

Docket No. 37723

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF SRBA CASE NO. 39576 SUBCASE NOS. 29-271 ET AL.

CITY OF POCATELLO
Appellant

V.

THE STATE OF IDAHO
Respondent

APPELLANT'S OPENING BRIEF

On Appeal from the Snake River Basin Adjudication,
Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

Honorable Eric J. Wildman, Presiding

Josephine P. Beeman (Idaho Bar # 1806)
Jane M. Newby (Idaho Bar # 2848)
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, Idaho 83702
TELEPHONE: (208) 331-0950
FACSIMILE: (208) 331-0954
EMAIL: jo.beeman@beemanlaw.com

Attorneys for City of Pocatello, Appellant

Clive Strong, Deputy Attorney General
Shasta Kilminster-Hadley, Deputy
Attorney General
Natural Resources Division Chief
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

Attorneys for State of Idaho, Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATUTES AND RULES.....	vi
STATEMENT OF THE CASE	
I. Nature of the Case.....	1
II. Course of Proceedings	2
III. Statement of Facts.....	8
A. Pocatello’s Water Rights Status as of November 19, 1987.	8
B. Pocatello Documented its Historical Alternate Points of Diversion Within its Interconnected Water Delivery System.....	9
C. IDWR’s Recommendation of Pocatello’s Claims With a Condition that Presumes Injury, Although No Evidence of Injury was Submitted, is a Change in the Department’s Position and Does Not Preserve Historic Practice.....	12
D. Evidence Submitted by Pocatello Reflects that Water Rights 29-7118 and 29-7119 Have Irrigation Purposes of Use, and Priority Dates for Alameda Wells #1 and #3 Are Earlier Than as Recommended.	16
ISSUES ON APPEAL	17
ARGUMENT	
I. Summary of Argument	18
II. Standard of Review.....	19

III.	Argument	
A.	The Idaho Department of Water Resources Lacked the Authority to Change its Position in the Snake River Basin Adjudication and to Recommend the City of Pocatello's Interconnected Municipal Ground Water Rights with a Condition that Previously was not Recommended or Decreed for Similar Municipal Water Rights at the SRBA Court.	22
B.	The Special Master and SRBA Court Erred in Adopting a Presumption of Injury Standard for the Purpose of Decreeing IDWR's Limiting Condition.....	30
C.	The Special Master and the SRBA Court Erred in Disallowing Completely the City of Pocatello's Ground Water Wells as Alternate Points of Diversion for Pocatello's Senior Surface Water Rights on Gibson Jack Creek and Mink Creek.	38
D.	The SRBA Court Erred in Holding that There was No Significant Distinction Between pre-1969 Changes to Water Rights and Changes (Transfers) Developed after May 26, 1969.	46
E.	The Special Master and the SRBA Court Erred as a Matter of Law in Recommending Water Right 29-7770 with an Irrigation Purpose of Use.	51
F.	The Special Master and the SRBA Court Erred in Recommending the Priority Dates for Water Right 29-13639 and Water Right 29-13558.	54
CONCLUSION.....		57

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>A&B Irrigation District v. Idaho Conservation League</i> , 131 Idaho 411, 958 P.2d 568 (1997).....	26
<i>American Falls Reservoir District. No. 2 v. Idaho Department of Water Resources</i> , 143 Idaho 862, 154 P.3d 433 (2007).....	15, 25
.....	26,27
<i>Asarco v. State of Idaho</i> , 138 Idaho 719, 69 P.3d 139 (2003)	27
<i>Barron v. Idaho Department of Water Resources</i> , 135 Idaho 414, 18 P.3d 210 (2001)	33
<i>Beecher v. Cassia Creek Irrigation Company</i> , 66 Idaho 1, 154 P.2d 507 (1944)	51
<i>Bongiovi v. Jamison</i> , 110 Idaho 734, 718 P.2d 1172 (1986)	55
<i>Clear Springs Foods, Inc. v. Clear Lakes Trout Co.</i> , 136 Idaho 761, 40 P.3d 119 (2002) ...	21, 43
<i>Evans v. Hara's, Inc.</i> , 123 Idaho 473, 849 P.2d 934 (1993).....	22, 55
<i>Fremont- Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.</i> , 129 Idaho 454, 926 P.2d 1301 (1996).....	15, 19
.....	32, 35
.....	36, 37
<i>Higley v. Woodard</i> , 124 Idaho 531, 861 P.2d 101 (Ct. App. 1993).....	20
<i>Hillcrest Irrigation District v. Nampa</i> , 57 Idaho 403, 66 P.2d 115 (1937)	48
<i>Kawai Farms, Inc. v. Longstreet</i> , 121 Idaho 610, 826 P.2d 1322 (1992).....	21
<i>Kelso v. State Ins. Fund</i> , 997 P.2d 591, 134 Idaho 130 (2000)	54
<i>McCray v. Rosenkrance</i> , 135 Idaho 509, 20 P.3d 693 (2001)	20
<i>Sears v. Berryman</i> , 101 Idaho 843, 623 P. 2d 455 (1981)	47

<i>Seccombe v. Wees</i> , 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989).....	20
<i>State v. Hagerman Water Right Owners, Inc.</i> , 130 Idaho 736, 947 P.2d 409 (1997).....	21, 55
.....	57
<i>State v. United States</i> , 128 Idaho 246, 912 P.2d 614 (1995)	41, 55
<i>Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.</i> , 118 Idaho 116, 794 P.2d 1389 (1990).....	21
<i>Woodland Private Study Group v. State of New Jersey</i> , 533 A.2d 387 (N.J. 1987).....	28

Statutes

Idaho Code §42-202(b)(6)	51
Idaho Code §42-222	passim
Idaho Code §42-1411(2)(j)	30, 34
Idaho Code §42-1411(4)	20, 55
Idaho Code §42-1411(5)	20
Idaho Code §42-1416A.....	41
Idaho Code §42-1425.....	passim
Idaho Code §42-1427.....	30

Rules

I.R.C.P. 52 (a)	20
I.R.C.P. 53(e)(2).....	20
I.R.C.P. 59(e)	7

Session Laws

Act of March 11, 1903, §11, 1903 Idaho Sess. Laws 223, 234	48
Act of March 27, 1969, ch. 302, §1, 1969 Idaho Sess. Laws 905	48

Other Authorities

Krogh-Hampe, A. Lynne, <i>Injury and Enlargement in Idaho Water Right Transfers</i> , 27 Idaho L. Rev. 249 (1990-91).....	41, 46
McCormick, Evidence §345, at 823 (1972).....	57
Rassier, Phillip J., <i>Idaho's Adjudication Presumption Statutes</i> , 28 Idaho L. Rev. 507 (1992).....	36, 46

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the *Order on Motion to Alter or Amend* entered by the Honorable John M. Melanson on April 12, 2010, in the Snake River Basin Adjudication (SRBA). The appeal examines (1) the authority of the Idaho Department of Water Resources (IDWR) to change its position in the SRBA in 2003, specifically, how it recommends the status of water rights as of the commencement of the SRBA on November 19, 1987, and to recommend the interconnected municipal ground water rights of the Appellant City of Pocatello (Pocatello) with a condition that was not previously recommended or decreed for similar municipal water rights at the SRBA court, (2) the disallowance completely of Pocatello's ground water wells as alternate points of diversion for Pocatello's senior surface water rights on Gibson Jack Creek and Mink Creek that are hydraulically connected sources with the City's ground water source, (3) the presumption of injury standard adopted by the SRBA court for the purpose of decreeing the condition recommended by IDWR and thereby limiting municipal water uses that have been in use for more than 60 years, (4) the conclusion of the SRBA court that there is no significant distinction between changes to water rights before the statutory transfer process became mandatory on May 26, 1969 and water right changes (transfers) after this date, (5) the recommendation of Pocatello's biosolids water right 29-7770 with an irrigation purpose of use, and (6) the recommendation of later priority dates for Pocatello's ground water right 29-13639, and the City's oldest ground water right 29-13558.

On November 19, 1987, the State of Idaho began the SRBA to determine the nature, extent, and priority of rights claimed by users of water in the system, and to conjunctively manage ground water and surface water rights. Persons using or claiming rights to use the water were required to file claims with IDWR. In determining the status of a water right and making recommendations for the water rights claimed in the SRBA, IDWR must look at the status of the right as of November 19, 1987; including an analysis under Idaho Code §42-1425 for alternate points of diversion established on or after May 26, 1969.

II. Course of Proceedings

In April, 1990 Pocatello filed thirty-eight state-law SRBA claims and one federal law SRBA claim to document and obtain a judicial decree for Pocatello's municipal water rights that Pocatello owns and operates for the benefit of its residents. (The federal law claim was denied. Eight of the state law claims have been issued partial decrees, and the other thirty state-law claims remain at issue in this appeal.) Pocatello subsequently amended its SRBA claims to document more accurately the priority dates for Pocatello's water use and to document that the City's ground water wells serve as alternate points of diversion for Pocatello's 21 ground water rights and four surface water rights.¹ The claims reflect that as of November 19, 1987, Pocatello's ground water supply for culinary uses within Pocatello consisted of a system of 22

¹ On May 26, 1969, the Idaho legislature repealed and reenacted Idaho Code §42-222 which set out new mandatory procedures for obtaining a change to a water right. Prior to this legislative action on May 26, 1969, water users could choose, but were not required, to follow a statutory procedure to transfer a point of diversion, and therefore the accomplished transfer statute, Idaho Code §42-1425, only applies to transfers occurring after May 26, 1969 through the start of the SRBA on November 19, 1987. Thus, the accomplished transfer statute cannot be used as authority for IDWR to place a condition on a transfer that occurred prior to May 26, 1969. Some of Pocatello's water rights were developed prior to May 26, 1969, and these should be distinguished from the water rights developed after this date.

interconnected culinary wells which were also part of the interconnected potable delivery system with the City's surface water rights. Other municipalities also filed claims that included alternate points of diversion for their municipal water rights. (R. 4502-13)

During this same time period in a transfer proceeding at IDWR, the City added Well #44 to its interconnected culinary delivery system to replace Well #3 which had become unusable. No ground water users or surface water users filed objections or alleged injury from the City's alternate points of diversion. (R. 7877-78)

The Basin 29 Director's Report for Irrigation and Other Water Rights was issued by IDWR on July 11, 2003. (R. 1-62) It recommended the ground water rights for Pocatello's interconnected culinary system with twenty-two wells as alternate points of diversion; these recommendations, however, came with a condition that was detrimental to Pocatello's operation of its system and essentially nullified Pocatello's pre- May 26, 1969 transfers as well as the City's accomplished transfers as of November 19, 1987; the condition also reflected a change in IDWR's position regarding conjunctive administration. IDWR later amended the director's reports, revising the language of the condition several times but with the condition still attached to the recommendations. (R. 880-1926) The condition reads as follows: "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."

IDWR's recommendations also disallowed Pocatello's interconnected ground water wells as alternate points of diversion for Pocatello's surface water rights on Mink Creek and Gibson Jack Creek, based on a determination that the creeks and the City's ground water source are not the "same source." Water right 29-7770, used only for Pocatello's biosolids program, was recommended with an irrigation purpose of use, while a municipal purpose of use was recommended for water right 29-7118 and water right 29-7119, the other water rights for Pocatello's biosolids program. Pocatello's oldest ground water right 29-13558, claimed with a June 30, 1905 priority date, was recommended a priority of July 26, 1924, and ground water right 29-13639 claimed with a December 31, 1940 priority date was recommended with a priority of October 22, 1952.

Based on these concerns and other specific factual matters (not at issue here), Pocatello filed objections to all thirty-eight recommendations on November 18, 2003 (R. 78-262), and on November 19, 2003, filed amended objections. (R. 276-455) Respondent State of Idaho (State) filed responses to the objections on January 15, 2004. (R. 456-568) On April 25, 2006, the Court granted the Surface Water Coalition's (SWC) Joint Motion to Participate. The members of the SWC also filed responses to Pocatello's objections. (R. 1927-2343)

On May 4, 2006, Pocatello filed a Motion for Summary Judgment on IDWR's Authority under Idaho Code §42-1425 to impose an "injury-based" condition in the absence of a third-party allegation of injury. (R. 2344-48) The motion was granted in part (in that Pocatello would be allowed at trial to present further evidence regarding IDWR's recommended condition) by SRBA Special Master Brigitte Bilyeu in the Order on Summary Judgment filed on August 18,

2006, and denied in all other parts, including Pocatello's request for a finding that the condition was improper as a matter of law. (R. 2533-50) In its May 4, 2006 brief in support of this summary judgment motion, Pocatello first raised the issue of pre-1969 transfers, claiming that some of the City's changes in points of diversion were made in the 1940s. (R. 2354)

Following discovery responses from the other parties, Pocatello filed a Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury under I.C. §42-1425 on November 30, 2006 (R. 2551-58) and on the same day the SWC filed its Motion for Summary Judgment on certain objections filed by Pocatello. (R. 3316-20) The Special Master granted summary judgment on the issue of a general interconnection but denied Pocatello's summary judgment motions as to injury and the municipal purpose of use. Second Order of Summary Judgment, February 16, 2007. (R. 3798-3811)

Trial was held before the Court on February 26-March 2, March 8, 2007. Only Pocatello and the State of Idaho participated in the trial as Pocatello and the SWC entered into a stipulation limiting Pocatello's annual volume of diversions under the surface water right priorities at the ground water alternate points of diversion (Pocatello's interconnected culinary wells) to no more than the amount of water determined to be physically and legally available at the original surface water points of diversion, and providing that there would be no increases in rate of diversion at the alternate points of diversion without an Idaho Code §42-222 transfer.² (R. 6574-91) IDWR functioned in its statutory capacity as the expert for the SRBA court. On the

² Pocatello offered this settlement as an effective resolution to all of its objections, which offer was not accepted by the State and IDWR as settlement of Pocatello's objections to "Other Provisions Necessary Condition."

first day of the trial, the parties stipulated that there were no issues remaining on eight subcases. At trial, 30 subcases remained with four major issues still unresolved.

The parties filed post-trial briefs and Pocatello also filed the Affidavit of Josephine P. Beeman in Support of Pocatello's Post- Trial Brief. (R. 4528-32) The State moved to strike the affidavit, arguing that the presentation of evidence had closed. (R. 4533-37) At the hearing on May 7, 2007, the Special Master granted the motion on the grounds that the Affidavit was improperly submitted evidence. Pocatello filed a Motion for Reconsideration of Order Granting State's Motion to Strike on May 7, 2007.

The Special Master's Report and Recommendation and Order on Motion to Reconsider was filed on October 2, 2007, and amended on October 30, 2007, and November 30, 2007. (R. 4553-4739, 4743-4818, 4823-57) The Special Master recommended: (1) the ground water wells could not be included as alternate points of diversion for Pocatello's senior surface water rights, as they do not withdraw from the same source; (2) the condition placed on Pocatello's ground water rights identifying the location, date, and quantity of the original right was necessary for the interconnected well system (where multiple points of diversion were established under the accomplished transfer provisions)³ to prevent injury to existing ground

³ The law concerning transfers accomplished prior to May 26, 1969 was never analyzed by the Special Master. Although the State asserted that Pocatello's *Motion to Alter or Amend* introduced new issues and legal theories regarding Pocatello's argument that 42-1425 does not apply to transfers prior to May 26, 1969, the City raised the issue earlier. The issue was first raised in the *Brief in Support of Motion for Summary Judgment on IDWR's Authority Under I.C. sec 42-1425*. It was again raised in *City of Pocatello's Response Brief to the Surface Water Coalition's Motion for Summary Judgment*, December 12, 2006: "All four water rights have priorities before 1969, and under the common law are therefore not required to file a transfer to any wells which began operating as apod's before 1969." (R. 3581) In the *Second Order on Summary Judgment*, February 16, 2007, the Special Master stated: "Additionally,

water rights of third parties; (3) water right 29-7770 should be decreed with an irrigation purpose of use, and; (4) the priority date for water right 29-13558 should be July 16, 1924, and the priority date for water right 29-13639 should be October 21, 1952. The Special Master also held that the post-trial Affidavit of Josephine P. Beeman would be considered as a legal argument.

Pocatello filed a Motion to Alter or Amend on November 28, 2007, under I.R.C.P. 59(e). (R. 4819-22) The Special Master denied the motion in Order Denying Motion to Alter or Amend filed on May 28, 2008. (R. 4881-89) On June 11, 2008, Pocatello filed a Notice of Challenge. (R. 4890-96) United Water of Idaho, City of Nampa, and City of Blackfoot filed a Motion for Leave to Participate or to Participate as Amici Curiae. (R. 4959-67) After a hearing, the Court granted the Motion to Participate as Amici Curiae. (R. 4987-91) After oral argument on the Challenge, Presiding Judge John A. Melanson issued a Memorandum Decision and Order on Challenge on November 9, 2009, affirming the order of the Special Master. (R. 5125-56) The Court held that the objections filed by Pocatello appropriately triggered the inquiry into injury (R. 5135) and that injury also includes the diminished effect on the priority dates of existing water rights in times of administration (R. 5139).

On November 23, 2009, Pocatello brought a Motion to Alter or Amend the November 9, 2009 Memorandum Decision & Order on Challenge. (R. 5157-61) After hearing on the motion, the SRBA Court affirmed its decision and order and denied the motion in the Order on Motion to

Pocatello argued it could change points of diversion without filing a transfer for changes prior to enactment of IC. 42-222. Therefore, Pocatello may provide evidence of a pre-1969 transfer, a valid I.C. second 42-222 transfer or a valid I.C. 42-1425 accomplished transfer showing a change occurred after the *Smith Decree*.” (R. 38-39) Evidence regarding priority and transfer dates was admitted at trial. *See* Exhibits 118 (R. 7292-96), 122 (R. 7325-26), and 125 (R. 7329-30).

Alter or Amend filed on April 12, 2010. (R. 5250-71) In doing so, the court amended its Findings of Fact to include the listing of Pocatello's ground water rights and wells showing which wells and water rights were developed before May 26, 1969, and which were developed subsequent to May 26, 1969. The Court held that the distinction between pre- and post-May 26, 1969 was insignificant because any transfers occurring prior to the mandatory effect of Idaho Code §42-222 were still subject to earlier statutory transfer requirements for points of diversion as well as the common law "no injury" rule.

A Notice of Appeal to the Idaho Supreme Court was filed by Pocatello on May 24, 2010, with an Amended Notice of Appeal filed afterwards on July 9, 2010. (R. 5272-92)

III. Statement of Facts

A. Pocatello's Water Rights Status as of November 19, 1987.

The City of Pocatello is a municipal water supplier serving a population of over 50,000 residents in a service area of approximately 34 square miles. Pocatello has an obligation to provide water to its customers on demand 24 hours a day, 365 days a year, for potable use and fire protection. In order to ensure this kind of operation and response, Pocatello's water delivery system is interconnected and redundant and utilizes both surface water and ground water. Wells connected by pipelines and a pumping system serve the entire culinary delivery system and can replace each other's operation when one of the wells fails or needs repairs. (Tr. Vol. III, p. 428, Ls. 5-6; p. 430, Ls. 4-13; p. 487, Ls. 2-25; p. 488, Ls. 1-18; p. 494, Ls. 4-17) The system also has diversions at "various points throughout the distribution system" so when there is a higher demand in one area of the city, the wells are able to respond and supply the demand wherever it

is needed. (Tr. Vol. IV, p. 651, Ls. 10-20) As wells are drilled and added, they are connected to the interconnected potable system.

Pocatello's amended SRBA claims confirmed the City's use of its senior priority water rights and documented the redundancy that allows Pocatello to provide uniformly for the needs of its customers within its service area. With one exception, Well #32, the source of water supply for these interconnected intown culinary wells is ground water pumped from the Lower Portneuf River Valley Aquifer (LRPVA), which is hydraulically connected to Mink Creek and Gibson Jack Creek. (Tr. Vol. III, p. 485, Ls. 17-20; Vol. IV, p. 803, Ls. 9-13)⁴

B. Pocatello Documented its Historical Alternate Points of Diversion Within its Interconnected Water Delivery System.

At trial, Carter Fritschle testified that IDWR did not recommend Pocatello's wells as alternate points of diversion for Pocatello's surface water rights because IDWR did not have enough information to indicate that any wells were actually diverting creek water (Tr. Vol. I, p. 75, Ls. 8-23; p. 87, Ls. 19-25); however, Pocatello's expert testified that, in his opinion, most of the water (between 50 to 75 percent) going into the LRPVA is coming from the creeks, seeping out of the creeks and into the aquifer and becoming ground water. (Tr. Vol. IV, p. 796, Ls. 15-25; p. 801, Ls. 13-25) Pocatello's expert stated that the creeks and the aquifer are essentially the same source. (Tr. Vol. IV, p. 803, Ls. 21-25; p. 805, Ls. 16-24)

Pocatello's interconnected potable system delivers surface water and ground water rights throughout Pocatello's culinary service area and has been operated by Pocatello for culinary uses

⁴ Citations to the transcript from the trial are identified as "Tr. ____."

beginning in the late 1880s with the City's surface water rights from Mink Creek and Gibson Jack Creek. The SRBA Court stated that it was "unable to locate where in the record Pocatello establishes a date certain that interconnected wells were in place" (Order on Motion to Alter or Amend, R. 5254). Tom Dekker, who started working for Pocatello's Department of Water in 1969 or 1970 and was responsible for mapping and records, (Tr. Vol. III, p. 423, Ls. 8-24), testified that the city's wells were all connected to the same system, an interconnection that was intended from the outset; there were very few individual wells that operated separately from the City's interconnected culinary system. (Tr. Vol. III, p. 429, L. 18 – p. 430, L.3.)

The exhibit attached to the Order on Motion to Alter or Amend (R. 5269-71) is a chart that identifies the dates the ground water rights and the wells were developed for the interconnected municipal system; a perusal of that chart reveals that most of the wells were drilled and connected to the system prior to May 26, 1969. This is also confirmed by the summary of records from the City's Exhibit 111 (attached as Appendix 1 and Appendix 2. These records document that the wells are interconnected.

Pocatello also provides a ground water supply for culinary, commercial, and industrial uses in and around the Pocatello Municipal Airport through a separate system of wells, which as of November 19, 1987, consisted of Wells #35 and #39 which are connected only with each other. (Tr. Vol. IV, p. 707, Ls. 9-12) Their source of water is from the ESPA. (Tr. Vol. IV, p. 812, Ls. 4-13)

Since the early 20th century, the interconnected wells have served as alternate points of diversion as Pocatello developed additional ground water rights to supply the interconnected

culinary system for the growing city. Each time a new well was drilled and added to the interconnected system, it resulted in a new alternate point of diversion for Pocatello's ground water rights. Due to changing water quality regulations, culinary water use from Mink Creek and Gibson Jack Creek began declining in 1985 and ceased completely in 1993 (Tr. Vol. III, p. 427, Ls. 1-6), although the surface water was and is still being used for irrigation purposes. (Vol. IV, p. 665, L. 21- p. 666, L. 2) As the diversions at Mink Creek and Gibson Jack Creek declined, the surface water rights were diverted through the culinary wells, with the wells functioning as alternate points of diversion for the City's most senior municipal rights, just as the wells operated as alternate points of diversion for the City's ground water rights. From above ground, the creeks are located between a quarter mile to a mile from Pocatello's nearest well. (Tr. Vol. I, p. 79, L. 1 - p. 80, L. 3)

Pocatello claimed 23 interconnected wells as alternate points of diversion for 21 ground water rights serving Pocatello's culinary uses. Except for Well #44 which replaced Well #3 in 1999, all of the wells operated prior to 1987 without enlargement of Pocatello's water rights. (Tr. Vol. V, p. 887, Ls. 9-16; p. 890, Ls. 7-25) The claim for alternate points of diversion for these ground water rights allows each of the interconnected culinary wells to be alternate points of diversion for water rights delivered through the interconnected system. This allows Pocatello to maintain physical delivery of water even when some of its wells are not operating. From an administrative perspective, it allows Pocatello to withdraw and deliver water by priority, beginning with its most senior rights, notwithstanding the well from which the water is pumped; this is how Pocatello operates its water system and has always operated it so as to provide a

dependable supply of water to its residents, and what it was seeking to have confirmed in the SRBA proceedings. (Tr. Vol. V, p. 873, L. 18- p. 874, L.25; p. 882, Ls. 6-17) These most senior rights are Pocatello's most valuable rights because they would be more protected from a potential delivery call from a downstream user. (Tr. Vol. V, p. 882, L. 18 - p. 883, L.1)

C. IDWR's Recommendation of Pocatello's Claims With a Condition that Presumes Injury, Although No Evidence of Injury was Submitted, is a Change in the Department's Position and Does Not Preserve Historic Practice.

Although the cities of Aberdeen, Jerome, and Rupert had the water rights serving their interconnected culinary water systems recommended and decreed with alternate points of diversion without a condition, (R. 7948-8019), IDWR's recommendations for eighteen of Pocatello's claims included a condition identifying the location, date, and quantity of the original right, that during times of possible, future administration essentially would leave Pocatello with no use of four operating wells and no use or reduced use of its four most senior water rights. (Tr. Vol. III, p. 504-507; p. 513-519) At trial Pocatello's expert testified that the condition nullifies Pocatello's alternate points of diversion for its ground water rights by rendering certain wells and certain senior water rights useless during periods that priority administration is necessary and when Pocatello would most need and most benefit from exercising its alternate points of diversion. (Tr. Vol. V, p. 900, Ls. 7-18)

Pocatello's 2003 recommendations document the first time IDWR included this condition in an SRBA recommendation. At trial, IDWR alleged that without the inclusion of the condition, prospective injuries could occur as a result of Pocatello's operation of its alternate points of

diversion for its ground water rights under the accomplished transfer statutes. (Tr. Vol. II, p. 240, Ls. 7-12) This change in IDWR's position as to alternate points of diversion not only takes future—and admittedly hypothetical (Tr. Vol. II, p. 287, Ls. 14-16)—injury into account, it also presumes injury.

However, no ground water users in the area of Pocatello's well system or elsewhere filed objections to Pocatello's accomplished transfer claims for its interconnected wells; nor did any water right holder allege injury as a result of Pocatello's operation of its alternate points of diversion for its ground water rights, either at the time of the change of point of diversion, or subsequently in these proceedings. In addition, neither IDWR nor the State presented evidence at trial that injury to individual water rights had occurred as a result of Pocatello's operation of its alternate points of diversion for its ground water rights, either as of November 19, 1987, or as of the time of trial in 2007.⁵ Mr. Tuthill testified that IDWR was not aware of any specific claims of injury from other well owners, nor did IDWR inquire of any injury, either as of 1987 or 2007. (Tr. Vol. II, p. 286, L. 9-p. 287, L. 1; p. 350, Ls. 5-12; p. 355, L. 14 - p. 356, L. 16) Thus, there is no record that Pocatello's operation of its interconnected well system did indeed cause injury to other water right holders or undermined a priority date as of 1987 or even as of 2007.

At trial Tom Dekker, retired superintendent at Pocatello's Department of Water, testified that during his tenure, he didn't recall any citizens complaining about well interference from Pocatello, nor did Jay Ulrich, the current superintendent, have any citizens represent to him that

⁵ The IDWR has also not developed any standards or criteria by which potential injury to local ground water rights can be evaluated and has not quantified the amount of aquifer water level drawdown that is injurious. (Tr. Vol. II, p. 294, Ls. 8-15; Vol. V, p. 925, L. 19- p. 926, L.1))

Pocatello's well operations interfered with their private wells. (Tr. Vol. III, p. 446, Ls. 16-22; p. 519, Ls. 12-17) Pocatello's expert, Gregory Sullivan, testified that no water rights existing on the date of the change were likely injured as a result of Pocatello's diversion of its 21 ground water rights at the 23 alternate points of diversion serving Pocatello's culinary uses, or Pocatello's diversion of its two ground water rights at the two alternate points of diversion serving the Pocatello Municipal Airport. (Tr. Vol. V, p. 896, Ls. 16-20)

The expert analyzed the magnitude of drawdown in Pocatello's interconnected culinary wells that existed prior to November 19, 1987, and determined that due to the prolific nature of the LPRVA and the relatively small magnitude of drawdown measured at the wells, Pocatello's alternate point of diversion operations had no significant impact on neighboring wells. (Tr. Vol. V, p. 948, Ls. 17-24; p. 961, Ls. 15-25; p. 962, Ls. 2-20; Vol. VI, p. 1047, Ls. 7-13) Mr. Sullivan was also not aware of any specific claims of injury to downstream surface water users as a result of Pocatello's alternate point of diversion operation as of 1987 (Tr. Vol. V, p. 963, Ls. 8-12), nor, in his opinion, would there have been any injury as of 1987 or even as of 2007. (Tr. Vol. V, p. 960, Ls. 9-18) The effect of Pocatello's ground water diversions in and of itself would not be injurious to downstream surface water users, because there is not material difference to these users between the alternate points of diversion or the original points of diversion. (Tr. Vol. V, p. 974, Ls. 10-23; p. 978, Ls. 4-14, p. 987, Ls. 3-13) There also would be no material change in the timing of seasonal depletions as a result of the alternate point operation and thus, again, no injury to surface water rights. (Tr. Vol. VI, p. 1066, Ls. 20-25)

IDWR's change in position with respect to Idaho Code §42-1425 accomplished transfers in the SRBA, which change the State supports, occurred in 2003 as a result of IWDR's evolving understanding of conjunctive water administration (Tr. Vol. II, p. 268, Ls. 8-14; p. 269, Ls. 19-23), due in part to developments in the conjunctive management rules and court decisions since the mid-1990s. (Tr. Vol. II, p. 302, Ls. 16-21) David Tuthill, then interim director of IDWR, helped create the condition, and testified that Pocatello's water rights were specifically conditioned so that the City could not expand its water rights over time inappropriately (Tr. Vol. II, p. 232, Ls.9-15), although the stipulation between Pocatello and SWC precludes an expansion. (Tr. Vol. VI, p. 1038, L. 11 - p.1039, L.8) The Supplemental Director's Report also stated that the purpose of the "other provisions necessary condition" was to preserve the historical relationship between various users. (R. 894)

This far-reaching change in the standard operating policies of the IDWR does not protect or preserve and in fact nullifies the historic practice and was not promulgated as a rule under the rule-making provisions of the Administrative Procedures Act. It is also opposite to the State's position in *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators*, 129 Idaho 454, 926 P.2d 1301 (1996), regarding the accomplished transfer statute and the decision from this Court in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), which rejected the District Court's decision that a presumption of injury was necessary as to junior ground water use.

D. Evidence Submitted by Pocatello Reflects that Water Rights 29-7118 and 29-7119 Have Irrigation Purposes of Use, and Priority Dates for Alameda Wells #1 and #3 Are Earlier Than as Recommended.

Water Rights 29-7118, 29-7119, and 29-7770 have all been used only to carry out Pocatello's biosolids program to treat Pocatello's sewage waste and protect the environment, a program regulated by the State and the Environmental Protection Agency. (Tr. Vol. II, p. 375, Ls. 7-10; Vol. III, p. 520, Ls. 1-10) All the water rights associated with the biosolids program have always been used exclusively for land application of biosolids. (Tr. Vol. III, p. 536, L. 3 - p. 537, L. 14) Although this land is owned by Pocatello, it is leased to farmers who are responsible for growing crops to which biosolids can be applied as the fertilizer (Tr. Vol. II, p. 386, Ls. 15-24) and for watering those crops, all in accordance with federal biosolids regulations. (Tr. Vol. II, p. 388, Ls. 1-3; R. 7722-7876) Thus, the application of the biosolids is quite distinct from irrigation of the land. (Tr. Vol. III, p. 538, Ls. 6-11)

Two of these rights, 29-7118 and 29-7119, have been recommended for municipal purposes of use, while 29-7770 has been recommended with an irrigation purpose of use. This recommendation is based on IDWR'S previous license of 29-7770 in 2003 with an irrigation purpose of use. Legally, 29-7770 is a municipal right (biosolids treatment) not an irrigation water right. Neither Pocatello nor IDWR have the authority to change the law regarding the purpose of use; Pocatello requested the "irrigation" purpose of use in order to expedite the right's long overdue licensing, but the more appropriate (legally correct) description of the right is "municipal." (Tr. Vol. III, p. 534, L.11 - p. 535, L. 18; p. 564, Ls. 11-25)

Finally, Pocatello provided evidence from multiple sources that the wells associated with water rights 29-13558 and 29-13639, Alameda Wells #1 and #3, were in place and diverting water for beneficial use by the dates claimed by Pocatello (June 30, 1905 and December 31, 1940, respectively). These sources included newspaper articles from 1924 and 1952 about the early history and rapid growth of the cities of Pocatello and Alameda, a 1962 Pocatello City Directory mentioning that ten wells were in operation, and a City of Alameda Application for Permit, which covered three wells already drilled and used in times past. (R. 7656-73) The evidence clearly supports priority dates earlier than July 16, 1924 for water right 29-13558 and earlier than October 21, 1952, for water right 29-13639, as recommended, particularly considering population growth, the functioning villages that formed Alameda, and the sworn statements in Alameda's 1952 application for permit.

ISSUES ON APPEAL

- I. Did the Idaho Department of Water Resources have authority to change its position in the Snake River Basin Adjudication and to recommend the City of Pocatello's interconnected municipal ground water rights with a condition that previously was not recommended or decreed for similar municipal water rights at the SRBA court?
- II. Did the Special Master and SRBA court err in adopting a presumption of injury standard for the purpose of decreeing IDWR's limiting condition?
- III. Did the Special Master and the SRBA court err in disallowing completely the City of Pocatello's ground water wells as alternate points of diversion for Pocatello's senior surface water rights on Gibson Jack Creek and Mink Creek?

- IV. Did the SRBA court err in holding that there was no significant distinction between pre- 1969 water rights and those rights developed after 1969?
- V. Did the Special Master and the SRBA court err in recommending water right 29-7770 with an irrigation purpose of use?
- VI. Did the Special Master and the SRBA court err in recommending the priority dates for water right 29-13639 and water right 13558?

ARGUMENT

I. Summary of Argument

In the remand of SRBA Basin-Wide Issue 5 from the Idaho Supreme Court, the SRBA court held that all of the water sources in a basin (such as Basin 29, the Portneuf drainage) are interconnected unless there is a general provision that specifically states a source within that basin is separate.⁶ The only separate source recommended for Basin 29 is, “Spring tributary to Papoose Creek.” Thus, this Court should decree Pocatello’s ground water and surface water rights with the alternate points of diversion as claimed, because the sources for the ground water rights and the surface water rights are interconnected and, according to the evidence and expert testimony at trial, “essentially the same.” The limiting condition recommended by IDWR for Pocatello’s interconnected ground water should be removed. The condition which limits the use of Pocatello’s earliest priority dates and does not protect the historic “redundancy and backup” practice by which Pocatello has operated its water system, is a change in IDWR’s position from earlier recommendations of similar municipal water rights in the SRBA and bears the indicia of unlawful rulemaking.

⁶ *Memorandum Decision and Order of Partial Decree, Subcase 91-00005, Basin Wide Issue No. 5, Connected Sources General Provision, February 27, 2002.*

This change in position is also counter to the positions of the State and IDWR in Idaho Supreme Court cases addressing “accomplished transfers” and conjunctive management rules and the decision in those cases, *Fremont-Madison* and *AFRD#2*. Now the State and IDWR maintain that Pocatello has the burden of proof to disprove injury from its alternate points of diversion, and Pocatello’s accomplished transfer claims presume injury per se (even though there were no claims or other evidence of injury to other water users). IDWR’s position has been that SRBA proceedings do not include a factual determination of the specific interrelationship or the degree of connectivity between specific water rights; however, it was these exact, complex, factual determinations that Pocatello was forced to address at trial. Future conjunctive administration by IDWR—not adjudication—can and should sort out the degree of interconnection between ground water and surface water rights. (Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits, Subcase 91-00005, Basin-Wide Issue 5, In Re SRBA Case No. 39576, July 2, 2001, at 19, 32.)

The “irrigation” purpose of use for water right 29-7770, which has always been used for municipal purposes in Pocatello’s biosolids program, is an error of law this Court can correct. The priority dates for the two Alameda water rights should be decreed as claimed under the reasonable evidence standard.

II. Standard of Review

Litigation in the SRBA is governed by the Idaho Rules of Civil Procedure (I.R.C.P.), the Idaho Rules of Evidence (I.R.E.), and the Idaho Appellate Rules (I.A.R.). Administrative Order 1

(AO1), §1(a). Subcases referred to the SRBA special master are governed by the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence. Idaho Code §42-1411(5).

The special master's findings of fact which are adopted by the district court are considered to be the findings of the district court.⁷ I.R.C.P. 52(a); *McCray v. Rosenkrance*, 135 Idaho 509, 20 P.3d 693 (2001). In an action to be tried without a jury, the district court shall accept the master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2). The Court must carefully consider objections to the Special Master's report. Where the findings of fact are clearly erroneous, the Court may, in whole or in part, adopt the report, modify it, reject it, receive further evidence, or remand the report with instructions. In reviewing a special master's findings of fact, the district court's task is to determine whether they are supported by substantial, although perhaps conflicting, evidence.⁸ A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law.⁹ The parties are entitled to an actual review and examination of all

⁷ Although the presiding judge stated that the district court was not the "finder-of-fact" (*Order on Motion to Alter or Amend*, R. 5255), both the Special Master and the SRBA court are finders of fact for the purposes of the SRBA.

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

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

of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous.¹⁰

The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). The special master's conclusions of law which are adopted by the district court are treated as the conclusions of the district court.

This Court must defer to the district court's findings of fact and should not substitute its judgment for that of the district court so long as the decision is supported by substantial and competent evidence, but will review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts. *Sun Valley Shamrock Resources, Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 794 P.2d 1389 (1990). Thus, this Court will review freely the district court's conclusions of law. *Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 826 P.2d 1322 (1992).

A Director's Report for a water right claim is prima facie evidence of the nature and extent of a water right. I.C. §42-1411(4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). An objecting party has the burden of going forward with evidence to establish any element which is in addition to or inconsistent with the description in the Director's report. *Id.* Generally, an objector must present "substantial evidence" to overcome the rebuttable presumption established by the Director's Report. *Clear*

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

Springs Foods, Inc., 136 Idaho at 764, 40 P.3d at 122. Substantial evidence is defined “as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.” *Evans v. Hara’s, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993).

III. Argument

A. **The Idaho Department of Water Resources Lacked the Authority to Change its Position in the Snake River Basin Adjudication and to Recommend the City of Pocatello’s Interconnected Municipal Ground Water Rights with a Condition that Previously was not Recommended or Decreed for Similar Municipal Water Rights at the SRBA Court.**

Pocatello differs from the cities of Aberdeen, Jerome, and Rupert, not in the exercise of alternate points of diversion for its municipal water rights as of the start of the SRBA, November 19, 1987, but in the date Pocatello’s interconnected ground waters rights were recommended to the SRBA Court, a date later than those for the other cities and a recommendation which reflected a change in the way water rights were recommended by the IDWR. Until it recommended Pocatello’s claims in the SRBA, IDWR had never before imposed conditions on alternate points of diversion claimed by other cities in the SRBA for their delivery systems. This imposition of a new condition in 2003 was not driven by changes in statutory language or legislative intent as there were no changes (as of 2003 or the present) to the law that applies to pre-May 26, 1969 transfers, to transfers under the mandatory provisions of Idaho Code §42-222, or to the accomplished transfer statute, §42-1425 (since its adoption in 1994)¹¹. The condition is

¹¹ For an extended analysis of the legislative history context of 42-222 and 42-1425, see Pocatello’s *Brief in Support of Motion to Alter or Amend*.

counter to the plain language of §42-1425 and IDWR lacks authority under the statute to recommend it for either Pocatello's pre-1969 water right transfers (because there was no statutory requirement for formally requesting transfers) or the post-1969 rights (because similarly situated rights at the SRBA court can't be decreed differently as to their status on November, 19, 1987). Even if this Court would determine that §42-1425 applies to pre-1969 rights and transfers, IDWR lacks authority to recommend the conditions to Pocatello's pre-1969 rights and transfers because, these same conditions were not applied to the similarly situated cities of Aberdeen, Jerome, and Rupert. Rights at the SRBA court cannot be decreed differently as to their status on November 19, 1987.

In 2003, IDWR created and recommended this new condition because of the agency's "evolving" understanding of conjunctive water administration. In placing the condition on the water rights serving Pocatello's culinary systems, IDWR contradicted its recommendation that 18 of Pocatello's ground water rights can be diverted at any of 22 alternate points of diversion. (The condition also lists one or at most three points of diversion for each of the 18 water rights, however, none of the 18 water rights have common points of diversion in their conditions.) The contradiction occurs because during times of administration, when the condition would operate, Pocatello would not be able to operate its alternate points of diversion to exercise its water rights in order of priority and instead would have to curtail ground water pumping. This would happen because the points of diversion listed by the condition include seven wells that do not exist; therefore, during times of priority administration, the water right amount associated with the seven wells would be unusable. In addition, the points of diversion listed by the condition leave

out four of Pocatello's active wells and the City would be unable to use these wells during times of administration.

In essence, the condition recommended by IDWR effectively denies and nullifies the pre-May 26, 1969 transfers by the City of Pocatello as well as the transfers claimed by Pocatello under the accomplished transfer statute, Idaho Code §42-1425, in that although legally Pocatello can pump its most senior rights first, if IDWR won't administer Pocatello's transfers (pre-1969, post-May 25, 1969, or accomplished transfers under §42-1425) by reference to the earliest priority dates, the transfer has been effectively denied. Pocatello may operate its wells at the transferred location under the earlier priority date, but if a delivery call is placed or administration is otherwise required, IDWR will use the date when water was first appropriated or used from each well (a junior date) to determine whether depletions from the wells are causing injury to senior rights. The condition is in excess of the Department's authority under that statute because it is concerned with future, speculative injury and not with injuries to existing water rights when the transfers occurred, or as of the start of the SRBA on November 19, 1987, and because there was never an objector coming forward and claiming injury from Pocatello's state law claims for accomplished transfers. (See the discussion on "injury" below.)

Pocatello asserts that not only is this recommended condition in excess of IDWR's authority as it is without legal basis under either §42-1425 or §42-222, the placement of this condition within the water rights exceeds the legal authority granted by statute for the definition of a water right and improperly focuses attention on factual matters that do not belong in the SRBA but instead belong in an administrative action.

Water right adjudications do not decide all the factual questions relevant to administration but rather leave many such issues to the administrative process. *American Falls Reservoir District, No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007). The SRBA district court has recognized that its decrees do not make all factual determinations necessary for conjunctive administration of surface and ground water rights.¹² This is especially true in determining to what extent the diversion and use of water from one interconnected source impacts the water flows in that source and other interconnected sources. *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). These matters are left to IDWR because the SRBA cannot make all those technical determinations and the Director is the expert with the responsibility to properly distribute the waters of the state, to exercise judgment and to decide questions, as a means of administering the law. These acts are administrative, not judicial.

In *American Falls Reservoir District, No. 2 v. Idaho Dept. of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2007), the Idaho Supreme Court recognized “the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior’s water right will indeed provide water to a senior.” *Id* at 16. Indeed, IDWR took the position in the case that it is only later “in subsequent

¹² “IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determine special interrelationships based on information not necessarily contained in the partial decree. . . . The partial decree need not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated.” *SRBA Order on Remand on Basin-Wide Issue 5*, July 2, 2001, at 19, from Idaho Supreme Court SRBA case April 10, 1998, 955 P. 2d 1108.

conjunctive administration of individual rights in response to a delivery call” that the Director should determine the highly complex facts that relate to the specific interrelationships or the degree of connectivity between specific water rights.¹³ Pocatello agrees with this position, as did the Idaho Supreme Court, when it stated that “water rights adjudications neither address, nor answer, the questions presented in delivery calls.” *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997).

These questions include “information on how each water right on a source physically interacts or affects other rights on that same source.” *ARFD#2* citing *A & B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997). They also include “how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” *Id.* The Court concluded that, “a partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source” and “[t]hat is precisely the reason for the conjunctive management rules and the need for analysis and administration by the Director.” (*Id.* at 18-19)

IDWR’s position as to the accomplished transfers for Pocatello’s SRBA state law claims is directly opposite to IDWR’s position and the decision in *American Falls*, and should be disallowed, and the proposed remark should be stricken from the water rights associated with the

¹³ See Brief of Defendant-Appellant at 32, *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, Nos. 33249, 33311, and 33399 (Idaho Nov. 20, 2006) (“Adjudicating a water right is not the same as administering a water right, and while the presumption of interconnection applies to adjudicating water right claims in the SRBA, it does not provide a sufficient factual basis for the subsequent conjunctive administration of individual rights in response to a delivery call, as the SRBA court recognized.”).

wells as the condition is unnecessary for the adjudication of these rights and addresses concerns that are more properly determined by IDWR in the administration of the rights.

Not only did IDWR change its practice regarding conditioning of accomplished transfers, it did so in reliance on its transfer guidelines, which were not promulgated pursuant to the Idaho Administrative Procedures Act and therefore cannot be enforced as law. IDWR testified about criteria that were part of uncompleted rulemakings that followed IDWR's 1994 adoption for Rules for Conjunctive Management of Surface and Ground water Resources. (Tr. Vol. II, pp. 331-35) Counter to Idaho's Administrative Procedures Act, IDWR began using the transfer guidelines to evaluate accomplished transfers in the SRBA, instead of completing the rulemaking it had begun. (S.J. Tr. p. 48) The chronology in Appendix 3 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.)

The transfer guidelines are a guidance document that the Department has used since October 2002 to make determinations on applications for formal transfers under Idaho Code §42-222, which are unrelated to §42-1425 accomplished transfers. IDWR's change in practice under §42-1425 and its reliance on an unpromulgated guidance document for formal transfers demonstrate an erosion in the Department's understanding of legislative intent. Both practices are without statutory basis, and to be lawful would require a rulemaking under the APA.

As a matter of law, IDWR's ESPA transfer guidelines cannot be applied in the SRBA because "an agency action characterized as a rule must be promulgated according to statutory directives for rulemaking in order to have the force and effect of law." *Asarco v. State of Idaho*,

138 Idaho 719, 723, 69 P.3d 139, 143 (2003). *Asarco* listed six specific characteristics that indicate when agency action amounts to a rule: (1) wide coverage, (2) applied generally and uniformly, (3) operates only in future cases, (4) prescribes a legal standard or directive not otherwise provided by the enabling statute, (5) expresses agency policy not previously expressed, and (6) is an interpretation of law or general policy. *Id.*, citing *Woodland Private Study Group v. State of New Jersey*, 533 A. 2d 387 (N.J. 1987).

IDWR has applied the standards in the Transfer Processing Memo and the condition remark language as a rule under *Asarco*. First, the condition has wide coverage—IDWR now applies this condition to other municipal water rights as they are recommended in the SRBA. (Tr. Vol. II, p. 295) The condition applies generally and uniformly to all municipalities, as IDWR’s intent is to apply the condition uniformly in the SRBA beginning with Pocatello. (Tr. Vol. II, p. 303) The condition operates only in future cases because the “full impact of the accomplished transfer might not be seen for many years.” (Tr. Vol. II, p. 240) The condition prescribed a legal standard that is not otherwise provided by enabling statute, and expresses agency policy not previously expressed. (Tr. Vol. 22, pp 269, 294)

To the extent the guidelines have informed the Department’s change in practice regarding conditioning of accomplished transfers, there was no basis for the SRBA court to grant any deference to the agency and acknowledge and accept IDWR’s change in position. In accepting the change of position the Court held that “[t]he Department should not be hindered by prior misconceptions or misunderstandings of such a quickly evolving area of the law.” (R. 5264) The SRBA is an *in rem* proceeding that results in decrees of water rights as they

existed on November 19, 1989. Pocatello would argue that relying on unpromulgated rules, along with the other unauthorized practices and positions of IDWR, which result in different recommended decrees for rights that were similarly situated on November 19, 1987 is more than just a misconception or a misunderstanding.

It is important that Pocatello's water rights be treated and administered uniformly, but uniform treatment is not possible with the condition. To illustrate, under Pocatello's Formal Transfer 5452, completed in 1999, several wells were listed as alternate points of diversion for the three water rights at issue in that transfer. Specifically, Well #7, #10, #12, #13, and #44 do not have the condition when they are listed as points of diversion for 29-2274, 29-2338, and 29-7375.¹⁴ These wells are conditioned, however, in the Special Master's Recommendation issued on October 2, 2007. R. 4553-4739. What this in means terms of properly administering the water rights in times of a call is confusion. The same wells have the condition in relation to some water rights but not others. This can only confuse and complicate administration and illustrates the fact that the condition is inappropriate and that the issues involved should not be dealt with in the SRBA, but in an administrative setting, as argued above.

This uniformity of administration by the IDWR must also be global, or it can't be a part of the SRBA. The SRBA process requires only such remarks or conditions as are necessary for the administration of the right by the Director. *Idaho Code* §42-1411(2)(j). In addition, the SRBA adjudication process decrees water rights based on a "snapshot in time" as of the

¹⁴ In addition, well 39, which is one of the wells used for the airport culinary system is unconditioned in Transfer No. 5452 but does include the condition in the *Special Master's Report and Recommendation and Order on Motion to Reconsider* (Oct. 2, 2007). (R. 4553-4739)

commencement of the SRBA on November 19, 1987. In this context, and consistent with IDWR SRBA practices until 2003, the cities of Aberdeen, Jerome, and Rupert had the water rights serving their inter-connected culinary water systems recommended and decreed with alternate points of diversion without such a condition. There is no basis in the record for decreeing the adjudicated facts of Pocatello's interconnected well system differently from the adjudicated facts for the Cities of Aberdeen, Jerome, and Rupert. IDWR cannot ignore the historic practice or now disavow the use of some water rights.

Moreover, the State's and IDWR's legal arguments in support of the condition and their changed position on §42-1425 accomplished transfers in this case is inconsistent with and counter to their legal arguments in prior cases that have gone to the Idaho Supreme Court. In the interests of fairness and efficiency the State and IDWR should uniformly recommend alternate points of diversion and maintain the same, appropriate, and legally correct position towards all alternate points of diversion claimed, not single out some alternate points of diversion for limiting conditions. Just as uniformity is preferred in describing elements of water rights under Idaho Code §42-1427, so should uniformity be preferred in the recommendations of accomplished transfers and alternate points of diversion under §42-1425 and in the state and agency interpretation of the law.

B. The Special Master and SRBA Court Erred in Adopting a Presumption of Injury Standard for the Purpose of Decreeing IDWR's Limiting Condition.

One of the most crucial issues in this case is whether Pocatello's exercise of alternate points of diversion injured any other water users. For an accomplished transfer to be approved

under the requirements of that statute, claimants must first prove that the transfer of point of diversion, place of use, or type of use that was made without complying with the formal transfer procedures under Idaho Code §42-222 was made prior to November 19, 1987. If it can be demonstrated that the accomplished transfer was made prior to that date, the Legislature provided a procedure and a limited scope of inquiry into the effects of such informal transfer at the time of the transfer. The scope of this inquiry is: was there injury to other water rights existing as of the date of the change and did the change result in an enlargement of the original right?

During the many years Pocatello exercised its alternate points of diversion prior to 1987, there were no complaints of injury from other users and no evidence of either injury or unavailable water. When Pocatello amended its SRBA claims to list each well as alternate points of diversion for its ground and surface water rights, no one filed an objection or claimed injury. No evidence was produced at trial that any injury had occurred as a result of Pocatello's operation of its interconnected well system and in the city's expert's analysis, no injury was likely either at the time of the change or in the subsequent years.

However, both the Special Master and the SRBA court found that the condition recommended by IDWR was necessary to prevent injury to ground water rights of third parties existing at the time of the transfer even though on its terms the condition does not address actual and identifiable injuries to those rights. As both IDWR and the State have repeatedly and pointedly stated throughout these proceedings, the purpose of the alternate points of diversion

condition is to prevent future, possible, and speculative injury.¹⁵ Such hypothetical injuries are not a sufficient basis for either imposing such a restrictive condition or asking the court to make such a binding ruling on such an important property interest. Future injury is also not a proper concern under the terms of §42-1425, as only injuries to the other water right holders on the date of the change could justify denial of a claim.

Contrary to the SRBA Court's finding (R. 5125-56), no injury analysis should even be triggered under §42-1425 unless there has been a third party objection filed to a claim. This assertion is based on a plain reading of §42-1425 and *Fremont- Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). As the claimant under the statute, Pocatello was not required to prove by a preponderance of the evidence that the change did not injure any other water right which was in existence as of the date of the change because the court in *Fremont-Madison* specifically rejected this interpretation as counter to the plain language of §42-1425. *Freemont-Madison*, 129 Idaho at 461-462. By its very terms, §42-1425(2)(a) requires that an objection be filed before a hearing on injury is triggered.¹⁶

¹⁵ There have been differing expressions of how that future injury might occur. Initially, IDWR was concerned about injury from future increases of capacity or rate of diversion. When this concern became moot upon the stipulation agreement between Pocatello and SWC, IDWR expressed concerns in terms of conjunctive administration and well interference, such as a municipal water right holder increasing the number of hours it pumped from a particular well and thus interfering with another water right holder's well. Pocatello would argue that the analysis required to identify these possible future injuries, again, is not appropriate in the SRBA and comes within the expertise of IDWR in administering the rights.

¹⁶ Idaho Code §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.").

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 rest of the statute.

Indeed, someone other than the claimant must first come forward and object to the accomplished transfer. The procedure for opposition to an accomplished transfer requires at least two parties: the claimant and an objector, specifically an objector claiming injury, as IDWR does not have standing to allege injury on behalf of those not present before the court. It is incumbent, then, upon water right holders to come forward and allege injury during the specified time in the accomplished transfer proceedings. Only at that point, with two parties, could there be an assignment of the burden of proof. Because there was never an objector claiming injury from Pocatello's state-law claims for accomplished transfers, Pocatello was never in a position to have the burden of proof to show whether its accomplished transfer "injured a water right existing on the date of the change." According to *Freemont-Madison*, the inquiry into injury should end upon a finding of no injury on the date of the change, assuming that there has been no enlargement of the original right, which is not at issue in the present case. In other words, if no water right holders have come forward and alleged injury the accomplished transfer must be granted, unless there has been an enlargement.¹⁷

¹⁷ In *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 210 (2001), the Idaho Supreme Court rejected the argument of a transfer applicant that because no one came forward to object to the proposed transfer, IDWR had to accept the applicant's showing non-injury. The Court held that the applicant bore the burden of providing the Department with sufficient information to show non-injury to other water rights and then the IDWR must weigh all the evidence. That case can be distinguished from the case at hand because in *Barron* the application was for a transfer under the formal transfer statute, Idaho Code §42-422, which is subject to different burdens of proof and procedure than claims filed under the accomplished transfer statute, Idaho Code §42-1425, the controlling statute in this case.

Both the Special Master's inquiry into injury and the Department's imposition of an injury-based condition were also improper because the Director's general powers to define and condition the elements of a water right under §42-1411 are modified and restricted by the more specific provisions of §42-1425 and 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 §42-1411 to accomplished transfer claims.¹⁸ 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.¹⁹

Even if an injury analysis had been appropriate, the Special Master erred in concluding that other water right holders would be injured by Pocatello's accomplished transfer because Pocatello's settlement with SWC should ameliorate IDWR's concerns about injury. Pocatello's interconnected well system has been in operation since before the commencement of the SRBA and for more than 20 years following the commencement of the SRBA and the city has been operating some of its wells since the early 1900s. No one came forward to assert injury. It is reasonable to assume that there has been none.

¹⁸ 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."

¹⁹ For an extended analysis of the legislative history and statutory context of §42-1425, see Pocatello's *Brief in Support of Motion to Alter or Amend*, (R. 5162-5231).

In finding that Pocatello could not transfer its point of diversion to ground water without injuring junior ground water pumpers who appropriated prior to the city establishing its wells and thus affirming IDWR's recommendation (R. 4755), the Special Master applied a *per se* injury rule under Idaho Code §42-1425 that incorrectly utilized standards of law applying to transfers under §42-222 rather than §42-1425. The SRBA Court agreed with this finding and with the Special Master's incorrect presumption that injury would result if there were intervening junior rights appropriated by other users after Pocatello established its surface water rights, but before the City's wells began operating as alternate points of diversion. (R. 5262, "Injury also includes the diminished effect on the priority dates of existing water rights in times of shortage.") 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, and in *AFRD#2*, which specifically rejected the District Court's decision that a presumption of injury was necessary as to junior ground water use.

Pocatello has consistently argued throughout these proceedings that it was improper for both IDWR and the Special Master to begin with a presumption that puts 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. Since no objections were filed alleging injury, the Special Master's discussion of the injury issue relies on the mistaken premise that Pocatello was required to rebut IDWR's unsupported allegations of injury. The Department was unable to identify any water rights injured by the change. Allowing a presumption of injury in the absence of such concrete and specific supporting facts forces the claimant to object to the

director's report. These additional proceedings, as well as the SRBA's finding that "the Director **must** investigate any injury that may have occurred to other water rights, regardless of whether a third party files an objection" (R. 5258) 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. §42-222 and to protect existing water uses which were the result of past transfers regardless of compliance with statutory mandates." Fremont-Madison, 129 Idaho at 458-59 (emphasis added).

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 §42-222.²⁰ 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."²¹

²⁰ 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).

²¹ 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).

Pocatello respectfully argues that this Court should interpret §42-1425 in a manner consistent with legislative intent and *Fremont-Madison* by holding that it was improper for the Special Master and the SRBA Court to presume injury in this case and that IDWR cannot force persons making claims under §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.

In both its *Memorandum Decision and Order on Challenge* and its *Order on Motion to Alter or Amend*, the SRBA Court stated that Pocatello's contesting the condition is a tacit acknowledgment that without the condition the priorities of existing water rights will be injured in favor of the alternate point of diversion for one of Pocatello's more senior rights. (R. 5141, 5263) Pocatello has demonstrated that the condition operates to preclude the use of specific Pocatello senior ground water rights and wells. Pocatello also entered into a binding stipulation with the Surface Water Coalition that the City believes protects the status quo rights.

Pocatello's agreement with the SWC is an essential component of any discussion of injury because the agreement is designed to confirm Pocatello's historic practice and to provide notice of any changes from that practice and to specifically limit Pocatello's use of its wells as alternative points of diversion for its surface water rights. However, neither the Special Master's nor the SRBA Court's finding of injury mentions the extensive expert testimony on Pocatello's agreement with the Surface Water Coalition, which agreement was offered as an effective resolution of all of Pocatello's objections and turned down by the State and IDWR.²²

²² 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 holders is primarily based on statements made by Carter Fritschle at trial and IDWR's Supplemental Director's Report. (R. 4559-64)

Thus the Special Master's and SRBA Court 's conclusions and presumptions of injury are clearly erroneous because they are without basis under the law and are not supported by adequate evidence.

C. The Special Master and the SRBA Court Erred in Disallowing Completely the City of Pocatello's Ground Water Wells as Alternate Points of Diversion for Pocatello's Senior Surface Water Rights on Gibson Jack Creek and Mink Creek.

Idaho Code §42-1425 establishes a means for transfers that were made informally prior to the initiation of the SRBA and that can be claimed by water users in the adjudication. For these claimants, the threshold question is whether or not a transfer of point of diversion, place of use, or type of use that was made as of or after May 26, 1969, but prior to November 19, 1987, without complying with the mandatory transfer procedures under §42-222. Pocatello amended its SRBA claims to document that each of its ground water wells serve as points of diversion for the ground water rights and for the senior surface waters rights from Mink Creek and Gibson Jack Creek that, as of November 19 1987, were providing water for the city's culinary system; these claims for alternate points of diversion were filed in accordance with the following three legal theories:

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.

1. Pre-May 26, 1969, without a formal transfer. (Prior to May 26, 1969, there was no requirement to file an application for approval of a transfer. Thus, Idaho Code §42-1425 does not apply to changes in water rights that occurred before May 26, 1969 as there is nothing for that statute to waive.)
2. Under Idaho Code §42-222. (This is the formal procedure for applying and receiving permission to change a water right and as such applies to changes occurring on or after May 26, 1969.
3. Under Idaho Code §42-1425. (Since I.C. §42-1425 waives mandatory requirements regarding changes in water rights, it only applies to those changes occurring from the effective date of the act, May 26, 1969, to the date of the start of the SRBA on November 19, 1987.)

Idaho Code §42-1425 provides a means for water users to have “amnesty” from the statutory requirements of the formal transfer process under §42-222 if the transfer were accomplished prior to the commencement of the SRBA on November 19, 1987. This statute, however, does not apply to changes made to Pocatello’s water rights before May 26, 1969, the date the statutory transfer process became mandatory.

In accordance with this law and IDWR’s prior practice in the SRBA for municipal water rights with alternate points of diversion, Pocatello’s alternate points of diversion should have been recommended as claimed.

But in the April 2006 Supplemental Director’s Report, the IDWR refused to recommend Pocatello’s wells as alternate points of diversion for surface water rights, concluding that water from the creeks is not used for culinary purposes and thus the creek water is not part of the interconnected well system; the wells are a significant distance from the creeks; any change in

how water was diverted occurred after 1987;²³ and there is no evidence that the wells and the creeks are on the same source. (R. 891) In making this recommendation IDWR referred to Transfer Processing Memo No. 24, which explains that IDWR will recommend a change from surface water to ground water if there is an immediate and direct hydraulic connection between the surface and ground water sources. The Department concluded the creeks do not have a close enough hydraulic connection to be considered as having the same source as the city wells.

The Special Master concurred with the conclusion of the Director's report that Pocatello's ground water wells are not alternate points of diversion for its surface water rights, on the basis that the accomplished transfer statute does not allow for changes in the source element. This incorrectly limits the scope of §42-1425. The Special Master also found that while the creeks and the LPRVA are hydraulically connected, because the LPRVA derives a significant portion of water from other sources besides the two creeks, they are not the same source. (R. 4564-65) The SRBA court affirmed these conclusions, finding that the accomplished transfer statute does not expressly authorize a change to the source element and the two sources are sufficiently disconnected such that ground water pumping has no affect on the surface sources. (R. 5147-49) In its *Order on Motion to Alter or Amend*, the SRBA court

²³ The Department provided no discussion or analysis to support this conclusion. Although the Special Master made a passing mention of this conclusion in her findings of fact, she never again mentioned or discussed the timing of Pocatello's diversion of surface water at the interconnected wells. The SRBA court also never discussed this issue. Pocatello at trial, however, offered the testimony of several city employees and its expert, Greg Sullivan, as well as multiple water use exhibits which evidenced the declining diversions at Mink Creek and Gibson Jack Creek and the concomitant increases in ground water diversions to the wells prior to 1987, to support a finding that Pocatello began diverting surface water from its interconnected wells before 1987.

reaffirmed those conclusions and also found that a change in source is essentially the appropriation of a new water right. (R. 5173)

The Special Master and the SRBA court incorrectly concluded that the provision for changes in point of diversion under §42-1425 does not allow for a change in the source element. This conclusion was based on the Special Master's analysis of the language in §1425(2) which includes "change of place of use, point of diversion, nature or purpose of use or period of use" but not a "change in source." This same language, also without "change in source," appears in Idaho's statutory transfer statute §42-222 and in §42-1416A, the predecessor to §42-1425. However, since a change in source necessarily includes a change in point of diversion, this statutory language should not be interpreted as prohibiting a change in source. See A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 251-252 (1990-91). Pocatello believes that §42-1425 is routinely applied to changes in source because the source element is a descriptive aspect of the point of diversion element.

The past practice at the SRBA court confirms the absence of an outright legal prohibition to changes in source under the accomplished transfer statute §42-1425. The SRBA court has issued partial decrees with changes in source pursuant to that statute.²⁴ In those partial decrees, the language "RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO SECTION 42-1425, IDAHO CODE" appears with the source element. In accordance with the SRBA court's independent determination of matters before it, as articulated by the Idaho Supreme Court in *State v. United States*, 128 Idaho 246, 258-59, 912 P.2d 614, 626-27 (1995),

²⁴ See the recommendations and partial decrees for 29-00071, 29-02219, and 29-10341.

those decrees represent the SRBA court's independent determination that an accomplished change in source pursuant to §42-1425 is in accordance with Idaho law. In the present case, however, the Special Master did not respond in accordance with the legal standard from *State v. United States* nor did the Special Master's response acknowledge those existing SRBA determinations confirming the lawful scope of §42-1425. "Pocatello argues that IDWR has recognized changes in source under [Idaho Code §42-1425]. However, this court adheres to the analysis that the statute does not provide for change in the source element." (R. 4884) The conclusion of the Special Master and the SRBA court that the accomplished transfer statute does not provide for a change in the source element is an error of law.

Based on this incorrect legal premise that §42-1425 does not provide for a change in the source element, the Special Master concluded that a claimant may not change or add points of diversion from surface water to ground water unless the surface water points of diversion and the ground water points of diversion are drawing from the same source, the same water. (R. 4563, 4565) The issue then becomes whether Pocatello's surface water rights are so closely connected to its ground water sources that the wells may be considered as coming from the same source.

Pocatello submits that it was an error of law for the Special Master and the SRBA court to conclude that in order to obtain a decree for an accomplished transfer claim of ground water points of diversion for surface water rights, Pocatello must first meet a burden of proof that its surface and ground water points of diversion draw from the "same source" within the general interconnected sources. The SRBA court has already determined that all sources of water in Basin 29 will be administered as connected sources of water within the Snake River Basin, and

that all sources of water in Basin 29 (except “Spring tributary to Papoose Creek”) will be administered as connected sources of water within Basin 29. As determined in SRBA Basin-Wide Issue 5, all sources are interconnected unless there is a separate source designation in the general provisions for a basin and IDWR in administration must then determine the extent of the interconnection. *Memorandum Decision and Order of Partial Decree, Subcase 91-00005, Basin Wide Issue No. 5, Connected Sources General Provision, February 27, 2002.*

Furthermore, when evaluating whether the surface and ground water sources were sufficiently interconnected to be the same source, an inquiry which should not even have been undertaken according to the Court in *AFRD# 2*,²⁵ the Special Master applied standards which should not have been applied to Pocatello’s accomplished transfers. First, the Special Master applied the law from the *Clear Springs* case, but *Clear Springs* dealt with the degree of interconnection between two surface sources, not to the interconnection of surface and ground water. Because the two situations are highly distinguishable, the standard should not have been applied to Pocatello’s use of its wells as alternate points of diversion for its senior surface water rights.

Second, the Special Master’s “same source” analysis relied on a standard that requires the alternate points of diversion (the City’s wells) to divert the same water as the surface water rights, (R. 4563-66) This “same water” standard can be found in the IDWR’s Transfer Processing Memo #4, an internal document of the Department that does not provide a binding legal standard for evaluating alternate points of diversion established prior to November 19,

²⁵ The *AFRD#2* decision prohibits judicial intervention into matters statutorily entrusted to IDWR and specifically identifies the issue of interconnection as one that should be dealt with administratively rather than in the SRBA.

1987. As argued above, this internal procedure was not promulgated under the Idaho Administrative Procedures Act (Idaho Code §67-5201 *et seq.*) – and – it explicitly states that it applies only to processing applications for transfers under §42-222. In an adjudicative proceeding for the water rights for the City of Pocatello as of November 19, 1987, it is inappropriate to apply standards for interconnection based on an unpromulgated memo developed as a guideline for a statute that is expressly inapplicable to Pocatello's alternate points of diversion established prior to November 19, 1987. It was error for IDWR to apply the Transfer Memo to Pocatello's claims for alternate points of diversion under §42-1425; the Special Master erred as a matter of law in deferring to IDWR's misapplication of the Transfer Memo to Pocatello's alternate points of diversion; and the SRBA Court erred in confirming the disallowal of Pocatello's interconnected culinary wells as alternate points of diversion for the City's senior surface water rights on Mink Creek and Gibson Jack Creek.

Idaho Code §42-1425 does apply to changes in source, and under the clearly erroneous standard, the Special Master's finding that Pocatello's wells divert from a different source than Mink Creek and Gibson Jack Creek is invalid for purposes of determining whether the City's wells may be decreed as alternate points of diversion for the City's senior rights on Mink Creek and Gibson Jack Creek, and it was an error of law for the Special Master to conclude that the sources were not interconnected.²⁶ The SRBA Court has authority to consider the degree of interconnection between Pocatello's surface water rights and its ground water wells, the Special

²⁶ It does not seem logical that the SRBA can determine that all sources are interconnected and that some sources are separate for purposes of administration (basin-wide) and then say that sources that are interconnected and administered together and serve the same place of use are "separate sources" for purposes of being able to exercise alternate points of diversion.

Master's determination is clearly erroneous because it does not provide for or apply a workable or legitimate standard by which to judge the degree of interconnection, a standard which *AFRD#2* identifies as being within the expert province of IDWR in administering – not adjudicating – water rights.

In contrast, Pocatello, presented the testimony of several city employees as well as an expert who visited Pocatello's sources and undertook an extensive, highly detailed, thorough analysis of the nature of the aquifer and surface water sources, describing the inflow and outflow from the aquifer, explaining that both Gibson Jack Creek and Mink Creek contribute significantly to the water supply for the LPRVA. The expert's testimony sufficiently rebutted IDWR's prima facie evidence that the sources were not interconnected. According to Gregory Sullivan, Pocatello's expert, who produced voluminous records and documents to support his conclusions, the LPRVA has an immediate and direct hydraulic connection to Mink Creek and Gibson Jack Creek and are from "essentially" the same water source.

The Special Master did not discuss in detail any of Greg Sullivan's testimony on the interconnection of sources, or engage in any analysis of the evidence presented on this issue. The Special Master only cited IDWR (Carter Fritschle) testimony at trial that the wells are a "significant distance from the creeks" (R. 4560) and IDWR's conclusion that the two sources are just too far apart, a conclusion that was based on little to no evidence and was not determined on any articulable standard of interconnection that would allow rebuttal. In contrast to Pocatello's testimony and evidence, IDWR's finding should not be given the same weight and should be found unpersuasive. Under the substantial evidence standard, both the Special Master and the

SRBA court improperly weighed the evidence and expert testimony presented at trial regarding the degree of interconnection within the aquifer. Their conclusions agreeing with IDWR's conclusion should be found erroneous.

D. The SRBA Court Erred in Holding that There was No Significant Distinction Between pre-1969 Changes to Water Rights and Changes (Transfers) Developed after May 26, 1969.

The accomplished transfer statute, Idaho Code §42-1425 does not apply to changes made to water rights before May 26, 1969, the date it became mandatory to seek a formal transfer for changes to water rights.²⁷ Pocatello respectfully asserts that the accomplished transfer statute may not be used to condition a transfer accomplished prior to May 26, 1969. The record also does not establish any allegations of injury by a party to the SRBA based on Pocatello's alternate points of diversion established before May 26, 1969. It was an error of law for IDWR 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. In holding that the distinction between a pre-1969 right and one developed after 1969 is "insignificant" (R. 5256-57) and Pocatello's

²⁷ The SRBA court in its *Order on Motion to Alter or Amend* stated that the requirement to file an application for a change in point of diversion became mandatory in 1943. (R. 5258) However, while the legislature enacted a procedure for filing an application for a change in point of diversion in 1943, water users were not required to follow such procedures; the necessity of filing a formal application for transferring points of diversion for all water rights did not exist until May 26, 1969. See A. Lynne Krogh-Hampe, *Injury and Enlargement in Idaho Water Right Transfers*, 27 Idaho L. Rev. 249, 250 (1990-91) and Phillip J. Rassier, *Idaho's Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 510-11 (1992).

“pre-1969 argument is irrelevant” and would apply only to six wells that were drilled and used earlier than 1943 (R. 5259), the SRBA Court erred as a matter of law.²⁸

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. Act of March 11, 1903, §11, 1903 Idaho Sess. Laws 223, 234. 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 §42-222 made such approval mandatory in 1969 for all water rights. Act of March 27, 1969, ch. 302, §1, 1969 Idaho Sess. Laws 905. 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. *Hillcrest Irrigation District v. Nampa*, 57 Idaho 403, 409, 66 P.2d 115, 117 (1937).

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 for all water rights), and the commencement of the Snake River Basin Adjudication on November 19, 1987. The text of §42-1425 confirms the statute’s limited

²⁸ Even when a 42-222 transfer is applied for and includes pre- May 26, 1969 wells and water rights, the SRBA could confirm the pre-May 26, 1969 transfers, even if that confirmation is different from the 42-222 transfer. This is analogous to the licensed right that is claimed and decreed with an earlier beneficial use priority date in the SRBA.

application. Section (1)(a) of §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.”

Therefore, §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 recommended Pocatello’s wells as alternative points of diversion for the Pocatello’s ground water rights with a limiting condition based on the application of §42-1425. (R. 5128-29) Water right holders had a constitutional right to make changes to their water rights without prior administrative approval up until May 26, 1969. IDWR cannot exercise authority it did not have before May 26, 1969 (having authority only over those transfers that were voluntarily filed with IDWR before May 26, 1969). Also, under *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981), a long, continuous, and knowing acquiescence in a practice precludes objection later. Since no one objected at the time to Pocatello’s pre-1969 alternate points of diversion, IDWR should be estopped from objecting to them now and alleging injury on behalf of water users who did not and have not alleged injury. The SRBA does not change the law that existed prior to May 26, 1969 and Pocatello has a right to the transfers it established prior to May 26, 1969. The interconnection of the wells and the existence of the water rights prior to May 26, 1969 are not in contest. Therefore, 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 Pocatello 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.

The conditions recommended on Pocatello's water rights are improper because they were imposed under the auspices of §42-1425 and can be applied to prevent Pocatello 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 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 located in T06S, R34E, S35, NWSE." (R. 4804-05)

The well in the condition, Pocatello Well # 4, no longer exists. 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 71 years.

Assume that IDWR determines it must administer Pocatello's 1931 ground water right according to the condition. Since Well #4 does not exist, Pocatello will not be able to divert its 1931 priority ground water right. This will change what Pocatello has done for over 70 years without any objection from another water user.

In its *Order on Motion to Alter or Amend*, the SRBA court found that Pocatello's argument that there were no mandatory transfer procedures existing prior to 1969 not dispositive of the issue because the "no-injury" rule was in place when the pre-1969 transfers took place and that "[t]he 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." (R. 5258) This injury to other water rights is injury to their priority dates and such injury, according to the SRBA court, is injury *per se* and includes the diminished effect on their priority dates in times of shortage. (R. 5259, 5261)

Pocatello respectfully argues that the common law prior to 1969 was clear that a water user may not change a point of diversion if such a change would injure other water rights, and that the injury to other water rights must be real, identifiable and material; theoretical or speculative injury is insufficient. *Beecher v. Cassia Creek Irrigation Company*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944). These three requirements contemplate a present injury to an identifiable right. However, as discussed above, no one objected to Pocatello's changes in point of diversion either before 1969 or after 1969 or as of 1987 or 2007. There is also no evidence and no record that Pocatello's operation of its interconnected well system ever undermined a priority date or otherwise caused injury to other water users. IDWR's interest in avoiding possible future injury is entirely understandable but, again, the complexity of the matter is best left to the expertise of the Department during times of administration.

E. The Special Master and the SRBA Court Erred as a Matter of Law in Recommending Water Right 29-7770 with an Irrigation Purpose of Use.

Water Right 29-7770, used for the land application of biosolids under Pocatello's biosolids program, should have been decreed with a municipal purpose of use, consistent with its use by Pocatello in the city's broad capacity and function as a municipality. It was an error of law to license and then recommend 29-7770 with an irrigation purpose of use. Idaho Code §42-202(b)(6) defines municipal purposes as "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider." In subcase 34-10030, Special Master Bilyeu issued a master's report that stated 42-202(B) codifies but does not limit the common law and when "municipal purpose" is used to describe the purpose of use of a water right, "municipal" means a right used by a municipality for the benefit of its inhabitants. A "municipal" right may be used for numerous purposes which benefit the city's inhabitants and encompasses a broad range of uses. *In Re SRBA*, Subcase 34-10030, Special Master's Report April 8, 1997, at 2.

Pocatello asserts the city has a municipal responsibility to treat and dispose of domestic sewage, and that the use of water under EPA-approved biosolids programs to treat and dispose of domestic sewage and to apply effluent to cropland would be included among these numerous purposes and broad range of uses that benefit its inhabitants. Pocatello also asserts that one of the reasons for having numerous purposes and a broad range of uses for a "municipal" right is

to provide municipalities with the flexibility over time to shift and adjust water use and application within the various categories that are included in “municipal use.”²⁹

On April 19, 1990, Pocatello filed a notice of claim for water right 29-2382, originally licensed for Irrigation and domestic use, also stating that it was used for irrigation. On April 25, 2003, Pocatello filed an amended notice of claim, stating the purpose of use for this water right was municipal. (R. 1024-1130) This accomplished transfer from irrigation to municipal was reconfirmed in the April 2006 Supplemental Director’s Report. (R. 897) Thus, pursuant to Idaho Code §42-1425, IDWR had the authority to recommend that the purpose of use for a water right be changed to municipal even when it was licensed for irrigation.

Water right 29-2382 illustrates an accomplished transfer in purpose of use that occurred with a change in ownership to the City of Pocatello and a subsequent change from irrigation to municipal use. In contrast, water right 29-7770, used in Pocatello’s biosolids program, should be decreed with a municipal purpose of use because it was an error of law to license it with an irrigation purpose of use. Water right 29-7770 should be decreed for the broadly defined “municipal” purposes consistent with the recommendations and decrees for the two other associated water rights, 29-7118 and 29-7119, for the biosolids program. The proposed exclusion of this one water right from the municipal use category does not advance any public policy purpose in the efficient development use of Idaho’s water and is not supported by law. The only function of water right 29-7770 has been as part of Pocatello’s biosolids program. Its

²⁹ Although Respondent has asserted that Pocatello cannot collaterally attack water right 29-3770’s initial description as an “irrigation” purpose of use, this assertion overlooks the fact that IDWR and the SRBA court could have appropriately decreed a municipal purpose of use because the beneficial use of the right has always been municipal.

use and ownership have never changed. It has always been a municipal water right. The accomplished transfer statute does not apply to this fact situation.

The Special Master's Report found that 29-7770 was used for the biosolids program but then erred as a matter of law in reporting 29-7770 with an irrigation purpose of use based on IDWR's previous license of 29-7770 with an irrigation purpose of use. This was a legal error by IDWR because application of water to municipal biosolids sewage waste treatment program is a municipal use as a matter of law. In affirming the Special Master's decision, the SRBA Court found that "biosolids waste disposal is consistent with an 'irrigation' purpose of use, because the water is used to irrigate crops." (R. 5265) This is an error of law as the record clearly reflects this "irrigation" was not in the usual sense of that term but instead, was part of a municipal biosolids application procedure directly regulated by EPA.

Courts are not bound by errors of law committed by administrative agencies. *Kelso v. State Ins. Fund*, 997 P.2d 591, 134 Idaho 130, 138 (2000). If this were not so, administrative agencies could make and change law. The Special Master has already concluded as a matter of law that the application of water to carry out the City's biosolids program is a municipal use for the two other biosolids water rights: 29-7118 and 29-7119. To the extent the irrigation purpose of use for 29-7770 was an error of law by IDWR in the licensing process this Court is not estopped but rather has a duty to correct the Department's and the Special Master's and the SRBA Court's errors of law and recommend the municipal purpose of use for this water right.

**F. The Special Master and the SRBA Court Erred in
Recommending the Priority Dates for Water Right
29-13639 and Water Right 29-13558.**

The Special Master and SRBA Court failed to apply the “reasonable evidence” standard to the evidence presented at trial in support of Pocatello’s claimed priority dates for water rights 29-13558 and 29-13639. Pocatello offered evidence from multiple sources that would “lead a reasonable mind to conclude” that the wells associated with water rights 29-13558 and 29-13639 were in place and diverting water by the dates claimed by the City (June 30, 1905 and December 31, 1940, respectively). The *Special Master’s Report* erred in recommending the dates in accordance with the recommendation of the Department.

While it is well established that the Director’s Report constitutes *prima facie* evidence, “the ‘*prima facie*’ status accorded to the Director’s Report in I.C. §42-1411(4) constitute[s] a rebuttable evidentiary presumption.” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745, 947 P.2d 409 (1997); quoting *State v. United States*, 128 Idaho 246, 255-256, 912 P.2d 614 (1995). The rebuttable presumption in favor of the Director’s Report means that “the facts contained therein are presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption.” *Hagerman* at 746 (emphasis added). *Bongiovi v. Jamison* explains that evidence sufficient to rebut the presumption must rise to the level of “substantial evidence.” *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986). Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.” *Evans v. Hara’s, Inc.*, 123 Idaho 473, 478, 849 P.2d 934 (1993).

At trial, Carter Fritschle of IDWR indicated that the Director's Report recommendations in 2003 for 29-13558 and 29-13639 did not include review of the additional evidence that Pocatello presented at trial, which were: Pocatello Exhibit 147: "A Scant Supply in 1924" article; Pocatello Exhibit 148: Pocatello Tribune article, dated 07/17/1924; Pocatello Exhibit 150: Alameda Enterprise article, dated 07/20/1952; Pocatello Exhibit 151: Polk's Pocatello City Directory 1962, and; Pocatello Exhibit 153: City of Alameda Application for Permit. (Tr. p. 196, Ls. 16-19)

The evidence was submitted to support priority dates earlier than 7/16/1924 for 29-13558 and earlier than 10/21/1952 for 29-13639. Exhibit 147 (R. 7656-59) is an excerpt from an early history of Pocatello, recounting the fact that the year, 1924, was a very dry year and pressure was placed on the villages of North Pocatello and Fairview, which consolidated to form the village of Alameda. The principal purpose at that time was to secure means to purchase the Fairview water system. Exhibit 148 (R. 7660-62) is a copy of a newspaper article dated July 17, 1924, from the Pocatello Tribune, confirming the consolidation of the villages on July 31, 1924. Exhibit 150 (R. 7663-64) is a copy of a newspaper article from the Alameda Enterprise, dated July 20, 1952, which describes the history of Alameda's water system: the first well was dug to a depth of 65 feet and was dug down to 100 feet during the term of Alameda's first mayor and later, another 65 foot well was dug. The article mentioned a Mr. Satterfield who came to the area in 1905. This evidence supports an earlier priority date than July 16, 1924, for water right 29-13588.

Exhibit 154 (R. 7674-7721) is a copy of license file 29-2324, in the name of the City of Alameda. The application for a permit to appropriate ground water, dated October 22, 1952, describes the water supply for the city as three wells drilled and in use for varying period of time past, serving as the only sources of supply for the municipal water system. (R. 7670-73) Exhibit 151 (R. 7665-69) is an excerpt from the 1962 Pocatello City Directory, which describes the growth of the City of Alameda at a rate of about 12 per cent per year, or over 125 per cent over ten years. Alameda grew from a population of 2100 people in 1940 to 4705 people in 1950 and to over 10,000 people in 1960. This evidence supports a priority date earlier than October 21, 1952 for water right 29-13639.

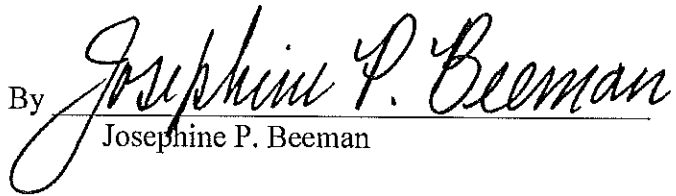
Carter Fritschle stated that IDWR required definitive evidence of the date the wells were drilled and put into service (Tr. p. 199, lines 7-9). However, the evidence provided by Pocatello reasonably supports the conclusion that the water rights in question were operating before the dates the Department recommended, particularly considering population growth, the functioning villages that formed Alameda, and the sworn statements in Alameda's 1952 application for permit. The evidence provided by Pocatello in support of its priority date claims for water rights 29-13558 and 29-13639 is sufficient to rebut the presumption in favor of IDWR's recommendations. "Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant." *Hagerman* at 746, quoting MCCORMICK, EVIDENCE §345, at 823 (1972).

CONCLUSION

The Surface Water Coalition settled with the City of Pocatello and the settlement with SWC is in accordance with the facts and legal principles set forth in this brief and all the other briefs, arguments, and pleadings Pocatello has filed in these proceedings. Pocatello respectfully requests that the decision of this Court reverse the SRBA court's *Order on Motion to Alter or Amend*, to accord with that settlement and to enter partial decrees for 20 ground water rights without the limiting and unauthorized condition imposed by the IDWR, and partial decrees for 23 alternate points of diversion for four surface water rights and 21 ground water rights, and to correct the errors of law made regarding the municipal purpose and the priority dates for three other water rights.

RESPECTFULLY SUBMITTED this 24th day of May 2011.

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

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

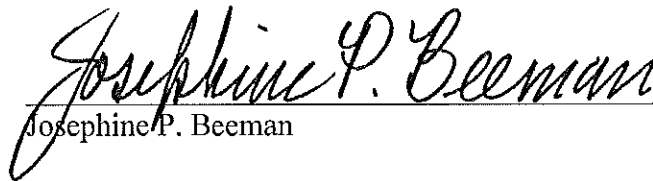
I HEREBY CERTIFY that on the 24th day of May 2011, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

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

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

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

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


Josephine P. Beeman

Appendix 1

City of Pocatello Well Usage by Month

(Extracted from Pocatello Trial Exhibit 111,
“City of Pocatello Monthly Report,” R. 6651-7128)

City of Pocatello
WELL USAGE BY MONTH
 (Extracted from Pocatello Trial Exhibit 111, "City of Pocatello Monthly Report," R. 6651-7128)

1962

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X			X	X					X	X	X
3					X	X	X	X	X			
4				X	X	X					X	
5				X	X	X	X	X	X	X		
6	X			X	X	X	X	X	X	X	X	X
7				X	X	X	X	X	X	X	X	X
10					X	X	X	X	X			
12							X	X				
14												
15												
16					X	X	X	X	X			
18				X	X	X	X	X	X	X		
19												
20												
20A												
20B												
21												
22												
23												
24												
25												
27												
UP.R.R							X	X				

City of Pocatello
WELL USAGE BY MONTH
1963

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X		X		X	X	X	X
3						X		X	X	X		
4		X	X		X	X	X	X	X	X	X	X
5												
6	X	X	X		X	X	X	X	X	X	X	X
7	X	X	X		X	X	X	X	X	X	X	X
10					X	X	X	X				
12								X				
14												
15												
16		X					X	X	X	X		
18						X	X	X	X	X		
19			X	X	X	X	X	X	X	X		
20			X	X	X	X	X	X	X	X		
20A												
20B												
21							X	X	X	X		
22			X	X	X	X	X	X	X	X		
23					X	X	X	X	X	X	X	X
24				X	X	X	X	X	X	X	X	
25			X	X	X	X	X	X	X	X	X	X
27												
U.P.R.R					X	X	X	X	X	X		

City of Pocatello
WELL USAGE BY MONTH
1964

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X				X	X	X	X
3						X	X	X	X			
4				X	X					X	X	X
5												
6	X	X	X	X	X	X				X	X	X
7	X	X	X	X	X	X				X	X	X
10				X	X	X	X	X	X	X		
12							X	X	X			
14												
15												
16						X	X	X				
18						X	X	X	X	X		
19				X	X	X	X	X	X	X		
20				X	X	X	X	X	X	X		
20A												
20B												
21						X	X	X	X			
22					X	X	X	X	X	X	X	
23	X	X	X	X	X	X	X	X	X	X	X	X
24					X							
25	X	X	X	X	X	X	X	X	X	X	X	X
27												
U.P.R.R.					X	X	X	X	X			

City of Pocatello

WELL USAGE BY MONTH

1965

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1966

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1967

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1968

[illegible]

City of Pocatello

1969

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1970

[illegible]

1971

1971

1972

X

City of Pocatello

WELL USAGE BY MONTH

1973

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1974

[illegible]

City of Pocatello

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1976

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1977

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1978

[illegible]

City of Pocatello
WELL USAGE BY MONTH
1979

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3					X	X	X	X	X	X		
4												
6	X	X	X	X								
7												
10					X	X	X	X	X			
12				X	X	X	X	X	X	X		
14												
15					X							
16	X	X	X	X	X	X	X	X	X	X	X	X
18	X			X	X	X	X	X	X	X		
19												
20												
20A												
20B												
21				X	X	X	X	X	X	X		
22				X	X	X	X	X	X	X		
23												
24												
25												
26 PIP	X	X	X	X	X	X	X	X	X	X	X	X
27		X	X	X	X	X		X	X	X	X	X
28	X	X	X	X	X	X	X	X	X	X	X	X
29					X	X	X	X	X	X		
31			X			X	X	X				
32		X		X	X	X	X	X	X	X		X
Cree					X	X	X	X	X	X	X	

City of Pocatello
WELL USAGE BY MONTH
1980

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	
3					X		X	X	X			
4												
6	X											
7												
10						X	X	X				
12				X	X	X	X	X	X	X		
14												
15												
16	X	X	X	X	X	X	X	X	X	X	X	X
18						X	X	X	X			
19												
20												
20A												
20B												
21				X	X	X	X	X	X	X		
22				X	X	X	X	X	X	X		
23												
24												
25												
26 PIP	X	X	X	X	X	X	X	X	X	X		X
27	X	X	X	X	X	X	X	X	X	X	X	X
28	X	X	X	X	X	X	X	X	X	X	X	X
29				X	X	X	X	X	X	X		
31						X	X	X	X			
32	X	X	X	X	X	X	X	X	X	X	X	X
Cree					X	X	X	X	X	X	X	X
W. Bench Booster						X	X	X	X	X		X

City of Pocatello
WELL USAGE BY MONTH
1981

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3						X	X	X	X			
4									X			
6												
7												
10						X	X	X	X			
12					X	X	X	X	X			
14												
15												
16		X	X	X	X	X	X	X	X	X	X	
18				X	X	X	X	X	X	X	X	X
19												
20												
20A												
20B												
21				X	X	X	X	X	X	X		
22				X	X	X	X	X	X	X		
23												
24												
25												
26 PIP				X	X	X	X	X		X	X	X
27	X	X	X	X	X	X	X	X	X	X		X
28	X	X	X	X	X	X	X	X	X	X	X	X
29						X	X	X	X			
31						X	X	X	X			
32	X	X	X	X	X	X	X	X	X	X	X	X
33							X	X		X		
Cree	X	X	X	X	X	X	X	X	X	X	X	X
W.Bench Booster	X	X	X	X		X	X	X	X		X	X

City of Pocatello
WELL USAGE BY MONTH
1982

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3					X	X	X	X				
4												
6												
7												
10						X	X	X				
12					X	X	X	X	X			
14												
15												
16				X	X	X	X	X	X			
18		X	X	X	X	X	X	X	X		X	
19												
20												
20A												
20B												
21					X	X	X	X	X	X		
22				X	X	X	X	X	X			
23												
24												
25												
26 PTP					X	X	X	X	X	X		
27	X	X	X	X	X	X	X	X		X	X	X
28	X	X	X	X	X	X	X	X	X			
29				X	X	X	X	X	X			
31						X	X	X				
32	X	X	X	X	X	X	X	X	X	X	X	X
33						X	X	X				
Cree	X	X	X	X	X	X	X	X	X	X	X	X
W.Bench	X	X	X	X		X		X	X	X		X

City of Pocatello
WELL USAGE BY MONTH
1983

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3						X	X	X	X			
4												
6												
7												
10						X	X	X				
12					X	X	X	X	X			
14												
15												
16				X	X	X	X	X	X	X	X	
18				X	X	X	X	X	X	X	X	X
19												
20												
20A												
20B												
21	X			X	X	X	X	X	X	X	X	X
22					X	X	X	X	X	X		
23												
24												
25												
26 PIP						X	X	X	X			
27	X	X	X	X	X	X	X	X	X	X	X	X
28					X	X	X	X	X	X		
29					X	X	X	X	X			
31							X	X				
32	X	X	X	X	X	X	X	X			X	X
33						X	X	X				
Cree	X	X	X	X	X	X	X	X	X	X		X
W.Bench	X		X	X	X		X	X	X	X	X	X

City of Pocatello

WELL USAGE BY MONTH

1984

[illegible]

City of Pocatello
WELL USAGE BY MONTH
1985

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3						X	X	X	X			
4												
6												
7												
10					X	X	X	X	X			
12				X	X	X	X	X	X			
14												
15												
16		X		X	X	X	X	X	X	X	X	X
18	X	X	X	X	X	X	X	X				
19												
20												
21	X	X		X	X	X	X	X	X	X	X	
22				X	X	X	X	X	X			
23												
24												
25												
26 PTP				X	X	X	X	X	X			
27	X	X	X	X	X	X	X	X	X	X		
28				X	X	X	X	X	X			
29				X	X	X	X	X	X			
30		X		X	X		X	X	X	X		
31					X	X	X	X	X			
32							X	X	X	X	X	X
33						X	X	X	X			
Cree	X	X	X	X	X	X	X	X	X	X	X	X
W.Bench	X	X	X	X				X	X	X	X	X

City of Pocatello

WELL USAGE BY MONTH

1986

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1987

[illegible]

City of Pocatello
WELL USAGE BY MONTH
1988

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3				X	X	X	X	X	X	X		
4												
6												
7												
10				X	X	X	X	X	X			
12					X	X	X	X	X			
14												
15												
16		X	X	X	X	X	X	X	X	X	X	
18	X			X	X	X	X	X	X	X	X	
19												
20												
21	X	X	X	X	X	X	X	X	X	X	X	X
22				X	X	X	X	X	X	X	X	
23												
24												
25												
26 PIP				X	X	X	X	X	X	X		
27	X	X	X	X	X	X	X	X	X	X	X	X
28				X	X	X	X	X	X	X	X	
29				X	X	X	X		X			
30	X	X	X	X	X	X	X	X	X	X	X	X
31					X	X	X	X	X			
32	X	X	X	X	X	X	X	X	X	X	X	X
33					X	X	X	X	X			
34							X					
Cree	X	X	X	X	X	X	X	X	X	X	X	X
W.Bench	X	X	X	X	X	X		X	X	X	X	X

City of Pocatello

WELL USAGE BY MONTH

1986

[illegible]

[illegible]

City of Pocatello

WELL USAGE BY MONTH

1961

[illegible]

City of Pocatello
WELL USAGE BY MONTH
1992

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X	X	X	X	X
3				X	X	X	X	X	X	X		
4												
6												
7												
10					X	X	X	X				
12				X	X	X	X	X				
14												
15												
16			X	X	X	X	X	X	X	X	X	X
18					X	X	X	X	X	X		
19												
20												
21				X	X	X	X	X	X	X	X	
22	X	X	X	X	X	X	X	X				
23												
24												
25												
26 PP				X	X	X	X	X	X			
27	X	X	X	X	X	X	X	X	X	X	X	X
28	X	X		X	X	X	X	X	X	X		
29			X	X	X	X	X	X	X	X		
30	X	X	X	X	X	X	X	X	X	X	X	X
31					X	X	X	X				
32	X	X	X	X	X	X	X	X	X	X	X	X
33				X	X	X	X	X	X	X		
34				X	X	X	X	X	X	X		
Cree	X	X	X	X	X	X	X	X	X	X	X	X
W.Bench	X	X	X	X	X	X		X	X	X	X	X

City of Pocatello
WELL USAGE BY MONTH
1993

Well #	January	February	March	April	May	June	July	August	Sept.	October	Nov.	Dec.
2	X	X	X	X	X	X	X	X				
3					X	X	X	X	MONTHLY REPORTS FOR SEPT. - DECEMBER MISSING			
4					X							
6												
7												
10							X	X				
12					X		X	X				
14						X						
15												
16	X	X	X	X	X	X	X	X				
18					X	X	X	X				
19												
20												
21					X	X	X	X				
22	X	X	X	X	X	X	X	X				
23												
24												
25												
26 PTP					X	X	X	X				
27	X	X	X	X	X	X	X	X				
28	X				X	X	X	X				
29	X				X	X	X	X				
30	X	X	X	X	X	X	X					
31						X	X	X				
32	X	X	X	X	X	X	X	X				
33								X				
34						X	X	X				
Cree	X	X	X	X	X	X	X					
W.Bench	X	X			X	X	X					

Appendix 2

City of Pocatello Wells in Use by Year (Pocatello's in-town interconnected Culinary Delivery System)

(Extracted from Pocatello Trial Exhibit 111,
"City of Pocatello Monthly Report," R. 6651-7128)

(Pocatello's in-town interconnected Culinary Delivery System)

(Extracted from Pocatello Trial Exhibit 111, "City of Pocatello Monthly Report," R. 6651-7128)

[illegible]

(Pocatello's in-town interconnected Culinary Delivery System)

(Extracted from Pocatello Trial Exhibit 111, "City of Pocatello Monthly Report," R. 6651-7128)

[illegible]

(Pocatello's in-town interconnected Culinary Delivery System)

(Extracted from Pocatello Trial Exhibit 111, “City of Pocatello Monthly Report,” R. 6651-7128)

[illegible]

Appendix 3

Chronology of IDWR's Change in Position

APPENDIX 3

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. (R. 5412) 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 depletion at proposed point of diversion in one day.)” (page 20) (R. 5432) <u>Factors For Considering Injury</u>: “Reduction in the quantity of water available to other water rights.” (page 19) (R. 5431) <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) (R. 5433) <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) (R. 5433) <u>Factors For Considering Enlargement</u>: “Diversion rate, annual diversion volume, and number of acres licensed or decreed.” (page 22)(R. 5434)
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) (R. 5423) 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) (R. 5423) <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) (R. 5425) “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) (R. 5426) <u>Neighboring Well Interference</u>: The condition remark “is again a necessary parameter when evaluating possible well-interference issues.” (page 15) (R. 5427) “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) (R. 5427) 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) (R. 5427)
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.” (S.J. Tr. p. 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.” (S.J. Tr. p. 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.” (S.J. Tr. p. 75) <u>Injury</u>: “Injury, whether it’s under 42-222 or section 42-1425, that legal issue is exactly the same.” (S.J. Tr. p. 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.” (S.J. Tr. p. 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, pp. 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.” (Tr. Vol. II, p. 247, Ls. 9-13, p. 357, Ls. 14-22, p. 303, Ls. 7-14, p. 305, Ls. 8-18)

Appendix 4

Conditions for Pre-May 26, 1969 Water Right Transfers and Post-May 26, 1969 Water Right Transfers

(Extracted from City of Pocatello's Brief in Support of Motion to Alter
or Amend November 9, 2009 Memorandum Decision and Order on
Challenge, R. 5162-5281)

APPENDIX 4

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 <u>before May 26,</u> <u>1969</u>	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 the wells listed below.

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

