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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 POCA TELLO'S
_____	)	BRIEF IN SUPPORT OF MOTION TO
	)	ALTER OR AMEND NOVEMBER 9,
	)	2009 MEMORANDUM DECISION AND
	)	ORDER ON CHALLENGE

DESCRIPTION

The City of Pocatello (City or Pocatello), by and through its counsel of record, Josephine P. Beeman of Beeman & Associates, P.C., files its Brief in Support of the City's November 23 Motion to Alter or Amend the Court's November 9 Memorandum Decision and Order on Challenge (November 9 Decision).

**1. THE NOVEMBER 9 MEMORANDUM DECISION SHOULD BE
AMENDED TO PROVIDE ENUMERATED FINDINGS OF FACT
AND CONCLUSIONS OF LAW.**

The following statements are from the Court's "Brief Statement of Material Facts,"
Section IV, pages 4-6 (November 9 Decision):

(1) "Water for the in-town service area is provided through an interconnected system supplied by twenty-one ground water rights delivered through twenty-two wells. The wells were developed at different times and are located throughout the in-town service area."

The charts below should be included in the November 9 Decision to identify the dates the City's 21 ground water rights and 22 associated wells were developed for the interconnected municipal system in-town.

**THE 21 WATER RIGHTS FOR POCATELLO'S
IN-TOWN INTERCONNECTED SYSTEM**

Water Right No.	Priority Date
29-2274	6/15/1948
29-2338	9/1/1953
29-2401	10/16/1958
29-2499	12/10/1964
29-4221	8/2/1943
29-4223	10/1/1962
29-4224	9/15/1955
29-4225	8/15/1956
29-4226	12/31/1955
29-7106	11/6/1972
29-7322	4/25/1976
29-7375	2/24/1977
29-11339	12/31/1961
29-11348	8/31/1951
29-13558	7/16/1924
29-13559	12/31/1925
29-13560	12/31/1926
29-13561	8/31/1931
29-13562	12/31/1936
29-13637	12/31/1940
29-13639	10/22/1952

**THE 22 INTERCONNECTED WELLS FOR
POCATELLO'S IN-TOWN SYSTEM**

Well #	Date drilled\ redrilled	Township	Range	Section	QQ
2	12/31/1926	7S	34E	1	NWNE
2	6/15/1948				
3	12/31/1926	7S	34E	1	SWNE
7	12/31/1940	6S	34E	35	NWNE
10	6/15/1948	6S	34E	26	NENW
12	9/1/1953	6S	34E	35	SENE
13	9/1/1953	7S	34E	1	SESE
13	10/16/1958				

14	12/31/1955	7S	35E	7	NESW
15	9/1/1953	7S	35E	6	NWSE
15	2/24/1977				
16	10/16/1958	6S	34E	26	SWSE
18	10/16/1958	6S	34E	15	NENW
21	9/15/1955	6S	34E	23	SWNE
22	10/22/1952	6S	34E	23	SENW
23	8/15/1956	6S	34E	23	NWNE
26	6/1/1945	6S	34E	15	NWNE
27	12/10/1964	6S	34E	14	NWNW
28	8/31/1951	7S	34E	1	NESE
29	11/6/1972	6S	34E	23	NESW
30	4/25/1976	6S	34E	35	NWNE
31	4/25/1976	6S	34E	15	NESE
32	4/25/1976	6S	34E	16	NENE
33	10/1/1962	7S	35E	18	SENE
34	2/18/1985	6S	34E	15	NESE

(2) “Water service for the airport is provided through a smaller separate interconnected system supplied by three ground water rights associated with three wells. Pocatello claimed two of the wells as alternative points of diversion for each other.”¹

It should be explained that the airport has an interconnected system supplied by ground water rights 29-7450 and 29-13638 delivered through interconnected wells 35 and 39. A third water right at the airport, 29-11344, is diverted through well 40 which is not interconnected with wells 35 or 39. IDWR Exh. 1 (description of airport system); Pocatello Exh. 181 (29-7450, 29-13638, 29-11344), and the Special Master’s Report and Recommendation for 29-7450, 29-13638, and 29-1134.

The charts below should be included in the November 9 Decision to identify the dates the City’s 2 ground water rights and 2 associated wells were developed for the interconnected airport system.

THE 2 WATER RIGHTS FOR POCATELLO’S INTERCONNECTED AIRPORT SYSTEM

Water Right No.	Priority Date
29-7450	6/13/1978
29-13638	12/31/1940

¹ The two wells are claimed as alternate points of diversion for specific water rights. The wells are not claimed as alternate points of diversion “for each other.”

**THE 2 INTERCONNECTED WELLS FOR
POCATELLO'S AIRPORT SYSTEM**

Well # Airport System	Date drilled and redrilled	Township	Range	Section	QQ
35	6/13/1978	6S	33E	10	NESE
39	12/31/1940	6S	33E	15	SWNE

(3) “Pocatello relies on the accomplished transfer provisions of Idaho Code § 42-1425 for establishing the wells as alternative points of diversion for each other and for its surface rights.”

Because the accomplished transfer statute I.C. § 42-1425 only applies to transfers accomplished in violation of the transfer requirements that became mandatory on May 26, 1969, the wells and water rights in existence prior to May 26, 1969 for the City's interconnected systems should be specifically identified as shown in the charts below.

**THE 21 WATER RIGHTS FOR POCATELLO'S
IN-TOWN INTERCONNECTED SYSTEM**

Water Right No.	Priority Date before May 26, 1969	Priority Date – May 26, 1969 or later
29-2274	6/15/1948	
29-2338	9/1/1953	
29-2401	10/16/1958	
29-2499	12/10/1964	
29-4221	8/2/1943	
29-4223	10/1/1962	
29-4224	9/15/1955	
29-4225	8/15/1956	
29-4226	12/31/1955	
29-7106		11/06/1972
29-7322		4/25/1976
29-7375		2/24/1977
29-11339	12/31/1961	
29-11348	8/31/1951	
29-13558	7/16/1924	
29-13559	12/31/1925	

29-13560	12/31/1926	
29-13561	8/31/1931	
29-13562	12/31/1936	
29-13637	12/31/1940	
29-13639	10/22/1952	

**THE 22 INTERCONNECTED WELLS FOR
POCATELLO'S IN-TOWN SYSTEM**

Well #	Date drilled/ redrilled <u>before May 26, 1969</u>	Date drilled/ redrilled <u>May 26, 1969 or later</u>	Township	Range	Section	QQ
2	12/31/1926		7S	34E	1	NWNE
2	6/15/1948					
3	12/31/1926		7S	34E	1	SWNE
7	12/31/1940		6S	34E	35	NWNE
10	6/15/1948		6S	34E	26	NENW
12	9/1/1953		6S	34E	35	SENE
13	9/1/1953		7S	34E	1	SESE
13	10/16/1958					
14	12/31/1955		7S	35E	7	NESW
15	9/1/1953		7S	35E	6	NWSE
15		2/24/1977				
16	10/16/1958		6S	34E	26	SWSE
18	10/16/1958		6S	34E	15	NENW
21	9/15/1955		6S	34E	23	SWNE
22	10/22/1952		6S	34E	23	SENE
23	8/15/1956		6S	34E	23	NWNE
26	6/1/1945		6S	34E	15	NWNE
27	12/10/1964		6S	34E	14	NWNW
28	8/31/1951		7S	34E	1	NESE
29		11/6/1972	6S	34E	23	NESW
30		4/25/1976	6S	34E	35	NWNE
31		4/25/1976	6S	34E	15	NESE
32		4/25/1976	6S	34E	16	NENE
33	10/1/1962		7S	35E	18	SENE
34		2/18/1985	6S	34E	15	NESE

(4) “The interconnected water systems for both the in-town service area and airport were in existence and in operation prior to the commencement of the SRBA on November 19, 1987, as required by Idaho Code § 42-1425.”

Based on the City of Pocatello’s water rights (and associated wells) developed prior to May 26, 1969, the statement should be amended to include, “In addition, for the City’s in-town

system, 18 ground water rights were developed prior to May 26, 1969, and were being delivered through 17 wells, all also developed prior to May 26, 1969.

(5) “IDWR recommended the wells as alternative points of diversion for the ground water rights as claimed based on the application of Idaho Code § 42-1425, with one exception.”

This statement should be amended in accordance with I.C. § 42-1425’s application to transfers accomplished in violation of the transfer requirements that became mandatory on May 26, 1969. The sentence should read:

IDWR recommended the wells as alternative points of diversion for the ground water rights as claimed based on the application of Idaho Code § 42-1425 ~~with one exception~~ to transfers accomplished in violation of the transfer requirements that became mandatory on May 26, 1969.

(6) “In order to prevent injury to existing ground water rights of third parties IDWR recommended that the following conditions or remark appear in the face of the Partial Decree for eighteen of the water rights in the in-town service area and for two of the three water rights supplying water to the airport:

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, ground water was first diverted under this right from Pocatello well [description] in the amount of cfs.

In accordance with the application of I.C. § 42-1425 to transfers accomplished in violation of the transfer requirements that became mandatory on May 26, 1969, the condition (if ultimately determined to be valid legally) should read:

FOR PRE-MAY 26, 1969 WATER RIGHTS:

The priority date of this ground water right is senior to May 26, 1969 and the following points of diversion for this ground water right were established prior to May 26, 1969 and the following points of diversion for this ground water right were in existence prior to May 26, 1969 in the capacities listed below. In addition, the condition should also state: 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, the following points of diversion for this ground water right were established subsequent to May 26, 1969, on the dates and in the capacities listed below.

Water Right No.	Priority Date before May 26, 1969
29-2274	6/15/1948
29-2338	9/1/1953
29-2401	10/16/1958
29-2499	12/10/1964
29-4221	8/2/1943
29-4223	10/1/1962
29-4224	9/15/1955
29-4225	8/15/1956
29-4226	12/31/1955
29-11339	12/31/1961
29-11348	8/31/1951
29-13558	7/16/1924
29-13559	12/31/1925
29-13560	12/31/1926
29-13561	8/31/1931
29-13562	12/31/1936
29-13637	12/31/1940
29-13639	10/22/1952

Well #	Date drilled/ redrilled before May 26, 1969	Capacity (cfs)			
		2003 Condition	2006 Condition	2007 Condition	Stipulation
2	12/31/1926	3.12	2.45	2.45	
2	6/15/1948		.67	missing	3.12
3	12/31/1926	4.23	4.23	4.23	4.46
7	12/31/1940	4.46	4.46	4.46	4.46
10	6/15/1948	5.35	5.35	missing	6.23
12	9/1/1953	6.20	6.20	missing	6.20
13	9/1/1953	2.22	2.22	missing	
13	10/16/1958	0.89	.89	.89	3.11
14	12/31/1955	0.22	.22	.22	2.23
15	9/1/1953	1.11	1.11	missing	
16	10/16/1958	6.67	6.67	6.67	6.67
18	10/16/1958	4.66	4.66	4.66	4.66
21	9/15/1955	3.89	3.89	3.89	3.89
22	10/22/1952	3.68	3.68	3.68	3.68
23	8/15/1956	4.44	4.44	4.44	4.44
26	6/1/1945	2.67	2.67	2.67	2.67
27	12/10/1964	4.10	4.10	4.10	4.90
28	8/31/1951	4.90	4.90	4.90	4.90
33	10/1/1962	0.21	.21	.21	2.67

Well #	Date drilled/ redrilled <u>May 26, 1969</u> <u>or later</u>	Capacity (cfs)			
		2003 Condition	2006 Condition	2007 Condition	Stipulation
15	2/24/1977	2.23	2.23	missing	3.34
29	11/6/1972	6.20	3.90	3.90	4.01
30	4/25/1976	5.57	5.57	5.58	6.23
31	4/25/1976	8.02	8.02	8.03	8.02
32	4/25/1976	3.45	3.45	3.46	3.45
34	2/18/1985	7.00	7.00	missing	7.00

FOR POST-MAY 26, 1969 WATER RIGHTS:

The priority date of this ground water right is junior to May 26, 1969. 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, ground water was first diverted under this right from Pocatello Well No. 4 [list] located in T06S, R34E, S35, NWSE[legal description].

Water Right No.	Priority Date – May 26, 1969 or later
29-7106	11/06/1972
29-7322	4/25/1976
29-7375	2/24/1977

(7) “IDWR’s basis for recommending the condition was twofold, “number one, well interference that could happen in the future as a result of increased pumping at wells and, secondly, conjunctive administration concerns relative to diversion from one location as compare [sic] with diversion from another location. Amended Master’s Report and Recommendation and Order on Motion to Reconsider, at 17 (quoting Tuthill testimony).”

The November 9 Decision does not define what constitutes “interference” for the purposes of administering the condition on Pocatello’s water rights.

(8) “Water Right 29-7770 was licensed with an “irrigation” purpose of use in 2003. Pocatello asserts that an accomplished transfer has changed the purpose of use for this licensed right from ‘irrigation’ to ‘municipal.’ IDWR recommended 29-7770 with an “irrigation” purpose of use in its Director’s Report consistent with the license.”

The record shows that Pocatello argued that the irrigation purpose of use was an error of law by IDWR that was correctible by this Court. Pocatello did not pursue a legal argument that the purpose of use was an accomplished transfer in use pursuant to I.C. § 42-1425.

2. I.C. § 42-1425 DOES NOT CONTEMPLATE AND WAS NOT INTENDED TO AUTHORIZE IDWR TO ENGAGE IN AN INJURY ANALYSIS WHERE NO THIRD PARTIES OBJECTED TO THE CLAIMS BASED ON INJURY, AND WHERE IDWR HAS NOT IDENTIFIED ANY WATER RIGHTS THAT WOULD BE INJURED AS A RESULT OF THE ACCOMPLISHED TRANSFERS.

- a. I.C. § 42-1411 does not provide IDWR with the authority to investigate injury or impose a restrictive injury-based condition on a water right claimed under I.C. § 42-1425 in the absence of a third party objector.**

Although Pocatello agrees with the Court that I.C. § 42-1425 should be read in the context of the Director's authority and statutory duty to investigate claims and file a Director's Report, Pocatello does not agree that the authority to file a Director's Report necessarily includes the power to place an injury-related condition on a water right claimed under I.C. § 42-1425 in the absence of a third party objector.² Specifically, both the statutory context and legislative history indicate that I.C. § 42-1411 does not authorize a Special Master to hold a hearing on injury or authorize the Director to impose a restrictive injury-related condition on an accomplished transfer claim where no third parties have objected.

To understand why both the Special Master's inquiry into injury and the Department's imposition of an injury-based condition were improper, it is necessary to examine both the legislative history and statutory context of I.C. § 42-1425. This examination leads to three important conclusions: **First**, the Director's general powers to define and condition the elements of a water right under I.C. § 42-1411 are modified and restricted by the more specific provisions

² See Memorandum Decision and Order on Challenge (City of Pocatello) at 9, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (Nov. 9, 2009).

of I.C. § 42-1425, which exclusively define the Director's authority with regard to claims for accomplished transfers.³ **Second**, as discussed in section 2(b) below, the legislature understood that many accomplished changes were made with the knowledge of other water users and, more importantly, that water has been distributed to the right as changed, often for many years (for example, in Pocatello's case, water has been distributed as changed for decades since 1969). **Third**, when the legislature rewrote Idaho's accomplished transfer statute in 1994, it specifically excluded language from the prior version that extended the Director's powers under I.C. § 42-1411 to accomplished transfer claims. From this, it can logically be inferred that the legislature did not intend the Director to have the authority to place conditions on claims for accomplished transfers in the same way he or she might condition other kinds of water right claims.

When construing a statute, the court's duty is to determine what the legislature intended its statutory language to mean by looking at the literal wording of the statute as well as the context, the object in view, what evils were meant to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, etc.⁴ Additionally, "when a statute is amended, it is presumed that the legislature intended it to have a meaning different than that accorded to it before the amendment."⁵ It is also the court's duty to give a statute an interpretation which will not render it a nullity.⁶

³ See *City of Sandpoint v. Sandpoint Independent Highway District*, 126 Idaho 145, 149, 879 P.2d 1078, 1082 (1994)(holding that "when there are specific statutes addressing an issue, those statutes control over more general statutes"); *Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 28, 89 P.3d 863, 868 (2004). See also, Pocatello's Reply Brief in Support of Motion for Summary Judgment on IDWR's Authority Under I.C. § 42-1425 at 4, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (June 9, 2006).

⁴ *Messenger v. Burns*, 86 Idaho 26, 29-30, 382 P.2d 913, 915 (1963).

⁵ *DeRousse v. Higginson*, 95 Idaho 173, 176, 505 P.2d 321 (1973)(citing *Wellard v. Marcum*, 82 Idaho 232, 239, 351 P.2d 482 (1960)); see also, *Athay v. Stacy*, 142 Idaho 360, 366, 128 P.3d 897, 903 (2005)(*reh'g den.*, Feb. 3, 2006); *Anderson v. Rayner*, 60 Idaho 706, 713, 96 P.2d 244 (1939).

⁶ *DeRousse v. Higginson*, 95 Idaho at 176. See also, *Filer Mutual Telephone Co. v. Idaho State Tax Commission*, 76, Idaho 256, 261, 281 P.2d 478 (1955); *Sampson v. Layton*, 86 Idaho 453, 457, 387 P.2d 883 (1963).

Idaho's first accomplished transfer statute, I.C. § 42-1416A, was enacted in 1989 as a practical alternative to satisfying the provisions of I.C. § 42-222.⁷ The statute gave "amnesty" to water right holders who had changed or transferred their water rights without first filing an application and complying with the provisions set out in I.C. § 42-222 by allowing them to claim the rights as changed in the SRBA.⁸ Based on the statutory language and the legislature's statements of purpose and fiscal impact, it appears that the legislature's main objectives in enacting I.C. § 42-1416A were (1) to protect the long-standing status quo uses of water made by certain water users despite their violation of the mandatory administrative approval requirements set out in 42-108 and 42-222, and (2) to save time and money by allowing the changes to be claimed in the SRBA rather than engage in a separate and contemporaneous administrative proceeding.⁹

In pertinent part, I.C. § 42-1416A provided that:

(1) If any person entitled to the use of water has made a change... 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:

(a) the water right may be claimed in the general adjudication as changed and an application for change of the water right is not required to be filed pursuant to section 42-222, Idaho Code; and

(b) **the water right may be determined by the director in the director's report pursuant to section 42-1411, Idaho Code, and decreed by the district court pursuant to section 42-1412, Idaho Code, as changed, if the change meets the substantive criteria of section 42-222, Idaho Code for approval of such changes, provided that the change may be approved subject to**

⁷ Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226 (codified at I.C. § 42-1416A, repealed 1994); Act of April 11, 1994, ch. 454, §§ 24, 31, 1994 Idaho Sess. Laws 1443, 1471, 1474 (codified at I.C. § 42-1425, which was amended in 2006 to provide for the northern Idaho adjudications). *See also*, Phillip J. Rassier, *Idaho's Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992)(citing the statement of purpose accompanying S.B. 1065, which became I.C. § 42-1416A, on file with the Legislative Council Library, Statehouse, Boise, Idaho).

⁸ Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226.

⁹ Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226 (codified at I.C. § 42-1416A, repealed 1994); Act of April 11, 1994, ch. 454, §§ 24, 31, 1994 Idaho Sess. Laws 1443, 1471, 1474 (codified at I.C. § 42-1425); Statement of Purpose and Fiscal Impact Statement accompanying S.B. 1065, on file with the Legislative Council Library, Statehouse, Boise, Idaho. *See also*, Phillip J. Rassier, *Idaho's Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 515 n. 38 (1992).

conditions necessary to satisfy the substantive criteria of section 42-222, Idaho Code, for approval of such changes.¹⁰

Despite the legislature's good intentions, several challenges were raised to I.C. § 42-1416A¹¹ and, in a 1994 decision by Judge Hurlbutt, I.C. § 42-1416A was found unconstitutionally vague 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."¹² In part as a result of Judge Hurlbutt's decision, the legislature repealed I.C. § 42-1416A and drafted the current accomplished transfer statute, I.C. § 42-1425.¹³

¹⁰ Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226 (codified at I.C. § 42-1416A, repealed 1994)(emphasis added).

¹¹ See Memorandum Decision and Order on Basin-Wide Issue No. 1, Constitutionality of I.C. § 42-1416 and I.C. § 42-1416A, as Written at 2-4, *In Re SRBA Case No. 39576*, Subcase No. 91-00001 (February 4, 1994) (listing in its discussion of procedural history the various parties who issued challenges to the constitutionality of §42-1416A).

¹² 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)(stating that, absent standards or guidelines notifying the claimants or the court as to when and how to apply the statute, a person of reasonable intelligence is left to guess at the statute's core meaning and the court could only apply the statute through speculation which constitutes arbitrary action).

¹³ Act of April 11, 1994, ch. 454, §§ 24, 31, 1994 Idaho Sess. Laws 1443, 1471, 1474 (amended in 2006 to include reference to northern Idaho adjudication, Act of March 30, 2006, ch. 222, § 3, 2006 Idaho Sess. Laws 660, 662). See also, Statement of Purpose for H.B. 969 (RS 03976C2) on file with the Legislative Council Library, Statehouse, Boise, Idaho (stating in subpoint five that the changes reflected in 42-1425 were intended to address Judge Hurlbutt's concerns with regard to 42-1416A by repealing the offending sections and "by enacting new provisions that specify the intent of the legislature with more precision").

I.C. § 42-1425 reads, in pertinent part:

“(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, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. ...”¹⁴

Comparing the two statutes, it is important to note that several provisions in I.C.

§ 42-1416A are conspicuously absent in I.C. § 42-1425. For example, in I.C. § 42-1425 the legislature eliminated the language from I.C. § 42-1416A which provided that the **“water right may be determined by the director in the director’s report pursuant to section 42-1411, Idaho Code.”** The legislature also changed the substantive criteria by which accomplished transfers were to be judged. Claimants under § 42-1425 are not required to show that the change met the substantive criteria of section 42-222, as was required under 42-1416A.¹⁵ Additionally, the legislature removed the language from 1416A which said that the change **“may be approved subject to conditions necessary to satisfy the substantive criteria of section 42-222.”**¹⁶

¹⁴ I.C. § 42-1425 (Michie 2008)(emphasis added).

¹⁵ I.C. § 42-1425 (Michie 2008)(“all requirements of sections 42-1408 and 42-222, Idaho Code, are hereby waived, in accordance with the following procedures...”).

¹⁶ *Id.*

These changes are significant and, according to the rule in *DeRousse v. Higginson*, we must presume that when the legislature amended § 42-1416A by removing and or changing these provisions, the legislature intended the new version codified in § 42-1425 to have a meaning different than that accorded to § 42-1416A.¹⁷ By removing the provisions in 42-1416A which gave the Director the authority to determine the water right claimed “pursuant to 42-1411,” and removing the language which provided that the right could be “approved subject to conditions necessary to satisfy the substantive criteria of section 42-222,” the logical conclusion is that, under § 42-1425, the Director is NOT supposed to determine the water right “pursuant to 42-1411” and that the Director can NOT approve the water right “subject to conditions necessary to satisfy the substantive criteria of section 42-222.”

This, however, is exactly what the statute would mean, if the Court allows IDWR to impose a restrictive, injury-based condition on Pocatello’s water rights in the absence of a third party objector.

b. Based on a plain reading of the statute, legislative intent, and the Idaho Supreme Court’s decision in *Fremont-Madison*, an inquiry into injury is not triggered under I.C. § 42-1425 unless there is a third party objection.

Contrary to the Court’s finding in the November 9, 2009 Memorandum Decision and Order on Challenge,¹⁸ an investigation into injury is not triggered under I.C. § 42-1425 unless a third party objection is filed to an accomplished transfer claim. This interpretation is supported by both the plain language of the statute and a contextual analysis of the statutory scheme and legislative history surrounding I.C. § 42-1425. Furthermore, this interpretation is consistent

¹⁷ *DeRousse v. Higginson*, 95 Idaho 173, 176, 505 P.2d 321 (1973)(“when a statute is amended, it is presumed that the legislature intended it to have a meaning different than that accorded to it before the amendment.”)(citing *Wellard v. Marcum*, 82 Idaho 232, 239, 351 P.2d 482 (1960)); *see also*, *Athay v. Stacy*, 142 Idaho 360, 366, 128 P.3d 897, 903 (2005)(*reh’g den.*, Feb. 3, 2006); *Anderson v. Rayner*, 60 Idaho 706, 713, 96 P.2d 244 (1939).

¹⁸ Memorandum Decision and Order on Challenge (City of Pocatello), *In Re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (Nov. 9, 2009).

with the Idaho Supreme Court's analysis in *Fremont-Madison*.¹⁹ Because no third party objectors came forward to protest the City of Pocatello's claims for accomplished transfers under I.C. § 42-1425, it was improper for IDWR and the Special Master to engage in the injury analysis which led to the recommendation of a restrictive injury-based condition on the City's interconnected municipal water rights.

- i. A plain reading of I.C. § 42-1425 supports the conclusion that an inquiry into injury is not triggered unless a third party objects to the accomplished transfer claim.

An examination of the statutory language and legislative history of I.C. § 42-1425 leads to the conclusion that an injury analysis is not triggered unless a third party has objected to an accomplished transfer claim. By its very terms, I.C. § 42-1425(2)(a) requires that an objection be filed before a hearing on injury is triggered.²⁰ Although § 42-1425(2)(a) does not specify that the triggering objection must be that of a third party, it is the logical conclusion when § 1425(2)(a) is read together with the legislative history and the rest of the statute.

I.C. § 42-1425(2)(a) exclusively defines the procedures that apply to accomplished transfer claims.²¹ These procedures were designed by the legislature to address specific issues and are materially different than the procedures applied to other types of claims.²² The legislature intended this "amnesty," or "accomplished transfer" law, (originally codified at I.C. § 42-1416A), to save time and money by giving the Director of IDWR the authority to recommend

¹⁹ See *In re SRBA Case No. 39576*, 129 Idaho 454 (1996)(*Fremont-Madison*).

²⁰ I.C. § 42-1425(2)(a) ("If an objection is filed to a recommendation for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.").

²¹ I.C. § 42-1425(2) (Michie 2008) ("Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:...").

²² See I.C. § 42-1425 (§ 42-1425(2)(b) (stating that the procedures set out in § 1425(2) are not applicable to any claim based on an enlargement of use).

water rights with changes that were made without the required prior administrative approval between May 26, 1969 (when administrative approval for changes and transfers became mandatory²³) and the commencement of the general adjudication on November 19, 1987.²⁴ In particular, the statute was meant to avoid the necessity of taking administrative action separate from the adjudication effort on all water rights claimed in the SRBA that had been changed without the prior administrative approval required by I.C. § 42-222.²⁵

In the findings set out in § 1425(1), the legislature expressly acknowledged that many accomplished changes had occurred “with the knowledge of other water users” and that “the water has been distributed to the right as changed,” often for a significant period of time.²⁶ The legislature also specifically declared that “the continuation of these historic use patterns is in the local public interest.”²⁷

Economic factors were also of concern. Detailed examination of the claims through the procedures of § 42-222 (which had been required under a previous version of the statute) was

²³ Act of March 27, 1969, ch. 302, §1, 1969 Idaho Sess. Laws 905 (adding the following paragraph to I.C. § 42-108: “After the effective date of this act, no person shall be authorized to change the point of diversion or place of use of water unless he has first applied for and received approval of the department of reclamation under the provisions of section 42-222, Idaho Code.”)(effective May 26, 1969; current version at I.C. § 42-108 (2008)).

²⁴ Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226 (codified at I.C. § 42-1416A, repealed 1994); Act of April 11, 1994, ch. 454, §§ 24, 31, 1994 Idaho Sess. Laws 1443, 1471, 1474 (codified at I.C. § 42-1425); *see also*, Phillip J. Rassier, *Idaho’s Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992)(citing the statement of purpose accompanying S.B. 1065, which became I.C. § 42-1416A, on file with the Legislative Council Library, Statehouse, Boise, Idaho).

²⁵ Phillip J. Rassier, *Idaho’s Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992)(citing the Statement of Purpose accompanying S.B. 1065, which became I.C. § 42-1416A, on file with the Legislative Council Library, Statehouse, Boise, Idaho).

²⁶ In pertinent part, I.C. § 42-1425(1)(b) (Michie 2008) provides: “The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided that no other existing water right was injured at the time of the change.”

Many of the wells Pocatello has claimed as alternate points of diversion under I.C. § 42-1425 have been diverting water “as changed” for more than 40 years (e.g. wells 2, 3, 7).

²⁷ *Id.*

declared to be “impractical and unduly burdensome.”²⁸ Furthermore, according to the legislature, approval of accomplished transfers through the procedures set forth in I.C. § 42-1425 would avoid the harsh economic impacts that would result from a denial of the claim.²⁹

The Statement of Purpose accompanying H.B. 969 (which became I.C. § 42-1425) also sheds light on the legislature’s objectives. In the fiscal note section of the Statement of Purpose, the legislature indicated that the proposed legislation was intended to protect the water uses of some water users who had failed to follow the statutory procedure for development of some of their water uses, and to “protect significant investments by water users and tax base for local governments by helping to maintain status quo water uses.”³⁰

It seems appropriate to draw the following conclusions: (1) The legislature understood that many of the changes (between May 26, 1969 and November 19, 1987) were accomplished with the knowledge of water users that may have been affected. (2) The legislature understood that water had been distributed “as changed,” often for a significant period of time. (3) The legislature wanted to protect, to the greatest extent possible, the investments of water users represented by the accomplished changes. (4) The legislature intended the abbreviated review procedures set out in § 1425 to decrease the need for costly administrative proceedings as much as possible. (5) The legislature intended to protect water right holders whose rights were injured at the time of the accomplished changes by providing them with the means and opportunity to assert their superior interests.

²⁸ I.C. § 42-1425(1)(c) (Michie 2008).

²⁹ I.C. § 42-1425(1)(b) (Michie 2008).

³⁰ Statement of Purpose/Fiscal Note accompanying H.B. 969 (RS 03976C2)(on file with the on file with the Legislative Council Library, Statehouse, Boise, Idaho).

ii. *Fremont-Madison and Barron v. IDWR*

In *Fremont-Madison*, the focus was on IDWR's determination of injury and under I.C. § 42-1425, the only person who can claim injury is a third party objector. By contrast, under I.C. § 42-1426, either the claimant for an enlargement or third party could claim injury (claimant could claim injury from the way that mitigation was applied for the enlargement); therefore, the determination of injury by IDWR could be reviewed by either party. But the only person who can claim injury under I.C. § 42-1425 is a third party, and when IDWR has made a determination of injury following an objection by a third party, either party could appeal the injury issue.

The rule from *Barron v. IDWR* does not apply because *Barron* involved a transfer under I.C. § 42-222, which is subject to different burdens of proof and procedure than claims filed under the accomplished transfer statute, I.C. § 42-1425, the controlling statute in this case.

3. I.C. § 42-1425 DOES NOT APPLY TO TRANSFERS ACCOMPLISHED PRIOR TO MAY 26, 1969; THEREFORE, I.C. § 42-1425 CANNOT PROPERLY BE USED AS JUSTIFICATION FOR CONDITIONING A TRANSFER ACCOMPLISHED PRIOR TO MAY 26, 1969.

It was an error of law to recommend a condition on Pocatello's water rights with priority dates earlier than May 26, 1969 that restricts the City's use of wells established as alternate points of diversion for the City's interconnected municipal system prior to May 26, 1969.

IDWR recommended Pocatello's wells as alternative points of diversion for the City's groundwater rights with a limiting condition based on the application of I.C. § 42-1425.³¹ However, IDWR does not have the authority under I.C. § 42-1425 to recommend a condition on any of Pocatello's water rights with priority dates earlier than May 26, 1969 that restricts the City's use of wells established as alternate points of diversion prior to May 26, 1969. Therefore,

³¹ See Memorandum Decision and Order on Challenge (City of Pocatello) at 4-5, *In re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (Nov. 9, 2009) ("IDWR recommended the wells as alternative points of diversion for the ground water rights as claimed based on the application of Idaho Code § 42-1425, with one exception. ...IDWR recommended that [a] condition or remark appear in the face of the partial decree for eighteen of the water rights in the in-town service area and for two of the three water rights supply water to the airport.").

if the Court allows the condition to remain on Pocatello's water rights, the condition for each right must be modified to list (and allow the City to divert water from) all of the City's wells that were established as alternate points of diversion for that right prior to May 26, 1969.

Appropriate conditions were discussed above (pages 6 – 8).

Water users in Idaho have been able to change or secure the transfer of some portions of a water right by filing an application with the State since at least 1903.³² Although the procedures for acquiring an administrative transfer have been available for more than one hundred years, water right holders were not required to obtain administrative approval of changes or transfers until I.C. § 42-222 made such approval mandatory in 1969.³³ Before administrative approval became mandatory, the right to make a change in use of a water right was held to be a constitutional right inherent in the right of property ownership similar to the constitutional right to appropriate water, although not expressly stated in the Idaho constitution.³⁴

As discussed in sections 2.a. and b. above, Idaho's accomplished transfer statute was created to provide the Director of IDWR with the authority to recommend water rights with changes that were made without prior administrative approval between May 26, 1969 (when administrative approval for changes to water rights and transfer became mandatory), and the

³² Act of March 11, 1903, § 11, 1903 Idaho Sess. Laws 223, 234 (providing that "any person owning any land to which water has been made appurtenant either by a decree of the court or under the provisions of this act may voluntarily abandon the use of such water in whole or in part... and transfer the same to other land," and that "such a person desiring to change the place of use of such water shall first make application to the State Engineer...").

³³ Act of March 27, 1969, ch. 302, §1, 1969 Idaho Sess. Laws 905 (adding a paragraph to I.C. § 42-108 providing that, "[a]fter the effective date of this act, no person shall be authorized to change the point of diversion or place of use of water unless he has first applied for and received approval of the department of reclamation under the provisions of section 42-222, Idaho Code.")(effective May 26, 1969; current version at I.C. § 42-108 (2008)); *see also*, Phillip J. Rassier, *Idaho's Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992).

³⁴ *Hillcrest Irrigation District v. Nampa*, 57 Idaho 403, 409, 66 p.2d115, 117 (1937); *First Security Bank v. State*, 49 Idaho 740, 744, 291 P. 1064, 1065 (1930)("The statute empowering the commissioner of reclamation to authorize a change in the place of use... neither added to nor detracted from a property right which already existed."); *see also*, A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 251-252 (1990-91).

commencement of the Snake River Basin Adjudication on November 19, 1987.³⁵ The text of I.C. § 42-1425 confirms the statute's limited application. Section (1)(a) of I.C. § 42-1425 describes the purpose and scope of the accomplished transfer statute:

"The legislature finds and declares that prior to commencement of the Snake River basin adjudication and the northern Idaho adjudications, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code."³⁶

Therefore, I.C. § 42-1425 does not apply to changes to water rights (claimed in the Snake River Basin Adjudication) that were accomplished prior to May 26, 1969.

IDWR cannot now retroactively use the provisions of I.C. § 42-1425 to place a condition on a water right that would impede a water right holder from diverting water in accordance with changes rightfully accomplished prior to May 26, 1969 because water right holders had a constitutional right to make changes to their water rights without prior administrative approval up until May 26, 1969. The interconnection of the wells and the existence of the water rights prior to May 26, 1969 is not in contest. Those water rights and wells are listed, again:

Water Right No.	Priority Date before May 26, 1969	Well #	Date drilled/ redrilled before May 26, 1969
29-2274	6/15/1948	2	12/31/1926
29-2338	9/1/1953	2	6/15/1948
29-2401	10/16/1958	3	12/31/1926
29-2499	12/10/1964	7	12/31/1940
29-4221	8/2/1943	10	6/15/1948
29-4223	10/1/1962	12	9/1/1953
29-4224	9/15/1955	13	9/1/1953

³⁵ Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226 (codified at I.C. § 42-1416A, repealed 1994); Act of April 11, 1994, ch. 454, §§ 24, 31, 1994 Idaho Sess. Laws 1443, 1471, 1474 (codified at I.C. § 42-1425); see also, Phillip J. Rassier, *Idaho's Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992)(citing the statement of purpose accompanying S.B. 1065, which became I.C. § 42-1416A, on file with the Legislative Council Library, Statehouse, Boise, Idaho).

³⁶ I.C. § 42-1425(1)(a) (Michie 2008) (emphasis added).

29-4225	8/15/1956
29-4226	12/31/1955
29-11339	12/31/1961
29-11348	8/31/1951
29-13558	7/16/1924
29-13559	12/31/1925
29-13560	12/31/1926
29-13561	8/31/1931
29-13562	12/31/1936
29-13637	12/31/1940
29-13639	10/22/1952

13	10/16/1958
14	12/31/1955
15	9/1/1953
16	10/16/1958
18	10/16/1958
21	9/15/1955
22	10/22/1952
23	8/15/1956
26	6/1/1945
27	12/10/1964
28	8/31/1951
33	10/1/1962

The conditions recommended on Pocatello's water rights are improper because they were imposed under the auspices of I.C. § 42-1425 and can be applied to prevent the City from diverting its pre-May 26, 1969 water rights from wells that were added as alternate points of diversion prior to May 26, 1969.

Pocatello's water right 29-13561 can be used to illustrate the problem. Water right 29-13561 has a priority date of August 31, 1931 and was recommended with the following condition:

"To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello Well No. 4 located in T06S, R34E, S35, NWSE."³⁷

The well in the condition, Pocatello Well # 4, is no longer in existence³⁸. However, Pocatello's Well # 7 has been an alternate point of diversion for 29-13561 since December 31, 1940 when Well #7 was drilled. This will soon be 69 years.³⁹

³⁷ See recommended partial decree for water right 29-13561 issued with Amended Master's Report and Recommendation and Order on Motion to Reconsider, *In Re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (Oct. 30, 2007).

³⁸ See City of Pocatello's Response to Brief of United Water Idaho, City of Nampa, and City of Blackfoot Addressing Alternative Points of Diversion Condition (City's Response to Providers' Brief) at 3, n.8, *In Re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (July 20, 2009)(identifying the seven non-existent or replaced wells listed in the conditions placed on Pocatello's water rights).

Assume the following hypothetical: A nearby private well owner, Ms. Smith, has a January 1, 1935 priority water right which diverts from a single well. If Pocatello's diversion of water right 29-13561 out of Well # 7 interferes with Ms. Smith's well, IDWR could apply the condition as written to prevent Pocatello from diverting water right 29-13561 from Well # 7 because Ms. Smith's water right has a priority that is senior to the date Well # 7 was drilled.⁴⁰

4. UNLIKE I.C. § 42-1426, WHICH HAS A PER SE INJURY RULE IN THE CASE OF ENLARGEMENTS, I.C. § 42-1425 DOES NOT HAVE A PER SE INJURY RULE FOR ACCOMPLISHED TRANSFERS.

The Special Master applied a per se injury rule under 42-1425 to affirm IDWR's recommendation that Pocatello's wells are not alternate points of diversion for the City's senior water rights. The November 9 December was in accord.

In reaching her conclusions, the Special Master incorrectly utilized standards of law applying to transfers under I.C. § 42-222, rather than I.C. § 42-1425, and incorrectly presumed that injury would result from Pocatello's use of city wells as alternative points of diversion for the City's surface water rights. Because the Special Master's determination of the facts was directed by her legal conclusions, the Court can and should re-evaluate the facts in a manner consistent with the law and evidence in this case.

a. The Special Master's factual conclusions on the issue of injury were induced by an incorrect view of the law.

The Special Master's analysis of injury began with her presumption that that injury to junior rights would result if there were intervening rights appropriated by other users after

³⁹ See Pocatello's Well Development Timeline, Appendix B 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, *In Re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (July 20, 2009).

⁴⁰ See November 9, 2009 Memorandum Decision and Order on Challenge (City of Pocatello) at 19 (stating that "[t]o the extent the use of the alternate point of diversion interferes with the well of a pre-existing senior water right, the priority of the senior right is injured – irrespective of the reason for the interference").

Pocatello appropriated its surface water rights, but before the city drilled its wells for the alternate points of diversion.⁴¹ The Special Master cited no authority to support this statement and did not address the Idaho Supreme Court's holding in *Fremont-Madison*, which squarely contradicts the use of such a presumption.⁴² Pocatello has consistently argued throughout the briefing that it was improper for both IDWR and the Special Master to begin with a presumption that put Pocatello in the position of having to disprove injury despite the fact that no injured water rights were identified and no water right holders objected on the basis of injury.

In *Fremont-Madison*, a hearing on whether a claimed change injured another water right holder only occurs under I.C. § 42-1425 if/when an objection is filed to the accomplished transfer claim.⁴³ No objections were filed in Pocatello's case. As a result, the Special Master's entire discussion of the injury issue relies on the mistaken premise that Pocatello was required to rebut IDWR's unsupported allegations of injury.

It is also contrary to the legislature's stated intent for IDWR to engage in an injury analysis where no water right holders objected and where the Department was unable to identify any water rights injured by the change. Allowing a presumption of injury in the absence of concrete and specific supporting facts (e.g., water right numbers) forces the claimant to object to the director's report and engage in additional administrative proceedings that would not otherwise have been necessary. These additional proceedings are not consistent with the legislature's attempt to make the § 42-1425 review process streamlined and cost effective:

“The purpose of I.C. § 42-1425 [was] to streamline the adjudication process by providing a substitute for the transfer process required by I.C. § 42-

⁴¹ Second Order on Summary Judgment at 8 (wherein the Special Master stated that “It should be pointed out that if there are intervening rights appropriated by other users from the same source after Pocatello appropriated its surface right but before drilling its wells for the alternate points of diversion, injury to junior rights is presumed.”)

⁴² Second Order on Summary Judgment at 8.

⁴³ *In re SRBA Case No. 39576*, 129 Idaho 454, 461-62, 926 P.2d 1301, ____ (1996) (*Fremont-Madison*).

222 and to protect existing water uses which were the result of past transfers regardless of compliance with statutory mandates.”⁴⁴

The legislature created Idaho’s accomplished transfer statute in response to concerns that it would be necessary to take administrative action separate from the adjudication effort on all water rights claimed in the SRBA that had been changed or transferred after 1969 in violation of the mandatory approval provisions in I.C. § 42-222.⁴⁵ The legislature stated that the accomplished transfer statute “would result in substantial savings to IDWR and to water right claimants... because it would not be necessary to conduct a separate administrative proceeding to evaluate the change in use at the same time the water right [was] being determined in the general adjudication.”⁴⁶

The court should interpret I.C. § 42-1425 in a manner consistent with legislative intent and *Fremont-Madison* by holding that it was improper for the Special Master to presume injury in this case and that IDWR cannot force persons making claims under I.C. § 42-1425 to object to or refute allegations of injury if no injured water rights have been identified and where no objections alleging injury were filed. Claimants under I.C. § 42-1425 are subject to different review processes and burdens of proof than claimants under I.C. § 42-222.⁴⁷

⁴⁴ *Fremont-Madison*, 129 Idaho at 458-59 (emphasis added).

⁴⁵ Phillip J. Rassier, *Idaho’s Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992) (citing the statement of purpose accompanying S.B. 1065, which became I.C. § 42-1416A, on file with the Legislative Council Library, Statehouse, Boise, Idaho).

⁴⁶ Fiscal Impact Statement accompanying S.B. 1065 (which became I.C. § 42-1416A, Idaho’s first accomplished transfer statute), on file with the Legislative Council Library, Statehouse, Boise, Idaho; Act of March 27, 1989, ch. 97, § 1, 1989 Idaho Sess. Laws 226 (codified at I.C. § 42-1416A, repealed 1994). See also, Phillip J. Rassier, *Idaho’s Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514-515, n. 38 (1992).

⁴⁷ See I.C. §§ 42-222, 42-1425; see also, testimony of Carter Fritschle, Tr. Vol. II, p. 338, L. 6 – p. 340, L. 18 (February 27, 2007) (“the level of investigation for an accomplished change in point of diversion, place of use, in the SRBA is not the same level as the investigation as through an actual filing of a transfer under 42-222”).

Because the accomplished transfer statute modified the criteria and review procedures for claims,⁴⁸ most importantly with regard to when separate administrative proceedings or inquiry into injury are required, it is error to apply a “no injury rule” to Pocatello’s facts.

The only standard used by IDWR, the Special Master, and now the District Court to determine the degree of interconnection between sources comes from Transfer Processing Memo No. 24.⁴⁹ The determination of interconnection is therefore invalid and should be found clearly erroneous.

b. The Special Master’s conclusion of injury is clearly erroneous because it is not supported by adequate evidence and was reached without any discussion of or consideration for the mitigating effects of Pocatello’s agreement with the Surface Water Coalition.

A party is entitled to an actual review and examination of all the evidence in the record by a referring district court upon review of a Special Master’s recommendation.⁵⁰ Pocatello’s agreement with the SWC is an essential component of any discussion of injury because the agreement is designed to mitigate injury to other water users from Pocatello’s use of its wells as alternative points of diversion for its surface water rights. The Special Master’s determination of injury,⁵¹ did not mention or discuss the extensive expert testimony on Pocatello’s agreement with the Surface Water Coalition (SWC).

⁴⁸ See prior discussion of I.C. § 42-1425 and *Fremont-Madison*, arguing that the most crucial effect of the accomplished transfer statute is to change what a claimant must prove and WHEN separate administrative proceedings or inquiry into injury are required.

⁴⁹ The Special Master stated in her Order Denying Motion to Alter or Amend that “where a change to a water right moves it ahead in priority, the injury to existing rights is real and immediate.” Order Denying Motion to Alter or Amend at 5, *In Re SRBA Case No. 39576*, Subcase Nos. 29-271 et al. (May 28, 2008).

⁵⁰ *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 876 (7th Cir. 1970), *cert. denied*, 91 S.Ct. 582 (1971). See also I.C. § 42-1412 (5) (“The district court or special master shall conduct the trial without a jury on an objection or any group of objections in accordance with the Idaho rules of civil procedure.”); I.R.C.P. 53(e)(1) (stating in part, “The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report, separately stated.”).

⁵¹ See Master’s Report at 12; Order Denying Motion to Alter Amend at 3 (“The Amended Special Master’s Report and Recommendation did not recognize Pocatello’s groundwater wells as points of diversion for its oldest

The November 9 Decision, at 18, refers to the agreement with the Surface Water Coalition, stating that, "Pocatello has already stipulated . . . to not increase the volumes beyond . . . amounts . . . established in 1987." The Stipulation and Agreement, at p. 15, in fact, establishes limits on rates of diversion, not volumes."

The exercise of this water right at any of the 23 alternate points of diversion listed below, by itself or in combination with the other listed water rights, will not exceed the respective rate of diversion at each diversion listed below, unless pursuant to an approved administrative action, including, but not limited to, a section 42-222 transfer.

Township Range Section 1/4 of 1/4 Pocatello Well No. and rate of diversion

7S	34E	1	NW	NE	Well No.2 in the amount of 3.12 cfs
7S	34E	1	SW	NE	Well No.3 in the amount of 4.46 cfs
6S	34E	35	NW	SE	Well No.7 in the amount of 4.46 cfs
6S	34E	26	NE	NW	Well No. 10 in the amount of 6.23 cfs
6S	34E	35	SE	NE	Well No. 12 in the amount of 6.20 cfs
7S	34E	1	SE	SE	Well No. 13 in the amount of 3.11 cfs
7S	35E	7	NE	SW	Well No. 14 in the amount of 2.23 cfs
7S	35E	6	NW	SE	Well No. 15 in the amount of 3.34 cfs
6S	34E	26	SW	SE	Well No. 16 in the amount of 6.67 cfs
6S	34E	15	NE	NW	Well No. 18 in the amount of 4.66 cfs
6S	34E	23	SW	NE	Well No. 21 in the amount of 3.89 cfs
6S	34E	23	SE	NW	Well No. 22 in the amount of 3.68 cfs
6S	34E	23	NW	NE	Well No. 23 in the amount of 4.44 cfs
6S	34E	15	NW	NE	Well No. 26 in the amount of 2.67 cfs
6S	34E	14	NW	NW	Well No. 27 in the amount of 4.9 cfs

surface water rights out of Mink Creek and Gibson Jack Creek. This finding was made considering the evidence at trial, including the Supplemental Director's Report, and the testimony of Carter Fritschle and Greg Sullivan.").

7S	34E	1	NE	SE	Well No. 28 in the amount of 4.9 cfs
6S	34E	23	NE	SW	Well No. 29 in the amount of 4.01 cfs
6S	34E	35	NW	NE	Well No. 30 in the amount of 6.23 cfs
6S	34E	15	NE	SE	Well No. 31 in the amount of 8.02 cfs
6S	34E	16	NE	NE	Well No. 32 in the amount of 3.45 cfs
7S	35E	18	SE	NE	Well No. 33 in the amount of 2.67 cfs
6S	34E	15	NE	SE	Well No. 34 in the amount of 7.00 cfs
7S	35E	16	SW	SW	Well No. 44 in the amount of 4.46 cfs

The Special Master concluded, as did the District Court, that the significance of the connection between the ground water and surface water is not such that ground water pumping results in depletions to surface flow and that accordingly the City would not be able to initiate a delivery call against prior groundwater pumpers.⁵² Even if IDWR had properly triggered proceedings on the issue of injury, it was error for the Special Master to conclude that injury would result because neither IDWR's nor the Special Master's conclusions are supported by adequate evidence.

The Special Master began by stating that the significance of the (hydrologic) connection between Pocatello's groundwater and surface water points of diversion is not such that pumping would result in depletions in surface flow.⁵³

The Special Master's findings and conclusions on the issue of injury should be disregarded as clearly erroneous because they do not address or take account of vital contrary evidence and testimony and because they lack sufficient factual support.

⁵² November 9 Decision, at 23.

⁵³ Master's Report at 12.

The Special Master's factual finding that Pocatello's use of its wells as alternative points of diversion for its surface water rights would cause injury to other water right holders⁵⁴ is primarily based on statements made by Carter Fritschle at trial and IDWR's Supplemental Director's Report.⁵⁵ However, neither Carter Fritschle's testimony nor the Supplemental Director's Report account for the protections against injury set out in Pocatello's agreement with the SWC. Despite the extensive expert testimony about the operation of the SWC agreement, the Special Master did not even mention the SWC agreement in her Master's Report or her later Order Denying Motion to Alter or Amend.⁵⁶ The Special Master's failure to mention or address the SWC agreement is particularly worrisome in light of the fact that several of its provisions were specifically designed to deal with concerns about injury. Furthermore, Mr. Fritschle's and IDWR's factual analyses of the injury issue are not based on sufficient facts for the Special Master to properly adopt their positions without more detailed findings regarding the nature of Pocatello's water system and the pertinent hydrologic environment.

⁵⁴ Master's Report at 6 (citing the Supplemental Director's Report at 11).

⁵⁵ See Master's Report at 6-7, 10-12. In her findings of fact section on page 6, the Special Master restates four conclusions from the Supplemental Director's report and concludes that "having wells as alternative points of diversion would improperly allow the withdrawal of water from wells using the earlier priority of the surface water rights." At pages 10-12, the Special Master relies specifically on Carter Fritschle's testimony regarding the interconnection of and distance between Pocatello's ground and surface points of diversion. On page 11, the Special Master states that she "concurs with the conclusion found in the Director's Report that Pocatello's groundwater wells are not alternative points of diversion for its surface water rights."

⁵⁶ See Master's Report and Order Denying Motion to Alter or Amend.

5. THE PROVIDERS' SCENARIOS SET OUT IN FOOTNOTE 10 OF THE MEMORANDUM DECISION AND ORDER ON CHALLENGE⁵⁷ ARE NOT BASED ON FACTS IN THE RECORD BEFORE THE COURT AND DO NOT PROVIDE A BASIS FOR A DECISION AFFECTING POCATELLO'S WATER RIGHTS OR DIRECTING IDWR'S ADMINISTRATION OF SIMILAR RIGHTS IN THE FUTURE.

The Providers' scenarios are not based on facts in the record before the Court. The Providers' scenarios each envision a situation where a municipal provider can drastically increase the rate of diversion at one well by combining the rates of diversion associated with all alternate points of diversion. Pocatello has agreed not to increase the rates of diversion in its individual interconnected wells beyond what existed at the commencement of the SRBA. See quoted material from the agreement with the Surface Water Coalition, p. 15, *supra*.

6. IDWR IMPROPERLY CHANGED ITS POSITION WITH REGARD TO THE ADMINISTRATION OF MUNICIPAL WATER RIGHTS WITHOUT ENGAGING IN RULEMAKING PROCEDURES UNDER IDAHO'S ADMINISTRATIVE PROCEDURES ACT.

The November 9 Decision, at p. 21, acknowledges that, "IDWR admitted at trial changing its position after gaining a better understanding how conjunctive management is to be implemented and the relative affects [sic] conjunctive management has on existing rights. . . . IDWR's change in position would be expected."

The following chronology from the exhibits and testimony at trial establish that IDWR's change in position is represented by the Department's ESPA Transfer Processing Memo (issued October 30, 2002).

10/30/2002	IDWR issues the <i>ESPA Transfer Processing Memo</i> which states, "these policies and procedures are to be followed until rescinded or amended, or superseded by statute or rule or court decision." Exhibit E, <i>Supplemental Director's Report</i> , page 1, IDWR Exhibit 1. The memo contains the following language: <u>Interconnection</u> : "An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in original source from
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⁵⁷ Memorandum Decision and Order on Challenge (City of Pocatello) at page 16, *In Re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (November 9, 2009).

	depletion at proposed point of diversion in one day.)” (page 20) <u>Factors For Considering Injury</u>: “Reduction in the quantity of water available to other water rights.” (page 19) <u>Additional Consideration For Evaluating Injury</u>: “Location of nearby wells. The location of the nearest production well, including domestic wells, to the proposed point of diversion, and if different, the nearest production well down gradient from the proposed point of diversion.” (page 21) <u>Enlargement</u>: “Enlargement will occur if the total diversion rate, annual diversion volume, or extent of beneficial use (except for nonconsumptive water rights), exceeds the amounts or beneficial use authorized under the water right(s) prior to the proposed transfer.” (page 21) <u>Factors For Considering Enlargement</u>: “Diversion rate, annual diversion volume, and number of acres licensed or decreed.” (page 22)
04/13/2006	IDWR issues <i>Supplemental Director’s Report</i> for the City of Pocatello’s SRBA claims. The <i>Supplemental Director’s Report</i> expressly relies on the <i>ESPA Transfer Processing Memo</i> by stating, “IDWR’s Transfer Processing Memo No. 24 (October 30, 2002) provides guidance to agents when evaluating a request to change in source from surface water to ground water or to add a well as an alternative point of diversion for a surface water right.”(page 11) The <i>Supplemental Director’s Report</i> also contains the following language: <u>Interconnection</u>: IDWR applies the entire interconnection standard for change of source that is stated in the <i>Transfer Processing Memo</i>. (page 11) <u>Presumed Future Injury</u>: “This condition is necessary in order to avoid injury and to assist in the administration and definition of the water rights.” (page 13) “If at some time in the future, the City increases the pumping capacity of a well within the City’s interconnected system, and it reduces that amount of water available to another user, this condition preserves the ability of the water users to protect their water right.” (page 14) “Without the condition, the Department would not have recommended the multiple, alternate points of diversion because injury to other water rights was likely.” (page 14) <u>Neighboring Well Interference</u>: The condition remark “is again a necessary parameter when evaluating possible well-interference issues.” (page 15) “When the City pumps water from a well at a different location, it may cause interference with a different surface

	water source, or another water user's well." (page 15) The remark "is important because many other wells could have been drilled nearby before or after the City-owned well was drilled or used." (page 15)
01/17/2007	The State of Idaho participates in the SRBA summary judgment hearing before Special Master Bilyeu. During the hearing, the State made the following statements: <u>Transfer Processing Memo</u>: "The transfer processing memo is not a regulation. It's not enforceable like a regulation. It's not enforceable like a regulation . . . they're [Pocatello] is certainly right, the memo by its own terms does not directly apply to an accomplished transfer under 42-1425." (Hearing Tr. page 48) "My perception of that memo is that it provides a more lenient standard than what the common law provides in the state of Idaho. And I was simply cutting the City of Pocatello some slack here." (Hearing Tr. page 49) "The City of Pocatello in its brief said or argued that the Transfer Processing Memo was not a rule or regulation adopted in accordance with I.D.A.P.A., and I agreed with that." (Hearing Tr. page 75) <u>Injury</u>: "Injury, whether it's under 42-222 or section 42-1425, that legal issue is exactly the same." (Hearing Tr. page 53) <u>Presumption of Injury</u>: "All you have to do when you have this issue of an unreliable supply versus a reliable supply on injury, all you have to do is look at under the original right, how much water would you be able to take and under the revised right how much water would they be able to take. And if the amount of water you're able to take under the proposed transfer is more, then there's injury and it should be precluded." (Hearing Tr. page 54)
02/26/2007	Carter Fritschle testifies at trial that the <i>Transfer Processing Memo</i> "guided" his analysis in determining whether Pocatello's APOD claims were admissible. (Tr. Vol. 11 pages 331-335)
02/27/2007	Dave Tuthill testifies at trial that he relied on the <i>Transfer Processing Memo</i>, the proposed <i>Water Management Rules</i>, and the proposed <i>ESPA Water Management Rules</i> in evaluating Pocatello's alternate point of diversion claims. IDWR changed its procedures to this "conditioning of the rights" because the condition was "necessary for the purpose of administration."

In acknowledging and accepting IDWR's change in position as expected, the November 9 Decision does not address that the change in position was based on IDWR's failure to engage in rulemaking procedures under Idaho's Administrative Procedures Act. This was briefed extensively in Pocatello's April 30, 2007 Post-Trial Brief, at pages 37-39.

7. NO SPECIFIC LEGAL STANDARD EXISTS FOR DETERMINING WHETHER A SUFFICIENT DEGREE OF INTERCONNECTION EXISTS BETWEEN SURFACE AND GROUND WATER POINTS OF DIVERSION SO AS TO BE CONSIDERED THE "SAME SOURCE."

The Special Master committed reversible error by making a determination regarding the degree of interconnection between the City's wells and surface water rights without reference to a legitimate or articulable standard.

- a. The Special Master utilized an improper and unworkable legal standard to reach her conclusion that Pocatello's groundwater wells do not withdraw from the same source as its surface water rights.**

Supplemental Director's Report states that Pocatello's point of diversion from Mink Creek is approximately six miles away from the closest Pocatello well.⁵⁸ Supplemental Director's Report also states that this "fact" is important when determining whether it is appropriate to treat points of diversion as alternate points of diversion for both a surface and a groundwater right.⁵⁹ Supplemental Director's report relies solely on IDWR's TPM 24 in reaching its conclusion that "there is no factual basis for recognizing the wells as alternate points of diversion for these surface water streams."

This is to be compared with what was presented by Pocatello. Pocatello offered the testimony of several city employees as well as an expert who visited Pocatello's sources and undertook an in depth analysis of the nature of the aquifer and surface water sources, and who produced voluminous records to support his conclusion that the LPRVA has an immediate and

⁵⁸ Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights at 11, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (April 13, 2006)(Director's Report)(citing Map 5 attached to Director's Report).

⁵⁹ Director's Report at 11, *supra* n. 3.

direct hydraulic connection to Mink Creek and Gibson Jack Creek. In the face of the overwhelming, thorough, and highly detailed analysis undertaken by Pocatello's expert, the Special Master's conclusion (agreement with IDWR's conclusion) seems clearly erroneous if not arbitrary. The only basis for IDWR's decision was that the two sources seem too far away from one another. This is a situation where the finding in the director's report that the two sources were insufficiently connected was based on little to no evidence and not determined according to any articulable standard that would allow Pocatello to rebut it. In contrast to the evidence presented by Pocatello, IDWR's finding is unpersuasive and should not be given the same weight. If ever there were a time where one party clearly offered enough evidence to rebut the prima facie status of the director's report, it is here.

Furthermore, the Special Master doesn't actually engage in any analysis of the evidence that WAS presented by Pocatello. The Special Master explains that Pocatello's expert witness provided an extensive and well-reasoned analysis of the LPRVA, he described the inflow and outflow from this aquifer and in his analysis he explained that both Gibson Jack Creek and Mink Creek contribute significantly to the water supply for the LPRVA. In his opinion, GJC and Mink Creek have a direct connection to the LPRVA such that they are essentially the same source.

8. POCATELLO PRESENTED SUFFICIENT EVIDENCE UNDER THE SUBSTANTIAL EVIDENCE STANDARD TO REBUT THE ALLEGATIONS OF INJURY AND LACK OF INTERCONNECTION BETWEEN POCATELLO'S SURFACE AND GROUND WATER SOURCES IN THE DIRECTOR'S REPORT.

- a. **Language used by the Special Master and adopted by the November 9 Decision is taken from Transfer Processing Memo No. 24 which the State admits does not apply to the facts of this case and is therefore an improper basis of the decision.**

In her findings of fact section, the Special Master stated that the Director's Report concluded that "water from the creeks is not used for culinary purposes and, thus the creek water is not part of the interconnected well system."⁶⁰ The findings of fact section also detailed the way in which IDWR's conclusions were based on an analysis taken from TPM 24. Because all agree that TPM 24 is not a valid document in this case, to the extent that the SM adopted factual findings from the Director's Report that were based on IDWR's analysis, those factual findings are invalid and should be held clearly erroneous because Pocatello provided sufficient evidence to prove its claims and IDWR's factual conclusions/findings are unsupported by the evidence because they rely on TPM 24.

The Special Master did not discuss the evidence in detail other than to say that she concurred with IDWR. The Special Master acknowledged that Pocatello's expert provided and "extensive and well-reasoned analysis of the [LPRVA]," and that he "described the inflow of water into the LPRVA and the outflow of water from this aquifer," and ultimately concluded that "both Gibson Jack Creek and Mink Creek contribute significantly to the water supply for the LPRVA... [and] have a direct hydraulic connection to the LPRVA."⁶¹ Although she stated that the creeks "contribute" to the LPRVA, she concluded that this was not sufficient. She did not

⁶⁰ Master's Report at 6.

⁶¹ Master's Report at 10.

say why this wasn't sufficient and could identify no standard which made this insufficient. IDWR found this insufficient based on the standards used in TPM 24, which are invalid. SM also stated that there is "no evidence" that creek water is diverted through the wells. This is incorrect and inconsistent with her acknowledgment that the creeks contribute to the LPRVA which supplies the wells. Although the Special Master claimed not to have relied on TPM 24, it is the only source of legal standards and included some of the very same language she used in her conclusions. The SM did not analyze the evidence provided by Pocatello in detail other than to generally state that Pocatello's expert concluded one thing and that IDWR concluded another. It is not sufficient for the SM to simply state that she found IDWR's arguments more persuasive, particularly when they were not based on adequate evidence considering the invalid TPM 24 and the falsely analogy to the Salmon River example.

IDWR's analysis was also based on the distance between the two sources, but IDWR's "distance based" reasoning is not adequately supported by the evidence. Considering the false analogies and lack of detail provided by IDWR in support of its arguments regarding interconnection, Pocatello provided more than sufficient evidence to rebut any prima facie evidence contained within the Director's Report. This is even assuming that the information in the director's report is properly accorded the status of prima facie evidence, which is questionable considering the problems a described above.

b. There is not sufficient evidentiary foundation or analysis in the Special Master's decisions to support a finding that any change in Pocatello's diversion of surface water occurred after 1987.

One of the bases for IDWR's refusal to recommend Pocatello's wells as alternate points of diversion for the City's senior surface water rights pursuant to I.C. § 42-1425 was the

Department's belief that the change, if any, in how the water was diverted occurred after 1987.⁶² Other than simply stating this belief in its April 2006 Supplemental Director's Report, the Department provided no discussion or analysis to support its conclusion.

In the findings of fact section of her October 2, 2007 Master's Report and Recommendation, the Special Master made a passing mention of IDWR's conclusion regarding the timing of Pocatello's change in use of surface water.⁶³ Although this finding could have been dispositive on the issue of whether Pocatello's wells should be listed as alternative points of diversion for the City's surface water rights, the Special Master never again mentioned or discussed the timing of Pocatello's diversion of surface water at its interconnected wells.

Although it is not clear whether the Special Master merely intended to report what was said in the Director's Report, or whether she meant to adopt IDWR's finding as her own, the Special Master's failure to discuss or analyze the timing issue is striking, particularly in light of the amount of evidence and testimony presented by Pocatello at trial. Pocatello offered the testimony of several City employees and its expert, Greg Sullivan, as well as multiple exhibits based on water use data,⁶⁴ to support a finding that the City began diverting surface water from its interconnected wells before 1987.

⁶² Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights at 11, *In Re SRBA Case No. 39576*, Subcase Nos. 29-00271, et al. (April 13, 2006)(Director's Report); *see also*, Testimony of Carter Fritschle, Tr. Vol. II, p. 332, L. 10 through p. 333 (February 27, 2007)(wherein Mr. Fritschle states that there was no evidence to indicate that Pocatello quit diverting at the original points of diversion and started diverting surface water at additional points of diversion prior to 1987).

⁶³ Master's Report and Recommendation and Order on Motion to Reconsider at 6, *In Re SRBA Case No. 39576*, Subcase Nos. 29-271, et al. (October 2, 2007)(Master's Report)("The Supplemental Director's Report concluded that: ... Any change in how water was diverted occurred after 1987").

⁶⁴ Pocatello offered several exhibits at trial which evidenced the declining diversions at Mink Creek and Gibson Jack Creek and the concomitant increases in groundwater diversions at the City wells prior to 1987. For example, City of Pocatello Exhibit 143, a chart included in Mr. Sullivan's expert report summarizing annual water use from 1964 through 1987, showed a trend of increasing groundwater use as a percentage of supply in the late 1980s, with a concurrent decline in the surface water diversion. *See* Tr. Vol. VI, p. 1029, L. 5 through p. 1031, L. 1 (March 8, 2007). *See also*, City of Pocatello Exhibit 139 (consisting of a table from Mr. Sullivan's expert report titled "City of Pocatello, Summary of Monthly Surface Water Use (1980-1987)"); City of Pocatello Exhibit 112 (consisting of a memo written by Tom Dekker on March 31, 1989 setting forth the yearly totals for water production

Mr. Hargreaves testified that beginning in the early 1980s, the city's diversions at the surface water sources gradually declined over time until the city ceased using surface water for culinary purposes altogether in 1993.⁶⁵ Mr. Dekker also testified that by the time the City quit using surface water for culinary purposes, the percentage of surface water being used for culinary purposes was a "lot lower" than it had been previously.⁶⁶ Pocatello's expert, Greg Sullivan, explained that as the City's diversions at Mink Creek and Gibson Jack Creek began to decline in the 1980s (up until 1993, when the City ceased diverting at the surface sources due to concerns about turbidity and the cost of water treatment), the City made up for the lost supply by diverting its surface water rights at its wells.⁶⁷ He emphasized the importance of Pocatello's claims for alternative points of diversion, stating that it is important that the City be able to continue to exercise its senior surface water rights as it has throughout history and prior to 1987.⁶⁸

At trial, Carter Fritschle testified that IDWR's conclusion (cited by the Special Master in her findings of fact)⁶⁹ that "the change, if any, on how the water was diverted occurred after 1987"⁷⁰ was based on a 1998 letter⁷¹ from the Idaho Department of Environmental Quality

from surface supplies from 1964 through 1988); City of Pocatello Exhibit 111 (consisting of monthly reports detailing water production in Pocatello's system from 1962 to 1993); City of Pocatello Exhibit 113 (consisting of a document titled "City of Pocatello Yearly Water Consumption from 1956 to Present" (ending in 1989).)

⁶⁵ Tr. Vol. IV, p. 738, L. 18 through p. 739, L. 10 (March 1, 2007).

⁶⁶ Tr. Vol. III, p. 426, L. 15 through p. 427, L. 9 (February 28, 2007) ("[W]hen they required that the surface water be treated, then we quit using surface water. By that time the percentage was a lot lower. So it was better to drill wells.").

⁶⁷ Tr. Vol. VI, p. 1024, L. 9 through p. 1025, L. 7, p. 1033, L. 25 through p. 1037, L. 25 (March 8, 2007).

⁶⁸ Tr. Vol. VI, p. 1023, L. 24 through p. 1024, L. 8 (March 8, 2007).

⁶⁹ Master's Report at 6, *supra* n. 4.

⁷⁰ Supplemental Director's Report at 11, *supra* n. 3.

⁷¹ See Exhibit D to the Supplemental Director's Report (contains Oct. 26, 1998 letter from IDEQ to Fred Asla).

(IDEQ) which indicated that Pocatello had diverted water from the original surface points of diversion at Mink Creek and Gibson Jack Creek after 1987.⁷² IDWR first made this argument in its Supplemental Director's Report at page 12, n.8:

“Notably, the City continued to use the surface water rights after 1987. So, even if the City could show an immediate and direct connection between the surface sources and its wells, an accomplished transfer would not be appropriate because the change in practice did not occur prior to 1987. *See* I.C. § 42-1425. This fact is demonstrated by a letter from the IDEQ that required the City to cease operation of its surface water sources for culinary purposes in 1998. *See* Exhibit D.”

IDWR seemed to be saying that the City's claim for additional points of diversion at its interconnected wells could not be approved if the City had diverted any of the surface water from the original points of diversion at Mink Creek and Gibson Jack Creek after 1987. This argument confuses a the nature of an accomplished alternative point of diversion with an accomplished change in point of diversion, and does not accurately reflect the nature of Pocatello's claim under I.C. § 42-1425.⁷³

By adding an alternative point of diversion to a water right, a water user gains the ability to divert its water right at the original point of diversion **and** the alternative point of diversion. A change in point of diversion, by contrast, would require that a water user abandon the original point of diversion listed on its water right and take up a new point of diversion at another location. In the case of such a change in point of diversion, evidence that the water user continued to use the original point of diversion would defeat the claim. Pocatello's claim under I.C. § 42-1425 is for alternative points of diversion, NOT an accomplished change of point of diversion. Therefore, the 1998 letter from IDEQ is not a proper basis for the denial of Pocatello's claim for alternative points of diversion for its surface water rights.

⁷² Tr. Vol. II, p. 332, L. 10 through p. 333, L. 14 (February 27, 2007).

⁷³ Cite to Pocatello's SRBA claims here?

Directly in response to Mr. Fritschle's statement about the IDEQ letter, Pocatello's expert, Greg Sullivan, testified that any evidence that Pocatello diverted its surface water at the original points of diversion after 1987 is consistent with the City's use of its wells as alternative points of diversion for the surface water rights. He stated that the City could divert the water at the original point of diversion, or at an alternative point of diversion, or some combination of the two, so long as the flow rates are not exceeded.⁷⁴

During cross examination, Mr. Fritschle himself confirmed the distinction between an alternative point of diversion and a change in point of diversion and agreed that an alternative point of diversion would allow the City to divert water either at the new points or at the original points of diversion, or split the right between the two.⁷⁵

**9. I.C. § 42-1425 DOES NOT PROHIBIT ACCOMPLISHED
TRANSFERS OF SOURCE.**

The November 9 Decision states that I.C. 42-1425 does not expressly authorize a change in source element. However, the Order, at p. 22, states that:

A change in source is essentially the appropriation of a new water right. However, in the case of a new appropriation the priority date is junior to those of existing users on the new source while a transferred right retains its original priority thereby shifting the schedule of existing priorities on the new source resulting in injury to existing priorities.

The error of a "per se" injury analysis under 42-1425 has already been discussed above. The Court's analysis of what constitutes a "change in source" is important to examine because of the extensive trial record regarding this factual issue.

⁷⁴ *Id.*

⁷⁵ Tr. Vol. II, p. 333, L. 23 through p. 335, L. 1 (February 27, 2007).

10. AS A MATTER OF LAW, AN “IRRIGATION” PURPOSE OF USE DESIGNATION DOES NOT APPLY TO A MUNICIPALLY OWNED WATER RIGHT BENEFICIALLY USED FOR BIOSOLIDS WASTE TREATMENT IN ACCORDANCE WITH FEDERAL LAW.

The primary function of water right 29-2770 was never intended to be irrigation. The material in the following exhibits from trial are discussed below as proof that water right 29-2770 was established as a municipal right, in accordance with federal law to facilitate the disposal of biosolid waste.

Exhibit 155 – 2/2/2004 City of Pocatello 11th Annual POTW Biosolids Report – This annual biosolids report is filed with the U.S. EPA for the City of Pocatello’s Biosolids Beneficial Recycling/Reuse Site. It is required by federal sludge regulations, and demonstrates that the water right is used to reduce biosolids.

Exhibit 156 – 9/7/1999 City of Pocatello National Pollutant Discharge Elimination System Permit – This NPDES permit gives the City of Pocatello authority under the federal Clean Water Act to discharge wastewater from its wastewater treatment facility into the Portneuf River, and shows that the water right is used to process waste.

Exhibit 157 – Part 503 Final Rule Signed 11/25/1992, “New Sludge rules” - These federal regulations set the criteria for classification of solid waste disposal facilities and practices. The City of Pocatello uses this water right to comply with these federal solid waste disposal rules.

Exhibit 158 – 2/1998 City of Pocatello Biosolids Management Plan – The Biosolids Management Plan is filed with the U.S. EPA, Region X, It describes the procedures the City of Pocatello uses in the beneficial recycling/reuse of biosolids through land application on agricultural fields. The City uses the water right to accomplish this process.

Exhibit 159 – 5/17/2005 City of Pocatello Crop Management Plan - The Crop Management Plan describes how specified acres will be planted as part of the City’s land application of biosolids. The water right is used in this agricultural activity as part of the City’s process to manage and dispose of biosolids.

11. IT IS NOT A COLLATERAL ATTACK ON A PRIOR LICENSE FOR POCATELLO TO CLAIM A PRIORITY DATE CONSISTENT WITH BENEFICIAL USE FOR WATER RIGHT 29-13639 PREDATING THE SUBSEQUENT LICENSE.

It was an error of law for the Court to find that Pocatello's claimed beneficial use priority date for water right 29-13639 is an impermissible collateral attach on a previously licensed right. Pocatello claimed a priority of December 31, 1940 based on beneficial use. The Court concluded that the priority date should be consistent with the license.

In the SRBA, IDWR has long had a policy allowing people to prove the existence of beneficial use rights that were subsequently documented with licenses having junior priority dates. Formal guidance to agents investigating such water right claims in the SRBA can be found in the original Claims Investigation Handbook issued in 1993.

Water right 29-13639 is based on a former license. Pocatello's claim is not to the additional use of water from the well not previously covered by the license. Pocatello's claim is for an earlier priority date for a previously licensed water right.

Dated this 9th day of December 2009.

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

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December 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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Josephine P. Beeman

Attachment (30 subcases)

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07322
29-07375
29-07450
29-07770
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29-11348
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29-13559
29-13560
29-13561
29-13562
29-13637
29-13638
29-13639

APPENDIX

SUMMARY OF GREG SULLIVAN'S TESTIMONY

(February 2007)

During direct examination by Ms. Beeman, Mr. Sullivan described the Portneuf River and its relation to the city of Pocatello. Mr. Sullivan testified that the Portneuf River arises in the mountains to the east of Pocatello and is composed mostly of snowmelt runoff with an average flow of about 200,000 acre feet per year. Mr. Sullivan testified that there are several diversions from the Portneuf River upstream of Pocatello consisting of irrigation ditches 10 to 20 miles upstream which irrigate the Portneuf River Valley. Mr. Sullivan explained that other large irrigation ditches divert water from Marsh Creek, a tributary of the Portneuf River upstream from Pocatello. Mr. Sullivan testified that the Portneuf River reaches the municipal area (Pocatello) at the Portneuf gap and flows through the town of Pocatello. He indicated that there are a few small relatively inconsequential surface diversions from the Portneuf River in that area but that the city does not use any water from the Portneuf River for its supplies, so the river flows relatively undisturbed to American Falls Reservoir, where it joins the Snake River.

Ms. Beeman then asked Mr. Sullivan questions regarding Mink Creek and Gibson Jack Creek. Mr. Sullivan testified that Mink Creek and Gibson Jack Creek were the city's first sources of water and that the creeks are tributaries that join the Portneuf River in the vicinity of the town of Pocatello. Mr. Sullivan explained that, although there are other tributaries in the area, Mink Creek and Gibson Jack Creek have the most flow because they have larger drainage areas and are fed by geographically larger and more elevated watersheds. He stated that the developers of Pocatello's original water supply piped water from Gibson Jack Creek and Mink Creek, despite the existence of closer tributaries, because Gibson Jack Creek and Mink Creek

were more dependable supplies that could be diverted at elevation, which meant the water could flow by gravity into the reservoir system and on into the city's pipelines.

Mr. Sullivan also testified that Mink Creek and Gibson Jack Creek typically flow year round. He explained that because the flow of the creeks is dominated by snowmelt, the creeks have peak flows during the runoff period in the spring and early summer but the base flow component is fed by groundwater. In response to a question about the diversion works on the creeks from Ms. Beeman, Mr. Sullivan testified that the creeks were the original sources of water for the city and that the creeks were initially developed by a private water company but the city took over in the early 20th century.

Next, Ms. Beeman asked Mr. Sullivan to describe City of Pocatello Exhibit 108, which contains copies of photographs Mr. Sullivan took during a tour of the City's facilities in October of 2006. According to Mr. Sullivan, one of the photos depicts the Mink Creek drainage, as viewed from the north side of the Portneuf River Valley near the Portneuf gap looking up the Mink Creek drainage. Another photo shows one of the open-air reservoirs into which the City's surface water was diverted, as well as the 5 million gallon tank used for storage.

Ms. Beeman then asked Mr. Sullivan several questions about the Lower Portneuf River Valley Aquifer. Mr. Sullivan testified that the majority of Pocatello's water supply comes from wells constructed in the LPRVA. A smaller portion of the city's supply, that water used near the airport for biosolids and culinary purposes, comes from the Eastern Snake Plain Aquifer. Mr. Sullivan described the Lower Portneuf River Valley Aquifer as an alluvial aquifer and generally explained the nature of alluvial aquifers and how they are formed.¹

Before continuing with Mr. Sullivan's testimony on the Lower Portneuf River Valley Aquifer, Ms. Beeman introduced City of Pocatello's Exhibits 131 and 132. Exhibit 131 is a

¹ Tr. Vol. IV, p. 772, L. 16 through p. 774, L. 4 (March 1, 2007).

1996 draft report prepared by John Welhan and others titled “The Lower Portneuf River Valley Aquifer: A Geologic/Hydrologic Mode and Its Implications for Wellhead Protection Strategies.” Exhibit 132 is a July 2006 report prepared by John Welhan titled “Water Balance and Pumping Capacity of the Lower Portneuf River Valley Aquifer, Bannock County Idaho.” Mr. Sullivan testified that the conclusions drawn by Mr. Welhan in exhibits 131 and 132 were reasonably reliable and represented the best available information on the LPRVA. Mr. Sullivan also stated that he primarily relied on the reports for their descriptions of the LPRVA, the sources of water for the LPRVA, and the water balance for the LPRVA; Mr. Sullivan stated that he had no reason to disagree with the conclusions drawn in those parts of the reports.²

In reference to Exhibits 131 and 132, Mr. Sullivan described the geology and hydrology of the Lower Portneuf River Valley Aquifer, specifically how the aquifer was formed and the aquifer’s sources of recharge. Relying on Exhibit 132, Mr. Sullivan testified about the primary sources of supply or recharge to the Lower Portneuf River Valley Aquifer. Mr. Sullivan testified that there are three main sources of inflow to the Portneuf River: first, there is inflow at the Portneuf gap; second, tributaries from the southwest (including Mink Creek and Gibson Jack Creek); and finally, a small amount of water originates from the Pocatello Creek drainage in the east.³

Ms. Beeman then asked Mr. Sullivan to describe in more detail the source of inflow to the LPRVA from the various tributaries to the southwest. Mr. Sullivan testified that he agreed with Mr. Welhan’s conclusion that most of the inflow to the LPRVA from those tributaries originates from Mink Creek and Gibson Jack Creek (based on the fact that they have the largest watershed areas and highest elevations). Mr. Sullivan explained that a lateral extension of the

² Tr. Vol. IV, p. 766, L. 21 through p. 781, L. 11 (March 1, 2007).

³ Tr. Vol. IV, p. 790, L. 15 through p. 795, L. 19 (March 1, 2007).

LPRVA extends up into Mink Creek somewhat—that when Mink Creek flows down out of the mountains and gets close to the Portneuf River, the water flows over the alluvial material and seeps into the LPRVA. He stated that it is typical of an alluvial system that the alluvial aquifer receives much of its supply from the surface source and that the surface supply is connected to and interconnected with the subsurface supply.⁴

Although Mr. Sullivan acknowledged that Mr. Welhan's reports did not break down the percentages of inflow to the LPRVA from Mink Creek and Gibson Jack Creek separately, Mr. Sullivan testified that he thought that between 50 to 75 percent of the supply of the Lower Portneuf River Valley Aquifer comes primarily from Mink Creek and Gibson Jack Creek.⁵

Mr. Sullivan also testified that he considered the Lower Portneuf River Valley Aquifer, Mink Creek, and Gibson Jack Creek to be essentially the same source from a hydrologic standpoint. Mr. Barber objected to Ms. Beeman's line of questioning on this subject and asked, in aid of objection, whether Mr. Sullivan meant that the sources are merely in hydraulic connection with one another. Mr. Sullivan replied that that was one of the points he was trying to make but also that the LPRVA, Mink Creek, and Gibson Jack Creek are closely connected and that the surface supply in Mink Creek is one of the primary sources of water to the LPRVA. Mr. Sullivan clarified that the LPRVA, Mink Creek, and Gibson Jack Creek are in direct hydraulic connection and that from a hydrologic standpoint he would consider them the same source, just that Mink Creek and Gibson Jack Creek are on the surface while the LPRVA is underground.⁶ In response to another question from Ms. Beeman, Mr. Sullivan testified that, based on Mr.

⁴ Tr. Vol. IV, p. 796, L. 15 through p. 800, L. 23 (March 1, 2007).

⁵ Tr. Vol. IV, p. 801, L. 13 through p. 802, L. 24 (March 1, 2007)(Mr. Sullivan also indicated that a small portion of the inflow to the LPRVA from tributaries was attributable to Cusick Creek and City Creek, but reiterated that the water comes primarily from Mink Creek and Gibson Jack Creek.).

⁶ Tr. Vol. IV, p. 802, L. 25 through p. 806, L. 2 (March 1, 2007).

Welhan's work, recharge from the tributaries to the southwest including Mink Creek and Gibson Jack Creek is the source of most of the groundwater for the Lower Portneuf River Valley Aquifer.⁷

A little later on, Mr. Sullivan testified about City of Pocatello's Exhibit 107, which is titled "Photographs of Surface Water Diversions and Wells, City of Pocatello" and contains more photographs taken during Mr. Sullivan's October 19-20, 2006 site visit. Mr. Sullivan stated that the first page of photographs in this exhibit were taken at the point of diversion for the surface water right on Mink Creek and include depictions of the diversion house, concrete works, and head gates.⁸ Ms. Beeman then asked Mr. Sullivan to describe the underlying structure of the ground beneath Mink Creek, in reference to the photos. Mr. Sullivan testified that there is not much of an alluvium structure so high on the Creek (near the point of diversion) and that the alluvium is more prominent lower on the creek, although there is alluvial material present. He explained that the creek flows on a gravelly, sandy material, although he wasn't sure how deep it was in the particular area shown in Exhibit 107. Mr. Sullivan further testified that the diversion works on Mink Creek are roughly five to seven miles from the Portneuf River.⁹

Ms. Beeman followed up by asking Mr. Sullivan whether there was an increasing alluvial structure from the point of diversion on Mink Creek to the Portneuf River. Mr. Barber initially objected to this question on the grounds that Mr. Sullivan is not a geologist and should not testify regarding soils. Mr. Barber also wanted to know whether Mr. Sullivan had done any investigation of the alluvium from the point of diversion all the way down to the Portneuf River. Mr. Sullivan replied that he had observed the alluvial material in the creek bed but had not

⁷ Tr. Vol. IV, p. 806, L. 7-14 (March 1, 2007).

⁸ Tr. Vol. V, p. 858, L. 17 through page 860, L. 20 (March 2, 2007).

⁹ Tr. Vol. V, p. 860, L. 21 through page 863, L. 12 (March 2, 2007).

investigated the depth of the material. Mr. Barber had no objection to Mr. Sullivan's testimony as long as it was limited to what Mr. Sullivan had observed on the surface.¹⁰

Mr. Sullivan then went on to describe page 2 of Pocatello's Exhibit 107, which shows four photographs taken at the point of diversion for the City's Gibson Jack Creek diversion. Mr. Sullivan testified that the first photo is an overview picture of the diversion structure which shows that water is diverted from the natural channel of Gibson Jack Creek into a concrete structure, from which the water can either be sent into a pipeline or allowed to overflow back into the main channel of Gibson Jack Creek. He described the second picture as another photo of the overflow structure taken from the downstream side looking upstream. The third picture, he testified, is one taken from the top of the diversion structure looking downstream with water flowing back into Gibson Jack Creek after it had passed over the overflow. The fourth picture also depicts the inlet to the concrete structure where water is taken out of Gibson Jack Creek.¹¹

At this point, Mr. Sullivan's testimony began to focus mainly on Pocatello's claim for alternative points of diversion for its groundwater rights. After some testimony concerning pumping from alternative points of diversion and well-interference, Mr. Sullivan's direct examination was placed on hold so that Mr. Barber could perform his direct examination of Carter Fritschle.¹² As a result, some of the following testimony from Ms. Beeman's continued direct examination of Mr. Sullivan is partially in response to Mr. Fritschle's testimony.

Ms. Beeman began her continued direct examination of Mr. Sullivan by asking him whether he was present during the testimony by Pocatello staff members describing the City's

¹⁰ Tr. Vol. V, p. 858, L. 17 through page 860, L. 20 (March 2, 2007).

¹¹ Tr. Vol. V, p. 863, L. 20 through page 865, L. 12 (March 2, 2007)(Mr. Sullivan also testified regarding page 3 of Exhibit 107, which depicts photos of the Well 16 well house and facilities, and page 4 of the exhibit, which shows pictures of the city's well houses at wells 28, 27, 10, and 21.).

¹² Tr. Vol. V, p. 993, L. 18 through page 994, L. 21 (March 2, 2007).

surface water rights, and asking Mr. Sullivan to explain how those water rights were established. Mr. Sullivan testified that the water rights on Mink Creek originated from an early District Court decree and that the water right on Gibson Jack Creek is based on a beneficial use claim. Ms. Beeman then had Mr. Sullivan examine Pocatello Exhibit 129, which Mr. Sullivan testified was the decree issued by the Bannock County District Court on June 5th, 1926 in the case of *Sam B. Smith v. City of Pocatello* that evidenced the City's Mink Creek water rights. Following up with the exhibit, Ms. Beeman asked Mr. Sullivan to describe the irrigation season listed on the decree. Mr. Sullivan replied that the irrigation season is described as the portion of the calendar year beginning on the 15th of April and ending on the 15th of September.¹³

Ms. Beeman then asked Mr. Sullivan to describe how the City has used its surface water rights. Mr. Sullivan testified that the City had diversion structures on Gibson Jack and Mink Creek and that the City diverted water into a pipeline which delivered the water into an open reservoir system on a bench west of the City from where the water was put into the City's water distribution system. Mr. Sullivan explained that this diversion continued well into the early to mid 1980s when the diversion from surface water sources began declining. From the early to mid 1980s, the surface water use declined and eventually, in the early 1990s, Mr. Sullivan testified that the culinary use ended, although there has been occasional irrigation use of surface waters since that time.¹⁴

Mr. Sullivan next testified about the difference between an alternate point of diversion and a change in point of diversion. Mr. Sullivan explained that an alternate point of diversion is like a change in point of diversion in that the city would be diverting the rights at a different point but that the city would retain the ability to alternatively divert the water at the original

¹³ Tr. Vol. VI, p. 1017, L. 18 through p. 1020, L. 2 (March 8, 2007).

¹⁴ Tr. Vol. VI, p. 1020, L. 3-17 (March 8, 2007).

point (which is not possible when the point of diversion is completely changed). Mr. Sullivan then referred to Pocatello Exhibit 122 to explain Pocatello's claims for surface water alternate points of diversion. Using the chart from Exhibit 122, Mr. Sullivan listed the water rights associated with the city's claims on Mink Creek and Gibson Jack Creek. Mr. Sullivan also referred to Pocatello Exhibit 104, a map showing the location of the alternate points of diversion for the city's surface water rights.¹⁵

Mr. Sullivan went on to explain why the claim for alternate points of diversion for the surface rights is so important to Pocatello. Mr. Sullivan testified that the surface water rights are the city's senior water rights and that, because the city no longer diverts that water at its surface water points of diversion, it is important that the city be able to continue to exercise those priorities as it has throughout the city's history by claiming the wells as alternate points of diversion. Mr. Sullivan then confirmed that the claims for alternate points of diversion for the city's surface water rights were claimed as accomplished transfers asserted in a general adjudication, and that the change in use occurred prior to 1987.¹⁶

Mr. Sullivan indicated that part of his testimony was based on the testimony from the city staff; specifically, Mr. Sullivan referred to the staff testimony pertaining to the city's declining use of the surface water rights from the 1980s on. Mr. Sullivan testified that the declining use of surface water was due to the increase in water quality regulation which required the city to treat the water before incorporating the surface water into its culinary system. Mr. Sullivan explained that there were also increasing concerns about turbidity in the supply and that the city would

¹⁵ Tr. Vol. VI, p. 1020, L. 21 through p. 1023, L. 9 (March 8, 2007).

¹⁶ Tr. Vol. VI, p. 1023, L. 24 through p. 1024, L. 8 (March 8, 2007).

sometimes choose not to divert the water because of turbidity or suspended solids (typically during times of runoff).¹⁷

Next, Ms. Beeman asked Mr. Sullivan to testify regarding Pocatello's Exhibit 143, a chart included in Mr. Sullivan's expert report summarizing annual water use from 1964 through 1987. Mr. Sullivan explained the sources of information used to generate the chart and stated that the purpose of the chart was to illustrate the city's use of surface and groundwater and how those uses had changed over time. Ms. Beeman then asked Mr. Sullivan if he recalled Mr. Dekker's testimony about the discrepancies in surface water use data during the late 1980s and whether the data in Exhibit 143 was affected by those discrepancies. Mr. Sullivan replied that the data in Exhibit 143 was affected by the discrepancies because the discrepancies occurred during years covered by his chart in Exhibit 143. Mr. Sullivan explained that Mr. Dekker's memorandum (Exhibit 112) showed 435 acre feet less surface water use for 1986 than was shown in Exhibit 113 (yearly water consumption data). He also stated that Mr. Dekker's memorandum showed surface water use 112 acre feet greater than in the yearly water consumption data for the year 1987. Mr. Sullivan explained that he used the data from Mr. Dekker's memorandum, rather than the totals from the yearly water consumption data in Exhibit 113, based on a review of the records and interviews of the city staff which indicated Mr. Dekker's memorandum was the most reliable information.¹⁸

Mr. Sullivan testified that because the purpose of Exhibit 143 was to illustrate general trends in the data, the relatively small discrepancies in the totals for surface water use in 1986 and 1987 did not change or affect his conclusions. He explained that the chart shows a trend of increasing groundwater use as a percentage of supply in the mid and late 1980s, with a

¹⁷ Tr. Vol. VI, p. 1024, L. 9 through p. 1025, L. 7 (March 8, 2007).

¹⁸ Tr. Vol. VI, p. 1027, L. 15 through p. 1029, L. 4 (March 8, 2007).

concurrent decline in the surface water use from that time on. Those trends would have remained the same, regardless of which data was used (either the numbers from Mr. Dekker's memo or from the yearly consumptive data). Mr. Sullivan went on to testify about the conclusions he was able to draw from the chart in Exhibit 143. Mr. Sullivan concluded that during the period of the mid to late 1980s the city's total water use increased overall, as did the percentage of water supplied from groundwater, while use of surface water declined. Ms. Beeman then asked Mr. Sullivan how the city made up for the reduced supply as the surface water use declined. Mr. Sullivan replied that the city made up for its decreased surface water use by increasing groundwater use.¹⁹

Returning to an earlier topic, Ms. Beeman again asked Mr. Sullivan whether he would consider the alternate points of diversion claim to be a change in point of diversion. Mr. Sullivan stated that, as he testified earlier, it is similar to a change in that the city is seeking to divert the water at a different location, but that the city is also seeking to retain the original location as well. Mr. Sullivan then stated that "yes, it is a change in point of diversion."²⁰

The topic of testimony was then turned toward the nature of the city's current surface water diversions. Mr. Sullivan explained that there is a small use of water from Gibson Jack Creek that is used for irrigation at Wild Horse Ridge subdivision.²¹

Ms. Beeman then asked Mr. Sullivan to identify Pocatello Exhibit 139, which is a table from Mr. Sullivan's expert report titled "City of Pocatello, Summary of Monthly Surface Water Use (1980-1987)" based on the Dekker memorandum (Exhibit 112) and the city's monthly water use reports (Exhibit 111). Ms. Beeman asked Mr. Sullivan whether there is a point at which the

¹⁹ Tr. Vol. VI, p. 1029, L. 5 through p. 1031, L. 1 (March 8, 2007).

²⁰ Tr. Vol. VI, p. 1031, L. 2-12 (March 8, 2007).

²¹ Tr. Vol. VI, p. 1031, L. 13-19 (March 8, 2007).

decline in surface water use is shown on the table. Mr. Sullivan referred to the table and listed the declining numbers for surface water use from 1980 to 1987. Mr. Sullivan also explained the significance of several months of zero surface water use during 1985 and 1986 (months with zero surface water use were April-May 1985 and March-May 1986).²²

Referring to Pocatello's Exhibits 111 and 139, Mr. Sullivan testified that the months showing a zero for surface water use were those months in which the city did not divert water at the original point of diversion for the surface water rights. Mr. Sullivan explained that the city had become increasingly worried about turbidity in the water and so, during times of runoff when silt and other materials were stirred up in the water, the city ceased diverting surface water into their system. Mr. Sullivan further concluded that because the city was not diverting water at the surface sources during this time, the city had to make up for that supply by diverting the water at its wells.²³ Ms. Beeman then returned to her earlier questions about the city's use of water at the Wild Horse Ridge subdivision. Mr. Sullivan reiterated that the surface water is used for irrigation of lawns in common areas and throughout the subdivision.²⁴

Ms. Beeman then changed tacks and began asking Mr. Sullivan questions about whether any other water rights might be injured by Pocatello's use of its wells as alternative points of diversion for its surface water rights. First, Ms. Beeman asked whether the city would be enlarging the flow rates for its surface water rights. Mr. Sullivan responded that the flow rates of 5cfs each on Mink Creek and Gibson Jack Creek would still limit the diversion of water from the surface water rights at the alternate points of diversion. He also testified that the city has

²² Tr. Vol. VI, p. 1031, L. 23 through p. 1037, L. 25 (March 8, 2007)(Mr. Sullivan testified that another month, June of 1985, also showed zero surface water use according to the data in Exhibit 111 but that through discussions with the city and a review of the records, it was determined that there were actually diversions in that month so the zero for that month listed in Exhibit 143 is incorrect.).

²³ Tr. Vol. VI, p. 1033, L. 25 through p. 1037, L. 25 (March 8, 2007).

²⁴ Tr. Vol. VI, p. 1038, L. 1-11 (March 8, 2007).

proposed additional conditions pursuant to a settlement with the Surface Water Coalition that would help ensure that there would be no enlargement of the city's rights by operation of the alternate points of diversion. Mr. Sullivan testified that the city had agreed to limit its exercise of the surface water rights such that the annual diversions at the wells under the surface water right priorities would be limited to the amounts measured and physically available at the original points of diversion.²⁵

Mr. Sullivan then went on to answer some questions about how the limitation/condition on Pocatello's diversion of surface water contained in the agreement with the SWC would be administered. Mr. Sullivan testified that there are two mechanisms contemplated in the agreement with the SWC. In the first mechanism, the city would measure and keep track of the water available at or near the original points of diversion, leave the water in the original creeks to flow on downstream, and divert the surface water priorities at their wells. Through an accounting process, Mr. Sullivan explained that the city would make sure that the annual diversions at the wells would not exceed the annual volume measured in the creeks. Mr. Sullivan then described the second mechanism as a process whereby the city would divert the water at the original points of diversion into its pipeline and then convey that water to the Portneuf River where it would be released, making sure to keep track of the measurements to ensure that its exercise of the surface water rights at the alternate points of diversion would not exceed the amounts measured and delivered to the Portneuf River. Mr. Sullivan indicated that the first mechanism would be preferable because it would not require the city to maintain the several miles of pipeline needed in the second mechanism, and because it would enhance the flows of Mink Creek and Gibson Jack Creek as they continued downstream.²⁶

²⁵ Tr. Vol. VI, p. 1038, L. 12 through p. 1039, L. 8 (March 8, 2007).

²⁶ Tr. Vol. VI, p. 1039, L. 9 through p. 1041, L. 22 (March 8, 2007).

Ms. Beeman then asked Mr. Sullivan to explain how the two mechanisms, if exercised, would operate to prevent injury to other water users (and whether the mechanisms would amount to an enlargement of Pocatello's water rights). Mr. Sullivan replied that there would be no injury from the operation of the wells as alternate points of diversion in this manner because the city would be foregoing its diversions at the original points of diversion and diverting the water instead at the alternate points of diversion, as it has been doing. Therefore, he explained, there would be no increase in the rate diverted and the volume would be limited to the amounts physically available at the creeks, which he thought should be sufficient to prevent any injury. Ms. Beeman inquired as to what might happen if, during the irrigation season, other users on the creeks diverted the city's water that was left in the creeks. Mr. Sullivan replied that the city has the right to use the stream channel to convey its water and that if another water user did use the water, it would be an injury to the city's water right that would be a matter for administration by IDWR.²⁷

Ms. Beeman then asked how the city's surface water diversions for irrigation at Wild Horse Ridge would be accounted for in the proposed administration of its surface water rights. Mr. Sullivan explained that to the extent the use continued, the amount of water used would be accounted for so that the combined use of water at the Wild Horse Ridge subdivision and the amount of water diverted through the city's wells would not exceed the annual volume limit defined by the physical measurements in the creek.

In response to another question by Ms. Beeman about whether the city is seeking to exempt itself from priority administration by diverting surface water through its wells as alternate points of diversion, Mr. Sullivan explained that the water rights still have priorities and would be subject to administration just like any other water right, just that they could be diverted

²⁷ Tr. Vol. VI, p. 1042, L. 2 through p. 1043, L. 13 (March 8, 2007).

at additional locations when not subject to administration. Mr. Sullivan also testified that he was unaware of any claims by other water users against the city, nor did he know of any objections to the city's SRBA claims for alternate points of diversion. Notwithstanding the lack of objections to the city's use of its alternative points of diversions for the surface water rights, Mr. Sullivan indicated that he had analyzed the potential of injury to other water users as a result of the city's alternate points of diversions for its surface water rights.²⁸

Ms. Beeman next referred Mr. Sullivan to Mr. Fritschle's testimony wherein Mr. Fritschle stated that IDWR denied Pocatello's claim for alternate points of diversion because of evidence that the City continued to divert its surface water rights after 1987. Mr. Sullivan stated that he did not agree with Mr. Fritschle's reasoning on this matter because any evidence that the city diverted its surface water at the original points of diversion after 1987 is consistent with the city's use of its wells as alternate points of diversion for the surface water rights. He explained that the city could divert the water at the original point of diversion or at an alternate point of diversion, or some combination of the two, so long as the allowed flow rates are not exceeded. Therefore, he said, any evidence that in 1998 the city was diverting at the original points of diversion is consistent with operation of alternate points of diversion (and not a reason to deny the claim). Mr. Sullivan clarified that his example of a diversion in 1998 was in reference to IDWR's use of a 1998 letter from Idaho DEQ to show that the city used surface water after 1987.²⁹

Mr. Sullivan went on to testify as to how he had analyzed the city's claim for alternate points of diversion of its surface water rights. Mr. Sullivan stated that he looked at several things in considering whether the city's operation of the wells as alternate points of diversion could

²⁸ Tr. Vol. VI, p. 1043, L. 1 through p. 1044, L. 14 (March 8, 2007).

²⁹ Tr. Vol. VI, p. 1044, L. 15 through p. 1045, L. 19 (March 8, 2007).

affect local groundwater rights or surface water users (i.e., injure other users). Ms. Beeman specifically inquired as to whether Mr. Sullivan looked at the interconnection of the sources. Mr. Sullivan replied that the sources are interconnected from a hydrologic as well as an administrative standpoint. When asked how exactly he analyzed the potential injury to local groundwater rights in the Lower Portneuf River Valley Aquifer, Mr. Sullivan explained that the analysis was much the same as the one he used to analyze the alternate points of diversion for the city's groundwater rights. Mr. Sullivan reiterated that the city had agreed not to increase the pumping rates at its wells beyond the rates that existed in 1987, and also referred to his earlier testimony about the water level measurement and drawdown levels in the city's wells. He explained that the drawdowns in the wells are generally less than 10 feet and that the drawdown in the aquifer outside of the casing would be much less than 10 feet. Furthermore, he stated that the aquifer is very prolific and that any change in the operation of the senior priorities at the wells would not have any impact on or injure local groundwater users.³⁰

With regard to the injury of other surface water users (as opposed to local groundwater users), Mr. Sullivan testified that he did not believe the exercise of the city's wells as alternate points of diversion would cause injury to surface water rights on Mink Creek and Gibson Jack Creek because of the nature of the historical diversion at the original points of diversion. Mr. Sullivan explained that when the city operated its surface water rights at the original points of diversion, the city reduced the flow of the creeks by running water through a pipeline for use in the city, which made the water unavailable for other creek users. If the city were to instead utilize one of the two mechanisms provided for in its agreement with the SWC, the flow available to other surface water users would not be reduced, which would actually enhance the flows (and benefit surface water users, if nothing else). Ms. Beeman then asked Mr. Sullivan to

³⁰ Tr. Vol. VI, p. 1045, L. 20 through p. 1047, L. 13 (March 8, 2007).

explain what effect the change would have on return flows as compared to the city's historical use of surface water. Mr. Sullivan testified that because the water was historically diverted entirely out of the basin, there were no local return flows to Mink Creek or Gibson Jack Creek, so it wouldn't be an issue if the water were instead diverted from its wells as alternate points of diversion.³¹

Mr. Sullivan further illustrated his point by drawing a picture on the white board depicting the Portneuf River, Mink Creek, and Gibson Jack Creek. While referring to his diagram, he described the city's traditional use of the water and reiterated that if the city uses either or the two mechanisms provided for in its agreement with the SWC (either divert the surface water rights through the pipeline to be discharged in the river, or leave the water in-stream) there would be no injury or reduction in flow to the detriment of other local users. Ms. Beeman had Mr. Sullivan's drawing admitted as Pocatello Exhibit 184 for illustration purposes only.³²

Ms. Beeman then continued her direct examination of Mr. Sullivan by asking Mr. Sullivan whether he had analyzed the potential for injury to water rights on the Portneuf River and Snake River, and how such surface water rights might be injured by a change in point of diversion of the city's surface water rights (*the question was framed in terms of a CHANGE in point of diversion, rather than an addition of alternate points of diversion). Mr. Sullivan testified that he had analyzed the potential for such injury and that such water rights could potentially be affected if the city's use of alternate points of diversion changed the timing, amount, or location

³¹ Tr. Vol. VI, p. 1047, L. 14 through p. 1049, L. 15 (March 8, 2007).

³² Tr. Vol. VI, p. 1049, L. 16 through p. 1051, L. 17 (March 8, 2007).

of where the right was exercised in a way that reduced the water supply available and needed for reasonable use under another water right.³³

Mr. Sullivan testified that in analyzing the potential injury to rights on the Portneuf River, he first identified whether there were any water rights on the Portneuf River between Mink Creek and Gibson Jack Creek on down to the Snake River. After reviewing IDWR's tabulation of those water rights, Mr. Sullivan observed that there were relatively few water rights in that reach of the river and that most of them are very small diversions. In comparison to the total flow of the river through the city, Mr. Sullivan opined that the surface rights on the Portneuf and Snake would have sufficient water.³⁴ Mr. Sullivan testified that if the city diverts its surface water rights from its wells, the location of the depletion of water as a result of the exercise of those rights would effectively be moved from the original points of diversion to a point further downstream. If anything, Mr. Sullivan thought that such a move would enhance the flows through the relevant portions of the Portneuf River and result in a net increase which would only help any existing users on the creeks or the Portneuf River rather than injure them.³⁵

Ms. Beeman next directed Mr. Sullivan's attention to his analysis of potential injury to Snake River surface water rights as a result of Pocatello's operation of its alternative points of diversion, asking whether he had analyzed whether there would be any enlarged use of the city's surface water rights which might affect Snake River surface water users. Mr. Sullivan replied that the conditions in place (SWC agreement) would prevent any enlargement of the city's use of the surface water rights when they are diverted at the alternate points of diversion. Ms. Beeman then asked Mr. Sullivan to explain his analysis of the potential for injury to Snake River surface

³³ Tr. Vol. VI, p. 1051, L. 19 through p. 1052, L. 10 (March 8, 2007).

³⁴ Tr. Vol. VI, p. 1052, L. 11 through p. 1054, L. 14 (March 8, 2007).

³⁵ Tr. Vol. VI, p. 1053, L. 20 through p. 1054, L. 14 (March 8, 2007).

users similar to those asked regarding Portneuf River users. Mr. Sullivan's explained that Snake River rights would be injured in much the same way Portneuf River rights would be injured and that his analysis was done in much the same way (i.e., he first examined IDWR records for water rights that could potentially be injured, and so on).

Ms. Beeman asked Mr. Sullivan to clarify if, in terms of the original amount of depletion from the city's exercise of its surface water rights, there would be any difference if the rights were to be exercised at the alternative points of diversion. Mr. Sullivan replied that ultimately the same volume of water is removed or depleted and that the difference would only be that where the water was diverted at the original points of diversion the effect would be relatively immediate, whereas the effect would be somewhat delayed if the water were pumped out of the wells.³⁶

Ms. Beeman then asked Mr. Sullivan to explain in more detail how a change in timing might injure another water right. Mr. Sullivan testified that even if the city didn't enlarge the overall amount of water, but that there was a change in timing such that during a certain part of the year there was a reduction in flow to a downstream user that caused a shortage in his supply, that could be considered a timing related injury. In other words (as restated by Ms. Beeman), if the city diverts its surface water priorities at the wells, it could delay the effect of the pumping on surface water flows. Mr. Sullivan then described his use and the general operation of a spreadsheet tool developed by IDWR that allows analysis of impacts from pumping on the Snake River. In response, Ms. Beeman introduced Pocatello Exhibit 137, which Mr. Sullivan testified consists of pages printed from the spreadsheet tool titled "The ESPA Groundwater Rights Transfer Spreadsheet Based on Enhanced Snake Plain Aquifer Model by Donna M. Cosgrove and Gary S. Johnson," dated February 2005. Referring to Exhibit 137, Mr. Sullivan stated that

³⁶ Tr. Vol. VI, p. 1054, L. 15 through p. 1056, L. 5 (March 8, 2007).

the spreadsheet tool allowed him to simulate the effect of pumping the city's wells and evaluate how long it would take for the pumping to affect the Snake River and where the River would be affected.³⁷

At this point, Ms. Beeman introduced Pocatello Exhibit 138, which Mr. Sullivan described as a figure from his rebuttal expert report entitled "Annual Depression Resulting from Surface Water Diversions and Groundwater Pumping at Alternate Points of Diversion, City of Pocatello." Mr. Sullivan stated that Exhibit 138 shows the effect on the Snake River that results from the exercise of the city's surface water rights at their original points of diversion, and at the alternate points of diversion at the city's wells. He explained that the city's historical diversion at the original points of diversion caused a 100% depletion in surface water flows but that if the city diverts the water at its wells, the depletion effect on the surface water flows goes down. Mr. Sullivan continued by saying that when the city started pumping the water out of the wells, there would be no impact on the surface streams because it takes a while for the effect to reach the river but that over a number of years, if the city continued to divert the surface water out of its wells, the effect of the pumping on the stream would eventually grow until it reached the level that existed when the water was being diverted at the surface points of diversion. In other words, there would be a change in the annual timing of the depletions, but it would be a beneficial change because of the lag effect; the surface streams would see an increased flow on a transient basis during the transition period until the city's pumping effects again reached a steady state. Mr. Sullivan concluded that there would be no adverse timing impact on the Snake River flows from an annual standpoint, therefore, no injury to Snake River rights.³⁸

³⁷ Tr. Vol. VI, p. 1056, L. 16 through p. 1062, L. 8 (March 8, 2007).

³⁸ Tr. Vol. VI, p. 1062, L. 13 through p. 1065, L. 19 (March 8, 2007).

Ms. Beeman then asked Mr. Sullivan to explain his analysis of changes in the seasonal timing of depletions with reference to Exhibit 139, which is the summary of monthly surface water use. Mr. Sullivan explained that Exhibit 139 shows that when the city diverted water at the original surface points of diversion, the diversions occurred year round and were relatively steady from month to month so that historically, the diversion resulted in a steady seasonal depletion of the surface flows. If, however, the water is diverted at the city's wells, he went on, the use would still be relatively steady because the city would continue to divert year round. Mr. Sullivan continued by saying that because the effects of pumping are attenuated and delayed in getting to the Snake River, the seasonal distribution of the effect of pumping on surface flows would be further flattened. Mr. Sullivan concluded that historically there was a flat effect of the city's use of water on the surface system, where flat means not changing much from month to month. By moving the diversion to the wells, there would continue to be a flat distribution of the seasonal timing of the depletions on the stream flows and, therefore, there would be no material change or injury as a result of the operation of the alternate points of diversion.³⁹

Mr. Sullivan next addressed the question of whether the city's surface water right priorities are subject to a priority call from downstream surface water rights. Mr. Sullivan stated that historically, they haven't been; he didn't think that the Portneuf River had been administered against calls from the Snake River, although he acknowledged Mr. Tuthill's testimony that this may change in the future. With regard to any administration that would occur, however, Mr. Sullivan indicated that the city's surface water rights are senior to most of the downstream rights and that the Surface Water Coalition members, who own most of the downstream water rights on the Snake River, had stipulated to the city's water rights claims. Mr. Sullivan agreed that the

³⁹ Tr. Vol. VI, p. 1065, L. 20 through p. 1067, L. 25 (March 8, 2007).

SWC members were apparently satisfied that the city's diversion of its surface water rights at alternate points of diversion would not cause them any injury.⁴⁰

At this point, Ms. Beeman introduced Pocatello Exhibit 116, Mr. Sullivan's expert report titled "Spronk Water Engineers, Inc., Expert Report Dated September 29, 2006, Prepared for the City of Pocatello, Claimant." After the Exhibit 116 was admitted, Ms. Beeman introduced Pocatello Exhibit 117, which Mr. Sullivan testified was the rebuttal report he prepared for this case entitled "Spronk Water Engineers, Inc., Expert Rebuttal Report Dated December 1, 2006, Prepared for the City of Pocatello, Claimant." Mr. Barber objected to the admission of Mr. Sullivan's rebuttal report on the grounds that it was in rebuttal to the Rockaway Report which was not offered as evidence, and therefore not relevant. The court overruled the objection and allowed both reports in.⁴¹

Mr. Barber then began his **cross-examination** of Mr. Sullivan. After a few introductory questions, Mr. Barber asked Mr. Sullivan some questions regarding the settlement agreement with the SWC, specifically, where exactly water would be returned to the Portneuf River under the terms of the agreement. Mr. Sullivan pointed out the location of the proposed reentry site on Exhibit 104 (map).⁴² Mr. Sullivan also answered some general questions about which part of the Portneuf River channel had been lined with concrete within the city and explained the distinction between the north and south sections of the Lower Portneuf River Valley Aquifer.⁴³

Mr. Barber asked Mr. Sullivan some questions regarding Exhibit 132, The Water Balance and Pumping Capacity of the LPRVA, Bannock County, Idaho, by John A. Welhan from 2006.

⁴⁰ Tr. Vol. VI, p. 1068, L. 1 through p. 1069, L. 4 (March 8, 2007).

⁴¹ Tr. Vol. VI, p. 1071, L. 3 through p. 1073, L. 13 (March 8, 2007).

⁴² Tr. Vol. VI, p. 1078, L. 13 through p. 1080, L. 2 (March 8, 2007).

⁴³ Tr. Vol. VI, p. 1080, L. 8 through p. 1082, L. 9 (March 8, 2007).

Specifically, Mr. Barber asked Mr. Sullivan to read a section of the report which stated that “[t]hese results indicate the total demand was already at 100 to 115 percent of system capacity more than a decade ago.” Mr. Barber asked Mr. Sullivan if, in reference to the statement, the demand is taking more than the system capacity there would be a drawdown of storage in the aquifer. Mr. Sullivan was at first not sure what Mr. Barber meant by system capacity and so there was some clarification as to Mr. Barber’s meaning during which Mr. Sullivan explained the general principles behind a water balance. As additional clarification, Mr. Barber read another excerpt from the report concerning aquifer recharge in a below normal year and stating that “storage water level in the southern aquifer has declined by more than 10 feet since 1975 and represents direct evidence that long term demand has exceeded long term capacity for more than two decades.” When asked whether he agreed with the statements from Welhan’s report, Mr. Sullivan replied that he had not done an independent investigation of the variability of the aquifer recharge between a dry year and a normal water year but that the Welhan report generally represented the best information available on the LPRVA.”⁴⁴

Mr. Barber then took Mr. Sullivan through figures listed in the Welhan report pertaining to the 1994 southern aquifer water balance and the annual recharge from the Portneuf River, asking Mr. Sullivan whether he agreed or disagreed with the numbers listed. Mr. Sullivan said that he had no reason to disagree with the numbers provided. Mr. Barber also asked Mr. Sullivan if he agreed with the numbers listed in the report for domestic well withdrawals. Mr. Sullivan replied that he was not sure how the domestic well data was determined because the wells aren’t metered therefore he could not venture an opinion on them. Mr. Barber then asked Mr. Sullivan some questions about the numbers listed in the Welhan report for total municipal withdrawals from the aquifer for the 1993-94 period. Mr. Sullivan indicated that the City’s records showed

⁴⁴ Tr. Vol. VI, p. 1099, L. 9 through p. 1103, L. 25 (March 8, 2007).

much less water withdrawn than in the Welhan report. Finally, Mr. Barber asked whether Mr. Sullivan had any reason to disagree with the data in the Welhan report showing that there was a .46 billion gallon decrease in storage per year within the aquifer. Mr. Sullivan responded that he wasn't entirely sure how the Welhan numbers were generated and explained that generally storage changes are estimates based on variable numbers. Mr. Sullivan then stated that he had not done any independent calculation to determine a different figure from that listed by Welhan.⁴⁵

Then, in response to some questions regarding the different sections of the LPRVA, Mr. Sullivan stated that there is some limited connection between the Portneuf River and the aquifer in the southern upper portion of the LPRVA, particularly during flooding periods when water would flow into the aquifer from the river. Mr. Barber followed up by asking whether, absent those flooding periods, there was much recharge of the LPRVA by the Portneuf River. Mr. Sullivan responded that Mr. Welhan's work indicated that there was not. Mr. Sullivan also stated that he agreed with a statement in Mr. Welhan's report that the LPRVA is relatively small and that anything done to change the water balance can affect the aquifer. For example, he explained, if there is a drought there would be less inflow which would affect the storage in the aquifers. Mr. Sullivan then stated that he had no reason to generally disagree with Mr. Welhan's finding that because the LPRVA is a small watershed, its principal aquifer is prone to large annual pumping-induced storage fluctuations or seasonal swings in groundwater level.⁴⁶

After a series of questions in reference to Pocatello Exhibit 133 (CH2M Hill report with domestic well inventory) and State's Exhibit 304 (blown up version of table 4 from CH2M Hill report) concerning the water levels of Pocatello's domestic wells, Mr. Barber again turned to the

⁴⁵ Tr. Vol. VI, p. 1104, L. 1 through p. 1108, L. 14 (March 8, 2007).

⁴⁶ Tr. Vol. VI, p. 1109, L. 23 through p. 1113, L. 14 (March 8, 2007).

issue of the wells as alternative points of diversion for Pocatello's surface water rights. Mr. Barber began by asking Mr. Sullivan how much water would be returned to the LPRVA were the city to utilize the option provided for in the agreement with the SWC wherein the city would allow its allotted surface water to flow down Mink Creek and Gibson Jack Creek to the Portneuf River. Mr. Sullivan stated that some of the water would seep into the aquifer but that he was not sure how much.⁴⁷

Mr. Barber then asked Mr. Sullivan if it were true that if the city exercised the other option described in the SWC agreement and diverted its surface water rights at the original points of diversion and conveyed the water to the Portneuf River by pipeline, that essentially none of the water would operate to the benefit of the upper southern aquifer. Mr. Sullivan replied that there would be a difference in recharge between the two examples and that it was possible that the second option described in the SWC agreement would provide less recharge to the southern aquifer than the first option. Mr. Barber followed up by asking whether it was correct that the further one transported the water downstream, the less opportunity the water would have to seep into the upper southern aquifer. Mr. Sullivan responded that it would depend on the connection and where the water was discharged. Furthermore, Mr. Sullivan explained that the discharge might still be in a recharge zone, even if the discharge were moved downstream. Mr. Barber again asked Mr. Sullivan whether there would still be less recharge were the city to divert the water through its pipeline rather than leave the flows in-stream. Mr. Sullivan replied that there would be less recharge at Gibson Jack but that he didn't know whether there would be less recharge to the overall aquifer.⁴⁸

⁴⁷ Tr. Vol. VI, p. 1128, L. 9 through p. 1129, L. 2 (March 8, 2007).

⁴⁸ Tr. Vol. VI, p. 1131, L. 5 through p. 1132, L. 19 (March 8, 2007).

Mr. Barber followed up by asking Mr. Sullivan to confirm that if water flows in from Mink Creek and flows down the Portneuf River, it has the entire distance until it gets to the channelized portion of the Portneuf River to recharge the aquifer. Mr. Sullivan replied that there is a pretty limited connection, at least according to Mr. Welhan, between the river and the aquifer in that area. To clarify, Mr. Barber asked Mr. Sullivan whether he meant that even from Mink Creek there is a limited connection between the river and the LPRVA. Mr. Sullivan then agreed that where Mink Creek discharges into the Portneuf River, there's limited recharge of the aquifer from that point downstream and Mr. Welhan's work indicates recharge generally happens during over-bank-flooding periods. Finally, Mr. Barber asked whether, given the situation where the city diverts its surface water rights through its pipeline and releases the water into the Portneuf River, the water released would primarily NOT recharge the upper southern aquifer. Mr. Sullivan replied that he didn't know exactly because it would depend on whether the water was released over a recharge zone but that the water may still have the opportunity to flow over such a recharge zone into the aquifer.⁴⁹

Mr. Barber then asked Mr. Sullivan some questions in reference to State of Idaho Exhibit 301, which is a partial decree of water rights on Mink Creek and Gibson Jack Creek. Mr. Barber inquired whether Mr. Sullivan was familiar enough with the city's points of diversion for its surface water rights to know whether the rights listed in the decree were upstream or downstream from the city's diversion. Mr. Sullivan stated that he was not. Mr. Barber then asked Mr. Sullivan to assume hypothetically that the water rights listed in the decree were all downstream and that the city did not divert its Mink Creek and Gibson Jack rights and instead let the water flow downstream, as contemplated in the SWC agreement. Mr. Barber then asked, assuming all this, whether from the city's perspective some administrative mechanism was necessary to

⁴⁹ Tr. Vol. VI, p. 1132, L. 20 through p. 1134, L. 15 (March 8, 2007).

prevent the downstream water holders from taking the water that would otherwise have accrued to the city's rights. Mr. Sullivan stated that such was not his testimony. Rather, Mr. Sullivan indicated that it would be sufficient for the city to leave the water in the river and that if someone else picked up the water, it would represent an illegal use by the surface water user.⁵⁰

Mr. Barber then asked whether there is anything in the SWC settlement agreement that requires the water to go past all of the other surface water diversions downstream. Referring to IDWR Exhibit 43 (SWC agreement), Mr. Sullivan directed Mr. Barber's attention to "Remark/Condition No. 2." Mr. Sullivan testified that Remark/Condition No. 2 essentially provides that exercise of the city's surface water rights at the alternate points of diversion will be limited to the amount of water delivered from these sources to the Portneuf River and which is delivered past any intervening water users during the stated period. Mr. Barber asked again whether some administrative mechanism would be required to have the water delivered past the intervening water users. Mr. Sullivan stated that this was correct but that he thinks it is IDWR's obligation. Mr. Barber then asked Mr. Sullivan whether the city would have to divert the water through its facilities directly to the river if there is no such administrative mechanism. Mr. Sullivan agreed that Mr. Barber was right.⁵¹

Next, Mr. Barber asked some questions in reference to Pocatello Exhibit 143 and Pocatello's annual water use. Looking at the years 1985-86, Mr. Barber asked if it was correct that there was a little less than 16,000 acre feet used total during those two years. Mr. Sullivan confirmed that the number of acre feet was correct and then testified that 16,000 acre feet would represent about 22 cfs of continuous flow. Mr. Barber then directed Mr. Sullivan to look at Pocatello Exhibit 125, and to confirm that the city could divert 22 cfs if the city started diverting

⁵⁰ Tr. Vol. VI, p. 1134, L. 16 through p. 1137, L. 13 (March 8, 2007).

⁵¹ Tr. Vol. VI, p. 1138, L. 18 through p. 1140, L. 5 (March 8, 2007).

from its earliest water rights up through water right 29-13637 with a date of Dec. 31, 1940. Mr. Sullivan confirmed that this was correct. Mr. Barber then referred Mr. Sullivan to his earlier testimony wherein Mr. Sullivan stated that there was a period of time when the city did not divert any of its surface water (from the original points of diversion) and that the city instead diverted the surface water at its wells as alternate points of diversion. Mr. Barber continued his line of questioning by asking why he (Mr. Barber) should believe that any surface water was diverted from the city's wells rather than assume the city had diverted groundwater based on the priorities shown in Exhibit 125. After an objection by Ms. Beeman, Mr. Barber clarified that he wanted to understand the bases of Mr. Sullivan's conclusion that the city was diverting surface water from its groundwater wells during those periods (when the city reported no diversion of surface water at the original points of diversion).⁵²

In response, Mr. Sullivan replied that he thought he had testified that the city would have been exercising those very valuable priorities and that it would not make sense for the city to give up those priorities when it was not diverting them from the original points of diversion. Mr. Barber then asked Mr. Sullivan whether, looking at Exhibit 125 and assuming that the 22 cfs would provide 16,000 acre feet a year, there are sufficient groundwater rights to provide or respond to a peak demand if it occurred. Using 1987 as a reference year, Mr. Sullivan stated that there are peak demands up to three times the 22 cfs and that there would be enough groundwater priorities to exercise or to divert that rate. At this point, Mr. Barber ended his cross-examination.⁵³

Upon **redirect examination**, Ms. Beeman again asked Mr. Sullivan to refer to Exhibit 125. Considering the exhibit, Ms. Beeman asked how the city would meet a peak demand with

⁵² Tr. Vol. VI, p. 1141, L. 3 through p. 1143, L. 3 (March 8, 2007).

⁵³ Tr. Vol. VI, p. 1143, L. 4 through p. 1144, L. 13 (March 8, 2007).

its groundwater rights if there were a priority administration with a cutoff date of September 15, 1955. Mr. Sullivan replied that, in such a situation, the city would only have 53.04 of cfs in priority, which would be less than the peak demand of 66 cfs. Ms. Beeman then asked what would happen if, in the same situation, the city were to operate its wells as alternate points of diversion for its surface water rights, assuming the flows were present and available in Mink Creek and Gibson Jack Creek. Mr. Sullivan responded that operation of the wells as alternate points of diversion for the surface water rights would add another 10 cfs which would allow the city to divert 63 cfs, close to the peak demand of 66 cfs.⁵⁴

Ms. Beeman then directed Mr. Sullivan to Mr. Barber's questions in reference to Pocatello Exhibit 132 (2006 Welhan Report). Ms. Beeman asked Mr. Sullivan whether water balance would change depending on whether Pocatello exercised its surface water rights at their original points of diversion or at the wells as alternate points of diversion. Mr. Sullivan replied, no, the water balance is done on a global, aquifer-wide basis, therefore, whether the city were pumping the water out of one well or another, it would still pump the water and there would be no net effect on the balance. Ms. Beeman then asked Mr. Sullivan to clarify whether pumping surface water from the city's wells would cause water levels to go up and down in the same way as if the city pumped from the original surface points of diversion. Mr. Sullivan testified that the overall level in the aquifer would still go up and down in response to pumping regardless of where the pumping occurred. Ms. Beeman then followed up with Mr. Sullivan on Mr. Barber's earlier questions regarding Pocatello Exhibit 115 and the historic water level data for Pocatello's wells.⁵⁵

⁵⁴ Tr. Vol. VI, p. 1144, L. 25 through p. 1146, L. 3 (March 8, 2007).

⁵⁵ Tr. Vol. VI, p. 1146, L. 7 through p. 1147, L. 12 (March 8, 2007).