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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

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.	**SUEZ'S FURTHER EXPLANATION OF APOD CONDITION LANGUAGE**

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DISCUSSION

This filing is provided by Applicant Suez Water Idaho Inc. ("Suez") in response to questions raised regarding alternative points of diversion ("APODs") by the Hearing Officer and Parties at the August 24, 2017 status conference. Specifically, Suez was asked to provide further explanation of IDWR's standard "APOD condition language" that Suez has stated it is willing to accept. This filing provides that explanation.[1]

APODs, by the way, are nothing more than multiple points of diversion associated with an individual water right.[2] If a farmer holds a water right that may be diverted from either of two wells, those are APODs. The only thing unusual about the APODs sought by the IMAP is that there are many of them.

Suez has recognized from the outset that APODs added (without limiting conditions) to existing rights could result in injury under some circumstances. When the IMAP was filed in 2003, Suez (through its predecessor United Water Idaho) acknowledged the appropriateness of adding a condition to protect against injury.

> By obtaining alternate points of diversion, UWID does not seek to reallocate water rights among its wells to the detriment of other aquifer pumpers. UWID simply seeks authorization to move licensed quantities around to the most efficient well where this can be done without injury. With this in mind, UWID expects that each existing well will retain the priority date associated with the well for purposes of well interference claims.

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[1] This explanation of APODs and the APOD condition language is the latest in, and is consistent with, a number of explanations provided by Suez: *Integrated Municipal Application Package*, at pages 15-16 (May 4, 2001, amended Mar. 20, 2002, amended Apr. 9, 2003); *United Water's Statement of Issues for July 24 Status Conference*, at pages 5-7 (July 20, 2012); *United Water's Statement Updating and Explaining the IMAP Relaunch*, at pages 14-33 (Aug. 14, 2012); *United Water's Initial Statement*, at pages 4-11 (Oct. 31, 2012), *United Water's Further Submission in Compliance with the Director's January 11, 2013 Order*, at pages 5-6 (Feb. 13, 2013); *Suez's 2017 Update Report on IMAP and 2065 Master Water Plan*, at pages 4, 8, 14, 16 (Apr. 28, 2017); *Suez's 2017 Supplement to the Update Report, addressing APODs*, at pages 3-8 (June 26, 2017).

[2] The 80 "global APODs" sought by Suez are for ground water rights. Suez also seeks two "mini-APOD" groups for certain specific ground and surface water rights. See discussion in *Suez's 2017 Supplement to the Update Report, addressing APODs* (June 26, 2017).

Integrated Municipal Application Package, at page 16 (May 4, 2001, amended Mar. 20, 2002, amended Apr. 9, 2003).

APODs may be established in number of ways: (1) They may be recognized at the outset when a water right is established in the permitting/licensing process. (2) They may be added to an existing water right through the formal transfer (or amendment of permit) process. (3) APODs that do not appear on the face of a permit, license, or decree may be recognized as "accomplished transfers" in a general adjudication.

In the first of these circumstances (APODs recognized when the right is first created), conditioning language is unnecessary. This is because the APODs are junior to every existing water right. It is in the latter two circumstances (formal and accomplished transfers) that condition language may be deemed necessary to prevent injury to existing water rights.

Many municipal providers within the Snake River Basin (including Suez) obtained APODs in their the Snake River Basin Adjudication ("SRBA") decrees for municipal water rights based on recognition of accomplished transfers. Accomplished transfers (like all transfers) are allowed only to the extent that other water rights are not injured.

In most instances, the addition of APODs to existing ground water rights is benign. Ordinarily, it makes no difference to other users whether a water right holder pumps water from Well A or Well B, so long as the total quantity of diversion is not increased beyond the permitted or licensed amounts. Indeed, this flexibility is the key benefit to the holder of water rights with APODs. In times of curtailment affecting an entire region (*e.g.*, conjunctive management), the water right holder may continue to divert its senior water rights from any well. For a municipal provider, this may be critical in order maintain some level of service throughout the entire service area.

However, there are two instances where the ability to select among APODs could result in injury to another water user. These are (1) localized well interference and (2) geographically-limited curtailment or other restrictions affecting only a portion of a municipal provider's service area.

In the SRBA, IDWR developed condition language which it imposed on municipal water rights for which APODs were recognized based on accomplished transfers. That language (tailored as necessary to the individual circumstances) follows the following format:

> 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 [name of well] located in [quarter-quarter description].

See email from Hearing Officer James Cefalo attached as Exhibit A.

This seemingly arcane language artfully summarizes more complicated concepts of how APODs will be administered under various circumstances. Fortunately, any obscurity in the meaning of this language has been clarified through prior litigation.

Suez, together with two other municipal providers, participated in that litigation at the SRBA level as an amicus curiae. In Suez's opening brief, it outlined three scenarios in which the administration of APODs could matter, and how the APOD condition would apply in each. *Brief of United Water Idaho, City of Nampa, and City of Blackfoot Addressing Alternative Points of Diversion Condition* (Apr. 10, 2009). A copy of this brief is attached hereto as Exhibit B.

In the SRBA Court's decision, the Judge Melanson expressly set out in full and approved the three scenarios and explanation thereof suggested by Suez *et al. Memorandum Decision and Order on Challenge* ("*Memorandum Decision*") at 16-18, *In Re SRBA,* Case No. 39576, Subcase Nos. 29-00271 *et al.* (Idaho, Fifth Judicial Dist., Nov. 9, 2009) (Melanson, J.). A copy of this decision is attached hereto as Exhibit C.

The SRBA Court ruled that the APOD condition language would be applicable in the context of localized well interference and geographically-limited administration covering a portion of a service area, but not in the context of a region-wide curtailment covering a provider's entire service area.

> The court concurs that in a circumstance involving regional priority administration a municipal provider may still be able to exercise alternative points of diversion within the region undergoing administration so long as the well under which the original right was established is also located within the region subject to the administration.

Memorandum Decision at 18.

Judge Melanson's decision was upheld in *City of Pocatello v. Idaho*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.).[3]

In its approval of the APOD language, the Idaho Supreme Court did not include a detailed explanation of how the condition works. Nothing in the opinion suggests, however, that the appellate court did not fully concur with Judge Melanson's decision. Accordingly, Judge Melanson's articulation of how the condition language works is the best and most complete guidance available.

Rather than repeat that discussion here, the reader is referred to the attached brief and decision in Exhibits B and C.

The bottom line is that the condition language (obscure though it is) gives ground water right holders with APODs the flexibility they need to operate in region-wide curtailments, while providing assurance to holders of existing rights that the APODs cannot be used to create a "super well" or otherwise interfere with other senior rights. The language also ensures that

[3] The synopsis to the published opinion incorrectly refers to this as an appeal from a decision of Judge Wildman.

APODs cannot be used to evade a localized curtailment (*e.g.*, special ground water management restrictions) covering only a portion of a provider's service area.

Suez hopes this explanation is helpful, particularly to Parties whose representatives are new to this proceeding.

Respectfully submitted this 11th day of September, 2017.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

By 
Michael P. Lawrence

Attorneys for Suez Water Idaho Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September, 2017, the foregoing was filed, served, and copied as shown below.

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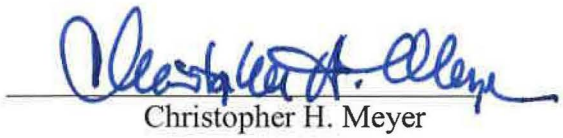

Christopher H. Meyer

Exhibit A — EMAIL FROM HEARING OFFICER CEFALO SETTING OUT STANDARD APOD LANGUAGE

Christopher H Meyer

From:	Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent:	Tuesday, September 5, 2017 12:53 PM
To:	Christopher H Meyer; Chris M. Bromley Esq. (cbromley@mchughbromley.com); John Roldan - City of Boise (Business Fax); 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
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

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Exhibit B **UNITED WATER'S OPENING AMICUS BRIEF TO JUDGE MELANSON IN POCATELLO LITIGATION**

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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

TABLE OF CONTENTS

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 all 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 any 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
29-11339
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
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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SERVICE

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Roxanne Brown Stuart Hurley SPF Water Engineering, LLC 300 E. Mallard Dr., Ste. 350 Boise, ID 83706 rbrown@spfwater.com shurley@spfwater.com	_____ U. S. Mail _____Hand Delivered _____Overnight Mail _____ Facsimile __X__ E-mail

Christopher H. Meyer

Exhibit C **JUDGE MELANSON'S MEMORANDUM DECISION IN POCATELLO LITIGATION**

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)**
	MEMORANDUM DECISION AND ORDER ON CHALLENGE (City of Pocatello)

Ruling: Order of the Special Master is **affirmed.**

I.
APPEARANCES

JOSEPHINE P. BEEMAN, Beeman & Associates, P.C., Boise, Idaho, on behalf of Challenger City of Pocatello ("Pocatello").

SHASTA KILMINSTER-HADLEY, Deputy Attorney General, Boise, Idaho, on behalf of Respondent State of Idaho.

CHRISTOPHER H. MEYER AND JOHN M. MARSHALL, Givens Pursley, LLP, Boise, Idaho, appearing *amici curiae* on behalf of United Water Idaho, City of Nampa, and the City of Blackfoot ("Municipal Providers or Providers").

JOHN M. MELANSON, Presiding Judge of the SRBA, presiding.

II.
PROCEDURAL BACKGROUND

1. The above-captioned water rights were claimed in the SRBA by the City of Pocatello.[1] Pocatello filed *Objections* to the recommendations contained in the *Director's Reports* issued by the Idaho Department of Water Resources ("IDWR"). The State of Idaho filed responses to Pocatello's *Objections*.

2. Following summary judgment proceedings and a trial, the Special Master issued a ***Master's Report and Recommendation and Order on Motion to Reconsider*** on October 2, 2007. The Special Master recommended that 1) the ground water wells could not be included as alternative points of diversion for Pocatello's surface water rights; 2) a remark identifying the location, date, and quantity of the original right was necessary for the interconnected well system where multiple points of diversion were established under the accomplished transfer provisions of Idaho Code § 42-1425 to prevent injury to existing water rights; 3) water rights 29-7118 and 29-7119 should be decreed with a municipal purpose of use, while water right 29-7770 should be decreed with an irrigation purpose of use; and 4) the priority date for 29-13558 should be July 16, 1924, as recommended in the *Director's Report*, while the priority date for 29-13639 should be October 21, 1952, which is one day earlier than the date recommended in the *Director's Report*.

3. On October 30, 2007, the Special Master issued an ***Amended Master's Report and Recommendation and Order on Motion to Reconsider***, which amended the Place of Use description for Pocatello's municipal rights.

4. On May 28, 2008, the Special Master issued an ***Order Denying Motion to Alter or Amend***.

[1] The claims are based on state law. Pocatello also claimed the use of the water pursuant to federal law under a single water right claim. The federal law basis for the water was resolved in a separate proceeding.

5. On June 11, 2008, Pocatello timely filed a *Notice of Challenge* to the ***Master's Report and Recommendation***. Also on June 11, 2008, Pocatello filed a *Motion to Stay Proceedings*, due to Pocatello's pending *Petition for Certiorari* before the United States Supreme Court on the federal law basis for these claims. After a hearing, this Court granted Pocatello's *Motion to Stay Proceedings*. However, *certiorari* was later denied. On December 18, 2009, the Court issued a ***Challenge Scheduling Order***, initiating the resumption of the *Challenge* proceedings.

6. 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*. After a hearing, the Court granted the *Motion to Participate as Amici Curiae*.

III.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on *Challenge* occurred August 13, 2009. The Court granted Pocatello's request for additional briefing. The final post-hearing brief was filed September 18, 2009. Therefore, this matter is deemed fully submitted for decision the next business day, or September 19, 2009.

IV.
BRIEF STATEMENT OF MATERIAL FACTS

At issue are thirty state-law based claims filed by the City of Pocatello.[2] The water rights are used to provide municipal water service to residents and water users

[2] The water rights include: 29-00271, 29-00272, 29-00273, 29-2274, 29-2338, 29-2401, 29-2499, 29-4221, 29-1222, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7118, 29-7119, 29-7322, 29-7375, 29-7450, 29-7770, 29-11339, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638, and 29-13639. Pocatello filed a total of thirty-nine claims in the SRBA. In addition to the thirty claims at issue Pocatello also has eight water rights that have been decreed and one federal claim that was disallowed. Those claims are not at issue.

within Pocatello's in-town service area and to its airport facility. The two water services are independent of each other. Water for the in-town service area is provided through an interconnected system supplied by twenty-one ground water rights delivered through twenty-two wells.[3] The wells were developed at different times and are located throughout the in-town service area. Pocatello claimed the wells as alternative points of diversion for each of the twenty-one ground water rights, meaning Pocatello would be authorized to withdraw water under its most senior priority right from any well location. Pocatello also holds four surface rights diverted from Mink and Gibson Jack Creeks, both tributary to the Portneuf River and the Lower Portneuf River Valley Aquifer.[4] The Lower Portneuf River Valley Aquifer provides the source for the ground water rights. The surface rights carry the most senior priorities. Pocatello also claimed the twenty-two ground water wells as alternative points of diversion for the surface water rights meaning Pocatello would be authorized to withdraw water for its surface rights from any well location.

Water service for the airport is provided through a smaller separate interconnected system supplied by three ground water rights associated with three wells. Pocatello claimed two of the wells as alternative points of diversion for each other. Pocatello relies on the accomplished transfer provisions of Idaho Code § 42-1425 for establishing the wells as alternative points of diversion for each other and for its surface rights. The interconnected water systems for both the in-town service area and airport were in existence and in operation prior to the commencement of the SRBA on November 19, 1987, as required by Idaho Code § 42-1425.

IDWR recommended the wells as alternative points of diversion for the ground water rights as claimed based on the application of Idaho Code § 42-1425, with one exception. In order to prevent injury to existing ground water rights of third parties IDWR recommended that the following condition or remark appear in the face of the

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[3] The system is supplied by twenty-three (23) water rights but only twenty-one of the ground water rights are at issue: 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] Mink Creek rights: 29-271, 29-272, and 29-273; Gibson Jack Creek right: 29-4222.

Partial Decree for eighteen of the water rights in the in-town service area[5] and for two of the three water rights supplying water to the airport.[6]

> 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's basis for recommending the condition was twofold, "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 [sic] with diversion from another location." ***Amended Master's Report and Recommendation and Order on Motion to Reconsider*** at 17 (quoting Tuthill testimony). IDWR did not recommend the ground water wells as alternative points of diversion for the surface rights. Pocatello objected to the inclusion of the conditions and to IDWR's recommendation that the ground water wells not be decreed as alternative points of diversion for the surface rights. No third party ground water right holder filed an *Objection* or *Response* to IDWR's recommendation.

Water right 29-7770 was licensed with an "irrigation" purpose of use in 2003. Pocatello asserts that an accomplished transfer has changed the purpose of use for this licensed right from "irrigation" to "municipal." IDWR recommended 29-7770 with an "irrigation" purpose of use in its *Director's Report* consistent with the license.

Finally, Pocatello claimed a priority date of June 30, 1905 for water right 29-13558, based in part on newspaper articles about the early history of the cities of Pocatello and Alameda. However, the *Director's Report* for 29-13558 recommended a priority date of July 16, 1924, which is one day before the City of Alameda was founded. Similarly, Pocatello claimed a priority date of December 31, 1940 for water right 29-13639. The *Director's Report* for 29-13639 recommended a priority date of October 22, 1952, based on an application for a permit for the right. The Special Master concluded

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[5] Three of Pocatello's groundwater rights (29-2274, 29-2338, and 29-7375) were recommended without the condition because those rights were subject to administrative transfer No. 5452, which did not include the condition and occurred after 1987.

[6] Water rights 29-7450 and 29-13638 were recommended with the condition.

that the priority date should be one day earlier than recommended in the *Director's Report*, or October 21, 1952.

V.

ISSUES RAISED ON CHALLENGE

The City of Pocatello raises a number of issues on Challenge. The Court summarizes the issues as follows:

1. Whether the Special Master erred in applying the amnesty provisions of I.C. § 42-1425 by conducting a hearing on injury in the absence of an objection by a third party?

2. Whether the Special Master erred in recommending a condition on certain ground water rights used for Pocatello's interconnected well system in order to prevent injury to existing rights?

3. Whether the Special Master erred in not listing interconnected ground water wells as alternative points of diversion for the Pocatello's surface water rights?

4. Whether the Special master erred in striking an affidavit filed by Pocatello in conjunction with its post-trial brief?

5. Whether the Special Master erred in recommending water right 29-7770 with an irrigation instead of a municipal purpose of use?

6. Whether the Special Master erred in recommending certain priority dates for water rights 29-13558 and 29-13639?

VI.

STANDARD OF REVIEW OF SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of fact of a special master.

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. ***AO1***, section 13f; I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). Exactly what is meant by the phrase "clearly erroneous," or how to measure it, is not always easy to discern. The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). A federal court of appeals stated as follows:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.

U.S. v. Aluminum Co. of America, 148 F.2d 416, 433 (2nd Cir. 1945) (L. Hand, J.).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); *Higley*, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special

master's findings of fact is to determine whether they are supported by substantial,[7] although perhaps conflicting, evidence. *Higley*, 124 Idaho at 534, 861 P.2d at 104.

B. Conclusions of law of a special master.

A special master's conclusions of law are not binding upon a district court, but they are expected to be persuasive. I.C. § 42-1412(5); *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997). To the degree that the district court adopts the special master's conclusions of law, those conclusions become those of the court. *Id.* at 740, 947 P.2d at 413; *Oakley Valley Stone* 120 Idaho at 378, 816 P.2d at 334. This permits a district court to adopt a special master's conclusions of law only to the extent they correctly state the law. *Id.* Stated another way, the conclusions of law of a special master are not protected by or cloaked with the "clearly erroneous" standard. Further, the label put on a determination by a special master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, Federal Practice and Procedure § 2588 (1995); *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975).

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. *MH&H Implement, Inc. v. Massey-Ferguson, Inc.*, 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

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[7] Substantial does not mean that the evidence was uncontradicted. All that is required is that the evidence be of such sufficient quantity and probative value that reasonable minds *could* conclude that the finding -- whether it be by a jury, trial judge, or special master -- was proper. It is not necessary that the evidence be of such quantity or quality that reasonable minds must conclude, only that they *could* conclude. Therefore, a special master's findings of fact are properly rejected only if the evidence is so weak that reasonable minds could not come to the same conclusion the special master reached. *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974); *see also Evans v. Hara's Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993). Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla but less than a preponderance." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 765, 40 P.3d 119, 123 (2002).

VII.
DISCUSSION

A. The Special Master did not err procedurally by conducting a hearing on injury in the absence of a third-party objection to Pocatello's accomplished transfer claim.

Pocatello argues the Special Master erred procedurally by conducting a hearing on injury despite the absence of a third-party objection to its accomplished transfer claim. Pocatello argues Idaho Code § 42-1425 limits inquiry into injury to existing rights only to situations where an existing water right holder (other than the claimant) objects to the accomplished transfer. This Court disagrees. A plain reading of the statutory language provides just the opposite.

Idaho Code § 42-1425 specifically provides a mechanism for memorializing in the SRBA previously unauthorized transfers. I.C. § 42-1425 (2). While the statute waives the otherwise mandatory administrative transfer requirements of Idaho Code §§ 42-108 and 42-222, it does not waive the rest of the SRBA procedures for processing a claim. Accordingly, the statute should be read in the context of the rest of the SRBA adjudication processes. The statute does not eliminate the Director's authority and statutory duty to investigate the claim and file a *Director's Report*. *See* Idaho Code 42-1410 and 42-1411. The statute contemplates the filing of an initial *Director's Report*. In the event an objection is filed to a claim for an accomplished transfer then IDWR is required to file a "supplemental report." (i.e. *supplemental* to the initial report.) I.C. § 42-1425 (2) (a). A *Director's Report* necessarily includes the authorization to determine "conditions on the exercise of any water right included in any decree, license, or approved transfer application" and "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." I.C. § 42-1411 (2) (i) and (j).

Idaho Code § 42-1425 (1)(c) provides that "the legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The *more limited examination of these changes provided for in this section, constitutes a*

reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing rights or constitutes an enlargement of use of the original right." I.C. § 42-1425(1)(c) (emphasis added). Idaho Code § 42-1425 (2) sets forth the criteria required to qualify for an accomplished transfer under the statute. Injury to existing rights is not the only inquiry into whether a claim qualifies under the statute. In addition, the subsequent changes to the original right as claimed must have occurred prior to the commencement date of the SRBA; the changes to the original right are limited to the elements provided for in the statute, and the transfer cannot result in an enlargement of the original water right. *See* I.C. § 42-1425 (2). 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.[8] This would potentially eliminate any review by the Director as contemplated by I.C. § 42-1425 (1)(c). Rather, in the event an objection is filed to the accomplished transfer then Idaho Code § 42-1425 requires additional measures and procedures including a supplemental report filed by the Director. I.C. § 41-1425 (2)(a). In this case an objection was filed by Pocatello thereby appropriately triggering an inquiry into injury.

A similar issue presented itself in the context of an administrative transfer in *Barron v. IDWR*, 135 Idaho 414, 18 P.3d 219 (2001). In *Barron*, the Idaho Supreme Court rejected transfer applicant's argument that because no party came forward to protest the proposed transfer, IDWR was required to accept the applicant's showing of non-injury, non-enlargement and favorable public interest without an examination. *Id.* at 441, 18 P.3d at 226. 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. Accordingly, the Special Master did not err in inquiring into the issue of injury to existing water rights.

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[8] For example, the statute is not applicable to a claim based on an enlargement of use irrespective of whether or not an objection is filed. I.C. § 42-1425(c)(2)(b). Accordingly, the only way in which the existence of an enlargement can be determined is through an investigation by IDWR.

B. The Special Master did not err in recommending the condition in order to prevent injury to existing water rights of third parties.

Pocatello argues the Special Master erred in concluding that the interconnected system of wells could not be decreed as alternate points of diversion under the provisions of the accomplished transfer statute without also including a condition specifying the date and particular well from which each water right was first established. For the reasons set forth below this Court affirms the ruling of the Special Master.

Idaho Code § 42-1425 authorizes changes to the place of use, point of diversion, nature or purpose of use, or period of use elements of a water right made prior to the commencement date of the SRBA (November 19, 1987) where the water right holder failed to comply with the statutorily defined transfer requirements.[9] *See* I.C. § 42-

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[9] Idaho Code § 42-1425 provided as follows:

> **Accomplished transfers.** – (1) Legislative findings regarding accomplished transfers and the public interest.
> (a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code.
> (b) The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim.
> (c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right.
> (2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general

1425(2). The statute authorizes the change only where no existing water right is injured at the time of change or where the change does not result in an enlargement of the original water right. *Id.* The statute does not expressly define what constitutes "injury" to existing water rights. Pocatello argues that IDWR's reasoning in support of the condition incorrectly takes into account future injury as opposed to injury that occurred at the time of the change to the water right. This Court disagrees. Pocatello's argument incorrectly assumes that the concept of "injury" is limited to immediate physical interference with the existing right of another at the time the change to the water right was made. The SRBA Court previously rejected that same argument in the context of a contest made to the application of the other amnesty statute, Idaho Code § 42-1426, with respect to enlargement claims.

At issue in ***Order on Challenge (A & B Irrigation District)*** Subcase Nos. 36-02080 *et. al.* (April 25, 2003) (Hon. R. Burdick) was a contest to a subordination condition recommended by IDWR with respect to enlargement claims where the claimant failed to provide mitigation for the injury as required by statute. The claimant in protesting the subordination condition argued that there was no injury to other water users. The SRBA Court disagreed and held that to the extent an enlargement claim is

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> adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:
> (a) If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.
> (b) This section is not applicable to any claim based upon an enlargement of use. [I.C., § 42-1425, as added by 1994, ch. 454, § 31, p. 1443; am. 1996, ch. 186 § 7, p. 584.]

The statute was amended in 2006 to address the northern Idaho adjudications but remains the same in substance.

given priority over an existing right on the same source without mitigation, the injury to the existing water right is *per se* even though at the time the enlargement was established there was sufficient water to satisfy both the enlargement claim as well as the rights of existing water right holders. The SRBA Court's analysis focused on the injury to the priority dates of existing rights on the same source in times of shortage. The SRBA Court relied on the Idaho Supreme Court's analysis of injury in *Fremont-Madison Irr. Dist v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996):

> In *Fremont-Madison*, the Idaho Supreme Court held that the enlargement provision of I.C. § 42-1426 (2) was constitutional only because of the mitigation provision, the Court held:
>
> > [S]ome injury from an enlargement can be identified if the enlargement takes priority over a validly established water right held by a so-called junior appropriator. The junior appropriator will not receive the water that he/she would have received but for the enlargement **if there is not enough water to serve all water users. It is difficult, if not impossible, to perceive of a situation in which an enlargement would not injure an appropriator who had an established right if the enlargement receives priority.** However, there is at least the possibility that an appropriator seeking an enlargement of one water right may accept a diminution of another water right held by the same appropriator to assure that the enlargement of the one water right will not reduce the total volume available to the junior appropriator.
>
> *Fremont-Madison* at 461. Implicit in the [Idaho Supreme] Court's reasoning is that to the extent a previously unauthorized enlargement claim is retroactively given senior priority over an existing right on the same source, without mitigation (i.e. a substitute source of water), **the injury is essentially *per se* because the priority of the affected right on the system has been diminished. At the time an enlargement occurs the affect on other appropriators may not be physically apparent or apparent because there may be sufficient enough water supply at the time to satisfy all rights on the system as well as the enlargement. However, the relative priority dates on a system only become significant when there is not enough water to supply all of the rights on the system. Hence, the essence and value of a water right in a prior appropriation system is the priority date. To the extent a claimant is entitled to retroactively receive a valid water right with a priority date**

> **senior to other appropriators on the same source the juniors are *per se* injured irrespective of the extent of the water supply.** The mitigation provision preserves the order of priorities on a system by preventing the available water supply to juniors from being diminished as a result of the new or enlarged right.
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> . . .
>
> **The inclusion of the subordination remark satisfies the constitutional concerns raised in *Fremont-Madison* by protecting the order of priorities of existing rights while at the same time permitting previously unauthorized enlargements to be decreed with the priority date as of the date of the enlargement subject to being subordinated to any junior rights existing as of the date of the enactment of I.C. § 42-1426(2), if any. The standardized remark allows the provisions of I.C. § 42-1426(2) to be applied and implemented without identifying each and every affected water right.**

Order on Challenge (A & B Irrigation District) at 25-26 (emphasis added). On appeal, the reasoning and decision of the SRBA Court was affirmed by the Idaho Supreme Court. *A & B Irr. Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 118 P.3d 78 (2005).

Although the issues in the instant case do not involve enlargement claims or the application of Idaho Code § 42-1426, the reasoning regarding injury to existing water rights is equally applicable. 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." ***Amended Master's Report and Recommendation and Order on Motion to Reconsider*** at 19.

Contrary to Pocatello's assertion this is neither future injury nor is the injury speculative. To the extent Pocatello is authorized to transfer a point of diversion for a water right from a well or wells located in vicinity where there is no significant hydraulic connection with wells of existing water users, to a different well developed subsequent to existing rights where there is a significant connection and the right being transferred is senior to existing rights, the injury to the schedule of priority dates of existing users is *per se*. But for the transfer of the alternate point of diversion existing users would have the more senior priorities in the vicinity. Pocatello's argument ignores the very purpose and significance of the priority dates of existing users. The purpose of a priority date is to provide for administration in time of scarcity. At the time the alternative point of diversion was established there may well have been sufficient water to satisfy all rights. Hence, it would not be necessary to regulate according to a priority schedule.

Even though the "source" of all water rights involved is "ground water" and all rights are supplied from the same aquifer, the aquifer may not be homogenous as between the discrete regions where the wells are located. The closer wells are in proximity to one another the greater the potential for well interference over time or in times of shortage. It is erroneous to assume that the relative affects from ground water pumping between wells is uniform throughout the aquifer just because the "source" of all of the rights is labeled "ground water." The condition eliminates the need to establish the highly complex facts that relate to the specific interrelationships or degree of connectivity between specific rights until such time as priority administration becomes necessary. Pocatello correctly points out that such a determination is typically beyond the scope of the SRBA proceedings and is a determination more appropriately associated with delivery calls. *See American Reservoir Dist. No. 2 v. IDWR*, 143 Idaho 862, 877, 154 P.3d 433, 448 (2006) (partial decree need not contain information on how each water right on a source physically interacts or affects other rights on the same source.) However, if and when that determination is necessary the condition eliminates any injury to the priorities of existing rights.

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 acknowledgment that without the condition the priorities of existing water rights will be diminished in favor of the alternative point of diversion for one of Pocatello's more senior rights. i.e injury. If however, the wells from which the alternative points of diversion never result in interference with the wells of existing users then priority administration between wells will not be triggered and the condition will not pose any limitation on Pocatello's 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. Therefore, the Court concludes that the inclusion of the condition is necessary to define Pocatello's rights. The recommendation of the Special Master is affirmed on this issue.

1. The Scenarios provided by the Municipal Providers illustrate why the condition is necessary to protect existing rights. The Court concurs with the Provider's assessment of the application of the condition.

The Municipal Providers briefed three different scenarios illustrating the circumstances under which the recommended condition would apply. The Providers seek clarification of the application of the provision over concern that the Special Master's recommendation could be interpreted too broadly. The Court has included the scenarios in the footnote because they aptly illustrate the adverse affect to the priorities of existing water users absent a condition. [10] The Providers assert that the Special Master's

[10]The Provider's presented three different scenarios to illustrate under what circumstances the condition would come into play.

> A. First scenario: local well interference.
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> 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 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 all 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 gmp. 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

determination could be read too broadly to preclude under any circumstances the use of alternative points of diversion any time priority administration is implicated. The Court concurs that in a circumstance involving regional priority administration a municipal provider may still be able to exercise alternative points of diversion within the region undergoing administration so long as the well under which the original right was established is also located within the region subject to the administration. However, a water right originating from a well located outside the region of administration with a priority date senior the priorities being regulated could not be diverted from wells within the area of administration in an effort to avoid regulation within the region of administration.

2. The three scenarios apply to Pocatello's rights despite the volume limitations place on Pocatello's wells.

Pocatello argues that the situations presented in the three scenarios are distinguishable and do not apply to its circumstances because Pocatello has already stipulated with the Surface Water Coalition to not increase the volumes beyond historical amounts in use at the time the accomplished transfers were established in 1987. *See Stipulation and Agreement Between Pocatello and Surface water Coalition in Pocatello's SRBA Subcases 29-271 et. seq.* (filed Feb 26, 2007). Pocatello argues that there is no injury to other water rights because the volume of water pumped from each well would

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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 could 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 administration, thus requiring IDWR to further constrain pumping, and thus injuring other water right holders.

not exceed beyond what was established on the date of commencement. Pocatello's argument misses the point. To the extent the use of the alternative point of diversion interferes with the well of a pre-existing senior water right the priority of senior right is injured — irrespective of the reason for the interference. Further, the fact that the volume pumped may not increase does not address the issue of avoiding a regional administration by pumping a senior right originally located outside of the area of administration from an alternative point of diversion inside the area of administration in order to avoid being regulated.

3. The fact that some of the original wells referenced in the condition are no longer in operation does not constrain Pocatello's use of the water right.

Pocatello argues the condition for some of its rights lists wells no longer in operation preventing effective operation of its interconnected system of wells. Pocatello argues because in times of priority administration when it is most dependent on its senior rights the portion of the rights associated with such wells would not be able to be diverted because the wells no longer exist.

Pocatello's argument does not provide a legal defense. However, the condition only comes into play in times of priority administration. 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 has 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 of the area of regulation.

4. The recommendation that the condition apply to alternative points of diversion, where the condition was not previously imposed on water rights diverting from the same wells, does not constitute a collateral attack on the transfer proceedings.

Three of Pocatello's rights on its system underwent a formal transfer in 1999 approving alternative points of diversion. The alternative points of diversion for these rights share the same wells claimed as alternative points of diversion for the rights at issue. The alternative points of diversion for the three rights were not conditioned. Pocatello argues diverting both conditioned and unconditioned rights from the same wells causes confusion and complicates administration of the water rights. Pocatello also argues that by adding the condition "to wells" that were previously unconditioned constitutes an impermissible collateral attack on the formal transfer.

This Court disagrees. First, it is routine in the SRBA for multiple rights to be decreed from a single well with different restrictions, limitations and priority dates. The situation in this case is no different. Next, the condition applies to the water right not the well.

5. The Special Master did not err in striking the *Affidavit of Josephine Beeman in Support of Pocatello's Post-Trial Brief*.

The parties filed post-trial briefs. Pocatello also filed the *Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief* which includes 11 exhibits. This Court has reviewed the *Affidavit*. The various exhibits include briefing filed in other cases (*Freemont-Madison v. IGWA* and *American Falls Reservoir Dist. #2 et.al.*); a letter dated July 11, 2001 from IDWR regarding "*Continued Negotiations of General Water Management Rules, IDAPA Docket No. 37-0313-9701*"; "*Draft Statewide Water Management Rules*" to name a few. The State moved to strike the *Affidavit* on the basis that the presentation of evidence had closed. The Special Master granted the State's motion but held that she would consider it legal argument. In the past IDWR recommended municipal rights as alternative points of diversion as claimed without imposing any limiting condition.

Pocatello argues that the *Affidavit* was submitted as legal argument to demonstrate that IDWR has changed its position with respect to conditioning municipal water rights. Pocatello states in its post-trial brief:

> This brief addresses all of the issues presented in the Court's six-day trial of Pocatello's 38 state-law SRBA claims. Perhaps the most consistently reoccurring theme is that the Idaho Department of water resources (IDWR) has changed its position with respect to Pocatello's municipal water rights from IDWR's prior investigation and recommendation of similar municipal rights in the SRBA.

Pocatello's Post-Trial Brief at 1. Idaho Rule of Evidence 401 defines "relevant evidence" as evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable without the evidence." I.R.E. 401. Clearly the *Affidavit* was submitted as evidence in support of the factual allegation that IDWR has changed its position with respect to recommending municipal right. To the extent the contents of the *Affidavit* were previously admitted into evidence Pocatello could appropriately refer to the contents in the brief. To the extent the contents were not previously admitted into evidence then the Special Master appropriately found the *Affidavit* to be "additional evidence." Pocatello's labeling of the *Affidavit* as legal argument is not binding on the Court. Accordingly, the Special Master did not err in considering the *Affidavit* a legal argument only.

Finally, the Special Master's ruling did not result in prejudice to Pocatello. Apparently, IDWR admitted at trial changing its position after gaining a better understanding how conjunctive management is to be implemented and the relative affects conjunctive management has on existing rights. Pocatello states: "At trial, IDWR explained that it purposely changed its position in 2003 because the Department had evolved in its understanding of conjunctive administration since the mid-1990's." *Pocatello's Opening Brief* at 11. IDWR's change is position would be expected. The ruling of the Special Master is affirmed.

C. The Special Master did not err in recommending that Pocatello's ground water wells not be decreed as alternative points of diversion for its senior surface rights.

Pocatello claimed its ground water wells as alternative points of diversion for its senior surface rights diverting from Gibson Jack and Mink Creek. The Special Master recommended that the accomplished transfer claim be disallowed. The Special Master concluded that the provisions of I.C. § 42-1425 do not authorize a change in the source element of a water right. The Special Master also found that although Gibson Jack and Mink Creeks contribute to the Lower Portneuf River Valley Aquifer (LPRVA) from which the ground water rights are pumped the two are not the same source. The Special Master found that although the two creeks contribute to the LPRVA, the LPRVA derives a significant supply of its water from other sources. This Court affirms.

1. Idaho Code § 42-1425 does not expressly authorize an accomplished transfer to the change in source element.

Idaho Code § 42-1411 sets forth the elements required for defining a water right. The "source" of the right is one of the enumerated elements. I.C. § 42-1411 (2)(b). 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.

This Court acknowledges and Pocatello has argued that ***Partial Decrees*** have been issued which refer to accomplished transfer to source. The Court responds as follows. First, the source element listed in a license or prior decree is not dispositive of the issue as a source can be described generally or in more specific terms. Two sources can share such a significant connection that the affect of a transfer from one source to another would have no affect on the priorities of existing users; i.e. diverting from either "source" has exactly the same affect on the rights of existing users. Second, the rights described by Pocatello were investigated by IDWR insuring that no injury resulted to

existing rights. For example if a right is transferred to a different source and there are either no rights diverting from the new source or the right being transferred is the most junior then there is no injury to existing rights. Lastly, the accomplished transfer claims were uncontested so any precedential value is limited based on the absence of a meaningful record. In this case, despite ruling that I.C. § 42-1425 did not authorize changes in source, the Special Master nonetheless appropriately allowed Pocatello the opportunity to prove the absence of injury to existing users.

2. The evidence does not support that the surface and ground water rights are diverted from the same source.

The Special Master heard conflicting testimony on the degree of interconnectedness between the surface and ground water sources and determined the two to be connected but separate. The Court has reviewed the testimony of Pocatello's expert Greg Sullivan and concludes that the evidence overwhelming 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 other coming from other tributaries." TR. Vol. IV pp. 801-02. 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. The Court will not disturb the Special Master's finding.

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 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. As such, Pocatello could not seek regulation of ground water rights to satisfy its surface rights as the rights presently exist. However, by approving an accomplished transfer, Pocatello would be able to divert its surface rights from ground water wells and thereby seek regulation of existing wells

where no such right previously existed. 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. The finding of the Special Master is affirmed.

D. The Special Master did not err in recommending water right 29-7770 with an irrigation purpose of use.

Pocatello claimed a "municipal" purpose of use for water right 29-7770. The *Director's Report* recommended the purpose of use as "irrigation." Pocatello holds three water rights (29-7118, 29-7119 and 29-7770) used exclusively for a biosolid waste treatment process. Biosolids generated in conjunction with Pocatello's sewage treatment process are applied to specific crops which absorb the waste as fertilizer. The three water rights were originally licensed with irrigation purposes of use. Licenses were issued for water rights 29-7118 and 29-7119 in 1975. Pocatello implemented the biosolids treatment program in 1981 and thereafter began using the rights in conjunction with the program ever since. Although the *Director's Report* recommended the purpose of use for the two rights as originally licensed (i.e. irrigation, the Special Master concluded that Pocatello successfully changed the purpose of use for 29-7118 and 29-7119 from irrigation to municipal based on the application of I.C. § 42-1425).

Water right 29-7770 does not share the same procedural posture. A license was issued for 29-7770 in 2003 with an irrigation purpose of use. The Special Master concluded that the provisions of the accomplished transfer statute were inapplicable because the license was issued after the commencement date of the SRBA and recommended the right with an irrigation purpose of use. This Court affirms.

In this case the license is controlling. This Court has long held that the SRBA cannot be used as a mechanism for reconditioning or collaterally attacking a license. The Court also addressed this issue as applied to these same claims in the context of Pocatello's alternative legal theory based on federal law. In ***Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law***, Subcase No. 29-11609 (City of Pocatello—Federal Law Claims) (Oct. 6, 2006), *affm'd*

on other grounds, Pocatello v. State, 145 Idaho 497, 180 P. 3d 1048 (2008), this Court held:

> Licenses are and have been consistently treated in the SRBA the same as prior decrees for purposes of binding the parties and their privies. In ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***, subcases 36-02708 *et al.* (Dec. 29, 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate forum for collaterally attacking licenses previously issued through administrative proceedings.
>
> > The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred.* Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higgenson*, 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844 693 P.2d 1046 (1984).
>
> *Id.* (quoting ***Supplemental Findings of Fact and Conclusions of Law*** (Facility Volume) (July 31, 1998); *see also* ***Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge***, subcase 36-08099 (Jan 11, 2000) upholding subordination remark contained in a license for hydropower water right claim).
>
> Like a prior decree, a licensed right is not conclusive as to the extent of the water right, since a license does not insulate a claimant from practices occurring after the license was issued such as abandonment or forfeiture. However, unlike a prior decree, the binding effect of a license extends beyond the parties to the administrative proceeding and their privies. The Idaho legislature also acknowledged the binding effect of prior licenses and decrees in enacting Idaho Code § 42-1427 which provides a mechanism for defining elements of water rights not described

> in prior decrees or licenses. Accordingly, the City is also bound by its prior license for water right claim 29-07431.
>
> The bottom-line is that a party cannot have its water use adjudicated or administratively determined in one proceeding and then re-adjudicate the right under a more favorable legal theory in a subsequent proceeding.

Memorandum Decision and Order on Challenge and Order Disallowing Water right Based on Federal Law at 12-13. (footnotes omitted). The significance of the permit and licensing method of appropriating a water right was not intended as a procedure for "registering" a pre-existing water use appropriated under the constitutional method. Rather it is a separate means of acquiring a water right. *Crane Falls Power & Irr. Co. v. Snake River Irr. Co.*, 24 Idaho 63, 82, 133 P.655, 674 (1913) (citing *Neilson v. Parker*, 19 Idaho 727, 115 Pac. 488 (1911)). Accordingly, Pocatello's redress should have been through the administrative licensing process. Ironically, Pocatello states in its opening brief that it "requested the irrigation designation in order to expedite the long overdue licensing of 29-7770." *Pocatello's Opening Brief on Challenge at 15.* Apparently Pocatello received the exact purpose of use for which it applied.

Pocatello argues that IDWR erred as a matter of law in designating the purpose of use as irrigation instead of municipal because the water has always been used in conjunction with the biosolids program and in exactly the same manner as 29-7118 and 29-7119. This Court does not find the irrigation purpose of use designation inconsistent with the manner in which the water right is beneficially used. The designation of municipal is a more general purpose of use encompassing various purposes of use required of a municipal provider. Idaho Code § 42-202B (6) defines municipal purposes as "residential, commercial, industrial, irrigation of parks and open space, and related purposes." While the irrigation of crops in conjunction with waste treatment could fall under the broader definition of municipal it could also fall under the more specific designation of irrigation. The water right is used to "irrigate" crops, which is entirely consistent with an irrigation purpose of use, albeit the designation does not have the same broad scope and flexibility as a municipal designation. In the event Pocatello wishes to use the water right for a different specific purpose that would otherwise also fall under

the broader definition of municipal, it will have to proceed with a formal transfer proceeding. The ruling of the Special Master is affirmed

E. The Priority Dates for 29-13558 and 29-13639.

1. The Special Master did not err in recommending a July 17, 1924, priority date for water right 29-13558.

Water right claim 29-13558 is based on beneficial use. Pocatello claimed a priority date of June 30, 1905. The *Director's Report* recommended a priority date of July 16, 1924. Following a trial on the merits, the Special Master held that the evidence presented by Pocatello in support of the claimed priority date was insufficient to rebut presumptive weight of the *Director's Report*. The water right was associated with the first well used by the City of Alameda. The *Director's Report* recommended a priority date of one day prior to the founding of Alameda on July 17, 1924. The recommendation relied on a historic newspaper article submitted by Pocatello in support of its claim. The article states that the City of Alameda was founded July 17, 1924, and that the depth of the well was increased during the term of Alameda's first mayor. The logical inference being that the well was in existence prior to the establishment of Alameda, however, the article does not state when the well was drilled. The Special Master found that the only evidence connecting the well to Pocatello's claimed priority of 1905 was a showing that an early resident moved into the area sometime in 1905. The Special Master concluded that Pocatello's showing was insufficient to rebut the presumption created by the *Director's Report*. On *Challenge* Pocatello argues that it offered evidence from multiple sources that the well was in place and diverting water by June 30, 1905. Pocatello does not cite to specific facts in the record supporting that the well was drilled and in use in 1905.

The *Director's Report* is considered to be *prima facie* evidence of the nature and extent of a water right. I.C. § 42-1411; *State v. Hagerman Water Right Owners*, 130 Idaho 736, 745, 947 P.2d 409, 418 (1997). The *prima facie* status constitutes a rebuttable

evidentiary presumption governed by Idaho Rule of Evidence 301. *McKray v. Rosenkrance*, 135 Idaho 509, 514, 20 P.3d 693, 698 (2000) (citing *State v. Hagerman Water Right Owners*). The presumption shifts only the burden of production not the burden of persuasion. *McKray* at 514, 20 P.3d at 698. The claimant of a water right has the ultimate burden of persuasion for each element of a water right. I.C. § 42-1411(5). The presumption is rebutted by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. I.R.E. 301; *Bongiovi v. Jamison*, 110 Idaho 734, 718 P.2d 1172 (1986) (fact presumed until opponent introduces "substantial evidence" of nonexistence of fact); *Krebs v. Krebs*, 114 Idaho 571, 759 P.2d 77 (Ct. App. 1988). Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla but less than a preponderance." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). If rebutted, the presumption disappears and the facts on which the presumption is based are weighed together with all other relevant facts. *Id.* The trier of fact has primary responsibility for weighing the evidence and determining 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 findings of fact of the Special Master unless clearly erroneous.[11] I.R.C.P. 53(e)(2).

The Special Master, after weighing the evidence, determined "although the evidence has some probative value, by itself does not rebut the *Director's Report* conclusion that priority is July 16, 1924." The Special Master's findings are not clearly erroneous. The evidence supports a finding that the well was in existence prior to the founding of the City of Alameda. However, this Court concurs that insufficient evidence was presented to establish a more specific priority date. Accordingly, the earliest priority the evidence supports is a priority of one day earlier than the founding of Alameda. The finding of the Special Master is affirmed.

2. The Special Master's recommendation of a priority date one day earlier than the licensed priority for water right 29-13639 is affirmed.

[11] *See supra* standard of review of findings of fact of Special Master.

The Special Master found that water right 29-13639 is based on prior license 29-2324. The prior license covered Alameda wells 1, 2 and 3. Water right 29-13639 relates to well number 3. The licensed priority date for 29-13639 is October 22, 1952. The *Director's Report* recommended a priority of October 22, 1952, based on the prior license. Pocatello claimed a priority of December 31, 1940, based on beneficial use. The Special Master determined that although Pocatello presented evidence regarding Pocatello's population growth, the evidence was insufficient to establish a specific priority date including the claimed priority of December 31, 1940. The Special Master made the finding that the permit and license support that the wells pre-existed October 22, 1952, and therefore concluded that the priority should be advanced one day prior of October 21, 1952. This Court disagrees.

Water right 29-13639 is based on a former license. Pocatello's claim is not to the use of additional water from the well not previously covered under the license. Pocatello's claim is for an earlier priority for a previously licensed water right. For the reasons discussed above, the Court finds this to be a collateral attack on a previously licensed right and concludes that the priority date should be consistent with the license or October 22, 1952. However, the State did not contest the Special Master's recommended priority for this right. The State argued that the priority should not be any earlier than the priority date recommended. Even disregarding the former license, the evidence does not support an earlier priority. The Court thereby affirms the recommendation of the Special Master.

VIII.
CONCLUSION AND ORDER

Pursuant to I.R.C.P. 53(e)(2) and ***AOI*** section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the ***Special Master's Report and Recommendation*** and wholly adopts them as its own.

Therefore, IT IS ORDERED that the *Challenge* is **denied**. ***Partial Decrees*** for the above-captioned order will be entered pursuant to a separate order consistent with this ***Memorandum Decision***.

IX.

RULE 54(b) CERTIFICATE

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

Dated November 19, 2009

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication