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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA	)	
	)	
Case No. 39576	)	Subcase Nos. 1-2068 and 1-2068Y
	)	
	)	CITY OF POCATELLO'S BRIEF ON
	)	MOTION TO ALTER OR AMEND
	)	RECOMMENDATION
_____	)	

The City of Pocatello (Pocatello), by and through its counsel of record, Beeman & Associates, hereby files its brief in support of its Motion to Alter or Amend the March 6, 2013 Special Master's Report and Recommendation (March 6 Order, amended *nunc pro tunc* on April 15, 2013).

Palisades dam was initially authorized in 1941 as the Palisades Dam project by the presentation to the President and the Congress of report and findings by the Secretary of the Interior on December 9, 1941 (House Document No. 457, 77th Congress, 1st Session), under the provisions of section 9 of the Reclamation Project Act of 1939 (53 Stat. 1187). The Bureau of Reclamation filed SRBA claim 1-2068 for Palisades, and the City of Pocatello filed SRBA claim 1-2068 Y based on the City's contract for roughly 50,000 acre-feet of storage in Palisades.

Pocatello understands that the use of storage space for municipal and industrial purposes is allowed under the Reclamation Project of 1939.

1. **The SRBA court, including proceedings before the Special Master, has an obligation to refer to and render decisions that are not in conflict with its own records. It was error for the Special Master to deny the inclusion of and consideration of Pocatello's exhibit 522 pertaining to United Water Idaho water rights associated with the municipal purpose of use under Reclamation water right 63-3614.**

The City of Pocatello tendered a copy of its Exhibit 522 to the Court and counsel at the hearing held on December 10, 2012. The contents of exhibit 522 are listed below and relate to adjudicative facts bearing on the "municipal" purpose of use claimed by the City of Pocatello for water rights 1-2068 and 1-2068Y. Reclamation's storage water right 63-3614 on the Boise River includes a municipal purpose of use; the following United Water Idaho water right records establish how the "municipal" use occurs under Reclamation's water right 63-3614:

- Exhibit 522, **Part 1:** United Water Idaho water right 63-2892 records -- including SRBA decree 63-2892, SRBA claim 63-2892, SRBA withdrawal of objection 63-2892, IDWR back file 63-2892;
- Exhibit 522 **Part 2:** United Water Idaho water right 63-31797 records -- including SRBA decree 63-31797, SRBA claim 63-31797, SRBA withdrawal of objection 63-31797;
- Exhibit 522 **Part 3:** United Water Idaho water right 63-31798 records -- including SRBA decree 63-31798, SRBA claim 63-31798, SRBA withdrawal of objection 63-31798;
- Exhibit 522, **Part 4:** United Water Idaho water right 63-31879 records -- including SRBA decree 63-31879 and SRBA withdrawal of objection 63-31879;

In particular, Exhibit 522 establishes that United Water Idaho uses Reclamation's water right 63-3614 by purchasing and leaving Reclamation water in the Boise River, *without diversion to United Water Idaho's place of use*, in order to replace/compensate/mitigate for diversions by United Water Idaho (UWI) under UWI water rights. It was error for the Special Master not to include in the record and not to take notice of these adjudicative facts. See *In re Estate of Conway*, 152 Idaho 933, 942, 277 P.3d 380, 389 (2012); also, *Martin v. Camas County*, 150 Idaho 508, 511-512, 248 P.3d 1243, 1246-1247 (2011). Pocatello's use of water right 1-2068, as

established at trial from testimony regarding Water District 01 water master reports from 1959-1968, includes a similar use of storage water without direct diversion by the City of Pocatello.

The City of Pocatello is an “upper valley entity” that is entitled to the delivery of water from Palisades reservoir “by exchange or otherwise” because the City of Pocatello is a “reservoir spaceholder” in Palisades and the City diverts “from the Snake River and its tributaries above American Falls Dam.”

These issues were addressed in the “historic use” litigation and the resulting remark for the priority date element of Palisades water right 1-2068. (The remark, in the original February 9, 2011 SRBA decision on challenge, was reconfirmed by the February 28, 2012 SRBA order following *remittitur* from the Idaho Supreme Court. Both decisions are contained in Exhibit 519.)

The United States, after consultation with the Watermaster and the Water District 1 Advisory Committee, may release stored water from Jackson Lake and Palisades reservoirs for the maintenance of power production at Palisades Dam powerplant and may store such water in American Falls Reservoir. The release of such water will be confined, however, when it appears to the Secretary that American Falls, Palisades, and Jackson Lake reservoirs will fail to fill, to not more than 1,000 cfs for minimum firm power production and that amount which can be stored in American Falls Reservoir; and no such release shall be made that will preclude the later delivery of water, by exchange or otherwise, to the upper valley entities entitled thereto. "Upper valley entities" shall mean those reservoir spaceholders diverting from the Snake River and its tributaries above American Falls Dam.

The last sentence of the remark was written to clarify that the City of Pocatello was an upper valley entity entitled to “delivery of water, by exchange or otherwise” from Palisades reservoir.

(Note: Pocatello has never withdrawn its objections in 1-2068, although the February 9, 2011 SRBA decision – footnote 2, page 3, states, “The City of Pocatello also filed *Objections*, but they were subsequently withdrawn.”)

Pocatello notes that the portions of Exhibit 517 which were admitted also establish the exchange of Pocatello’s Palisades storage water in 1994 for purposes of artificial recharge in the

Eastern Snake Plain Aquifer. Specifically, the IDWR and Reclamation documentation is included from the presentation at the June 1994 Idaho Water Users Association Water Law Seminar.

- 2. It was error for the Special Master to determine that an accomplished transfer and the diversion of storage water by the City under water right 1-2068 or 1-2068Y were necessary for the inclusion of a municipal purpose of use under water right 1-2068 or 1-2068Y.**

As discussed above, adjudicative facts in basin 63 (Boise river drainage) establish the SRBA decree of a municipal purpose of use for Reclamation's storage water right 63-3614, although the municipal use by United Water Idaho does not involve UWI's diversion of the storage water.

Similar to UWI in the Boise drainage, Pocatello has the legal right to divert storage water from the Snake River drainage. The February 19, 2008 decision of the Idaho Supreme Court denying Pocatello's federal law claim 29-11609 held that Pocatello was granted "access to surface water sources on the Reservation, along with the opportunity to establish a water right under state law." Exhibit 518 is this decision. The holding is on page 4 of the decision. Certiorari was denied by the U.S. Supreme Court on December 8, 2008. City of Pocatello v. US and Shoshone-Bannock Tribes, Idaho Supreme Court Opinion (February 19, 2008; cert den. December 8, 2008); parallel cite: Pocatello v. State, 145 Idaho 197; 180 P.3d 1048.

Exhibit 507 which was admitted includes the consent decrees and maps of the 1990 Fort Hall Indian Water Rights Agreement and the Fort Hall Irrigation Project showing the 90-126 acres within the City's municipal boundaries for which the City of Pocatello has contracts for use of Fort Hall Irrigation Project water diverted from the Snake River. The maps show that the North canal and the Highline canal are the delivery system across the Reservation to the City of Pocatello. The Fort Hall Irrigation Project is served by water right 1-10248 from the Snake

River, in addition to water rights in the Blackfoot River drainage (27-11560, 27-11561 and 25-13615).

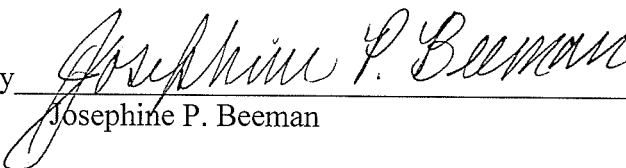
Apart from the physical presence of a delivery system that provides Snake River water to the City of Pocatello, and the City's independent legal right to divert Snake River water for its municipal purposes, the City of Pocatello does not require an accomplished transfer under Idaho Code 42-1425 for the inclusion of a municipal purpose of use under water right 1-2068 or 1-2068Y. The City's use of storage water from Palisades is documented in the Water District 01 water delivery records which were the object of testimony at trial, and that use predates the mandatory transfer legislation which went into effect in 1969. Idaho Code 42-1425 is an amnesty statute for water users who did not comply with the mandatory transfer legislation after its passage in 1969. The Court and counsel are respectfully referred to Pocatello's briefing on this issue in the matter of Pocatello's state law claims.

3. The City of Pocatello was not a party to the September 25, 2012 Stipulation regarding inclusion of the "Pioneer ownership remark" in subcase 1-2068, and it is error to include the remark at this time.

The record of documents in this proceeding establishes that Pocatello's objection about an ownership remark has not been resolved.

Dated this 13th day of May 2013.

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

By 
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May 2013, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

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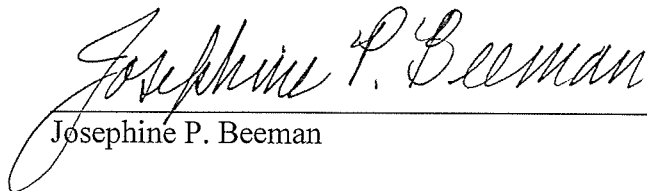
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