

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
CITY OF POCA TELLO'S BASIN 29 STATE-BASED WATER RIGHTS¹**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
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¹ Subcase nos. 29-00271, 29-00272, 29-00273, 29-02274, 29-02338, 29-02354, 29-02382, 29-02401, 29-02499, 29-04221, 29-04222, 29-04223, 29-04224, 29-04225, 29-04226, 29-07106, 29-07118, 29-07119, 29-07222, 29-07322, 29-07375, 29-07431, 29-07450, 29-07502, 29-07770, 29-07782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13636, 29-13637, 29-13638 and 29-13639

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I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Bilyeu's November 2, 2005 *Fourth Amended Trial Scheduling Order*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase numbers 29-00271, 29-00272, 29-00273, 29-02274, 29-02338, 29-02354, 29-02382, 29-02401, 29-02499, 29-04221, 29-04222, 29-04223, 29-04224, 29-04225, 29-04226, 29-07106, 29-07118, 29-07119, 29-07222, 29-07322, 29-07375, 29-07431, 29-07450, 29-07502, 29-07770, 29-07782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13636, 29-13637, 29-13638 and 29-13639. This Report sets forth the basis for the Department's recommendations for these state-based water rights. The Report was prepared under the supervision of Karl J. Dreher, Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employees have knowledge of the information contained in the Report. Carter Fritschle, Manager, Adjudication Technical Section was the primary investigator and has specific knowledge about the fact-specific issues relating to the water right elements. David R. Tuthill, Jr., Administrator, Water Management Division has knowledge about the more global issues.

II. SUMMARY OF THE ISSUES

The City of Pocatello ("City" or "Pocatello") filed objections to all 38 of its state-based water right recommendations contained in the Basin 29 Director's Report for Irrigation and Other Uses on November 18, 2003, and pursuant to direction by the SRBA Court, filed Amended Objections on November 19, 2003. At issue are the Department's

recommendations of Pocatello's state-based water right claims. The general issues raised in the subcases are summarized in Figure 1, attached hereto. Figure 1 is a table that summarizes by water right number the global issues for each subcase and whether that subcase has fact-specific issues concerning a specific element of the water right, such as priority date. Pocatello's objections include objections that pertain generally to all of the recommendations to all 38 water rights and also include objections that pertain to specific fact-based elements on a small number of the 38 water rights. Figure 2 attached hereto is a detailed list of those subcase numbers that have objections to specific elements of the water right. Figure 2 also notes whether or not a stipulation to that specific element has been reached. The recommendations at issue contain water rights based on beneficial use, licenses and prior decrees.

In addition to the City, the parties to the 38 subcases are Respondents State of Idaho, and the United States on behalf of the Bureau of Indian Affairs, the Bureau of Reclamation, and Fish and Wildlife Services.² The Bureau of Land Management ("BLM") also remains a party as an objector.³ Representatives from IDWR and the

² On April 12, 2006, the Special Master orally granted the Motion to Participate as Respondents filed by Milner Irrigation District, Northside Canal Company, Twin Falls Canal Company, American Falls Reservoir District #2, A&B Irrigation District, Burley Irrigation District and Minidoka Irrigation District.

³ The BLM filed Objections to the recommendations for 31 of the subcases primarily because of a concern over the place of use; however, the BLM also filed objections to other elements. These 31 subcases are: 29-271, 29-272, 29-273, 29-2274, 29-2338, 29-2382, 29-2401, 29-2499, 29-4221, 29-4222, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-7450, 29-7782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638 and 29-13639). The BLM Objections to Pocatello's *place of use* were dismissed after the BLM and Pocatello reached a resolution. See Special Master Bilyeu's *Order on Joint Motion to Dismiss Objections* issued on November 22, 2004. The BLM still remains a party however, because its objections to other elements still remain.

parties met on August 11, 2005, to discuss the basis for IDWR's recommendations of Pocatello's water rights.

This report will first discuss a general overview of the City of Pocatello's water supply system. It will then discuss the issues relating to the broad, global issues raised by Pocatello's objections. Finally, the basis of the Department's recommendation of the individual fact-specific elements on individual water rights will be provided.

The more global issues can be summarized as follows.⁴

- 1) Issues relating to separate streams and separate administration of both surface and ground water rights;
- 2) Issues involving the inclusion of wells as alternative points of diversion for Pocatello's surface water rights;
- 3) Issues surrounding IDWR's "Other Provisions Necessary" condition relating to multiple, alternate points of diversion.

III. OVERVIEW OF CITY'S WATER SYSTEM

The City has two distinct service areas to which it supplies municipal water. The larger of the two service areas is for what one would consider in traditional terms the

⁴ Pocatello filed an Objection to each of their 38 state-based recommendations stating that the water rights should contain a remark regarding Pocatello's water distribution facilities as follows:

The City of Pocatello's water supply system for distribution of all of its ground water and surface water supplies includes various reservoir and tank storage, which are capable of being fully recharged by the quantity of water available in a 24-hour period from all of the city's sources of water. The right to use such storage facilities is therefore a part of each of the city's water rights.

In a letter from Jo Beeman to Dave Tuthill dated May 3, 2004 (Exhibit A), Pocatello reiterates the agreement that this storage remark is not necessary because the volume of Pocatello's storage facilities is less than the 24-hour diverted volume of Pocatello's surface and ground water rights, combined. Pursuant to this agreement, IDWR sent a Stipulation to Resolve Objection on May 13, 2004, (Exhibit B). The State of Idaho, as Respondent, returned signed Stipulations to IDWR. Those signed Stipulations were again sent to Pocatello on March 29, 2005 (Exhibit C). No signed Stipulations have been returned to IDWR, although IDWR believes this issue is resolved.

water system for the "city proper," which will be referred to as the "city system." The other service area is for the municipal use at the city-owned airport and will be referred to as the "airport system."

A. Wells Providing Potable Water

As of 1987, the City had 22 interconnected wells that provided municipal water to the city system service area. *See* Map 1. Pocatello also had three wells, two of which were interconnected, that provided municipal water to the airport system service area.⁵ *See* Map 2. Maps 1 and 2 show all of the municipal wells supplying water for distribution through the two city municipal distribution systems, one serving the city proper and the other serving the airport area. These two city municipal distribution systems existed as of 1987 and are depicted on Maps 1 and 2.

B. Wells Located Within the City Proper, But Not Interconnected to Either Distribution System

The use of water from well 17, which is associated with the Highland Golf Course and located within the City proper, was converted from irrigation to municipal purposes prior to 1987. However, this well was not interconnected to the wells in the city system and can only be used to provide water for the Highland Golf Course. *See* Map 3.

Well 43 was developed as an irrigation well by Owen K. and Opal M. Ward for the irrigation of 50 acres of agricultural land. Mr. Ward passed away and Mrs. Ward donated the irrigated agricultural land in 1992 to the City for use as a public park in memory of Owen Ward. This park is now known as "Ward Park." *See* Map 3. This well was not interconnected with the city system prior to 1987.

⁵ The Department recommended all three airport wells as interconnected, although, subsequent information was provided to show that only two of these wells are actually interconnected.

The well at the Restlawn Cemetery is used for the irrigation of the cemetery grounds and is not interconnected with the city system. The City acquired the cemetery and the associated well after 1987. *See* Map 3.

Well 19 is used at Pocatello's sewage disposal plant which is not actually located within the city proper but is located between the city proper and the airport so it has been included in this group for convenience. Well 19 was licensed for municipal purposes with a priority date of 1958. This well it is not interconnected to the wells in the city system. *See* Map 3.

Thus, these four wells were not recommended as interconnected and each of the rights to divert water from these wells is recommended with a single point of diversion.

C. Wells Located Outside the City Proper and Used for Irrigation of Agricultural Lands

The City also has three wells used for the irrigation of land used for growing crops. Wells 41 and 42 are used to irrigate 578.5 acres of crops near the western edge of the airport. *See* Map 4. The WPC Well is used to irrigate 280 acres of crops on the land where the city applies the solid waste (sludge) from its wastewater treatment facility. *See* Map 4. These wells were recommended as irrigation wells and not as part of the City's interconnected wells system or for municipal use.

D. Surface Water Diversion System

In addition to the ground water rights, Pocatello owns diversion works on Mink Creek and Gibson Jack Creek. However, water from these sources is no longer used for culinary purposes within any of the City's service area and thus, is not part of the City's interconnected system. *See* Exhibit D. It is not clear whether or not these surface water sources provide irrigation water to certain subdivisions within the service area, albeit

from a separate, non-interconnected system. The points of diversion for these surface water rights are depicted on Map 5.

E. Wastewater Diversion System

Another water source claimed by Pocatello is the effluent from its wastewater treatment plant. This effluent is piped to an area north of the city and may be mixed with effluent from the Simplot plant at Don, Idaho for the irrigation of crops on 777 acres. *See* Map 6 for all points of diversion claimed by the City.

IV. DISCUSSION REGARDING GLOBAL ISSUES

A. Separate Sources

1. Surface Water Rights on Mink Creek and Gibson Jack Creek

Pocatello's objections state that its water rights should be decreed with the following general provision:

For purposes of water distribution in the Portneuf River drainage basin, water rights from the following sources to the extent recommended herein, are not considered junior to water rights from the Portneuf River, and will be administered separately from all water rights in Basin 29:

Mink Creek

Gibson Jack Creek

Ground water rights tributary to the Portneuf drainage.

The SRBA Court held that all sources tributary to the Snake River are connected.

"At present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to be from a common source". *Order on Cross Motions for Summary Judgment; Order on Motion to Strike Affidavits*, 5 SRBA 23, 23.16 (July 2, 2001). Through the advent of conjunctive management, specifically in the SRBA during Basin Wide Issue 5, the interconnected sources general provision and the findings of the court during those hearings, IDWR determines whether to recommend a water

right as separate for administrative purposes in the SRBA. The third paragraph of the interconnected sources general provision sets forth the presumption that every water right is connected: “[A]ll other water rights within Basin 29 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.” For a water right to be listed as administered separately in the interconnected sources general provision, IDWR considers the following:

- 1) Was there a prior decree designating the source as separate?
- 2) Is the source in fact physically separate and not tributary to other water sources in the basin?

The Department has also looked at historical practice along with equitable and practical considerations when listing a water right as separate for administrative purposes. For example, Cassia Creek was in a separate active water district, included in the case *Albion Idaho Land Co. v. Adams*, Decree No. 992 (D. Idaho 1928) and downstream water rights had insufficient supplies of water. Given this history, the Department recommended Cassia Creek to be administered separately from other water rights in Basin 43. Also, as another example, Smith Creek was in a separate active water district and downstream water rights had insufficient supplies of water and thus, Smith Creek was recommended to be administered separately from other water rights in Basin 63.

Mink Creek and Gibson Jack Creek, however, are factually different from other streams that have been designated as separate by the Department in the SRBA. First, there is no prior decree designating either stream as separate. Second, each stream

routinely flows into other water sources, in this case, the Portneuf River. Third, the facts do not warrant treating the sources as separate.

2. Ground Water Rights

With regard to administration of ground water rights separately from the Portneuf River Basin, ground water in this area is hydraulically connected to surface water. There are no instances in the SRBA where this is not the case. Importantly, Pocatello agrees with this fact. In its Amended Objection, Pocatello states:

Point of Diversion: The City of Pocatello's municipal wells derive their supply from the Lower Portneuf River Valley Aquifer that underlies the Portneuf River as it flows through the City of Pocatello. Mink Creek and Gibson Jack Creek are connected to the Lower Portneuf River Valley Aquifer that underlies the Portneuf River as it flows through the City of Pocatello. Mink Creek and Gibson Jack Creek are connected to the Lower Portneuf River Valley Aquifer upstream of the City of Pocatello's municipal wells. Due to this interconnection these municipal wells divert these surface water priorities as they are legally and physically available.

This admission by Pocatello undermines Pocatello's request that the ground water rights in the area be administered separately from the surface water rights in Basin 29. As Pocatello acknowledges, the surface and ground water sources in Basin 29 are interconnected. It would not be appropriate to administer Pocatello's ground water rights separately from Basin 29 surface water rights or separately from other water rights within the Snake River Basin.

B. Inclusion of Wells as Alternate Points of Diversion for Surface Water Rights

Pocatello wants to include its wells as alternate points of diversion for the City's surface water rights. In essence, this would allow Pocatello to withdraw water from its

wells under the priority dates associated with its surface water rights.⁶ The facts simply do not support the inclusion of the wells as alternate points of diversion for Pocatello's surface water rights. For example, Mink Creek is the source of water right nos. 29-271, 29-272 and 29-273, and Pocatello's point of diversion from Mink Creek is approximately six miles away from the closest Pocatello well. *See* Map 5.⁷ This fact is important when determining whether it is appropriate to treat points of diversion as alternate points of diversion for both a surface and a ground water right. The basis of the Department's refusal to recommend the wells as alternate points of diversion for rights is twofold: first, the change, if any, on how the water was diverted occurred after 1987 and second, there is no factual basis for recognizing the wells as alternate points of diversion for these surface water sources.

IDWR's Transfer Processing Memo No. 24 (October 30, 2002) provides guidance to agents when evaluating a request to change in source from surface water to ground water or to add a well as an alternate point of diversion for a surface water right. That memo provides:

(6) Change of Source. Whether the source would be changed from ground water to surface water or from surface water to ground water, factual evidence is needed that illustrates there is an immediate and direct connection between the surface source and the well.

(emphasis added). Memo attached hereto as Exhibit E.

The memo further provides:

An application for transfer proposing such a change in source is not approvable unless the ground water and surface water sources have a direct and immediate hydraulic connection (at least 50 percent depletion in the original source from depletion at a proposed point of diversion in one

⁶ The City's surface water rights are: 29-271, 29-272, 29-273 and 29-4222.

⁷ Water diverted under right no. 29-4222 from Gibson Jack Creek is being rented to a private user for irrigation and is not being used by the City for any of its municipal purposes.

day). The existing point of diversion and proposed point of diversion must be proximate such that diversion and use of water from the proposed point of diversion would have substantially the same effect on the hydraulically connected source as diversion and use of water from the original point of diversion. If such application for transfer is approved, the changed water right shall be administered no differently than any other water right from the surface water source. If approved, the source for a change from a surface water source to a ground water source should be listed as ground water tributary to the surface water source.

(emphasis added)

The factual conditions necessary for including the wells as alternate points of diversion for Pocatello's surface water rights do not exist in Pocatello's case.⁸

C. "Other Provisions Necessary" Condition Regarding Multiple, Alternate Points of Diversion

In its claims, Pocatello claimed all of its points of diversion on all of its rights under the theory of an accomplished transfer. *See* Idaho Code § 42-1425. To support its claims, Pocatello provided a map showing the location of each point of diversion and the distribution system as it existed on November 19, 1987.⁹ By listing all of its points of diversion for all of its water rights, the City would be allowed to withdraw water under its most senior priority water right from any well location. The Department, in order to recommend multiple, alternate points of diversion on the City's interconnected water rights under an accomplished transfer theory, included a condition to prevent injury that could result from allowing this practice. Without the condition, the Department would

⁸ Notably, the City continued to use the surface water rights after 1987. So, even if the City could show an immediate and direct connection between the surface sources and its wells, an accomplished transfer would not be appropriate because the change in practice did not occur prior to 1987. *See* I.C. § 42-1425. This fact is demonstrated by a letter from the Idaho Department of Environmental Quality that required the City to cease operation of its surface water sources for culinary purposes in 1998. *See* Exhibit D.

⁹ The Department analyzed the map provided by the City of Pocatello and used it to conclude that there were only 22 interconnected wells within the city proper. This conclusion is discussed in more detail below. The map supplied by the City of Pocatello can be found in the claim file for claim nos. 29-2382 attached as Exhibit G hereto and discussed more fully below.

not have recommended the multiple, alternate points of diversion because injury to other water rights was likely.

1. Factual Background

The Department found that there were 22 interconnected wells that serve Pocatello for the “city proper” as depicted on Map 1 before November 19, 1987.¹⁰ In addition to these 22 interconnected wells, there are four wells that serve other parts of the city proper or city-owned facilities. However, as discussed above, these are not interconnected to the City’s water supply system and thus, the Department recommended them accordingly. Three water rights, 29-2274, 29-2338 and 29-7375, located within the city proper have 12 points of diversion recommended because transfer no. 5452 dated June 28, 1999, only recognized 12 points of diversion for those three water rights. Because there was a post-1987 final administrative action on these three water rights, the Department recommended them as transferred. However, water diverted by those three water rights comes from the interconnected well system.

In addition to the wells that serve the city proper, the City also owns three wells at its airport that are used for municipal purposes. IDWR recommended all three of these wells as interconnected for claim nos. 29-7450, 29-11344 and 29-11638.

2. “Other Provisions Necessary” Condition Basis

The condition recommended on the City’s interconnected water rights says: “To the extent necessary for administration, water was first appropriated or used from:” followed by a listing of locations, priority dates and quantities. This condition is

¹⁰ Water rights recommended with the 22 interconnected wells as the points of diversion are: 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-7106, 29-7322, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637 and 29-13639.

necessary in order to avoid injury and to assist in the administration and definition of the water rights.

As an example, this condition would read:

To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No. 7 located in T06S, R34E, S35, NWSE, on 12/31/1940 in the amount of 4.46 cfs.

This remark can be broken down into three substantive parts as follows:

Pocatello Well No. 7 located in T06S, R34E, S35, NWSE
on 12/31/1940
in the amount of 4.46 cfs.

The location of the well is the description by quarter-quarter where the well was drilled. This description is important because many other wells could have been drilled nearby before or after the City owned well was drilled or used.

The date associated with the well is the date water was first appropriated from that well. This date is important when addressing well-interference issues and mitigation requirements for aquifer-wide regulation. If at some time in the future, the City increases the pumping capacity of a well within the City's interconnected system, and it reduces the amount of water available to another water user, this condition preserves the ability of a water user to protect their water right. For example, if a well developed by Pocatello in 1990 causes interference with a neighbor's well that was drilled in 1960, the City's well will be treated as junior to the 1960 well even though the City, on occasion, could be diverting a quantity from that well that is associated with a 1950 well owned elsewhere by the City.

Finally, the amount of water listed for each well is the amount of water appropriated from that well under that date. This quantity is again a necessary parameter when evaluating possible well-interference issues. Allowing the City to increase the diversion rate withdrawn from any particular well by listing multiple, alternate points of diversion on its water rights could cause injury to other surface and ground water users. For example, if a senior surface water user makes a call and the Department determines that the City's use of ground water is causing injury to that senior surface water user from a certain well, the City has the flexibility to obtain that quantity from different well locations to supply its residents with water. However, the City is still responsible for mitigating any injury associated with the withdrawal of that quantity from its wells. In addition, when the City pumps water from a well at a different location, it may cause interference with a different surface water source, or another water user's well. Hence, an additional reason for describing the well with the quantity and date as it was originally appropriated is to maintain the historical relationship between various water users.

The "other provisions necessary condition" included on the Department's recommendations preserves the historical information necessary for administering the water rights as they were historically developed.

3. Revision

Finally, the Department has revised the condition from what it originally recommended to clarify the term "administration" and to account for replacement wells.

The Department refined the condition and revised the listing of well locations, quantities and dates.¹¹ The refined condition 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, water was first appropriated at or used from:

This revised remark has now become IDWR's standard condition for municipalities¹² that request multiple, alternate points of diversion on ground water rights under the accomplished transfer statute or Idaho Code § 42-222.

IDWR believes this is the condition that should be on the City's water rights. *See* Exhibit F.

V. DISCUSSION REGARDING INDIVIDUAL WATER RIGHTS AND THEIR FACT-SPECIFIC ELEMENTS

In addition to the global matters discussed above, there are objections to specific elements on certain subcases that remain unresolved. The bases for the Department's recommendations to the elements objected to by the City on each individual subcase are described below.

A. Water Right No. 29-2382

This water right was recommended to the City with municipal as the purpose of use, but includes a limited season of use and a volume limitation. Certified copies of the license and claim files are attached hereto as Exhibit G. A private farmer originally developed this water right for the irrigation of cropland. Because the water right was developed as an irrigation water right, it, by its very nature had a season of use and a

¹¹ See Exhibit F for the water rights that should contain the revised remark and listing of well locations, quantities and dates.

¹² This condition would also apply to a non-municipal water right with multiple, alternate wells of varying priority located near a surface water source.

volume associated with it. The City acquired this water right from a private owner to use the water to irrigate the Highland Golf Course. *See* Map 4. The City wants to remove the volume limitation and expand the season of use to a year-round use. Removing these limitations would impermissibly enlarge the water right beyond its historical development and would violate the conditions set forth in Idaho Code § 42-1425. Therefore, although the Department recognizes that the nature of use has changed under the accomplished transfer theory from irrigation to a municipal use, the extent of beneficial use as the water right was historically developed cannot be enlarged.

B. Water Right No. 29-4222

This water right is based on a Posted Notice and is a surface water right for Gibson Jack Creek. A certified copy of the claim file is attached hereto as Exhibit H. The City has objected to the quantity of this right alleging that 7.00 cfs is the proper quantity consistent with the City's historical development of municipal water on Gibson Jack Creek. The Department recommended a quantity of 5.00 cfs. The quantity recommended by the Department was based on a Posted Notice filed by the Pocatello Water Company, Ltd. for the diversion of 5.00 cfs from Gibson Jack Creek. Another Posted Notice was filed by the Pocatello Water Company, Ltd. for the diversion of 2.00 cfs from the South Fork of Gibson Jack Creek. However, no information was supplied to document the development of the second Posted Notice, nor is there any evidence that a diversion system was ever constructed on the South Fork of Gibson Jack Creek. Also, the Department has not received any information from the City to establish the diversion rate from Gibson Jack Creek is higher than the 5.00 cfs claimed on the Posted Notice.

C. Water Right No. 29-4223

This water right is based on beneficial use and was developed from what is commonly referred to as the "Call Well." It was developed as a domestic water right for a subdivision by a private owner and acquired by the City in 1977. Attached hereto as Exhibit I is a certified copy of the claim file for this water right. According to the evidence provided to the Department, a 95 gallons per minute pump was installed in this well in 1962. This pump was still on the well when Pocatello acquired this water right in 1977.

Pocatello objects to the quantity recommended by the Department. The City wants to increase the quantity from 0.21 cfs to 2.67 cfs "pursuant to the doctrine of due diligence." The quantity of water recommended under this water right is the amount that can be historically justified. If Pocatello wants to have a water right for the quantity of water pumped from this well to match its current capacity, then the City needs to file an application for permit to account for the additional water.

D. Water Right No. 29-4226

This water right is also based on beneficial use, and it was developed from what is commonly referred to as the "Cree Well." It was developed as a domestic water right for a subdivision by a private owner and was later acquired by the City. The Department is not sure of the exact date when the larger pump was installed, but it appears to have occurred in the 1970s. A certified copy of the claim file for this water right is attached hereto as Exhibit J. Pocatello claimed a flow rate of 1.22 cfs for this water right, but the Department recommended 0.22 cfs. The Cree Well was drilled in 1955 with the intent to install a 100 gallons per minute pump for 29 residential lots. The quantity of water

recommended is adequate for the number of homes located on the plat where this water was originally developed.

If the City wishes to have a water right for the quantity of water pumped from this well to match its current capacity, then an application for permit for the additional quantity must be filed with the Department.

E. Water Right Nos. 29-7118 and 29-7119

Pocatello objected to the Department's recommendations for the purpose of use element of these water rights. The two licensed water rights are used to irrigate cropland at the city-owned airport which is located northwest of the City. These wells are not the same wells that supply potable municipal water to the airport area. The Department recommended the purpose of use as "irrigation" as licensed. The City leases these lands to a local farmer who irrigates the ground. According to the Department's license files, the farmer, at the request of Pocatello, applied for the water rights for this property. A certified copy of the license and claim files for these licensed water rights is attached hereto as Exhibit K. Because the only purpose for these water rights is to irrigate cropland, the purpose of use for these water rights is properly irrigation, not municipal. Pocatello chose to allow the local farmer to develop water rights for an agricultural purpose and this purpose was properly addressed in the license as irrigation. The SRBA is not the proper forum for collaterally attacking a valid license. *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence Issue ("Fish Facility Volume")*, 3 SRBA 18, 18.15 (December 29, 1999).

If the City wants to change the purpose of use, then it may file an application for transfer under Idaho Code § 42-222.

F. Water Right No. 29-7431

Pocatello objected to the source element of the Department's recommendation of this water right. Pocatello wishes to have the source of this water right changed from wastewater to ground water; however, the source of this water right is properly wastewater. Attached hereto as Exhibit L is a certified copy of the license and claim files for this water right.

This water right allows the City to apply effluent from its wastewater treatment plant to cropland located outside the city's corporate boundary. If the only water captured by the City were water from municipal wells, then this license would be unnecessary. However, what is more likely the case, is that the diversion under this license captures not only Pocatello wastewater, but also includes waste from water appropriated by others as well as some water from storm drains. This is akin to a farmer diverting water that runs off of his neighbor's field and collects in a waste ditch. The farmer who diverts the water from the waste ditch onto his own field would need a water right for wastewater. *See* I.C. § 42-201(2). Thus, it is appropriate for the source to remain as wastewater as recommended by the Department.

G. Water Right No. 29-7770

Pocatello objected to the Department's recommendation for the purpose of use element of this water right (commonly known as Pocatello's Biosolids Well). To aid in the understanding of the history of this water right, certified copies of the license and claim files are attached hereto as Exhibit M.

The City wants the licensed purpose of use to be changed from irrigation to municipal. Yet, when the City completed its application for permit for this license in

1984, the proposed use was irrigation from a ground water source. The remarks on the application indicate that the water is necessary for the irrigation of crops. On July 1, 1987, the City requested that the Department consider defining the purpose of use for this license as "DCMI" (domestic, commercial, municipal and industrial.) The Department responded by a letter dated July 28, 1987, that stated the use cannot be considered "DCMI" as requested.¹³ Hence, the change from irrigation to a broader use was specifically addressed during the licensing process. License no. 29-7770 was issued in January 2003 with nothing further raised about irrigation as the purpose of use until an amended claim was filed in the SRBA after the license was issued.

Changing the purpose of use in the SRBA would be a collateral attack on the license which is prohibited by *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence Issue ("Fish Facility Volume")*, 3 SRBA 18, 18.15 (December 29, 1999). The City may file a transfer under Idaho Code § 42-222 to change the purpose of use under this license.

H. Water Right No. 29-7782

This water right was recommended as licensed. Attached hereto as Exhibit N is a certified copy of the license and claim files for this water right. Although there is evidence that the well described as the point of diversion for this water right became interconnected with the City's other municipal wells prior to 1987, when the City applied for this water right, it applied for only one well as if it was not interconnected. Thus, it was licensed with only one point of diversion and not multiple, alternate points of diversion as the City desires in its objection. Because the license was issued in 1998 and

¹³ At the time, the Department had a policy that defined municipal use to include irrigation and other uses within the corporate limits of a municipality. In this case, the field that was irrigated was located outside the City's corporate boundaries (and still is).

no objection was filed to how the point of diversion element was described, the City must file an application for transfer under Idaho Code § 42-222 to change the point of diversion element.

I. Water Right No. 29-13558

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

J. Water Right No. 29-13639

The City of Pocatello claimed this water right as a beneficial use right from Alameda well no. 3. License no. 29-2324 which covered Alameda well nos. 1, 2 and 3 has a priority date of October 22, 1952. Certified copies of the license and claim files are attached hereto as Exhibit P. The City objected to the recommended priority date stating that the priority date should be December 31, 1940. The City has not provided any

evidence to support the claimed priority date. Thus, the Department recommended this water right with the licensed priority date of October 22, 1952, because there was no evidence to support an earlier date.

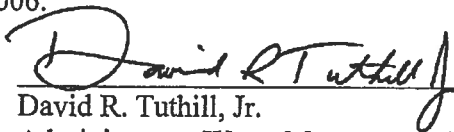
K. Resolved Issues

Several of the issues raised by Pocatello's objections have reached resolution via stipulations sent to Pocatello. These resolutions relate to claim nos: 29-4221, 29-7450, 29-11344, 29-13636 and 29-13628. See Figure 2 and the stipulations attached hereto as Exhibit Q. The stipulations are descriptions of the elements of the individual water rights that have been agreed to. Because negotiations in good faith between the City and IDWR have resolved these issues, even though the City has not signed the stipulations, IDWR believes that the descriptions of the elements as attached hereto represent the agreed upon resolution. Thus, no further discussion regarding these specific elements is needed.

VI. CONCLUSION

The Department's recommendations of the City's water rights are based on historical evidence of beneficial use and reasonable conclusions were drawn from the evidence presented to the Department.

Submitted this 13th day of April, 2006.


David R. Tuthill, Jr.
Administrator, Water Management Division


Carter Fritschle
Manager, Adjudication Technical Section

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 14th day of April, 2006.

Document Served: **SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
CITY OF POCA TELLO'S BASIN 29 STATE-BASED
WATER RIGHTS**

Persons Served:

CITY OF POCA TELLO - Hand Delivered
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Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
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TWIN FALLS CANAL COMPANY
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MINIDOKA IRRIGATION DISTRICT
Represented by:
W. KENT FLETCHER
PO BOX 248
BURLEY, ID 83318



INDEX OF ATTACHMENTS

Attachment No.	Description
1	Summary of the Global Issues Per Subcase
2	Summary of Subcases with Objections to Fact Specific Element
Water Right No.	
1	Interconnected Wells in City Proper
2	Municipal Wells at the Airport
3	Other Wells in or Near City Proper
4	Agricultural Irrigation Wells
5	All Points of Diversions
6	All Points of Diversions Overlaying 2004 NAIP Photography
Attachment No.	
A	Letter from Beeman to Tuthill dated 5/3/2004
B	Letter from McHugh to Beeman dated 5/13/2004 with stipulations
C	Letter from Williams to Beeman dated 3/29/2005 with stipulations
D	Letter from DEQ dated 10/26/1998
E	IDWR's Transfer Processing Memo No. 24 (October 30, 2002)
F	Revised Remark
G	Certified Copies of License and Claim Files for Water Right Number 29-2382
H	Certified Copy of Claim File for Water Right Number 29-4222
I	Certified Copy of Claim File for Water Right Number 29-4223
J	Certified Copy of Claim File for Water Right Number 29-4226
K	Certified Copies of License and Claim Files for Water Right Numbers 29-7118 and 29-7119
L	Certified Copies of License and Claim Files for Water Right Number 29-7431
M	Certified Copies of License and Claim Files for Water Right Number 29-7770
N	Certified Copies of License and Claim Files for Water Right 29-7782
O	Certified Copy of Claim File for Water Right 29-13558
P	Certified Copies of License and Claim Files for Water Right Number 29-13639
Q	Agreed Upon Stipulations

Attachments can be viewed in the legal & repository files