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Christopher H. Meyer, [ISB No. 4461]

John M. Marshall [ISB No. 5678]

GIVENS PURSLEY LLP

601 West Bannock Street

P.O. Box 2720

Boise, Idaho 83701-2720

Office: 208-388-1200

Fax: 208-388-1300

chrismeyer@givenspursley.com

johnmarshall@givenspursley.com

Attorneys for United Water Idaho, City of Nampa, and City of Blackfoot

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

In Re SRBA

Case No. 39576

Subcase Nos.: 29-00271, et al.
(See Attached Exhibit A)

**REPLY BRIEF OF UNITED WATER
IDAHO, CITY OF NAMPA, AND CITY OF
BLACKFOOT ADDRESSING
ALTERNATIVE POINTS OF DIVERSION
CONDITION**

TABLE OF CONTENTS

INTRODUCTION	3
ARGUMENT	3
I. The fact that some APOD conditions identify original wells that are no longer in operation does not prohibit use of APODs listed on the face of the water right.	3
II. Pocatello’s contention that more APODs should be listed on the face of its water rights is a side issue that has no bearing on the operation of the APOD condition.....	4
III. If the APOD condition is retained, its limited application should be explained.	5
IV. The APOD condition applies in all injury situations, including increases in diversion rate and volume.	6
CONCLUSION.....	8
Exhibit A List of Subcases	10
CERTIFICATE OF SERVICE	11

INTRODUCTION

This is the reply brief of United Water Idaho, the City of Nampa, and the City of Blackfoot (collectively, “Providers”). This brief responds to *City of Pocatello’s Response to Brief of United Water Idaho, City of Nampa, and City of Blackfoot Addressing Alternative Points of Diversion Condition* (“Response”), which was filed on July 20, 2009.¹

Apparently Pocatello is in agreement with key observations made by Providers in their opening brief. The city’s main point is that its situation is different. We do not see those differences as being significant, but debating those differences is not the goal of this reply. Instead, we hope to re-focus attention on what we see as the key point—how the alternative points of diversion (“APOD”) conditions should be construed to operate if the Court retains them.

ARGUMENT

I. THE FACT THAT SOME APOD CONDITIONS IDENTIFY ORIGINAL WELLS THAT ARE NO LONGER IN OPERATION DOES NOT PROHIBIT USE OF APODS LISTED ON THE FACE OF THE WATER RIGHT.

In its Response, Pocatello states that the city’s water rights situation is complicated and “dramatically different” from the three hypothetical scenarios presented in Providers’ opening brief. Response at 3. We continue to think that those three scenarios capture the essence of the conversation regarding APODs.

To explain the complexity of its situation, Pocatello notes that some of its water rights contain an APOD condition that identifies only wells that are no longer in operation. This is

¹ In undersigned counsel’s experience, reply briefs are not ordinarily filed by *amici*. However, this case has followed an unusual course in which the City of Pocatello provided a separate response to *amici’s* brief and the Court authorized filing of reply briefs. Court’s Order of July 21, 2009.

neither surprising nor complex. This would occur naturally when the well or wells that served as the point of diversion when the water right first was developed are no longer in operation.

Apparently, Pocatello is concerned that if no current well is listed in the APOD condition, the city would not be able to divert water under the water right from any well during times of administration.² This is not so. Even if no existing well is identified in the APOD condition as an original well, the water right identifies many other wells (APODs) on the face of the water right under the heading “Point of Diversion.” In the absence of injury, the city is free to divert water under the water right—even during times of administration—from any or all of the APODs listed on the face of the water right (assuming wells are within the curtailment area).

For example, even if a conjunctive management curtailment order were in effect, the city could pump water under its senior water rights from any well listed as an APOD, irrespective of what wells are listed as the original wells in the APOD condition, so long as the new well(s) being used are not causing injury to another person’s adjacent well.

II. POCATELLO’S CONTENTION THAT MORE APODs SHOULD BE LISTED ON THE FACE OF ITS WATER RIGHTS IS A SIDE ISSUE THAT HAS NO BEARING ON THE OPERATION OF THE APOD CONDITION.

Pocatello contends that the list of APODs on the face of its water rights is too short. For example, Pocatello complains that the Idaho Department of Water Resources (“IDWR”) included on the APOD list only those wells that may be claimed via an accomplished transfer and not other wells associated with water rights that were subject to a post-1987 formal transfer.

That is an interesting argument, but it has nothing to do with the subject of Providers’ *amici curiae* brief. That is, it has no bearing on whether an APOD condition should be imposed or how it should operate. If Pocatello is correct and the list of APODs is too short, then by all

² Pocatello contends that the APOD conditions “leave Pocatello without access to operating wells and senior water rights during times of administration.” Response at 11.

means the Court should add additional APODs to the list of wells from which Pocatello's water rights may be diverted. If, on the other hand, the Court sides with IDWR and rules that the authorized APODs should not include rights subject to formal transfer but only those subject to accomplished transfer, then the City's solution is a simple one: wait until the partial decrees issue and then file transfer applications covering its entire portfolio to sweep together all of its pre-and post-SRBA rights under a new umbrella list of APODs.³ The key point is that Pocatello's dispute over which wells to include on its list of APODs has nothing to do with the operation of the APOD condition.

III. IF THE APOD CONDITION IS RETAINED, ITS LIMITED APPLICATION SHOULD BE EXPLAINED.

What is important for the Court to note, and the sole reason that Providers have sought to participate as *amici*, is that the wells listed in the APOD condition are relevant only under very specific circumstances. The APOD condition will come into effect if and only if diversion under the water right causes injury to some other water right. The important question, which we hope the Court will clarify, is when that would be.

As we tried to illustrate in our opening brief, injury would occur in only two situations: (1) where the pumping results in local well interference and (2) where the pumping subverts local administration by bringing in a water right historically associated with a well located outside the area of administration. These are relatively rare situations. The point that is so important to Providers and, we should think, would be important to Pocatello too, is that the original wells listed in the APOD condition are irrelevant and impose no constraint at all when (1) there is no administration and (2) when administration is broadly based, meaning that the

³ This is what Providers intend to do. We hope and trust that IDWR will work with them to make this process as painless and efficient as possible. After all, the hard work has been done. A transfer that does no more than consolidate and expand the list of APODs should be a ministerial matter.

curtailment area includes both the original well location and the location from which the water right is now being pumped.

Some day conjunctive management will come to the Treasure Valley and other places, just as it has come to the Magic Valley in the Snake River Plain. When that day comes, there could be geographically broad curtailment of junior ground water rights affecting one or more of the Providers. In that situation, it is of vital importance to Providers that they be allowed to pump water under their more senior rights from any well within their integrated delivery system—even if the wells listed in the APOD condition are shut down. It is important for the Court to explain in its ruling that pumping senior rights (those that are not subject to curtailment) from newer wells will not cause injury *per se* because, in a geographically broad-based curtailment, it matters not a whit whether a senior water right is pumped from one well or another. Moving the point of diversion to some other well that better suits the city's needs will not increase the burden on other rights, so long as both locations are within the same curtailment zone.

IV. THE APOD CONDITION APPLIES IN ALL INJURY SITUATIONS, INCLUDING INCREASES IN DIVERSION RATE AND VOLUME.

Changes in how a water right is used may cause injury to become manifest after a transfer or adjudication of the right. For example, a water right used at less than its full authorized rate or volume may result in no injury to an adjacent senior well. Later, when the right is pumped at the full authorized rate or volume, injury may result. IDWR imposed the APOD condition to ensure that if conditions of use do change, injury allegations may be evaluated on the basis of the historical relationship between various users. In other words, the APOD condition prevents the city from defending its increase in rate or volume by asserting that it is pumping some other senior right in its portfolio.

In responding to this point, Pocatello draws a distinction between injury based on increases in diversion rate and increases in diversion volume. Pocatello's position is that increases in diversion rate are impossible because (1) the city entered into a stipulation⁴ and (2) such increases are not allowed in any event. Providers take no position with respect to the stipulation,⁵ but vigorously object to Pocatello's position as to the latter point.⁶

Pocatello also contends that IDWR may not raise concerns about increases in diversion volume because IDWR did not specifically call out this type of injury in the Director's Report. Response at 7 n.21. It is not apparent to Providers why IDWR would be required to describe to the city each type of injury that someday may occur. In any event, it is certainly a matter of concern to Providers how volume-based injury would be considered in other APOD conditions. As we see it, it makes no difference whether the injury is based on increases in diversion rate or diversion volume. Injury is injury.

If a city pumps a 1920 water right out of a 1985 well and in so doing injures a nearby 1950 water right, it is our understanding that the APOD condition will provide relief of some sort⁷ to the 1950 water right holder. This would be so irrespective of whether the injury results from increasing the diversion rate or increasing the number of hours per days of pumping (*i.e.*, increasing the diversion volume).

⁴ Pocatello explains in its Response that it entered into a stipulation with certain objectors under which the city has agreed not to increase its diversion rate for any well beyond 1987 levels.

⁵ Providers are in no position to express a view as to the effect or effectiveness of such a stipulation, particularly as to persons or entities that were not parties to the stipulation.

⁶ Pocatello contends that the "snapshot" taken by the SRBA in 1987 fixes the maximum diversion rate for any well listed on the permissible APODs. This is most certainly not the case. Absent some limiting condition, the whole purpose of having APODs is to allow water rights to be moved around and/or stacked at any given well as the water right holder deems appropriate. Providers object most vigorously to the suggestion that they are prohibited from deepening a well or otherwise increasing its pumping capacity, so long as injury to others is avoided.

⁷ That remedy may not necessarily be curtailment of the city's well. It could be, for instance, a requirement that the city provide a substitute supply by providing free municipal water.

For example, there might be injury because the city has increased the pumping capacity of the 1985 well and is now pumping both the 1920 water right and the 1985 water right out of the 1985 well.⁸ Or there might be injury because the city is pumping at the same diversion rate but for more hours per day. In either case, IDWR's position is that this constitutes injury, and it is unfair for the city to swap in a 1920 water right under an accomplished transfer to defeat the injury claim.⁹ The same would be true in the one other scenario in which the APOD condition would come into play—the small, geographically-limited administration scenario.

The bottom line is that the APOD condition, if it is retained, will protect against all types of injury. If Pocatello can escape the APOD condition by entering into a stipulation to avoid one particular type of injury, Providers would like to do so as well.

CONCLUSION

Providers express no opinion as to whether IDWR is correct in its assertion that the APOD condition is necessary to prevent injury.¹⁰ Likewise, Providers leave it to Pocatello and IDWR to argue about which rights should be included in the city's list of APODs.

If, at the end of the day, Pocatello persuades the Court that the APOD condition is unnecessary, so be it. Providers—and presumably many other municipal providers—would be delighted to have that condition lifted from their water rights as well.

⁸ As noted above, Pocatello contends this kind of injury cannot occur because of its stipulation. The stipulation, however, does not address other types of injury.

⁹ See *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996) (Basin-Wide Issue No. 4), which upheld the accomplished transfer statute noting that it is applicable only to transfers that avoid injury and enlargement.

¹⁰ Providers have explained repeatedly that they take no position as to whether the APOD condition should or should not be imposed. "UWID, Nampa, and Blackfoot do not oppose Pocatello's contention that the condition should be eliminated altogether." Providers' Opening Brief at 4. We do not understand why Pocatello says that Providers claim the condition is necessary. Response at 11.

But if the Court sides with IDWR and finds that the APOD condition is appropriate to prevent injury, it is important that the Court also make clear that the APOD condition will not restrict a city's ability to pump from any of its authorized APODs when there is no administration or when there is an area-wide curtailment that encompasses both the original well site and the new well site. In other words, the APOD condition should apply only where there is localized well interference or a geographically limited curtailment in which a senior water right historically associated with well(s) outside the curtailment area is pumped from within the curtailment area.

DATED July 31, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

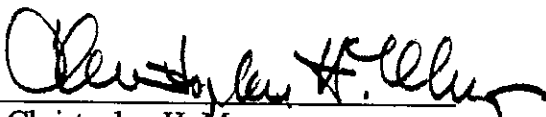
By 
Christopher H. Meyer
*Attorneys for Intervenors United Water
Idaho, City of Nampa, and City of
Blackfoot*

Exhibit A **LIST OF SUBCASES**

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 31, 2009, the foregoing was filed, served, or copied as follows:

ORIGINAL FILED

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

☐ U. S. Mail
☐ Hand Delivered
☒ Overnight Mail
☐ Facsimile
☐ E-mail

SERVICE

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

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Lawrence G. Wasden, Attorney General
Clive J. Strong, Chief
Shasta Kilminster-Hadley, Deputy Attorney General
Natural Resources Division
PO Box 44449
Boise, ID 83711
Fax: (208) 854-8072
Attorneys for State of Idaho

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

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

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Josephine P. Beeman
Beeman & Associates PC
409 West Jefferson
Boise, ID 83702-6049
Office: 208-331-0950
Fax: 331-0954
jo.beeman@beemanlaw.com
Attorneys for City of Pocatello

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

A. Dean Tranmer
City Attorney, City of Pocatello
911 N. 7th Street
P.O. Box 4169
Pocatello, ID 83205
Fax: 208-239-6986
dtranmer@pocatello.us
Attorney for City of Pocatello

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Sarah A. Klahn
White & Jankowski LLP
Kittredge Building
511 16th St., Ste. 500
Denver, CO 80202
Attorneys for City of Pocatello

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Barker, Rosholt & Simpson LLP
113 Main Avenue W., Ste. 303
PO Box 485
Twin Falls, ID 83303-0485
Attorneys for North Side Canal Co. Ltd.

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

C. Thomas Arkoosh
Capital Law
301 Main St.
PO Box 32
Gooding, ID 83330
Fax: (208) 424-8874
tarkoosh@capitolawgroup.net
Attorney for American Falls Reservoir

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

David Heida
Capitol Law
301 Main St.
PO Box 32
Gooding, ID 83330
Fax: (208) 934-8873
dheida@capitolawgroup.net
Attorneys for American Falls Reservoir

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Roger D. Ling
615 H St.
PO Box 396
Rupert, ID 83350
Fax: (208) 436-6804
rdl@idlfirm.com
Attorney for A&B Irrigation District and Burley Irrigation District

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Travis L. Thompson
Barker, Rosholt & Simpson LLP
113 Main Avenue W., Ste. 303
PO Box 485
Twin Falls, ID 83303-0485
Fax: (208) 735-2444
ttt@idahowaters.com
Attorneys for Milner Irrigation District, North Side Canal Co. Ltd., North Side Canal Company and Twin Falls Canal Company

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

W. Kent Fletcher
1200 Overland Ave.
PO Box 248
Burley, ID 83318
Fax: (208) 878-2548
wkf@pmt.org
Attorney for Minidoka Irrigation District

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

COURTESY COPIES

Hon. John M. Melanson
Presiding Judge
Snake River Basin Adjudication
253 3rd Ave. N.
P.O. Box 2707
Twin Falls, ID 83303-2707
Fax: 208-736-2121
Email: judgem@srba.state.id.us

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Hon. Brigitte Bilyeu
Special Master
Snake River Basin Adjudication
253 3rd Ave. N.
P.O. Box 2707
Twin Falls, ID 83303-2707
Office: 208-736-4715 (direct)
bbilyeu@srba.state.id.us

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Nicholas B. Spencer, Esq.
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
Office: 208-287-4813 direct
Fax: 208-287-6700
nick.spencer@idwr.idaho.gov

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Phillip J. Rassier, Esq.
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700
phil.rassier@idwr.idaho.gov

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

Garrick Baxter, Esq.
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700
Email: garrick.baxter@idwr.idaho.gov

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

CLIENT COPIES

Gregory P. Wyatt
Vice President and General Manager
H. Scott Rhead
Director of Engineering
United Water Idaho Inc.
8248 W. Victory Road
P.O. Box 190420
Boise, ID 83719-0420
Fax: 208-362-3858
greg.wyatt@unitedwater.com
scott.rhead@unitedwater.com

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Michael J. Fuss
Director, Public Works Department
City of Nampa
Nampa City Hall
411 Third Street South
Nampa, ID 83651
Fax: 208-465-2261
fussm@cityofnampa.us

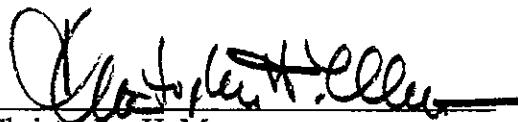
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☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Ron Harwell
Public Works Director
City of Blackfoot
157 N. Broadway
Blackfoot, ID 83221
Fax: 208-785-8602
ron@cityofblackfoot.org

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail

Roxanne Brown
Stuart Hurley
SPF Water Engineering, LLC
300 E. Mallard Dr., Ste. 350
Boise, ID 83706
rbrown@spfwater.com
shurley@spfwater.com

☐ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☒ E-mail


Christopher H. Meyer