

T5452 CITY OF POCATELLO

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

JUL 01 1999

Department of Water Resources
Eastern Region

TRANSFER OF WATER RIGHT

TRANSFER NO. 5452
WATER RIGHT NO(S). 29-02274/29-02338/29-07375

This is to certify that: CITY OF POCA TELLO
PO BOX 4169
POCA TELLO ID 83205

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
Right No. 29-02274 : MUNICIPAL Priority: 06/15/1948	01/01 to 12/31	21.00 CFS
Right No. 29-02338 : MUNICIPAL Priority: 09/01/1953	01/01 to 12/31	14.76 CFS
Right No. 29-07375 : MUNICIPAL Priority: 02/24/1977	01/01 to 12/31	3.34 CFS
TOTAL:		* 39.10 CFS

SOURCE
GROUNDWATER

LOCATION OF POINT(S) OF DIVERSION:

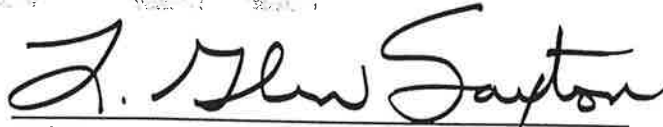
NESE , Sec. 10, Township 06S, Range 33E
BANNOCK County
NESE , Sec. 12, Township 06S, Range 33E
POWER County
SWNE , Sec. 15, Township 06S, Range 33E
NWSW , Sec. 15, Township 06S, Range 34E
NENW , Sec. 26, Township 06S, Range 34E
NWSE , Sec. 27, Township 06S, Range 34E
SENE , Sec. 35, Township 06S, Range 34E
SENE , Sec. 35, Township 06S, Range 34E
NWSE , Sec. 35, Township 06S, Range 34E
SESE , Sec. 1, Township 07S, Range 34E
SWSW , Sec. 16, Township 07S, Range 35E
BANNOCK County

TRANSFER NO. 5452
WATER RIGHT NO(S). 29-02274/29-02338/29-07375

CONDITIONS OF APPROVAL AND REMARKS

1. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
2. Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.
3. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
4. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
5. Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
6. The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.
7. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.
- * 8. The total instantaneous diversion of water from all points of diversion under Transfer 5452 shall not exceed 39.10 cfs.
9. The well(s) previously used under these rights shall be abandoned in a manner which complies with Department well abandonment rules.
10. Place of use is located within the City of Pocatello and the surrounding service area.
11. Two (2) points of diversion are located within SENE, and three (3) points of diversion are located within NWSE, of S35, T06S, R34E.

Dated this 28th day of June, 19 99


Chief, Water Allocation Bureau

MEMORANDUM

TO: Files 29-02274, 29-02338 & 29-07375

FROM: Pam Skaggs/^{PS}State Office

SUBJECT: Transfer 5452

DATE: June 18, 1999

Transfer 5452 changes and adds points of diversion under Rights 29-02274, 29-02338 and 29-07375. The city has closed some of their well due to groundwater pollution. The transfer identifies all the wells currently used and the addition of a new well under these combined municipal use rights.

A map identifying the specific locations of the points of diversion has been requested from region staff. Recommended conditions include drilling permit requirements, well abandonment requirements, water quality, multiple points of diversion/measuring devices, annual measuring & reporting, and standard transfer conditions.

APPLICATION FOR TRANSFER OF WATER RIGHT
PART 1Name of applicant City of Pocatello Phone 208 234-6174Post Office address PO Box 4169, Pocatello, Idaho 83205

A. PURPOSE OF TRANSFER

1. ☒ Change point of diversion ☒ Add diversion point(s) ☐ Change place of use
☐ Change nature of use ☐ Change period of use ☒ Other Replacement of closed wells by a

2. Describe the reason for the proposed changes new.

Due to loss of several wells by groundwater pollution the City of Pocatello wants to replace them and to reflect the diversions (points of diversion) as now operating due to the groundwater pollution.

B. DESCRIPTION OF RIGHT(S) OR PORTION THEREOF, AFTER THE REQUESTED CHANGE

1. Right Number	Priority	Amount (cfs/ac-ft)	Nature of Use	Period of Use
<u>29-02274</u>	<u>06-15-1948</u>	<u>21.00</u>	<u>Municipal</u>	<u>1 Jan</u> to <u>31 Dec</u>
<u>29-02338</u>	<u>09-01-1953</u>	<u>14.76</u>	<u>Municipal</u>	<u>1 Jan</u> to <u>31 Dec</u>
<u>29-07375</u>	<u>02-24-1977</u>	<u>3.34</u>	<u>Municipal</u>	<u>1 Jan</u> to <u>31 Dec</u>
				to

2. Total amount of water being transferred 39.10 cubic feet per second and/or _____ acre-feet per annum.3. Source of water Groundwater tributary to _____

4. Point(s) of Diversion:

Lot	1/4	1/4	1/4	Sec.	Twp.	Rge.	County	Local name for diversion
				<u>16</u>	<u>7S</u>	<u>35E</u>	<u>Bannock</u>	<u>NEW</u>
				<u>See Attachment</u>				

5. Lands irrigated or place of use: within the city limits of Pocatello and vicinity

Twp.	Rge.	Sec.	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	NE 1/4	NW 1/4	SW 1/4	SE 1/4	

Total acres _____

PART 1

6. General Information:

a. Description of diversion system wells & pumps for the city municipal system

b. Are the lands from which you propose to transfer the water right subject to any liens, deeds of trust, mortgages, or contracts? _____ Yes _____ No. If yes, provide a notarized statement from the holder of the lien, deed of trust, mortgage or contract agreeing to the proposed changes.

c. Describe the affect on the land now irrigated if the place of use is changed pursuant to this transfer:

d. Remarks:

Because of the groundwater pollution problems the City of Pacatello is forced to seek a new well location as a replacement well. It also must pump additional water from existing wells to make up the water from the wells that have been closed. Several wells now in use are in the path of the plume.

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Transfer of Water Rights No. _____

And said application is hereby _____, subject to the following limitations and conditions:

Witness my hand this _____ day of _____, 19 _____

3 87

T5452

POINTS OF DIVERSION

NESE, SEC 10, T6S R33E BANNOCK CO.
NESE, SEC 12, T6S R33E POWER CO.
SWNE, SEC 15, T6S R33E BANNOCK CO.
NWSW, SEC 15, T6S R34E
NENW, SEC 26, T6S R34E
NWSE, SEC 27, T6S R34E
SENE, SEC 35, T6S R34E
NWSE, SEC 35, T6S R34E 3 POINTS OF DIVERSION
SENE, SEC 35, T6S R34E 2 POINTS OF DIVERSION
SESE, SEC 1, T7S R34E

PART 2

TRANS NO. 5452

A. DESCRIPTION OF RIGHT AS RECORDED:

Water Right No. 29-02274

STAGE: LICENSE

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
MUNICIPAL	to	21.00 CFS

SOURCE

GROUNDWATER

Priority: 06/15/1948

LOCATION OF POINT(S) OF DIVERSION:

NWSW , Sec. 15, Township 06S, Range 34E
NENW , Sec. 26, Township 06S, Range 34E
NWSE , Sec. 27, Township 06S, Range 34E
NWSE , Sec. 35, Township 06S, Range 34E
SENE , Sec. 1, Township 07S, Range 34E
BANNOCK County

PLACE OF USE: See RemarksCONDITIONS/REMARKS:

1. 2 P/D IN SENE, S1, T7S, R34E.
2. 4 P/D IN NWSE, SEC. 35, T6S, R34E.
3. P/D'S WERE DETERMINED FROM FIELD REPORT.
4. P/U WITHIN CITY OF POCA TELLO & VICINITY.

PART 2

TRANS NO. 5452

A. DESCRIPTION OF RIGHT AS RECORDED:

Water Right No. 29-02338

STAGE: LICENSE

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
MUNICIPAL	to	14.76 CFS

SOURCE

GROUNDWATER

Priority: 09/01/1953

LOCATION OF POINT(S) OF DIVERSION:

NESE , Sec. 10, Township 06S, Range 33E
NESE , Sec. 12, Township 06S, Range 33E
SWNE , Sec. 15, Township 06S, Range 33E
SENE , Sec. 35, Township 06S, Range 34E
SESE , Sec. 1, Township 07S, Range 34E
NWSE , Sec. 6, Township 07S, Range 35E
BANNOCK County

PLACE OF USE: See RemarksCONDITIONS/REMARKS:

1. P/D ALSO IN POWER CO.
2. P/U WITHIN CITY OF POCA TELLO & VICINITY.

PART 2

TRANS NO.

5452

A. DESCRIPTION OF RIGHT AS RECORDED:

Water Right No. 29-07375

STAGE: LICENSE

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
MUNICIPAL	01/01 to 12/31	3.34 CFS

SOURCE

GROUNDWATER

Priority: 02/24/1977

LOCATION OF POINT(S) OF DIVERSION:NWSE , Sec. 6, Township 07S, Range 35E.
BANNOCK CountyPLACE OF USE: See RemarksCONDITIONS/REMARKS:

1. P/U WITHIN CITY LIMITS OF POCA TELLO.

PART 3

B. CHANGES IN NATURE OF USE

1	New Nature of Use	Amount (cfs/ac-ft)	Hours/days/year	Period of Use
				to
				to

2. Quantity and quality of return flows and location of discharge:

3. Describe effects on other water uses resulting from the proposed change:

I hereby assert that no one will be injured by such change and that the change does not constitute an enlargement in use of the original right. The information contained in this application is true to the best of my knowledge.

I understand that any willful misrepresentations made in this application may result in voiding its approval.

[Signature]
(Signature of Applicant)

Subscribed and sworn to before me this 19th day of April, 19 99.

[Signature]
(Notary Public)

My commission expires 1-22-04

FOR DEPARTMENT USE ONLY

Transfer contains 7 pages and _____ attachments

Received by _____ Date _____ Protest filed by _____

Prelim. check by _____ Fee \$100⁰⁰

Receipted by DN Date April 20, 1999 E024925

Published in Idaho State Journal - Statewide Copies of protest forwarded by _____

Pub. dates May 6 & 13, 1999 Hearing held by _____ Date _____

Watermaster recommendation requested on _____ Recommended for ☐ approval ☐ denial

_____ rec'd. _____ by _____

Copy of transfer sent to lien holder _____

704 AUG 18 PM 4:38

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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

In Re SRBA

Subcase 29-271 (See Exhibit A)

Case No. 39576

ORDER ON SUMMARY JUDGMENT

I. PROCEDURAL BACKGROUND

The above subcases were claimed in the SRBA by the City of Pocatello (hereafter “Pocatello”) under a state basis. (Pocatello claimed the same water use under its federal theory under subcase number 29-11609.) *Director’s Reports* were issued by the Idaho Department of Water Resources (hereafter “IDWR”) on the state-based claims. Pocatello filed *Objections* to the *Director’s Reports* because it disagreed with conditions placed on the “other provisions necessary” element. The condition states:

To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No. ____, located in [legal description] on [date] in the amount of _____ cfs.

Pocatello filed *City of Pocatello's Motion for Summary Judgment on IDWR's Authority Under I.C. § 42-1425* (hereafter "*Summary Judgment Motion*") on May 4, 2006. The *Summary Judgment Motion* argues that the condition is improper as a matter of law. First, Pocatello asserts that formal transfer No. 5452 was approved pursuant to I.C. § 42-222 without a condition. Thus, any conditions added in a *Director's Report* are impermissible collateral attacks on the administrative decision.

Second, Pocatello asserts the “accomplished transfer” statute, I.C. § 42-1425, allows for changes in water rights and that these “accomplished transfers” claims should be recognized without any conditions.

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EXHIBIT 6

8-18-06

The State of Idaho opposed the *Summary Judgment Motion*. A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, Americans Falls Reservoir District #2, and the Minidoka Irrigation District filed a *Joint Response to City of Pocatello's Motion for Summary Judgment* generally supporting the *Summary Judgment Motion*. A hearing on the *Summary Judgment Motion* was held on July 12, 2006.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any," to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 425 P.2d 362 (1969).

III. FACTS

The following facts are not in dispute.

1. IDWR issued Transfer No. 5452 to Pocatello on June 28, 1999. (Attached hereto as Exhibit 1)
2. Transfer No. 5452 refers to water right nos. 29-02274, 29-02338, and 29-07375 as those subject to the transfer.
3. Transfer No. 5452 did not include the condition at issue under the "Conditions of Approval and Remarks" section.
4. The *Director's Reports* for claims 29-02274, 29-02338, and 29-07375 did not add any conditions. (Attached hereto as Exhibit 2)
5. Other state-based claims filed by Pocatello assert transfers under the "accomplished transfer" statute, I.C. § 42-1425.
6. The *Director's Reports* for some of these "accomplished transfer" claims include a condition under the "other provisions necessary" element which states:

To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No____, located in [legal description] on [date] in the amount of ____ cfs.

7. IDWR filed a *706 Report* relating to Pocatello's claims. In the *706 Report*, a similar condition is recommended:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from: ____

8. These subcases were not "remanded" to IDWR.

IV. ANALYSIS

A. Transfer No. 5452

Pocatello argues that IDWR may not add a condition to a transferred water right if the transfer was approved without the condition pursuant to I.C. § 42-222. It is undisputed that in 1999, Pocatello transferred the water rights relating to 29-2274, 29-2338, and 29-7375. IDWR approved the transfer without adding the condition.

Pocatello points out that adding a material change to a water right subject to a formal transfer decision is an impermissible collateral attack on an administrative decision. The SRBA Court generally disfavors such collateral attacks. *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" issue*, subcases 36-02708 *et al.* (December 29, 1999) However, IDWR did not include the condition in the recommendations for the three enumerated water rights 29-2274, 29-2338, or 29-7375.

At oral argument, Pocatello argued that the condition was included in other subcases which relate to Transfer No. 5452. Unfortunately neither Pocatello nor the other parties could identify the subcases to which this argument applies. It is inappropriate for the court to grant summary judgment regarding unidentified subcases.

B. Idaho Code § 42-1425

Pocatello has multiple state-based claims that rely on the accomplished transfer statute. Idaho Code § 42-1425 was enacted to address changes in established water rights that were made in violation of Idaho's mandatory transfer procedures. The statute sets forth:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19,

1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.

I.C. § 42-1425(2).

The statute allows SRBA claimants to assert water rights with changes to the elements if three components exist:

1. The change was made before November 19, 1987;
2. No other water rights existing on the date of the change were injured; and
3. The change did not result in an enlargement of the right.

The statute establishes a procedure for evaluating claims based on an accomplished transfer.

If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights.

I.C. § 42-1425(2)(a). (Emphasis added.)

1. Legality of the Condition

Pocatello argues that the condition placed on its accomplished transfer is improper. Pocatello's argument is twofold. First, Pocatello argues that the condition is improper because these subcases were not "remanded" to IDWR as set forth in I.C. § 42-1425(2)(a).

Second, Pocatello argues that the condition is improper as a matter of law because it seeks to prevent **potential** injury rather than actual injury. Pocatello bases this argument on language from the *706 Report* which states that the condition was recommended "to prevent injury that **could result** from allowing this practice." *706 Report* at 15.

Pocatello asserts that its accomplished transfers did not injure water rights existing on the date of the change. IDWR concluded that water rights existing on the date of the changes were injured by the change and added the condition. *706 Report* at 15.

Pocatello reads the *706 Report* language as improperly looking at prospective, not actual injury. However, construing the language in favor of the non moving party shows that it addresses actual injury. The injury IDWR discusses is to the priority of rights on a given source. Injury to a water right would occur when another right takes precedence. For example, if a change in the point of diversion of Pocatello's wells allows a portion of its water rights to be delivered before existing water rights, those existing water rights are injured. Depending on conditions such as precipitation and weather, the damages may not appear immediately. Immediate injury to priority resulting in future damages appears to be just what IDWR was trying to prevent with the condition. The *706 Report* raises genuine issues of material fact on the injury issue. Therefore, this Special Master declines to strike the conditions under the summary judgment standard.

2. Remand Provision

Idaho Code § 42-1425 requires that the district court "shall remand the water right to the director for further hearing" if an objection is filed to a claim asserting an accomplished transfer.

Pocatello objected to the *Director's Report* because it disagreed with the conditions. Thus it would appear that the statutory directive of a remand has been met.

It is interesting to note that parties to the SRBA have not previously requested a formal "remand" to IDWR because IDWR regularly receives additional information from parties during the litigation process and supplements or amends its recommendations when necessary. Parties may provide additional information to IDWR, and IDWR may consider that information without a formal remand.

However duplicative a formal remand may be, it is provided for when an objection is filed relating to I.C. § 42-1425. Here, an objection was filed that relates to the accomplished transfer portion of the claim. To the extent Pocatello seeks a formal remand to IDWR, the motion is **granted**. These subcases are "remanded" to IDWR, with the Special Master retaining concurrent jurisdiction. The remand will consist of additional information or evidence being presented to IDWR. After IDWR considers the additional information, its conclusions may be reported in an *Amended Director's Report* or a *Supplemental 706 Report*. The *Amended*

Director's Report or *Supplemental 706 Report* should contain explanatory material stating the basis for its recommendation and should address injury to existing water rights. To be clear, the remand is not intended to be a separate administrative transfer proceeding, but is to be part of the record for this case.

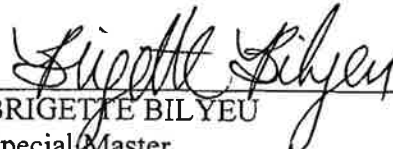
V. CONCLUSION

The *Motion for Summary Judgment* is **denied** in part and **granted** in part. There are no facts of record showing that IDWR added conditions to the subcases identified in Transfer No. 5452. If other subcases relating to Transfer No. 5452 are identified at trial, the court may consider facts and argument relating to transfer No. 5452 at that time. However, there are insufficient facts of record supporting a summary judgment ruling relating to Transfer No. 5452.

The facts of record regarding Pocatello's claimed accomplished transfers indicate that IDWR considered the injury question which is part of the inquiry under I.C. § 42-1425. IDWR apparently recommended conditions to prevent injury to existing water rights. No facts of record or legal arguments presented here support a finding that the condition is improper as a matter of law. Whether IDWR's conclusion on injury is correct is a matter for trial.

Finally, I.C. § 42-1425 provides for a remand to IDWR if an objection is filed "to a claim for accomplished change" Pocatello's objections dispute the conditions recommended by IDWR. Therefore, the objections appear to come within the statutory language "an objection . . . filed to a claim for accomplished change." Therefore, these subcases are "remanded" to IDWR for the purpose of allowing Pocatello to present additional evidence and information regarding the condition. The Special Master retains concurrent jurisdiction. All information must be presented to IDWR on or before August 31, 2006. IDWR should report its additional conclusions in a *Supplemental 706 Report*. The *Supplemental 706 Report* is due September 7, 2007.

DATED: August 18, 2006.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 37723-2010

IN RE: SRBA CASE NO. 39576

CITY OF POCA TELLO,

Petitioner-Appellant,

v.

THE STATE OF IDAHO,

Respondent.

Boise, November 2011 Term

2012 Opinion No. 54

Filed: March 22, 2012

Stephen W. Kenyon, Clerk

THIS IS A SUBSTITUTE
OPINION. THE COURT'S
PRIOR OPINION DATED
JANUARY 5, 2012
IS HEREBY WITHDRAWN.

Appeal from the District Court of the Fifth Judicial District of the State of Idaho,
in and for Twin Falls County. The Hon. Eric J. Wildman, District Judge.

The judgment of the district court is affirmed.

Josephine Beeman, Beeman & Associates, P.C., Boise, argued for appellant.

Shasta Kilminster-Hadley, Deputy Attorney General, Boise, argued for
respondent.

EISMANN, Justice.

This is an appeal from the decision of the district court in the Snake River Basin Adjudication holding: (a) that Pocatello cannot use its wells as alternate points of diversion for its surface water rights; (b) that it can use its interconnected wells as alternate points of diversion for all of the associated water rights on the condition that doing so will not change the priority date and quantity of water that can be pumped from each well; (c) that one groundwater right was properly classified as for an irrigation purpose; and (d) that Pocatello failed to establish earlier priority dates for two of its groundwater rights. We affirm the judgment of the district court.

I.

Factual Background

In 1985, the legislature enacted legislation to commence an adjudication of the water rights of the Snake River basin. On June 17, 1987, the Director of the Idaho Department of Water Resources (IDWR), filed a petition in the name of the State to begin the Snake River Basin Adjudication (SRBA), and on November 19, 1987, the adjudication was commenced. In April 1990, the City of Pocatello filed its water right claims, and it later filed amended claims. Pursuant to its statutory duties, IDWR filed *Director's Reports* with respect to Pocatello's claims. The disputed matters were tried to a Special Master, and Pocatello then challenged several of the Special Master's findings of fact and conclusions of law in the district court. The court entered a judgment affirming the Special Master's recommendations, and Pocatello filed a motion to correct or amend the judgment. After that motion was denied, it timely appealed.

Water for Pocatello's in-town service area is pumped into an interconnected distribution system from twenty-two wells supplied by twenty-one groundwater rights.¹ The wells were developed at different times and are located throughout the in-town service area. Because the interconnected water distribution system was in operation prior to November 19, 1987, Pocatello contended, pursuant to Idaho Code section 42-1425, that each of these wells had become an alternate point of diversion for each of the twenty-one water rights, which would permit it to withdraw water under its most senior groundwater rights from any well. IDWR recommended that each well in the system could serve as an alternate point of diversion for each of the twenty-one water rights if the water rights were subject to a condition stating, "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello well [description] in the amount of ___ cfs." IDWR did not recommend that condition for three of Pocatello's groundwater rights that supplied water to the in-town system (29-2274, 29-2338, and 29-7375) because those rights were subject to administrative transfer No. 5452, which did not include the condition and occurred after 1987. Pocatello also had a separate water delivery system to provide water to its airport. That system

¹ These water rights are: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637 and 29-13639.

was supplied by three water rights pumped from three wells. IDWR recommended that the condition be attached to two of those water rights (29-7450 and 29-13638). The Special Master recommended that the condition be attached to the water rights as suggested by IDWR, and the district court agreed.

Pocatello also has four surface water rights, one in Gibson Jack Creek and three in Mink Creek.² It contended that because those creeks had previously been a source of potable water and they feed the aquifer from which it pumps water from its wells, those wells were alternate points of diversion for the surface water rights. The Special Master concluded that the creeks and the aquifer were separate sources, and Idaho Code section 42-1425(2) did not provide for changes in the source of a water right. The district court agreed.

In 1984, Pocatello submitted an application for a groundwater right, stating that the proposed use was to irrigate crops located outside the city. On July 1, 1987, the city asked that the proposed use be changed to domestic, commercial, municipal, and industrial, but IDWR refused to do so. Based upon the city's application, in January 2003 IDWR issued the city license number 29-7770 for an irrigation purpose. Pocatello contended that this water right should be changed to a municipal purpose pursuant to Idaho Code section 42-1425(2) because it was using the water in its biosolids program. The Special Master rejected that argument because the statute only applied to changes in use of water rights that occurred prior to November 19, 1987. Because the city did not obtain this water right until January 2003, the statute did not apply. The district court agreed with the Special Master.

The *Director's Report* recommended a priority date of July 16, 1924, for water right number 29-13558 and a priority date of October 22, 1952, for water right number 29-13639. Pocatello contended that the priority dates should be 1905, and December 31, 1940, respectively. The Special Master concluded that the city had failed to prove the claimed earlier dates. However, because the evidence showed that the well related to water right 29-13639 preexisted the date of the application for a license, the Special Master moved the priority date of that right forward by one day to October 21, 1952. The district court upheld the Special Master, although it affirmed moving the priority date of 29-13639 only because the state did not object.

² The Mink Creek rights are 29-271, 29-272, and 29-273, and the Gibson Jack Creek right is 29-4222.

II.

Did the District Court Err in Upholding the Condition Attached to Pocatello's Ground Water Rights?

Pocatello contended that each of the wells in its two interconnected water distribution systems had become an alternate point of diversion for all water rights associated with that system pursuant to Idaho Code section 42-1425(2). That statute provides, insofar as is relevant, as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication . . . may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.

IDWR recommended that each well could be an alternate point of diversion for all water rights associated with an interconnected system only if the water rights had an attached condition stating, "To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from Pocatello well [description] in the amount of ___ cfs." IDWR asserted that the condition was necessary to avoid injury to other water rights and to assist in the administration of water rights in times of shortage. The district court agreed, writing:

Specifically, injury to an existing water right is not limited to the circumstance where immediate physical interference occurs between water rights as of the date of the change. Injury also includes the diminished effect on the priority dates of existing water rights in anticipation of there being insufficient water to satisfy all rights on a source (or in this case a discrete region of the aquifer) and priority administration is sought. Even though the priority administration may occur at some point in the future, injury to the priority date occurs at the time the accomplished transfer is approved.

The court also noted, "The very fact that Pocatello contests the condition is an acknowledgment that without the condition the priorities of existing water rights will be diminished in favor of the alternative point of diversion for one of Pocatello's more senior rights. i.e injury."

Pocatello claims that the district court erred in requiring the condition in order to prevent injury to any existing water rights, where no actual injury to any other water right was shown. According to Pocatello, “[N]o injury analysis should even be triggered under § 42-1425 unless there has been a third party objection filed to a claim” and “Future injury is also not a proper concern under the terms of § 42-1425, as only injuries to the other water right holders on the date of the change could justify denial of a claim.” Pocatello is wrong on both counts.

Pocatello’s water distribution system consists of twenty-two wells that each pump water into an interconnected distribution system, allowing the entire distribution system to be the place of use for each well. When each well began diverting water, it had an associated water right with a specific priority date and a specific quantity of water that could be pumped from the well. Idaho Code section 42-1425 does not permit Pocatello to change the priority date of the water right associated with any well or the quantity of water that can be pumped from the well. It validates “[a]ny change of place of use, point of diversion, nature or purpose of use or period of use of a water right . . . [that was accomplished] prior to November 19, 1987, . . . provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right.” I.C. § 42-1425(2). “Proceeding under section 42-1425 a water user cannot obtain a transfer that constitutes either an enlargement of the water right or otherwise injures water rights existing on the date of the change.” *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 458, 926 P.2d 1301, 1305 (1996).

“An increase in the volume of water diverted is an enlargement and is not allowed under I.C. § 42-1425.” *Id.* Likewise, “there is *per se* injury to junior water rights holders anytime an enlargement receives priority.” *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). “Priority in time is an essential part of western water law and to diminish one’s priority works an undeniable injury to that water right holder.” *Jenkins v. Idaho Dept. of Water Res.*, 103 Idaho 384, 388, 647 P.2d 1256, 1260 (1982). “The limitations in section 42-1425 protect other water users from injury to their rights resulting from *a recognition of the transfers* that are memorialized in the adjudication.” *Fremont-Madison*, 129 Idaho at 458, 926 P.2d at 1305 (emphasis added). If Pocatello could have each well be an alternate point of diversion for each water right without the attached condition, as stated by IDWR in its supplemental *Director’s Report*, “the City would be allowed to withdraw

water under its most senior priority water right from any well location.” Recognizing the transfers without the attached condition would injure junior water rights holders by diminishing their priorities. The district court did not err in upholding the attached condition.

III.

Did the Department of Water Resources Have the Authority to Recommend the Condition that Was Attached to Pocatello’s Ground Water Rights when It Had Not Done So in Prior Similar Cases?

Pocatello argues on appeal that the condition recommended by IDWR was a change from the position it had taken in prior similar cases involving cities with multiple wells and an interconnected delivery system and that it could not make that change without going through the rule-making process. Pocatello did not timely raise this issue in the district court.

In its post-trial brief submitted to the Special Master, Pocatello argued: “When IDWR recommended Pocatello’s state law claims in 2003, it added condition language to every water right recommended with alternate points of diversion under the accomplished transfer statute. IDWR’s inclusion of the condition provision is a change in position that it instituted in 2003.” However, it did not include that issue in its challenge to the district court of the Special Master’s recommendations.³ It raised that issue for the first time to the district court in its motion pursuant to Rule 59(e) of the Idaho Rules of Civil Procedure to alter or amend the judgment.

³ In its opening brief on its challenge to the district court, Pocatello listed the issues as follows:

A. Consideration of Complex Factual Matters in Pocatello’s Trial Below.

1. Was it error as a matter of law for the Special Master to approve IDWR’s condition on ground water rights for Pocatello’s interconnected well system when consideration of the condition required proceedings counter to the processes endorsed by the Idaho Supreme Court decisions in *Fremont-Madison* and *American Falls*?

B. Conditions on the Water Rights for the Interconnected Well System.

1. Was it error as a matter of law for the Special Master to conclude that Pocatello could not have its interconnected wells decreed as alternate points of diversion for its municipal groundwater rights under the accomplished transfer statute unless the decree included a condition to protect junior water rights?

2. Did the Special Master commit error and impermissibly constrain Pocatello’s exercise of its water rights by recommending several of Pocatello’s groundwater rights claimed under the accomplished transfer statute with condition language that identifies nonexistent wells?

“The purpose of motions under that rule is ‘to allow the trial court . . . to correct errors both of fact and law that had occurred in its proceedings.’ Consideration of I.R.C.P. 59(e) motions must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.” *First Sec. Bank of Idaho, N.A. v. Webster*, 119 Idaho 262, 266, 805 P.2d 468, 472 (1991) (citations omitted). “A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.” *Kona Enters, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 (2008); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1, pp. 127-28 (2d ed. 1995); 47 Am. Jur. 2d *Judgments* § 658 (2006). Such motion cannot be used to present new information that the trial

3. Was it an error as a matter of law for the Special Master to conclude that the Affidavit of Josephine P. Beeman in Support of Pocatello’s Post-Trial Brief submitted additional evidence in violation of pre-trial orders?

4. Was it an error as a matter of law for the Special Master to conclude that placing a restrictive condition on five wells claimed as alternate points of diversion for Pocatello’s interconnected groundwater rights under the accomplished transfer statute did not amount to a collateral attack on Pocatello’s approved Formal Transfer No. 5452, which listed the same five wells as alternate points of diversion without the condition?

C. Wells as Alternate Points of Diversion for Surface Water Rights.

1. Was it error as a matter of law for the Special Master to conclude that in order to obtain an SRBA decree for an accomplished transfer claim of groundwater points of diversion for surface water rights, the City of Pocatello must first meet a burden of proof that its surface and groundwater points of diversion draw from the “same source” within these hydraulically connected sources?

2. Did the Special Master err as a matter of law by using incorrect standards of law to determine whether Pocatello’s surface water rights on Mink Creek and Gibson Jack Creek were closely connected enough to Pocatello’s interconnected groundwater wells to be considered the same source?

(Footnotes omitted.) The only reference to IDWR changing its position was in connection with Pocatello’s argument that the Special Master erred in excluding three exhibits attached to the post-trial affidavit of Pocatello’s counsel. In its brief, Pocatello argued: “Throughout the SRBA proceedings related to its state law claims, Pocatello has repeatedly raised the overarching issue that IDWR changed its position regarding accomplished transfers under I.C. § 42-1425. The exhibits were not ‘new evidence’ constituting a ‘trial by ambush’ as described in *Shelak v. White Motor Co.*” (Footnote omitted). Not surprisingly, the district court did not address the issue of IDWR’s change in position in its initial decision. Pocatello raised it in its motion to alter or amend the judgment, and the district court then rejected the argument stating: “However, it appears that the ‘change in position’ that Pocatello refers to is a better understanding of conjunctive management and aquifer resources in the State of Idaho. . . . The Department should not be hindered by prior misconceptions or misunderstandings of such a quickly evolving area of the law.”

court did not have before it rendered its judgment. *Marcher v. Butler*, 113 Idaho 867, 870, 749 P.2d 486, 489 (1988). A Rule 59(e) motion cannot be used to raise issues and offer evidence that, in hindsight, the litigant wishes it would have presented prior to the entry of a final judgment. Because this issue had not been raised to the district court prior to the entry of judgment, it could not be raised thereafter by a motion under Rule 59(e). Therefore, we will not address it on appeal.

IV.

Did the District Court Err in Holding that the Condition Applied to Water Rights Acquired Prior to May 26, 1969?

On appeal, Pocatello asserts, “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.” It did not raise that issue in the district court until it filed its motion to amend the judgment pursuant to Rule 59(e) of the Idaho Rules of Civil Procedure. In that motion, it argued for the first time to the district court that the condition proposed by IDWR could not apply to any water rights acquired prior to May 26, 1969, because prior to that date administrative approval was not required to change a point of diversion.

Whether Pocatello had changed the point of diversion for any of its wells prior to May 26, 1969, was an issue of fact. Merely connecting the wells to a common distribution system would not have changed the point of diversion for any of its water rights. The special master did not make any findings on that issue, undoubtedly because Pocatello did not raise it before the master.

Following the trial before the master, Pocatello submitted a post-trial brief, the first line of which stated, “This brief addresses all of the issues presented in the Court’s six-day trial of Pocatello’s 38 state-law SRBA claims.” Pocatello listed the issues tried as follows:

- The ‘OTHER PROVISIONS NECESSARY’ remark recommended for 20 ground water rights associated with the City’s interconnected culinary system.
- The recommended denial of the City’s interconnected culinary wells as alternate points of diversion for the Mink Creek and Gibson Jack Creek surfacc water rights.
- The irrigation purpose of use recommended for Water Rights 29-7118, 29-7119, and 29-7770.

- The priority dates for Water Rights 29-13558 and 29-13639.

In the portion of its brief entitled “Statement of the Case,” it asserted, “Ultimately, Pocatello’s claims for its integrated culinary system show the City’s knowledge of and compliance with the SRBA’s ‘accomplished transfer’ statute, Idaho Code 42-1425.” In the footnote to this statement, it said, “On April 25, 2003, Pocatello filed 32 amended SRBA claims; Pocatello amended 22 of these claims to include additional points of diversion.”

In the section of its brief describing the course of the proceedings before the master, Pocatello stated:

The City amended its SRBA claims to list each of these wells as points of diversion for the 21 ground water rights and four surface water rights that, as of November 19, 1987, were providing water for the City’s integrated culinary system in town. *These claims for “alternate points of diversion” were filed in accordance with the accomplished transfer statute, Idaho Code 42-1425.*

(Emphasis added; footnotes omitted).

In its argument in the brief, Pocatello asserted, “Pocatello’s evidence shows that its accomplished transfer claims meet the stated legislative intent of 42-1425 and the procedural requirements of the plain language of 42-1425.” There was no mention in its brief of its assertion that section 42-1425 does not apply to transfers of points of diversion that occurred prior to May 26, 1969. Because Pocatello did not raise the issue before the special master, there is not a factual basis for this argument. As the district court wrote, “This Court has reviewed the record in detail and was unable to locate where in the record Pocatello establishes a date certain that the interconnected wells were in place.”

It also did not raise the issue to the district court in its challenge of the special master’s recommendations. It first raised the issue in its motion to alter or amend the court’s judgment. In response, the district court wrote:

The State argues that Pocatello has attempted to introduce new evidence and legal theories in its *Motion* and *Brief*. Specifically, the State asserts that Pocatello never briefed or argued the issue of whether pre-1969 water rights are exempt from the Director’s review under I.C. § 42-1425, prior to filing its Motion. This Court agrees.

As we stated above, a Rule 59(e) motion cannot be used to raise arguments or present evidence for the first time that could reasonably have been raised prior to the entry of judgment. Because

this issue had not been raised to the district court prior to the entry of the final judgment, it could not be raised thereafter by a motion under Rule 59(e). Therefore, we will not address it on appeal.

V.

Did the District Court Err in Holding that Pocatello's Wells Were Not Alternate Points of Diversion for Its Surface Water Rights?

Pocatello had used its surface water rights in Gibson Jack Creek and Mink Creek to supply its municipal water system until it was required to cease doing so in 1993 due to changing water quality regulations. It contends that its wells became alternate points of diversion for its surface water rights pursuant to the provisions of Idaho Code section 42-1425. The aquifer from which Pocatello pumps water and the two creeks are separate sources, even though they are hydrologically connected. The district court held that the statute does not authorize a change in the source element of a water right. The statute validates changes in “place of use, point of diversion, nature or purpose of use or period of use of a water right” under the specific circumstances. I.C. § 42-1425(2). Pocatello argues that “since a change in source necessarily includes a change in point of diversion, this statutory language should not be interpreted as prohibiting a change in source.”

The interpretation of a statute is a question of law over which we exercise free review. *Gooding County v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002). It must begin with the literal words of the statute, *Thomson v. City of Lewiston*, 137 Idaho 473, 478, 50 P.3d 488, 493 (2002); those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 667, 735 P.2d 974, 978 (1987). We construe statutes under the assumption that the legislature was aware of all other statutes and precedents at the time the statute was passed. *Druffel v. State Dept. of Transp.*, 136 Idaho 853, 856, 41 P.3d 739, 742 (2002).

In 1986, the legislature enacted Idaho Code section 42-1411(2), which states the elements that the director of IDWR must determine with respect to a claimed water right. Ch. 220, § 13, 1986 Idaho Sess. Laws 573, 573-75. As originally enacted, it stated:

The director shall determine the following elements with respect to all water rights acquired under state law:

- (a) the name and address of the claimant;
- (b) the source of water;
- (c) the quantity of water used in cubic feet per second or the quantity of water stored in acre-feet per year;
- (d) the date of priority;
- (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
- (f) the purpose of use;
- (g) the period of the year when water is used for such purposes;
- (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
- (i) the annual volume of consumptive use; and
- (j) such other matters as are necessary to define the right.

The elements listed describe the basic elements of a water right, *State v. Nelson*, 131 Idaho 12, 15, 951 P.2d 943, 946 (1998), and they include the source of water and the point of diversion as separate elements. In 1994, the legislature enacted Idaho Code section 42-1425. Ch. 454, § 31, 1994 Idaho Sess. Laws 1474, 1474-75. The statute provides the “place of use, purpose of use, point of diversion, nature of use or period of use of a water right” could be changed by a transfer that occurred prior to November 19, 1987. I.C. § 42-1425(2). The legislature did not include the source of water in the list of elements of a water right that could be changed under the statute. Had it intended source to be included, it would have done so. The district court did not err in holding that the source of a water right cannot be changed under Idaho Code section 42-1425.

VI.

Did the District Court Err in Holding that Water Right 29-7770 Was for an Irrigation Purpose?

At the request of Pocatello, water right 29-7770 was licensed in 2003 for an irrigation purpose. The Special Master held that because the city had not sought an administrative change in the purpose of the water right and the license granting the water right was issued after the November 19, 1987, deadline in Idaho Code section 42-1425, the purpose of use remained irrigation. In its challenge to the district court, Pocatello argued that the water right should have

been issued for a municipal purpose rather than the requested irrigation purpose. The district court held that Pocatello would have to proceed with an administrative transfer proceeding.

On appeal, Pocatello argues that IDWR committed an error in law by issuing the license for the use requested by the city. Idaho Code section 42-108 states, “Any person desiring to make such change of point of diversion, place of use, period of use, or nature of use of water shall make application for change with the department of water resources under the provisions of section 42-222, Idaho Code.” Section 17(b)(3) of Administrative Order No. 1 adopted by the SRBA court states, “Claimants seeking a change in their claimed water right under I.C. § 42-222 shall contact IDWR.” That is what Pocatello must do to change the purpose of water right 29-7770. The district court did not err in so holding.

VII.

Did the District Court Err in Affirming the Special Master’s Findings as to the Priority Dates for Water Rights 29-13558 and 29-13639?

The *Director’s Report* recommended water right number 29-13558 with a priority date of July 16, 1924, and water right number 29-13639 with a priority date of October 22, 1952. The report “shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law.” I.C. § 42-1411(4). “Any party filing an objection to any portion of the director’s report shall have the burden of going forward with the evidence to rebut the director’s report as to all issues raised by the objection.” I.C. § 42-1411(5). “Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right.” *Id.*

Pocatello claimed that the priority date for 29-13558 was 1905 and that the priority date for 29-13639 was December 31, 1940. The matter was tried to a special master, who found that Pocatello had not met its burden of proof as to both of its claimed priority dates. “The trier of fact has the primary responsibility for weighing the evidence and determines whether the required burden of proof on an issue has been met.” *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002). The district court was required to accept the master’s findings of fact unless they were clearly erroneous. Idaho R. Civ. P. 53(e)(2). The district court determined that they were not clearly erroneous and accepted them. “The special master’s findings of facts, which are adopted by the SRBA district court, are

considered to be the findings of the SRBA district court.” *Clear Springs Foods*, 136 Idaho at 764, 40 P.3d at 122. A trial court’s findings of fact will not be set aside on appeal unless they are clearly erroneous. *Bramwell v. South Rigby Canal Co.*, 136 Idaho 648, 650, 39 P.3d 588, 590 (2001); Idaho R. Civ. P. 52(a). On appeal, we do not judge the credibility of the witnesses or the weight of the evidence. *Bream v. Benscoter*, 139 Idaho 364, 367, 79 P.3d 723, 726 (2003). We only examine the record to determine if the factual findings are supported by evidence that a reasonable trier of fact would accept and rely upon in determining whether a disputed issue of fact has been proved. *Id.* at 367-68, 79 P.3d at 726-27.

Water Right 29-13558. In its supplemental *Director’s Report*, IDWR explained its recommendation for the priority date of this water right as follows:

This water right is based on beneficial use and is for the first well used by the City of Alameda and developed by the predecessor to the City of Alameda. . . . Pocatello claimed a priority date of 1905 and states specifically in its objection that the date should be June 30, 1905. However, the supporting documentation provided by the City to the Department only supports a July 16, 1924 priority date. According to a newspaper article in the claim file the city of Alameda was founded on July 17, 1924. According to the article, the first well was dug to a depth of 65 feet. The article further states that the well was deepened to a depth of 100 feet during the term of Alameda’s first mayor. The priority date recommended by the Department is one day before the City of Alameda was founded. The Department recommended this date because the well appeared to be in existence when the City was founded. The actual date the well was developed has not been documented.

There is nothing in the record even remotely supporting Pocatello’s claim to a 1905 priority date. The newspaper article was in the July 20, 1952, edition of the *Alameda Enterprise*, and it reported a speech given to a service club by an early pioneer resident of Alameda. The article reported that the speaker “came to the area in 1905,” and that is apparently how Pocatello arrived at its claimed priority date of 1905. The article did not report the speaker as stating that the well was in existence when he came to the area. The only inference that could be drawn from the article is that the well was in existence when Alameda was founded. The speaker’s only reported comments regarding when the well came into existence were as follows:

In commenting on the city water system, the speaker pointed out that the first well was dug to a depth of 65 feet, providing a good supply of water, but during the term of Mr. Freckleton, Alameda’s first mayor, the well was drilled down to 100 ft. and another 65 ft. well was dug later.

On appeal, Pocatello does not contend that there is any evidence in the record supporting its claimed 1905 priority date, or any other date. It simply argues that there is evidence that the villages of North Pocatello and Fairview consolidated to form Alameda and that the principal purpose was to purchase an existing water system. Pocatello concludes by stating, “This evidence supports an earlier priority date than July 16, 1924, for water right 29-13588,” although it does not argue that the evidence supports any particular date, month, or year as the priority date.

“Until 1971 Idaho recognized two methods of appropriating water of the state both of which were equally valid: the statutory method of appropriation and the constitutional method of appropriation.” *Fremont-Madison Irrigation Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). Water right 29-13588 is based upon the constitutional method. When one diverts unappropriated water and applies it to a beneficial use, the “right dates from the application of the water to a beneficial use.” *Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co.*, 24 Idaho 63, 82, 133 P. 655, 661 (1913). That date must be based upon evidence, not speculation. If a water right is based upon the constitutional method, “one of the essential requisites to establish his claim is the application of water to a beneficial use, and, where there is a total lack of evidence upon this point, a decree awarding water to the claimant cannot be sustained.” *Reno v. Richards*, 32 Idaho 1, 8, 178 P. 81, 83 (1918).

In *Reno*, Franklin A. Reno and Jennie C. Reno each had 160-acre homestead entries to which canals and laterals were constructed in 1904, permitting water to flow over their lands for the irrigation of natural grasses. However, there was no cultivation on their tracts until 1907. The trial court awarded them each a water right of 3.2 second feet with a date of priority in 1904. Even though the irrigation of natural grasses was a beneficial use, we vacated the awards because

we have failed to find any evidence showing the amount of water applied to the homestead entries in question during the years 1904, 1905, and 1906; nor is there any evidence at all definite as to whether the whole, or a portion only, of said tracts were irrigated during those years.

Id. at 14-15, 178 P. at 86. We added that “it appears that the awards to each of these claimants give them a date of priority in advance of the actual application of the water to a beneficial use of

which there is any *definite evidence*, and in amounts greater than that actually applied from year to year.” *Id.* at 15, 178 P. at 86 (emphasis added).

Likewise, in *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920), the plaintiffs began in 1906 cleaning out a spring and constructing a ditch to transport the spring water to a natural channel that ran through a canyon. In 1907, the water flowed down to the mouth of the canyon where they diverted it into a ditch they had constructed. In 1909, they irrigated 40 acres of the plaintiff Mary Rabido’s land. The trial court found that her priority date was 1907, the year the water was brought down the canyon. We disagreed, stating, “[W]e must fall back on the date of the actual application of the water for the date of her priority. From the evidence in the record it is not possible to state exactly when the .8 second feet of water was applied to her entry.” *Id.* at 63, 190 P. at 75.

With respect to water right number 29-13558, there is no evidence in the record that the water from this well was actually applied to a beneficial use at any time prior to the date decreed by the district court. Therefore, it did not err in determining that the priority date is July 16, 1924.

Water Right 29-13639. In its supplemental *Director’s Report*, IDWR explained its recommendation for the priority date of this water right as follows:

The City of Pocatello claimed this water right as a beneficial use right from Alameda well no. 3. License no. 29-2324 which covered Alameda well nos. 1, 2 and 3 has a priority date of October 22, 1952. . . . The City objected to the recommended priority date stating that the priority date should be December 31, 1940. The City has not provided any evidence to support the claimed priority date. Thus, the Department recommended this water right with the licensed priority date of October 22, 1952, because there was no evidence to support an earlier date.

The special master moved the date forward one day to October 21, 1952, because the application for the permit, the first step in obtaining a license, indicated the well was in existence when the application was filed, and the court affirmed that date because the State did not object.

Pocatello claims that this water right was acquired earlier than October 21, 1952, based upon the constitutional method of appropriation. An appropriator who has obtained a water right under the constitutional method does not waive that right or its priority by later seeking a license under the statutory method of appropriation. *Clark v. Hansen*, 35 Idaho 449, 454, 206 P. 808, 809 (1922). However, to obtain an earlier date Pocatello had the burden of proving its claim

with definite evidence showing an earlier date on which the water was applied to a beneficial use and the amount so applied.

As with water right number 29-13558, Pocatello did not do so. It simply states, “Alameda grew from a population of 2100 people in 1940 to 4705 people in 1950 and to over 10,000 people in 1960. This evidence supports a priority date earlier than October 21, 1952 for water right 29-13639.” It again does not identify what the earlier date should be. It apparently wants this Court to speculate as to one. Speculation is not a substitute for evidence. The district court did not err in determining that the priority date for water right number 29-13558 was October 21, 1952.

VIII.

Is the State Entitled to an Award of Attorney Fees Pursuant to Idaho Code Section 12-121?

The State seeks an award of attorney fees pursuant to Idaho Code section 12-121. We will not award attorney fees on appeal under that statute unless we are “left with the abiding belief that the appeal was brought, pursued, or defended frivolously, unreasonably or without foundation.” *Rudd v. Merrill*, 138 Idaho 526, 533, 66 P.3d 230, 237 (2003). The entire appeal must have been brought or pursued frivolously, unreasonably, or without foundation. *Id.* Although it is close, we cannot say that the entire appeal was brought and pursued frivolously, unreasonably, or without foundation. Therefore, we will not award the State attorney fees.

IX.

Conclusion

We affirm the judgment of the district court. We award respondent costs on appeal, but not attorney fees.

Chief Justice BURDICK, Justices J. JONES, W. JONES, and HORTON **CONCUR.**

Cox, Sharla

From: Andrea L. Browne <andreab@white-jankowski.com>
Sent: Monday, June 26, 2017 3:58 PM
To: Cefalo, James; Cox, Sharla
Cc: dtranmer@pocatello.us; tolsen@pocatello.us; schroeder@water-law.com; j.browitt@water-law.com; Sarah Klahn; Mitra Pemberton
Subject: Transfer No. 81155 - Pocatello's Motion to Dismiss Protest and in the Alternative Motion in Limine
Attachments: 20170626 Motion to Dismiss Protest and Alternative Motion in Limine-Pocatello (00205060xAC161).PDF; 20170626 Exhibit 1 to Motion to Dismiss (Location Map) (00205061xAC161).PDF; 20170626 Exhibit 2 to Motion to Dismiss (City of Pocatello's Summary of Water Rights) (00205062xAC161).PDF; 20170626 Exhibit 3 to Motion to Dismiss (Transfer #5452) (00205063xAC161).PDF; 20170626 Exhibit 4 to Motion to Dismiss (Summary of 5452 Water Rights and PODs) (00205064xAC161).PDF; 20170626 Exhibit 5 to Motion to Dismiss (Partial Decree's re 29-02274- 29-02338- 29-07375 dated 04-26-12) (00205065xAC161).PDF; 20170626 Exhibit 6 to Motion to Dismiss (Case No. 39576 - Order on Summary Judgment) (00205066xAC161).PDF

Sharla and ALL –

I have attached a courtesy copy of *Pocatello's Motion to Dismiss Protest and in the Alternative Motion in Limine* that was sent today via Fed-Ex Overnight for filing with the Department.

If you have any questions, please contact the office.

Andrea Browne
Administrative Legal Assistant



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Denver, Colorado 80202
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**Summary of Water Rights
City of Pocatello**

(1)

Water Right	Water Rights							Historical Well No. or Source	AKA/Name	Aquifer
	Priority Date	Diversion Rate (cfs)	Cum Rate (cfs)	Vol Limit (af/y)	Irrigated Acreage	Season of Use	Purpose of Use			
SURFACE WATER RIGHTS										
29-271	2/26/1869	3.22	3.22	-	-	1/1 - 12/31	Municipal	Mink Creek		N/A
29-4222	6/16/1898	5.00	8.22	-	-	1/1 - 12/31	Municipal	Gibson Jack Creek		N/A
29-272	10/1/1901	0.56	8.78	-	-	1/1 - 12/31	Municipal	Mink Creek		N/A
29-273	10/1/1917	1.218	10.00	-	-	1/1 - 12/31	Municipal	Mink Creek		N/A
INTERCONNECTED CITY ("IC") WELLS AND WATER RIGHTS										
29-13558	7/16/1924	1.34	1.34	-	-	1/1 - 12/31	Municipal	Alameda 1		LPRVA
29-13559	12/31/1925	0.96	2.30	-	-	1/1 - 12/31	Municipal	Alameda 2		LPRVA
29-13560	12/31/1926	9.13	11.43	-	-	1/1 - 12/31	Municipal	1/5 (2.45 cfs) 2 (2.45 cfs) 3 (4.23 cfs)		LPRVA LPRVA LPRVA
29-13561	8/31/1931	4.23	15.66	-	-	1/1 - 12/31	Municipal	4		LPRVA
29-13562	12/31/1936	2.45	18.11	-	-	1/1 - 12/31	Municipal	6		LPRVA
29-13637	12/31/1940	4.46	22.57	-	-	1/1 - 12/31	Municipal	7		LPRVA
29-4221	6/1/1943	2.67	25.24	-	-	1/1 - 12/31	Municipal	26	PIP	LPRVA
29-2274	6/15/1948	9.69	34.93	-	-	1/1 - 12/31	Municipal	8 9 10 44		LPRVA LPRVA LPRVA LPRVA
29-11348	8/31/1951	4.90	39.83	-	-	1/1 - 12/31	Municipal	28	20/Turner	LPRVA
29-13639	10/21/1952	3.68	43.51	-	-	1/1 - 12/31	Municipal	22	Alameda 3	LPRVA
29-2338	9/1/1953	9.53	53.04	-	-	1/1 - 12/31	Municipal	12 13 15	17	LPRVA LPRVA LPRVA
29-4224	9/15/1955	3.89	56.93	-	-	1/1 - 12/31	Municipal	21	Alameda 4	LPRVA
29-4226	12/31/1955	0.22	57.15	-	-	1/1 - 12/31	Municipal	14	Cree	LPRVA
29-4225	8/15/1956	4.44	61.59	-	-	1/1 - 12/31	Municipal	23	Alameda 5	LPRVA
29-2401	10/16/1958	12.22	73.81	-	-	1/1 - 12/31	Municipal	13 (0.89 cfs) 16 (6.67 cfs) 18 (4.66 cfs)	17	LPRVA LPRVA LPRVA

**Summary of Water Rights
City of Pocatello**

(1)

Water Right	Water Rights							Historical Well No. or Source	AKA/Name	Aquifer
	Priority Date	Diversion Rate (cfs)	Cum Rate (cfs)	Vol Limit (af/y)	Irrigated Acreage	Season of Use	Purpose of Use			

INTERCONNECTED CITY ("IC") WELLS AND WATER RIGHTS (cont.)

(2)	29-11339	12/31/1961	3.36	77.17	-	-	1/1 - 12/31	Municipal	Alameda 6 (1.70 cfs) Alameda 7 (1.66 cfs)		LPRVA LPRVA
(2)	29-4223	10/1/1962	0.21	77.38	-	-	1/1 - 12/31	Municipal	33	Call	LPRVA
(2)	29-2499	12/10/1964	4.10	81.48	-	-	1/1 - 12/31	Municipal	27		LPRVA
(2)	29-7106	11/6/1972	3.90	85.38	-	-	1/1 - 12/31	Municipal	29		LPRVA
(2)	29-7322	4/25/1976	17.07	102.45	-	-	1/1 - 12/31	Municipal	30 (5.58 cfs) 31 (8.03 cfs) 32 (3.46 cfs)		LPRVA LPRVA ESPA
(3)	29-7375	2/24/1977	2.23	104.68	-	-	1/1 - 12/31	Municipal	15		LPRVA
	29-7782	1/18/1985	7.00	111.68	-	-	1/1 - 12/31	Municipal	34		LPRVA
(4)	29-8086	3/26/1992	4.00	115.68	-	-	1/1 - 12/31	Municipal	36		LPRVA

INTERCONNECTED AIRPORT ("IA") WELLS AND WATER RIGHTS

(5)	29-13638	12/31/1940	2.20	2.20	-	-	1/1 - 12/31	Municipal	39	Phillips 1	ESPA
(5)	29-7450	6/13/1978	3.34	5.54	-	-	1/1 - 12/31	Municipal	35	Phillips 3	ESPA

BIOSOLIDS PROGRAM WATER RIGHTS

(6)	29-2255D	5/22/1939	0.482	0.482	96.4	24.1	4/1 - 11/1	Irrigation	2	Swanson	ESPA
	29-4276	4/1/1940	0.27 0.01	0.752	- -	13.5 -	4/1 - 10/31 1/1 - 12/31	Irrigation Stockwater	Douglas Spring	Spring	N/A
	29-11344	12/31/1942	1.92	2.67	-	-	1/1 - 12/31	Municipal	40	Phillips 2	ESPA
	29-2259	6/20/1944	2.60	5.27	600.0	150.0	4/1 - 10/31	Irrigation	Pit Road	Swanson	ESPA
(6)	29-2255F	9/16/1949	0.40	5.67	80.0	20.0	4/1 - 11/1	Irrigation	2	Submers	ESPA
	29-2344A	12/31/1953	1.18	6.85	289.0	91.0	4/1 - 10/31	Irrigation	DP 140		ESPA
	29-7073	9/30/1971	1.49	8.34	266.0	76.0	5/1 - 9/1	Irrigation	3	Vertical turb	ESPA
	29-7118	4/11/1973	4.01	12.35	1,114.0	278.5	4/1 - 11/1	Irrigation	42	A0007545	ESPA
	29-7119	4/11/1973	6.00	18.35	1,200.0	300.0	4/1 - 11/1	Irrigation	41	A0007547	ESPA
	29-7770	5/21/1984	4.46	22.81	1,120.0	280.0	4/1 - 10/31	Irrigation	WPC	City Pivot	ESPA

Summary of Water Rights City of Pocatello

(1)

Water Right	Water Rights							Historical Well No. or Source	AKA/Name	Aquifer
	Priority Date	Diversion Rate (cfs)	Cum Rate (cfs)	Vol Limit (af/y)	Irrigated Acreage	Season of Use	Purpose of Use			

OTHER WATER RIGHTS

(7)	29-2354	8/27/1954	0.28	0.28	56.0	19.0	4/1 - 10/31	Irrigation	Restlawn Cemetery		LPRVA
	29-2382	12/21/1956	3.82	4.10	450.0	-	4/1 - 10/31	Municipal	17	Highland GC	LPRVA
	29-13636	10/16/1958	0.80	4.90	-	-	1/1 - 12/31	Municipal	19		ESPA
	29-7222	8/22/1974	1.00	5.90	-	50.0	4/1 - 11/1	Irrigation	43	Ward Park	ESPA
	29-7431	12/29/1977	9.28	15.18	3,108.0	777.0	4/1 - 11/1	Irrigation	Wastewater		N/A
(7)	29-7502	7/6/1979	0.10	15.28	20.0	19.0	3/15 - 11/15	Irrigation	Restlawn Cemetery		LPRVA

STORAGE RIGHTS

	01-2068	7/28/1939	50,000 AF	-	50,000 AF	-	1/1 - 12/31	Storage	Palisades Reservoir		N/A
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Notes:

- (1) Flow rate in parenthesis is the diversion rate associated with individual well to the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources.
- (2) "IC Wells" - Municipal water rights decreed in SRBA with 22 PODs for ground water rights.
- (3) "IC Wells" - Municipal water rights decreed in SRBA with 13 PODs for ground water rights. Water right part of Transfer No. 5452.
- (4) Post SRBA water right.
- (5) "IA Wells" - Municipal water rights decreed in SRBA with 2 PODs for ground water rights.
- (6) Use of water right nos. 29-2255D and 29-2255F is limited to the irrigation of a combined total of 44.1 acres in a single irrigation season.
- (7) Use of water right nos. 29-2354 and 29-7502 is limited to the irrigation of a combined total of 19.0 acres in a single irrigation season.

**Water Rights in Transfer 5452 and
Associated Points of Diversion**

City of Pocatello

(1) Water Right	(2) Original PODs (Pre Transfer 5452)	(3) Additional PODs (Post Transfer 5452)
29-2274	Well Nos. 7, 8, 9, 10, and 13	Well Nos. 4, 6, 11, 12, 35, 39, and 44
29-2338	Well Nos. 11, 12, 13, 15 ⁽⁴⁾ , 35, and 39	Well Nos. 4, 6, 7, 8, 9, 10, and 44
29-7375	Well Nos. 15 ⁽⁴⁾	Well Nos. 4, 6, 7, 8, 9, 10, 11, 12, 13, 35, 39, and 44

Notes:

- (1) Water right associated with Transfer 5452.
- (2) Historical wells/PODs associated with water rights from license (prior to Transfer 5452).
- (3) Points of diversion added to water right in Transfer 5452.
- (4) Water rights licenses for 29-2338 and 29-7375 include Well No. 15 (NWSE Sec 6 T7S R35E). This POD is not in Transfer 5452.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 5452
WATER RIGHT NO(S). 29-02274/29-02338/29-07375This is to certify that: CITY OF POCA TELLO
PO BOX 4169
POCA TELLO ID 83205

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
Right No. 29-02274 :		
MUNICIPAL	01/01 to 12/31	21.00 CFS
Priority: 06/15/1948		
Right No. 29-02338 :		
MUNICIPAL	01/01 to 12/31	14.76 CFS
Priority: 09/01/1953		
Right No. 29-07375 :		
MUNICIPAL	01/01 to 12/31	3.34 CFS
Priority: 02/24/1977		
TOTAL:		* 39.10 CFS

SOURCE
GROUNDWATERLOCATION OF POINT(S) OF DIVERSION:

-NESE , Sec. 10, Township 06S, Range 33E
BANNOCK County

-NESE , Sec. 12, Township 06S, Range 33E
POWER County

-SWNE , Sec. 15, Township 06S, Range 33E

-NWSW , Sec. 15, Township 06S, Range 34E

-NENW , Sec. 26, Township 06S, Range 34E

-NWSE , Sec. 27, Township 06S, Range 34E

SENE , Sec. 35, Township 06S, Range 34E

-SENE , Sec. 35, Township 06S, Range 34E

-NWSE , Sec. 35, Township 06S, Range 34E

-SESE , Sec. 1, Township 07S, Range 34E

-SWSW , Sec. 16, Township 07S, Range 35E
BANNOCK County

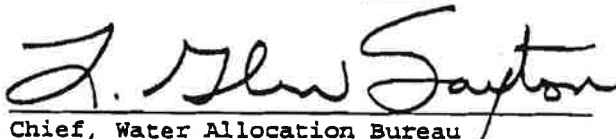
SCANNED
APR 30 2001MICROFILMED
AUG 09 1999

TRANSFER NO. 5452
WATER RIGHT NO(S). 29-02274/29-02338/29-07375

CONDITIONS OF APPROVAL AND REMARKS

1. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
2. Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.
3. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
4. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
5. Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
6. The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.
7. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.
- * 8. The total instantaneous diversion of water from all points of diversion under Transfer 5452 shall not exceed 39.10 cfs.
9. The well(s) previously used under these rights shall be abandoned in a manner which complies with Department well abandonment rules.
10. Place of use is located within the City of Pocatello and the surrounding service area.
11. Two (2) points of diversion are located within SENE, and three (3) points of diversion are located within NWSE, of S35, T06S, R34E.

Dated this 28th day of June, 19 99



Chief, Water Allocation Bureau

MICROFILMED

AUG 09 1999

EXHIBIT 2

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-2274
NAME AND ADDRESS: CITY OF POCA TELLO
PO BOX 4169
POCA TELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 9.690 CFS

PRIORITY DATE: 06/15/1948

POINT OF
DIVERSION:

T06S R33E S10 NESE Within POWER County
T06S R33E S12 NESE Within POWER County
T06S R33E S15 SWNE Within POWER County
T06S R34E S15 NWSW Within BANNOCK County
T06S R34E S26 NENW Within BANNOCK County
T06S R34E S27 NWSE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T07S R34E S1 SESE Within BANNOCK County
T07S R35E S16 SWSW Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
MUNICIPAL

PERIOD OF USE
01/01 12/31

QUANTITY
9.690 CFS

PLACE OF USE:

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-2338
NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 9.530 CFS

PRIORITY DATE: 09/01/1953

POINT OF
DIVERSION:

T06S R33E S10 NESE Within POWER County
T06S R33E S12 NESE Within POWER County
T06S R33E S15 SWNE Within POWER County
T06S R34E S15 NWSW Within BANNOCK County
T06S R34E S26 NENW Within BANNOCK County
T06S R34E S27 NWSE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T07S R34E S1 SESE Within BANNOCK County
T07S R35E S16 SWSW Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
MUNICIPAL

PERIOD OF USE
01/01 12/31

QUANTITY
9.530 CFS

PLACE OF USE:

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-2499
NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 4.100 CFS

PRIORITY DATE: 12/10/1964

POINT OF
DIVERSION:

T06S R34E S14 NWNW Within BANNOCK County
T06S R34E S15 NWNE Within BANNOCK County
T06S R34E S15 NENW Within BANNOCK County
T06S R34E S15 NESE Within BANNOCK County
T06S R34E S15 NESE Within BANNOCK County
T06S R34E S16 NENE Within BANNOCK County
T06S R34E S23 NWNE Within BANNOCK County
T06S R34E S23 SWNE Within BANNOCK County
T06S R34E S23 SENW Within BANNOCK County
T06S R34E S23 NESW Within BANNOCK County
T06S R34E S26 NENW Within BANNOCK County
T06S R34E S26 SWSE Within BANNOCK County
T06S R34E S35 NWNE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T07S R34E S1 NWNE Lot 2 Within BANNOCK County
T07S R34E S1 SWNE Within BANNOCK County
T07S R34E S1 NESE Within BANNOCK County
T07S R34E S1 SESE Within BANNOCK County
T07S R35E S6 NWSE Within BANNOCK County
T07S R35E S7 NESW Within BANNOCK County
T07S R35E S18 SENE Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
MUNICIPAL

PERIOD OF USE
01/01 12/31

QUANTITY
4.100 CFS

PLACE OF USE:

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

To the extent necessary for administration, water was first appropriated or used from:
Pocatello Well No. 2 located in T07S, R34E, S01, NWNE,
on 12/31/1926 in the amount of 3.12 cfs
Pocatello Well No. 3 located in T07S, R34E, S01, SWNE,
on 12/31/1926 in the amount of 4.23 cfs.
Pocatello Well No. 7 located in T06S, R34E, S35, NWNE,
on 12/31/1940 in the amount of 4.46 cfs.
Pocatello Well No. 10 located in T06S, R34E, S26, NENW,
on 6/15/1948 in the amount of 5.35 cfs.
Pocatello Well No. 12 located in T06S, R34E, S35, SENE,
on 9/1/1953 in the amount of 6.20 cfs.
Pocatello Well No. 13 located in T07S, R34E, S01, SESE,
on 9/1/1953 in the amount of 2.22 cfs, and on 10/16/1958 for an
additional amount of 0.89 cfs.
Pocatello Well No. 14 located in T07S, R35E, S07, NESW,
on 12/31/1955 in the amount of 0.22 cfs.
Pocatello Well No. 15 located in T07S, R35E, S06, NWSE,
on 9/1/1953 in the amount of 1.11 cfs, and on 2/24/1977 for an additional
amount of 2.23 cfs.
Pocatello Well No. 16 located in T06S, R34E, S26, SWSE,
on 10/16/1958 in the amount of 6.67 cfs.
Pocatello Well No. 18 located in T06S, R34E, S15, NENW,
on 10/16/1958 in the amount of 4.66 cfs.
Pocatello Well No. 21 located in T06S, R34E, S23, SWNE,
on 9/15/1955 in the amount of 3.89 cfs.
Pocatello Well No. 22 located in T06S, R34E, S23, SENW,
on 10/22/1952 in the amount of 3.68 cfs.
Pocatello Well No. 23 located in T06S, R34E, S23, NWNE,
on 8/15/1956 in the amount of 4.44 cfs.
Pocatello Well No. 26 located in T06S, R34E, S15, NWNE,
on 6/1/1945 in the amount of 2.67 cfs.
Pocatello Well No. 27 located in T06S, R34E, S14, NWNW,
on 12/10/1964 in the amount of 4.10 cfs.
Pocatello Well No. 28 located in T07S, R34E, S01, NESE,
on 8/31/1951 in the amount of 4.90 cfs.
Pocatello Well No. 29 located in T06S, R34E, S23, NESW,
on 11/6/1972 in the amount of 6.20 cfs.
Pocatello Well No. 30 located in T06S, R34E, S35, NWNE,
on 4/25/1976 in the amount of 5.57 cfs.
Pocatello Well No. 31 located in T06S, R34E, S15, NESE,
on 4/25/1976 in the amount of 8.02 cfs.
Pocatello Well No. 32 located in T06S, R34E, S16, NENE,
on 4/25/1976 in the amount of 3.45 cfs.
Pocatello Well No. 33 located in T07S, R35E, S18, SENE,
on 10/1/1962 in the amount of 0.21 cfs.
Pocatello Well No. 34 located in T06S, R34E, S15, NESE,
on 2/18/1985 in the amount of 7.00 cfs.

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION
PURSUANT TO SECTION 42-1425, IDAHO CODE.

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 29-7375

NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 2.230 CFS

PRIORITY DATE: 02/24/1977

POINT OF
DIVERSION:

T06S R33E S10 NESE Within POWER County
T06S R33E S12 NESE Within POWER County
T06S R33E S15 SWNE Within POWER County
T06S R34E S15 NWSW Within BANNOCK County
T06S R34E S26 NENW Within BANNOCK County
T06S R34E S27 NWSE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 SENE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T06S R34E S35 NWSE Within BANNOCK County
T07S R34E S1 SESE Within BANNOCK County
T07S R35E S16 SWSW Within BANNOCK County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE
MUNICIPAL

PERIOD OF USE
01/01 12/31

QUANTITY
2.230 CFS

PLACE OF USE:

07/10/2003

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

EXHIBIT A CITY OF POCA TELLO

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
29-07431
29-07450
29-07502
29-07770
29-07782
29-11339
29-11344
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13636
29-13637
29-13638
29-13639

(Subcase list: BEEMANGP)
8/18/06

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON SUMMARY JUDGMENT was mailed on August 18, 2006, with sufficient first-class postage to the following:

AMERICAN FALLS RESERVOIR

Represented by:
C. THOMAS ARKOOSH
301 MAIN STREET
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

AMERICAN FALLS RESERVOIR

Represented by:
DAVID HEIDA
301 MAIN STREET
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

CITY OF POCATELLO

Represented by:
JOSEPHINE P. BEEMAN
409 WEST JEFFERSON STREET
BOISE, ID 83702
Phone: 208-331-0950

STATE OF IDAHO

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

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT

Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396
Phone: 208-436-4717

CITY OF POCATELLO

Represented by:
SARAH A KLAHN
WHITE & JANKOWSKI LLP
KITREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
TWIN FALLS, ID 83301-6167
Phone: 208-733-0700

UNITED STATE OF AMERICA
UNITED STATES OF AMERICA

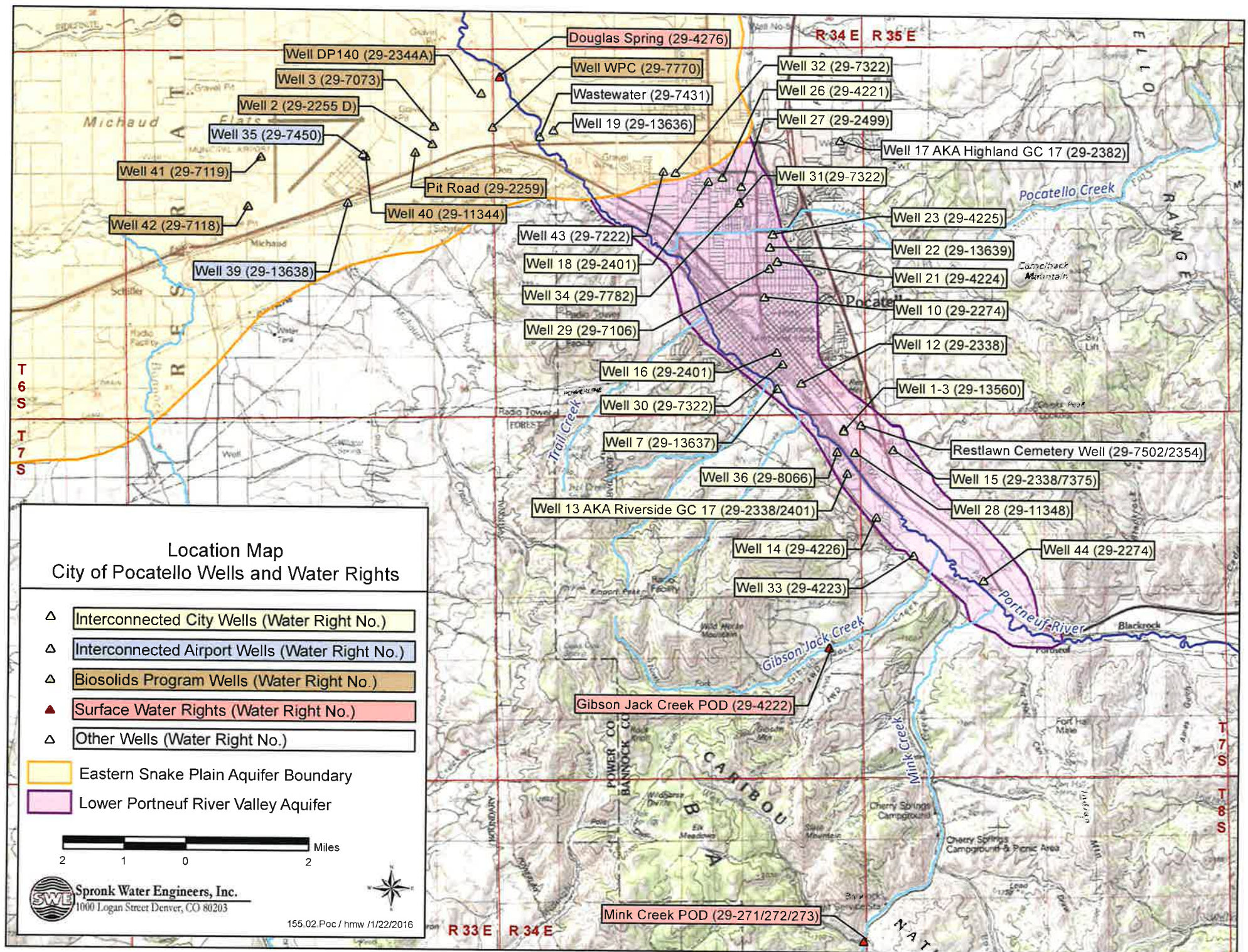
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

MINIDOKA IRRIGATION DISTRICT

Represented by:
W. KENT FLETCHER
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

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

UNITED STATES OF AMERICA
US DEPT OF JUSTICE, ENRD
550 W FORT ST MSC 033
BOISE, ID 83724



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 5452
WATER RIGHT NO(S). 29-02274/29-02338/29-07375

This is to certify that: CITY OF POCATELLO
PO BOX 4169
POCATELLO ID 83205

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
Right No. 29-02274 : MUNICIPAL Priority: 06/15/1948	01/01 to 12/31	21.00 CFS
Right No. 29-02338 : MUNICIPAL Priority: 09/01/1953	01/01 to 12/31	14.76 CFS
Right No. 29-07375 : MUNICIPAL Priority: 02/24/1977	01/01 to 12/31	3.34 CFS
TOTAL:		* 39.10 CFS

SOURCE
GROUNDWATER

LOCATION OF POINT(S) OF DIVERSION:

NESE , Sec. 10, Township 06S, Range 33E
BANNOCK County
NESE , Sec. 12, Township 06S, Range 33E
POWER County
SWNE , Sec. 15, Township 06S, Range 33E
NWSW , Sec. 15, Township 06S, Range 34E
KENW , Sec. 26, Township 06S, Range 34E
NWSE , Sec. 27, Township 06S, Range 34E
SENE , Sec. 35, Township 06S, Range 34E
SENE , Sec. 35, Township 06S, Range 34E
NWSE , Sec. 35, Township 06S, Range 34E
SESE , Sec. 1, Township 07S, Range 24E
SWSW , Sec. 16, Township 07S, Range 35E
BANNOCK County

SCANNED
APR 30 2001

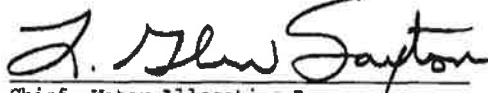
MICROFILMED
AUG 09 1999

TRANSFER NO. 5452
WATER RIGHT NO(S). 29-02274/29-02338/29-07375

CONDITIONS OF APPROVAL AND REMARKS

1. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
2. Use of water under this approval shall comply with applicable water quality standards of the Division of Environmental Quality of the Idaho Department of Health and Welfare.
3. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
4. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
5. Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
6. The right holder shall measure and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.
7. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.
- * 8. The total instantaneous diversion of water from all points of diversion under Transfer 5452 shall not exceed 39.10 cfs.
9. The well(s) previously used under these rights shall be abandoned in a manner which complies with Department well abandonment rules.
10. Place of use is located within the City of Pocatello and the surrounding service area.
11. Two (2) points of diversion are located within SENE, and three (3) points of diversion are located within NWSE, of S35, T06S, R34E.

Dated this 28th day of June, 19 99


Chief, Water Allocation Bureau

MICROFILMED

AUG 09 1999

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

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 29-02274

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

APR 26 2012

By

Clerk

Deputy Clerk

NAME AND ADDRESS: CITY OF POCA TELLO
PO BOX 4169
POCA TELLO, ID 83205

SOURCE: GROUND WATER

QUANTITY: 9.69 CFS

PRIORITY DATE: 06/15/1948

POINT OF DIVERSION: T06S R33E S10 NESE Within Power County
S12 NESE
S15 SWNE
R34E S15 NWSN Within Bannock County
S16 NENW
S27 NWSE
S35 NWSE
NWSE
SENE
SENE
T07S R34E S01 SESE
R35E S16 SWSN

PURPOSE AND

PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Municipal	01-01 TO 12-31	9.69 CFS

PLACE OF USE:

Place of use is within the service area of the City of
Pocatello municipal water supply system as provided for under
Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

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

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

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)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 29-02338

NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83205

SOURCE: GROUND WATER

QUANTITY: 9.53 CFS

PRIORITY DATE: 09/01/1953

POINT OF DIVERSION: T06S R33E S10 NESE Within Power County
S12 NESE
S15 SWNE
R34E S15 NWSW Within Bannock County
S26 NENW
S27 NWSE
S35 NWSE
NWSE
NWSE
SENE
SENE
T07S R34E S01 SESE
R35E S16 SWSW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Municipal	01-01 TO 12-31	9.53 CFS

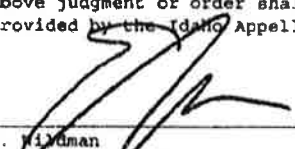
PLACE OF USE:
Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

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


Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

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

APR 26 2012

By _____

Deputy Clerk

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

In Re SRBA)
Case No. 39576)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 29-07375



NAME AND ADDRESS: CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83205

SOURCE: GROUND WATER

QUANTITY: 2.23 CFS

PRIORITY DATE: 02/24/1977

POINT OF DIVERSION: T06S R33E S10 NESE Within Power County
S12 NESE
S15 SWNE
R34E S15 NWSW Within Bannock County
S26 NENW
S27 NWSE
S35 SENE
NWSE
SENE
NWSE
NWSE
SESE
T07S R34E S01 SESE
R35E S16 SWSW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Municipal	01-01 TO 12-31	2.23 CFS

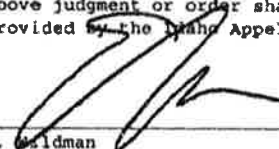
PLACE OF USE:
Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

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


Eric J. Waldman
Presiding Judge of the
Snake River Basin Adjudication

