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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

APR 12 2010

By

Clerk

Deputy Clerk

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

In Re SRBA

Case No. 39576

) Subcase Nos. 29-00271, *et al.*
) (See Attached Exhibit A)
)
) ORDER ON MOTION TO ALTER OR
) AMEND
) (City of Pocatello)
)
)

Ruling: Motion to Alter or Amend the Judgment, **Denied.**

I.

APPEARANCES

JOSEPHINE P. BEEMAN, Beeman & Associates, P.C., Boise, Idaho, on behalf of
Challenger City of Pocatello.

SHASTA KILMINSTER-HADLEY, Deputy Attorney General, Boise, Idaho, on behalf
of Respondent State of Idaho.

CHRISTOPHER H. MEYER AND JOHN M. MARSHALL, Givens Pursley, LLP,
Boise, Idaho, appearing *amici curiae* on behalf of United Water Idaho, City of Nampa,
and the City of Blackfoot.

JOHN M. MELANSON, Presiding Judge of the SRBA, *pro tem*, presiding.

II.

BRIEF PROCEDURAL BACKGROUND

On November 9, 2009, this Court issued its *Memorandum Decision and Order on Challenge (City of Pocatello)* ("**Order**"). The facts and procedural history of the *Challenge* are explained in the Court's **Order** and are incorporated herein by reference.

On November 23, 2009, the City of Pocatello (“Pocatello”) filed a *Motion to Alter or Amend* the Court’s **Order**, pursuant to I.R.C.P. 59(e).¹ On December 10, 2009, Pocatello filed its *Brief in Support of Motion to Alter or Amend* (“*Brief*”). On January 15, 2010, the State of Idaho (“the State”) filed a *Response to the City of Pocatello’s Motion to Alter or Amend* (“*Response*”).

III.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument occurred in this matter on March 22, 2010. The parties did not request the opportunity to submit additional briefing and the Court does not require any additional briefing in this matter. Therefore, the matter is deemed fully submitted for decision on the next business day, or March 23, 2010.

IV.

ISSUES

A. Issues Raised by the City of Pocatello.

Pocatello raised a number of issues in its *Motion to Alter or Amend*. The Court summarizes the issues as follows:

1. Whether this Court erred by failing to enumerate specific findings of fact and conclusions of law in its previous **Order**?
2. Whether I.C. § 42-1425 authorizes IDWR to engage in an injury analysis when no third parties objected to the claims?
3. Whether I.C. § 42-1425 applies to transfers accomplished prior to May 26, 1969?
4. Whether Pocatello presented sufficient evidence to rebut the *Director’s Report*’s allegations of injury and lack of connectivity between Pocatello’s surface and ground water sources?

¹ As distinguished from a *Motion to Alter or Amend a Special Master’s Recommendation*, pursuant to *SRBA Administrative Order 1* § 13(a).

5. Whether a specific legal standard exists to determine whether a sufficient degree of connectivity establishes that surface and ground water points of diversion occur on the same source?
6. Whether I.C. § 42-1425 prohibits accomplished transfers of source?
7. Whether injury to a priority date is injury *per se* under I.C. § 42-1425?
8. Whether IDWR improperly changed its position regarding the administration of municipal rights?
9. Whether the Providers' scenarios are based on facts in the record and whether this Court could consider such scenarios in reaching its decision?
10. Whether water right 29-7770 was properly recommended with an "irrigation" purpose of use?
11. Whether Pocatello's claim of an earlier priority date is a collateral attack on the license issued for water right 29-13639?

B. Issues raised by the State of Idaho.

The State raises only one issue in its *Response to the City of Pocatello's Motion to Alter or Amend*. The Court summarizes the issue as follows:

1. Whether the State should be awarded costs and attorney fees pursuant to I.C. § 12-117?

V.

DISCUSSION

For the reasons already stated in this Court's previous *Order*, Pocatello's *Motion to Alter or Amend* is **denied**. In its *Motion* and *Brief*, Pocatello repeats many of the same arguments made in its previous motions and briefings to this Court. However, each of the arguments raised by Pocatello will be addressed below.

A. Pocatello's *Motion* is properly framed as a *Motion to Alter or Amend* under I.R.C.P. 59(e).

In its *Motion to Alter or Amend*, Pocatello stated:

The City of Pocatello ... hereby moves this court to alter or amend the District Court's November 9, 2009 Memorandum Decision and Order pursuant to I.R.C.P. 7(b)(1), 7(b)(3), and 59(e), or, in the alternative, to reconsider the Memorandum Decision and Order on Challenge pursuant to I.R.C.P. 11(a)(2).

In its *Response*, the State argued that this Court should treat Pocatello's *Motion* as a motion to alter or amend, because a motion for reconsideration should only be utilized to reconsider interlocutory orders. In addition, the State asserted that Pocatello has raised new legal theories and claims that were not raised in the *Notice of Challenge*, in violation of Idaho Rule of Civil Procedure 59(e).

Rule 11(a)(2)(B) governs motions for reconsideration. It provides that "a motion for reconsideration of any **interlocutory orders** of the trial court may be made at any time before the entry of final judgment, but not later than fourteen (14) days after entry of the final judgment." (Emphasis added). A Rule 11(a)(2)(B) motion for reconsideration is addressed to the discretion of the court. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001).

Rule 59(e) governs motions to alter or amend a judgment. It provides that "a motion to alter or amend the judgment shall be served not later than fourteen (14) days after entry of the judgment." Pursuant to Rule 59(e), "a district court can correct legal and factual errors in proceedings before it." *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). A Rule 59(e) "motion to amend a judgment is addressed to the discretion of the court." *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982).

The distinction between a motion for reconsideration and motion to alter or amend a judgment is significant in that Rule 11(a)(2)(B) permits a party to present new evidence in conjunction with a motion to reconsider, whereas new evidence may not be presented under Rule 59(e) in conjunction with a motion to alter or amend. *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006).

In this case, the Court's **Order** contained a Rule 54(b) certificate, providing that:

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

Order, p. 30. (Emphasis added). Since the *Order* is deemed a final judgment by the Rule 54(b) certificate, it is no longer an interlocutory order. As such, a motion to reconsider under Rule 11(a)(2), which only applies to “interlocutory orders of the trial court,” is not appropriate.

Rule 59(e), which is applicable to judgments, is available to Pocatello to request that the Court alter or amend the *Order*. However, Pocatello is precluded from attempting to present any new evidence. The State argues that Pocatello has attempted to introduce new evidence and legal theories in its *Motion* and *Brief*. Specifically, the State asserts that Pocatello never briefed or argued the issue of whether pre-1969 water rights are exempt from the Director’s review under I.C. § 42-1425, prior to filing its *Motion*. This Court agrees.

At oral argument on the *Motion*, Pocatello cited a portion of the subcase record in 2006 where the State raised a similar argument during briefing on summary judgment. In addition, Pocatello cited another portion of the record in 2007, where the Special Master allowed Pocatello to provide evidence of its pre-1969 transfers. Pocatello also presented the Court with a document at oral argument that cited a portion of Pocatello’s *Response Brief on Summary Judgment* from 2006. In its *Response Brief on Summary Judgment*, Pocatello argued that the city was not required to file a transfer application for any wells that began operating prior to 1969. This Court has reviewed the record in detail and was unable to locate where in the record Pocatello establishes a date certain that the interconnected wells were in place. Rather, arguments raised by Pocatello only refer to the fact that the system was in place prior to 1987. Moreover, while this issue may have arguably been raised briefly by the State and Pocatello, and impliedly by the Special Master on summary judgment, Pocatello did not raise this issue before this Court on

Challenge. Nonetheless, this Court will address Pocatello's pre-1969 argument further in Section D, below.

B. On Challenge, this Court does not make enumerated findings of fact.

Pocatello argues that this Court erred by failing to provide enumerated findings of fact and conclusions of law. Under *Administrative Order 1* ("AOI"), this Court "shall accept the Special Master's findings of fact unless clearly erroneous." AOI § 13(f). Upon a *Notice of Challenge*, the presiding judge reviews a *Special Master's Recommendation* and may "in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions." *Id.*; I.R.C.P. 53(e)(2). This Court is not the finder-of-fact, and in these circumstances, is not required to list enumerated findings of facts or conclusions of law. Regardless, Pocatello requests that this Court accept seven proposed modifications to the Court's recitation of material facts in its previous *Order*.

The Court will amend its previous decision to include four charts provided in Pocatello's proposed findings of fact numbers (1) and (2).² These charts clarify and further describe the water rights at issue and provide a more understandable record. However, Pocatello also requests the Court to amend its previous decision to clarify which of Pocatello's water rights were developed prior to May 26, 1969.³ Pocatello argues that this date should be included because I.C. § 42-1425 (also referred to as the accomplished transfer statute) does not apply to transfers occurring before that date. Therefore, Pocatello contends that I.C. § 42-1425 cannot be used as a justification for placing a condition on a transfer that occurred prior to May 26, 1969. This Court acknowledges that some of Pocatello's rights were developed prior to 1969. However, as this Court will explain in further detail below, the distinction between a pre-1969 right

² Four charts entitled, "The 21 Water Rights for Pocatello's In-Town Interconnected System," "The 22 Interconnected Wells for Pocatello's In-Town System," "The 2 Water Rights for Pocatello's Interconnected Airport System," and "The 2 Interconnected Wells for Pocatello's Airport System" are attached to this decision as exhibits.

³ On May 26, 1969, the Idaho legislature repealed and reenacted I.C. § 42-222, which set out new procedures for obtaining a change to a water right. Also on that same date, I.C. § 42-108 was amended to state 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." 1969 Idaho Sess. Laws ch. 303, § 1, p 906.

and one developed after 1969 is insignificant, because any transfer occurring prior to the May 26, 1969 adoption of I.C. § 42-222 was still subject to the earlier statutory transfer requirements for points of diversion, as codified as I.C.A. § 41-216 as early as 1943, as well as the common-law “no injury” rule. The procedures set out in I.C. § 42-222 (and the earlier I.C. § 41-216) codified the common law rule that senior water users could not change the place of use or point of diversion, if such a change would injure other rights. Further, injury to a priority date is *per se* (see Section F below). As such, this Court declines to amend its previous decision to include modifications in Pocatello’s proposed findings of fact numbers (3), (4), (5), and (6).

Finally, this Court declines to amend its previous decision to define what constitutes “interference” in Director Tuthill’s testimony, as requested by Pocatello in its proposed finding of fact number (7). However, this Court will amend its previous decision to clarify the record regarding Pocatello’s argument that IDWR made an error of law in recommending its purpose of use for water right 29-7770 as “irrigation,” pursuant Pocatello’s proposed finding of fact number (8).

C. A plain reading of the transfer statutes allows the Director to engage in an injury analysis absent a third-party objection.

Idaho Code § 42-1425 allows the Director to approve water right claims for claimants who failed to follow the transfer procedures set out in I.C. § 42-222, provided that such transfers do not injure other water users and do not result in an enlargement of the original water right. In order to allow such claims, the Director must perform an “expeditious review” of the transfer to determine if injury or an enlargement has occurred. I.C. § 42-1425 (1) (c).

Pocatello argues that the Director’s authority to perform this review does not include the power to place an injury-related condition on a water right claimed under I.C. § 42-1425. As explained in the Court’s previous *Order*, the Director’s authority to process a water right claim in the SRBA is not waived by I.C. § 42-1425. Rather, I.C. § 42-1425 exempts both the Director and the water right claimant from following the more “burdensome” procedures set out in I.C. § 42-222, and prevents the Director from dismissing a water right claim for a failure to follow such procedures. However, the

accomplished transfer statute does not preclude the Director from investigating water right claims in accordance with his other statutory duties. For instance, I.C. § 42-1411 defines the broad power of the Director to determine the elements of a water right “to the extent that the director deems appropriate and proper, to define **and administer** the water rights acquired under state law.” I.C. § 42-1411(2) (Emphasis added). In addition, the Director shall include “such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right or **for administration of the right** by the director.” I.C. § 42-1411(2) (j) (Emphasis added). Such power and authority still applies during the Director’s “expeditious” review to ensure that the accomplished transfer does not injure other existing rights. While the Director is not required to follow the procedures set out in I.C. § 42-222, the Director **must** investigate any injury that may have occurred to other water rights, regardless of whether a third party files an objection. As stated in the Court’s **Order**, the Director is not required to accept Pocatello’s water right claim as a *prima facie* showing that no injury to other water rights has occurred. Further, the condition imposed in this case only applies through the administration of water rights during times of shortage, and does not affect the appropriation or right to use the water rights at issue. As discussed in this Court’s prior decision, the transfer of ground water rights adds complexities not otherwise present in transfers related to surface water sources.

Therefore, this Court will not disturb its earlier determination that the Director has the authority to investigate injury and impose an injury-based condition on a water right claimed under I.C. § 42-1425 in the absence of a third-party objection. As such, the Special Master did not err by inquiring into injury to existing water rights.

D. Pre-1969 transfers.

The tenor of Pocatello’s argument in its *Opening Brief on Challenge* was that the water rights at issue were a part of the city’s interconnected well system, which had “been in operation since before November 19, 1987.” *Opening Brief* at 5. *See also Opening Brief* at 10 (“Pocatello’s interconnected well system has been in operation since before the commencement of the SRBA...”). Because Pocatello did not specify a date when the well system was developed, this Court appropriately focused on the application

of the accomplished transfer statute to these pre-1987 rights in its earlier decision. Now, Pocatello argues that the accomplished transfer statute does not apply to water right transfers accomplished prior to May 26, 1969.⁴ In essence, Pocatello contends that the Director cannot justify placing a condition on the pre-1969 rights by relying on I.C. § 42-1425, because prior to 1969, the Director had no authority to approve such a transfer. In other words, Pocatello asserts that prior to the enactment of I.C. § 42-222 in 1969, water users were not required to follow **any** procedures to transfer a point of diversion, and therefore, I.C. § 42-1425 does not apply to those pre-1969 rights. However, this is not a correct statement of the law. The requirement to file an application for a change in point of diversion became mandatory in 1943. *See* 1943 Idaho Sess. Laws ch. 53, p. 101. *See also* SRBA Court's ***Order on Challenge (A & B Irrigation District)*** Subcase Nos. 36-02080 *et. al.* (April 25, 2003) (Hon. R. Burdick) at 20, *aff'd sub nom. A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005). Further, this Court is unable to find in the record any indication that Pocatello's interconnected well system was developed prior to 1943 and was somehow exempted from this requirement. In addition, it appears that only 6 of the 21 ground water wells at issue have priority dates earlier than 1943. Therefore, Pocatello's pre-1969 argument is irrelevant, unless Pocatello can demonstrate that the city's interconnected well system was established prior to 1943. Even then, the argument would at best only apply to six wells.

Moreover, Pocatello's argument that no mandatory transfer procedures existed prior to 1969 is not dispositive of the issue before this Court, because the "no-injury" rule was in place at the time the pre-1969 transfers allegedly took place. The common law prior to 1969 made clear that a water user may not change a point of diversion, if such a change would injure other water rights. *See First Security Bank v. State*, 49 Idaho 740, 745, 291 P. 1064, 1066 (1930) (holding that in an action involving a change in place of diversion, the reasons why the change will or will not injure other appropriators may be considered). Idaho Code § 42-222 and its predecessors codified this "no-injury rule,"

⁴ While this argument may have been addressed by the State and Pocatello at summary judgment in 2006, the issue of what transfer procedures were in place prior to 1969 was not fully briefed to this Court on *Challenge*. Further, it does not appear that the Special Master addressed this specific legal question, either.

beginning in 1899 with the passage of House Bill 183, which stated in part that “[t]he person entitled to the use of water may change the place of diversion, if others are not injured by such change ...” 1899 Idaho Sess. Laws §11, p. 381. As explained below and in the previous *Order*, injury to the priority date of a water right is injury *per se*. This concept was established in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 545, 461, 926 P.2d 1301, 1308 (1996), and in this Court’s *Order on Challenge (A & B Irrigation District)*. These cases were decided after the adoption of the amnesty statutes. IDWR, consistent with the holdings of the Supreme Court, has included remarks to allow the statutes to operate as intended, while protecting the priorities of junior water users in times of administration. Further, since the Director has engaged in conjunctive management, the concept of injury has broadened beyond what was previously understood. In this case, the Director found such an injury, yet still allowed Pocatello to claim the alternative points of diversion, so long as a mitigating condition was included. At the time a claimant files a claim in the SRBA, the Director still maintains the authority to examine such transfers for injury to other water rights, especially since the “no injury” rule has been well-established for over 100 years.

E. Separate source issues.

Pocatello argues that the Special Master and this Court erred by disallowing ground water wells on the Lower Portneuf River Valley Aquifer (“LPRVA”) as alternative points of diversion for senior surface rights diverting from Gibson Jack and Mink Creek. Pocatello asserts that (1) Pocatello presented sufficient evidence to rebut the allegations of injury and lack of interconnection between Pocatello’s surface and ground water sources; (2) no specific legal standard exists to determine whether a sufficient degree of interconnection exists between surface and ground water points of diversion; and (3) I.C. § 42-1425 does not prohibit accomplished transfers of source.

Under I.R.C.P. 53(e)(2), this Court shall accept the Special Master’s findings of fact unless they are clearly erroneous. As the trier-of-fact, the Special Master has the responsibility for weighing the evidence presented and determining whether the required burden of proof has been met. *Clear Springs Foods, Inc. v. Clear Lakes*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002). After taking testimony and weighing the evidence

presented, the Special Master determined that the creeks and aquifer were two separate sources. The evidence presented included testimony from IDWR, a *Supplemental Director's Report*, and Pocatello's expert testimony demonstrating that the creeks contributed significantly to the LPRVA. The Special Master, however, was not convinced that the creeks' contribution to the aquifer was significant enough to demonstrate that the creeks and the aquifer were the same source. This finding was not clearly erroneous because it was supported by substantial and competent evidence. This Court also cited portions of the record where Pocatello's own expert testified that the LPRVA is supplied from sources other than Gibson Jack and Mink Creek.

Pocatello also argues that the Special Master's decision to rely on the testimony of IDWR and the *Supplemental Director's Report* is arbitrary, because no specific legal standard exists to determine the degree of interconnectedness between surface and ground water points of diversion. The connectivity between the creeks and the aquifer is a factual question. The legal standard that the Special Master must apply is whether Pocatello presented sufficient evidence to rebut the *Supplemental Director's Report* as to the elements of its claimed water rights (including source). As mentioned above, and in the previous decision, Special Master correctly applied this legal standard and determined that Pocatello had not met its burden.

Finally, Pocatello argues that I.C. § 42-1425 does not prohibit accomplished transfers of source. As mentioned in the previous **Order**, I.C. § 42-1425 only authorizes changes to the "place of use, point of diversion, nature or purpose of use, or period of use." The accomplished transfer statute does not expressly allow changes in source, presumably because the injury to water users on the new source is *per se* (see section F below). A change in source is essentially the appropriation of a new water right. For example, if a water user with a 1939 priority date wishes to change from Source A to Source B, water users on Source B with junior priority dates would not be put on notice that the new demand on the source is senior to their water rights. The expectation would be that this is a new water right junior to existing water rights on the source. In other words, the senior water user, through an accomplished transfer of source, shifts the schedule of priority on Source B without ever putting the existing users on notice by following statutory transfer procedures, during which existing users would have the

opportunity to object. However, in the event of a new appropriation on Source B, the new appropriator acquires a water right junior to existing users on the source, and all users on that source are on notice of the appropriation of this new, junior right. However, if that new appropriator is instead deemed to have an accomplished transfer pursuant to I.C. § 42-1425, that user usurps the existing priority scheme on that source, without providing proper notice to existing users. For the reasons mentioned above and in the previous **Order**, I.C. § 42-1425 does not authorize transfers of source. This Court acknowledges that there may be rare circumstances where a water table could be so high that ground and surface water sources could be indistinguishable, in which case the application of I.C. § 42-1425 may fall into a grey area. However, this is not one of those circumstances.

F. Injury to a priority date is injury *per se*.

Pocatello argues that I.C. § 42-1425 does not have an injury *per se* rule. Specifically, Pocatello repeats its earlier arguments that the Special Master applied the wrong legal standard by concluding that injury to a priority date is *per se*. Therefore, Pocatello argues, the condition to mitigate for such injury should not be included on the face of Pocatello's rights. As this Court stated in its previous **Order**, the Special Master's ruling on this issue is affirmed.

Relying on the reasoning in this Court's **Order on Challenge (A & B Irrigation District)**, and the Idaho Supreme Court's reasoning in *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 461, 926 P.2d 1301, 1308 (1996), this Court determined that injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in times of shortage. As demonstrated by the example in Section E, above, an accomplished transfer from Source A to Source B may not immediately affect the existing users on Source B. However, during times of shortage, the transferred senior water right on Source B would take priority over rights that had been on that source long before the accomplished transfer. To allow such a transfer would result in injury to the

existing users' priority dates **at the time the change is made**, regardless if there is enough water to satisfy all the users on the source at that time. At the time the "transfer" took place, the expectation of existing users would be that a new right is being appropriated, not the transfer of an existing water right to a new source has occurred. Hence, there would be no reason for junior users to protest. As demonstrated by this example, such an injury to a priority date in a prior appropriation system is a seminal injury. Therefore, a mitigating condition is proper to protect existing users.

Further, the same is true when the source for all of the rights is listed as "ground water." As the Court explained in its previous *Order*:

Even though the "source" of all water rights involved is "ground water" and all rights are supplied from the same aquifer, the aquifer may not be homogenous as between the discrete regions where the wells are located. The closer wells are in proximity to one another the greater the potential for well interference over time or in times of shortage. It is erroneous to assume that the relative effects from ground water pumping between wells is uniform throughout the aquifer just because the "source" of all of the rights is labeled "ground water." The condition eliminates the need to establish the highly complex facts that relate to the specific interrelationships or degree of connectivity between specific rights until such a time as priority administration becomes necessary.

Order at 15. In such a situation, IDWR utilizes the ground water model to determine the amount of possible well interference, in order to protect existing users. The condition placed on Pocatello's right does not prevent any of the accomplished transfers from taking place. Instead, the condition properly protects existing users, in order to avoid injury. If it is true, as Pocatello claims, that no injury would ever result from decreeing these alternative points of diversion, then the condition would never come into effect and Pocatello's use of such alternative points of diversion would not be altered. However, Pocatello's argument that the remark places a limitation on its rights during administration is a tacit acknowledgement of injury to existing users.

Pocatello also argues that the Special Master did not have substantial evidence to support the determination of injury to priority dates as *per se*. This Court disagrees. The Special Master's determination was supported by substantial evidence and is therefore not clearly erroneous.

G. IDWR changed its position regarding the administration of ground water rights.

Pocatello argues that IDWR has improperly changed its position regarding the administration of ground water rights. As stated in the previous *Order*, IDWR acknowledged a change in position, because IDWR's understanding of conjunctive administration had evolved, due to developments in the conjunctive management rules, and decisions by this Court and the Idaho Supreme Court. Pocatello argues that placing a condition like the one at issue in this case is a change in position that requires IDWR to follow the rule-making procedures of the Idaho Administrative Procedures Act ("IDAPA"). However, it appears that the "change in position" that Pocatello refers to is a better understanding of conjunctive management and aquifer resources in the State of Idaho. This understanding affects what the Director deems as "necessary for the administration" of ground water rights within his authority under I.C. § 42-1411(2). The Department should not be hindered by prior misconceptions or misunderstandings of such a quickly evolving area of the law.

H. The Providers' scenarios were utilized by the Court for illustrative purposes.

Pocatello argues that the Providers' scenarios were not based on facts in the record, and do not apply to the rights at issue in this case, because Pocatello has agreed not to increase the rate of diversion in its individual interconnected wells beyond what existed at the commencement of the SRBA. This Court acknowledges that the scenarios were not based on facts in the record. Rather, the scenarios were properly considered by this Court to illustrate effectively the adverse effects to the priorities of existing water users, absent the inclusion of a condition.

I. The Special Master did not err in recommending water right 29-7770 with an irrigation purpose of use, or recommending the priority date for 29-13639.

Pocatello argues that evidence presented at trial demonstrates that water right 29-7770 was never intended as an “irrigation” water right.⁵ In essence, Pocatello repeats its previous argument that the Special Master erred by recommending water right 29-7770 with an “irrigation” purpose of use, because the disposal of biosolids waste is a “municipal” use. However, as the Court stated in its previous *Order*, water right 29-7770 was licensed in 2003 with an “irrigation” purpose of use. In addition, Pocatello claimed this water right with an “irrigation” purpose of use in order to expedite the right’s long overdue licensing. *See Pocatello’s Opening Brief on Challenge* at 15.

The Special Master concluded that the provisions of I.C. § 42-1425 were inapplicable to this water right because the license was issued after the commencement of the SRBA, and recommended 29-7770 as licensed. Pocatello had ample opportunity to object to the “irrigation” purpose of use during the proceedings on the license. Therefore, Pocatello may not use the proceedings on the subcase to collaterally attack the license for this right. Further, biosolids waste disposal is consistent with an “irrigation” purpose of use, because the water is used to irrigate crops.

Pocatello also argues that it was an error of law for this Court to find that Pocatello’s claimed priority date for water right 29-13639 is also an impermissible collateral attack on a previously issued license. Water right 29-13639 is based on a prior license, with a priority date of October 22, 1952. Pocatello claimed an earlier 1940 priority date. Again, for the reasons stated above, this Court finds this to be a collateral attack on a previously issued license. As such, this Court affirms the decision of the Special Master.

J. The State of Idaho will not be awarded costs and attorney fees.

In its *Response*, the State requests that this Court award the State costs and attorney fees, pursuant to I.C. § 12-117. The State argues that Pocatello improperly raised new legal theories on the *Motion to Alter or Amend* that were not raised on *Challenge*. The State also asserts that Pocatello is inappropriately repeating its earlier

⁵ In its *Brief*, Pocatello refers to water right no. 29-2770. However, that water right was not at issue in this subcase. The Court assumes that Pocatello meant to refer to water right no. 29-7770.

argument to this Court. While this Court agrees that many of the issues raised on the *Motion* were decided and explained in its previous *Order*, and that Pocatello has not prevailed, this Court does not find that Pocatello filed its *Motion* without a reasonable basis in fact or in law. As such, the State will not be awarded costs and attorney fees.

VI.

CONCLUSION AND ORDER

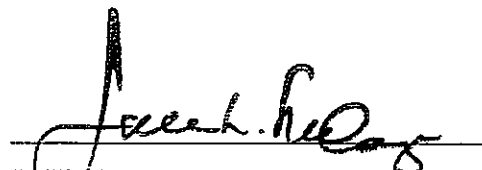
Therefore, for the reasons mentioned above, and for the reasons already stated in this Court's previous *Order*, IT IS HEREBY ORDERED that Pocatello's *Motion to Alter or Amend* is **Denied**.

VII.

RULE 54(b) CERTIFICATE

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

Dated: April 12, 2010.

A handwritten signature in black ink, appearing to read "John M. Melanson", written over a horizontal line.

JOHN M. MELANSON
Presiding Judge, *pro tem*
Snake River Basin Adjudication

EXHIBIT A

Subcase Nos:

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
29-11339
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13637
29-13638
29-13639

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 POCA TELLO'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
POCA TELLO'S IN-TOWN SYSTEM**

Well #	Date drilled\redrilled	Township	Range	Section	QQ
2	12/31/1926	7S	34E	1	NWNE
2	6/15/1948				SWNE
3	12/31/1926	7S	34E	1	NWNE
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

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND (CITY OF POCA TELLO) was mailed on April 12, 2010, with sufficient first-class postage to the following:

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AMERICAN FALLS RESERVOIR

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CITY OF BLACKFOOT

CITY OF NAMPA
UNITED WATER IDAHO
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CITY OF POCA TELLO

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BURLEY IRRIGATION DISTRICT

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MILNER IRRIGATION DISTRICT
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TWIN FALLS CANAL COMPANY

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UNITED STATES OF AMERICA

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(Certificate of mailing continued)

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ORDER

Page 2 4/12/10

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Deputy Clerk