A. Dean Tranmer ISB No. 2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	**POCATELLO'S TRIAL BRIEF**

The City of Pocatello ("Pocatello") hereby submits its trial brief in the captioned matter.

INTRODUCTION

In order to facilitate an understanding of the evidentiary points and legal arguments upon which Pocatello will rely, this brief is divided into "issues" with relevant assertions of law and fact referenced in each. Also, Pocatello incorporates by reference its legal arguments and factual assertions contained in *Pocatello and IGWA's Joint Motion for Summary Judgment and Motion In Limine.*

1. **Issue: As a junior ground water user, Pocatello's interests in this matter are significant.**

Pocatello relies on approximately 40 ground water rights diverted through 48 wells for its municipal supplies, and has more than 50,000 treated water customers. Currently, only thirteen of Pocatello's wells are subject to administration as part of the ESPA. *See*, Exhibit 3004 (showing Pocatello's service area, and distinguishing between wells subject to ESPA administration and those that are not yet administered as part of the ESPA). On information and belief, based on discussions with the Director, it is only a matter of time before the Department incorporates the remainder of the City's wells into the ESPA administrative structure. Thus, while only thirteen wells are currently subject to administration, the City has been made to understand that its entire suite of ground water rights will eventually be subject to administration and curtailment under the Department's authority.

The thirteen wells currently subject to administration are located at or near the Pocatello airport. Two of the City's ESPA wells provide treated water to the airport employees, and travelers, and also provide water for fire protection. Seven of the wells located near the airport are termed "biosolids wells". These wells are integrated into the City's plan under its NPDES permit for disposal of biosolid wastes from the City's wastewater plant. Reliance on the City's biosolid wells is critical to the City's compliance with its NPDES permit; if the City fails to irrigate on the schedule provided for in the permit, it would be in violation of its NPDES permit and subject to fines. If Pocatello's ESPA wells are curtailed, there is a direct impact on public health and safety and Pocatello would likely be in violation of its NPDES permit.

Testimony from Mr. Lanning, Pocatello's Public Works Director, will establish the facts surrounding Pocatello's water supplies, and the uses the City makes of its ground water. Testimony from Mr. Ulrich, Pocatello's Water Department Superintendent will describe the

details regarding Pocatello's NPDES permit, and the consequences to the City from failure to comply with the permit.

2. **Issue: General Legal Framework**

The constitutional right to appropriate water under Idaho law has long been qualified by reference to other constitutional principles. Scrutiny of the water right does not end at the time a license or decree is entered. *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Res.*, 143 Idaho 862, 154 P.3d 433, 447 (2007)("*AFRD#2*").[1] The following concepts qualify a water right and, by extension, the Idaho Department of Water Resources's ("IDWR") response to a delivery call, in Idaho. In general, the legal concepts described below are consistent with those laid out by the Director in the Conclusions of Law section of the May 2, 2005 Order.

Beneficial use.. The Surface Water Coalition's ("SWC") right to appropriate water is conditioned by its ability to put the water to beneficial use. The quantity of water on the face of a license or decree does not create an entitlement to that amount of water absent a showing that the amount is needed for beneficial uses. *Schodde v. Twin Falls Land & Water Co.*, 224 U.S. 107 (1912); *Lee v. Hanford*, 21 Idaho 327, 121 P. 558 (1912).

Administration of surface and ground water rights in a common stream system is also subject to determination of whether the amount of water sought through a delivery call is necessary for beneficial uses. Beneficial use is the measure of the water right, and thus the measure of what must be delivered in the case of a delivery call. *Farmers' Co-op Ditch Co. v. Riverside Irrigation Dist.*, 16 Idaho 525, 535-36, 102 P. 481, 483-84 (1909) (requiring an adjudication court to decree only that amount of water necessary); *Abbot v. Reedy*, 9 Idaho 577,

[1] "Specifically, the Director 'has the duty and authority' to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water."

581, 75 P. 164, 765 ("the law only allows the appropriator the amount actually necessary for the useful or beneficial purpose for which he applies it"). Thus, in response to the SWC's delivery call, determining the amount of water the SWC can beneficially use rather than relying on the quantity on the face of their licenses or decrees is a valid exercise of IDWR's discretion to administer delivery calls under the Rules of Conjunctive Management of Surface and Ground Water Resources ("CMR"). *See* Rules of Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11 ("CMR"); *AFRD* #2, 154 P.3d 433.

Prohibition on waste. Further, IDWR is required to exercise its discretion consistent with the constitutional prohibition on waste. IDAHO CONST. art. XV; CMR 40.03; *Mountain Home Irr. Dist. v. Duffy,* 79 Idaho 435, 442-43, 319 P.2d 965 (1957). Therefore, IDWR's discretion does not extend to ordering curtailment of ground water users if the water to be delivered to seniors cannot be demonstrably put to beneficial uses.

Optimum development. IDWR's response to any delivery call must also incorporate the constitutional principle of "optimum development" of the State's waters. IDAHO CONST. art XV, § 7 ("the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest"). In this case, that requires the IDWR to consider applicable principles in the State Water Plan, including its "zero flow at Milner" provisions, in the context of answering the SWC's delivery call. *See Nettleton v. Higginson*, 98 Idaho 87, 91, 558 P.2d 1048, 1051-52 (1977) ("The governmental function in enacting...the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources.") *See also*, Greg Sullivan's November 7, 2007, Rebuttal Report, page 2, paragraph 7 and Exhibits 3041, 3042. (State Water Plans for 1986 and 1992).

Full economic development. I.C. § 42-226 is the legislature's incorporation of the concepts of optimum development and beneficial use found in the constitution and discussed above as it applies to ground water. This is the legal principle that serves to both protect and qualify junior ground water rights. The protection arises by foreclosing "shut and fasten" administration by reference merely to the senior's priority date and quantity of the decree or license but also to qualify the junior ground water right because administration of ground water is to be incorporated into the prior appropriation system.

Reasonable use. The reasonable use requirement is incorporated through Article 15, section 5 of the Idaho Constitution. "Priority of right shall be subject to such reasonable limitations as to the quantity of water used and the times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe." *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120-21 (1911)[2]; *see also*, *AFRD #2,* 154 P.3d at 446-48 (finding authority for the Director to make determinations regarding reasonableness of diversion and use). Whether a use is reasonable is committed to the sound discretion of the Director under the constitution, statutes, and CMR. CMR 40.03.

Rules of Conjunctive Management of Surface and Ground Water Resources: IDWR is authorized to employ CMR in determining the response to a delivery call. The CMR incorporate by reference principles of Idaho law, and thus incorporate the legal principles identified above. *AFRD*#2, 154 P.3d at 444. In addition, the following CMR, and legal principles incorporated by reference therein, are applicable to this proceeding:

---

[2] The right of appropriation is not an unrestricted right, but "must be exercised with some regard to the rights of the public....'[A water right] must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.'"

a. Idaho Administrative Procedures Act ("IDAPA"). This is incorporated by reference in CMR Rule 10.12, which incorporates principles of Idaho law, defined as the constitution, statues, administrative rules and case law of Idaho, into the CMR. The IDAPA is important in this matter because it provides a legal framework for the Hearing Officer to review the Director's Order and the evidence submitted by the parties contesting the Order. The IDAPA provides that injury is a question of fact which must be proven by the petitioner and supported by substantial and competent evidence. I.C. § 67-5279; *Barron v. Idaho Dept. of Water Resources*, 18 P.3d 219, 223 (Idaho 2001) ("*Barron*") ("[u]nder the IAPA, the IDWR's decision may be overturned only where its findings:...(d) are not supported by substantial evidence in the record...").

b. Rule 20. This rule incorporates by reference the constitutional principles described above.

c. Rule 40. Rule 40 provides the procedures associated with a delivery call. Under Rule 40.03 the Director is required to determine whether the petitioner "is suffering material injury to a senior-priority right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground water as described in Rule 42."

   i. Upon a determination of material injury, the Director orders the watermaster of the relevant water district to effectuate the IDWR's response to the delivery call consistent with his findings. Rule 40.01 and 40.02.

d. Rule 42. Rule 42 provides the substantive factual inquiries which the Director must make and consider in determining whether a petitioner is suffering material injury. These standards are also applicable in this proceeding, as described in further detail below.

3. **Issue: The determination of injury to seniors involves factual determinations made in the context of the applicable legal principles. In addition to the guiding principles described above, the CMR and specifically Rule 42 provide the proper framework in which to evaluate the evidence regarding material injury.**

Determination of material injury, as well as the appropriate administrative response if material injury is found, involves resolution of complex factual issues. "It is vastly important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts." *AFRD#2*, 154 P.3d at 466. The same is true of an appeal from the Director's Order; thus, facts are the basis to challenge the Director's Order.

That injury is a question of fact in this proceeding is confirmed by the Idaho Administrative Procedure Act ("IDAPA"), which provides that the petitioner must prove injury through substantial and competent evidence. Idaho Code § 67-5279; *Barron v. Idaho Dept. of Water Res's*, 135 Idaho 414, 418, 18 P.3d 219, 223 (2001)("*Barron*") ("[u]nder the IDAPA, the IDWR's decision may be overturned only where its findings:...(d) are not supported by substantial evidence in the record..."); *Freemont-Madison Irr. Dist. and Mitigation Group v. IGWA*, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996) ("the party asserting a claim is in the best position to establish the existence of a controverted fact, and must, therefore, bear the burden of proving the existence of that fact").

In sorting through the facts asserted to be demonstrative of material injury, the Hearing Officer is to be guided by the factors identified in the CMR, including Rules 10, 20, and 42. While Idaho law provides that a senior water right holder is entitled to his decreed water right, "[t]here certainly may be some post-adjudication factors which are relevant to the determination of how much water is actually needed [in the context of a delivery call]." *AFRD#2*, 154 P.3d at 449.

The factors to be applied in determining material injury include:

1. the amount of water available in the source from which the water right is diverted (Rule 42.01.a);

2. the effort or expense of the holder of the water right to divert water from the source (Rule 42.01.b);

3. whether the exercise of junior-priority groundwater rights individually or collectively affect the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or groundwater right, including seasonal, multi-year, and cumulative impacts of all groundwater withdrawals from the area having a common groundwater supply (Rule 42.01.c);

4. the rate of diversion compared to the acreage served under irrigation, annual water diverted, system diversions and efficiencies, and the method of irrigation water application (Rule 42.01.d);

5. the amount of water being diverted and used compared to the water rights (Rule 42.01.e);

6. the existence of water measuring and recording devices (Rule 42.01.f);

7. the extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices (Rule 42.01.g); and

8. the extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversions, including the construction of wells or the use of existing wells to direst and use water from the area having a common groundwater supply under the petitioner's surface water right priority (Rule 42.01.h).

To contest the Director's Order, the senior must present substantial and competent factual evidence of the material injury it is asserting. In support of its arguments on this issue, Pocatello also incorporates by reference its arguments made in *Pocatello and IGWA's Motion for Summary and Motion In Limine*, filed December 11, 2007. By the same token, juniors challenging a delivery call order are required to show that the analyses made by the Director under Rule 42 are deficient in some way.

The water budget methods and evaluations made by Pocatello's experts, Mr. Sullivan and Mr. Franzoy, and the administrative approach proposed by Mr. Sullivan, are derived from an evaluation of the factors in Rule 42. As Mr. Sullivan and Mr. Franzoy, Pocatello's experts, have testified and will testify, Pocatello's testimony and reports submitted in this matter are based on an evaluation of the physical evidence, using engineering methods, and considering the decisional environment. *See generally,* Direct of Mr. Sullivan, Direct Testimony of Mr.

Franzoy, submitted September 26, 2007; Rebuttal Testimony of Mr. Sullivan and Mr. Franzoy, submitted November 7, 2007.

4. **Issue: While the Director's May 2, 2005 Order relied on Rule 42, the method employed was adequate only for purposes of making a determination under the "emergency" powers of the Department and a more thorough examination of the factors that determine amounts necessary for beneficial use is required in the context of this hearing.**

The Director's May 2 Order determined injury by evaluation of two factors: 1) a forecast of the supply of water likely to be available to meet the needs of the SWC water users; and 2) a forecast of the amount of water necessary for the SWC, given the crop water needs for a given year. The Director's analysis of the SWC's need and ability to put water to beneficial use in response to their delivery call was appropriate under Idaho law as the Department's threshold determination of injury. *AFRD #2*, 154 P.3d at 448.

However, Director Dreher testified at his deposition that his initial determination was based on available information and the need to make a decision in a short time.[3] He also testified that he expected the hearing in this matter to include a more thorough-going evaluation of the technical facts that determine the amount of water the SWC requires to avoid injury. This is consistent with Pocatello's expert, Mr. Sullivan, who testified in his direct testimony that the methods employed by the Director in the May 2 Order were not sufficiently refined to properly answer the question of whether the SWC's water rights were materially injured. Sullivan Direct Testimony, September 26, 2007, page 24, lines 8-21. As Mr. Sullivan's analyses, included in his Direct Testimony and Report, show, because of the shortcomings in the Director's method, the May 2 Order found injury to Twin Falls Canal Company when there was none.

a. Issue: Forecasting water supply.

[3] Mr. Dreher's deposition was taken on December 19-20. We do not yet have even a draft of the transcript. Pocatello will amend its trial brief with citation to and excerpts from Mr. Dreher's testimony, once a draft is received.

The IDWR used the Heise gage flows, as well as Bureau of Reclamation ("Bureau") estimates of reservoir fill, to predict water supplies that will be available for diversion by the SWC. Initially, the Director's May 2 Order evaluated projected water supplies by examining April 1 Heise gage flows and then searching the recent record for years with similar April 1 Heise gage flows. That method was modified slightly by Director Tuthill in his 2007 Orders. *See,* Exhibit 3014 (compiling all of the methods used to forecast supply between the May 2, 2005 Order and the Seventh Supplemental Order). Pocatello's expert, Greg Sullivan, has opined that the Director's current methods (i.e., as those methods have been modified from the May 2 Order) are most appropriate for forecasting supplies that are likely to be available for the SWC. Sullivan Direct Testimony, September 26, 2007, pages 21-23, lines 9-24, 1-24, and 1-3.

b. Issue: Forecasting demand—how much water is necessary for the SWC to make beneficial use, given the requirements of their crops?

As described by Mr. Sullivan in his September 26, 2007 testimony, the Director's assumption that "minimum full supply" could be determined by reference simply to headgate diversions, without regard to the weather or climate factors in a given year, over-simplifies the inquiry. *See* Sullivan Direct Testimony, September 26, 2007, page 23-24, lines 4-24, and 1-21. For example, if the "minimum full supply" happens to be the amount diverted in a cool, wet year, it cannot be assumed that the same amount of water will necessarily produce crops in a hot, dry year. This shortcoming was identified by the Director, as well, in Finding of Fact 91 of the May 2 Order.

The better method, as described in Mr. Sullivan's testimony, is to develop a "water budget" for each canal company. Mr. Sullivan's analysis included information required by CMR 42.01.g., including: crop irrigation requirements ("CIR"), annual climate variations, cropping patterns, irrigated area, soil moisture, achievable farm irrigation efficiency, conveyance losses,

surface water supplies, and the availability of supplemental ground water. *See,* Sullivan Direct Testimony at pages 33-34, lines 19-24, 1-6. An illustration of the conceptual approach to a water budget analysis is shown in Pocatello's Exhibit 3021 and the flow chart associated with the inquiry is including in Exhibit 3022.

Reliance on the method described by Mr. Sullivan demonstrates that, for the historic period used by the Director in his determinations, the only company injured was American Falls Reservoir District No. 2 ("AFRD#2"), which was short of water by approximately 2500 a.f. in 2004. *See*, Exhibit 3023 and 3028.

c. Issue: Pocatello and the SWC agree that a "water budget" approach should be used in this matter, but the differences in the inputs to the respective water budgets are dramatic.

As all participants in this case know, this is a case of first impression. That makes the case important because it is first, but also because it is likely to be used as a pattern to resolve future disputes of this kind. The process used to resolve this case will likely guide resolution of future delivery calls, and will inform the practical definitions given to Idaho's constitutional principles described previously, including, *inter alia*, reasonable use, optimum use, and full economic development. Answering the question of which assumptions and inputs are proper for use in the water budget analysis is perhaps the central dispute in this case, and is likely to be the linchpin to its resolution.

Pocatello's experts performed a water budget analysis that found injury to AFRD #2 in only one year of the historic period. By contrast, the SWC's water budget analyses found shortages to many of the SWC members' water rights in 9 of 17 years in the historic period.[4] *See,* Table 10-16 of SWC's September 26, 2007 Report. These differences arise from the inputs

[4] Comparing the two analyses directly is difficult because the SWC has been unwilling to say whether the shortages they found rise to a level of material injury.

to the water budget analyses and the assumptions made by the respective teams of experts. Pocatello's experts evaluated the factual showings required under Ruler 42, and then used data inputs derived from testimony of the SWC managers, as well as their own expertise in determining how efficiently the SWC systems could utilize irrigation water.

By contrast, the SWC's experts testified that they had not considered the Rule 42 factors—in some cases, had not even read the CMR—in developing their opinions. SWC's experts used data inputs that were inconsistent with the testimony of the SWC managers and, just as problematic, data that were inconsistent with prior analyses developed to answer similar questions. *See*, Brockway Deposition, October 22, 2007, p 25, line 2-22; Koreny Deposition, October 18, 2007, p 107, line 22 – p 108, line 2.[5] Certain numbers, including the conveyance losses developed by Dr. Brockway for certain of the canal company systems, were inconsistent with the underlying logic and likely erroneous. *See,* Rebuttal Testimony of Gregory K. Sullivan, paragraph 28, pages 24-33, November 7, 2007.

d. **Issue: The only SWC testimony related to injury is the 2005 deposition testimony of certain of the SWC managers.**

Although SWC and Pocatello agree that a water budget analysis is the proper method to determine the "demand" side of the injury equation, there is no SWC testimony or information in the record that the shortages calculated by the SWC are "injury" as that term is used in the CMR. In fact, the only SWC testimony or information in the record of this matter is qualitative testimony from 2005 the depositions of certain of the canal company manager that their water users had suffered injury at one or more times during the recent past.

However, lay testimony alone cannot resolve the dispute in this matter. Indeed, the constitutional requirements to consider beneficial use, reasonable use, optimum use, and full

[5] *See also,* Deposition Excerpts attached as Exhibits 1-4 to Pocatello and IGWA's Joint Motion for Summary Judgment and In Limine, December 11, 2007.

economic development foreclose determination of a conjunctive management delivery call dispute through lay testimony from a water user to the effect that he believes has previously not received all of his water. Thus, even if a particular manager or other lay witness's testimony is credible on the issue of shortage, Idaho water law imposes certain decisional requirements within which the delivery call must be resolved and these require expert testimony to determine whether a given shortage rises to the level of material injury.

5. **Issue: Carry-over storage is governed by the principles of beneficial use and it is not an *entitlement* under federal or state law.**

One of the most important disputes in this case is the nature of the carry-over storage entitlement. There are two aspects to this dispute: first, the nature of the legal requirements, if any, that describe the carry-over storage component of the SWC's storage rights. Second, the practical or factual aspects of the carry-over storage element of administration. Issue #5 will focus on the legal aspects of carry-over storage.

The Director's determination regarding carry-over storage found that it was authorized under the CMR, Rule 42.01.g. The Director determined that carry-over storage in his May 2 Order operated as an "insurance policy"[6] in the event the SWC had insufficient supplies during the following irrigation season to satisfy beneficial uses. *See,* May 2 Order, Conclusion of Law paragraph 51. .

Rather than an insurance policy, to be honored in the event of injury, the SWC takes the position that, in order to avoid injury they must keep their reservoirs as full as possible. *See*, SWC's September 26, 2007 Report, Chapter 11, pages 11-7[7]; *see also*, Report of David Raff,

[6] This term is not used in the Order, however, Mr. Dreher used it during his December 19-20, 2007 deposition to describe carry-over storage

[7] "Had additional water been available in 2004, TFCC and other SWC members *may have* diverted and beneficially used more water than their actual 2004 diversion. Additional water use could have occurred for two reasons, first had shareholders been *more confident* of the available water supply in 2004 they *could have* planted crops with a higher water demand...." Emphasis added.

Bureau of Reclamation (in which he opines that *any* reduction of carry-over storage, including the use of the storage water by SWC for beneficial purposes, increases the "risk" to the SWC's water supply). Under this view of carry-over storage to avoid injury, carry-over storage would be like an insurance policy: the SWC would be authorized (like the purchaser of private insurance to protect a house or car) to determine how much water they desire to carry-over, and demand that ground water users make up the difference in supply. The Department's role in this determination would be merely ministerial.

As a threshold matter, the Idaho Supreme Court has rejected the concept that the SWC (or anyone else) is entitled to keep their reservoirs full at all times just in case of a dry year. *AFRD #2*, 154 P.3d at 451.[8] Of the concepts underlying the "carry-over storage" rule[9] included in the CMR, the Supreme Court has said:

> Concurrent with the right to use water "first in time" in Idaho, is the obligation to *put that water to beneficial use*. To permit excessive carryover of stored water without regard to the need for it would be in itself unconstitutional.

Id. (emphasis added). Thus, under Idaho law the extent of lawful carry-over storage is modified and qualified by the beneficial use rule. Accordingly, the Director's authority to require carry-over storage must be conditioned by the "beneficial use" requirement rather than the confidence level of senior storage users.

Further, storage in-and-of-itself is not a beneficial use. *United States of America v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007)("*Pioneer*")("there is no dispute that the BOR does not beneficially use [stored] water for irrigation. It manages and operates

---

[8] "At oral argument one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law in Idaho."

[9] "...the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system." Rule 42.01.h.

storage facilities."), *see also, People ex. re. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1251 (Colo. 1996); *Handy Ditch Co. v. Greeley & Loveland Irr. Co.*, 280 P. 481 (Colo. 1929).

Instead, storage must be made in anticipation of a future beneficial use, such as irrigation or DCMI[10]. Thus, under Idaho law, carry-over storage, where the SWC *might* be able to make use of the water in a future year, is not authorized.

Importantly, the Bureau contracts held by SWC incorporate the terms of the 1902 Reclamation Act, 43 U.S.C.A. section 372, which provides "beneficial use shall be the basis, the measure and the limit" of the right to use water associated with Bureau projects. *See,* Contract No. 14-06-W-60, May 13, 1954; Contract No. 14-06-100-1833, February 2, 1960; Contract No. 14-06-W-28, December 12, 1952.

The federal contract bases of the SWC's rights are wholly consistent with Idaho law. Thus, there is no legal basis for the SWC to argue that they are legally entitled to elect the use and disposal of their reservoir storage water. The storage right is conditioned by the requirement of beneficial use, and, therefore, carry-over storage is as well.

6. **Issue: In any event, determining injury from lack of carry-over storage is not appropriate in this case.**

As described above, there is no legal basis to conclude that the SWC has "carry-over" storage entitlements that can be treated differently from other water rights in Idaho. If an entity is not making beneficial use—or cannot show a projected beneficial use—for its storage entitlement, then carry-over storage is not appropriate.

Pocatello and IGWA have taken the position that for purposes of administration, carry-over storage is a concept with little legitimate value. The Director has ordered carry-over storage amounts in the May 2, 2005 and certain subsequent orders, but the ground water users have not

[10] DCMI stands for "domestic, commercial, municipal and industrial" and is often used in the context of municipal water uses in Idaho.

been required to provide the carry-over amounts until the following irrigation season. Mr. Sullivan describes the problems with a carry-over storage requirement in his September 26, 2007 testimony: "I don't think there should be a minimum carryover requirement because conceptually it amounts only to an unnecessary shift in the timing of the long-term mitigation obligation of the junior ground water users without any tangible benefit." Sullivan Direct Testimony, September 26, 2007, page 25, lines 11-13. Mr. Sullivan goes on to describe the unnecessary complications that arise from requiring future mitigation water on pages 25-26 lines 15, 24, and 1-16. In short, "carry-over" storage is an obligation that either disappears because the SWC's reservoirs fill (and they are, after all, only entitled to the total amount of their contracts) or is an obligation that is subtracted from next-year's replacement requirements.

7. **Issue: Curtailment is not an appropriate response to a delivery call; instead, mitigation or replacement water should be used to avoid injury to seniors.**

The SWC has declined to identify the amount of water that they require to avoid injury to their water rights. *See*, Exhibits 1-4 to *Pocatello and IGWA's Motion for Summary Judgment and Motion In Limine*. Despite being unable to tell the Hearing Officer how much water they require to avoid injury, the September 26, 2007 Report prepared by SWC's consultants includes a "curtailment analysis" in Chapter 11. As Mr. Sullivan's rebuttal opinions demonstrate, curtailing ground water users to avoid injury from yet-to-be-experienced shortages of water is an inefficient use of the resource. Rebuttal Testimony and Report, Gregory K. Sullivan, pages 46-47, paragraph 36, November 7, 2007. For example, even the SWC's analysis (which Pocatello disagrees with, as described above) showed that only 9 of 17 years were years of water shortage. *See,* Table 10-16 from SWC September 26, 2007 Report. Curtailment of wells is not something that can be turned on and off, like a switch. Ground water irrigators will go out of business. Municipalities don't have the option of going out of business: curtailment of municipal water

supplies would spell disaster for cities. Economic disaster is an adequate basis to reject curtailment as a means of administration.

Testimony and analyses provided by Pocatello's experts shows, based on water budget analyses, that any injury that may be suffered by the SWC senior water rights in the future can be dealt with through provision of in-season replacement supplies. The key is for the IDWR to adopt an appropriate method of administration that alleviates the problems with the Director's May 2 2005 "index year" method and begin active administration. Part of that administration should include the ability for junior ground water users to provide replacement supplies.

8. **Issue: The Bureau of Reclamation offers no relevant evidence in this matter.**

The Bureau did not join in the SWC's delivery call. It moved to intervene and the Director allowed intervention under the theory that:

> The USBR is the legal owner of some of the water rights directly at issue in this proceeding as stated in Finding of Fact 54 of the Order of February 14, 2005. Therefore, the USBR has a direct and substantial interest in the subject of the proceeding that is not adequately represented by the present parties. Because the interests of the USBR will not unduly broaden the issues, the USBR is granted intervention.

Order on Petitions to Intervene and Denying Motion for Summary Judgment; Renewed Request for Information; and Request for Briefs at pages 2 and 5, April 6, 2005.

At the time the Director allowed the Bureau's intervention, the *Pioneer* case had not been decided by the Idaho Supreme Court. *United States of America v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) ("*Pioneer*"). In that decision, the Court considered a challenge to the substance of a Remark to be added to SRBA partial decrees regarding ownership interests in Bureau contract rights. *Id.* The Court analyzed the title question by reference to federal Reclamation decisions, including *California v. United States*, 438 U.S. 645 (1978). *See generally id.*, discussion at 603-604. *Id.* The Court emphasized that, in Idaho it is a 'well-settled rule of public policy that the right to the use of the public water of the state can only be claimed

where it is applied to a beneficial us in the manner required by law.'" *Id.* at 604. The Court went on to decide:

> There is no dispute that the BOR does not beneficially use the water [in its reservoirs] for irrigation. It manages and operates the storage facilities...Without the diversion by the irrigation districts and beneficial use of water for irrigation purposes by irrigators, valid water rights for the reservoirs would not exist under Idaho law.

Id. After reviewing holdings in other federal cases, including *Ickes v. Fox* and *Nevada v. United States,* the Court concluded that the language for the disputed Remark should be:

> The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address section of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the [Bureau] contracts...The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations.

Id. at 609.

By operation of the *Pioneer* decision, the Bureau's interests at stake in this case have shrunk considerably. It is no longer considered to have "legal title" to the water in its reservoirs and, as it has not joined SWC's delivery call itself, has little at stake in the proceedings and what interests it has are contiguous with those being litigated by the SWC.

Nonetheless, the Bureau has submitted two reports in this matter. Neither report addresses impacts from ground water pumping to beneficial uses. The report by Patrick McGrane purports to address the benefits of curtailment of junior ground water pumping on the Bureau's ability to fill its reservoirs—but the analysis involves wintertime storage of water. *See*, Report of Patrick McGrane, September 26, 2007. No beneficial use of water is made in the winter, and the Bureau makes no beneficial use in any event. The second report, by David Raff, suggests that a hypothetical series of equations can be used to demonstrate that any reduction in

storage from any Bureau facility will increase the "risk" associated with a contract-holder's water supply. While this proposition would seem self-evident, the Bureau has not and cannot establish that it is legally meaningful. Dr. Raff even testified at his deposition that the SWC's own use of its water for beneficial purposes, such as irrigation, would increase SWC's risk. Deposition Excerpt, October 30, 2007 Deposition of David Raff, pages 55-57. (Attached as Exhibit 1).

Neither report is relevant to the disputed issues in this case, and in fact, in deposition, Mr. McGrane admitted that the Bureau's interests in this case were four-fold: to allow the Bureau to meet its obligations generally; to allow the Bureau to meet its water delivery contracts; to allow the Bureau to meet its ESA requirements; and to allow the Bureau to meet its flood control requirements reliably. *See*, Exhibit 2, deposition of Patrick McGrane, page 35, lines 1-5. The only one of these issues that is arguably within the ambit of the issues in this case is the second one: to allow the Bureau to meet its water delivery contracts, although meeting its contracts does not, in and of itself, answer the question of whether the water being delivered under those contracts was necessary for beneficial use.

As for the other points enumerated by Mr. McGrane, in the context of the CMR and the SWC's delivery call, the IDWR is not authorized to take action to protect the Bureau's obligations to meet its ESA requirements—i.e., to provide flow augmentation water under the terms of the Nez Perce agreement[11]. Further, the CMR provide no basis for assisting the Bureau in meeting its flood control requirements.[12]

---

[11] Mr McGrane testified in his deposition that he drafted those portions of the August 2007 Biological Assessment for Bureau of Reclamation Operations and Maintenance in the Snake River Basin Above Brownlee Reservoir that discussed hydrologic variations and the impact of ground water pumping on the Bureau's ability to meet its ESA requirements. The Bureau's other witness, Rich Rigby, was also involved in drafting these portions of the BO. *See*, Deposition pages 23-33.

[12] The other item mentioned, for the Bureau to meet its obligations generally, is arguably too vague for purposes of granting relief.

The Bureau's participation in this case should be severely restricted to providing evidence that is relevant to the issues in dispute. Because the Bureau has been determined to have no ownership interest in water in storage in its reservoirs, and because the Bureau does not dispute that it does not put such water to beneficial use, and finally, because the Bureau has not made a delivery call, it has little if any interests at stake.

CONCLUSION

Ultimately, this is a case of first impression about distributing water, a resource that belongs to the people of the State of Idaho and which the IDWR is charged with regulating. As the *AFRD #2* decision established, the constitutional and statutory framework governing IDWR's administration of ground water exerts a significant regulatory effect on water uses in the state. In other words, it is not enough to say "I'm senior, so shut down the wells".

In addition to the legal context in which this case arises, the factual context is equally important. Even the SWC's engineering analysis in this case shows that over nearly 50% of the historical record (8 of the last 17 years SWC found no shortages), the SWC was not short of water. During periods of material injury, SWC is entitled to delivery of water to avoid injury. That, however, does not mean that the only option is curtailment. And even before reaching the point of deciding *how* to deliver adequate water to the SWC under their water rights to avoid injury to their beneficial uses, the SWC must make the threshold showing that the shortages allegedly suffered rose to the level of injury under the CMR.

No party is satisfied with the approach adopted by the Director in this matter. Pocatello's brief has identified the problems associated with the Director's methods and conclusions both for purposes of the initial injury determination he made for 2005, as well as for purposes of relying on the May 2 Order approach for future administration. The better approach is three-fold:

1. Adopt the water budget analysis approach for determining material injury as described in Pocatello's submission;

2. Implement the prospective administration provisions as described in Pocatello's Testimony and Reports;

3. And make provision for replacement or mitigation water to be provided during times of injury to the SWC, rather than requiring curtailment.

Respectfully submitted this 21st day of December, 2007.

CITY OF POCATELLO ATTORNEY'S OFFICE

Attorneys for the City of Pocatello

By _____
A. DEAN TRANMER

WHITE & JANKOWSKI

By _____
SARAH A KLAHN
Attorneys for City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2007, I caused to be served a true and correct copy of the foregoing **Pocatello's Trial Brief** by electronic mail and/or facsimile to:

Sarah A. Klahn, White & Jankowski, LLP

Gerald F. Schroeder Hearing Officer State of Idaho Dept of Water Resources 322 E Front St Boise ID 83720-0098 *** service by electronic mail and facsimile only facsimile – 208-287-6700 fcjschroeder@gmail.com Victoria.Wigle@idwr.idaho.gov Dave.tuthill@idwr.idaho.gov	Daniel V. Steenson Ringert Clark PO Box 2773 Boise ID 83701 *** service by electronic mail only facsimile – 208-342-4591 dvs@ringertclark.com	Josephine P. Beeman, Esq. Beeman & Associates 409 W Jefferson Boise I D 83702 *** service by electronic mail only facsimile – 208-331-0954 jo.beeman@beemanlaw.com
C. Tom Arkoosh Arkoosh Law Office 301 Main St Gooding ID 83330 *** service by electronic mail only facsimile – 208-934-8873 tarkoosh@cableone.net	John Rosholt John Simpson Travis Thompson Barker Rosholt 113 Main Ave West Ste 303 Twin Falls ID 83301-6167 *** service by electronic mail only facsimile – 208-735-2444 jar@idahowaters.com tlt@idahowaters.com jks@idahowaters.com	Michael Gilmore Deputy Attorney General Statehouse, Room 210 PO Box 83720 Boise ID 83720-0010 *** service by electronic mail facsimile – 208-334-2830 mike.gilmore@ag.idaho.gov
W. Kent Fletcher Fletcher Law Office PO Box 248 Burley, ID 83318-0248 *** service by electronic mail only facsimile – 208-878-2548 wkf@pmt.org	Randy Budge Candice McHugh Scott J. Smith Racine Olson PO Box 1391 Pocatello ID 83204-1391 *** service by electronic mail only rcb@racinelaw.net cmm@racinelaw.net sjs@racinelaw.net	Terry Uhling J.R. Simplot Co 999 Main St Boise ID 83702 *** service by electronic mail only tuhling@simplot.com

Roger D. Ling Ling Robinson PO Box 396 Rupert ID 83350-0396 *** service by electronic mail only facsimile – 208-436-6804 rdl@idlawfirm.com	Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise Field Office 960 Broadway Ste 400 Boise ID 83706 *** service by electronic mail only facsimile – 208-334-1918 kmarioncarr@yahoo.com	James Tucker Idaho Power Co 1221 W Idaho St Boise ID 83702 *** service by electronic mail only jamestucker@idahopower.com
A.Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 *** service by electronic mail only facsimile – 208-234-6297 dtranmer@pocatello.us	Matt Howard U.S. Bureau of Reclamation 1150 N Curtis Road Boise ID 83706-1234 *** service by electronic mail only facsimile – 208-378-5003 mhoward@pn.usbr.gov	James Lochhead Adam DeVoe Brownstein Hyatt 410 – 17th St 22nd Floor Denver CO 80202 *** service by electronic mail only jlochhead@bhf-law.com adevoe@bhf-law.com
Allen Merritt Cindy Yenter IDWR 1341 Fillmore St Ste 200 Twin Falls ID 83301-3033 *** service by electronic mail and facsimile only facsimile – 208-736-3037 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov	Lyle Swank IDWR 900 N Skyline Dr Idaho Falls ID 83402-6105 *** service by electronic mail and facsimile only facsimile – 208-525-7177 lyle.swank@idwr.idaho.gov	Michael C Creamer Jeffrey C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 *** service by electronic mail only mcc@givenspursley.com jcf@givenspursley.com

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY.

DEPOSITION OF DAVID A. RAFF, Ph.D.
OCTOBER 30, 2007

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

Notary Public

THE DEPOSITION OF DAVID A. RAFF, Ph.D. was taken on behalf of the the City of Pocatello and Idaho Groundwater Appropriators, Inc., at the offices of Bureau of Reclamation, 1150 North Curtis, Boise, Idaho, commencing at 9:10 A.M., on Tuesday, October 30, 2007, before Michael S. Lucero, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, A&B Irrigation Company, and Burley Irrigation Company:
Barker, Rosholt & Simpson LLP
BY MR. PAUL L. ARRINGTON
113 Main Avenue West, Suite 303
Twin Falls, Idaho 83301-6167

For United States Bureau of Reclamation:
United States Department of the Interior,
Office of the Field Solicitor
BY MS. KATHLEEN MARION CARR
960 Broadway, Suite 400
Boise, Idaho 83706

APPEARANCES (Continued):

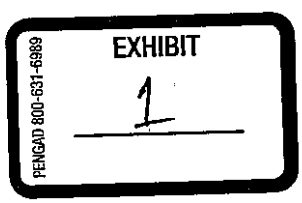
For City of Pocatello:
White & Jankowski, L.L.P.
BY MS. SARAH A. KLAHN
511 Sixteenth Street, Suite 500
Denver, Colorado 80202

Also Present: Karen Wogsland, Patrick McGrane(briefly)

INDEX

EXHIBITS

(No exhibits were marked.)



vacuum without any help from the people who claim to be experts in this case?
A. Is your question whether or not the hearing officer should make a decision in a vacuum without --
Q. I mean, what if he turns to you and says, Dr. Raff, I don't know whether shifting the risk is a good thing or not. What do you think? Are you going to tell him, no, I don't know?
A. I would tell him what I just told you, that I don't really have an opinion or not -- strike that.
I don't have an opinion about whether the shift of risk is good or bad, just that there is a shift of risk.
Q. And it's sort of up to him to decide, weigh all the balls in the air and not have any help from you or, presumably, anyone else about this shifting of the risk; is that right?
A. I haven't -- I'm certainly happy to help the hearing officer to the extent that the Bureau of Reclamation finds that to be my job to the extent that I can. I can't offer an opinion to the extent that I don't have one.

Q. So can you describe to me why your report is even relevant to this case, then, if you don't have an opinion about whether what the director did was right or wrong and whether your assessment, which is that it shifts the risk is good or bad, how is it relevant?
A. The -- my task, my job at the request of counsel, who determined -- I guess they determine the relevance. They've asked me to do something. I've done it. There is a shift of risk. To the extent that that is known or understood, I have tried to convey. The relevance is a legal matter from my perspective.
Q. So although you don't have an opinion about whether what the director did was good or bad, you do have the opinion that by selecting reasonable carryover numbers, the director imposed an additional limitation on carryover storage; is that correct?
A. It is my expert opinion that the director's reasonable carryover determinations impose an additional limitation on carryover storage beyond system capacity.
Q. But you can't say what type of reasonable carryover determination would avoid

that additional limitation that you've identified there in that sentence; is that right?
A. There's a shift of risk with any change to the setting in which carryover storage is.
Q. "To the setting in which carryover storage is"? What do you mean?
A. Any change to the amount of water for carryover storage from one scenario to the next is a change in risk.
Q. But if the contractor holder uses some of that water, that changes the carryover storage. Is the water user then shifting the risk on himself? Or shifting the risk on someone else, I guess?
A. Your question, if I can repeat it back to you --
Q. Yes.
A. -- is if somebody removes water from a reservoir, if that is a shift of risk?
Q. Mm-hmm.
A. Are you asking if that's a removal of water that would otherwise be available for carryover?
Q. Any time water is removed it's not available for carryover; would you agree?

A. Then from the time before it was removed to the time after it was removed risk has changed; yes.
Q. Okay. And is that an acceptable limitation on carryover when a water user takes water out of the reservoir to reduce his own carryover storage?
A. I have no opinion as to acceptable or unacceptable.
Q. So if we inserted as the facts set in your report that instead of the director's reasonable carryover determinations as the foundation, we were using the Surface Water Coalition's removal of water under their contracts as the facts set, your opinions stay the same, don't they? It still shifts the risk, it still creates a limitation because water is being removed from the reservoir and used; right?
A. If water is removed from a reservoir for any reason that could otherwise be there, there is a shift of risk.
Q. And it reduces carryover storage, doesn't it?
A. Yes. Well, the removal of the water reduces carryover that would otherwise be

available; yes.
Q. Would your answer be the same if we were talking about removal of water from the reservoir for rental of water?
A. Which answer?
Q. My question was if the Surface Water Coalition removes water from the reservoir and puts it on their crops, that reduces reservoir storage. Do you agree?
A. If that water would otherwise be carried over, then it reduces storage.
Q. Okay. What do you mean by "otherwise be carried over"?
A. There's water that is taken to or from a river that would not necessarily be available for carryover.
Q. Why not?
A. It's downstream of a reservoir. It's coming during the irrigation season and isn't meant to be stored. It's meant to be used right then. Those are two examples.
Q. That's called natural flow water?
A. It could be natural flow water.
Q. In the Upper Snake system there are two types of water I'm familiar with. One's called

natural flow water rights and the other is called storage water rights. Are you familiar with other kinds of water rights? For surface water, I mean.
A. No. Those are the water rights that I'm familiar with.
Q. Okay. So if a Surface Water Coalition entity takes water from American Falls Reservoir under a contract and puts it on their crops, that water is no longer in the reservoir; right? Would you agree with that?
A. It's no longer in American Falls; yes.
Q. Okay. And it's no longer available for carryover storage; right?
A. Not in American Falls.
Q. Is it available for carryover storage somewhere else?
A. If it's consumptively used or not.
Q. Well, hopefully, if it's being put on crops, what would you think would happen?
A. If it's consumptively used, then it's not available for carryover.
Q. And if it is waste or runoff, is there a reservoir below American Falls that that water can be captured and stored in?

A. I can't speak to waste or -- what was the other word, runoff?
Q. Well, you brought up consumptively used.
A. I just wanted to be clear.
Q. Okay. So if it's not consumptively used, where does the water go? Does it go into another reservoir below American Falls, do you know?
A. I can't speak to an individual water particle. It could be reused. I can't -- I can't speak to what happens to individual water particles.
Q. But at least we agree that if the Surface Water Coalition takes water out of the reservoir and puts it on their crops, they've reduced their carryover storage; correct?
A. Yes.
Q. Okay. And that creates a limitation in the same sense that you used that word in the second paragraph on carryover storage, because there's less carryover storage now; right?
A. It reduces carryover. I guess I don't put it in the same context as a limitation on carryover because -- well, it is a reduced

carryover.
Q. So why isn't that a limitation on carryover storage, too?
A. If there is no further water available to replace that water that is removed, then that is a reduction in the amount of carryover that is available that year, and so -- and to the extent that that is a limit, then that is an additional limit.
Q. Okay. Now, you also mention as a limitation on carryover storage, system capacity. Did you mean by that the size of the reservoirs?
A. Yes.
Q. Did you also mean by that the availability of water to store in the first place or were you thinking of only the size of the vessel?
A. The uses of the words in terms of -- in that first opinion on the first page, "beyond system capacity," refers to simply the size of the reservoirs.
Q. Okay. Do you know or did you inquire during the time that you were doing this report about whether Reclamation has obligations to meet that exceed its reservoir storage capacity

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO VARIOUS WATER RIGHTS)
HELD BY OR FOR THE BENEFIT OF A&B)
IRRIGATION DISTRICT, AMERICAN)
FALLS RESERVOIR #2, BURLEY)
IRRIGATION DISTRICT, MILNER)
IRRIGATION DISTRICT, MINIDOKA)
IRRIGATION DISTRICT, NORTH SIDE)
CANAL COMPANY, AND TWIN FALLS)
CANAL COMPANY.)
)

DEPOSITION OF PATRICK C. MCGRANE, P.E.
OCTOBER 29, 2007

REPORTED BY:

MICHAEL S. LUCERO, CSR No. 255, RPR

Notary Public

THE DEPOSITION OF PATRICK C. MCGRANE, P.E. was taken on behalf of the City of Pocatello and Idaho Groundwater Appropriators, Inc., at the offices of Bureau of Reclamation, 1150 North Curtis, Boise, Idaho, commencing at 1:00 P.M., on Monday, October 29, 2007, before Michael S. Lucero, Certified Shorthand Reporter and Notary Public within and for the State of Idaho, in the above-entitled matter.

APPEARANCES:

For Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company, A&B Irrigation Company, and Burley Irrigation Company:
Barker, Rosholt & Simpson LLP
BY MR. PAUL L. ARRINGTON
113 Main Avenue West, Suite 303
Twin Falls, Idaho 83301-6167

For United States Bureau of Reclamation:
United States Department of the Interior,
Office of the Field Solicitor
BY MS. KATHLEEN MARION CARR
960 Broadway, Suite 400
Boise, Idaho 83706

APPEARANCES (Continued):

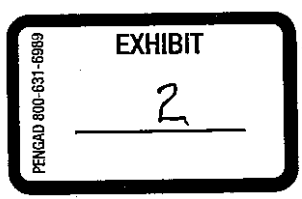
For City of Pocatello:
White & Jankowski, L.L.P.
BY MS. SARAH A. KLAHN
511 Sixteenth Street, Suite 500
Denver, Colorado 80202

For Idaho Groundwater Appropriators, Inc.:
Racine, Olson, Nye, Budge & Bailey, Chtd.
BY MS. CANDICE M. McHUGH
101 South Capitol Boulevard, Suite 208
Boise, Idaho 83702

Also Present: Karen Wogsland

INDEX

EXHIBITS



A. Reclamation owns the storage rights with -- associated with its projects. I can't say whether those are at stake in this matter.
Q. What do you understand the substance of the dispute in this case to be?
A. From a Reclamation standpoint?
Q. Let's start with that.
A. My understanding of reclamation's case is that ground water users are depleting natural flows which requires surface water users to call on more storage, which lessens storage at the Reclamation reservoirs.
My understanding is storage -- and I've been told by my attorneys that storage is a beneficial use. And I know that lower amounts of storage reduce -- have impacts at the reservoir.
Q. Okay. Are you familiar with the -- strike that. We'll come back to that.
So the Bureau's interest in this matter, at least as far as you understand them, are to maintain storage levels in Bureau reservoirs; is that accurate? Is that an accurate statement about your understanding?
A. That is the only -- I can't think of any other -- I'm not aware of other arguments at

this time.
Q. And I think you said it was your understanding, based on discussions with counsel, that storage is a beneficial use under Idaho law?
A. Yes.
Q. So is it your understanding that the Bureau wants to maintain levels in the Bureau reservoirs at a certain height?
A. No.
Q. Do you want the reservoirs full all the time?
A. No.
Q. I mean, if storage is a beneficial use, there must be some amounts of storage that the Bureau has in mind that is the focus of the litigation.
A. Actually, no.
Q. So if the hearing officer determined that storage was a beneficial use, but you were only entitled to half of the storage in the reservoir at any given time, that would be a win for the Bureau?
A. No.
Q. What would be a win for the Bureau here?

A. A win for the Bureau would be storage levels that allow us to meet our obligations, meet our water delivery contracts, meet our ESA requirements, meet our flood control requirements reliably.
Q. Okay. So one of the things you said was to meet your obligations as far as water delivery contracts. And you have a number of contract holders in the reservoirs in the Upper Snake, don't you?
A. Yes.
Q. Is it the Bureau's position that the -- well, let me ask you a follow-up question on that last one. You described a win as being the ability to meet your various obligations, that you enumerated, reliably. What do you mean by "reliably"?
A. In a manner that our contractors are used to in terms of flow augmentation so that we could meet our -- what we have determined to be our reliability to meet 427 KAF obligations.
Q. 427 what? I'm sorry. K-A-F?
A. Yes.
Q. Okay.
A. Reliably be able to meet our flood

control requirements all the time. That's really not an issue because that requires drafting of the project, not filling.
Q. Right. Okay. When you talk about meeting your obligations, did you distinguish at all between types of water years? In other words, do you want to meet your obligations every year no matter what the conditions are? Or do you have a slightly different standard for reliability if it's a dry year?
A. Ideally, we'd like to meet our contracts in every year, but we have to acknowledge that in a dry year, an extremely dry year, that could not be done.
Q. What's the consequence if Reclamation doesn't meet it's 427,000 acre-foot obligations under the -- I'm sorry. It's 427,000 acre-foot flow augmentation amount under the Nez Perce agreement?
MS. CARR: And I'm going to object on the basis that it calls -- if it calls for a legal conclusion.
Q. (BY MS. KLAHN) I'm not asking you for a legal conclusion.
Is there a concrete consequence, that