

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

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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
	)	POST-HEARING BRIEF
_____	)	

INTRODUCTION

A primary issue in this case is whether Pocatello's senior surface water rights on Mink Creek and Gibson Jack Creek should be decreed with the City's wells as alternate points of diversion pursuant to Idaho's accomplished transfer statute, I.C. § 42-1425. According to the Special Master and the State, resolution of this issue rests on the threshold question of whether Pocatello's surface water rights on Mink Creek and Gibson Jack Creek are closely connected enough to its interconnected wells to be considered the same source.¹

Pocatello has argued throughout these proceedings that the Special Master erred in her analysis of this question. Specifically, by focusing on a "same source" analysis, the Special Master (1) misidentified the core legal issue, (2) utilized incorrect standards of law, and (3) improperly applied those standards of law to the facts in the record.

During oral argument on August 13th, 2009 the State represented the issue before the Court as a matter of determining whether the Special Master's findings of fact on the issue of

¹ Special Master's Report and Recommendation at 10 (October 2, 2007).

interconnection should be upheld under the clearly erroneous standard of review.² Because Pocatello believes that the issue before the court is a more complicated matter involving several mixed questions of law and fact, Pocatello requested that additional briefing be allowed. The purpose of this brief, consistent with the City's August 14, 2009 letter to the Court, is to identify the factual and legal errors made by the Special Master on this issue and to clarify for the court how those errors might be evaluated in reference to the clearly erroneous standard of review.

STANDARD OF REVIEW

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure (I.R.C.P.), the Idaho Rules of Evidence (I.R.E.), and the Idaho Appellate Rules (I.A.R.).³ The District Court is not bound by a Special Master's conclusions of law, although they are expected to be persuasive.⁴ The Court shall adopt the Special Master's findings of fact unless they are clearly erroneous.⁵ The Court must carefully consider objections to the Special Master's report. Where the findings of fact are clearly erroneous, the Court may, in whole or in part, adopt the report, modify it, reject it, receive further evidence, or remand the report with instructions.⁶

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court.⁷ In reviewing a special master's findings of

² Tr. p. 46-47 (August 13, 2009).

³ Administrative Order 1 (AO1), § 1(a).

⁴ *North Snake Ground Water District v. Gisler*, 136 Idaho 747, 40 P.3d 105 (2002)(citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409 (1997)).

⁵ AO1, § 13(f); I.R.C.P. 53(e)(2).

⁶ *Id.*

⁷ I.R.C.P. 52(a); Memorandum Decision and Order on Challenge; Order of Partial Decrees at 5-7, *In Re SRBA Case No. 39576*, Subcases 55-10288B, et al. (Jan. 3, 2005)(citing *Seccombe v. Wees*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989)); *see also*, *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993).

fact, the district court's task is to determine whether they are supported by substantial, although perhaps conflicting, evidence.⁸ A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law.⁹ The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous.¹⁰

A Director's Report for a water right claim is prima facie evidence of the nature and extent of a water right.¹¹ Generally, an objector must present "substantial evidence" to overcome the rebuttable presumption established by the Director's Report.¹² Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance."¹³

⁸ Memorandum Decision and Order on Challenge; Order of Partial Decrees at 5-7 (citing *Seccombe v. Wees*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989)); *see also*, *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993).

⁹ Memorandum Decision and Order on Challenge; Order of Partial Decrees at 5-7. (citing Wright and Miller, *Federal Practice and Procedure* § 2585 (1995))(emphasis added).

¹⁰ *Id.* (citing *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971)).

¹¹ I.C. § 42-1411(4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002).

¹² *Clear Springs Foods, Inc.*, 136 Idaho 761 at 764, 40 P.3d at 122.

¹³ *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

ARGUMENT

The Special Master's factual and legal conclusions regarding whether Pocatello's surface water rights should be decreed with the City's wells as alternate points of diversion are flawed in several respects.

First, the Special Master incorrectly concluded that the crux of the issue is whether the surface water rights are so closely connected to the City's groundwater wells that they may be considered from the "same source." **Second**, the Special Master made her determination regarding the degree of interconnection between Pocatello's wells and surface water rights without employing a proper or articulable standard and in contravention of the Court's decision in *AFRD#2*, which stated that such determinations belong in the administrative arena.

These factual and legal issues were further compounded because the Special Master did not apply the proper summary judgment standard for a non-jury proceeding.¹⁴ Under the clearly erroneous standard, based on these factual and legal errors, Pocatello asks the court to reverse the Special Master and decree the City's surface water rights with the City's wells listed as alternate points of diversion pursuant to the accomplished transfer statute, I.C. § 42-1425. The

¹⁴ This was the first issue identified in Pocatello's Notice of Challenge. The Special Master applied the wrong standard for summary judgment proceedings without a jury. SRBA subcases are tried before the SRBA court without a jury. The summary judgment standard is that used in non-jury trial cases. The trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Eye & Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121, 125 (2005). This is a different standard from a case to be tried to a jury. When a court reviews a summary judgment motion filed in a case to be tried to a jury, all facts are to be liberally construed for the non-moving party and any reasonable inferences drawn in that party's favor. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517 (1991).

The Special Master applied the summary judgment standard in a case to be tried to a jury. "The facts are liberally construed in favor of the non-moving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence." *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material facts rests on the moving party. *Petrosevik v. Salmon River Canal Co.*, 92 Idaho 865, 425 P.2d. [February 16, 2007 Second Order on Summary Judgment, p. 2]

City's April 30, 2007 proposed findings of fact (Appendix A to the City's April 30, 2007 post trial brief) are Attachment A to this brief.

- I. **The Special Master erred as a matter of law regarding the accomplished transfer statute I.C. § 42-1425's lawful application to changes in source. Under the clearly erroneous standard, the Master's finding that Pocatello's wells divert from a different source than Mink Creek and Gibson Jack Creek is invalid for purposes of determining whether the City's wells may be decreed as alternate points of diversion for the City's senior rights on Mink Creek and Gibson Jack Creek.**

The Special Master's denial of Pocatello's claims for alternate points of diversion at the City's surface water rights is based on an inaccurate legal interpretation of the accomplished transfer statute I.C. § 42-1425. The Special Master's October 2, 2007 *Report and Recommendation* states that I.C. § 42-1425 does not provide for a change in source.¹⁵ This conclusion was based on the Special Master's analysis of the language in I.C. § 42-1425(2) which includes "change of place of use, point of diversion, nature or purpose of use or period of use" but does not include "change in source."¹⁶ The same language, also without "change in source," appears in Idaho's statutory transfer statute I.C. § 42-222 and in I.C. § 42-1416A, the predecessor to I.C. § 42-1425.¹⁷ However, since a change in source necessarily includes a change in point of diversion, this statutory language is not to be interpreted as prohibiting changes in source. See A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 251-252 (1990-91), p.261.

¹⁵ May 28, 2008 SRBA Order Denying Motions to Alter or Amend, p. 4

¹⁶ 42-1425 (2) "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 any 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, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, ... may be claimed in the applicable general adjudication even though the person has not complied with sections 41-108 and 42-222, Idaho Code, ...

¹⁷ 42-222. CHANGE IN POINT OF DIVERSION, PLACE OF USE, PERIOD OF USE, OR NATURE OF USE OF WATER UNDER ESTABLISHED RIGHTS -- FORFEITURE AND EXTENSION -- APPEALS. (1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change.

I.C. § 42-1416A Prior change in point of diversion, place of use, period of use, or nature of use of water right claimed in a general adjudication. -- (1) If any person entitled to the use of water has made a change

The observed practice at the SRBA court confirms the absence of an outright legal prohibition to changes in source under the accomplished transfer statute I.C. § 42-1425. The SRBA court has issued partial decrees with changes in source pursuant to the accomplished transfer statute I.C. § 42-1425. Two such partial decrees are in Attachment B to this brief.¹⁸ In those partial decrees, the language “RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO SECTION 42-1425, IDAHO CODE” appears with the source element. Pocatello provided this language to the Special Master as an example of the established SRBA law regarding changes in source under the accomplished transfer statute. In accordance with the SRBA court’s independent determination of matters before it, as articulated by the Idaho Supreme Court in *State v. United States*, 128 Idaho 246, 258-59, 912 P.2d 614, 626-27 (1995),¹⁹ the decrees represent the SRBA court’s independent determination that an accomplished change in source pursuant to section 42-1425, Idaho Code, is in accordance with Idaho law. The Special Master’s response did not acknowledge these existing SRBA determinations confirming the lawful scope of section 42-1425, Idaho Code:

in point of diversion, place of use, period of use or nature of use of all or a part of the water, including a change as part of an exchange as defined by section 42-105, Idaho Code, prior to entry of an order commencing a general adjudication pursuant to section 42-1408, Idaho Code, and the person entitled to the use of water has not complied with the requirements of sections 42-108 and 42-222, Idaho Code, regarding such changes, the following shall apply...” [In 1994 SRBA Judge Hurlbutt found I.C. § 42-1416A unconstitutionally vague [Memorandum Decision and Order on Basin-Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, as Written at 16, 18, *In Re SRBA Case No. 39576*, Case No. 91-00001 (February 4, 1994)] which led to the passage of I.C. § 42-1425.] because it lacked “standards, criteria or guidelines as to how, when, and what proof must be taken to assure the substantive criteria of I.C. § 42-222 [were] met.

¹⁸ The SRBA partial decrees are for water rights 29-02219 and 29-10341. The same decrees, and a third, are discussed in the City of Pocatello’s December 13, 2007 Brief in Support of Motion to Alter or Amend at 2, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al.

¹⁹ Although these decrees were referenced and quoted in the City of Pocatello’s December 13, 2007 Brief in Support of Motion to Alter or Amend at 2, the Special Master did not respond in accordance with the legal standard from *State v. United States*, 128 Idaho 246, 258-59, 912 P.2d 614, 626-27 (1995). Instead, the Special Master responded that, “Pocatello argues that IDWR has recognized changes in source under this statute. However, this court adheres to the analysis that the statute does not provide for change in the source element.”

“Pocatello argues that IDWR has recognized changes in source under [I.C. § 42-1425]. However, this court adheres to the analysis that the statute does not provide for change in the source element.”

Order Denying Motions to Alter or Amend at 3, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al (May 28, 2008).

The Special Master’s conclusion that “[I.C. § 42-1425] does not provide for a change in the source element” is an error of law.

Based on the incorrect legal premise that I.C. § 42-1425 does not provide for a *change in the source element*, the Special Master concluded that a claimant may not change or add points of diversion from surface water to groundwater unless the surface water points of diversion and the ground water points of diversion are drawing from the same source²⁰ ... are drawing the same water.²¹ The Special Master defined the crux of the matter for Pocatello as whether the City’s surface water rights are so closely connected to its groundwater sources that the wells may be considered the same source.²²

Pursuant to I.C. § 42-1425’s lawful application to changes in source, and under the clearly erroneous standard, the Master’s finding that Pocatello’s wells divert from a different source than Mink Creek and Gibson Jack Creek is invalid for purposes of determining whether the City’s wells may be decreed as alternate points of diversion for the City’s senior rights on Mink Creek and Gibson Jack Creek.

²⁰ Special Master’s Report & Recommendation and Order on Motion to Reconsider at 10, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (October 2, 2007); *see also*, Second Order on Summary Judgment at 6-7, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (February 16, 2007).

²¹ The “same water” language appears in the Special Master’s Report & Recommendation and Order on Motion to Reconsider at 12, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (October 2, 2007).

²² Special Master’s Report & Recommendation and Order on Motion to Reconsider at 10; *see also*, Second Order on Summary Judgment at 6-7.

II. The Special Master's determination of the degree of interconnection between the City's wells and surface water rights is clearly erroneous because it is not based on a legitimate or articulable standard (standards which AFRD#2 identifies as not addressed by water right adjudications and as within the expert administrative province of IDWR).

Pocatello's briefs following trial have directed the Court to the decision in *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*²³ and its determination that "water rights adjudications neither address, nor answer":

- "information on how each water right on a source physically interacts or affects other rights on that same source."
- "how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.(citation omitted)"

These are questions presented in delivery calls.²⁴

The second round of summary judgment motions, briefs, and order confirmed the physical interconnection of Mink Creek, Gibson Jack Creek, Lower Portneuf River Valley Aquifer (LPRVA), the Snake River, and the Eastern Snake Plain Aquifer (ESPA).²⁵ The purpose of Pocatello's Motion for Summary Judgment regarding interconnection was to confirm this physical interconnection so that the fact of the sources' interconnection would not be an issue at

²³ *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007) (hereinafter AFRD#2).

²⁴ *Id.* at 18.

²⁵ Pocatello moved for summary judgment under I.R.C.P. 56 that Mink Creek, Gibson Jack Creek, Lower Portneuf River Valley Aquifer (LPRVA), the Snake River, and the Eastern Snake Plain Aquifer (ESPA) are interconnected sources of water. *City Of Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, And Injury under I.C. § 42-1425 at 3* (November 30, 2006). The Special Master granted Pocatello's motion as to the interconnection of these sources, but held only that "there is a general relationship between the sources and water rights at issue." The Special Master's understanding was that "this general interconnectedness does not resolve the issue of injury or prove that Pocatello's wells may be added as alternate points of diversion." Second Order on Summary Judgment at 12 (February 16, 2007).

trial.²⁶ “[T]he issue related to *whether there needs to be a standard* for alternate points of diversion would be addressed at trial.”²⁷ Pocatello also advised the Special Master and counsel that the State’s briefing in the AFRD#2 case [determined by the Idaho Supreme Court in later 2007] would brought to the Court because “there’s a good formula there for what the Court decides and what is decided in later administrations.”²⁸

If I.C. § 42-1425 did not provide for a change in source and if it were appropriate for the court to consider the degree of interconnection between Pocatello’s surface water rights and its groundwater wells, the Special Master’s determination is clearly erroneous because it does not provide or apply a workable or legitimate standard by which to judge the degree of interconnection.

In the *Second Order on Summary Judgment*, the Special Master stated the crux of the matter as whether the surface water rights at Mink Creek and Gibson Jack Creek are so closely connected to the groundwater sources, that the wells may be added as alternative points of diversion;²⁹ and that the connection must be “so close that the ground water and surface water are essentially the same source.”³⁰

The Special Master acknowledged that there is no real controversy regarding the general interconnection of these sources (i.e., LPRVA, Mink Creek, Gibson Jack Creek, ESPA), but stated that a determination of general interconnectedness is insufficient to support such a finding.³¹

²⁶ Transcript p. 27 line 12 to page 28, line 3.

²⁷ Transcript, p. 28, lines 2-19.

²⁸ Transcript p. 68, lines 5-10.

²⁹ Second Order on Summary Judgment at 6 (February 16, 2007)(emphasis added).

³⁰ Second Order on Summary Judgment at 6-7.

³¹ *Id.*; see also, Master’s Report & Recommendation and Order on Motion to Reconsider at 12 (stating that “Mink Creek and Gibson Jack Creek and the LPRVA are hydraulically connected.”).

Confusingly, however, the Special Master stated in her *Report and Recommendation* that “a close connection between two water supplies is different than a showing they are the same source.”³² The Special Master also referred to Carter Fritschle’s testimony at trial that the wells are a “significant distance from the creeks.”³³

The Special Master does not discuss any of Greg Sullivan’s testimony in detail regarding how one might determine the interconnection of two sources and merely cites Fritschle’s testimony and IDWR’s conclusion that the two sources are too far apart. This is not something that a court could reliably apply.

Dated this 4th day of September 2009.

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

By Josephine P. Beeman
Josephine P. Beeman

³² Master’s Report & Recommendation and Order on Motion to Reconsider at 12.

³³ *Id.* at 7.

Attachment (30 subcases)

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

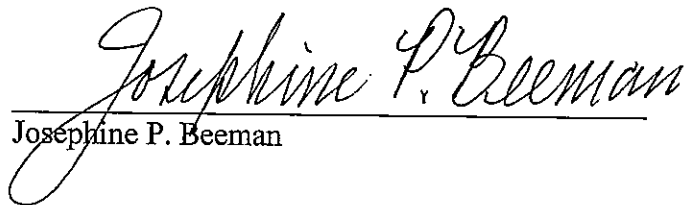
I HEREBY CERTIFY that on the 4TH day of September 2009, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

US DEPARTMENT OF JUSTICE
ENVIRONMENT & NAT'L RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

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



Josephine P. Beeman

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

**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, et al. (see attached Exhibit A)
	)	
	)	Pocatello's Proposed Findings of Fact
	)	
Case No. 39576	)	
_____	)	

The City of Pocatello, by and through its counsel of record, Beeman & Associates, P.C.,
hereby submits its Proposed Findings of Fact.

THE CITY OF POCATELLO'S MUNICIPAL CULINARY WATER SYSTEM

1. The City of Pocatello is a municipal water supplier serving a population of over 50,000 residents in a service area of approximately 34 square miles. The City has an obligation to its customers to provide potable water on demand 24 hours a day, 365 days a year.
2. As of November 19, 1987, the City of Pocatello's surface water supply for culinary uses within the City consisted of diversion works on Mink Creek and Gibson Jack Creek, and the City's associated interconnected delivery system.
3. As of November 19, 1987, the City of Pocatello's ground water supply for culinary uses within the City consisted of a system of the following 22 interconnected wells and the City's associated interconnected delivery system: Wells 2, 3, 7, 10, 12, 13, 14, 15, 16, 18, 21, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, and 34.
4. The City's interconnected system for culinary water delivers its surface water and ground water rights throughout the City's culinary service area.
5. The City has operated an interconnected system for culinary uses beginning in the late 1880s with its surface water rights from Mink Creek and Gibson Jack Creek.

6. Since the early 20th century, the interconnected wells which serve as alternate points of diversion also developed ground water rights to supply the City its interconnected culinary system. Each time a new well was drilled and added to the interconnected system, it resulted in a new alternate point of diversion for the City's ground water rights. Culinary water use from its surface water sources on Mink Creek and Gibson Jack Creek began declining in 1985 and ceased completely in 1993 as a result of changing water quality regulations.
7. As surface water diversions declined, the water rights were diverted through the culinary wells.
8. Well #44 was drilled in 1999 as a replacement well for the compromised function due to ground water contamination of some of the 22 interconnected wells that served the City's culinary uses as of November 19, 1987.
9. Some of the 22 wells that were interconnected to the City's culinary system as of November 19, 1987 include: Alameda #1, Alameda #2, Alameda# 6, Alameda #7, Well #1, Well #4, and Well #6. The wells that are "off line" but may be rehabilitated include: Well #1. The wells that have been replaced include: Alameda #1 and Alameda #2 were replaced by Well #29, and Well #1 was replaced with Well #5.
10. The ground water rights that provided the water supply to the City's interconnected culinary system prior to November 19, 1987 and continue to provide a water supply include the following 21 water rights: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.
11. The surface water rights that provided the water supply to the City's interconnected culinary system prior to November 19, 1987 include the following four water rights: 29-271, 29-272, 29-273, and 29-4222.
12. The source of water supply for the City's 23 interconnected culinary wells is ground water pumped from the Lower Portneuf River Valley Aquifer (LRPVA). The source of water supply for one of the 23 City's interconnected wells (Well #32) is ground water pumped from the Eastern Snake Plain Aquifer (ESPA).
13. The Lower Portneuf River Valley Aquifer is a highly prolific aquifer.
14. A large portion of the recharge to supply the aquifer comes from the Bannock Range, primarily from Gibson Jack and Mink Creeks.
15. The Lower Portneuf River Valley Aquifer, Mink Creek, and Gibson Jack Creek are interconnected sources of water and are considered the same source of water for purposes of the SRBA decree.
16. The Eastern Snake Plain Aquifer is a large regional aquifer that extends across much of southern Idaho.

17. The Lower Portneuf River Valley Aquifer and the Eastern Snake Plain Aquifer are hydrologically connected.

THE CITY OF POCATELLO'S MUNICIPAL AIRPORT CULINARY WATER SYSTEM

18. The City provides a water supply for culinary, commercial, and industrial uses in and around the Pocatello Municipal Airport through a system of interconnected wells (Airport Interconnected Wells).
19. The City of Pocatello's Airport Interconnected Wells as of November 19, 1987 consisted of Wells #35 and #39.
20. The source of water supply for the two Airport Interconnected Wells is ground water pumped from the ESPA.

THE CITY OF POCATELLO'S SRBA CLAIM FOR ALTERNATE POINTS OF DIVERSION FOR GROUND WATER UNDER I.C. § 42-1425

21. The City of Pocatello's claimed alternate points of diversion under *I.C. § 42-1425* for the following 21 ground water rights serving the City's culinary uses are: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.
22. The alternate points of diversion claimed for the 21 ground water rights serving the City's culinary uses are 22 wells that were interconnected as of November 19, 1987, as listed in paragraph 3, and Well #44. Well #44 is a replacement well for the compromised function of some of the 22 pre-1987 interconnected City culinary wells as a result of ground water contamination.
23. The City of Pocatello's claimed alternate points of diversion under *I.C. § 42-1425* for the following two water rights serving the Pocatello Municipal Airport: 29-7450 and 29-13638.
24. The alternate points of diversion claimed for the two ground water rights serving the Pocatello Municipal Airport are two wells that were interconnected as of November 19, 1987.
25. The claim for alternate points of diversion for ground water rights allows each of the interconnected culinary wells to be alternate points of diversion for water rights delivered through the interconnected system. This allows the City to maintain physical delivery of water even when some of its wells are not operating. From an administrative perspective, it allows the City to withdraw and deliver water by priority, beginning with its most senior rights, notwithstanding the well from which the water is pumped.

26. Diversion of the 21 ground water rights serving the City's culinary system and the two ground water rights serving the Pocatello Municipal Airport through alternate points of diversion occurred prior to November 19, 1987.
27. The water rights were claimed in a general adjudication.
28. No water right holder alleged injury as a result of Pocatello's operation of its alternate points of diversion for its ground water rights either at the time of the change of point of diversion or subsequently in these proceedings.
29. At trial, neither IDWR nor the State of Idaho presented evidence that injury to individual water rights had occurred as a result of Pocatello's operation of its alternate points of diversion for its ground water rights.
30. At trial, IDWR alleged that prospective injuries may occur as a result of Pocatello's operation of its alternate points of diversion for its ground water rights under *I.C. § 42-1425*, but IDWR did not prove any injury as of November 19, 1987 or as of the time of trial in 2007.
31. IDWR included the following remark under "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT" in the recommendation for the water rights associated with the accomplished transfer of point of diversion to address the prospective injury contemplated in the future:

To the extent necessary for administration between points of diversion for ground water and between points of diversion for ground water and hydraulically connected surface sources, water was first diverted under this right from Pocatello Well No. [___], located in [legal description].
32. At trial, Pocatello's expert testified, and this Court agrees, that the condition nullifies the City's claim for alternate points of diversion for its ground water rights by rendering it useless during periods that priority administration is necessary and when the City would most benefit from exercising its alternate points of diversion.
33. At trial, Pocatello's expert testified, and this Court agrees, that no water rights existing on the date of the change were injured as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving the City's culinary uses, or Pocatello's diversion of its two ground water rights at the two alternate points of diversion serving the Pocatello Municipal Airport.
34. Pocatello's expert analyzed the magnitude of drawdown in the City's interconnected culinary wells that existed prior to November 19, 1987 and determined that due to the prolific nature of the LPRVA and the relatively small magnitude of drawdown measured at the wells, Pocatello's alternate point of diversion operations had no significant impact to neighboring wells.

35. At trial, Pocatello's expert testified, and this Court agrees, that there was no enlargement of the 21 ground water rights serving its culinary system, or the two ground water rights serving the Pocatello Municipal Airport, prior to 1987 as a result of Pocatello's diversion of its ground water rights at the alternate points of diversion.

**THE CITY OF POCATELLO'S SRBA CLAIM FOR ALTERNATE
POINTS OF DIVERSION FOR SURFACE WATER UNDER IDAHO CODE § 42-1425**

36. The City of Pocatello's claimed 23 wells as alternate points of diversion for the City's four surface water rights: 29-271, 29-272, 29-273, and 29-4222.
37. The 23 alternate points of diversion claimed for the four surface water rights serving the City's culinary uses are 22 wells that were interconnected as of November 19, 1987, as listed in paragraph 11, and Well #44. Well #44 is a replacement well for the compromised function of some of the 22 pre-1987 interconnected City culinary wells resulting from ground water contamination.
38. Diversion of Pocatello's surface water rights at the 23 alternate points of diversion occurred prior to November 19, 1987.
39. At trial, Pocatello's expert testified, and this Court agrees, that no water rights existing on the date of the change were as a result of Pocatello's diversion of its surface water rights at the 23 alternate points of diversion serving the City's culinary uses.
40. At trial, Pocatello's expert testified, and this Court agrees, that there was no enlargement of the surface water rights as a result of Pocatello's diversion of its surface water rights at the 23 alternate points of diversion.
36. Pursuant to a settlement agreement with the Surface Water Coalition, the City has further agreed to limit the annual volume of diversions under the surface water right priorities at the ground water alternate points of diversion to no more than the amount of water determined to be physically and legally available at the original surface water points of diversion.

**POCATELLO FILED AN APPLICATION FOR TRANSFER 5452
REGARDING WATER RIGHTS 29-2274, 29-2338, AND 29-7375.
IDWR EXAMINED AND APPROVED THE TRANSFER ON JUNE 28, 1999**

37. On June 28, 1999, Transfer 5452 was issued approving 13 wells as alternate points of diversion for Pocatello's water rights 29-2274, 29-2338 and 29-7375.
38. The approved transfer did not include any remarks to limit the use of the water rights at the 13 alternate points of diversion or to limit the use of the 13 wells as alternate points of diversion.
39. The 13 alternate points of diversion included five wells that were connected to the municipal culinary system (four wells already connected as of November 19, 1987; and a

fifth well, Well #44, added in 1999 as a replacement well for pre-1987 interconnected culinary wells), and one well connected to the airport culinary system. The other seven wells listed as alternate points of diversion are not part of the interconnected municipal culinary system or the interconnected airport culinary system.

40. Pocatello claimed the three ground water rights (29-2274, 29-2338 and 29-7375) as part of the 21 ground water rights served by the City's interconnected culinary system of 23 wells; the 23 wells include replacement Well #44. IDWR did not recommend the three water rights as part of the City's interconnected culinary system, nor did IDWR recommend the alternate points of diversion which Pocatello claimed for these three rights.
41. The three water rights were appropriately claimed in the SRBA by Pocatello under I.C. § 42-1425 with 23 alternate points of diversion.
42. The three water rights are included in the list of 21 water rights for which Pocatello's expert testified that no water rights existing on the date of the change were injured as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving the City's culinary uses.
43. The three water rights are included in the list of 21 water rights for which Pocatello's expert testified that no enlargement of the water rights as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving the City's culinary uses.

THE CITY OF POCATELLO'S BIOSOLIDS PROGRAM

43. The Biosolids Program is a municipal operation regulated by the State of Idaho and the federal government as part of public health and safety responsibilities.
44. The Biosolids Program disposes of the solids generated in the City's wastewater treatment process and requires water use in the process. The solids are used as fertilizer on fields owned by the City and located in the vicinity of the wastewater treatment plant. The crops grown on the fields that are fertilized with biosolids receive water from four water rights owned and operated by Pocatello specifically for the Biosolids Program.
45. The use of water in a Biosolids Program is a municipal use.
46. The four water rights for the City's Biosolids Program are 29-7118, 29-7119, 29-11344, and 29-7770. The well associated with 29-7118 is known as Well #42. The well associated with 29-7119 is known as Well #41. The well associated with 29-11344 is Well #43. The source of water for 29-7770 is wastewater.
47. The City of Pocatello claimed a municipal purpose of use for the four water rights that serve the City's Biosolids Program: 29-7118, 29-7119, 29-11344, and 29-7770.

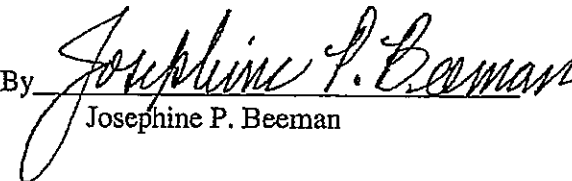
48. The source of water supply for each of the wells that serve the water rights for the City's Biosolids Program is ground water pumped from the ESPA.
49. Water rights 29-7118, 29-7119, and 29-7770 were developed specifically for the Biosolids Program and have not been used for other purposes. IDWR licensed each right with an irrigation purpose of use.
50. The irrigation purpose of use in licenses 29-7118, 29-7119, and 29-7770 is an error of law.
51. Water right 29-7770 has a priority date of May 21, 1984 and is properly claimed in the SRBA. *I.C. § 42-1420*.

WATER RIGHTS 29-13558 AND 29-13639:
PRIORITY DATES FOR ALAMEDA WELL #1 AND ALAMEDA WELL #3

52. A priority date of 1905 was claimed by Pocatello in the SRBA for Water Right 29-13558 (Alameda Well #1). IDWR recommended a priority date for the water right of July 7, 1924.
53. A priority date of December 31, 1940 was claimed by Pocatello in the SRBA for water right 29-13639 (Alameda Well #3). IDWR recommended a priority date for the water right of October 22, 1955.
54. At trial, Pocatello demonstrated that water was beneficially used from water right 29-13558 (Alameda Well #1) in 1905.
55. At trial, Pocatello demonstrated that water was beneficially used from water right 29-13639 (Alameda Well #1) on October 22, 1955.

DATED this 30th day of April 2007.

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

By 
Josephine P. Beeman

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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 29-02219

NAME AND ADDRESS: CRIS G DAVIS
LAURETTA M DAVIS
PO BOX 76
DOWNEY, ID 83234

SOURCE: MARSH CREEK TRIBUTARY: PORINEUF RIVER
POND TRIBUTARY: MARSH CREEK

RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO
SECTION 42-1425 IDAHO CODE.

QUANTITY: 2.50 CFS

PRIORITY DATE: 07/28/1919

POINT OF DIVERSION: I11S R36E S14 SWNE Within Bannock County
S23 NENE
NESE
SENE

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 10-31	2.50 CFS

PLACE OF USE:	Irrigation		Within Bannock County
	I11S R36E S23	NENE 5.0	SENE 13.0
		NESE 5.0	
	S24	SWNW 28.0	NESW 8.0
		NWSW 28.0	
	S26	NENE 37.0	NWNE 39.0
	163.0 Acres Total		

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO
THE IRRIGATION OF A COMBINED TOTAL OF 163 ACRES IN A SINGLE
IRRIGATION SEASON. COMBINED RIGHT NOS.: 29-2219, 29-2155,
29-13381

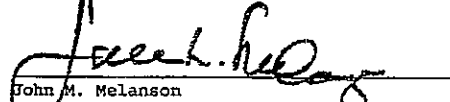
THIS RIGHT IS LIMITED TO THE IRRIGATION OF 140 ACRES WITHIN THE
PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

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. 19576

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 29-10341

NAME AND ADDRESS: PIDCOCK CO INC
PO BOX 32
INKOM, ID 83245

SOURCE: GREEN CANYON CREEK TRIBUTARY: PORTNEUF RIVER
UNNAMED STREAM TRIBUTARY: GREEN CANYON CREEK

RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO
SECTION 42-1425, IDAHO CODE.

QUANTITY: 1.32 CFS

PRIORITY DATE: 02/16/1869

POINT OF DIVERSION: T07S R36E S26 NWSWNE Within Bannock County
SENEENW
NESENN

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	1.32 CFS
	Stockwater	01-01 TO 12-31	0.02 CFS

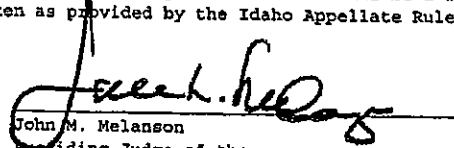
PLACE OF USE:	Irrigation	Stockwater
	T07S R36E S26 SWNW 8.8 S27 NENE 21.8 53.7 Acres Total	Within Bannock County SENE 6.1 SENE 17.0
	Same as Irrigation	Within Bannock County

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

RIGHT INCLUDES ACCOMPLISHED CHANGE IN SEASON OF USE PURSUANT TO
THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication