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DEPARTMENT OF
WATER RESOURCES

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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)
	)	
	)	
	)	STATE OF IDAHO'S REPLY TO CITY OF
Case No. 39576	)	POCATELLO'S RESPONSE TO AMICUS BRIEF
	)	
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	)	
_____	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general and submits the STATE OF IDAHO'S REPLY TO THE CITY OF POCATELLO'S RESPONSE TO AMICUS BRIEF in the above-entitled matter. The Amicus Brief introduced three factual scenarios in which the alternative points of diversion condition recommended by the Director would come into play. In its RESPONSE TO CITY OF POCATELLO'S OPENING BRIEF ON CHALLENGE ("State's Response"), the State concurred with the analysis provided in the Amicus Brief of how the condition would affect administration of Pocatello's water rights under the three scenarios discussed.

STATE OF IDAHO'S REPLY TO CITY OF POCATELLO'S RESPONSE TO AMICUS
BRIEF

A. The condition is necessary to prevent local well interference attributable to Pocatello's use of alternative points of diversion.

In Pocatello's response to the Amicus Brief, it claims that the first scenario of well interference described by Amici is not applicable to Pocatello's water rights because the City has stipulated that it would not increase the capacity of its wells without first seeking administrative approval. The first scenario describes an example of local well interference, in which, if the City had two wells, one with a 1920 priority date and one with a 1985 priority date, each diverting 1,000 gpm, each designated as an alternative point of diversion, the City could seek to divert both water rights out of the newer well. However, doubling the amount diverted from the 1985 well from 1,000 gpm to 2,000 gpm could expand the cone of depression around that well, causing injury to nearby water users with existing water rights. The condition recommended by the Director would provide a record of the original priority and diversion rate of a particular well so that nearby water users could be protected from injury caused by a change in pumping at that well.

Pocatello claims that this scenario could never occur with its water rights because it stipulated, in an agreement with the Surface Water Coalition, that it would not increase the capacity of its wells beyond that which existed in November, 1987, without first seeking administrative approval. There are two reasons why said stipulation does not relieve the necessity of the recommended condition. First, the State and the Idaho Department of Water Resources ("IDWR") were not parties to and did not accept the stipulation. The agreement between Pocatello and the Surface Water Coalition does not create a binding agreement between Pocatello and the State or IDWR, may not be enforceable by IDWR, and presumably could be dissolved by the parties in the future. Finally, the agreement contains provisions that are

unacceptable to IDWR, and therefore was not accepted to settle the objections raised by Pocatello.

Secondly, although an agreement not to increase well capacity beyond that existing in 1987 would, if binding between IDWR and Pocatello, assuage certain concerns about well interference due to increases in diversion rates, it fails to address other examples of well interference, such as increases in the volume of water pumped from a particular well. Although the particular example of local well interference provided in the Amicus Brief dealt with increased diversion rates, the same effect occurs if there is an increase of volume diverted from a particular well that creates injury to another user.

In the example provided by the Director at trial, local well interference would occur when Well 1, historically pumping 12 hours a day under Water Right A, begins pumping 24 hours a day under Water Rights A and B. Without the condition to indicate that in 1987, Well 1 was only pumping under Water Right A, which necessitated just 12 hours of pumping daily, a domestic user adversely affected by the increased draw down of the City's well would have no basis to claim injury from the increased pumpage from Well 1. The Director's testimony clearly described the need for the condition to preserve information about the original well where injury is not caused by increased well capacity, but by an increase in the volume of water diverted. *See State's Response*, P. 3.

Pocatello claims that because it has agreed not to increase capacity at its wells, there is no chance for local well interference, and therefore the condition is unnecessary. However, the Director's testimony demonstrates that the condition is necessary to prevent well interference under other scenarios than increases in diversion rate. Furthermore, Pocatello's promise not to increase well capacity without administrative approval is not binding as to the State or IDWR,

and therefore does not alleviate concerns about increases in diversion rates, as set forth in the first scenario provided in the Amicus Brief. The condition on the decrees provides the necessary assurance that Pocatello will not use its alternative points of diversion in such a way as to cause injury to other water users.

B. The condition is necessary in the case of small, geographically-limited administration.

Although the City of Pocatello did not address the second and third scenarios provided in the Amicus Brief in its response, the State feels it necessary to emphasize the necessity of the condition in the case of a geographically-limited administration affecting some but not all of Pocatello's wells. In his testimony at trial, the Director described the other area of concern to be addressed by the recommended condition: conjunctive administration "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. The Director further testified as to specific examples when the condition would be necessary in a conjunctive administration scenario. *See State's Response*, P. 4.

The Amicus Brief addresses this same situation in its third scenario, and accurately describes why the condition would be necessary in a situation where there was administration of an area containing some, but not all of Pocatello's wells. The condition would restrict the City from pumping a water right from outside the curtailment area from a well inside the curtailment area. The necessity of the condition in this scenario is clear; without it, the City could use alternative points of diversion to undermine the curtailment.

Finally, the second scenario described by Amici is that of a broad, regional administration in which there is curtailment of all water rights in the region with a priority date junior to 1980. In that example, the City would be unable to divert under its 1985 water right,

but could use the 1985 well to pump water under its other, more senior water rights, so long as doing so would not cause a new injury. The State agrees with Amici that, in this scenario, the condition would not restrict the City's choices in any way.

C. The condition in no way precludes the City of Pocatello from using its operating wells or its water rights originally diverted from wells no longer in existence.

Pocatello claims that the condition will operate differently for its water rights than for the rights described in the Amicus Brief because the conditions on some of Pocatello's rights list wells that no longer exist. As explained in the State's Response, the condition recommended by IDWR serves to document the original development of the water right in order to prevent injury to other users if the City consolidates its rights in fewer wells. For those water rights that were first diverted under wells that no longer exist, the listing of the original well in the condition functions to permit administration based on the right's original point of diversion.

Pocatello complains that listing non-operating wells would mean that it could not divert under its most senior rights. On the contrary, each of those rights lists 22 points of diversion, representing the City's 22 operating wells, under which it can be used. The original well is listed because, if administration of the right is necessary, information about the original point of diversion, including location and diversion rate, is needed to ensure that other water users are not injured by the City's use of alternative points of diversion. The scenarios mentioned above provide clear examples in which information about the original well would be necessary for administration of water rights in an interconnected system.

Pocatello also states that the conditions on its water rights only list 18 of the City's 22 operating wells. This is correct. As discussed in Pocatello's Opening Brief, three of its water rights, 29-2274, 29-2338, and 29-7375, were recommended without the condition because they

were subject to a post-1987 administrative transfer, Transfer No. 5452. Wells No. 10, 12, and 15, were among the wells that made up the original points of diversion for those rights. They are not included in an alternative points of diversion condition because Transfer No. 5452 did not have the alternative point of diversion language. These wells are listed as alternative points of diversion on all 22 of the City's water rights, however, and Pocatello is not precluded from using them by the fact that they are not listed in a condition.

Well No. 34 is the point of diversion for water right 29-7782. The proof of beneficial use for the license was filed in 1990; however, Well No. 34 came on line in August of 1987. Water right 29-7782 does not have the alternative points of diversion condition because it was licensed with only that one point of diversion. However, because Well No. 34 came on line before November 19, 1987, it is listed as one of the points of diversion on the rights that were not part of Transfer No. 5452.

Finally, Pocatello claims that two of its wells, Wells No. 2 and 13, are listed with reduced capacity. This is inaccurate-- the conditions list diversion rates, not well capacity. Single wells are often the original point of diversion for multiple water rights, each with a different rate of diversion, all of which may be less than the well's total pumping capacity. Wells No. 2 and 13 are both associated with two water rights each. Well No. 2 is associated with Water Right Nos. 29-2274 and 29-13560. Water right No. 29-2274, was recommended without the condition, as described above, and therefore does not list Well No. 2. Water Right No. 29-13560 lists Well No. 2 in the condition as follows:

“...ground water was first diverted under this right from Pocatello Well No. 1 located in T07S, R34E, S01, Lot 2 (NWNE) in the amount of 2.45 cfs, from Pocatello Well No. 2 located in T07S, R34E, S01, Lot 2 (NWNE) in the amount of 2.45 cfs...”

Although the total capacity of Well No. 2 may be greater than 2.45 cfs, the condition is only concerned with the rate at which water under this specific right was first diverted—not the total capacity of the well. Well No. 13 is similarly associated with two of the City's water rights, (29-2338 and 29-2401) only one of which has the condition. The condition on 29-2401 states simply that water was diverted from that well under that right in the amount of .89 cfs. There is no reference to the Well No. 13's total capacity because it is the water right that is administered, not the well. The fact that Wells No. 2 and 13 have a greater pumping capacity than the diversion rate of the water rights on which they are listed has no impact on Pocatello's ability to use its water rights or its wells to their full extent.

CONCLUSION

The condition on the City of Pocatello's water rights is necessary to prevent injury to other water users. The Amicus Brief provided an accurate depiction of why the condition is necessary as well as how it would affect the City's use of its water under the three scenarios presented therein.

RESPECTFULLY SUBMITTED this 3rd day of August, 2009.

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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
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29-07222
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29-11344
29-11348
29-13558
29-13559
29-13560
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29-13562
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29-13638
29-13639

CERTIFICATE OF SERVICE

I certify that on this 3rd day of August, 2009, I caused to be served the original and/or copy of the STATE OF IDAHO'S REPLY TO CITY OF POCA TELLO'S RESPONSE TO AMICUS BRIEF on each of the following persons by the indicated method:

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Twin Falls Canal Company
c/o Travis L. Thompson
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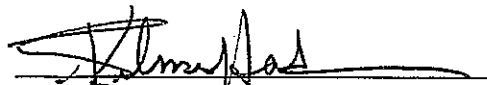
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Not Applicable


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