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Attorneys for City of Pocatello

RECEIVED
OCT 3 1 2012
DEPARTMENT OF
WATER RESOURCES

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF INTEGRATED MUNICIPAL APPLICATION PACKAGE ("IMAP") OF UNITED WATER IDAHO, INC. BEING A COLLECTION OF INDIVIDUAL APPLICATIONS FOR TRANSFERS OF WATER RIGHTS AND APPLICATIONS FOR AMENDMENT OF PERMITS	)	**CITY OF POCATELLO'S INITIAL STATEMENT**

The City of Pocatello (Pocatello), by and through its attorneys, Beeman & Associates, P.C., submits this *Initial Statement* pursuant to the October 19, 2012 *IDWR Order Setting Schedule for Parties to Respond and Propose Timetable for Discovery and Hearing*. Attached to the *Initial Statement* are two documents which Pocatello is providing from the record in *City of Pocatello* v. *State of Idaho,* 152 Idaho 830, 275 P.3d 845 (2012):

> *Brief of United Water Idaho, City of Nampa, and City of Blackfoot Addressing Alternative Points of Diversion Condition,* filed April 10, 2010 in In Re SRBA Case No. 39576, Subcase Nos. 29-00271, in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.(UWI amicus brief).
>
> *Stipulation and Agreement between Pocatello and the Surface Water Coalition in Pocatello's SRBA Subcases 29-271 et seq.* dated February 26, 2007. (Pocatello-SWC Stipulation)

According to the IDWR Order, the following matters are to be addressed in the parties' initial statements:

1) Matters raised at Status Conference including recent documents submitted by the parties;

Pocatello believes certain injury issues (as discussed in the *Pioneer Irrigation District's Statement of Issues Re United Water Idaho's IMAP Application,* October 15, 2012, and as discussed in the *Boise Project Board of Control, Big Bend Irrigation District, Wilder Irrigation District and Boise-Kuna Irrigation District's Statement of Issues and Request for Clarification,* October 15, 2012) need to be addressed. Specifically:

- If the APOD remark allows United Water Idaho (UWI) to increase the historic rate of diversion (well capacity) of a well, following approval of the IMAP, does the burden of proof and burden of persuasion of "no injury" still reside with United Water Idaho, as to injury associated with this future increase in well capacity?
- Should the historic rate of diversion of wells which operate as APODs be included in the conditions of approval of the IMAP?
- Should future increases of historic rates of diversion for UWI wells in the IMAP be subject to separate transfer proceedings?

2) Scope of the Hearing;

Pocatello respectfully defers to IDWR and the parties on this issue.

3) Scope of Responsibilities of the Parties;

Pocatello respectfully defers to IDWR and the parties on this issue, except as to the factual issues associated with documenting the existing rates of diversion for the UWI wells in the IMAP.

4) Scope of Discovery;

Pocatello respectfully defers to IDWR and the parties on this issue.

5) Timetable for Discovery and Hearing.

Pocatello respectfully defers to IDWR and the parties on this issue.

Dated this 31st day of October, 2012.

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

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I caused to be served the foregoing document by U.S. Mail on:

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STIPULATION AND AGREEMENT BETWEEN POCATELLO AND THE SURFACE WATER COALITION IN POCATELLO'S SRBA SUBCASES 29-271 *et seq.*

WHEREAS, on November 19, 2003, the City of Pocatello filed Amended Objections to the IDWR recommendations for all of the City's 38 state-law based SRBA claims, the claim numbers being described on Exhibit A attached;

WHEREAS, on March 2, 2006, the American Falls Reservoir District #2, A & B Irrigation District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (Surface Water Coalition or SWC) filed Responses to each of Pocatello's Amended Objections; and

WHEREAS, the Surface Water Coalition and the City of Pocatello desire to resolve their differences with regard to these 38 subcases by stipulation and agreement rather than litigation;

THE PARTIES DO HEREBY STIPULATE AND AGREE AS FOLLOWS:

1. Water Right No. 29-7118: SWC and Pocatello agree that the water right shall be changed and conditioned as described on Exhibit B attached.

2. Water Right No. 29-7119: SWC and Pocatello agree that the water right shall be changed and conditioned as described on Exhibit C attached.

3. Water Right No. 29-7770: SWC and Pocatello agree that the water right shall be changed and conditioned as described on Exhibit D attached

4. 21 ground water rights - Water Rights Nos. 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637 and 29-13639 and 4 surface water rights - Water Rights Nos. 29-271, 29-272, 29-273, and 29-4222 - shall include "Remark/Condition #1" as described on Exhibit E.

5. Water Rights Nos. 29-271, 29-272, 29-273, and 29-4222: shall include "Remark/Condition #2" as described on Exhibit E.

6. Water Rights Nos. 29-7450 and 29-13638: shall include the "Remark/Condition" described on Exhibit F.

7. SWC and Pocatello acknowledge that the Special Master of the contested proceeding before the SRBA Court, or a subsequent Judge or Court reviewing the matter on appeal, may not grant some or all of the requests set forth in the Pocatello's objections, or may grant Pocatello more of the requests set forth in its objections than those set forth in this stipulation. The remarks, conditions and limitations contained in this stipulation shall be binding upon the parties to this stipulation and included in any partial decree for each water right addressed, to the extent acceptable to the SRBA Court. Any such remark, condition or limitation shall continue to be binding upon the parties even though such remark, condition or limitation, or any of them, may be rejected by the court.

8. The SWC originally had concerns about the Swan Falls general provision raised by Pocatello's Amended Objections. However, based on the SRBA court's August 23, 2004 order designating Basin Wide Issue # 91-13, the Surface Water Coalition' concerns are expected to be addressed in proceedings related to that Basin-Wide Issue and not in these individual subcases. Nothing in this Stipulation waives or alters the right of the SWC, or any entities composing the SWC, to appear and assert its position concerning the Swan Falls general provision in any proceeding.

9. In consideration of this stipulation, the SWC withdraws its Responses and withdraws from these subcases entirely and shall cease to participate except to the extent necessary to enforce the terms of this stipulation. In addition, the SWC may participate in any issues that arise out of these subcases that are designated as basin-wide issues.

10. Each party will bear its own attorney's fees and costs.

CITY OF POCATELLO

Dated: Feb 26, 2007

By Josephine P. Beeman
Josephine P. Beeman
Beeman & Associates, P.C.

AMERICAN FALLS RESERVOIR DISTRICT #2

Dated: Feb 26, 2007

By for
C. Tom Arkoosh
Jay J. Kiiha
Arkoosh Law Offices, Chtd.

MINIDOKA IRRIGATION DISTRICT

Dated: Feb 26, 2007

By
W. Kent Fletcher
Fletcher Law Offices

A&B IRRIGATION DISTRICT AND
BURLEY IRRIGATION DISTRICT

Dated: Feb 26, 2007

By Roger D. Ling
Roger D. Ling
Ling Robinson & Walker

MILNER IRRIGATION DISTRICT, NORTH
SIDE CANAL COMPANY AND TWIN FALLS
CANAL COMPANY

Dated: Feb 26, 2007

By
John A. Rosholt
John K. Simpson
Travis L. Thompson
Paul L. Arrington
Barker Rosholt & Simpson, LLP

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2007, I served a true and correct copy of the foregoing STIPULATION AND AGREEMENT BETWEEN POCATELLO AND THE SURFACE WATER COALITION IN POCATELLO'S SRBA SUBCASES 29-271 *ET SEQ.* on the person(s) listed below, in the manner indicated:

Idaho Department of Water Resources P.O. Box 83720 Boise, ID 83720-0098	____ U.S. Mail, Postage Prepaid __x Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Josephine P. Beeman Beeman & Associates, P.C. 409 W. Jefferson Street Boise, ID 83702 *Attorneys for City of Pocatello*	____ U.S. Mail, Postage Prepaid __x Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Sarah A. Klahn WHITE & JANKOWSKI, LLP 511 16th Street, Suite 500 Denver, CO 80202 *Attorneys for City of Pocatello*	__x U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Natural Resources Division Chief IDAHO ATTORNEY GENERAL'S OFFICE P.O. Box 44449 Boise, ID 83711-4449 *Attorneys for State of Idaho*	____ U.S. Mail, Postage Prepaid __x Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Environment & Natural Resources Division U.S. DEPARTMENT OF JUSTICE 550 W. Fort Street, MSC 033 Boise, ID 83724 *Attorneys for United States of America*	__x U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email

Kent Fletcher

EXHIBIT A

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
29-13639

EXHIBIT A

Close IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/19/2007

WATER RIGHT NO. 29-7118

Owner Type	Name and Address
Current Owner	CITY OF POCATELLO PO BOX 4169 POCATELLO, ID 83205 (208)234-6254
~~Attorney~~	~~WHITE & JANKOWSKI LLP~~ ~~ATTN SARAH A KLAHN~~ ~~511 16TH ST STE 500~~ ~~DENVER, CO 80202~~ ~~(303)595-9441~~
~~Attorney~~	~~JOSEPHINE P BEEMAN~~ ~~BEEMAN & ASSOCIATES PC~~ ~~409 W JEFFERSON ST~~ ~~BOISE, ID 83702~~ ~~(208)331-0950~~

Priority Date: 04/11/1973
Basis: License
Status: Active

Source	Tributary
GROUND WATER	

Beneficial Use	From	To	Diversion Rate	Annual Volume	Annual Consumptive Use*
					919 AFA (based on 3AFA average historical irrigation

EXHIBIT B

~~IRRIGATION~~MUNICIPAL	~~04/01~~01/01	~~11/01~~12/31	4.01 CFS	1114 AFA	requirement for alfalfa at Pocatello airport weather station and allowing for a 10% deviation from the average for a total of 3.3 AFA)
Total Diversion			4.01 CFS		*applies with change to a municipal use other than the municipal biosolids program

Location of Point(s) of Diversion:

GROUND WATER NWNWSW Sec. 16 Township 06S Range 33E POWER County

Place(s) of use: MUNICIPAL SERVICE AREA FOR THE CITY OF POCATELLO MUNICIPAL WATER SUPPLY SYSTEM AS PROVIDED FOR UNDER IDAHO LAW. THIS RIGHT IS CURRENTLY USED FOR THE MUNICIPAL BIOSOLIDS PROGRAM AT THE IDENTIFIED ACREAGE.

Place of Use Legal Description: ~~IRRIGATION~~ MUNICIPAL POWER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
06S	33E	16		SWNW	40		SENW	32						
				NESW	32		NWSW	40		SWSW	28		SESW	12
		17		SENE	32									
				NESE	32		SESE	30						
		20		NENE	0.5									

Total Acres: 278.5

Conditions of Approval:

1. C18 This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

Dates:

Other Information:
State or Federal: S
Owner Name Connector:

Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False

Close

Close IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/19/2007

WATER RIGHT NO. 29-7119

Owner Type	Name and Address
Current Owner	CITY OF POCATELLO PO BOX 4169 POCATELLO, ID 83205 (208)234-6254
~~Attorney~~	~~WHITE & JANKOWSKI LLP~~ ~~ATTN SARAH A KLAHN~~ ~~511 16TH ST STE 500~~ ~~DENVER, CO 80202~~ ~~(303)595-9441~~
~~Attorney~~	~~JOSEPHINE P BEEMAN~~ ~~BEEMAN & ASSOCIATES PC~~ ~~409 W JEFFERSON ST~~ ~~BOISE, ID 83702~~ ~~(208)331-0950~~

Priority Date: 04/11/1973
Basis: License
Status: Active

Source	Tributary
GROUND WATER	

Beneficial Use	From	To	Diversion Rate	Annual Volume	Annual Consumptive Use*
					990 AFA (based on 3 AFA average historical irrigation

[redacted]
EXHIBIT
C

~~IRRIGATION~~MUNICIPAL ~~04/01~~01/01 ~~11/01~~12/31	6 CFS	1200 AFA	requirement for alfalfa at Pocatello airport weather station and allowing for a 10% deviation from the average for a total of 3.3 AFA.) *applies with change to a municipal use other than the municipal biosolids program
Total Diversion	6 CFS		

Location of Point(s) of Diversion:

GROUND WATER SENWSW Sec. 09 Township 06S Range 33E POWER County

Place(s) of use: MUNICIPAL SERVICE AREA FOR THE CITY OF POCATELLO MUNICIPAL WATER SUPPLY SYSTEM AS PROVIDED FOR UNDER IDAHO LAW. THIS RIGHT IS CURRENTLY USED FOR THE MUNICIPAL BIOSOLIDS PROGRAM AT THE IDENTIFIED ACREAGE.

Place of Use Legal Description: ~~IRRIGATION~~ MUNICIPAL POWER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
06S	33E	9		NENW	2		NWNW	2		SWNW	40		SENW	34
				NESW	34		NWSW	40		SWSW	40		SESW	34
		16		NENW	34		NWNW	40						

Total Acres: 300

Conditions of Approval:

1. C03 RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION PURSUANT TO SECTION 42-1425, IDAHO CODE.
2. C18 This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

Dates:

Other Information:
State or Federal: S

Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False
Close

Close IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

02/19/2007

WATER RIGHT NO. 29-7770

Owner Type	Name and Address
Current Owner	CITY OF POCATELLO PO BOX 4169 POCATELLO, ID 83205 (208)234-6254
~~Attorney~~	~~WHITE & JANKOWSKI LLP~~ ~~ATTN SARAH A KLAHN~~ ~~511 16TH ST STE 500~~ ~~DENVER, CO 80202~~ ~~(303)595-9441~~
~~Attorney~~	~~JOSEPHINE P BEEMAN~~ ~~BEEMAN & ASSOCIATES PC~~ ~~409 W JEFFERSON ST~~ ~~BOISE, ID 83702~~ ~~(208)331-0950~~

Priority Date: 05/21/1984
Basis: License
Status: Active

Source	Tributary
GROUND WATER	

Beneficial Use	From	To	Diversion Rate	Annual Volume	Annual Consumptive Use*
					924 AFA (based on 3 AFA average historical irrigation

EXHIBIT D

~~IRRIGATION~~MUNICIPAL ~~04/01~~01/01 ~~10/31~~12/31	4.46 CFS	1120 AFA	requirement for alfalfa at Pocatello airport weather station and allowing for a 10% deviation from the average for a total of 3.3 AFA) *applies with change to a municipal use other than the municipal biosolids program
Total Diversion	4.46 CFS		

Location of Point(s) of Diversion:

GROUND WATER NESENE Sec. 12 Township 06S Range 33E POWER County

Place(s) of use: MUNICIPAL- SERVICE AREA FOR THE CITY OF POCATELLO MUNICIPAL WATER SUPPLY SYSTEM AS PROVIDED FOR UNDER IDAHO LAW. THIS RIGHT IS CURRENTLY USED FOR THE MUNICIPAL BIOSOLIDS PROGRAM AT THE IDENTIFIED ACREAGE.

Place of Use Legal Description: ~~IRRIGATION~~ MUNICIPAL POWER County

Township	Range	Section	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres	Lot	Tract	Acres
06S	33E	1		SWSE	5									
		12		NENE	27		NWNE	40		SWNE	40		SENE	40
				NENW	40		SENW	40						
				NESW	26									
				NESE	7		NWSE	15						

Total Acres: 280

Conditions of Approval:

1. C18 This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

Dates:

Other Information:
State or Federal: S

Owner Name Connector:
Water District Number:
Generic Max Rate per Acre:
Generic Max Volume per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Cary Act Number:
Mitigation Plan: False
Close

REMARK/CONDITIONS FOR WATER RIGHTS DELIVERED THROUGH THE CITY OF POCATELLO'S INTERCONNECTED WELLS

REMARK/CONDITION #1

The following remark/condition will be included on 25 water rights for the City of Pocatello:

- 21 ground water rights: 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7322, 29-7375, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, and 29-13639.
- 4 surface water rights: 29-271, 29-272, 29-273, and 29-4222

The exercise of this water right at any of the 23 alternate points of diversion listed below, by itself or in combination with the other listed water rights, will not exceed the respective rate of diversion at each diversion listed below, unless pursuant to an approved administrative action, including, but not limited to, a section 42-222 transfer.

Township	Range	Section	¼ of	¼	Pocatello Well No. and rate of diversion
7S	34E	1	NW	NE	Well No. 2 in the amount of 3.12 cfs
7S	34E	1	SW	NE	Well No. 3 in the amount of 4.46 cfs
6S	34E	35	NW	SE	Well No. 7 in the amount of 4.46 cfs
6S	34E	26	NE	NW	Well No. 10 in the amount of 6.23 cfs
6S	34E	35	SE	NE	Well No. 12 in the amount of 6.20 cfs
7S	34E	1	SE	SE	Well No. 13 in the amount of 3.11 cfs
7S	35E	7	NE	SW	Well No. 14 in the amount of 2.23 cfs
7S	35E	6	NW	SE	Well No. 15 in the amount of 3.34 cfs
6S	34E	26	SW	SE	Well No. 16 in the amount of 6.67 cfs
6S	34E	15	NE	NW	Well No. 18 in the amount of 4.66 cfs
6S	34E	23	SW	NE	Well No. 21in the amount of 3.89 cfs
6S	34E	23	SE	NW	Well No. 22 in the amount of 3.68 cfs
6S	34E	23	NW	NE	Well No. 23 in the amount of 4.44 cfs
6S	34E	15	NW	NE	Well No. 26 in the amount of 2.67 cfs
6S	34E	14	NW	NW	Well No. 27 in the amount of 4.9 cfs
7S	34E	1	NE	SE	Well No. 28 in the amount of 4.9 cfs
6S	34E	23	NE	SW	Well No. 29 in the amount of 4.01 cfs
6S	34E	35	NW	NE	Well No. 30 in the amount of 6.23 cfs
6S	34E	15	NE	SE	Well No. 31 in the amount of 8.02 cfs
6S	34E	16	NE	NE	Well No. 32 in the amount of 3.45 cfs
7S	35E	18	SE	NE	Well No. 33 in the amount of 2.67 cfs
6S	34E	15	NE	SE	Well No. 34 in the amount of 7.00 cfs
7S	35E	16	SW	SW	Well No. 44 in the amount of 4.46 cfs

EXHIBIT E

REMARK/CONDITION #2

The following remark/condition will be included on the 4 surface water rights for the City of Pocatello: 29-271, 29-272, 29-273, and 29-4222

Exercise of this water right from October 1 through September 30 at the 23 alternate points of diversion will be limited to the amount of water delivered from these surface water sources to the Portneuf River after that water has been diverted, in priority, at the original point of diversion (on Mink Creek or Gibson Jack Creek) and which is delivered past any intervening water users during the period from October 1 through September 30. Pursuant to the settlement in the SRBA proceedings on these subcases, the City, conditioned upon and pursuant to an agreement between the parties and IDWR, could implement an administrative mechanism that would permit the City's diversion entitlement to be measured in Mink Creek or Gibson Jack Creek and delivered past other water users on those creeks.

REMARK/CONDITION FOR WATER RIGHTS DELIVERED THROUGH THE CITY OF POCATELLO'S INTERCONNECTED AIRPORT WELLS

REMARK/CONDITION
The following remark/condition will be included on water rights 29-7450 and 29-13638 for the City of Pocatello:

The exercise of water rights 29-7450 and 29-13638, at either of the alternate points of diversion listed below, either individually or in combination, will not exceed the rate of diversion listed for the respective wells, unless pursuant to an approved administrative action, including, but not limited to, a 42-222 transfer.

Township	Range	Section	¼	of ¼	Pocatello Well No. and rate of diversion
6S	33E	10	NE	SE	Well No. 35 in the amount of 3.34 cfs
6S	33E	15	SW	NE	Well No. 39 in the amount of 2.20 cfs

EXHIBIT
E

Christopher H. Meyer, [ISB No. 4461]
John M. Marshall [ISB No. 5678]
GIVENS PURSLEY LLP
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Boise, Idaho 83701-2720
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chrismeyer@givenspursley.com
johnmarshall@givenspursley.com
Attorneys for United Water Idaho, City of Nampa, and City of Blackfoot

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA Case No. 39576	Subcase Nos.: 29-00271, et al. (See Attached Exhibit A) **BRIEF OF UNITED WATER IDAHO, CITY OF NAMPA, AND CITY OF BLACKFOOT ADDRESSING ALTERNATIVE POINTS OF DIVERSION CONDITION**

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B. Second scenario: broad, regional administration 6

C. Third scenario: small, geographically-limited administration 7

CONCLUSION 9

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CERTIFICATE OF SERVICE 12

INTRODUCTION

The City of Pocatello ("Pocatello") has filed a challenge to decisions Special Master Bilyeu issued on October 2, 2007, October 30, 2007, and May 28, 2008. Among other issues, Pocatello challenges a condition recommended by the Idaho Department of Water Resources ("IDWR") dealing with alternative points of diversion.[1] This brief is filed on behalf of United Water Idaho ("UWID"), the City of Nampa ("Nampa), and the City of Blackfoot ("Blackfoot") (collectively, "Providers"). Providers are providers of municipal water to customers within their respective service areas. Simultaneously with the filing of this brief, Providers have submitted a motion for leave to participate or to participate as amici curiae.

ARGUMENT

I. THE PURPOSE OF THIS BRIEF IS LIMITED TO EXPLAINING HOW THE CONDITIONS, IF RETAINED, SHOULD WORK.

UWID, Nampa, and Blackfoot have or will soon receive partial decrees for each of their municipal water rights. Like Pocatello, Providers submitted claims for their municipal water rights identifying alternative points of diversion for each of the wells serving their respective integrated delivery systems, based on an accomplished transfer under Idaho Code § 42-1425. These sets of alternative points of diversion were recommended for approval by IDWR subject to essentially the same condition that Pocatello opposes in its challenge. The condition reads:

> To the extent necessary for administration between points of division 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].

[1] The terms "alternate points of diversion" and "alternative points of diversion" mean the same thing—that the holder of the water right may select which, among multiple points of diversion, to use. Follett's *Modern American Usage* and Fowler's *Modern English Usage* suggest the better term may be "alternative," meaning a choice, rather than "alternate," which traditionally implies a systematic rotation or alteration. However, the term "alternate" is also used to describe a substitute for another thing, which comes closer to the meaning here. Both, then, seem to be correct.

At the time IDWR included this condition in the recommendations, Providers were aware of Pocatello's ongoing challenge to it. UWID, Nampa, and Blackfoot discussed the condition with IDWR and, based on their understanding of IDWR's intent, elected not to challenge the condition.

UWID, Nampa, and Blackfoot do not oppose Pocatello's contention that the condition should be eliminated altogether. For instance, Pocatello made the argument that if other water right holders are concerned with the effect of alternative points of diversion, they should file an objection and provide evidence of how their rights might be affected. None did. If Pocatello prevails, Providers would expect the same treatment as Pocatello receives.[2]

The purpose of this brief, however, to not to re-argue Pocatello's position. Its purpose is to clarify how the condition should be understood to operate (if the Court determines it should be retained) so that its effect is consistent with IDWR's intent. For the reasons explained below, Providers are concerned that the Special Master's Decision could be read to alter the meaning of the condition upon which Providers based their decision not to object. Accordingly, Providers submit this Brief to ensure that the Court fully understands and articulates the effect of the condition in its decision and order.

II. THREE SCENARIOS FOR ADMINISTRATION

Providers have always understood that the condition, at its core, is intended to prevent injury and thus operates differently – or, rather, comes into play or not – depending upon the type of water rights administration involved. Based on that understanding, Providers elected not to challenge the condition. The purpose of this brief is to inform the Court of these key

[2] In some cases, Providers expressly reserved the right to seek lifting of the condition as to them, if Pocatello prevails in its challenge.

distinctions and to request that they are confirmed in the Court's decision – again, should the Court retain the condition despite Pocatello's challenge.

Providers can conceive of three scenarios in which administration of their ground water rights might occur:

1. a "local well interference" scenario;
2. a "broad, regional administration" scenario; and
3. a "small, geographically-limited administration" scenario.

While many variations might be imagined, we think these three categories usefully describe the range of situations. We discuss each in turn, beginning with the local well interference scenario.

A. First scenario: local well interference

Suppose a city owns four wells, each with a water right for 1,000 gpm; and suppose the priority dates are 1920, 1945, 1970 and 1985, respectively. Assume that the wells are part of an integrated diversion and delivery system. Assume that, based on accomplished transfer, the city obtained partial decrees for each water right identifying all four wells as alternative points of diversion for each other, subject to the condition quoted above in Part I. The alternative points of diversion provision would allow the city to pump any water right, or any combination of water rights, from any well. For example, if the 1920 well caved in and the city were able to improve production from the 1985 well, it could pump both the 1920 water right and the 1985 water right from the newer well—without seeking a transfer.

Suppose, however, that doubling the production out of the 1985 well interfered with a nearby 1950-priority well owned by a person we will call Mrs. Smith. In other words, going from 1,000 to 2,000 gpm expanded the cone of depression around the city's 1985 well, which, in turn, impaired production at Mrs. Smith's well. If the city's water rights had alternative points of

diversion subject to no conditions, the city would be within its rights and Mrs. Smith could not complain about additional water, under a 1920 water right, now being diverted out of the city's 1985 well. The effect of the condition, however, is to retain a record of the original well and priority date for each water right in order to preserve Mrs. Smith's right to complain of injury from this change in how the 1920 water is pumped. In short, without the condition, Mrs. Smith loses. With the condition, Mrs. Smith wins.

B. Second scenario: broad, regional administration

The "regional administration" scenario lies at the other end of the spectrum. Suppose now that there is no Mrs. Smith and no local well interference problem, but that the city has the same four wells as described above. Suppose further that IDWR imposes region-wide administration covering the entire valley, including all of the city's service area. This might be due to a conjunctive administration delivery call. It might be due to declining aquifer levels throughout the region (as opposed to interference from a discrete neighboring well through an expanded cone of depression, like the first scenario). For whatever the reason, IDWR orders the curtailment of <u>all</u> water rights in the valley junior to 1980. At this point, the city can no longer pump its 1985 water right, but it can still pump 3,000 gpm from its three more senior water rights. Due to the alternative points of diversion provision in its partial decrees, the city has the ability to select from which well or wells to pump that 3,000 gpm. It might pump 750 gpm out of each of the four wells. It might shut down the 1920 well, while pumping the full 1,000 gpm out its three more recently installed wells. Or it might select any other combination that added up to 3,000 gpm. The point is that the condition does not come into play and does not restrict the city's choices in any way (so long as the change does not create some new injury), despite the fact that there is aquifer-wide administration of the city's water rights.

The reason is simple: In this situation, the water shortage is regional (encompassing the municipal provider's entire water system). The administration is not limited to specific well locations. Accordingly, it does not matter from which well the city pumps its 3,000 gpm. Pumping from each of the wells has the same effect on the regional water supply.

Likewise, if the city provided mitigation for the curtailed 1985 water right, it would be allowed to pump any of its four water rights from any of its wells—just as if there were no administration.

C. Third scenario: small, geographically-limited administration

The third example is in between the first two. Suppose IDWR imposed administration within a small area, such as within a ground water management area that covers only half the city's water system. Suppose that within the curtailment zone, all wells junior to 1980 were curtailed. Suppose further that the 1920 and 1985 wells were located within the curtailment zone, and the 1945 and 1970 wells were located outside it. The city, again, loses 1,000 gpm under its 1985 right.

Under this situation, the condition would come into play. It would prevent the city from pumping the 1945 or 1970 water (associated with wells outside the curtailment area) from the 1985 well. That would be improper, because the effect would be to bring water rights from outside the curtailment area into the curtailment area, thereby undermining the purpose of the curtailment.

However, even here the city would have some flexibility under its alternative points of diversion. The city could decide from which of the wells within the curtailment area it wants to pump 1,000 gpm under the 1920 right. It might pump 500 gpm from each, or it might prefer to take the entire 1,000 gpm out of its newest well. Likewise, if it chose, the city would be free to take the 1920 water right (associated with a well within the curtailment area) and pump it from a

well outside the curtailment area. And, of course, the city would be free to pump its water rights associated with wells outside the curtailment area from any of its wells outside the curtailment area (again, assuming no local well interference or other injury resulted).

The reason is the same as in the second scenario. It makes no difference whether the 1920 water is pumped from the 1920 well or the 1985 well. Both have the same effect on the ground water management area. But moving senior rights in from outside an administration zone will not be allowed under the condition, because that would defeat the purpose of the administration, thus requiring IDWR to further constrain pumping, and thus injuring other water right holders.

We offer these illustrative examples because it appears that these distinctions may not have been clearly articulated in briefing and testimony to the Special Master and, in any event, were not reflected in the Special Master's decision. While, the Special Master's decision is consistent with preservation of the distinctions described above, it is subject to misinterpretation.[3] It could be read (we would say mis-read) to suggest that the holder of rights subject to the condition may no longer use alternative points of diversion <u>any</u> time that its water rights are under administration.[4] That is plainly wrong. If that were the meaning of the

[3] The operative provision of the Special Master's decision is this: "But the *Director's Report* identifies the quantity and priority associated with the original right so that Pocatello is not inappropriately insulated from calls by intervening pumpers. If, as Pocatello argues, the alternative points of diversion cause no injury to juniors, then the condition should not affect Pocatello's rights." *Special Master's Decision* at 19 (Oct. 30, 2007).

[4] This concern derives from the Special Master's quotation of testimony from David Tuthill, who testified on behalf of IDWR. Director Tuthill testified that the conditions are required because of two concerns: "The two areas we are 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 compare[d] with diversion from another location." *Special Master's Decision* at 17 (Oct. 30, 2007). Providers have conceded that that the conditions, if retained, would prevent a municipal water right holder from utilizing alternative points of diversion as a trump card in a well interference contest. But, except in unusual conditions where pumping from one well had a different effect on other right holders than pumping from another, we do not believe the conditions should constrain use of alternative points of diversion in the context of a region-wide curtailment resulting from, for instance, conjunctive administration.

condition, it would defeat the very purpose of alternative points of diversion, and Providers would never have agreed to the condition.

CONCLUSION

In sum, if it is retained by the Court, the condition should be explained so as not to prevent the use of alternative points of diversion any time there is administration of the holder's water rights. Rather, we respectfully urge the Court to make clear that the condition operates only to the extent necessary to prevent injury. Thus, Providers and Pocatello will retain the flexibility to divert their ground water rights from any of their wells, even during times of administration, so long as doing so does not injure other water right holders.

Providers are confident that Mr. Tuthill agrees with Providers, and that he did not intend to say that alternative points of diversion cannot be employed simply because conjunctive administration is in place. But his unexplained reference to a conjunctive administration concern could easily be misunderstood.

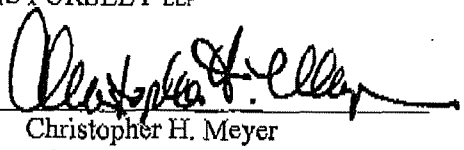
Providers' concern also extends to the *Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* (Apr. 13, 2006) ("Director's Report"), which states at page 14: "The date associated with the well is the date water was first appropriated from that well. This date is important when addressing well-interference issues and mitigation requirements for aquifer-wide regulation." The Director's Report continues on the next page to explain how this might work in an aquifer-wide regulation: "For example, if a senior surface 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."

Providers have no quarrel with this statement in the Director's Report. Our concern, however, is that it may be misunderstood. The city should be constrained by the original well information only when use of an alternative point of diversion would, in turn, cause some new injury—beyond that which resulted in the aquifer-wide curtailment in the first place. While such a situation is possible, we suggest that it would be relatively rare in an aquifer-wide curtailment. The key point, once again, is that the aquifer-wide curtailment itself does not restrict the city from using any of its alternative points of diversion. It may freely pump its most senior water rights from any of its wells, even during administration, so long as doing so does not, in itself, cause some new injury—for instance by creating an enlarged cone of depression next to Mrs. Smith's well in the hypothetical above or by changing hydraulic relationships with a river that result in injury to a surface user.

DATED April 10, 2009.

Respectfully submitted,

GIVENS PURSLEY LLP

By 

Christopher H. Meyer
John M. Marshall

Exhibit A **LIST OF SUBCASES**

Subcase Nos:

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07322
29-07375
29-07450
29-07770
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29-11348
29-13558
29-13559
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29-13637
29-13638
29-13639

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 10, 2009, the foregoing was filed, served, or copied as follows:

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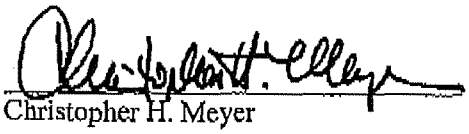

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