

COPY
RECEIVED
MAY 30 2006
DEPARTMENT OF
WATER RESOURCES

Roger D. Ling, ISB #1018
LING ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

C. Tom Arkoosh, ISB #2253
ARKOOSH LAW OFFICES, CHTD.
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for A & B Irrigation District and
Burley Irrigation District

Attorneys for American Falls
Reservoir District #2

John A. Rosholt, ISB #1037
John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
BARKER ROSHOLT & SIMPSON LLP
113 Main Ave. West, Suite 303
Twin Falls, Idaho 83301-6167
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

**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)
)
)
)
)

Subcases Nos. 29-00271, et al.

**JOINT RESPONSE TO CITY OF
POCATELLO'S MOTION FOR
SUMMARY JUDGMENT**

This Joint Response to City of Pocatello's Motion for Summary Judgment is filed by A &
B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner

JOINT RESPONSE TO CITY OF POCATELLO'S MOTION
FOR SUMMARY JUDGMENT

Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively referred to as the “Coalition”).¹

ISSUES POSED BY POCATELLO’S MOTION

The Motion filed by the City of Pocatello (Pocatello) requests:

1. A summary judgment stating that the Idaho Department of Water Resources (IDWR) has no authority to recommend conditions for water rights claimed pursuant to the accomplished transfer provisions of Idaho Code § 42-1425 unless an objection to the claim is remanded by the district court to IDWR to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.
2. A summary judgment on its transfers approved in 1999 pursuant to Idaho Code § 42-222 on the grounds that IDWR does not have authority to reopen those transfers that were determined pursuant to those procedures set forth in Idaho Code § 42-222.
3. That its 42-1425 accomplished transfers be remanded to IDWR for hearing.

Although it is not requested or argued in the Motion, in Pocatello’s Brief in Support of the Motion, Pocatello argues that no hearing is required concerning the 42-1425 accomplished transfers because the objections filed to those water rights do not raise the issues of enlargement or injury.

¹ The respondents are filing a “joint” response for the convenience of the court and the other parties and reserve the right to participate as individual parties in these subcases, including any hearing on Pocatello’s motion.

STANDARD OF REVIEW

The Coalition agrees with the Standard of Review set forth in Pocatello's Brief.

ARGUMENT

IDWR has no right to reopen transfers approved pursuant to Idaho Code § 42-222, except to the extent Pocatello's claims change the approved transfers.

Idaho Code § 42-222 sets forth a procedure to apply for a change of a water right. When one applies for a change of a water right pursuant to the provisions of Idaho Code § 42-222, the application for change must be examined by the Director of IDWR, all consents required by Idaho Code § 42-108 must be obtained, and notice of the requested change must be provided to afford anyone who desires to protest the change to file a notice of protest within ten (10) days of the last notice publication of the change. If there is a protest, the Director of IDWR must investigate the same and conduct a hearing. The watermaster must make a recommendation concerning the change. In addition, depending upon the type of change that is requested, other information must be furnished by the applicant.

The Director is required to review all of the evidence, determine that no other water rights are injured, determine that the change does not constitute an enlargement in use, determine the change is consistent with the conservation of water resources and is in the local public interest, determine that the change will not adversely affect the local economy and determine that the new use is beneficial. Once these findings are made, the Director furnishes a copy of the approved application for change to the applicant, authorizing the applicant to make the change, and the

original water right is presumed to have been amended by reason of the authorized change.

If IDWR follows the procedure set forth in Idaho Code § 42-222, due process is provided to other potentially injured waterusers. Once the transfer is accomplished, the applicant should be entitled to rely upon the actions of the department in approving the transfer.

Although it was addressing the issue in the context of a partial decree, the Idaho Supreme Court provided some guidance concerning this issue in *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998):

Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.'

Id. at 16, 951 P.2d at 947 (citations omitted).

Collateral attack of the elements of a partial decree cannot be made in an administrative forum. See *Order on Motion to Enforce Order Granting State of Idaho's Motion for Interim Administration*, Subcase 92-00021 (November 17, 2005); *Connected Sources General Provision; Memorandum Decision and Order of Partial Decree*, Subcase 91-00005 (February 27, 2002). By the same token, IDWR should not be allowed to approve a transfer on one hand, and then effectively attack elements of that transfer through the recommendation process of the adjudication except for evidence of forfeiture or abandonment.

The water rights that were transferred pursuant to Idaho Code § 42-222 should not be reopened except to the extent that Pocatello seeks to change those water rights to operate as alternative points of diversion with its claimed transfers under Idaho Code § 41-1425.

A hearing should be held on any “accomplished transfer” pursuant to Idaho Code

§ 42-1425.

As an alternative to the procedure provided in Idaho Code § 42-222, Idaho Code § 42-1425 sets forth a procedure to recognize *de facto* transfers that did not comply with the due process requirements of Idaho Code § 42-222. Idaho Code § 42-1425 authorizes a person who, prior to November 19, 1987, changed the place of use, point of diversion, nature or purpose of use or period of use of a water right to make a claim in the adjudication even though the person did not comply with Idaho Code § 42-222, 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.

The procedure set forth in Idaho Code § 42-1425(2)(a) states:

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.

In this action, objections have been filed to Pocatello’s § 42-1425 claims that purport to comply with the provisions of Idaho Code § 42-1425(2)(a). Since those objections have been filed, the district court must remand the § 42-1425 claims to the Director for further hearing.

CONCLUSION

The Coalition agrees with Pocatello’s assertion that its water rights transferred pursuant to the procedure set forth in Idaho Code § 42-222 cannot be collaterally attacked by IDWR in the

SRBA Court; IDWR should not look behind its transfer orders when making recommendations to the SRBA Court, except to the extent that Pocatello is requesting a change to those water rights.

There has not been a similar review of Pocatello's claimed § 42-1425 transfers. Once an objection is filed to a claim pursuant to Idaho Code § 42-1425(2)(a), the district court must remand the water right to the Director for further hearing. Objections having been filed, those water rights must be remanded as required by law.

DATED: May 25, 2006.

LING ROBINSON & WALKER

ARKOOSH LAW OFFICES CHTD.



Roger D. Ling

Attorneys for A & B Irrigation District
and Burley Irrigation District



C. Tom Arkoosh

Attorneys for American Falls
Reservoir District #2

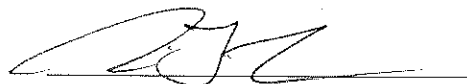
FLETCHER LAW OFFICES

BARKER ROSHOLT & SIMPSON LLP



W. Kent Fletcher

Attorneys for Minidoka Irrigation District



John A. Rosholt
John K. Simpson
Travis L. Thompson

Attorneys for Milner Irrigation District,
North Side Canal Company, and
Twin Falls Canal Company

JOINT RESPONSE TO CITY OF POCATELLO'S MOTION
FOR SUMMARY JUDGMENT

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2006, I served a true and correct copy of the foregoing **JOINT RESPONSE TO CITY OF POCATELLO'S MOTION FOR SUMMARY JUDGMENT** on the following by the method indicated:

1. Original to: Hand Delivery
2. Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707
2. One copy to each attorney for the claimant at the following addresses: U.S. Mail

Josephine P. Beeman Beeman & Associates, P.C. 409 W. Jefferson St. Boise, ID 83702	Sarah A. Klahn White & Jankowski, LLP 511 16 th Street, Suite 500 Denver, CO 80202
---	--
3. Copies to: U.S. Mail

IDWR Document Depository P.O. Box 83720 Boise, ID 83720-0098	United States Department of Justice Environment & Natural Resources Division 550 West Fort Street, MSC 033 Boise, ID 83724
Chief, Natural Resources Division Office of the Attorney General State of Idaho P.O. Box 44449 Boise, ID 83711-4449	

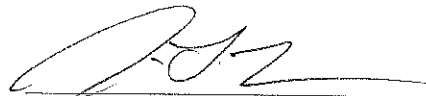

Travis L. Thompson

EXHIBIT A

Subcase Nos.:

- 29-00271
- 29-00272
- 29-00273
- 29-02274
- 29-02338
- 29-02354
- 29-02382
- 29-02401
- 29-02499
- 29-04221
- 29-04222
- 29-04223
- 29-04224
- 29-04225
- 29-04226
- 29-07106
- 29-07118
- 29-07119
- 29-07222
- 29-07322
- 29-07375
- 29-07431
- 29-07450
- 29-07502
- 29-07770
- 29-07782
- 29-11339
- 29-11344
- 29-11348
- 29-13558
- 29-13559
- 29-13560
- 29-13561
- 29-13562
- 29-13636
- 29-13637
- 29-13638
- 29-13639