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DEC 13 2006
DEPARTMENT OF
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 29-00271, <i>et al.</i> (see attached Exhibit A)
	)	
	)	
	)	
Case No. 39576	)	RESPONSE MEMORANDUM IN OPPOSITION
	)	TO CITY OF POCA TELLO'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	
	)	

This memorandum responds to the arguments made by the City of Pocatello, hereinafter referred to as the "City," in support of the *City of Pocatello's Motion For Summary Judgment on Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury Under I.C. § 42-1425*, hereinafter the "City's Motion." The City moves for summary judgment on the following two issues: (1) The City's twenty-two wells should be recognized as alternative points of diversion for the City's surface water rights from Mink Creek and Gibson Jack Creek under Idaho

Code § 42-1425. (2) Water right nos. 29-7119, 29-7110, 29-7770, and 29-7431 should be decreed with a municipal purpose of use. Disputed issues of fact preclude entry of summary judgment here for either matter, except that the proposed change in purpose of use for water right no. 29-7770 is clearly impermissible.

I. STATEMENT OF THE CASE

i. The Nature of the Proceedings

This controversy relates to the determination of the City's water rights.

ii. Course of the Proceedings

The City filed thirty-eight claims to water rights acquired under state law and filed objections to the Director's Recommendation for each of these thirty-eight state water right claims.

The State of Idaho filed a timely response to each of these objections.

The Surface Water Coalition filed a Joint Motion to Participate in March 2006. The Court granted this motion on April 25, 2006.

The Director of the Idaho Department of Water Resources, hereinafter "IDWR," filed a Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights on April 13, 2006, hereinafter referred to as "Supplemental Director's Report," which included a variety of maps and exhibits. Map 5 shows all points of diversions, and it shows that the surface water diversion from Mink Creek is over 6 miles south of the nearest ground water well of the City. The surface water diversion from Gibson Jack Creek is about two miles from the nearest ground water well. Exhibits K, L and M were described as certified copies of the following License and Claim Files for water right nos. 29-7118, 29-7119, 29-7431, and 29-7770.

Exhibit K: The lessee of land from the City applied for water right numbers 29-7118 and 29-7119 in the name of the City. The lessee used the water for irrigation of the leased land, and the

City has not made any potable use of the water from the wells described as the point of diversion for these water rights.

Exhibit L: The Director issued license water right no. 29-7431 to the City for irrigation with wastewater from the City's sewage treatment plant on June 11, 1987.

The Supplemental Director's Report reached the following conclusions regarding water right no. 29-7770:

The City wants the licensed purpose of use to be change from irrigation to municipal. Yet, when the City completed its application for permit for this license in 1984, the proposed use was irrigation from a ground water source. The remarks on the application indicate that the water is necessary for the irrigation of crops. On July 1, 1987, the City requested that the Department consider defining the purpose of use for this license as 'DCMI' (domestic, commercial, municipal, industrial.) The Department responded by a letter dated July 28, 1987, that stated the use cannot be considered 'DCMI' as requested. Hence the change from irrigation to a broader use was specifically addressed during the licensing process. . . .

Changing the purpose of use in the SRBA would be a collateral attack on the license . . .

iii. Statement of Facts

The City submitted the *Spronk Water Engineers, Inc. Expert Report Dated September 29, 2006 Prepared for the City of Pocatello*, hereinafter "Exhibit B: Spronk Report," which was prepared by Gregory K. Sullivan, in support of its Motion for Summary Judgment. This report addresses the factual issues as follows:

3.0 Alternate Points of Diversion for Surface Water Rights:

...

3.1 The Department's Basis for Refusal

...

SWE [Spronk Water Engineers, Inc.] has been advised by Pocatello's legal counsel that the Transfer Guidelines are not legally binding principles for limiting SRBA claims for alternate points of diversion. As a result the factual basis for the City's claim was evaluated by other means. (See Pocatello's Brief in Support of Motion for Summary Judgement on IDWR's Authority Under I.C. § 42-1425)

...

3.3 Historical Use

...

The City's water use records indicate the City used its wells as alternate points of diversion for its surface water rights prior to November 19, 1987.

3.4 Hydraulic Connection between Surface Water Sources and the LPRVA

...

In addition, information reviewed indicates that the LPRVA [Lower Portneuf River Valley Aquifer] is in hydraulic connection with the surface water system at two locations: (1) generally along the Bannock Range, where tributaries to the Portneuf River, including Mink Creek and Gibson Jack Creek, emerge from the foothills and comprise a source of recharge to the LPRVA, and (2) north of the City. Based on that information, it is my opinion that the City's surface water diversions and ground water diversions are from the same water source.

3.5 Effect on Other Water Rights

...

Portneuf River and Snake River Water Rights

The City's use of the surface water rights diverted at the City's interconnected municipal wells will be generally the same as it was historically, except that water will be diverted from the interconnected City Wells rather than from the diversion structures on Mink and Gibson Jack Creeks.

Local Impacts

It is unlikely that Pocatello's municipal wells had any significant impact to neighboring wells prior to November 19, 1987 as a result of diverting its surface water rights at alternate points of diversion for the same reasons as described in section 2.

Exhibit B: Spronk Report, at 17-19.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and admissions of records show that there was no genuine issue of material fact. In making that determination of whether an issue of material fact exists, all disputed facts are liberally construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Garner v. Bartshi*, 139 Idaho 430, 432 80

P.3d 1031, 1034 (2003). Substantive law defines as material those factual disputes that affect the outcome. Disputes about irrelevant matters do not defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. DISPUTED ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT REGARDING THE DIVERSION OF THE SURFACE WATER RIGHTS FROM MINK CREEK AND GIBSON JACK CREEK FROM THE CITY'S WELLS.

The City requested that four surface water rights from Mink Creek and Gibson Jack Creeks be allowed to divert from the City's wells, which divert from the LPRVA, and argued that Idaho Code § 42-1425 authorized such a change. IDWR's Supplemental Director's Report described the basis for rejecting the City's claim here and stated as follows:

IDWR's Transfer Processing Memo No. 24 (October 20, 2002) provides guidance to agents when evaluating a request to change in source from surface water to ground water or to add a well as an alternate point of diversion for a surface water right. That memo provides:

(6) Change of Source. Whether the source would be changed from ground water to surface water or from surface water to ground water, factual evidence is needed that illustrates there is an immediate and direct connection between the surface and the well.

The City's expert rejected any consideration of Transfer Processing Memo No. 24 and provided a general conclusion that the surface water sources were interconnected with the LPRVA, that it is unlikely this change had any significant impact on other users, and that the City had diverted such surface water from its wells prior to November 19, 1987. Statement of the Case, hereinafter "SOC," at 4. Thus, the City argues that "IDWR, the State and the SWC have no information about injury to individual water rights by Pocatello's use of the 22 interconnected wells located at the points of diversion identified and recommended by IDWR for Pocatello's interconnected culinary system" and that this Court should grant it summary judgment on this issue. City's Motion at 4. The City has not applied the correct legal standard

for review of the Director's Recommendation here. If the correct legal standard is applied, it is apparent that dispute issues of fact preclude entry of summary judgment.

Claimants "bear[] both the burden of production as well as the burden of proof as to each element of a claimed water right." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). Pursuant to Idaho Code § 42-1411(4), the Director's Report "is *prima facie* evidence of the nature and extent of the water rights under state law." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). Claimants, as the objecting parties, have "the burden of going forward with evidence to establish any element of a water right which is in addition or inconsistent with the description in a director's report." Idaho Code § 42-1411(5); *see also State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 746, 947 P.2d 409, 419 (1997) ("The director's report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption."). *Hagerman Water Right Owners* also addressed the issue of what happens when the Director's *prima facie* determination is rebutted. The Court stated:

While HWRO's affidavits may dispel the presumed 'correctness' of the facts contained in the Director's Report, the facts contained therein still exist as facts. Facts contained in the affidavits create triable issues to the extent they conflict with the facts alleged in the Director's Report. **Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant.**

130 Idaho at 746, 947 P.2d at 419. Even assuming *arguendo* that the conclusory opinions of the City's expert rebut the *prima facie* determination in the Supplemental Director's Report, the opinion of the Director remains that an injury to other water users would occur if the City's wells could be used as alternative points of diversion for the surface water rights.

Thus, the Court has two opposing opinions about whether the changes would cause injury. There is no reason to treat opposing expert opinions any different from opposing “facts.” Disputed issues exist, and summary judgment must be denied.

III. THE CITY HAS A VERY DIFFICULT BURDEN OF PROOF TO BEAR REGARDING THE ADDITION OF THE CITY’S WELLS AS ALTERNATE POINTS OF DIVERSION FOR ITS SURFACE WATER RIGHTS FROM MINK CREEK AND GIBSON JACK CREEK.

The City has two major problems with its request to add the City’s wells as alternate points of diversion for its surface water rights. First, the standards set forth in the Transfer Processing Memorandum assist in identifying whether a proposed transfer will injure other water right. The City should be required to address these standards instead of ignoring them. Second, the existence of a hydraulic connection between Mink Creek and Gibson Jack Creek with the LPRVA does not address completely the issue of source of these water rights. The City should be required to address whether the proposed changes will make the water supply more reliable and thus provide the City a greater volume of water than its original diversions from Mink Creek and Gibson Jack Creek.

The City’s rejection without analysis of the standards stated in Transfer Processing Memo is without any basis. That memorandum is intended to assist in the determination of the issue of injury. The requirement that there be “an immediate and direct connection between the surface source and the well” makes a great deal of sense when considering the issue of injury. The present matter illustrates why that test assists in addressing that issue of injury. The City’s expert opines that the diversion of water from the City’s wells has the same impact as if the water were diverted from the original surface water sources since the sources are interconnected. The City’s expert fails to consider what happens during times of severe drought.

If the City diverted the entire surface water flows of Mink Creek and Gibson Jack Creek as the senior water user, downstream junior surface water users on Mink Creek and Gibson Jack Creek would have no source of surface water supply until the watershed increased sufficiently in area to provide surface water flow in the respective watercourses. If, instead, during that drought the City had been allowed to divert its Mink Creek and Gibson Jack Creek water rights from its wells, Mink Creek and Gibson Jack Creek would now have surface water flow at the City's diversion points, which had not been diverted by the City. Junior downstream surface water users on Mink Creek and Gibson Jack Creek now would divert the surface water flow of those watercourses. Those are diversions that would not have happened during the drought, but for the change in the City's points of diversions. Obviously, it is a benefit to the junior water right holders on Mink Creek and Gibson Jack Creek, but, it is also a big detriment. If we look at the entire water system, we have added a water demand that the priority system would have otherwise cut-off during the drought. That additional demand will operate to the injury of some water user downstream. The requirement from the Transfer Memo that "an immediate and direct connection between the surface source and the well" exist before a transfer is allowed would have prevented this additional demand. If the City continues to request this change in its water rights, the City should be required to address at trial the standards stated in the Director's Transfer Processing Memo.

This same concern may also be analyzed as an impermissible change in source. Idaho law has long held that "junior appropriators have a vested right to a continuance of the conditions existing on the stream at and subsequent to the time they made their appropriations, and that no proposed change in place of use or diversion will be permitted when it will injuriously affect such established rights." *Crockett v. Jones*, 47 Idaho 497, 504, 277 P. 550, 552 (1929). The

City's water rights from Mink Creek and Gibson Jack Creek have early priority dates back to before 1900. Much has happened since those rights were initially developed. Mink Creek and Gibson Jack Creek are small surface water tributaries of the Portneuf River. Small surface watersheds may have widely fluctuating flows during each year, and from year to year as droughts come and go. What the City is attempting to do by this request is to transform an unreliable surface water supply to a ground water supply that will always be there. Junior water rights were developed with the impact of a very early and large water right now held by the City from an unreliable water supply. If the change is allowed those water rights will then divert from a very reliable water supply. The total volume of water diverted will thus increase and operate to the injury of other water users. If the City continues to request this change in its water rights, the City should be required to address in its injury whether the requested changes in point of diversion would provide a greater supply of water available to the City and what effect this will have on other users.

IV. DISPUTED ISSUES OF FACT PRECLUDE ENTRY OF SUMMARY JUDGMENT REGARDING THE DETERMINATION OF THE PURPOSE OF USE FOR WATER RIGHT NOS. 29-7118, 29-7119, AND 29-7431.

The Director's Report concluded that the purpose of use for water right numbers 29-7118, 29-7119, and 29-7431 was irrigation. The City argues that it is a municipality, that municipal water use may include irrigation, and that the City has diverted and used water under those denominated rights as a municipality. City's Motion at 2. The City and the State of Idaho have some agreement here. We agree that a municipal water right may include irrigation. We agree that the City is a municipality that may exercise a municipal water right, but we do not agree that every diversion and use of water by a municipality under Idaho law is automatically a water right with a municipal purpose of use.

The designation of a water right as a municipal water right has some important privileges under recent amendments to Idaho Law. The Act of March 18, 1996, ch. 297, 1997 Idaho Sess. Laws 967 amended Idaho Code § 42-222(2) to exempt from forfeiture water rights held by a municipal provider, such as the City, to meet reasonably anticipated future needs. That Act also provided a definition of “municipal purposes” in Idaho Code § 42-202B(4)(6), which states as follows:

‘Municipal purposes’ refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled to supply to all those users with a service area, including those located outside the boundaries or a municipality served by a municipal provider.

Id. The City has made no effort to demonstrate that the uses under water right nos. 29-7118, 29-7119, and 29-7431 come within this definition of municipal purposes. A brief perusal of the Supplemental Director’s Report indicates that disputed issues of fact exist regarding whether these water rights come within this definition of municipal purposes as follows:

Water right nos. 29-7118 and 29-7119: These water rights provide water for an irrigation purpose of use by a farmer who has a long term lease with the City. The farmer actually applied for the water in the name of the City. This water supply is not connected to the rest of the City’s water system. Supplemental Director’s Report, Exhibit K. Thus, this use appears to be traditional irrigation of a cropland, which is not within the definition of municipal use stated above.

Water right no. 29-7431: Wastewater from the sewage treatment plant operated by the City is disposed of by application to land described as the place of use. Thus, this use appears to be traditional land disposal of sewage sludge, which is not within the definition of municipal use stated above.

Disputed issues of fact exist regarding the Director’s determination of the purpose of use for

water right nos. 29-7118, 29-7119, and 29-7431.

V. THE COURT SHOULD DENY THE REQUESTED CHANGE IN THE PURPOSE OF USE FOR WATER RIGHT NO. 29-7770 FROM IRRIGATION TO MUNICIPAL PURPOSES

- A. Idaho Code § 42-1425 does not authorize the proposed change in purpose of use from irrigation to municipal purposes

Idaho Code § 42-1425 authorizes the district court to recognize changes in purpose of use without compliance with Idaho law if the claimant is able to demonstrate that the proposed change in use occurred prior to the commencement of the SRBA on November 19, 1987, among other limitations. The undisputed facts in this matter demonstrate that this could not have occurred. The IDWR issued water right license no. 29-7770 on December 7, 1989 with an irrigation purpose of use. Since the date of the license post dates the commencement date of the adjudication, any claimed change in purpose of use after the issuance of a license was too late. Idaho Code § 42-1425 does not authorize the proposed change in use for water right no. 29-7770.

- B. Changing the purpose of use for water right no. 29-7770 from irrigation to municipal would be an impermissible collateral attack on the license issued here.

The SRBA District Court entered its *Order on Challenge (Consolidated Issues)* of “Facility Volume” Issue and “Additional Evidence Issue (“Fish Facility Volume”) on December 29, 1999. The Court concluded that a claimant was not entitled to collaterally attack a water right license in the Snake River Basin Adjudication. *Id.* at 16.

Here, IDWR issued water right no. 29-7770 on December 7, 1989 with an irrigation purpose of use. During the licensing process, the City requested that the purpose of use be changed from irrigation to “DCMI,” and the IDWR denied this request. SOC at 3. Thus, the issue of changing the purpose of use was addressed in the licensing process. The City’s objection is an impermissible collateral attack on the license.

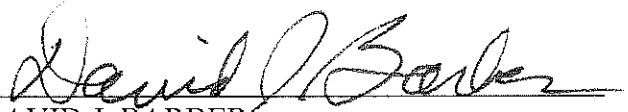
CONCLUSION

Disputed issues of fact exist that preclude entry of summary judgment except with respect to water right no. 29-7770. The court has sufficient information regarding water right no. 29-7770 to enter judgment denying the requested change for that water right.

RESPECTFULLY SUBMITTED this 11th day of December 2006.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION

A handwritten signature in dark ink, appearing to read "David J. Barber", is written over a horizontal line.

DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
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29-13639

CERTIFICATE OF SERVICE

I certify that on this 11th day of December 2006, I caused to be served the original and/or copy of the RESPONSE MEMORANDUM IN OPPOSITION TO CITY OF POCA TELLO'S MOTION FOR SUMMARY JUDGMENT on each of the following persons by the indicated method:

1. One Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☒ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☒ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

City of Pocatello
c/o Josephine P. Beeman
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

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☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
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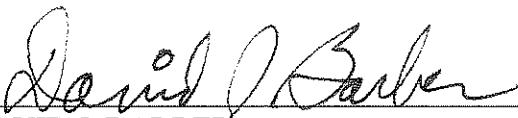
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- ☒ Statehouse Mail

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Not Applicable



DAVID J. BARBER
Deputy Attorney General