

**Docket No. 37723-2010**

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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

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CITY OF POCA TELLO  
Appellant

v.

THE STATE OF IDAHO  
Respondent

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**CITY OF POCA TELLO'S  
BRIEF IN SUPPORT OF PETITION FOR REHEARING**

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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

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <u>Page</u> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| TABLE OF AUTHORITIES (see Footnote #1) <sup>1</sup>                                                                                                                                                                                                                                                                                                                                                                                                                                                             |             |
| INTRODUCTION .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 4           |
| ARGUMENT                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |             |
| I. IN THE PROCEEDINGS BEFORE THE SRBA DISTRICT COURT, PRIOR TO THE ENTRY OF FINAL JUDGMENT AND PRIOR TO THE FILING OF THE APPELLANT’S NOVEMBER 23, 2009 MOTION TO ALTER OR AMEND, APPELLANT – AT TRIAL, IN ITS POST-TRIAL BRIEF, NOTICE OF CHALLENGE, AND ORAL ARGUMENT ON CHALLENGE – RAISED THE ISSUE WHETHER THE DEPARTMENT OF WATER RESOURCES HAD THE AUTHORITY TO RECOMMEND THE CONDITION THAT WAS ATTACHED TO POCATELLO’S GROUND WATER RIGHTS WHEN THE DEPARTMENT HAD NOT DONE SO IN PRIOR SIMILAR CASES. |             |
| A. AT TRIAL .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | 4           |
| B. POST-TRIAL BRIEF .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | 10          |
| C. CITY OF POCATELLO’S NOTICE OF CHALLENGE .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 12          |
| D. HEARING ON NOTICE OF CHALLENGE .....                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 12          |
| II. IN THE PROCEEDINGS BEFORE THE SRBA DISTRICT COURT, PRIOR TO THE ENTRY OF FINAL JUDGMENT AND PRIOR TO THE FILING OF THE APPELLANT’S NOVEMBER 23, 2009 MOTION TO ALTER OR AMEND, APPELLANT’S ORAL ARGUMENT ON CHALLENGE PRESENTED THE ISSUE THAT 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                                                                                                                |             |

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<sup>1</sup> Pocatello’s brief in support of the Petition for Rehearing is based on materials in the record before the SRBA district court to verify that certain factual and legal issues were presented in the proceedings before the SRBA district court, prior to the entry of final judgment and prior to the filing of the Appellant’s November 23, 2009 motion to alter to alter or amend.

If the Petition for Rehearing is granted, Pocatello would expect to include a table of authorities in the briefing on the factual and legal issues not addressed in the Court’s January 5, 2012 opinion.

|                                                                                                                                                                                                                                                                                                                                                                                                                |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| MANDATORY TO SEEK A FORMAL TRANSFER FOR CHANGES<br>TO WATER RIGHTS.....                                                                                                                                                                                                                                                                                                                                        | 13 |
| III. IN THE PROCEEDINGS BEFORE THE SRBA SPECIAL MASTER,<br>APPELLANT PROVIDED AN EXTENSIVE FACTUAL RECORD<br>OF THE WATER RIGHTS FOR ITS INTOWN INTERCONNECTED<br>CULINARY SYSTEM AND THE WATER RIGHTS FOR ITS<br>AIRPORT INTERCONNECTED CULINARY SYSTEM,<br>INCLUDING THE CHANGES TO THOSE WATER RIGHTS THAT<br>OCCURRED PRIOR TO MAY 26, 1969.                                                               |    |
| A. EXAMINATION OF TOMMIE DEKKER,<br>TRIAL DAY 3, FEBRUARY 28, 2007.....                                                                                                                                                                                                                                                                                                                                        | 15 |
| B. EXAMINATION OF JAY ULRICH,<br>TRIAL DAY 3, FEBRUARY 28, 2007.....                                                                                                                                                                                                                                                                                                                                           | 18 |
| IV. DOES THE DETERMINATION THAT THE SOURCE OF A<br>WATER RIGHT CANNOT BE CHANGED BY THE SRBA COURT<br>UNDER IDAHO CODE SECTION 42-1425, AFFECT WATER<br>RIGHTS ISSUED BY THE SRBA COURT WHERE THE SOURCE<br>ELEMENT OF THE WATER RIGHT WAS SPECIFICALLY<br>RECOMMENDED AND DECREED WITH THE FOLLOWING<br>STATEMENT: “RIGHT INCLUDES ACCOMPLISHED CHANGE<br>IN SOURCE PURSUANT TO SECTION 42-1425, IDAHO CODE.” |    |
| A. CITY OF POCA TELLO’S BRIEF IN SUPPORT OF MOTION<br>TO ALTER OR AMEND .....                                                                                                                                                                                                                                                                                                                                  | 21 |
| B. HEARING ON MOTION TO ALTER OR AMEND.....                                                                                                                                                                                                                                                                                                                                                                    | 22 |
| CONCLUSION.....                                                                                                                                                                                                                                                                                                                                                                                                | 23 |

## INTRODUCTION

This brief is a compiled extract of the factual and legal arguments raised at the SRBA district court, prior to the entry of final judgment and prior to the filing of the Appellant's November 23, 2009 motion to alter to alter or amend.<sup>2</sup>

## ARGUMENT

### I.

**IN THE PROCEEDINGS BEFORE THE SRBA DISTRICT COURT, PRIOR TO THE ENTRY OF FINAL JUDGMENT AND PRIOR TO THE FILING OF THE APPELLANT'S NOVEMBER 23, 2009 MOTION TO ALTER OR AMEND, APPELLANT -- AT TRIAL, IN ITS POST-TRIAL BRIEF, NOTICE OF CHALLENGE, AND ORAL ARGUMENT ON CHALLENGE -- RAISED THE ISSUE WHETHER THE DEPARTMENT OF WATER RESOURCES HAD THE AUTHORITY TO RECOMMEND THE CONDITION THAT WAS ATTACHED TO POCATELLO'S GROUND WATER RIGHTS WHEN THE DEPARTMENT HAD NOT DONE SO IN PRIOR SIMILAR CASES.**

The following materials are direct quotes from the documents and transcripts on record in this appeal.

#### **A. EXAMINATION OF IDWR INTERIM DIRECTOR TUTHILL, TRIAL DAY 2, FEBRUARY 27, 2007.**

THE COURT: [C]learly through the pretrial process the *City of Pocatello* – and I'm referring back to some of the motions for taking judicial review of certain documents – I think *has raised the question about whether it's proper for the Department to have recommended conditions for some municipalities and not for others.*

\*\*\*\*\*

MR. TUTHILL: Early in the adjudication, for example, when we submitted our director's reports in basins 35 and 36, we did not include this condition.

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<sup>2</sup> Clerical errors were listed in Pocatello's Petition for Rehearing (January 26, 2012).

MR. BAXTER: When were those submitted?

MR. TUTHILL: The director's report in basin 36 was submitted in 1992. The director's report for basin 35 was submitted in – later in the 1990s.

MR. BAXTER: And why wasn't it included on those ones at that time?

MR. TUTHILL: At that time we had not identified this concern relative to water rights of this type.

MR. BAXTER: And as it relates to conjunctive management, where were you as to your understanding of conjunctive management when those earlier water rights were recommended?

MR. TUTHILL: We were – we were much more junior in our understanding relative to conjunctive administration.

MR. BAXTER: And I apologize, Mr. Tuthill. You said ---

MS. BEEMAN: Objection. *Pocatello moves to strike the testimony unless a foundation is laid for – in the law for the change in what the Department did.*

Trial, February 27, 2007, Tr. Vol. II, pp. 267-8 (emphasis added).

MR. BAXTER: Now, Mr. Tuthill, has the thinking of Water Resources on this issue evolved over time, then?

MR. TUTHILL: Yes. We are much more aware of conjunctive administrative principles now that we were in the mid-1990s.

MR. BAXTER: And so do you see this condition as necessary when you have alternate points of diversion?

MR. TUTHILL: In a situation like this, yes.

Trial, February 27, 2007, Tr. Vol. II, pp. 269-70.

MS. BEEMAN: You recommended Pocatello's claims to the Court in I believe it was July 2003, but mid-2003.

MR. TUTHILL: Yes.

MS. BEEMAN: It was also your testimony that you now apply that condition to other municipal water rights as they are recommended in the SRBA?

MR. TUTHILL: Yes.

Trial, February 27, 2007, Tr. Vol. II, p. 295.

MS. BEEMAN: As I indicated, *this line of cross-examination bears upon the Department's change in the way it recommends alternate points of diversion claimed under Idaho Code 42-1425*. And you have testified that you changed the way you implement the procedural requirements. Your change in implementing the procedural requirements under 42-1425 affected the water rights, how the water rights of the City of Pocatello were recommended compared to how water rights of other cities were reviewed and recommended prior to Pocatello's recommendation for the accomplished transfer?

MR. TUTHILL: I didn't characterize it, I don't think, as procedural requirements, but rather *conditioning of the rights*.

MS. BEEMAN: But isn't it true you changed your procedure? If you take a look at Exhibit 172, the notice of claim. Does the notice of claim indicate multiple points of diversion? This is the notice of claim for 35-4071.

MR. TUTHILL: Yes.

MS. BEEMAN: And does the director's report recommend those without condition?

MR. TUTHILL: There's some conditions, but not the condition like the one that we're speaking of today, that's right.

MS. BEEMAN: Thank you. And that's what my question is. And it was partially decreed in that fashion?

MR. TUTHILL: Correct.

MS. BEEMAN: So in other words, you changed your procedure from recommending without condition to recommending with this condition?

MR. TUTHILL: I wouldn't characterize it as procedure as much as *changing the conditioning that we find appropriate for this type of water right*. Our procedure of reviewing the right is – I don't know that that's that much changed. But our recommendation of this condition on this type of a right has changed. So the extent that that is a procedure, then that has changed.

MS. BEEMAN: If I understand you, you just testified that *the manner in which you investigate the 42-1425 accomplished transfer and point of diversion has not changed?*

MR. TUTHILL: *Correct.*

MS. BEEMAN: But *the manner in which you recommend it has changed?*

MR. TUTHILL: *Correct.*

MS. BEEMAN: And that is the basis of what you referred to as the evolution of the Department's understanding of conjunctive management?

MR. TUTHILL: Correct.

MS. BEEMAN: I can have Mr. Tuthill separately go through the remaining *exhibits – 173, 174, 175, 176, 177, 178, and 179* – in the fashion we have just gone through Exhibit 172. They're all offered for *proof of the manner in which the accomplished change in point of diversion was recommended prior to the recommendation of the accomplished transfer and point of diversion for the City of Pocatello's 18 water rights that have that condition.*

Trial, February 27, 2007, Tr. Vol. II, pp. 298-301 (emphasis added).

MS. BEEMAN: [F]or purposes of this issue, *each one has the notice of claim showing multiple points of diversion for a municipal water right, the director's report showing a recommendation without this condition, and then the partial decree.*

\*\*\*\*\*

MS. BEEMAN: And you are aware that part of the record in this case is that the *ESPA transfer guidelines* are acknowledged as they *are not applicable law because they are not adopted pursuant to the Administrative Procedures Act?*

\*\*\*\*\*

MS. BEEMAN: [Y]our testimony is that *the provision of this condition is something you are doing uniformly in the SRBA, beginning with Pocatello?*

MR. TUTHILL: *That's our intent.*

Trial, February 27, 2007, Tr. Vol. II, pp. 302-303 (emphasis added).

MS. BEEMAN: I would like to refer back to our discussion about the *municipal water rights that were recommended prior to the condition being placed on Pocatello's municipal rights.* \* \* \* \* [W]ould you agree that these alternate-point-of-diversion claims in the Exhibits 173 through 179 are no different than Pocatello's claims?

MR. TUTHILL: The Pocatello claims are a bit different in terms of proximity to surface sources as compared with some of the other cities.

MS. BEEMAN: But the claims themselves, the question was whether the claims –

MR. TUTHILL: The claims – the claims would have been similar, yes.

MS. BEEMAN: Multiple points of diversion –

MR. TUTHILL: Correct.

MS. BEEMAN: -- from a municipal water right? For clarification purposes, is it your testimony that *the investigation of the existence of the accomplished transfer under 42-1425 is as – the conditions as of November 19, 1987?*

MR. TUTHILL: *Correct.*

MS. BEEMAN: We have just identified a number of municipal water rights recommended and partially decreed in the SRBA that do not have this condition.

Trial, February 27, 2007, Tr. Vol. II, pp. 307-308 (emphasis added).

MS. BEEMAN: We're talking about *water rights that were decreed without the condition and their future administration.*

\*\*\*\*\*

MR. TUTHILL: \* \* \* \* \* In our view, those recommendations are made so we can't go back and change those.

\*\*\*\*\*

MR. TUTHILL: [*T*]*hey were inadequately conditioned.*

Trial, February 27, 2007, Tr. Vol. II, p. 309 (emphasis added).

MR. BARBER: And let us assume for a minute hypothetically that the option of having the language that is a part of the remark that is the subject of this trial in part was not available for you to be inserting in there. Would you have recommended the alternative points of diversion for each of the City's water rights?

MR. TUTHILL: *Based on our understanding today, we would not have recommended the accomplished transfer under 42-1425 without a condition explicitly identifying the rate of flow and priority date for each well.*

MS. BEEMAN: Motion to strike. *This is not relevant to a determination of an accomplished transfer as of November 19, 1987*, and it is outside the bounds of the 706 report.

Trial, February 27, 2007, Tr. Vol. II, pp. 315-16 (emphasis added).

**B. POST-TRIAL BRIEF, R. 4000-4001, 4036-4039.**

The following are the first two pages of Pocatello's Post-trial Brief, R. 4000-4001 (footnotes omitted):

This brief addresses all of the issues presented in the Court's six-day trial of Pocatello's 38 state-law SRBA claims. Perhaps the most consistently recurring theme is that the Idaho Department of Water Resources (IDWR) has changed its position with respect to Pocatello's municipal water rights from IDWR's prior investigation and recommendation of similar municipal water rights in the SRBA. The change in position resulted in the conditioning of water rights for Pocatello's intown culinary system and airport culinary system. This change of position is detrimental to Pocatello and counter to the positions of the State and IDWR in their successful outcomes in the 1996 Idaho Supreme Court decision addressing "accomplished transfers" and the March 2007 Idaho Supreme Court decision upholding the conjunctive management rules. Pocatello respectfully notes that IDWR's change in position bears the indicia of an unlawful rulemaking.

The following materials are also quoted from Pocatello's Post-Trial Brief, p. 4039-4039:

The Department testified that the imposition of the condition language arises from IDWR's "evolution" regarding conjunctive administration. In describing its evolution and the bases for the condition, IDWR testified about criteria that were part of uncompleted rulemakings that followed IDWR's 1994 adoption of Rules for Conjunctive Management of Surface and Ground Water Resources. [A timeline of the uncompleted rulemakings is included in the Appendix to Pocatello's Post-Trial Brief. R. 4504-4513. The timeline also includes IDWR's rulings and IDWR's testimony regarding Pocatello's state-law claims.] Counter to Idaho's Administrative Procedures Act, IDWR began using the ESPA transfer guidelines to evaluate accomplished transfers in the SRBA, instead of completing the rulemaking it had begun. As a result of the summary judgment motion Pocatello filed on November 30, 2006, and the SRBA hearing on summary judgment January 17, 2007, IDWR and the State have acknowledged that the guidelines are not applicable law.

The Transfer Guidelines are a guidance document, unadopted pursuant to the Idaho APA, that the Department has used since October 2002 to make

determinations on applications for formal transfers under Idaho Code § 42-222. To the extent that has informed the Department's change in practice regarding conditioning of accomplished transfers in the SRBA, there is no basis for the Court to grant any deference to the agency. In addition to being an unadopted guidance document, the Transfer Guidelines are—by their terms—devoted to determinations regarding *formal transfers under I.C. 42-222* and are unrelated to I.C. 42-1425 accomplished transfers.

The change in procedure requires a rulemaking under the APA. As a matter of law, IDWR's ESPA transfer guidelines, nor any of the other uncompleted rulemakings of the Department [included in the timeline in the appendix, R. p. 4504-4513], can 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* 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.

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." [Testimony of Dave Tuthill, Tr. Vol. II, p. 295.] The condition applies generally and uniformly to all municipalities. [Dave Tuthill testified to the following. (1) IDWR's intent is to apply the condition "uniformly in the SRBA beginning with Pocatello." Tr. Vol. II, p. 303, and (2) the condition "has now become IDWR's standard condition for municipalities that request alternate points of diversion on groundwater rights under 42-1425 or 42-222." Tr. Vol. II, P. 304.] The condition operates only in future cases because "the full impact of the accomplished transfer might not be seen for many years." [Testimony of Dave Tuthill, 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. [Dave Tuthill testified that the policy of imposing the condition language has "evolved over time" and is a part of IDWR's evolution on how it handles claims under the accomplished transfer statutes." Tr. Vol. II, pp. 269, 294.]

### **C. CITY OF POCATELLO'S NOTICE OF CHALLENGE**

In its June 11, 2008 Notice of Challenge (R. 4890) and in its June 25, 2008 Notice of Errata<sup>3</sup> to Notice of Challenge (R. 4904), Pocatello cited the Special Master's failure to address the "unlawful rulemaking" issue. Item #10 in Pocatello's original issues on challenge (the same item is #6 on the Notice of Errata) states as follows:

6. There is no mention of the APA legal standards with respect to IDWR's unpromulgated rules (the transfer guidelines). Court relies on the guidelines in its decision.

R. 4906.

### **D. HEARING ON NOTICE OF CHALLENGE**

The oral argument on Challenge included Appellant's discussion that the condition in its SRBA recommendations had never before been used in the SRBA and evidenced a failure to follow the Administrative Procedures Act.

*[T]he adjudication was begun in 1987, and the unique circumstances for the City of Pocatello related to **the condition recommended for 18 of its water rights** for its in-town-municipal-delivery system and its two interconnected water rights at the airport **has not occurred before in the adjudication.***

*[T]he concern that Pocatello has, as already addressed in its briefing, is that depending upon the decision in the notice of challenge, we have many, **many water rights that have been decreed prior to this time, ground water rights, where there are multiple wells serving multiple water rights....***

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 6 (emphasis added).

*[I]n the City's briefing on challenge we have referred to, for instance, the discussion of the Asarco case and when **we need to follow the APA.** And when we talk about the intent here with this condition that, you know, IDWR wants to apply it going forward, it's to operate in the future, **these are hallmarks of rule making....***

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<sup>3</sup> On June 25, 2008, Pocatello filed a Notice of Errata to its Notice of Challenge to correct inadvertent clerical errors and to make clarifications of statements regarding the transcript preparation. See accompanying June 25, 2008 letter of explanation. R. 4911.

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 12-13 (emphasis added).

## II.

**IN THE PROCEEDINGS BEFORE THE SRBA DISTRICT COURT, PRIOR TO THE ENTRY OF FINAL JUDGMENT AND PRIOR TO THE FILING OF THE APPELLANT'S NOVEMBER 23, 2009 MOTION TO ALTER OR AMEND, APPELLANT'S ORAL ARGUMENT ON CHALLENGE PRESENTED THE ISSUE THAT 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.**

The following materials are direct quotes from the documents and transcript on record in this appeal.

### HEARING ON NOTICE OF CHALLENGE

MS. BEEMAN: [T]he *accomplished transfer statute* has an interesting history, and I think everybody here understands that it and its predecessors, which were Basin-Wide 1 and then Basin-Wide 4, were done for the purpose of *allowing folks who didn't comply with the transfer statute* to kind of get the record cleaned up before the court. And part of that history is that they needed to do it because *the transfer statute became mandatory in 1969*.

MS. BEEMAN: If you look at the list of the city's water rights<sup>4</sup> ... -- this is in reference to the attachments to the City's response to the providers brief -- if you look at the chart of the water rights, *transfers weren't mandatory before May 26, 1969. They became mandatory as of May 26, 1969*.

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 9 (emphasis added).

MS. BEEMAN: *Pocatello has over 80 cfs of water rights that predate the May 26, 1969 priority date*. They also have wells. ... *in its pre-1969 wells*, all of its

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<sup>4</sup> The 3 documents referenced in the August 13, 2009 hearing on Challenge (City of Pocatello Ground Water Development Timeline, Record page 5476, 5568, 5082; Appendix A - Chart of 30 water rights, Record page 5046; Appendix B - Wells for intown interconnected culinary system, Record page 5047) are attached to this brief. City of Pocatello's Ground Water Development Timeline (April 25, 2003) (attached to Pocatello Reply to State's Response on Challenge (August 3, 2009)) was submitted with Pocatello's 32 amended SRBA claims on April 25, 2003 and appears multiple times with Pocatello's water rights in IDWR Exhibit 1. (Record pages, 5476, 5568.)

pre-1969 wells, *it had also around 80 cfs* of wells. *So we have transfers that occurred prior to the mandatory date.*

MS. BEEMAN: [T]he city still has around 63 to 69 cfs of wells which operated prior to 1969, were in operation as of 1987, and were still in operation as of the time of trial in 2007.

MS. BEEMAN: So one of the issues here is when we look at Pocatello's concern that *the condition* recommended for its water rights leaves out certain wells, these are wells that were operating, particularly well 2, well 7, 10, 12, 13 and 15, *either the well is missing entirely or part of its pre-1969 capacity is missing.*

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 10 (emphasis added).

MS. BEEMAN: [T]he *difficulties with the condition*, we have -- in the condition we have *wells that were operating before 1969*. In fact, well 2 -- the part of well 2 that's *missing* was put in place in 1948, and that's on the well-development timeline; well 7 has been in operation at 4.46 cfs since 1940 and it's *missing*; well 10 has been operating at 5.35 cfs since 1948 and it's *missing*; well 12, which has been operating at 6.2 cfs since 1958 is *missing*; and the portion of well 13 that was developed in 1953, it was originally developed at 2.22 cfs, that's *missing*.

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 11 (emphasis added).

MS. BEEMAN: [T]he *condition* on the water rights for the City of Pocatello *doesn't list these wells*.... [W]e have the problem with the missing wells, wells that without question were in operation....

Hearing on Notice of Challenge, August 13, 2009, Tr. p.12 (emphasis added).

MS. BEEMAN: [W]e have the *Department on record* in Pocatello's case saying it applied this standard, *this condition*, because that's what it's doing with all of its *42-222 transfers*. That's a real problem.

MS. BEEMAN: I've just talked to the court about how *many of the City's wells predate 1969*, how *many of its water rights predate 1969*....

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 14 (emphasis added).

MS. BEEMAN: *19 of those wells were in operation before 1969*.... They're the old wells, the oldest water rights.

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 15 (emphasis added).

MS. BEEMAN: When the City talks about its concerns about wells that are listed that don't exist or wells that have existed for 40 years and aren't listed, these are on the 18 water rights that have the condition.

Hearing on Notice of Challenge, August 13, 2009, Tr. p. 37.

### III.

**IN THE PROCEEDINGS BEFORE THE SRBA SPECIAL MASTER, APPELLANT PROVIDED AN EXTENSIVE FACTUAL RECORD OF THE WATER RIGHTS FOR ITS INTOWN INTERCONNECTED CULINARY SYSTEM AND THE WATER RIGHTS FOR ITS AIRPORT INTERCONNECTED CULINARY SYSTEM, INCLUDING THE CHANGES TO THOSE WATER RIGHTS THAT OCCURRED PRIOR TO MAY 26, 1969.**

The following testimony and particularly the references to Pocatello Exhibit 111 (R. 6651-7128) establish the Appellant's summary of individual well dates from Exhibit 111 in the appendix to its opening brief on appeal. Exhibit 111 and the associated testimony and maps (Exhibits 106, and 109) discussed establish every interconnected well as of 1961 and changes to the interconnected well in the years from 1961 to 1993. This chronology from the 1960's through the early 1990's is the record of the date each new well became part of the interconnected system and became an alternate point of diversion for every water right served by the interconnected system.

The following materials are direct quotes from the documents and transcript on record in this appeal.

**A. EXAMINATION OF TOMMIE DEKKER,  
TRIAL DAY 3, FEBRUARY 28, 2007.**

MR. TRANMER: [F]rom *either 1969 or 1970 until the time you retired*, you were employed by the City of Pocatello in the water department?

MR. DEKKER: Yes.

\*\*\*\*\*

MR. TRANMER: What are the *sources of water for the Pocatello water system*?

MR. DEKKER: Mostly now it's all wells. I think before – *originally, the only source was surface water, like Mink Creek and Gibson Jack. But then as the demand grew, we started drilling wells.*

Trial, February 28, 2007, Tr. Vol. III, pp. 424, 426 (emphasis added).

MR. TRANMER: Would you describe for the Court what the *culinary system* entails for the City of Pocatello, what it's made up of.

MR. DEKKER: *A system of pipelines. All the wells pump into the same system.* The system supply, at the time we still used it, we had an area called the reservoir yard. That water would come to the reservoir yard and then be put into the system. So it was all one system.

\*\*\*\*\*

MR. DEKKER: *The water is pumped from the system in the valley up to the storage tanks.* And the reservoir yard, when we a – quit using the surface supply, I think a big – a tank was built u there and connected to the system, because the whole system kind of floated on that tank. That tank kept the pressure more constant.

\*\*\*\*\*

MR. DEKKER: \* \* \* \* [A]ll the system supplies water to the customers and all the wells pump into the same system.

Trial, February 28, 2007, Tr. Vol. III, pp. 428-30 (emphasis added).

MR. TRANMER: I'm going to hand you what's been marked as *City of Pocatello Exhibit No. 111*. Rather voluminous. Take a look at that exhibit. Can you identify what – or do you need some more time to look?

MR. DEKKER: No, I know what they are. They're *monthly reports*.

MR. TRANMER: Of what?

MR. DEKKER: The *water system for Pocatello*.

MR. TRANMER: And who prepared these reports?

MR. DEKKER: I probably had a hand in some of them.

MR. TRANMER: Are these records –

MR. DEKKER: Yeah.

MR. TRANMER: -- of the City of Pocatello?

MR. DEKKER: Yes.

MR. TRANMER: And are they monthly – when you say “monthly reports”, *what do they report?*

MR. DEKKER: The *water production*, what – the *expansion of the system*, what was happening basically to the water system.

MR. TRANMER: And the City of Pocatello prepared a monthly report –

MR. DEKKER: Yes.

MR. TRANMER: -- reporting those types of things?

MR. DEKKER: Uh-huh, yes. Yes, they did.

MR. TRANMER: And kept them ---

MR. DEKKER: Yes.

MR. TRANMER: -- as official records?

MR. DEKKER: Yes.

MR. TRANMER: And the exhibit has *monthly reports from 1962 to 1993?*

MR. DEKKER: I haven't – yes. I haven't checked the years. But I'm assuming.

MR. TRANMER: Would you check the last report and the first report.

MR. DEKKER: '61 to '93.

Trial, February 28, 2007, Tr. Vol. III, pp. 431-33 (emphasis added).

MR. BARBER: If you could find that *large map* again so I could ask him some questions about locations of reservoirs.

MR. TRANMER: I believe *106* was the one that was admitted.

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MR. DEKKER: [T]hat used to be a big, open reservoir. So all the water from Gibson Jack and Mink Creek would flow into this pipeline to that open reservoir, then it would go into the system. But all around town we have one the bench areas, we have *steel tanks, reservoirs, so all the wells pump into the valley system; then we have these booster stations that suck that out of the system and fill the tanks. And then the tank's gravity-feed back down the hills.*

Trial, February 28, 2007, Tr. Vol. III, pp. 449-51 (emphasis added).

MR. BARBER: My understanding is that at least the surface water from Gibson Jack Creek and Mink Creek was delivered to that open reservoir. Is that correct?

MR. DEKKER: Correct.

MR. BARBER: Was there any groundwater pumped up from the wells and put into the reservoir?

MR. DEKKER: No, not the open reservoir.

MR. BARBER: Not the open reservoir?

MR. DEKKER: No.

MR. BARBER: But the tank that was right next to the open reservoir, groundwater was pumped from down below in the valley up to that tank; is that a fair assumption?

MR. DEKKER: At one time, yes. At one point in history, yeah.

Trial, February 28, 2007, Tr. Vol. III, p. 454.

**B. EXAMINATION OF JAY ULRICH,  
TRIAL DAY 3, FEBRUARY 28, 2007.**

JAY ULRICH, having been called as a witness by Pocatello, was duly sworn and testified as follows:

MR. ULRICH: I'm currently employed as the *water superintendent for the City of Pocatello*. \* \* \* \* I was the water pollution control superintendent about 1974 through 1994.

Trial, February 28, 2007, Tr. Vol. III, pp. 479-80 (emphasis added).

MR. TRANMER: Okay. What are the sources of water for the Pocatello water system?

MR. ULRICH: *Our current source water is all groundwater from – and deep wells.*

MR. TRANMER: That's for the *culinary system*?

MR. ULRICH: Correct.

Trial, February 28, 2007, Tr. Vol. III, p. 484 (emphasis added).

MR. ULRICH: We have – and *all of our wells are on the valley floor*, basically, not on the hillsides. They all pump from what we believe is the same aquifer. We do have *boosting facilities* within the network that boost *to our storage tanks*. And essentially the entire water system floats on the storage reservoirs.

MR. TRANMER: What do you mean by “floats”? I realize that's a water term. What do you mean?

MR. ULRICH: Our wells work off of pressure. And as pressure changes, they turn on and off. And our booster facilities do the same things. And we store water in the reservoirs. And that water then flows back down the hill towards the valley floor through what we call pressure-reducing valve stations, PRVs.

MR. TRANMER: And why has Pocatello set up their system in that fashion?

MR. ULRICH: Reliability, so that we don't – we're able to serve our customers. If you lose a well for whatever reason – power outages, maintenance, contamination, what have you – that you still can supply the entire town with the rest of the operating wells. And redundancy, of course, that we have back up for our pumping facilities.

MR. TRANMER: Is the City dependent – *City's fire-suppression system also dependent on your culinary system*?

MR. ULRICH: *Yes, it is.*

MR. TRANMER: *So if I had a house situated right next to city hall in Pocatello, where is the water coming from when I turn on my tap?* What well does that water come from?

MR. ULRICH: I couldn't tell you. *Any of the operating wells could potentially* be – it could be a blend of all of those wells within the system.

MR. TRANMER: Are there – do wells come off line very often?

MR. ULRICH: *We routinely take wells off, particularly during the winter , to do normal routine maintenance.*

MR. TRANMER: Does that include replacing pumps and – what else does it entail?

MR. ULRICH: *We probably pull three or four wells every winter*, check them, the tolerances on them, take a look at them. Some of them are sent to Twin Falls to be rebuilt and things like that. Also do electrical work and motor maintenance and those sorts of things.

Trial, February 28, 2007, Tr. Vol. III, pp. 487-89.

MR. TRANMER: So, if you had a – if you were in a different city – let's say *if Pocatello had a system that wasn't interconnected* and one of these booster stations went down that pumps water to a tank, if you didn't have the interconnected system, what would happen to the water in the tank and the people served by that system?

MR. ULRICH: Well, you would have *an area of town* served by that potentially isolated system that *would be out of water*.

\*\*\*\*\*

MR. TRANMER: *[C]an you pump water from a well on the east side of the Portneuf River to a water tank on the west side of the Portneuf River?*

MR. ULRICH: Well, *yes, you can do that*. Although I don't want you to envision that it's a single pipeline that runs from the wellhead to that tank. *It's this network of piping that is all hooked together*.

Trial, February 28, 2007, Tr. Vol. III, pp. 492-94 (emphasis added).

(Pocatello's *Exhibit 109* marked.)

MR. ULRICH: This is basically *a schematic of Pocatello's drinking water system* that was prepared by Montgomery, Watson, Hartzel, who is an engineering firm who prepared our master plan for us.

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MR. TRANMER: *[T]his represents the extraction of water from the groundwater aquifer into the system; is that correct?*

MR. ULRICH: That's correct.

Trial, February 28, 2007, Tr. Vol. III, pp. 496, 498 (emphasis added).

#### CROSS-EXAMINATION

MR. BARBER: Let me ask you, have you looked at *Exhibit 111, the water department monthly report from January 1962 through 1993*?

MR. ULRICH: I have seen the document, yes.

\*\*\*\*\*

MR. BARBER: *Is this where the department – water department would keep the record of, let's say, a replacement well?* It would be recorded in these monthly reports?

MR. ULRICH: During those time – I think so. I think that's – they did a pretty good job of recording what was going on in terms of capital improvements and things like that.

Trial, February 28, 2007, Tr. Vol. III, p. 547 (emphasis added).

#### IV.

**DOES THE DETERMINATION THAT THE SOURCE OF A WATER RIGHT CANNOT BE CHANGED BY THE SRBA COURT UNDER IDAHO CODE SECTION 42-1425, AFFECT WATER RIGHTS ALREADY ISSUED BY THE SRBA COURT WHERE THE SOURCE ELEMENT OF THE WATER RIGHT WAS SPECIFICALLY RECOMMENDED AND DECREED WITH THE FOLLOWING STATEMENT: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO SECTION 42-1425, IDAHO CODE."**

The following materials are direct quotes from the documents and transcript on record in this appeal:

**A. CITY OF POCA TELLO'S BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND (DECEMBER 13, 2007), R. 4858- 4867:**

Pocatello respectfully disagrees with the Master's statement that I.C. 42-1425 does not provide for a change in the source element. *Master's Report*, at 10. Pocatello refers the Master to the recommendations and partial decrees for 29-00271, 29-02219, and 29-10341 as examples where the source element of the

water right was specifically recommended and decreed with the following statement: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO SECTION 42-1425, IDAHO CODE.

R. 4859.

**B. HEARING ON MOTION TO ALTER OR AMEND  
(February 27, 2008, Tr. 26-27.)**

MS. BEEMAN: \* \* \* *Pocatello wanted to provide examples within basin 29 itself, although there would be examples in other basins, where decrees have been entered with accomplished change in source under the accomplished transfer statute.* And the source element is really a descriptive aspect of the point of diversion.

SPECIAL MASTER: The source element is not an element itself? I'm not quite following that point.

MS. BEEMAN: The point of diversion is where your source is identified. And for instance in -- *we gave examples of three water rights* that had been decreed in basin 29, and there was a change in source and it's listed in the source, but the point of diversion is what determines what your source is. So when you have a change in point of diversion you have a change in the source often. And that is *recognized in decrees that have been entered in the SRBA.* And in fact the language on these three decreed rights, *each one of them states: Right includes accomplished change in source pursuant to 42-1425.* And the point here is that it's where your point of diversion is, and that where your point of diversion is will determine what your source is. And the accomplished transfer statute allows for that and these decrees state that on their face.

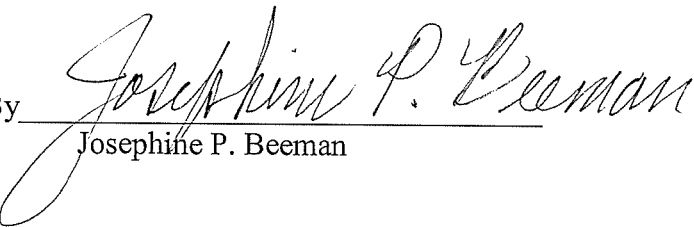
SPECIAL MASTER: All right. So your point, I think if I'm understanding what you just said, is that *because the statute allows a change in point of diversion, the implication is that if the source changed, the source changed, and it would be because of point of diversion changes?*

**CONCLUSION**

Appellant Pocatello respectfully requests that the Court consider these matters in a Rehearing of the Opinion issued January 5, 2012.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of February 2012.

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

By   
Josephine P. Beeman

## CERTIFICATE OF SERVICE

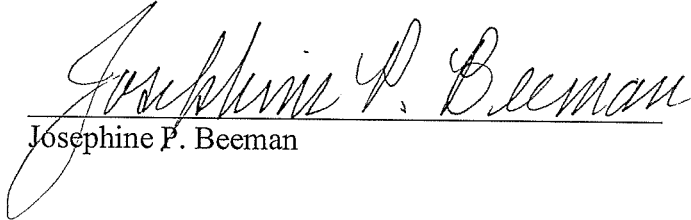
I HEREBY CERTIFY that on the 24<sup>th</sup> day of February 2012, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

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

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

US DEPARTMENT OF JUSTICE  
ENVIRONMENT & NAT'L RESOURCES  
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GIVENS PURSLEY LLP  
P. O. BOX 2720  
BOISE, ID 83701-2720

  
\_\_\_\_\_  
Josephine P. Beeman

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

CHART OF 30 WATER RIGHTS

| Notice of<br>Challenge | intown interconnected<br>system<br>21 ground water rights |        | intown interconnected<br>system<br>18 ground water rights |       | intown interconnected<br>system<br>4 surface water rights |       | airport interconnected<br>system<br>2 ground water rights | biosolids<br>program<br>3 ground water<br>rights | Alameda<br>wells;<br>Priority for 2<br>ground water<br>rights |
|------------------------|-----------------------------------------------------------|--------|-----------------------------------------------------------|-------|-----------------------------------------------------------|-------|-----------------------------------------------------------|--------------------------------------------------|---------------------------------------------------------------|
|                        | CFS                                                       |        | CFS                                                       |       | CFS                                                       |       |                                                           |                                                  |                                                               |
| 30 water<br>rights     |                                                           |        |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-02274               | 29-02274                                                  | 9.69   |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-02338               | 29-02338                                                  | 9.53   |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-02401               | 29-02401                                                  | 12.22  | 29-02401                                                  | 12.22 |                                                           |       |                                                           |                                                  |                                                               |
| 29-02499               | 29-02499                                                  | 4.10   | 29-02499                                                  | 4.10  |                                                           |       |                                                           |                                                  |                                                               |
| 29-04221               | 29-04221                                                  | 2.67   | 29-04221                                                  | 2.67  |                                                           |       |                                                           |                                                  |                                                               |
| 29-04223               | 29-04223                                                  | .21    | 29-04223                                                  | .21   |                                                           |       |                                                           |                                                  |                                                               |
| 29-04224               | 29-04224                                                  | 3.89   | 29-04224                                                  | 3.89  |                                                           |       |                                                           |                                                  |                                                               |
| 29-04225               | 29-04225                                                  | 4.44   | 29-04225                                                  | 4.44  |                                                           |       |                                                           |                                                  |                                                               |
| 29-04226               | 29-04226                                                  | .22    | 29-04226                                                  | .22   |                                                           |       |                                                           |                                                  |                                                               |
| 29-07106               | 29-07106                                                  | 3.90   | 29-07106                                                  | 3.90  |                                                           |       |                                                           |                                                  |                                                               |
| 29-07322               | 29-07322                                                  | 17.06  | 29-07322                                                  | 17.06 |                                                           |       |                                                           |                                                  |                                                               |
| 29-07375               | 29-07375                                                  | 2.23   |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-11339               | 29-11339                                                  | 3.36   | 29-11339                                                  | 3.36  |                                                           |       |                                                           |                                                  |                                                               |
| 29-11348               | 29-11348                                                  | 4.90   | 29-11348                                                  | 4.90  |                                                           |       |                                                           |                                                  |                                                               |
| 29-13558               | 29-13558                                                  | 1.34   | 29-13558                                                  | 1.34  |                                                           |       |                                                           |                                                  | 29-13558                                                      |
| 29-13559               | 29-13559                                                  | .96    | 29-13559                                                  | .96   |                                                           |       |                                                           |                                                  |                                                               |
| 29-13560               | 29-13560                                                  | 9.13   | 29-13560                                                  | 9.13  |                                                           |       |                                                           |                                                  |                                                               |
| 29-13561               | 29-13561                                                  | 4.23   | 29-13561                                                  | 4.23  |                                                           |       |                                                           |                                                  |                                                               |
| 29-13562               | 29-13562                                                  | 2.45   | 29-13562                                                  | 2.45  |                                                           |       |                                                           |                                                  |                                                               |
| 29-13637               | 29-13637                                                  | 4.46   | 29-13637                                                  | 4.46  |                                                           |       |                                                           |                                                  |                                                               |
| 29-13639               | 29-13639                                                  | 3.68   | 29-13639                                                  | 3.68  |                                                           |       |                                                           |                                                  | 29-13639                                                      |
|                        |                                                           |        |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-00271               |                                                           |        |                                                           |       | 29-00271                                                  | 3.22  |                                                           |                                                  |                                                               |
| 29-00272               |                                                           |        |                                                           |       | 29-00272                                                  | .56   |                                                           |                                                  |                                                               |
| 29-00273               |                                                           |        |                                                           |       | 29-00273                                                  | 1.218 |                                                           |                                                  |                                                               |
| 29-04222               |                                                           |        |                                                           |       | 29-04222                                                  | 5.00  |                                                           |                                                  |                                                               |
|                        |                                                           |        |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-7450                |                                                           |        |                                                           |       |                                                           |       | 29-7450                                                   |                                                  |                                                               |
| 29-13638               |                                                           |        |                                                           |       |                                                           |       | 29-13638                                                  |                                                  |                                                               |
|                        |                                                           |        |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| 29-7118                |                                                           |        |                                                           |       |                                                           |       |                                                           | 29-7118                                          |                                                               |
| 29-7119                |                                                           |        |                                                           |       |                                                           |       |                                                           | 29-7119                                          |                                                               |
| 29-7770                |                                                           |        |                                                           |       |                                                           |       |                                                           | 29-7770                                          |                                                               |
|                        |                                                           |        |                                                           |       |                                                           |       |                                                           |                                                  |                                                               |
| TOTALS                 |                                                           | 104.67 |                                                           | 83.22 |                                                           | 9.998 |                                                           |                                                  |                                                               |

| 33 Wells<br>Well #<br>Gone<br>Active                                                               | Date<br>drilled<br>and<br>redrilled | Rate of Diversion – Nov 19, 1987        |                                                                                                                               |                                                                                                                                                                         |                                                                                                                       | Town<br>ship | Ran<br>ge | Sec-<br>tion | QQ   |
|----------------------------------------------------------------------------------------------------|-------------------------------------|-----------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|--------------|-----------|--------------|------|
|                                                                                                    |                                     | 2003<br>Cond<br>22 wells                | 2006<br>cond<br>31 wells                                                                                                      | 2007<br>cond<br>25 wells                                                                                                                                                | Stipulation<br>23 wells                                                                                               |              |           |              |      |
| 1                                                                                                  | 12/31/1926                          |                                         | 2.45                                                                                                                          | 2.45                                                                                                                                                                    |                                                                                                                       | 7S           | 34E       | 1            | NWNE |
| 2                                                                                                  | 12/31/1926                          | 3.12                                    | 2.45                                                                                                                          | 2.45                                                                                                                                                                    | 3.12                                                                                                                  | 7S           | 34E       | 1            | NWNE |
| 2                                                                                                  | 6/15/1948                           |                                         | .67                                                                                                                           | missing                                                                                                                                                                 |                                                                                                                       | 7S           | 34E       | 1            | NWNE |
| 3                                                                                                  | 12/31/1926                          | 4.23                                    | 4.23                                                                                                                          | 4.23                                                                                                                                                                    | 4.46                                                                                                                  | 7S           | 34E       | 1            | SWNE |
| 4                                                                                                  | 8/31/1931                           |                                         | 4.23                                                                                                                          | 4.23                                                                                                                                                                    |                                                                                                                       | 6S           | 34E       | 35           | NWSE |
| 5                                                                                                  | 10/1933<br>replaced 1               |                                         |                                                                                                                               | Replaced 1                                                                                                                                                              |                                                                                                                       | 6S           | 34E       | 35           | NWSE |
| 6                                                                                                  | 12/31/1936                          |                                         | 2.45                                                                                                                          | 2.45                                                                                                                                                                    |                                                                                                                       | 6S           | 34E       | 35           | NWSE |
| 7                                                                                                  | 12/31/1940                          | 4.46                                    | 4.46                                                                                                                          | 4.46                                                                                                                                                                    | 4.46                                                                                                                  | 6S           | 34E       | 35           | NWNE |
| 8                                                                                                  | 6/15/1948                           |                                         | 2.67                                                                                                                          |                                                                                                                                                                         |                                                                                                                       | 6S           | 34E       | 15           | NWSW |
| 9                                                                                                  | 6/15/1948                           |                                         | 1.00                                                                                                                          |                                                                                                                                                                         |                                                                                                                       | 6S           | 34E       | 27           | NWSE |
| 10                                                                                                 | 6/15/1948                           | 5.35                                    | 5.35                                                                                                                          | missing                                                                                                                                                                 | 6.23                                                                                                                  | 6S           | 34E       | 26           | NENW |
| 12                                                                                                 | 9/1/1953                            | 6.20                                    | 6.20                                                                                                                          | missing                                                                                                                                                                 | 6.20                                                                                                                  | 6S           | 34E       | 35           | SENE |
| 13                                                                                                 | 9/1/1953                            | 2.22                                    | 2.22                                                                                                                          | missing                                                                                                                                                                 | 3.11                                                                                                                  | 7S           | 34E       | 1            | SESE |
| 13                                                                                                 | 10/16/1958                          | 0.89                                    | .89                                                                                                                           | .89                                                                                                                                                                     |                                                                                                                       |              |           |              |      |
| 14                                                                                                 | 12/31/1955                          | 0.22                                    | .22                                                                                                                           | .22                                                                                                                                                                     | 2.23                                                                                                                  | 7S           | 35E       | 7            | NESW |
| 15                                                                                                 | 9/1/1953                            | 1.11                                    | 1.11                                                                                                                          | missing                                                                                                                                                                 | 3.34                                                                                                                  | 7S           | 35E       | 6            | NWSE |
| 15                                                                                                 | 2/24/1977                           | 2.23                                    | 2.23                                                                                                                          | missing                                                                                                                                                                 |                                                                                                                       |              |           |              |      |
| 16                                                                                                 | 10/16/1958                          | 6.67                                    | 6.67                                                                                                                          | 6.67                                                                                                                                                                    | 6.67                                                                                                                  | 6S           | 34E       | 26           | SWSE |
| 18                                                                                                 | 10/16/1958                          | 4.66                                    | 4.66                                                                                                                          | 4.66                                                                                                                                                                    | 4.66                                                                                                                  | 6S           | 34E       | 15           | NENW |
| 21                                                                                                 | 9/15/1955                           | 3.89                                    | 3.89                                                                                                                          | 3.89                                                                                                                                                                    | 3.89                                                                                                                  | 6S           | 34E       | 23           | SWNE |
| 22                                                                                                 | 10/22/1952                          | 3.68                                    | 3.68                                                                                                                          | 3.68                                                                                                                                                                    | 3.68                                                                                                                  | 6S           | 34E       | 23           | SENE |
| 23                                                                                                 | 8/15/1956                           | 4.44                                    | 4.44                                                                                                                          | 4.44                                                                                                                                                                    | 4.44                                                                                                                  | 6S           | 34E       | 23           | NWNE |
| 26                                                                                                 | 6/1/1945                            | 2.67                                    | 2.67                                                                                                                          | 2.67                                                                                                                                                                    | 2.67                                                                                                                  | 6S           | 34E       | 15           | NWNE |
| 27                                                                                                 | 12/10/1964                          | 4.10                                    | 4.10                                                                                                                          | 4.10                                                                                                                                                                    | 4.90                                                                                                                  | 6S           | 34E       | 14           | NWNW |
| 28                                                                                                 | 8/31/1951                           | 4.90                                    | 4.90                                                                                                                          | 4.90                                                                                                                                                                    | 4.90                                                                                                                  | 7S           | 34E       | 1            | NESE |
| 29                                                                                                 | 11/6/1972                           | 6.20                                    | 3.90                                                                                                                          | 3.90                                                                                                                                                                    | 4.01                                                                                                                  | 6S           | 34E       | 23           | NESW |
| 30                                                                                                 | 4/25/1976                           | 5.57                                    | 5.57                                                                                                                          | 5.58                                                                                                                                                                    | 6.23                                                                                                                  | 6S           | 34E       | 35           | NWNE |
| 31                                                                                                 | 4/25/1976                           | 8.02                                    | 8.02                                                                                                                          | 8.03                                                                                                                                                                    | 8.02                                                                                                                  | 6S           | 34E       | 15           | NESE |
| 32                                                                                                 | 4/25/1976                           | 3.45                                    | 3.45                                                                                                                          | 3.46                                                                                                                                                                    | 3.45                                                                                                                  | 6S           | 34E       | 16           | NENE |
| 33                                                                                                 | 10/1/1962                           | 0.21                                    | .21                                                                                                                           | .21                                                                                                                                                                     | 2.67                                                                                                                  | 7S           | 35E       | 18           | SENE |
| 34                                                                                                 | 2/18/1985                           | 7.00                                    | 7.00                                                                                                                          | missing                                                                                                                                                                 | 7.00                                                                                                                  | 6S           | 34E       | 15           | NESE |
| 44                                                                                                 |                                     |                                         |                                                                                                                               |                                                                                                                                                                         | 4.46                                                                                                                  | 7S           | 35E       | 16           | SWSW |
| Alameda 1                                                                                          |                                     |                                         | 1.34                                                                                                                          | 1.34                                                                                                                                                                    |                                                                                                                       |              |           |              |      |
| Alameda 2                                                                                          |                                     |                                         | 0.96                                                                                                                          | 0.96                                                                                                                                                                    |                                                                                                                       |              |           |              |      |
| Alameda 6                                                                                          |                                     |                                         | 1.70                                                                                                                          | 1.70                                                                                                                                                                    |                                                                                                                       |              |           |              |      |
| Alameda 7                                                                                          |                                     |                                         | 1.66                                                                                                                          | 1.66                                                                                                                                                                    |                                                                                                                       |              |           |              |      |
| Cfs by:<br>list,<br>active,<br>gone,<br>missing<br>active,<br>net diff<br>among<br>active<br>wells |                                     | 2003<br>22wells=95.49<br>22active=95.49 | 2006 v. 2003<br>31wells=111.65<br>22active=93.19<br>9 gone = 18.46<br>-2.3= net diff<br>among active<br>wells 2006 v.<br>2003 | 2007 v. 2003<br>25 wells=83.23<br>18active=68.44<br>7 gone =14.79<br>Missing=24.78<br>(well or inor in<br>capacity)<br>-2.27= net diff<br>among active<br>wells '07v'03 | Stip v. 2003<br>23wells=104.8<br>23active=104.8<br>well 44=4.46<br>+4.85= net diff<br>among active<br>wells stip v'03 |              |           |              |      |
| Total<br>cfs                                                                                       |                                     | 95.49 2003                              | 93.19 active<br>+2.30 well diff<br>95.49 2003                                                                                 | 68.44 active<br>+24.78 missing<br>93.22<br>+2.27welldiff<br>95.49 2003                                                                                                  | 104.80 active<br>-4.46 well 44<br>100.34<br>-4.85welldiff<br>95.49 2003                                               |              |           |              |      |

Appendix B