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DEPARTMENT OF
WATER RESOURCES

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE ("IMAP") OF SUEZ WATER IDAHO INC., BEING A COLLECTION OF INDIVIDUAL APPLICATIONS FOR TRANSFERS OF WATER RIGHTS AND APPLICATIONS FOR AMENDMENT OF PERMITS.	**SUEZ'S SUBMISSION OF SUPPLEMENTAL AUTHORITY ON APODS**

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ADDITIONAL AUTHORITIES

During the Status Conference on November 9, 2017, reference was made to the APOD conditions added to two recent water right transfers by the Cities of Meridian and Ketchum. These and other APOD conditions are discussed as well in emails from the Hearing Officer dated September 5, 2017, September 11, 2017, and November 13, 2017. Copies of these emails are attached as Appendix A.

The transfers resulted in two orders issued by IDWR Director Gary Spackman:

- Order Addressing Exceptions and Amending Transfer Approval, *In the Matter of Application for Transfer No. 79778 in the Name of the City of Meridian* (Oct. 4, 2016) ("*Meridian Order*").
- Order Addressing Exceptions and Amending Transfer Approval, *In the Matter of Application for Transfer No. 80621 in the Name of the City of Ketchum* (Oct. 27, 2016) ("*Ketchum Order*").

Copies of these orders (collectively, "*Spackman Orders*") are attached as Appendix B and C.

These orders reference a brief submitted by State of Idaho to the Idaho Supreme Court in the case of *City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012). A copy of the brief ("*Idaho Brief*") is attached as Appendix D.

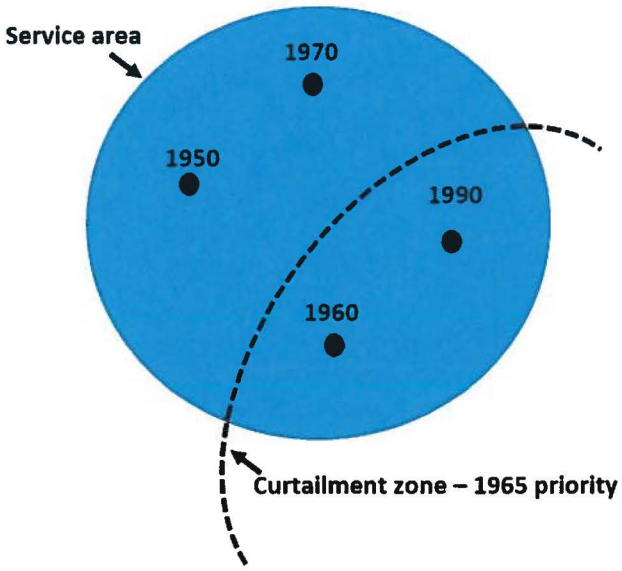
DISCUSSION

The *Spackman Orders* contain a detailed explanation of how the Department's standard APOD condition language operates under various curtailment situations. Because the condition language itself is somewhat abstruse, the Director's explanations are helpful in stepping through how the condition will be applied.

In short, the APOD condition language comes into play in localized well interference contexts and in geographically limited curtailments. But it imposes no restriction on the use of

APODs in the event of a region-wide curtailment covering the municipal provider's entire service area.

There is, however, one point that requires some attention. This deals with the circumstance of a limited curtailment in which only a portion of a municipal provider's service area (including a fraction of its wells) is curtailed. This is a fairly remote hypothetical. But it could arise in the context of a "trim line" passing through the middle of a service area or other circumstances in which some but not all of a provider's wells fall within the area subject to curtailment.



Consider the simplified hypothetical illustrated above. A municipal provider has four wells and four water rights. As each well was constructed, the municipal provider obtained a municipal water right authorizing diversion of 3 cfs from the well associated with that right. They have priority dates of 1950, 1960, 1970, and 1990. The provider later transferred the rights so that each water right may be diverted from any of the four wells, and each right was made subject to the standard APOD condition language. *See, e.g.,* Appendix A, p. 22 (Condition 208).

A curtailment then goes into effect curtailing all wells junior to 1965. If this were a region-wide curtailment, the 1970 and 1990 water rights would be curtailed, and the provider could pump the 1950 and 1960 water rights from any of its four wells in any combination it chooses (so long as there is no local well interference or other injury).

Now suppose it is a geographically limited curtailment applying only to the land that includes the 1960 and 1990 wells. The 1950 and 1970 wells are located outside of the curtailment area. The APOD condition would allow the 1960 water right to continue to pump (from any well), because it is senior to the curtailment cutoff date. The curtailment would prevent the 1990 water right from being pumped from the 1990 well within the curtailment area.

The provider is allowed to continue to divert under its 1950 and 1970 water rights from either its 1950 and 1970 wells (which are outside the curtailment area) in any combination it chooses. However, the APOD condition prevents the provider from diverting water under the 1950 or 1970 water rights from either the 1960 or the 1990 well (which are within the curtailment area). That is because doing so would undermine the purpose of the curtailment.

Essentially, the APOD condition rolls the clock back to before the transfer that added the APODs and allows only that pumping that would have been allowed prior to the transfer.[1] In other words, the APOD condition prevents the provider from "bringing in" water from water rights historically associated with wells outside of the curtailment area.

We noted above that the provider cannot pump the 1990 water right from either well within the curtailment area. Now here is the tricky question. Can the provider pump its 1990 water right from its 1950 or 1970 wells? SUEZ believes that answer must be "yes." Indeed, the

[1] One could argue that this APOD condition limitation should apply only in the context of accomplished transfers (where the APOD language was first developed), and not to formal transfers. SUEZ understands, however, that the Department takes the position that even a formal transfer requires the APOD condition. SUEZ has agreed not to oppose the Department's position on this.

curtailment is intended to encourage that very behavior. It is desirable that users move their diversions to locations that do not contribute to the stress that caused the curtailment. By definition, the geographically limited curtailment means that diversion from outside the curtailment area does not contribute to whatever injury caused the curtailment. Hence, it should not be restricted.

This point may be illustrated in another way. Suppose a water user held a water right for a well at Point A. The user becomes concerned that in the future there might be curtailment in the vicinity of Point A. Accordingly, the user seeks to transfer its water right to a location accessing the same aquifer but unlikely to be subject to curtailment. Should that be allowed? Of course, it should. There is no injury or enlargement. Indeed, the user might seek a transfer to the other well while maintaining the first well at Point A as an APOD. That way the user could continue to pump from the Point A well until curtailment occurred, and then switch over to the new well outside the curtailment area. Should that be allowed? Of course, it should. Again, there is no injury or enlargement. The APOD scenario described above with municipal APODs is no different.

Thus, under the municipal hypothetical above (limited curtailment and a 1965 cutoff date), the APOD condition would allow the provider to pump its 1960 water right from any of its four wells. And it could pump its 1950, 1970, and 1990 water rights but only from the 1950 and 1970 wells, which are outside the curtailment area. (This assumes, of course, that the 1950 and 1970 wells have been improved to allow them to pump all 9 cfs.)

SUEZ believes that the *Spackman Orders* are consistent with this. However, in fairness, there is some ambiguity. Here is what the *Spackman Orders* say:

> In a limited curtailment action by the Department that does not encompass all the points of diversion in the Meridian system, the

> alternate point of diversion conditions only serve to identify the original locations for points of diversion associated with the priority date under each right to ensure that Meridian does not attempt to avoid curtailment of its junior priority water rights by moving them outside the curtailment area and moving its senior water rights into the curtailment area to undermine the curtailment.

Meridian Order at 3 (essentially identical statement in *Ketchum Order* at 4) (emphasis supplied).

The problematical part of this statement is underlined. Read alone, that language suggests that, in the municipal hypothetical above, the provider could not divert its 1990 water right at its 1950 or 1970 APODs (outside the curtailment area). SUEZ does not believe that is what was intended by this statement in the *Spackman Orders*. SUEZ urges that the statement be read as a whole to prevent the combination of (1) moving senior water into the curtailment area and (2) moving junior water out to replace it. In other words, it prohibits swapping the 1990 and 1950 water rights as a way of avoiding and undermining the curtailment action.

SUEZ agrees that such a swap is prohibited by the APOD condition. But SUEZ believes that, so long as no water is brought into the curtailment area via the APODs (*i.e.*, only the 3 cfs 1960 right is pumped from wells within the curtailment area), the provider should be allowed to pump any of its water rights from the APODs outside the curtailment area.

This conclusion is reinforced by the brief of the State of Idaho attached as Appendix D. In explaining a limited curtailment, it states:

> Pocatello's agreement with SWC also fails to address the need for the [APOD] condition in times of regional administration, where there is geographically limited curtailment affecting some of the City's wells, but not others. This might occur, for example, where curtailment is limited to wells within a discrete ground water management area. In that event, the condition would restrict the City from transferring a senior water right from outside the curtailment to a well inside the curtailment area. The necessity for the condition in this scenario is clear; without it, the City could use alternative points of diversion to undermine curtailment.

Idaho Brief at *8-9 (Appendix D at p. 43) (emphasis supplied). In other words, the APOD condition is intended to prevent water rights from being brought into the curtailment area. It is not intended to bar water rights from being moved out of the curtailment area.

CONCLUSION

In sum, SUEZ has no objection to the imposition of the Department's APOD condition as a condition of approval of the IMAP. However, it believes that there ought to be clarification (either in the condition language or in the IMAP approval order) as to how this works, particularly with respect to limited curtailments. Specifically, the condition should only prohibit use of APODs to pump from within the limited curtailment area those water rights historically associated with wells located outside of the curtailment area.

Respectfully submitted this 28th day of November, 2017.

GIVENS PURSLEY LLP

By _____
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Attorneys for SUEZ Water Idaho Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of November, 2017, the foregoing was filed, served, and copied as shown below. Service by email is authorized by the Hearing Officer's Order of September 11, 2017 at page 3.

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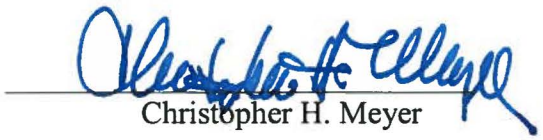
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Christopher H. Meyer

Appendix A EMAILS FROM HEARING OFFICER

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Cc: Pat Hughes (pchendley@comcast.net); Lori Gibson; Michael P. Lawrence; Baxter, Garrick; Peppersack, Jeff; White, Kimi; Miller, Nick; Cox, Sharla; Keen, Shelley; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com)
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Chris,

I appreciate your reminder. An informal email with all of the parties included works just fine. The condition language quoted in your email is still the language used by the Department for APODs. We have a couple of different versions of the condition, depending on the complexity of the original water rights. Conditions 208 thru 211 refer back to the original point of diversion(s) for the water right. Condition 226 accomplishes the same goal as conditions 208 thru 211, but instead refers back to a previous approval or decree.

Condition 208: "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 _____ Well No. _ located in T___, R___, S__, ____."

Condition 209: "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 _____ Well No. _ located in T___, R___, S__, ____, _____ Well No. _ located in T___, R___, S__, ____ and _____ Well No. _ located in T___, R___, S__, ____."

Condition 210: "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 _____ Well No. _ located in T___, R___, S__, ____ which was replaced by _____ Well No. _ located in T___, R___, S__, ____."

Condition 211: "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 _____ Well No. _ located in T___, R___, S__, ____, _____ Well No. _ located in T___, R___, S__, ____ and _____ Well No. _ located in T___, R___, S__, ____. _____. Well Nos. _, _ and _ were replaced by _____ Well No. _ located in T___, R___, S__, ____."

Condition 226: "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, this right retains its original priority for well locations authorized under this right as identified in <decree, license or Transfer XXXXX> dated <XX-XX-20XX>."

1

I hope this information is useful for your ongoing discussions. I hope to have an order out by the end of next week, addressing the pending procedural motions and setting the November 9th status conference.

James Cefalo

From: Christopher H Meyer [mailto:ChrisMeyer@givenspursley.com]
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Subject: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Special Master Cefalo,

I am writing as a follow-up to the IMAP status conference on August 24, 2017.
Some questions were asked about the standard "APOD condition language," which Suez has agreed would be acceptable.
As I recall, you said that would look into whether the language used in the past is still the "standard" language.

The language which appears in IDWR's existing municipal rights via the SRBA process is:

"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 at [name of well] located in [quarter-quarter description]."

This is the same language litigated (and approved) in *In Re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).

I am happy to provide some further comment on how this language (which was developed in the context of accomplished transfers) might be employed in the IMAP. But first I wanted to confirm that this is still the Department's preferred or "standard" language.

I trust you do not object to this informal communication.
I am copying all parties.
I have no objection to your adding this email to the administrative file, if you deem appropriate.

-Chris

CHRISTOPHER H. MEYER
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601 W Bannock St, Boise, ID 83702 / PO Box 2720, Boise, ID 83701
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Christopher H Meyer

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Monday, September 11, 2017 3:38 PM
To: Christopher H Meyer; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Charles L. Honsinger Esq. (honsingerlaw@gmail.com); Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Brent Orton; Bryce Farris; Charles Honsinger; Cherese McLain; Christopher E. Yorgason; Gordon Law; Kyle Radek; Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunaID.gov); Shelley Davis; Stephan Burgos; Warren Stewart
Cc: Pat Hughes (pchendley@comcast.net); Lori Gibson; Michael P. Lawrence; Baxter, Garrick; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com); White, Kimi
Subject: Additional information regarding APOD conditions (Suez - IMAP)

Dear Parties,

After sending my last email, Department staff reminded me that an additional condition has been included on APOD water rights. The condition describes the points of diversion which are being added through a transfer application. The condition states: "Transfer _____ authorizes additional Well No(s) _____ located in T_____, R_____, Sec. _____, QQ_____ as a point(s) of diversion under this right as of the date of approval." Some recent examples of where this condition has been used are Transfer 79778 (City of Meridian) and Transfer 80621 (City of Ketchum).

I also wanted to provide you a brief update on the eight permits included in the IMAP (63-11878, 63-12055, 63-12140, 63-12192, 63-12310, 63-12452, 63-12464 and 63-12516). Proof of beneficial use has been filed for all eight permits. Field exams have already been completed for four of the permits (63-11878, 63-12055, 63-12140 and 63-12192). A field exam is still needed for the other four permits. Department staff in Boise have agreed to move the licensing review for these eight permits higher up on the priority list. I hope to provide a more detailed update on the licensing process when we meet in November.

James Cefalo
Hearing Officer

Christopher H Meyer

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Monday, November 13, 2017 9:37 AM
To: Christopher H Meyer; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Charles L. Honsinger Esq. (honsingerlaw@gmail.com); Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Brent Orton; Bryce Farris; Charles Honsinger; Cherese McLain; Christopher E. Yorgason; Gail McGarry; Gordon Law; Kathleen Carr; Kyle Radek; Matt Howard; Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunaID.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart; Abigail R. Germaine Esq. (agermaine@cityofboise.org); Barker, Albert (IWRB Member); Andrew Waldera; Bob Bachman (bbachman@kunaid.gov); Brent Orton; Bryce Farris; Charles Honsinger; Cherese McLain; Chris M. Bromley Esq. (cbromley@mchughbromley.com); Christopher E. Yorgason; Douglas Strickling; Gail McGarry; Garrick Nelson P.E. (gnelson@meridiancity.org); John Roldan - City of Boise (jroldan@cityofboise.org); Kathleen Carr; Kyle Radek; Matt Howard; Paul L. Arrington (paul@iwua.org); Richard T. Roats (kunaattorney@icloud.com); Richard T. Roats Esq. (rroats@kunaID.gov); Sarah A. Klahn Esq. (sarahk@white-jankowski.com); Shelley Davis; Stephan Burgos; Warren Stewart
Cc: Lori Gibson; Michael P. Lawrence; Gregory P. Wyatt (greg.wyatt@suez-na.com); Roger D. Dittus (roger.dittus@suez-na.com); Blades, Emmi; White, Kimi
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Chris,

The two transfers referenced in a previous email (dated 9/11/2017) were Transfer 79778 (City of Meridian) and Transfer 80621 (City of Ketchum). The Meridian documents can be found in the backfile for water right 63-2893. The Ketchum documents can be found in the backfile for water right 37-2628.

James

From: Christopher H Meyer [mailto:ChrisMeyer@givenspursley.com]
Sent: Friday, November 10, 2017 4:05 PM
To: Cefalo, James ; Chris M. Bromley Esq. (cbromley@mchughbromley.com) ; Charles L. Honsinger Esq. (honsingerlaw@gmail.com) ; Abigail R. Germaine Esq. (agermaine@cityofboise.org) ; Barker, Albert (IWRB Member) ; Andrew Waldera ; Brent Orton ; Bryce Farris ; Charles Honsinger ; Cherese McLain ; Christopher E. Yorgason ; Gail McGarry ; Gordon Law ; Kathleen Carr ; Kyle Radek ; Matt Howard ; Richard T. Roats (kunaattorney@icloud.com) ; Richard T. Roats Esq. (rroats@kunaID.gov) ; Sarah A. Klahn Esq. (sarahk@white-jankowski.com) ; Shelley Davis ; Stephan Burgos ; Warren Stewart ; Abigail R. Germaine Esq. (agermaine@cityofboise.org) ; Barker, Albert (IWRB Member) ; Andrew Waldera ; Bob Bachman (bbachman@kunaid.gov) ; Brent Orton ; Bryce Farris ; Charles Honsinger ; Cherese McLain ; Chris M. Bromley Esq. (cbromley@mchughbromley.com) ; Christopher E. Yorgason ; Douglas Strickling ; Gail McGarry ; Garrick Nelson P.E. (gnelson@meridiancity.org) ; John Roldan - City of Boise (jroldan@cityofboise.org) ; Kathleen Carr ; Kyle Radek ; Matt Howard ; Paul L. Arrington (paul@iwua.org) ; Richard T. Roats (kunaattorney@icloud.com) ; Richard T. Roats Esq. (rroats@kunaID.gov) ; Sarah A. Klahn Esq. (sarahk@white-jankowski.com) ; Shelley Davis ; Stephan Burgos ; Warren Stewart
Cc: Lori Gibson ; Michael P. Lawrence ; Baxter, Garrick ; Peppersack, Jeff ; White, Kimi ; Miller, Nick ; Cox, Sharla ; Keen, Shelley ; Gregory P. Wyatt (greg.wyatt@suez-na.com) ; Roger D. Dittus (roger.dittus@suez-na.com) ; Blades, Emmi ;

White, Kimi
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Mr. Cefalo,

In the IMAP status conference yesterday, I mentioned recently discovering the decision by Director Spackman on 10-4-2016 (In the Matter of Application for Transfer No. 79778 in the Name of City of Meridian).
I understood you to say that you had referenced that case and another in a prior email.
The email below is the only one I have found from you and, unless this is another case of Meyer Pattern Blindness, I don't see the cases referenced.

In any event, if there are other APOD decisions (or guidance, etc.) that you are aware of (other than this Meridian decision and the original Pocatello decision that was appealed), I would very much appreciate your sharing them with Suez and the other parties.

Thank you.

-Chris

CHRISTOPHER H. MEYER
Givens Pursley llp
chrismeyer@givenspursley.com /www.givenspursley.com

From: Cefalo, James [mailto:James.Cefalo@idwr.idaho.gov]
Sent: Tuesday, September 5, 2017 12:53 PM
To: Christopher H Meyer <ChrisMeyer@givenspursley.com>; Chris M. Bromley Esq. (cbromley@mchughbromley.com) <cbromley@mchughbromley.com>; John Roldan - City of Boise (Business Fax); Charles L. Honsinger Esq. (honsingerlaw@gmail.com) <honsingerlaw@gmail.com>; Abigail R. Germaine Esq. (agermaine@cityofboise.org) <agermaine@cityofboise.org>; Barker, Albert (IWRB Member) <apb@idahowaters.com>; Andrew Waldera <andy@sawtoothlaw.com>; Brent Orton <borton@cityofcaldwell.com>; Bryce Farris <bryce@sawtoothlaw.com>; Charles Honsinger <honsingerlaw@gmail.com>; Cherese McLain <cdm@msbtlaw.com>; Christopher E. Yorgason <chris@yorgasonlaw.com>; Gail McGarry <emcgarry@usbr.gov>; Gordon Law <gordon@cityofkuna.com>; Kathleen Carr <kathleenmarion.carr@sol.doi.gov>; Kyle Radek <kradek@meridiancity.org>; Matt Howard <mhoward@usbr.gov>; Richard T. Roats (kunaattorney@icloud.com) <kunaattorney@icloud.com>; Richard T. Roats Esq. (rroats@kunaID.gov) <rroats@kunaID.gov>; Sarah A. Klahn Esq. (sarahk@white-jankowski.com) <sarahk@white-jankowski.com>; Shelley Davis <smd@idahowaters.com>; Stephan Burgos <sburgos@cityofboise.org>; Warren Stewart <wstewart@meridiancity.org>
Cc: Pat Hughes (pchendley@comcast.net) <pchendley@comcast.net>; Lori Gibson <lorigibson@givenspursley.com>; Michael P. Lawrence <mpl@givenspursley.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Peppersack, Jeff <Jeff.Peppersack@idwr.idaho.gov>; White, Kimi <Kimi.White@idwr.idaho.gov>; Miller, Nick <Nick.Miller@idwr.idaho.gov>; Cox, Sharla <Sharla.Cox@idwr.idaho.gov>; Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Roger D. Dittus (roger.dittus@suez-na.com) <roger.dittus@suez-na.com>
Subject: RE: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Chris,

I appreciate your reminder. An informal email with all of the parties included works just fine. The condition language quoted in your email is still the language used by the Department for APODs. We have a couple of different versions of the condition, depending on the complexity of the original water rights. Conditions 208 thru 211 refer back to the original point of diversion(s) for the water right. Condition 226 accomplishes the same goal as conditions 208 thru 211, but instead refers back to a previous approval or decree.

Condition 208: "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 _____ Well No. _ located in T___, R___, S__, ____."

Condition 209: "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 _____ Well No. _ located in T___, R___, S__, ____, _____ Well No. _ located in T___, R___, S__, ____ and _____ Well No. _ located in T___, R___, S__, ____."

Condition 210: "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 _____ Well No. _ located in T___, R___, S__, ____ which was replaced by _____ Well No. _ located in T___, R___, S__, ____."

Condition 211: "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 _____ Well No. _ located in T___, R___, S__, ____, _____ Well No. _ located in T___, R___, S__, ____ and _____ Well No. _ located in T___, R___, S__, ____. _____. Well Nos. _, _ and _ were replaced by _____ Well No. _ located in T___, R___, S__, ____."

Condition 226: "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, this right retains its original priority for well locations authorized under this right as identified in dated ."

I hope this information is useful for your ongoing discussions. I hope to have an order out by the end of next week, addressing the pending procedural motions and setting the November 9th status conference.

James Cefalo

From: Christopher H Meyer [mailto:ChrisMeyer@givenspursley.com]
Sent: Tuesday, September 05, 2017 11:26 AM
To: Chris M. Bromley Esq. (cbromley@mchughbromley.com) <cbromley@mchughbromley.com>; John Roldan - City of Boise (Business Fax) <IMCEAFAX-John+20Roldan+20P+2EE+2E+40+2B1+20+28208+29+20433-5650@givenspursley.com>; Charles L. Honsinger Esq. (honsingerlaw@gmail.com) <honsingerlaw@gmail.com>; Abigail R. Germaine Esq. (agermaine@cityofboise.org) <agermaine@cityofboise.org>; Barker, Albert (IWRB Member) <apb@idahowaters.com>; Andrew Waldera <andy@sawtoothlaw.com>; Brent Orton <borton@cityofcaldwell.com>; Bryce Farris <bryce@sawtoothlaw.com>; Charles Honsinger <honsingerlaw@gmail.com>; Cherese McLain <cdm@msbtlaw.com>; Christopher E. Yorgason <chris@yorgasonlaw.com>; Gail McGarry <emcgarry@usbr.gov>; Gordon Law <gordon@cityofkuna.com>; Kathleen Carr <kathleenmarion.carr@sol.doi.gov>; Kyle Radek <kradek@meridiancity.org>; Matt Howard <mhoward@usbr.gov>; Richard T. Roats (kunaattorney@icloud.com) <kunaattorney@icloud.com>; Richard T. Roats Esq. (rroats@kunaID.gov) <rroats@kunaID.gov>; Sarah A. Klahn Esq. (sarahk@white-jankowski.com) <sarahk@white-jankowski.com>; Shelley Davis <smd@idahowaters.com>; Stephan Burgos <sburgos@cityofboise.org>; Warren Stewart <wstewart@meridiancity.org>; Cefalo, James <James.Cefalo@idwr.idaho.gov>
Cc: Pat Hughes (pchendley@comcast.net) <pchendley@comcast.net>; Lori Gibson <lorigibson@givenspursley.com>; Michael P. Lawrence <mpl@givenspursley.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Peppersack, Jeff <Jeff.Peppersack@idwr.idaho.gov>; White, Kimi <Kimi.White@idwr.idaho.gov>; Miller, Nick <Nick.Miller@idwr.idaho.gov>; Cox, Sharla <Sharla.Cox@idwr.idaho.gov>; Keen, Shelley <Shelley.Keen@idwr.idaho.gov>; Gregory P. Wyatt (greg.wyatt@suez-na.com) <greg.wyatt@suez-na.com>; Roger D. Dittus (roger.dittus@suez-na.com) <roger.dittus@suez-na.com>
Subject: Question regarding APOD condition language (Suez's IMAP proceeding) [IWOV-GPDMS.FID508386]

Special Master Cefalo,

I am writing as a follow-up to the IMAP status conference on August 24, 2017.
Some questions were asked about the standard "APOD condition language," which Suez has agreed would be acceptable.
As I recall, you said that would look into whether the language used in the past is still the "standard" language.

The language which appears in IDWR's existing municipal rights via the SRBA process is:

"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 at [name of well] located in [quarter-quarter description]."

This is the same language litigated (and approved) in *In Re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).

I am happy to provide some further comment on how this language (which was developed in the context of accomplished transfers) might be employed in the IMAP. But first I wanted to confirm that this is still the Department's preferred or "standard" language.

I trust you do not object to this informal communication.
I am copying all parties.
I have no objection to your adding this email to the administrative file, if you deem appropriate.

-Chris

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direct 208-388-1236 / cell 208-407-2792 / assistant 208-388-1227 (Lisa Hughes)
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Appendix B MERIDIAN ORDER

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 79778 IN THE NAME OF CITY OF MERIDIAN	**ORDER ADDRESSING EXCEPTIONS AND AMENDING TRANSFER APPROVAL**

PROCEDURAL HISTORY

On March 17, 2016, the Idaho Department of Water Resources ("Department") issued a preliminary order approving Transfer No. 79778 ("Transfer") authorizing the City of Meridian ("Meridian") to divert ground water for municipal purposes from twenty-seven wells under each of their twenty-six water rights. The Transfer included the following condition of approval:

> *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, this right retains its original priority for well locations authorized under this right as identified in the [decree or license] dated [decree or license date].*

This condition is hereafter referred to as the "administration condition." The Transfer included an additional condition of approval:

> *The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use or where the use of surface water was replaced by the use of water diverted in connection with this right before the approval of Transfer 79778. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.*

This condition is hereafter referred to as the "surface water first condition."

On April 1, 2016, Meridian filed a petition for reconsideration of the order. After communication between Meridian and the Department to clarify the administration condition and the surface water first condition, the Department issued an order denying the petition for reconsideration on April 22, 2016.

On May 5, 2016, Meridian filed its *Exceptions to Order Denying Petition for Reconsideration* ("Exceptions").

EXCEPTIONS TO PRELIMINARY ORDER

Meridian takes exception with the administration condition and the surface water first condition. Meridian argues the administration condition "is vague and confusing and may result in unintended and negative impacts to the City." *Exceptions* at 1. Meridian also argues:

> [T]he [transfer approval] failed to recognize the potential consequences of [the surface water first condition] regarding the use of surface water for irrigation purposes prior to the use of water under any of the rights subject to transfer that was added to the rights even though it was not present in the conditions prior to approval of the transfer.

Id.

Administration Condition

Meridian argues that the administration condition is "vague and confusing" and that "[i]t is unknown exactly what is meant by the word 'administration.'" *Exceptions* at 3. Meridian suggests that in a basin wide administration action by the Department, the administration condition "requires that the City's water rights be limited to only one single diversion point for the majority of its water rights, ..." *Exceptions* at 4-5. In another example, Meridian suggests that "under the administration condition, a junior priority water right holder can insist that the water right be limited to its original point of diversion... ." *Exceptions* at 6.

The Transfer authorizes Meridian to use its city wells as alternate points of diversion for each of its municipal water rights. The effect of the Transfer is that Meridian can divert its most senior rights from any of its wells. This raises the potential for injury to other water rights existing prior to the Transfer, either due to local interference between wells or due to a geographically limited[1] delivery call. The administration condition was applied to each right in the Transfer to identity well locations associated with the priority date under each right in the event administration of rights becomes necessary.

The language in the administration condition is substantially similar to language used by the Department in an alternate point of diversion condition which was upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830 (2012). In that case, the Court agreed with the Department that the condition was necessary to assist in the administration of water rights and to avoid injury to other water rights. *Id.* at 835. The Court recognized that the key consideration is injury to the priority of the water rights. As the Court recognized, "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." *City of Pocatello*, 152 Idaho at 835.

[1] The condition helps ensure that a municipality cannot circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area to protect junior priority wells within the curtailment area.

From the Department's perspective, there is no substantive difference between the language in the administrative condition and the language in the condition upheld by the Idaho Supreme Court in *City of Pocatello*. Meridian seems to believe otherwise, however. To remove any question regarding the language, the Director will modify the administration condition. Those water rights decreed in the SRBA with an alternate point of diversion condition (for example, water right no. 63-08332) will retain the decreed condition. A condition similar to the SRBA decreed alternate point of diversion condition will be added to those water rights which previously did not include an alternate point of diversion condition if the location information is available to the Department.

The administration condition does not identify which points of diversion are alternate points of diversion, which is pertinent information for a transfer with regard to potential injury claims by other water rights. The Department will also include the following condition for each right in the Transfer as follows:

> Transfer _____ authorizes additional Well No(s) _____ located in T_____, R_____, S___, _____, _____ as a point(s) of diversion under this right as of the date of approval.

In a basin wide curtailment action by the Department encompassing all the points of diversion in the entire Meridian system, the alternate point of diversion conditions would have no impact on Meridian because the city would only be required to curtail its junior water rights, but would retain flexibility to use its remaining senior water rights at alternate locations. *See* Brief for Respondent at 9, fn. 2, City of Pocatello v. State of Idaho, (S.Ct. Doc. No. 37723-2010).[2] In a limited curtailment action by the Department that does not encompass all the points of diversion in the Meridian system, the alternate point of diversion conditions only serve to identify the original locations for points of diversion associated with the priority date under each right to ensure that Meridian does not attempt to avoid curtailment of its junior priority water rights by moving them outside the curtailment area and moving its senior water rights into the curtailment area to undermine the curtailment. *See id.*

With regards to well-to-well interference issues, the alternate point of diversion conditions ensure that if, at some time in the future, a well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the Meridian well, alleges injury from pumping water from the Meridian well, and Meridian's increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, Meridian will be required to reduce pumping to not cause interference. *See Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Meridian cannot pump water from alternate points of diversion to the detriment of other existing well owners. But this condition does not mean "the City will <u>never</u> be able to assert the priority dates of its water rights at the new points of diversion approved under the transfer against <u>any</u> other water right" as suggested by Meridian. *Exceptions* at 6.

---

[2] Available on Westlaw at 2011 WL 3512891.

Surface Water First Condition

Meridian suggests the Director lacks the authority to impose the Surface Water First condition on water rights on which the condition was not imposed prior to the approval of the Transfer. *Exceptions* at 8. Meridian argues "the 'Surface Water First' condition constitutes the impermissible restriction of a valid property right, and should be removed from those rights where it was not present prior to approval of Transfer no. 79778." *Id.* at 9.

Idaho Code § 42-222 requires that the Department "examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided...the change does not constitute an enlargement in use of the original right, [and] the change is consistent with the conservation of water resources within the state of Idaho... ." Idaho Code § 42-222(1). Prior to the Transfer approval, six of the city's 26 water rights involved in the Transfer included a condition requiring the use of available surface water to be used prior to the diversion of ground water. The condition helps conserve Idaho's ground water (which is a limited resource in certain areas and which is generally a higher quality water source) by requiring that surface water be used first when available for irrigation use.[3] The Transfer authorizes Meridian to use its city wells as alternate points of diversion for each of its 26 water rights. The effect of the Transfer is that Meridian can more easily divert ground water at any location under any of its water rights. This raises the potential for Meridian to circumvent the requirement to use surface water first on lands historically irrigated under the six water rights with the condition because Meridian could assert that the water is diverted under a right without the Surface Water First condition. It also raises the potential to enlarge the use of ground water under Meridian's rights in lieu of available surface water because Meridian could use ground water in situations where it had been restricted to using surface water in the past. The Surface Water First condition is necessary to ensure that approval of the Transfer will not be inconsistent with the conservation of water resources within the State and will not enlarge the water rights being transferred. The Department is not limited in its use of conditions to those that existed under each right prior to the Transfer so long as conditions are added to ensure statutory criteria for a transfer can be met. The Surface Water First condition is necessary to ensure that the statutory criteria of Idaho Code 42-222 are met.

Meridian argues that "imposition of the 'Surface Water First' condition may prevent the City from flexibly using its water rights to ensure compliance under future water quality regulations." *Exceptions* at 8. Meridian desires to use lower quality water from certain wells for irrigation use to ensure higher quality water is available for culinary purposes. Additionally, Meridian desires to maintain natural ground water pressure gradients in the aquifer by continuing to pump the lower quality water for irrigation to reduce migration of the lower quality water into other areas. *Exceptions* at 8-9. The Director disagrees that the surface water first condition reduces flexibility. The condition does not restrict which wells or ground water rights can be used for irrigation, it only ensures that the status quo is maintained regarding use of surface

[3] The strong public policy in favor of the use of surface water first when both ground water and surface water sources are available is also reflected in Idaho's land use code. Idaho Code § 67-6537 provides, in relevant part, that "[a]ll applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary water source for irrigation." Idaho Code § 67-6537(1).

water on lands where surface water is available and has been historically used. The surface water first condition includes an exception where the use of surface water was replaced by the use of ground water diverted in connection with each right before the approval of the Transfer.

ORDER

IT IS HEREBY ORDERED that Transfer No. 79778 is APPROVED with amended conditions as shown in the accompanying approval document.

Dated this 4th day of October, 2016.

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October 2016, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Exceptions and Amending Transfer Approval and Explanatory information to accompany a Final Order

CITY OF MERIDIAN
33E BROADWAY AVE
MERIDIAN, ID 83642

CHARLES HONSINGER
HONSINGER LAW PLLC
P O BOX 517
BOISE, ID 83701

Deborah J. Gibson

Debbie Gibson
Administrative Assistant

Appendix C KETCHUM ORDER

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 80621 IN THE NAME OF CITY OF KETCHUM	**ORDER ADDRESSING EXCEPTIONS AND AMENDING TRANSFER APPROVAL**

PROCEDURAL HISTORY

On March 4, 2016, the Idaho Department of Water Resources ("Department") issued a preliminary order approving Transfer No. 80621 ("Transfer") authorizing the City of Ketchum ("Ketchum") to divert ground water for municipal purposes from seven wells under each of their seven water rights. The Transfer included the following as a condition of approval ("Condition #3"):

> *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, this right retains its original priority for well locations authorized under this right as identified in the decree dated 6/29/11.*

On March 18, 2016, Ketchum filed a petition for reconsideration of the order ("Petition"). After communication between Ketchum and the Department to clarify Condition #3, the Department issued an order denying the Petition on April 8, 2016.

On April 22, 2016, Ketchum filed its *Exceptions to Preliminary Order for Transfer Approval* ("Exceptions").

EXCEPTIONS TO PRELIMINARY ORDER

Ketchum takes exception with Condition #3 and argues:

1. Condition #3 is vague, over-broad, and confusing.
2. The Department has been applying this condition inconsistently and should first set forth a policy that states the circumstances which warrant this Condition.

Exceptions at 3.

Ketchum requests that the Department strike Condition #3 or substitute language to clarify when limited pumping would be imposed. *Id.*

The Transfer authorizes Ketchum to use its city wells as alternate points of diversion for each of its municipal water rights. The effect of the Transfer is that Ketchum can divert its most senior rights from any of its wells. This raises the potential for injury to other water rights existing prior to the Transfer, either due to local interference between wells or due to a geographically limited[1] delivery call. Condition #3 was applied to each right in the Transfer to identify well locations associated with the priority date under each right in the event administration of rights becomes necessary.

The language in Condition #3 is substantially similar to language used by the Department which was upheld by the Idaho Supreme Court in *City of Pocatello v. Idaho*, 152 Idaho 830 (2012). In that case, the Court agreed with the Department that the condition was necessary to assist in the administration of water rights and to avoid injury to other water rights. *Id.* at 835.

Ketchum argues that, in *City of Pocatello*, "the Court held that the condition was necessary during **priority administration** in order to protect from physical interference between water rights during time of shortage" and therefore the "condition would only apply during priority administration during a water delivery call." *Exceptions* at 3-4 (emphasis in original). Ketchum equates "priority administration" to "a water delivery call." Ketchum suggested an alternate condition that would limit application of the condition to "priority administration during delivery calls." *Id.* at 4

Ketchum seeks to impose a limitation that is not imposed by the Idaho Supreme Court in *City of Pocatello* and is not consistent with the record in that case. Ketchum's argument focuses on one section of the Court's decision and seeks to limit the condition to its application only in a delivery call. The problem with this interpretation is that the Court in *City of Pocatello* did not limit the application of the condition to just a delivery call situation. To the contrary, the Court recognized that the key consideration is injury to senior priority water rights. As the Court recognized, "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." *City of Pocatello*, 152 Idaho at 835. The reason for the condition was to address well interference issues *and* mitigation requirement for aquifer wide regulation. *Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Application of the condition is not limited to just a delivery call. The Director disagrees with the narrow application of the condition suggested by Ketchum because it would preclude application in a well interference situation.

Idaho Code § 42-222 requires that the Department "examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby... ." The Department is not limited in its use of conditions to protect from injury only during a delivery call. Application of Condition #3 should be applied broadly to any situation where the approval of alternate points of diversion under a water right for a municipality has the potential to injure other rights. The condition should be applied to municipal rights specifically, because municipal rights generally identify (or have the potential to identify) a much larger place of use than other water rights and injury

[1] The condition helps ensure that a municipality cannot circumvent the curtailment of ground water diversions within a defined geographic area by bringing in water rights from outside the curtailment area to protect junior priority wells within the curtailment area.

situations may not arise for years or even decades due to the growing service area of a municipality.

Ketchum also argues that the Department's application of Condition #3 to municipalities is inconsistent, and therefore arbitrary. *Exception* at 5. Ketchum submitted a list of transfers approved by the Department for municipalities that either included the condition or did not include the condition without explanation. Ketchum believes the Department should develop a policy to guide the Department and inform the public regarding use of the condition.

The Department's Administrator's Memorandum – Transfer Processing No. 24 dated December 21, 2009 includes the following policy statement (see p. 24):

> An application for transfer that is approved to provide alternate points of diversion from ground water under one or more municipal water rights to develop or expand a common delivery system shall include conditions of approval to identify the point(s) of diversion authorized under each right prior to the transfer. The purpose of the condition is to provide for future administration of water rights in situations where increased municipal pumping over time is determined to cause injury through interference with other nearby wells.

The Department's policy states that the purpose of the condition is to address injury through interference with other nearby wells. The policy does not expressly address injury due to delivery calls. Nonetheless, Condition #3 should address possible injury due to delivery calls. The policy statement instructs staff to include a condition when alternate points of diversion are added to a municipal right through a transfer.

The Director agrees that Condition #3 should be applied consistently. Absence of the condition would not excuse a municipal right holder from a determination of injury due to the use of alternate points of diversion. Inconsistent use of the condition on transfer approvals is not justification for an applicant to injure a senior water right. The condition is not arbitrary.

FURTHER ANALYSIS ON REVIEW

Ketchum asserts that Condition #3 is vague, over-broad and confusing. There is no substantive difference between the language in Condition #3 and the language in the condition upheld by the Idaho Supreme Court in *City of Pocatello*. Ketchum seems to believe otherwise, however. To remove any question regarding the language, however the Director will edit the Transfer approval. First, those water rights decreed in the SRBA with an alternate point of diversion condition (for example water right no. 37-2628) will retain the decreed condition identifying where ground water was first diverted under the water right. Second, for those water rights which previously did not include an alternate point of diversion condition (for example, water right no. 37-4413), a condition similar to the SRBA decreed alternate point of diversion condition will be added if the location information is available to the Department. Third, the Department will include the following condition for each right in the Transfer as follows:

> Transfer _____ authorizes additional Well No(s) _____ located in T_____, R_____, S___, _____, _____ as a point(s) of diversion under this right as of the date of approval.

The additional condition is necessary to identify which points of diversion are alternate points of diversion authorized by the Transfer, which is pertinent information for a transfer with regard to potential injury claims by other water rights.

Ketchum further asserts the condition should be removed because the Department has not explained "in what circumstances Condition #3 will be imposed." *Exceptions* at 4. The record in the City of Pocatello provides information on how the condition operates. In a basin wide curtailment action by the Department encompassing all the points of diversion in the entire Ketchum system, the alternate point of diversion conditions would have no impact on Ketchum because the city would only be required to curtail its junior water rights, but would retain flexibility to use its remaining senior water rights at alternate locations. *See* Brief for Respondent at 9, fn. 2, City of Pocatello v. State of Idaho, (S.Ct. Doc. No. 37723-2010).[2] In a limited curtailment action by the Department that does not encompass all the points of diversion in the Ketchum system, the alternate point of diversion conditions only serve to identify the original locations for points of diversion associated with the priority date under each right to ensure that Ketchum does not attempt to avoid curtailment of its junior priority water rights by moving them outside the curtailment area and moving its senior water rights into the curtailment area to undermine the curtailment. *See id.*

When well-to-well interference is an issue, the alternate point of diversion conditions ensure that if a well owner holding a water right bearing a priority date senior to the date of alternate points of diversion for the Ketchum well, alleges injury from pumping water from the Ketchum well, and Ketchum's increased pumping under a water right not originally diverted from the well is shown to be the reason for the interference, Ketchum will be required to reduce pumping to not cause interference. *See Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* in SRBA subcase 29-271 *et al* (April 17, 2006), at 14. Ketchum cannot pump water from alternate points of diversion to the detriment of other existing well owners.

For the reasons stated, the Department will not remove the alternate point of diversion conditions, but will amend the transfer approval as discussed above.

ORDER

IT IS HEREBY ORDERED that Transfer No. 80621 is APPROVED with amended conditions as shown in the accompanying approval document.

Dated this 27th day of October, 2016

GARY SPACKMAN
Director

[2] Available on Westlaw at 2011 WL 3512891.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of October 2016, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Exceptions and Amending Transfer Approval and Explanatory information to accompany a Final Order

CITY OF KETCHUM
ROBYN MATTISON
PO BOX 2315
KETCHUM, ID 83340

MSBT LAW
CHERESE MC LAIN
950 W BANNOCK ST, STE 520
BOISE, ID 83702

BROCKWAY ENGINEERING
2016 N WASHINGTON ST, STE 4
TWIN FALLS, ID 83301

Deborah J. Gibson
Deborah Gibson
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Revised July 1, 2010

Appendix D IDAHO BRIEF

's

2011 WL 3512891 (Idaho) (Appellate Brief)
Supreme Court of Idaho.

CITY OF POCATELLO, Appellant,
v.
The State of Idaho, Respondent.

No. 37723-2010.
July 25, 2011.

Appeal from the Snake River Basin Adjudication, Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls In the Matter of SRBA Case No. 39576 Subcase Nos. 29-00271 et al., Hon. Eric J. Wildman, District Court Judge, presiding.

Brief for Respondent

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*1 I. STATEMENT OF THE CASE

A. Nature of the Case

This is a water rights case on appeal from the Snake River Basin Adjudication ("SRBA") District Court. Pocatello appeals the SRBA District Court's *Order on Motion to Alter or Amend* (R. 5250-71) its *Memorandum Decision and Order on Challenge* (R. 5125-56). In its *Order on Motion to Alter or Amend,* the SRBA Court held that the Special Master did not err by 1) conducting a hearing on injury absent a third-party objection to Pocatello's accomplished transfer claim; 2) recommending a condition to address injury; 3) rejecting Pocatello's claims that its ground water wells should be alternate points of diversion for its surface rights; and 4) recommending water right 29-7770 with an irrigation purpose of use. The Court further held that pre-1969 water rights are subject to the no-injury rule and thus are not exempt from investigation of injury by the Director. The SRBA Court also affirmed its adoption of the Special Master's findings of fact that the City's surface water rights and groundwater wells do not divert from the same source and the recommended priority dates of water rights 29-13558 and 29-13639.

B. Course of Proceedings Below and the Facts

1. Proceedings in the Snake River Basin Adjudication ("SRBA")

The water rights at issue here were claimed in 1990 by the City of Pocatello. (R. 4502-13). Following the issuance of the Director's Reports in 2003 (R. 1-62), Pocatello filed an objection to each water right recommendation (R. 78-262). The State of Idaho, and later the Surface Water Coalition ("SWC") filed responses to the City's objections (R. 456-568 and R. 1927-2343, respectively). Following summary judgment proceedings *2 and a trial, the Special Master issued a *Master's Report and Recommendation and Order on Motion to Reconsider* (R. 4553-4739), in which she recommended: 1) that the condition imposed by the Director be maintained to prevent injury to existing water rights; 2) that the City's groundwater wells NOT be recommended as alternative points of diversion for Pocatello's surface water rights; 3) that water right 29-7770 be decreed with an irrigation purpose of use; and 4) that the priority date for water right no. 29-13558 be decreed as recommended by the Director, while the priority of water right 29-13639 be decreed with a priority date one day earlier than the Director recommended. The Special Master subsequently issued an *Amended Master's Report and Recommendation and Order on Motion to Reconsider,* amending the place of use description for Pocatello's municipal rights (R. 4743-4818).

On May 28, 2008, the Special Master issued an *Order Denying Motion to Alter or Amend* (R. 4881-89), and on June 11, 2008, Pocatello filed a *Notice of Challenge to the Master's Report and Recommendation* (R. 4890-96). On April 10, 2009, United Water of Idaho, City of Nampa and City of Blackfoot filed a *Motion for Leave to Participate or to Participate as Amici Curiae* (R. 4959-67). The SRBA District Court granted the *Motion to Participate as Amici Curiae* (R. 4987-91). After oral argument on the Challenge, the SRBA District Court issued its *Memorandum Decision and Order on Challenge,* on November 9, 2009, affirming the order of the

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Special Master (R. 5125-56).

On November 23, 2009, Pocatello filed a *Motion to Alter or Amend the Memorandum Decision and Order on Challenge* (R. 5157-61). Following a hearing, the SRBA Court denied the Motion, affirming its decision in the *Memorandum Decision and Order on Challenge* (R. 5250-71). Pocatello filed a *Notice of Appeal* with the Idaho ***3** Supreme Court on May 24, 2010, and an *Amended Notice of Appeal* on July 9, 2010 (R. 5272-92).

2. Statement of the Facts

This case concerns state based water rights claimed by the City of Pocatello. The water rights are used to provide municipal water service to water users and residents of the City of Pocatello, and to service its airport facility. Water for the in-town service is supplied though an interconnected system of 22 wells through which 21 ground water rights are diverted. Pocatello claims the wells, developed at different times and in different locations, as alternative points of diversion for each of its 21 ground water rights. Pocatello seeks the right to divert water under its most senior ground water rights from any of its wells. Additionally, Pocatello holds 4 surface water rights that divert from Mink Creek and Gibson Jack Creek, which are both tributary to the Portneuf River and the Lower Portneuf River Valley Aquifer ("LPRVA"). The LPRVA is the source of the City's ground water rights. Pocatello claimed its 22 groundwater wells as alternative points of diversion for the four surface water rights as well.

IDWR recommended the ground water rights with alternative points of diversion, but included a condition it deemed necessary to prevent injury to other water users:

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 Pocatello's ground water wells as alternative points of diversion for the City's surface water rights. The City objected to the inclusion of the condition and to the denial of alternative points of diversion for its surface water rights. No third-party *Objections* or *Responses* to IDWR's recommendation were filed.

***4** Pocatello's water right no. 29-7770 was licensed in 2003 with a purpose of use of irrigation. *Appellant's Opening Brief* at 16. IDWR recommended the right consistent with the license, as an irrigation right (R. 42). Pocatello objected to the Director's recommendation (R. 390-395).

Pocatello claimed a priority date of June 30, 1905 for water right no. 29-13558 (R. 856) based on newspaper articles about the history of the cities of Alameda and Pocatello (R. 7656-7664). IDWR recommended a priority of July 16, 1924, one day before the City of Alameda was established (R. 48). Similarly, Pocatello claimed a priority date of December 31, 1940 for water right no. 29-13639 (R. 870). IDWR recommended a priority date of October 22, 1952, based on the application date for the water right permit (R. 61). The Special Master recommended the right with a priority of October 21, 1952 (R. 4764).

II. ISSUES PRESENTED

The issues presented, as framed by the Respondent, are as follows:

A. Whether the District Court erred in affirming the Special Master's finding that the City of Pocatello's interconnected municipal groundwater rights should include a condition indicating the original point of diversion and priority date.

B. Whether the District Court erred in affirming the Special Master's determination that the City of Pocatello's groundwater wells could not be designated alternative points of diversion for the City's surface water rights.

C. Whether the District Court properly found that transfers of water rights developed prior to 1969 are subject to the same no-injury requirement as transfers of post-1969 water rights.

D. Whether the District Court properly upheld the Special Master's finding the purpose of use of water right 29-7770 is irrigation.

E. Whether the District Court properly upheld the Special Master's findings as to the priority dates of water rights 29-13639 and 13558.

*5 F. Whether respondents should be awarded attorney fees and costs on appeal.

III. STANDARD OF REVIEW

The District Court is required to adopt the special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2), *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991). In turn, 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. I.R.C.P. 52(a); *McCray v. Rosenkrance*, 135 Idaho 509, 513, 20 P.3d 693, 697 (2001). The findings of the district court will not be set aside on appeal unless clearly erroneous. I.R.C.P. 52(a. The standard for review of the trial court's findings of fact is whether they are supported by substantial, although conflicting, evidence. *Rasmussen v. Martin, 104 Idaho 401,404, 659 P.2d 155, 158 (Ct.App.1983.*

"The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive." *State v. Hagerman Water Right Owners*, 130 Idaho at 740, 947 P.2d at 413 (1997). The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court. *McCray*, 135 Idaho at 513, 20 P.3d at 697. This Court freely reviews the SRBA district court's conclusions of law. *Id.*

IV. ARGUMENT

A. The District Court did not err in affirming the Special Master's finding that the City of Pocatello's interconnected municipal groundwater rights should include a condition indicating the original point of diversion and priority date

The District Court correctly affirmed the Special Master's recommendation of Pocatello's water rights with the contested condition. The District Court agreed that the condition is necessary to prevent injury to other water rights from the City's use of *6 alternative points of diversion (R. 5135-40). The Court also held that the Director has the authority to impose the condition, pursuant both to Idaho Code § 42-1411 and 42-1425, and that the Special Master correctly inquired into whether injury to other water rights would occur, despite no third-party objections to the claims (R. 5133-34). Finally, the Court held that the condition would not prevent Pocatello from diverting water under senior rights for which the original point of diversion no longer exists (R. 5143).

1. A condition indicating the original point of diversion and priority date is necessary to prevent Pocatello from using alternative points of diversion to undermine the priority of other water users.

The City of Pocatello claimed all of its wells as alternative points of diversion for each of its groundwater right claims (R. 4502-13). The effect of claiming municipal rights with alternative points of diversion is to allow the City to divert any of its water rights from any of its wells. The Idaho Department of Water Resources ("IDWR") recommended the ground water rights with the alternate points of diversion, but included a condition stating

> To the extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface waters, groundwater was first diverted under this right from Pocatello well (legal description) in the amount of _____cfs.

(R. 10-62). At trial, the Director of IDWR at the time, David Tuthill, testified that the condition is necessary to protect other water users from injury. He explained the concerns that led to the recommendation of the condition on rights claimed with alternative points of diversion:

> *7 Our understanding of our responsibility through the adjudication is to appropriately condition a water right so that it cannot be expanded over time inappropriately...The two areas that we were concerned about were, number one, well interference that could happen in the future as a result of increased pumping at wells and, secondly, conjunctive administration concerns relative to diversion from one location as compared with diversion from another location.

Tr. Vol. II, p. 231, L. 24 through p. 232 L. 25[1]. Pocatello objected to the condition, stating that there was no injury to other water users as a result of the City's interconnected well system, in place prior to 1987. As a result, the Special Master was required to investigate whether the condition was necessary to avoid injury to existing water rights. As explained by the District Court in its *Memorandum Decision and Order on Challenge*, "[i]n this case an objection was filed by Pocatello, appropriately triggering an inquiry into injury." (R. 5135).

1 Citations to the transcript from the trial are identified as "Tr.___."

Pocatello argues that the Special Master erred in finding that the condition is necessary to prevent injury to existing water rights. The District Court disagreed, finding that the Special Master correctly applied the legal principles of what constitutes injury to a water right. The Court found that:
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 Special Master correctly acknowledged this principle: 'Where a change or transfer would undermine a priority date, the injury is real and material even if the damage is not immediately manifest. In a prior appropriation system, undermining a priority date is a seminal injury. Thus the condition appears to correctly protect juniors from injury to their priorities.'

*8 (R. 5139). The District Court affirmed the Special Master's conclusions of law as to the nature of injury to the priority of water rights and adopted the Special Master's findings of fact that recommending Pocatello's rights with alternative points of diversion without the condition would cause such injury. (R. 5153)

The City of Pocatello has provided no evidence that the Court's findings of facts as to injury to priority are clearly erroneous. Pocatello has also failed to disprove the Court's legal conclusion that a diminishment of priority is a seminal injury that occurs at the time a transfer is approved. Rather than address the well reasoned finding of the Court as to the real and immediate injury to priority that would occur upon approval of the accomplished transfer, the City maintains that the Court is simply concerned with future, speculative injury.

Pocatello offers no rebuttal to the assertion that, were its rights recommended without the condition, the effect would be to diminish the priority of others. Instead, it maintains that its settlement with the Surface Water Coalition ("SWC") "should ameliorate IDWR's concerns about injury." *Appellant's Opening Brief* at 34. This

constitutes a tacit acknowledgement that the operation of its water rights without the stipulation would cause injury to existing water users. The agreement between Pocatello and the SWC requires that the City seek administrative approval before increasing its well capacity (R. 6574-76). Pocatello ignores that the stipulation is only binding on Pocatello and the SWC, may be dissolved at the whim of the parties and is not be enforceable by IDWR.

Pocatello's agreement with the SWC also fails to address the need for the condition in times of regional administration, when there is geographically limited *9 curtailment affecting some of the City's wells, but not others. This might occur, for example, where curtailment is limited to wells within a discrete ground water management area. In that event, the condition would restrict the City from transferring a senior water right from outside the curtailment to a well inside the curtailment area. The necessity of the condition in this scenario is clear; without it, the City could use alternative points of diversion to undermine the curtailment.[2]

2 The condition would have no impact on Pocatello's ability to divert under its water rights in the most likely administration scenario-curtailment applicable to all wells and water rights serving the City. In such a broad, area-wide curtailment scenario, IDWR, to protect the senior rights of downstream water users could order the curtailment of all water rights junior to a certain date in order to protect the senior rights of downstream water users. In that event, the condition would have no impact because the curtailment would be based strictly on the priority of Pocatello's rights. The City's junior rights could simply not be diverted, while the City's senior rights could be pumped from any well within the municipal system. Indeed, this is a key reason for recognizing alternative points of diversion -a benefit that is not undermined by the contested condition.

Pocatello fails to show that the District Court's findings of fact on the subject of injury are not supported by substantial evidence. On the contrary, the assertion by the City that its agreement with the SWC will prevent injury bolsters the finding that injury would occur in the absence of the agreement. The Court's conclusions of law are similarly supported by substantial evidence and by Idaho law. Therefore, the Court's findings and conclusions should be affirmed.

2. The Director has authority to impose this descriptive condition on Pocatello's water rights.

The City of Pocatello argues that IDWR lacked the authority to recommend the City's water rights with the above-cited condition because it had not previously recommended that other municipal water rights with alternative points of diversion include such a condition[3]. The fact that other rights recommended earlier in the SRBA were not similarly conditioned is irrelevant to whether this condition is necessary for the *10 City of Pocatello's rights. Here the condition has been shown to be necessary to prevent injury to other water users diverting from the common source.

3 Subsequent to the City of Pocatello's recommendations, IDWR has included the alternative points of diversion condition in water right recommendations for municipal providers with interconnected systems.

Additionally, a greater understanding of conjunctive administration has a direct impact on what the Director deems necessary for administration of a right today as opposed to the past. To force the Director to adhere to past practices despite a better understanding of the principles of conjunctive administration would prevent him from fulfilling his statutory obligations. It would also leave Idaho's water resources mired in a system of acknowledged misconceptions and archaic principles in an area of water resource management that is rapidly evolving in Idaho. The Director must be able to bring to bear his expertise in processing water right claims, and that expertise necessarily expands and evolves with new developments in water resource management and in the law. Pocatello's claim that the Director cannot condition its water rights because it did not recommend the same condition in 2003 on other municipal rights is therefore unavailing.[4]

4 It is also worthy of note that the Amici Curae in this subcase are themselves municipal providers (United Water of

Idaho, City of Nampa and City of Blackfoot), who described in detail in their Amicus Brief the injury to the priority of other water users that would result in the absence of the recommended condition. (R. 4968-78)

3. The District Court did not err in affirming the Special Master's finding that, absent the condition recommended by IDWR, the proposed accomplished transfers would injure other water rights.

The City of Pocatello argues that the Court should reverse the District Court and Special Master's finding that the proposed accomplished transfers injure other water users. *Appellant's Opening Brief* at 30-38. Pocatello contends that the statute authorizing accomplished transfers limits inquiry into injury to situations where a party ***11** objects to the transfer. *Appellant's Opening Brief at* 32. This is an incorrect reading of the accomplished transfer statute. Idaho Code § 42-1425 provides a means for memorializing previously unauthorized/undocumented transfers in the SRBA. It states that certain changes to a water right may be claimed in a general adjudication "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." These changes must have occurred prior to the commencement of the SRBA, that is to say prior to November 19, 1987. The statute goes on to outline the procedure for dealing with objections to a change under the statute, but does not *limit* inquiry into injury to only those cases where there has been an objection.

As the SRBA District Court pointed out, Idaho Code § 42-1425 "does not eliminate the Director's authority and statutory duty to investigate the claim and file a Director's Report." (R. 5133). Rather, it permits the Director to recommend that a water right be claimed as it was exercised as of the commencement of the SRBA, so long as no injury to other rights resulted from the change. This allows the Director the flexibility to recommend accomplished transfers without denying such changes on the procedural basis that no formal transfer occurred. It does not create a scenario whereby all changes will be accepted as claimed without investigation by IDWR or verification that the criteria of Idaho Code § 42-1425 have been met. In addition to not causing injury to existing water rights, the accomplished transfer does not authorize an enlargement of the right.

Idaho Code § 42-1425 was held constitutional in ***12** *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Basin-Wide Issue No. 4), precisely because of its built-in protections against injury and enlargement. This no-injury premise is critical to the accomplished transfer. Without it, the accomplished transfer statute would be unconstitutional. Accordingly, the Department is duty-bound to ensure that in recognizing any accomplished transfer, injury is avoided.

Contrary to the argument advanced by the City of Pocatello, the absence of objections to a proposed accomplished transfer does not absolve the Director of his duty to investigate whether a proposed accomplished transfer complies with the statutory criteria described above.

As the SRBA District Court stated:
Nowhere does the statute require IDWR to accept Pocatello's claim as a prima facie showing of compliance with the statutory criteria nor does Idaho Code § 42-1425(2) limit these criteria to the circumstance where an objection is filed by a third party. This would potentially eliminate any review by the Director as contemplated under I.C. § 42-1425 (l)(c).

...

Although the amnesty provisions of I.C. § 42-1425 waive the application of the formal transfer requirements, the purpose of the statute is not to put the claimant in a better position than had the transfer requirements been followed by overlooking whether the transfer results in injury or enlargement in the absence of an objection by a third party."

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(R. 5134). This Court has addressed this issue before in *Barron v. IDWR*, in which it held that IDWR was not required to accept a transfer applicant's showing of compliance with the transfer statute without an examination, simply because no objections were filed. 135 Idaho 414, 421-422, 18 P.3d 219, 226-227 (2001).

In addition to misconstruing the Director's authority under Idaho Code § 42-1425, the City of Pocatello fails to address the Director's statutory duty to investigate water right claims and file a Director's Report on the nature and extent thereof, pursuant to ***13** Idaho Code §§ 42-1410 and 42-1411, respectively. The Director is authorized to include in his Report "such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." Idaho Code § 42-1411.

As discussed above, the Director provided evidence that recommending Pocatello's rights with alternative points of diversion without a condition limiting diversion by priority and diversion rate would be injurious to other existing water rights. (R. 892-894; Tr. Vol. II, p. 231, L. 24 through p. 232 L. 25). The language in the condition merely serves to maintain the priority associated with each of the City's rights while allowing the flexibility and efficiency of an interconnected well system. This is a necessary protection of other existing water users and for the Director's administration of the water right, and does not affect Pocatello's rights adversely. In fact, the condition merely ensures that the City will exercise its water rights consistent with the prior appropriation doctrine. As noted in the Special Master's Amended Report, IDWR would not have recommended the alternative points of diversion without the condition (R. 4749).

Without the condition, the protection afforded to other water users by the priority date attached to their rights is diminished. As discussed above, the SRBA District Court has held that where the priority of an affected right is diminished, the injury is essentially *per se*. *See Order on Challenge, (A & B Irrigation District)* at 25-26. "Even though the priority administration may occur at some point in the future, the injury to the priority date occurs at the time the accomplished transfer is approved." (R. 5139). The Court made the additional point that:
***14** The condition in no way prevents Pocatello from using its wells as alternative points of diversion for each other. The condition only has significance in the event of priority administration at which time the senior priorities of existing users are protected. The very fact that Pocatello contests the condition is an acknowledgement 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... The Special Master also acknowledged this point - '[i]f, as Pocatello argues, the alternative points of diversion cause no injury to juniors, then the condition should not affect Pocatello's rights.' Amended Master's Report and Recommendation and Order on Motion to Reconsider at 19.

(R. 5140-5141).

The SRBA District Court was correct in finding that the injury analysis conducted by the Special Master was appropriate as a matter of law. The Special Master's findings of fact with regard to the necessity of the condition are well supported in the Amended Report, and therefore were properly adopted by the District Court.

4. The condition does not prevent Pocatello from effectively and efficiently delivering water to its municipal customers, even in cases where the original point of diversion listed no longer exists.

Pocatello argues that IDWR erred in recommending the above-cited condition on water rights that were first diverted from wells that no longer exist. The State disagrees. *Appellant's Opening Brief* at 23. In cases where the original point of diversion of a water right is no longer in use, the condition is nonetheless necessary to document both the quantity of water diverted under the right and its original point of diversion. To explain this, it is helpful to examine a hypothetical scenario. First, assume a municipality has Water Right #1, which was developed at Well A in 1955 for 2.0 cfs. Next, assume you have a domestic water user with Water Right #2, which was developed at Well B in 1970, several miles away from Well A. Now assume that the municipality has Water Right #3, which was developed in 1980 at Well C for 1.5 cfs and that Well C is near Well B. ***15**

Further assume that the municipality's water delivery system is interconnected and Water Right #1 lists both Well A and Well C as points of diversion. Finally, assume Well A is eventually abandoned by the municipality and the municipality now wants to divert the full 3.5 cfs through Well C.

Under the above hypothetical, if the increase in pumping from Well C from 2.0 cfs to 3.5 cfs causes well interference for owner of Well B, the owner would be precluded from getting relief from that injury without IDWR's recommended condition on the water rights because there would be no record of the original development for these interconnected water rights. Thus, IDWR's recommended condition protects other water users by identifying how much water was developed under each water right at each original well. Without this history, IDWR could not evaluate injury to other water rights if a municipality consolidates its water rights at fewer wells. A municipality could argue that they are entitled to withdraw the full 3.5 cfs of their water rights without concern for the historical diversion rate. And while the increase in pumping in the hypothetical scenario above is small, the cumulative impact of consolidation could be much greater for municipalities who hold a large portfolio of interconnected water rights. The condition recommended by IDWR ensures that consolidation of water rights at individual wells will not injure other water rights.

The original legal description for the wells also comes into play in times of geographically limited administration. The original legal description is important so that senior water rights developed outside the area of administration are not transferred into the area of administration. If Water Right #1 was developed at Well A, which was outside the current area of administration, while Water Right #3 was developed inside the ***16** area of administration at Well C, the Department would view the use of Water Right # 1 at Well C as injury to water right rights within the area of administration that have a priority date between Water Right #1 and Water Right #3, such as Water Right #2.

Pocatello complains that listing non-operating wells would mean that it could not divert under its most senior rights. *Appellant's Opening Brief at* 23, 49. On the contrary, each of those rights lists 22 points of diversion, representing the City's 22 operating wells, under which it can be used. As the SRBA Court explained:

> To the extent Pocatello's use of the right through an alternative point of diversion interferes with the well of an existing right then Pocatello has still the option of diverting from other wells not causing interference. This is no different than with Pocatello's other rights. In the event of regional administration, Pocatello could still divert from alternative points of diversion within the region subject to administration, provided the original well no longer in operation is also located within that same region and is senior to the priority being regulated. This is also no different than with any of Pocatello's other rights. Pocatello is correct that to the extent the well no longer in operation is located outside of the area of regulation, Pocatello would not be able to revert back to the original well to avoid regulation as the well is no longer in operation. Pocatello would still be able to divert the right from alternative wells, if any, located outside the area of regulation.

(R. 5144). The original well is listed because, if administration of the right is necessary, information about the original point of diversion, including location and diversion rate, is needed to ensure that other water users are not injured by the City's use of alternative points of diversion. The scenarios mentioned above provide clear examples in which information about the original well would be necessary for administration of water rights in an interconnected system.

Finally, Pocatello argues that it cannot administer its water rights uniformly because all of its rights have not been recommended with the condition. *Appellant's Opening Brief* at 29. Three of the City's water rights were subject to a formal transfer ***17** dated June 28, 1999, which designated 12 alternative points of diversion, and did not include the condition discussed above. (*See* R. 4761). Because the transfer was issued in 1999, the Special Master concluded that the City could not meet the pre-1987 change requirement necessary for an accomplished transfer under Idaho Code § 42-1425 (R. 4761-62). Therefore, the Special Master's Amended Report states that the points of diversion for those water rights should remain as recommended, and that the water rights should be decreed as in the transfer, without the condition. *Id.* The City contends that this creates

confusion because "[t]he same wells have the condition in relation to some water rights, but not to others." *Appellant's Opening Brief*, p. 29.

Pocatello's argument is without merit, because it is *water rights* that are conditioned in the SRBA, not wells. A water user can divert water under multiple water rights using the same well. Those water rights may have different priority dates as well as different uses. The fact that three of Pocatello's water rights do not have the condition does not create any confusion, as IDWR administers water by water right, not by conditions placed on individual wells. To the extent that the City would like uniformity in how its water rights are conditioned, it can file an administrative transfer with IDWR to have the condition imposed on the three rights which were not subject to an accomplished transfer.

B. The District Court did not err in affirming the Special Master's determination that the City of Pocatello's groundwater wells could not be designated alternative points of diversion for the City's surface water rights.

The City of Pocatello claimed its groundwater wells as alternative points of diversion for its surface water rights on Mink Creek and Gibson Jack Creek (R. 3812-3823, 816-818). These surface water rights are among the City's most senior rights. ***18** The City has ceased to divert surface water from the creeks and instead, seeks to divert groundwater from the Lower Portneuf River Valley Aquifer ("LPRVA"), under these senior water rights.

The City of Pocatello claims that the Special Master erred as a matter of law in finding that the City was required to show that its ground water and surface water rights were diverting from the same source in order to obtain an accomplished transfer for ground water points of diversion. *Appellant's Opening Brief* at 41. The City's rational is that "[t]he SRBA court has already determined that all sources of water in basin 29 will be administered as connected sources of water within the Snake River Basin, and that all sources of water in basin 29 (except 'Spring tributary to Papoose Creek') will be administered as connected sources of water within basin 29." *Opening Brief*, p. 13.

Pocatello seems to be arguing that *connected* sources of water are to be considered the *same* source of water. This argument is without merit; source is an element of a water right, whereas interconnection of water sources bears on administration of water rights. Pocatello's argument that a water user is entitled to convert a surface water right to a ground water right so long as the sources are connected, carried to its logical conclusion, turns water administration on its head. If Pocatello is correct, a person with a senior priority surface water right at the upper end of the Eastern Snake Plain Aquifer ("ESPA") would be able to divert an equal quantity of water through a ground water well hundreds of miles away at the lower end of the ESPA. This runs counter to the prior appropriation doctrine and counter to administration using the ESPA ground water model. Additionally, there is a vast difference between surface water rights ***19** on creeks whose water levels vary drastically throughout the year, and the relatively constant, reliable supply provided by groundwater.

The City construes the Special Master's investigation into the source element of the subject water rights as an error as a matter of law, claiming that *American Falls Reservoir Dis. No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (2006) prohibits judicial intervention into issues of interconnection. *Appellant's Opening Brief at* 43. This is a mischaracterization of the Court's comments in that case. The issue in *American Falls* was a facial challenge to the constitutionality of the conjunctive management rules. This Court did not address what the SRBA can or should consider in issuing a partial decree; the *American Falls* decision merely stated that a "partial decree need not contain information on how each water right on a source physically interacts or affects other rights on that same source." *American Falls*, 143 Idaho at 877, 154 P.3d at 448.

Furthermore, in this matter, the Special Master was not determining a degree of interconnection for purposes of administration, but whether the ground water and surface water rights were diverting from the same source. Source is an element of a water right and completely within the purview of the SRBA District Court.

The City of Pocatello asserts its ground water wells as alternative points of diversion for its senior surface water rights, claiming an accomplished transfer under Idaho Code § 42-1425. *Appellant's Opening Brief* at 38-39. Idaho Code § 42-1425(2) states in part 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 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 ***20** state, [1] prior to November 19, 1987, ... 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 [2] no other water rights existing on the date of change were injured and [3] the change did not result in an enlargement of the original right.

The statute, however, does not allow for a change in the source element. As the SRBA District Court stated in its *Memorandum Decision and Order on Challenge:*

The accomplished transfer provisions of Idaho Code § 42-1425 authorize changes to the "place of use, point of diversion, nature or purpose of use or period of use" but does not expressly authorize a change to the source element. Presumably for the very reason that the injury to the water rights of existing water users on the "new" source is *per se*. A change in source is essentially the appropriation of a new water right. However, in the case of a new appropriation the priority date is junior to those of existing users on the new source while a transferred right retains its original priority thereby shifting the schedule of existing priorities on the new source resulting in injury to existing priorities.

(R. 5146). Thus, if Pocatello's groundwater wells are not drawing from the same source as its surface water rights, an accomplished transfer is not authorized by the statute. The City of Pocatello does not appear to dispute that a change in source is not authorized by Idaho Code § 42-1425, rather it claims that because its Basin 29 rights are connected, there would be no change in source if its ground water wells were used to divert water under its surface water rights. *Appellant's Opening Brief at* 42-45.

The groundwater rights in question, as claimed by Pocatello, divert from the LPRVA while the surface water rights divert from Mink Creek and Gibson Jack Creek (R. 801-70, 3812-20). IDWR's Senior Water Agent and Manager of the Adjudication Technical Section, Carter Fritschle, testified that, while the sources were hydraulically connected, the distance between the wells and the creeks (1/4 mile to 1 mile) was great enough that the wells could not be said to be drawing the same water as the surface rights (TR., Vol. I, p. 79, L. 1 - p.80, L.3). Pocatello's expert, Greg Sullivan, testified to the ***21** contrary, that the sources are so closely connected as to be essentially the same source (TR. Vol. IV pp. 802-03). The SRBA District Court carefully reviewed the record before the Special Master and concluded that:

the evidence overwhelming [sic] supports the Special Master's finding. Mr. Sullivan testified that 'roughly at least half the supply, if not more is coming from these tributaries. So that would be half the supply of the Lower Portneuf River Valley Aquifer comes from Mink Creek - or primarily comes from Mink Creek and Gibson Jack Creek with some coming from other tributaries.' TR. Vol. IV pp. 801-802. Mr. Sullivan then concludes that because of the existence of this hydraulic connection, Mink Creek, Gibson Jack Creek and the LPRVA are essentially the same source. TR. Vol. IV pp. 802-03. The testimony does not support the conclusion.

(R. 5147). After reviewing the testimony of both witnesses, the Special Master concluded that

> "[a] showing that two separate water rights have independent sources or are fed by different springs supports a finding of a separate source...the city wells, although closely connected to the surface creeks, derive water from a different source when they draw from the LPRVA. Although the LPRVA derives a large portion of its water from the two creeks, it derives a significant portion of water from other sources."

(R. 4754).The SRBA District Court, in affirming the Special Master's findings of fact, also pointed out that,

> By allowing the transfer the injury to the priority dates of existing ground pumpers would be unavoidable. The two sources are sufficiently disconnected such that ground water pumping has no affect [sic] on the surface sources. While evidence was presented that the two creeks contribute to the aquifer no evidence was presented supporting that the aquifers contribute to the creeks....Pocatello fails to address the issue of the water it would receive from sources other than Mink or Gibson Jack Creek which contribute to roughly the other half of the supply of the aquifer.

(R. 5147-48).

***22** The City has presented no evidence to support rejecting the Special Master's findings of fact. Rather, the City claims that it was an error as a matter of law for the Special Master to investigate whether the City's water rights divert from the same source. *Appellant's Opening Brief at* 42. On the contrary, the SRBA is charged with determining the nature and scope of water rights, including the water source.

The Special Master properly undertook an analysis of the source elements of the City's groundwater and surface water rights to determine if an accomplished transfer of alternative points of diversion was authorized by Idaho Code § 42-1425. After hearing the expert testimony of the City's witness and the Department's witness, the Special Master concluded that such alternative points of diversion would amount to a change in source, which is not authorized by the statute. The District Court properly adopted the Special Master's findings of fact, and properly affirmed the lower court's determination that Idaho Code § 42-1425 does not, as a matter of law, authorize changes in source.

C. The District Court properly found that transfers of water rights developed prior to 1969 are subject to the same no-injury requirement as transfers of post-1969 water rights.

In its Motion, Pocatello claims that the accomplished transfer statute does not apply to changes made to water rights before 1969, when it became necessary to seek a formal transfer for changes to water rights. *Appellant's Opening Brief* at 46. Therefore, the City reasons that the Director has no authority to recommend a condition on water rights based upon such pre-1969 changes. *Id.* at 48.

Contrary to Pocatello's assertion, pre-1969 transfers are subject to an injury analysis. Pocatello argues that, prior to the enactment of Idaho Code § 42-222 in 1969, water right holders could make changes to their rights at will, and therefore, the ***23** accomplished transfer statute can only apply to those changes to a water right occurring between 1969 and 1987, the date by which a change must occur to be authorized under Idaho Code § 42-1425. *Appellant's Opening Brief at* 46-48. The City asserts that before the 1969 enactment of Idaho Code § 42-222, which required administrative approval of changes to a water right, water right holders had a constitutional right to change their water rights as they wished. *Id.* Accordingly, the City claims, the Director has no authority to approve or disapprove of changes occurring before 1969 and cannot impose a condition based on an analysis of injury resulting from such changes. *Id.* at 48.

Pocatello's argument is misplaced. First, as the SRBA District Court observed, "[t]he requirement to file an application for a change in point of diversion became mandatory in 1943." (R. 5258). Second, Idaho Code § 42-108 states that a water right holder may change the point of diversion so long as the change does not injure the water rights of others. This limitation has been part of the statute since it was enacted in 1899.

Idaho common law dating from the early 1900's also holds that a person cannot change their water right if others are injured thereby. *Walker v. McGinness,* 8 Idaho 540, 69 P. 1003, 1006 (1902); see also *Montpelier Milling Co. v. City of Montpelier,* 19 Idaho 212, 113 P.741, 745 (1911). "[A] prior appropriator has no right to change the point of diversion, when it will in any manner injure a subsequent appropriator." *Bennett v. Nourse,*

22 Idaho 249, 125 P.1038, 1039-1040 (1912); see also *Crockett v. Jones*, 42 Idaho 652, 249 P.483 (1926).

Pocatello has argued that:

> IDWR cannot now retroactively use the provisions of Idaho Code § 42-1425 to place a condition on a water right that would impede a water right ***24** holder from diverting water in accordance with changes rightfully accomplished prior to May 26, 1969 because water right holders had a constitutional right to make changes to their water right without prior administrative approval up until May 26, 1969.

(R. 5288). This analysis is incorrect because, as discussed above, prior to 1969, water right holders had a constitutional right to make changes to their water rights only if such changes did not cause injury to other water users. Idaho Code § 42-1425(2) states that changes to water rights occurring prior to 1987 may be claimed in the SRBA "even though the person has not complied with sections 42-108 and 42-222" provided no other water rights were injured. Pocatello hangs its hat on the requirement of administrative approval mandated by Idaho Code § 42-222 but neglects the reference to Idaho Code § 42-108, which has long required that any of the changes permitted therein cause no injury to other water users.

As discussed above, the Special Master properly determined that Pocatello's designation of alternative points of diversion for its water rights causes injury to the priority of other water rights (R. 4758-61). To the extent that such changes occurred before 1969, they are not in compliance with the requirements of Idaho Code § 42-108 or Idaho common law. To the extent that they occurred after 1969, they are not in compliance with Idaho Code § 42-222. In either circumstance, the water right changes, if claimed, come under the purview of Idaho Code § 42-1425. The Director therefore is unquestionably vested with authority to analyze such changes and to recommend the condition thereon.

Finally, Pocatello neglects the language of Idaho Code § 42-1411, which empowers the Director, when recommending a water right, to add such conditions and remarks "as are necessary for definition of the right, for clarification of any element of a ***25** right, or for administration of the right..." This authority is distinct from that provided by Idaho Code § 42-1425. As shown in the course of this proceeding, the condition on Pocatello's water rights is necessary for the administration of the rights in times of shortage, under scenarios of both local well interference and regional administration (R. 4758-61, 5139-42). Thus, even without the analysis conducted pursuant to Idaho Code § 42-1425, the Director is empowered to impose the condition as a necessity for administration under the prior appropriation doctrine.

D. The District Court properly upheld the Special Master's finding that the purpose of use of water right 29-7770 is irrigation.

The City of Pocatello argues that the Special Master erred as a matter of law in finding that changing the designated use of water right 29-7770 from irrigation to municipal requires a valid administrative transfer. The Special Master based her determination on the fact that the accomplished transfer statute only applies to changes made to water rights before 1987, and this water right was licensed as an irrigation right in 2003. The City argues that the Special Master can and should change the use designation to correct the Department's "error of law" in designating the use as irrigation. *Appellant's Opening Brief at* 53. Furthermore, the City states that it is not arguing for a change in use for the water right, rather that the use has "always been within the broad definition of 'municipal', and that legally this right must be changed to a more appropriate descriptor." *Id.* at 15. "It is an error of law for the purpose of use to be listed as municipal because the purpose of use for water right 29-7770 is exactly the same as that of water rights 29-7118 and 29-7119, which the Special Master and IDWR have agreed are municipal." *Id.*

***26** As set forth in the Special Masters Amended Report, however, the City itself sought and obtained the licensed water right in 2003, claiming irrigation as the purpose of use (R. 4762). The City of Pocatello claims

that the Department erred in designating this water right's use as irrigation, yet stated in its *Opening Brief on Challenge* that "Pocatello requested the irrigation designation in order to expedite the long-overdue licensing of 29-7770." (R. 5008). The City cannot now claim that the Department erred in issuing the water right in accordance with the City's claimed use. Circumvention of a department backlog through listing irrigation as the purpose of use does not justify now changing the use to municipal. There is no agency error with regard to the purpose of use of water right 29-7770, Pocatello simply seeks to change it now without going through the formal statutory transfer process.

There has been no valid transfer to change the licensed elements of water right 29-7770, and there is no pre-1987 change that can be documented through the accomplished transfer statute because the water right was not licensed until 2003. Therefore, there is no evidence to support a change in the elements of the water right to be decreed. The SRBA District Court properly affirmed the Special Master's decision in maintaining the purpose of use as irrigation.

E. The District Court properly upheld the Special Master's findings as to the priority dates of water rights 29-13639 and 29-13558.

The Director's Report is considered to be prima facie evidence of the elements of a water right. Idaho Code § 42-1411. The Director's Report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997). Idaho Rule of Evidence 301 states that a presumption in a civil ***27** action or proceeding is rebutted "by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist." "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 Court shall adopt the Special Master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2).

City of Pocatello claims that the Special Master did not correctly apply the standard of proof in her analysis of whether the facts presented by the City were sufficient to overcome the prima facie evidence of priority in the Director's Report. *Appellant's Opening Brief at* 54. This argument attempts to disguise a matter of fact as a matter of law. The Special Master did not apply the wrong standard of proof, but rather determined that the evidence offered by Pocatello failed to rise to the level of substantial evidence required to rebut the Director's Report.

The City claims that water right 29-13558 is for the first well used by the City of Alameda. For evidence of a 1905 priority date, the City offered a historic newspaper article describing the history of a Mr. Satterfield, who, according to the article, moved to the area in 1905 (R. 7664). The article quotes Mr. Satterfield as saying that Alameda's first well was deepened during the time of Alameda's first mayor, and indicates that the City of Alameda was founded in 7/17/1924. *Id.* The Department recommended a priority date of 7/16/1924 because of the logical inference from the article that the well was in existence prior to the establishment of Alameda, and in the absence of any further detail on when the well was drilled (R. 901). The City of Pocatello seeks a priority date of 1905 based solely upon the claim that Mr. Satterfield came to the area in 1905.

***28** There is nothing in the City's evidence to suggest that the well existed when Mr. Satterfield arrived in the area, or that his arrival in 1905 precipitated the construction of a well. As the City presented evidence that Alameda was not formed until 1924, there is no basis to conclude that deepening the well during the term of the first mayor supports a priority of 1905. As stated in the Amended Report, "[a]lthough that evidence has some probative value, by itself it does not rebut the Director's Report conclusion that priority is July 16, 1924." (R. 4764). The SRBA District Court properly upheld the Special Master's finding that there was insufficient evidence to meet the standard required by I.R.E. 301, to rebut the finding of priority made by the Director.

The evidence offered by the City to rebut the Director's Report regarding priority of water right 29-13639 is also tenuous. The Director based his determination of priority on an earlier license for the specific well which

gave a priority date of October 22, 1952 (R. 901). Pocatello asserts that beneficial use was made under the right on December 31, 1940, but offered no evidence of such beneficial use. Rather, the City offered evidence that Alameda's population grew from 2,100 in 1940 to 4,705 in 1950 (R. 7666). The Special Master, after reviewing the evidence, stated that the proffered evidence "does not rebut the Director's Report recommendation of October 22, 1952, or present sufficient evidence of a priority of December 31, 1940." (R. 4764). The Special Master did find that, since the application and permit both indicated that the wells existed on October 22, 1952, the priority should be advanced to one day prior to that date, or October 21, 1952 (R. 4764).

The Special Master applied the appropriate standard of review in analyzing the City of Pocatello's evidence, and found that the evidence was not sufficient to meet the ***29** required burden of proof. The City has presented no evidence that the Special Master's findings were clearly erroneous, therefore, the SRBA District Court properly upheld the Special Master's findings.

F. Whether The Respondent Should Be Awarded Attorney Fees And Costs On Appeal.

Idaho Code § 12-121 provides that, in any civil action, the court may provide reasonable attorney's fees to the prevailing party[5]. Pursuant to *I.R.C.P. 54(e) 1,* the award of attorney's fees can only occur when the court finds that the case was brought frivolously, unreasonably or without foundation. Where the appellant has failed to identify findings of fact made by the district court that are clearly or arguably unsupported by substantial evidence, and where the appellate court was not asked to establish new legal principles, modify or clarify existing law, but the focus of the appeal was the application of settled law to the facts, the appeal is deemed to be without foundation. *Troche v. Grier, 118 Idaho 740, 742, 800 P.2d 136, 138 (Ct. App. 1990); Scott v. Castle 104 Idaho 719, 725, 662 P.2d. 1163, 1169 (Ct. App. 1983).*

[5] The State believes that *Idaho Code § 12-121* is the applicable statute in this proceeding, however should the Court find that *Idaho Code 6 12-117* applies, we plead in the alternative to be awarded attorney fees and costs under that statute.

While the State does not as a general practice request attorney's fees and costs, it does so in this proceeding because the City of Pocatello has failed to identify findings of fact that are clearly erroneous and has merely sought review of the application of settled law to the facts.

First, as to issues of fact, Pocatello has failed to meet its burden to show that the findings of fact of the District Court are clearly erroneous. Pursuant to *I.R.C.P. 52(a,* the special master's findings of facts, which are adopted by the SRBA district court, are ***30** considered to be the findings of the SRBA district court, and the findings of the SRBA district court will not be set aside on appeal unless clearly erroneous. Pocatello has failed to demonstrate that any of the findings of fact made by the Special Master and adopted by the District Court are clearly or even arguably unsupported by substantial evidence. With respect to the issues of whether its surface water rights divert from the same source as its ground water wells, and the correct priority dates of water right nos. 29-13639 and 29-13558, Pocatello's appeal is merely an attempt to have this Court second guess the District Court and Special Master on conflicting evidence.

As to issues of law, Pocatello's appeal is unreasonable and without foundation in Idaho law. The City's contention that Idaho Code § 42-1425 permits a change in source, or limits the Director's investigation of the right to instances where an objection has been filed are belied by the clear and unambiguous language of the statute itself. The same plain language prohibits changing the purpose of use of water right no. 29-7770 because the change in use occurred after November 19, 1987. Additionally, Pocatello's argument that the Department erred as a matter of law in recommending that right with an irrigation purpose of use *as requested and demonstrated by Pocatello itself* is frivolous and unreasonable.

Pocatello's assertion that the District Court erred in finding that injury to priority is injury *per se* is also without a reasonable basis in existing law, this Court addressed the issue in *Fremont-Madison Irrigation Dist. v. Idaho*

Ground Water Appropriators, Inc., 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996) (Basin-Wide Issue No. 4). The contention that the Director cannot impose a condition today that he did not impose on ***31** similar water rights 10 years ago is in direct conflict with Idaho Code § 42-1411 which unambiguously grants the Director the authority to impose conditions or remarks he *deems necessary* for the administration of the right. Finally, the question of whether pre-1969 water right transfers are subject to the no-injury rule is a matter of settled Idaho law.

As a result of the City of Pocatello's appeal the State has been forced to spend considerable time and resources responding to this appeal. Since the appeal is unreasonable and lacks foundation in fact or law, the State should be awarded its reasonable attorney's fees and costs pursuant to Idaho Code § 12-121.

IV. CONCLUSION

Pocatello has failed to show that the findings of fact of the SRBA District Court are clearly erroneous as to whether the proposed accomplished transfer listing all of Pocatello's wells as alternate points of diversion for its groundwater rights injures other water rights, as to whether the City's groundwater wells are diverting from the same source as the City's surface water rights, or as to the priority dates of water right nos. 29-13639 and 29-13558. Therefore, these findings should be affirmed.

Idaho law clearly supports the District Court's conclusions that, as a matter of law, the Director has the authority to investigate Pocatello's claimed accomplished transfer, and to recommend a condition he deems necessary for the administration of the water rights. Further, the plain language of Idaho Code § 42-1425 supports the District Court's conclusion that the statute does not provide for accomplished transfers resulting in a change of source, or allow for accomplished transfers in the case of changes made after 1987. The State respectfully requests, therefore that the Court affirm the findings of the SRBA District Court and grant it attorney fees and costs..

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