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DEPARTMENT OF
WATER RESOURCES

**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	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	
Case No. 39576	)	CITY OF POCATELLO'S BRIEF IN SUPPORT OF
_____	)	MOTION FOR SUMMARY JUDGMENT ON
	)	IDWR'S AUTHORITY UNDER
		I.C. § 42-1425

INTRODUCTION

The City of Pocatello is a municipal water supplier serving a population of 52,000 in a service area of 28 square miles (17,800 acres). Like most municipalities, the City has an obligation to its customers to provide potable water on demand 24 hours a day, 365 days a year. Throughout its history, the City has attempted to maximize the use of its existing ground water rights and increase the flexibility of its operations by transferring ground water rights from one

location to another within the City's service area. Some transfers were approved through formal procedures under 42-222; some were "accomplished transfers" under 42-1425.

The transfers allow each of the interconnected wells for the City's potable system to be an alternate point of diversion for the water rights delivered through the interconnected system. This allows the City to maintain physical delivery of water even when some of its wells are not operating. From an administrative perspective, it allows the City to withdraw and deliver water by priority, beginning with its most senior rights, notwithstanding the well from which the water is pumped.

When the City filed its claims in the SRBA, it made claims under the accomplished transfer statute (or "amnesty" statute), I.C. § 42-1425, which provides a means for water users to have "amnesty" from the statutory requirements of the formal transfer process under I.C. § 42-222 if the transfers were accomplished prior to 1987. In 1999, after the SRBA began, the City also requested a formal transfer under I.C. § 42-222 to add new well #44 to Pocatello's interconnected well system¹. IDWR granted the City's request under Transfer No. 5452 (attached to Affidavit of Josephine P. Beeman as Exhibit 1) which resulted in changes to the point of diversion for three of the City's water rights to allow diversions from the original well locations and well 44.

The City filed claims in the SRBA on March 28, 1990 and April 25, 2003. For the following SRBA claims, the City claimed accomplished transfers under 42-1425: 29-2274, 29-2338, 29-2354, 29-2382, 29-2401, 29-2499, 29-4221, 29-4222, 29-4223, 29-4224, 29-4225, 29-4226, 29-7106, 29-7118, 29-7222, 29-7322, 29-7375, 29-7431, 29-7450, 29-7502, 29-7770, 29-7782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562,

¹ That is what happened physically. However, as a result of further investigation in the SRBA process, Pocatello and IDWR found that Transfer 5452 added well #44 to only three of the 21 water rights served by the interconnected system in 1999. That is why transfer 5452 adds a point of diversion (well 44) to water rights 29-2274, 29-2338, and 29-7375.

29-13636, 29-13637, 29-13638, and 29-13639. The IDWR Director's Report for Basin 29, including Pocatello's SRBA claims, was filed with the SRBA court on July 10, 2003. In recommending accomplished transfers for the City's culinary system, IDWR included the following condition under "OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT":

"To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No ____, located in [legal description] on [date] in the amount of ____ cfs."

This information was listed for each of the alternate points of diversion on the SRBA recommendations for the water rights for the City's culinary system.

As mentioned above, the City's formal transfer under 42-222 – Transfer 5452, filed and approved in 1999 -- added well 44 to three water rights involved with the City's interconnected system. The Transfer Order 5452 is attached hereto and does not contain the condition IDWR subsequently recommended in the SRBA.

In IDWR's 706 Report, IDWR recommends a provision that varies slightly from its original recommendation:

"To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from : " (706 Report , p. 16).

By its terms, the condition is unrelated to the issues of enlargement of use or injury to existing water rights when the transfers occurred and effectively denies the transfers claimed by the City under 42-1425 and reverses IDWR's decision granting Transfer No. 5452. Pocatello respectfully asserts that IDWR's recommended condition is in excess of IDWR's authority and is without legal basis under either 42-1425 or 42-222.

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate only where two conditions are met: (1) “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact;” and (2) “the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). When those two conditions are satisfied, a motion for summary judgment is proper. *See Sorenson v. Saint Alphonsus Reg’l Med. Ctr.*, 141 Idaho 754, 758, 118 P.3d 86, 90 (2005) (“Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”); *State ex rel. Kempthorne v. Blaine County*, 139 Idaho 348, 349, 79 P.3d 707, 708 (2003) (“A summary judgment is properly granted when the moving party shows there is no genuine issue of material fact and is entitled to judgment as a matter of law.”).

II. IDAHO’S TRANSFER AMNESTY STATUTE

A. Section 42-1425 provides a process for claiming and determining accomplished transfers and IDWR’s remark does not comply.

Section 42-1425 establishes a means for transfers that were made informally prior to the initiation of the SRBA to be claimed by water users in the adjudication. For claimants, the threshold is whether or not a transfer of point of diversion, place of use, or type of use that was made without complying with the formal transfer procedures under I.C. 42-222 was made prior to November 19, 1987:

Any change of...point of diversion...by any person entitled to use water...prior to November 19, 1987, may be claimed in a general adjudication even though the person has not complied with 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 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures.***

If it can be demonstrated that the transfer was made prior to November 19, 1987, the Legislature provided a procedure and a limited scope of inquiry into the effects of such informal transfer *at the time of the transfer*. Pocatello's 42-1425 claims are pre-November 19, 1987 and all involve changes of diversion points for ground water rights. Some of the changes in points of diversion were made in the 1940's. The City has provided an evidentiary basis for the claimed changes in point of diversion, and IDWR has, with four exceptions², accepted the City's facts. Thus, except for these four subcases, IDWR has accepted the threshold factual allegations of the City. For purposes of 42-1425, the City's claims are subject to the procedures in that statute.

The Legislature then subjected such pre-November 19, 1987 transfers to a very limited inquiry:

Any change of...point of diversion...by any person entitled to use water...prior to November 19, 1987, may be claimed in a general adjudication even though the person has not complied with 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 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:***

Thus, the scope of the inquiry is spelled out: was there injury to other vested water rights as of the date of the change? Or did the change result in enlargement?

The procedures by which these limited inquiries may be made are spelled out next in the statute:

Except for the consent requirements of 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho code are hereby waived in accordance with the following procedures:

If an objection is filed to a claim for accomplished change of...point of diversion the district court shall remand the water right to the director for further hearing to determine

² Subcase Nos. 29-271, -272, -273, and -2274. Because these involve disputed issues of fact, these claims are not proper for summary judgment herein; however, a ruling in Pocatello's favor would apply to those rights if the factual disputes are resolved in the City's favor.

whether the change injured a water right existing on the date of the change or constituted an enlargement.

IDWR initially recommended the following condition to the City's transfers claimed under section 42-1425 for its culinary system:

"To the extent necessary for administration, water was first appropriated or used from: Pocatello Well No ____, located in [legal description] on [date] in the amount of ____ cfs."

The City filed objections to those recommendations on November 19, 2003. The statute is ambiguous about whether *any* objection filed to a claim for a transfer under section 1425 is effective to initiate the procedures under 1425(2)(a). The context of the statute and the limited inquiry allowed by the Legislature suggests that the only objections that can result in initiation of 1425(2)(a) procedures are those objecting to the claim on the basis of injury or enlargement of use.³

Pocatello suggests that, if *any* objection triggers the hearing requirement, the hearing should be in front of the SRBA Court. But such a hearing, wherever it is held, must be limited to the narrow issues identified by the Legislature—injury at the time of transfer or enlargement of use. Alternatively, Pocatello suggests that the statute does *not* trigger a hearing unless the objection relates directly to the issues raised by section 1425. Here, Pocatello objected to IDWR's recommendation regarding these 1425 transferred rights, and this objection does not raise either the enlargement or injury issues of 42-1425. Thus, no hearing is required under the statute, and IDWR is without authority to condition the accomplished transfers.

³ In **Memorandum Decision and Order, allowing presentation of additional evidence regarding enlargement, etc (SRBA subcase 65-5033C, March 24, 2005)**, SRBA Special Master Booth states that IDWR may investigate any 42-1425(a) issues as part of its initial Director's Report. However, a conservative reading of the statute suggests that at the time an Objection is filed, the Department should seek a remand to hold a hearing on the narrow issues allowed under section 1425. In Pocatello's sub-cases, this begs the question of how a hearing can be held in front of the Department when there is no objection on the basis of injury or enlargement—does the Department appear as a party at its own hearing? Is a respondent, such as the State of Idaho appearing in support of the Department authorized to participate on the side alleging injury? How can the State of Idaho (or anyone else not holding a water right vested at the time of the transfer) litigate such a question?

B. If an evidentiary hearing is held, whatever the evidence shows in an evidentiary hearing, IDWR's currently recommended condition is in excess of its authority under 42-1425.

IDWR's condition found in its 706 Report that it recommends be applied to rights claimed under 42-1425 and 42-222, is in excess of its authority under 42-1425:

To the extent necessary for administration between points of diversion for ground water and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from:

This condition does not deal with avoiding injury to rights at the time of the transfer.⁴ Instead, it is a prospective condition: "Without the condition, the Department would not have recommended the multiple, alternate points of diversion because injury to other water rights was likely." Furthermore, the condition effectively nullifies the accomplished transfer: the City may operate its wells at the transferred location under the earlier priority date, but if a delivery call is placed or administration is otherwise required, IDWR will use the date when water was first appropriated or used from each well (a junior date) to determine whether depletions from the wells are causing injury to senior rights.

As a practical matter, the accomplished transfer is critically valuable to the City because it allows any interconnected well to pump any of the associated water rights. Physically, in a crisis, the City could provide the entire culinary supply from its surviving wells. Legally, the City can pump its most senior rights first, and in a prior appropriation system, that priority date matters the most when water rights are being administered⁵. If IDWR won't administer these

⁴ Pocatello understands that IDWR has never alleged enlargement of use as to the City's accomplished transfers, and so excludes that issue from the brief.

⁵ For example, if water right A has a priority date of 1932 and was originally only pumped by well A, and water right B has a 1970 priority date and was originally only pumped by well B, but as of 1980, well A and B are interconnected, the City is entitled to have those rights administered as first a 1932 priority date, then a 1980 priority date, regardless of which well is being pumped.

accomplished transfers by reference to the earliest priority dates, the transfer has been effectively denied.

III. SECTION 42-1425 DOES NOT AUTHORIZE IDWR TO RE-OPEN AND CONDITION ALREADY DECIDED FORMAL TRANSFERS UNDER 42-222.

Idaho law has recognized and accommodated changes in points of diversion, place of use, and manner of use since early in its statehood. *Bennett v. Nourse*, 125 P. 1038 (1912) (recognizing the right to change a point of diversion); *First Security Bank of Blackfoot v. State*, 291 P. 1064 (1930) (recognizing the right to change the place of use); *Washington State Sugar Co. v. Goodrich*, 147 P. 1073 (1915) (recognizing the right to change the manner of use).

Section 42-222(1), provides that any change in point of diversion must be approved by IDWR.

The Director's obligation upon receiving such a request for transfer is:

1. To publish the transfer application and provide that protests must be filed within 10 days of the last date of publication (42-222(1))⁶;
2. To advise the watermaster of the district in which such water right is used of the proposed change and the watermaster shall notify the Director of his recommendation with regard to the application (42-222(1));
3. To "examine all the evidence [including that provided by the watermaster] and available information and shall approve the change in whole or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the State of Idaho and is in the local public interest..." 42-222(1).

⁶ I.C. 42-222 provides that the Director: "...examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right."

In 1999, Pocatello transferred the water rights associated with 29-2274, 29-2338 and 29-7375 to allow well 44 to be added to the City's interconnected culinary system. There are no conditions on the Transfer analogous to the conditions in the Director's report. IDWR has not alleged any basis to re-open these transfers except that the City will operate these as alternate points of diversion with its claimed transfers under 42-1425.

IDWR seeks to impose the same condition on these transferred rights that it has imposed on transfers claimed by the City under 42-1425. IDWR's imposition of the "other provisions necessary" remark on ground water rights transferred pursuant to I.C. 42-222 effectively reverses IDWR's Transfer Order #5452, June 28, 1999 ("Transfer Order"). Whatever the scope of IDWR's authority under 42-1425 to condition accomplished transfers, it does not allow a re-opening of transferred rights that were decided under 42-222.⁷

CONCLUSION

The Court should find that a conservative reading of the statute means that Pocatello's objection triggers a hearing under 42-1425. Because there are no proper party objectors to carry the burden of showing injury, Pocatello suggests that such a hearing be held in front of the Special Master. In any event, no conditions should be added to Pocatello's water rights claimed as transferred under 42-1425 unless and until evidence is taken; further, such conditions must relate only to the narrow scope of issues outlined by the Legislature in 42-1425(2). Further, Pocatello requests that the Court find that 42-1425 provides no basis for IDWR to reopen to condition transfers previously granted by IDWR under I.C. 42-222.

⁷ Order on Challenge (consolidated issues) of "facility volume" issue and "additional evidence" issue, SRBA subcase nos. 36-02708 et al. (December 29, 1999).

DATED this 4th day of May 2006.

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EXHIBIT A

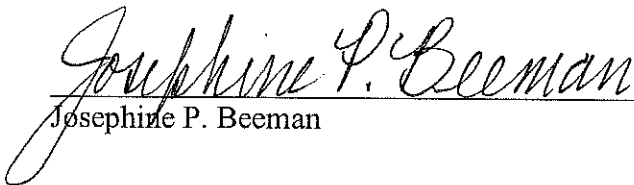
Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
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29-04222
29-04223
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of May 2006, I caused a true copy of the foregoing **CITY OF POCATELLO'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON IDWR'S AUTHORITY UNDER I.C. § 42-1425** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

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