water wells cannot be designated as alternative points of diversion for its surface

~~water rights under Idaho Code § 42-1425 because such a change would amount to a change in source.~~

Pocatello claims that the Special Master erred as a matter of law in finding that Pocatello was required to show that its ground water and surface water rights were diverting from the same source in order to obtain an accomplished transfer for ground water points of diversion. Pocatello's rational is that "[t]he 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." Opening Brief, p. 13. Pocatello seems to be arguing that *connected* sources of water are to be considered the *same* source of water. This is clearly erroneous; source is an element of a water right, whereas interconnection of water sources bears on administration of water rights. Carried to its logical conclusion, Pocatello's rational would mean that a groundwater user on the Eastern Snake Plain Aquifer could claim his well as an alternate point of diversion for a surface water right diverting from the Snake River.

Pocatello construes the Special Master's investigation into the source element of the subject water rights as an error as a matter of law, claiming that *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2006) prohibits judicial intervention into issues of interconnection. As discussed above, this is a mischaracterization of the Court's comments in that case. The issue in *American Falls* was a constitutional challenge to the conjunctive management rules in the context of a delivery call. The Court did not address what the SRBA can or should consider in issuing a partial decree; the Court in *American Falls* merely stated 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." 143

Idaho at 877, 154 P.3d at 448. Furthermore, in this matter, the Special Master was not determining a degree of interconnection for purposes of administration, but whether the ground water and surface water rights were diverting from the same source. Source is an element of a water right and completely within the purview of the SRBA.

Pocatello asserts its ground water wells as alternative points of diversion for its senior surface water rights, claiming an accomplished transfer under Idaho Code § 42-1425. Idaho Code § 42-1425 (2006) (2) states in part as follows:

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 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, [1] prior to November 19, 1987, . . . may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided [2] no other water rights existing on the date of change were injured and [3] the change did not result in an enlargement of the original right.

Id. (emphasis added). The statute allows for the change in every element of a water right *except* the source element. Thus, if Pocatello's groundwater wells are not drawing from the same source as its surface water rights, an accomplished transfer is not authorized by the statute. Pocatello does not appear to dispute that a change in source is not authorized by Idaho Code § 42-1425, rather it claims that because its Basin 29 rights are connected, there would be no change in source if its ground water wells were used to divert water under its surface water rights.

The groundwater rights in question divert from the Lower Portneuf River Valley Aquifer ("LPRVA"), while the surface water rights divert from Mink Creek and Gibson Jack Creek. Pocatello's expert testified that the sources are so closely connected as to be essentially the same source. IDWR's witness testified that, while the sources were hydraulically connected, the distance between the wells and the creeks (1/4 mile to 1 mile) was great enough that the wells

could not be said to be drawing the same water as the surface rights would. After reviewing the testimony of both witnesses, the Special Master concluded that

“[a] showing that two separate water rights have independent sources or are fed by different springs supports a finding of a separate source...the city wells, although 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.”

Amended Report, p. 12.

The Special Master's findings of fact should be adopted by this Court unless they are clearly erroneous. I.R.C.P. 53(e)(2). Pocatello has presented no evidence to support rejecting the Special Master's findings of fact. Rather, the Pocatello claims that it was an error as a matter of law for the Special Master to investigate whether the Pocatello's water rights divert from the same source. On the contrary, the SRBA is charged with determining the nature and scope of water rights, including the water source. The Special Master properly undertook an analysis of the source elements of Pocatello's groundwater and surface water rights to determine if an accomplished transfer of alternative points of diversion was authorized by Idaho Code § 42-1425. After hearing the expert testimony of Pocatello's witness and the Department's witness, the Special Master concluded that such alternative points of diversion would amount to a change in source, which is not authorized by the statute.

5. The Special Master properly denied Pocatello's request to change the use designation for water right 29-7770 from irrigation to municipal.

Pocatello argues that the Special Master erred as a matter of law in finding that changing the designated use of water right 29-7770 from irrigation to municipal would require either a valid administrative transfer or an accomplished transfer. Pocatello argues that the Special Master can and should change the use designation to correct the Department's error of law in

designating the use as irrigation. Furthermore, Pocatello states that it is not arguing for a change in use for the water right, rather that the use has “always been within the broad definition of “municipal”, and that legally this right must be changed to a more appropriate descriptor.” Opening Brief, P. 15. “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.” *Id.*

In fact, as set forth in the Special Masters Amended Report, Pocatello itself sought and obtained the licensed water right in 2003, claiming irrigation as the purpose of use. Pocatello claims that the Department erred in designating this water right’s use as irrigation, yet states in its brief that “Pocatello requested the irrigation designation in order to expedite the long-overdue licensing of 29-7770.” Pocatello cannot now claim that the Department erred in issuing the water right in accordance with the Pocatello’s claimed use. Circumvention of a department backlog through listing irrigation as the purpose of use does not justify now changing the use to municipal. There is no agency error with regard to the purpose of use of water right 29-7770, Pocatello simply seeks to change it now without going through the formal transfer process.

There has been no valid transfer to change the licensed elements of water right 29-7770, either administrative or through an accomplished transfer under Idaho Code § 42-1425. Therefore, there is no evidence to support a change in the elements of the water right to be decreed. This Court should uphold the Special Master’s decision in maintaining the purpose of use as irrigation.

6. **The Special Master properly found that Pocatello did not present sufficient evidence to overcome the prima facie evidence presented in the Director’s Report concerning the priority dates of water right nos. 29-13689 and 29-13558.**

The Director's Report is considered to be prima facie evidence of the elements of a water right. Idaho Code § 42-1411. The facts in a Director's Report are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997). Idaho Rule of Evidence 301 states that a presumption in a civil action or proceeding is rebutted "by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist." "The trier of fact has the primary responsibility for weighing the evidence and determined whether the required burden of proof on an issue has been met." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002). The Court shall adopt the Special Master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2).

Pocatello claims that the Special Master did not correctly apply the standard of proof in her analysis of whether the facts presented by Pocatello were sufficient to overcome the prima facie evidence of priority in the Director's Report. This argument attempts to disguise a matter of fact as a matter of law. The Special Master did not apply the wrong standard of proof, but rather determined that the evidence offered by Pocatello did not rise to the level of substantial evidence required to rebut the Director's Report.

Pocatello claims that water right 29-13558 is for the first well used by the City of Alameda. Pocatello offered evidence in a newspaper article dated July 17, 1924 that the City of Alameda was formed on July 31, 1924. Based upon the date of the article, and the lack of any evidence to the contrary, the Director recommended a priority of July 16, 1924. Pocatello seeks a priority date of 1905, based upon the claim that a Mr. Satterfield came to the area in 1905, and

~~that later, in 1952, the same Mr. Satterfield said that Alameda's first well was deepened during~~
the term of its first mayor.

There is nothing in Pocatello's evidence to suggest that the well existed when Mr. Satterfield arrived in the area, or his arrival in 1905 precipitated the construction of the well. As Pocatello presented evidence that Alameda was not formed until 1924, it is difficult to see how deepening the well during the term of the first mayor indicates a priority of 1905. As stated in the Amended Report, "[a]lthough that evidence has some probative value, by itself it does not rebut the Director's Report conclusion that priority is July 16, 1924." Amended Report, P. 22. This Court should uphold the Special Master's finding that there was insufficient evidence to meet the standard required by I.R.E. 301, and support the finding of priority made by the Director.

The evidence offered by Pocatello to rebut the Director's Report regarding priority of water right 29-13639 is even more tenuous. The Director based his determination of priority on an earlier license for the specific well which gave a priority date of October 22, 1952. Pocatello asserts that beneficial use was made under the right on December 31, 1940, but offered no evidence of such beneficial use. Rather, Pocatello offered evidence that Alameda's population grew from 2,100 in 1940 to 4,705 in 1950. Growth in population is not sufficient evidence to determine the priority date of a specific well. The Special Master, after reviewing the evidence, stated that the proffered evidence "does not rebut the Director's Report recommendation of October 22, 1952, or present sufficient evidence of a priority of December 31, 1940." Amended Report, p. 22.

The Special Master applied the appropriate standard of review in analyzing Pocatello's evidence, and found that the evidence was not sufficient to meet the required burden of proof.

Pocatello has presented no evidence that the Special Master's findings were clearly erroneous, therefore, this Court should uphold the Special Master's findings and deny the Pocatello's request for earlier priority dates.

CONCLUSION

Pocatello has failed to demonstrate that the Special Master committed any errors of law. Neither did Pocatello present any evidence that the Special Master's findings of fact were erroneous. The Court should therefore uphold the Special Master's recommendations and issue partial decrees for the subject water rights in accordance with the Amended Master's Report and Recommendation.

RESPECTFULLY SUBMITTED this 6th day of July 2009.

STATE OF IDAHO
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ATTORNEY GENERAL

CLIVE J. STRONG
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CHIEF, NATURAL RESOURCES DIVISION


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----- EXHIBIT A -----

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
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29-07770
29-07782
29-11339
29-11344
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13636
29-13637
29-13638
29-13639

CERTIFICATE OF SERVICE

I certify that on this 6th day of July 2009, I caused to be served the original and/or copy of the **STATE OF IDAHO'S RESPONSE TO CITY OF POCA TELLO'S OPENING BRIEF ON CHALLENGE** on each of the following persons by the indicated method:

1. One Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
☒ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

City of Pocatello
c/o Josephine P. Beeman
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

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United Water Idaho
City of Nampa
City of Blackfoot
c/o C. Thomas Arkoosh
David Heida
310 Main Street
PO Box 32
Gooding, ID 83330

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Minidoka Irrigation District
c/o W. Kent Fletcher
1200 Overland Ave.
PO Box 248
Burley, ID 83318

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A & B Irrigation District
Burley Irrigation District
c/o Roger D. Ling
PO Box 396
Rupert, ID 83350-0396

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Milner Irrigation District
Northside Canal Company
Twin Falls Canal Company
c/o Travis L. Thompson
113 Main Ave., W., Ste. 303
PO Box 485
Twin Falls, ID 83303-0485

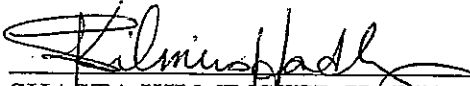
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Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



SHASTA KILMINSTER-HADLEY
Deputy Attorney General