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ATTORNEYS FOR THE CITY OF POCATELLO

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

IN THE MATTER OF DISTRIBUTION OF WATER )	
TO VARIOUS WATER RIGHTS HELD BY OR FOR )	
THE BENEFIT OF A&B IRRIGATION DISTRICT, )	
AMERICAN FALLS RESERVOIR DISTRICT #2, )	<b>POCATELLO'S INITIAL</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>MEMORANDUM OF EXCEPTIONS</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>RE: OPINION CONSTITUTING</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	<b>FINDINGS OF FACT,</b>
AND TWIN FALLS CANAL COMPANY )	<b>CONCLUSIONS OF LAW AND</b>
	<b>RECOMMENDATION</b>

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Pocatello hereby files its Initial Exceptions to the Hearing Officer's *Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation* ("Recommendations") pursuant to the Idaho Department of Water Resources Rule of Procedure 720.02.b.

**INTRODUCTION**

Under IDAPA Rule 720.02.b, a party may file a petition for reconsideration or take exceptions to the Recommendations within 14 days of service of the Recommendations. However, if a petition for reconsideration is filed, any party may take exceptions to the

Recommendations within 14 days of service of a denial of that petition. IDAPA 720.02.b.

Communications with counsel for the Surface Water Coalition (“SWC”) indicate that the SWC intends to file a motion to reconsider the Hearing Officer’s Recommendations. The SWC’s Motion to Reconsider, to which Pocatello will timely respond, may result in modification to the Hearing Officer’s Recommendations. As such, and while Pocatello does find areas of agreement with the Recommendations, the exceptions to the Recommendations identified below are made to satisfy the procedural deadline and constitute Pocatello’s “Initial Exceptions”.

### EXCEPTIONS

Pocatello takes exception to the following portions of the Hearing Officer’s Recommendations.

**Section IX.4. The members of the Surface Water Coalition suffered material injury from ground water pumping in 2004, and it was reasonable to predict material injury in 2005.**

Pocatello takes exception to the Hearing Officer’s finding of injury. Recommendations at 30. The evidence relied upon by the Hearing Officer was neither reliable nor appropriate and does not meet the “substantial evidence” criteria under Idaho law. I.C. § 67-5279; *Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 164, 125 P.3d 515, 520 (Idaho 2005).

**Section XIV. The development of an average yearly irrigation supply for surface water coalition members.**

Pocatello takes exception to the Hearing Officer’s rejection of the water budget analysis in evaluating the average yearly irrigation supply for SWC members and alternative development of the average yearly irrigation supply. Recommendations at 48-53. Pocatello’s basis for its exceptions to this provision is reflected in part, *inter alia*, in Pocatello’s Proposed Findings of Fact, Conclusions of Law and Ruling at 17, part V.D. and 18-35, part V.G.-L. and Pocatello’s Post-Trial Brief at 6-16, part I.C. A copy of these documents is attached hereto.

**Section XV. The reasonableness of the surface water coalition's diversion systems and conveyance practices.**

Pocatello takes exception to the Hearing Officer's determination that each of the SWC members is operating with reasonable diversion systems and conveyance practices.

Recommendations at 54-55. Pocatello's basis for its exceptions to this provision is reflected in part, *inter alia*, in Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 21-27, part V.I and J., and Pocatello's Post-Trial Brief at 6-14, part I.C.

**Section XVI. The concept of achievable farm efficiency.**

Pocatello takes exception to the Hearing Officer's rejection of the concept of achievable farm efficiency. Recommendations at 55-57. Pocatello's basis for its exceptions to this provision is reflected in part, *inter alia*, in Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 21-27, part V.I and J., and Pocatello's Post-Trial Brief at part 6-14. I.C.

**Section XVII.4.-.5 and 13.-14. The Right to Carryover Storage.**

Pocatello takes exception to certain of the Hearing Officer's determinations regarding the SWC's right to carryover storage. Recommendations at 58-59 and 63-64. Pocatello's basis for its exceptions to these provisions is reflected in part, *inter alia*, in Pocatello's Proposed Findings of Fact, Conclusions of Law and Ruling at 21-33, parts V.I, J. and K; at 42-43, part VII.D. and Pocatello's Post-Trial Brief at 17-18, part II.

**CONCLUSION**

Because the Hearing Officer may determine to modify his Recommendations upon briefing of a motion to reconsider, Pocatello has not provided a brief in support of its exceptions at this time. However, if the SWC does not file a Motion to Reconsider, Pocatello will follow this with a brief in support of its positions outlined above to be filed no later than May 21, 2008.

Respectfully submitted, this 13<sup>th</sup> day of May, 2008.

CITY OF POCA TELLO ATTORNEY'S OFFICE

By   
A. DEAN TRANMER

WHITE & JANKOWSKI

By   
SARAH KLAHN  
Attorneys for City of Pocatello

## CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of May, 2008, I caused to be served a true and correct copy of the foregoing **Pocatello's Initial Memorandum of Exceptions re: Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation** by electronic mail and/or facsimile to:

  
 Sarah Klahn, White & Jankowski, LLP

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