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

The City of Pocatello (City or Pocatello) replies to the State of Idaho's Response Brief as follows:

A. The alternative points of diversion condition placed on Pocatello's ground water rights should be removed because it is unnecessary and contrary to established law and practice.

One of the most crucial issues in this case is whether Pocatello's claims for accomplished transfers injure any other water users and thus require conditioning. The State's Response brief and the Providers' brief both attempt to illuminate the problem by providing hypothetical examples to illustrate how the condition would work and why it might be necessary for administration. The hypotheticals suggested by the Providers and the State only address situations where after November 19, 1987 there has been an increase in individual well capacity at an alternative point of diversion. Because Pocatello stipulated before trial that it will not increase the capacity of its wells beyond the individual capacities established as of November 19, 1987 without first obtaining administrative approval, the Providers' and State's hypotheticals do not apply to the record before the court. The condition placed on Pocatello's water rights should be supported by the record and applicable SRBA case law, and if not, the condition should be removed.¹

¹ To the extent that the Providers and the State ask the court to rule on the condition based on the hypotheticals, the court is asked to rule on facts outside the record.

There is not an issue as to the 22 points of diversion listed with the 18 ground water rights where the condition is recommended. The existence of the 22 wells as of November 19, 1987 is not an issue;² and the individual well capacities as of November 19, 1987 are not a major issue.³

1. IDWR does not have the authority to impose a condition on municipal water rights claimed in the SRBA as accomplished transfers based on fears of future injury where no water right holders have come forward to allege injury during the SRBA proceedings.

The State argues that the condition is necessary to avoid future injury to other water users as a result of Pocatello's operation of its integrated municipal system with multiple alternative points of diversion.⁴ Pocatello disagrees with this assertion for several reasons. First, IDWR does not have the authority under the accomplished transfer statute, or under I.C. 42-1411 to condition a water right based on hypothetical future injury. Although the State points out that the Director has the authority to include "conditions on the exercise of any water right included in any decree, license, or approved transfer application," and "any remarks... as are necessary

² The pertinent "snapshot in time" for Pocatello's claims under I.C. 42-1425 captures the status of the 22 interconnected wells serving as alternate points of diversion for the City's associated ground and surface water rights as of November 19, 1987. The snapshot represents the final configuration of the wells, which were variously developed, reconfigured, and/or replaced according to the City's needs during the preceding 82 years.

³ The total combined capacity of Pocatello's 22 interconnected wells as of November 19, 1987 is between 95.49 cfs and 100.34 cfs. There is a 4.85 cfs variance/range primarily because the physical capacity listed for wells 14 and 33 is shown as 2.23 cfs and 2.67 cfs, respectively, in the SWC-Pocatello Stipulation Agreement (Feb. 23, 2007), but listed in the 2003 Director's Report (July 10, 2003), and the 2006 Supplemental Director's Report (April 13, 2006), as .22 cfs and .21 cfs, respectively.

The 2003 Director's Report, the 2006 Supplemental Director's Report, and the 2007 SWC-Pocatello Stipulation Agreement all agree on the individual well capacity for 15 of the 22 wells (wells 2, 7, 12, 13, 15, 16, 18, 21, 22, 23, 26, 28, 31, 32, 34).

Seven of the 22 wells (wells 3, 10, 14, 27, 29, 30, and 33) are listed among these three documents with varying capacities as of November 19, 1987; however, the total combined variance is at most 4.85 cfs. Appendix B to this Response Brief tabulates the information summarized in this footnote.

⁴ In their Response to Pocatello's Opening Brief on Challenge, the State contends that "the record demonstrates that the condition is necessary to avoid injury." State of Idaho's Response to City of Pocatello's Opening Brief on Challenge at 2, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (Jul. 6, 2009)(hereinafter State's Response). The State also contends that the condition "simply functions to protect other water users when Pocatello's use of its wells as alternative points of diversion would cause injury." State's Response at 5.

for definition of the right, for clarification of any element of a right, or for administration of the right by the director,” the Director’s power to do so is not unlimited. In fact, that power is specifically limited by statute. I.C. § 42-1411.

Where specific statutory mandates dictate procedures for particular processes, the general powers of the Director to condition water rights are modified by the more specific and particular procedures unless the intent was clearly otherwise. In the case of an accomplished transfer, which is specifically excepted from the list in the first part of 1411 excerpted above, the legislature had a specific purpose in mind, to allow water right holders to confirm their water rights as they had been historically developed despite the fact that changes were made to those water rights without prior administrative approval. Essentially, the accomplished transfer statute is a shortcut mechanism that the legislature put in place to bypass the more time-consuming analysis normally required by Idaho’s mandatory transfer statute, I.C. § 42-222.⁵

2. The condition is not necessary because no other water right holders were injured by Pocatello’s operation of its interconnected in-town culinary system as of November 19, 1987, or even twenty years later as of trial in 2007.

No water right holders came forward to allege injury as a result of Pocatello’s claimed accomplished transfer. It is incumbent upon those water right holders to come forward and allege injury during the SRBA proceedings. Pocatello has used its water rights in the claimed manner for more than 20 years since November 19, 1987 without encountering allegations of injury from other water users. IDWR cannot step into the shoes of water right holders it believes to be injured; IDWR does not have standing to allege injury on behalf of those not present before the court. According to Fremont Madison,⁶ the inquiry should end upon a finding of no injury on the date of the change, assuming that there has been no enlargement of the original right. In other words, if no water right holders or interested persons have come forward and alleged injury, the accomplished transfer must be granted unless there has been an enlargement.

⁵ I.C. 42-222 became mandatory in 1969 and many of the accomplished transfers in the SRBA process would have occurred before this date.

⁶ The Fremont Madison decision is discussed at length in Pocatello’s Post-Trial Brief, pp. 20-26, and accompanying footnotes 50-65.

3. Even if IDWR had the authority to impose a condition based on fears of possible future injury to other water right holders, the condition is unnecessary because IDWR's fears regarding future injury from the operation of Pocatello's interconnected municipal system are unfounded and can be better addressed in existing remedies outside the SRBA

Special Master Bilyeu found that "where a change or accomplished transfer would undermine a priority date, the injury is real and material even if the damage is not immediately manifest." By stating that the condition "protect[s]" junior water users, the Special Master acknowledges that the injury will not occur until some hypothetical and unknown future date, if ever. The dispute is not yet ripe for the court's review.

If the "injury to priority" is in fact present and not future, the Special Master has allowed IDWR to step into the shoes of the injured persons and effectively use the condition to make a claim on their behalf. IDWR's real concern is whether or not those who may suffer well interference in the future as a result of Pocatello's operation of its interconnected well system will have a remedy. A remedy already exists: the well owner can commence an action against Pocatello based on well interference or the well owner can ask IDWR to establish and administer a reasonable pumping lift level.

4. By asking the Court to consider hypotheticals and facts which are not in the record before the Court, the State and the Providers raise matters that are appropriate in a rulemaking.

The court has been provided with a specific set of factual circumstances and questions of law to address. The State and the Providers refer to the condition based on facts not before the court, and ask that the court rule on the condition generally rather than on the condition as it has been applied to Pocatello. This appears as a request for a rulemaking without proper notice to interested persons and opportunity to comment.

As discussed in Pocatello's Response to the Providers' Brief, IDWR's concerns about injury due to possible future increases in capacity at Pocatello's wells are unfounded. Despite Director Tuthill's testimony at trial, that IDWR's concerns about injury from increases in rate of diversion were "taken care of" by the stipulation agreement between Pocatello and the Surface Water Coalition, the State raised the concerns again in its Response to Pocatello's Opening Brief on Challenge.⁷

⁷ The State's Response, at p. 7, poses a hypothetical where a municipality increases the rate of diversion (capacity) at one of its interconnected wells to make up for the loss of one of its earlier priority wells. There is little doubt that more than doubling the rate of diversion from a particular well in an

The argument is made in general terms as if the State were asking the court to authorize IDWR to place the condition on all interconnected municipal water rights with multiple alternative points of diversion. This is not a rulemaking where the general merits of an IDWR policy going forward should be debated, but rather a specific case to be analyzed and decided according to its particularities.⁸ The only issue appropriate for decision is whether the condition is necessary for the administration of Pocatello's water rights, not the rights of other hypothetical municipalities.

5. The conditions, as written, contain significant factual errors that unjustifiably impair Pocatello's ability to operate its legitimately established interconnected intown culinary water system.

Pocatello's record is evidence of the inherent practical problems that make the use of an alternative points of diversion condition complicated, difficult, and impracticable.

IDWR's recommendations acknowledge that Pocatello legitimately operated its interconnected municipal water system in the manner claimed since prior to November 19, 1987. The entire purpose of the accomplished transfer statute is to confirm such long-term historical use; the statute itself acknowledges that the changes making up the accomplished transfer are often made largely with the knowledge of other water users.

IDWR was provided with detailed information about the development of Pocatello's interconnected wells during this litigation.⁹ By placing the condition on Pocatello's water rights,

interconnected system could potentially negatively affect other nearby wells. In its stipulation agreement with the Surface Water Coalition, Pocatello has agreed not to increase the rate of diversion at any of its wells beyond the levels established as of November 19, 1987 without first seeking administrative approval. What is more disturbing, however, is that both the State and the Providers assume that such a step could even be possible.

⁸ The discussion of unauthorized rulemaking in the context of the *Asarco* is discussed at length at pages 37-40 and footnotes 79-87 of Pocatello's Post-Trial Brief.

⁹ City of Pocatello's Ground Water Development Timeline (April 25, 2003) (attached to this Reply Brief) was submitted with Pocatello's 32 amended SRBA claims on April 25, 2003 and appears multiple times with Pocatello's water rights in IDWR Exhibit 1. Despite the extensive record cited in the development timeline, the State, at p. 8 of its Response, argues that the condition is necessary for administration because without it, there would be no record of the original development for Pocatello's interconnected water rights. The State goes on to say that 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." Consolidation of municipal water rights at fewer wells is not an issue in Pocatello's proceedings.

IDWR has effectively denied the historic use because Pocatello's most senior water rights are not usable during times of administration.¹⁰

The conditions placed on Pocatello's water rights do not accurately reflect the development information provided to IDWR before and during trial. As discussed in Pocatello's Response to the Providers' Brief, the condition¹¹ lists wells no longer in existence and thus does preclude Pocatello from diverting certain senior rights.¹²

The inaccuracies and problems with the condition as applied to Pocatello indicate that, as a matter of policy, well interference and priority date disputes should be addressed on specific and articulable facts raised by the real parties in interest, as is provided in existing administrative mechanisms available through IDWR.

6. The State and the Providers suggest an interpretation of the accomplished transfer statute that would result in a major change from the status quo with serious adverse policy implications.

The State and the Providers suggest an interpretation of the accomplished transfer statute that would allow a municipal water right holder to combine the rates of diversion under its water rights and divert the total combined rate of diversion from a single well that was originally developed and approved with a lower capacity. Based on this interpretation, the State argues that the condition is appropriate for Pocatello's water rights to address the risk of injury to other water right holders if a city abandons one well and then doubles the capacity of another well.¹³

¹⁰ The record from trial that discusses this impact to Pocatello was fully discussed in footnote 2 of Pocatello's Post-Trial Brief, a portion of which is excerpted here: "Moreover, IDWR identified wells that are no longer in existence, specifically Alameda well 6 (29-11339) and well 7 (29-11339), Pocatello well 4 (29-13561), well 5 (29-13560), and well 6 (29-13562), and under the condition these water rights would not be able to be diverted because the wells do not exist. Tr. Vol. III, pp 517-519 (Jay Ulrich). The condition would prevent other interconnected wells in times of administration from pumping the nonoperable well's water; thus, the water right amount associated with the non-operable well would not be usable. Tr. Vol. III, pp. 504-505 (Jay Ulrich)." See also discussion of Harold Hargreaves' testimony and Jay Ulrich's testimony in the text and footnotes on pp. 33-35 of Pocatello's Post-Trial Brief.

¹¹ IDWR has changed the remark for this condition three times, as described in detail in footnote 11 of Pocatello's Post-Trial Brief (May 1, 2007).

¹² See footnote 10, *supra*.

¹³ The State provided an example on pp. 7-8 of its Response. The example supposes that a municipality holds two water rights, #s 1 and 3. Water right #1 was developed at well A in 1955 for 2.0 cfs, and water right #3 was developed in 1980 at well C for 1.5 cfs. The example then supposes that the municipality could abandon well A at some time in the future and divert the combined cfs of the two water rights from well C without providing notice to other water right holders through the administrative transfer process. The example is not possible under Pocatello's facts.

This interpretation of 42-1425 is a change from the status quo. By filing claims for accomplished transfers in the SRBA, a water right holder effectively gives formal legal notice to interested persons of the location, capacity, rate of diversion, and priority date of the water rights and interconnected wells subject to the accomplished transfer as of November 19, 1987. This is true for municipal water right holders who already have SRBA decrees with alternative points of diversion.

The State now suggests that these partial decrees are notice that after November 19, 1987, the municipal water right holder could increase (double, quadruple) the rate of diversion at a single well without providing any prior notice to other water right holders who might be injured.

The State's Response explains why this interpretation actually worsens the potential injury to other water users:

[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.

In suggesting that the condition ensures protection to other water users, the State does not address the unconditioned rights already decreed with alternate points of diversion.

B. Water right 29-7770 should properly be recommended with a “municipal,” rather than “irrigation” purpose of use.

It is appropriate for the SRBA court to change the purpose of use designation for water right 29-7770 because the designation is wrong as a matter of law. The State incorrectly argues that the purpose of use designation for water right 29-7770 should remain listed as “irrigation” despite the fact that the water right has only and always been used in a municipal capacity for the City's biosolids program.

IDWR stipulated that water rights 29-7118 and 29-7119 each had a municipal purpose of use.¹⁴ Water right 29-7770 is used in exactly the same manner as water rights 29-7118 and 29-7119. Where a water right lists a purpose of use designation that IDWR acknowledges is clearly wrong, it is an error of law which the SRBA court has the power to correct.

¹⁴ Special Master's Report and Recommendation and Order on Motion to Reconsider at 10-13, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (Oct. 2, 2007).

Pocatello does not have the power to alter purpose of use law in Idaho when it fills out a water right application.¹⁵ When IDWR evaluated Pocatello's application for 29-7770, IDWR erred as a matter of law by issuing the license with an "irrigation" purpose of use rather than a "municipal" purpose of use. To hold that the purpose of use designation must remain listed as "irrigation" when IDWR acknowledges the actual use is municipal, would effectively allow Pocatello to change the purpose of use law regarding "irrigation".¹⁶ The court should recommend water right 29-7770 with a municipal purpose of use.

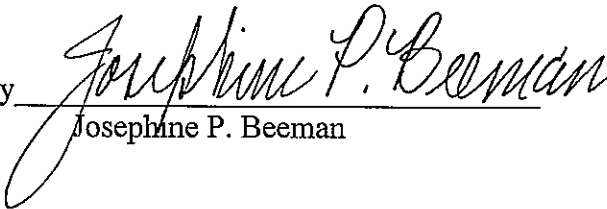
CONCLUSION

The Court should reverse the Special Master and recommend Pocatello's in-town and airport culinary ground water rights free of the condition. Pocatello incorporates its briefing below on all issues raised in the City's Notice of Challenge.

Dated this 3RD day of August 2009.

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By


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¹⁵ *Kelso & Irwin, P.A. v. State Insurance Fund*, 134 Idaho 130, 138 (2000)(citing *Curry v. Ada County Highway Dist.*, 103 Idaho 818, 819, 654 P.2d 911, 912 (1982)). The State essentially argues that Pocatello should be estopped from having the purpose of use designation for water right 29-7770 corrected because Pocatello itself requested an irrigation purpose of use in order to expedite the licensing of 29-7770. For equitable estoppel to apply, however, there must be a "false representation or concealment of material facts." Pocatello's statement regarding the purpose of use for water right 2-7770 is a mistaken statement of law, not fact; therefore, Pocatello should not be estopped from having the court correct the designation.

¹⁶ *See Kelso & Irwin, P.A.*, 134 Idaho at 138.

Attachment (30 subcases)

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
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CERTIFICATE OF SERVICE

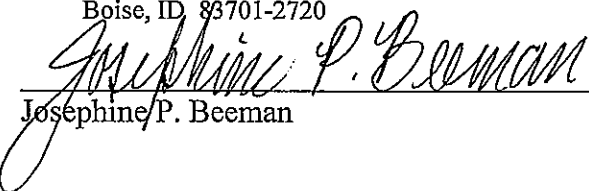
I HEREBY CERTIFY that on the 3rd day of August 2009, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

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City of Pocatello Ground Water Development Timeline April 25, 2003					
Priority date	Amount by priority	Cumulative amount (cfs)	IDWR Reference	Well #	Explanation showing ground water use development over time
1905	1.34 cfs	1.34	29-2324	A 1	Alameda well 1 (replaced by well #29 in 1972)
1925	0.96	2.3	29-2324	A 2	Alameda well 2 (replaced by well #29 in 1972)
1926	9.13	11.43	29-2274	1, 2, 3	Establish capacity and demonstrate use of facilities on Pocatello wells # 1 (2.45 cfs), 2 (2.45 cfs), 3 (4.23 cfs)
Aug. 31 1931	4.23	15.66	29-2274	4	Establish additional capacity: Pocatello well # 4 (4.23 cfs, using pump from # 3 with no intent to abandon well #3). Continue use of Pocatello wells # 1, 2
1934-1936	0	15.66	29-2274	5	No change in capacity: abandon well # 1 and replace with well # 5; using wells # 4 (transfer pump # 1), 5 (transfer pump # 2 with no intent to abandon well # 2); pump 3 sold to Idaho Falls
1936	2.45	18.11	29-2274	6	Establish additional capacity: well # 6 (2.45 cfs with new pump); continue use of wells # 4, 5
1939	0	18.11			No change in capacity: well # 3 reactivated
Dec. 31 1940	10.34	28.45	29-2274 29-2338 29-2324	7, 39 (Ph 1), 22 (A 3)	Establish additional capacity: well # 7 completed (pump capacity of 2000 gpm or 4.46 cfs); well #39 or Phillips 1 (2.2 cfs); well #22 or Alameda well 3 (3.68 cfs)
Dec. 31 1942	1.92	30.37	29-2338	40 (Ph 2)	Establish additional capacity: Well #40 or Phillips 2 (1.92 cfs; Report of Eng for amount; Evidence binder supports priority date)
June 1 1943	2.67	33.04	29-4221	26 (PIP)	Establish additional capacity: well PIP (2.67 cfs; Evidence binder supports priority date)
1947	0	33.04			No change in capacity: well # 8 drilled but infrastructure completed and well put into use in 1948
June 15 1948	9.69	42.73	29-2274: 1948 Permit; 1953 Proof of C/W due; 1959 Notice of BU due; 1954 Field Report	2 (add'l cfs) 8 9 10	Establish additional capacity: well # 2 reactivated (additional .67 cfs for total of 3.12 cfs); well # 8 (2.67 cfs; larger pump installed before Notice of Completion of Works due [4/25/53] on 1948 permit; see 1954 field exam); well # 9 drilled in 1948 (450 gpm pump by 1952 = 1 cfs); well # 10 (5.35 cfs pump capacity). Well # 3 redrilled; no change in capacity.
Aug. 1951	4.9	47.63	29-7106	28 (aka 20/Turner)	Well # 28 (also # 20 and Turner well) drilled in August 1951; license 29-7106 (erroneous 1972 priority date) establishes 1951 use.
Sept. 1 1953	9.53	57.16	29-2338	11, 12, 15 13 (Riverside GC)	Well # 11 (0 cfs; well and property sold in 1992); well # 12 (6.2 cfs); well # 13 (Riverside Golf Course, 2.22 cfs); well # 15 (1.11 cfs); Phillips 1 @ 1940; Phillips 2 @ 1942
Aug. 27 1954	0.28	57.44	29-2354	Restlawn	Restlawn Cemetery well
Sept. 15 1955	3.89	61.33	29-4224	21 (A 4)	Well # 21 (Alameda 4) for 3.89 cfs
Oct. 1 1955	1.22	62.55	29-4226	14 /CREE	Well #14 or Cree for 1.22 cfs
Aug. 15 1956	4.44	66.99	29-4225	23 (A 5)	Well # 23 (Alameda 5) for 4.44 cfs
Dec. 21 1956	3.82	70.81	29-2382	17 (Highland GC)	Well # 17 (3.82 cfs; Highland Golf Course; land & well purchased by city in 1973; not to be confused with well #17 at Riverside Golf Course)
Oct. 16 1958	13.02	83.83	29-2401 for 15.63	16, 18, 19 13 (add'l cfs at RGC)	Well # 16 (6.67 cfs); well #17 is actually Riverside Golf Course well # 13 (increased capacity, .89 cfs), well # 18 (4.66 cfs); well # 19 (0.8 cfs); well 3 claimed in 1926
July 1961	3.36	87.19	29-2383 29-2384	A 6 A 7	Alameda 6, 29-2383 (1.70 cfs) and Alameda 7, 29-2384 (1.66 cfs)
Oct. 1 1962	2.67	89.86	29-4223	33	Well # 33 for 2.67 cfs (Evidence binder)
Dec. 10 1964	4.1	93.96	29-2499	27	Well # 27 for 4.1 cfs
Nov. 6 1972	3.9	97.86	29-7106	29	Well # 29 for 3.9 cfs (3.9 cfs: 6.2 cfs less 2.3 cfs for replacement of Alameda 1 and 2 wells; 6.2 cfs: licensed amount 11.1 cfs less 4.9 cfs for well # 28 claimed with 1951 priority date)
Apr. 11 1973	10.01	107.87	29-7118, 29-7119	42, 41 (Airport 1, 2)	Well #42 or airport 1 (4.01 cfs) and #41 or airport 2 (6 cfs)
Aug. 22 1974	1	108.87	29-7222	43	Well #43 or Ward Park for 1 cfs
Apr. 25 1976	17.07	125.94	29-7322	30, 31, 32	Well # 30 (5.57 cfs); well # 31 (8.02 cfs); well # 32 (3.45 cfs)
Feb. 24 1977	2.23	128.17	29-7375	15 (add'l cfs)	Well #15 redrilled, 2.23 cfs (well capacity is 3.34 cfs, less 1.11 cfs claimed on earlier license, 29-2338)
Dec. 29 1977	9.28	137.45	29-7431		Reuse of municipal water, irrigation season only (9.28 cfs)
June 13 1978	3.34	140.79	29-7450	35 (Ph 3)	Well # 35 or Phillips 3 (3.34 cfs)
July 6 1979	.1	140.89	29-7502	Restlawn	Restlawn Cemetery well (.1 cfs)
May 21 1984	4.46	145.35	29-7770	WPC	Well # WPC: Does Pocatello have evidence of 5.72 cfs?
Jan. 18 1985	7	152.35	29-7782	34	Well #34 (7 cfs)
2001	0	152.35	Transfer 5452	44	POD added to 29-2274, 29-2338, and 29-7375
TOTAL	152.35				