

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED
2007 FEB 16 PM 4 59

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	)	Subcases See Exhibit A
	)	
Case No. 39576	)	SECOND ORDER ON SUMMARY
	)	JUDGMENT
_____	)	

I. PROCEDURAL BACKGROUND

These subcases were claimed in the SRBA by the City of Pocatello (hereafter "Pocatello") under a state basis. Pocatello claimed the same water use under a federal theory under subcase number 29-11609. Pocatello's federal theory is currently on appeal to the Idaho Supreme Court. *Director's Reports* were issued by the Idaho Department of Water Resources (hereafter "IDWR") on the state-based claims. Pocatello filed *Objections* to each subcase. Pocatello previously filed a *Motion for Summary Judgment on IDWR's Authority Under I.C. § 42-1425* (hereafter "*First Summary Judgment*"). In the *First Summary Judgment*, Pocatello argued that the "accomplished transfer" statute, I.C. § 42-1425, required the SRBA court to allow accomplished changes in its water rights without the conditions recommended by IDWR. Pocatello argued that no conditions should be imposed because the accomplished changes did not injure other rights. The *First Summary Judgment* was **denied**. (*Order on Summary Judgment* (Aug. 18, 2006))

A second round of summary judgment motions was filed by the parties and argued on January 17, 2007. Pocatello filed *City of Pocatello's Motion for Summary Judgment on Municipal Purpose of Use, Interconnection, and Injury under I.D. § 42-1425* (hereafter

"Pocatello's Second Motion"). The Surface Water Coalition filed a cross motion titled *Surface Water Coalition's (SWC) Motion for Summary Judgment*. The State of Idaho participated in the briefing and at oral argument.

A. *Pocatello's Second Motion*

Pocatello's Second Motion asks for summary judgment on three issues. First, Pocatello argues the purpose of use for water rights 29-7119, 29-7118, 29-7770, and 29-7431 is "municipal purpose" as a matter of law. Second, Pocatello seeks a determination that Mink Creek, Gibson Jack Creek, the Lower Portneuf River Valley Aquifer, the Snake River, and the Eastern Snake Plain Aquifer are interconnected as a matter of law. Third, Pocatello again argues that there is no evidence its accomplished transfers injured existing water rights.

B. *Surface Water Coalition's Motion*

The American Falls Reservoir District #2, A & B Irrigation District, Burley Irrigation District, Minidoka Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company filed a joint motion for summary judgment. These parties are collectively referred to as the "Surface Water Coalition." The Surface Water Coalition argues that Pocatello cannot collaterally attack the elements of its previously licensed and decreed water rights. Therefore, those rights must be decreed with the elements previously determined.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any," to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation, Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material facts rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 425 P.2d

III. FACTS

The following facts are not in dispute.

1. Water rights in the SRBA are generally interconnected.
2. All water rights at issue are owned by Pocatello, a municipal entity.
3. Water rights 29-7118, 29-7119, 29-7770, and 29-7431 are used on land owned by Pocatello.
4. Water rights 29-7118, 29-7119, 29-7770, and 29-7431 were claimed in the SRBA with an irrigation purpose of use.
5. Water rights 29-7118, 29-7119, 29-7770, and 29-7431 were previously licensed by IDWR with an irrigation purpose of use.
6. The *Director's Reports* for 29-7118, 29-7119, 29-7770, 29-7431 concluded purpose of use is irrigation.
7. The *Director's Reports* and *Supplemental Director's Report* for 29-271, 272, and 273 (Mink Creek Rights) conclude that adding the city's wells as points of diversion would injure existing rights.
- 7.5 The *Director's Reports* and *Supplemental Director's Report* concludes that adding the wells as alternative points without the proposed condition would injure existing rights.
8. Pocatello's expert report concluded that adding the city's wells as points of diversion would not injure existing rights.
9. Water Right 29-7770 was licensed in 2003 with a municipal purpose.

IV. POCATELLO'S MOTION

A. Purpose of Use (29-7118, 29-7119, 29-7770, and 29-7431)

Pocatello argues that purpose of use for 29-7118, 29-7119, 29-7770, and 29-7431 is municipal as a matter of law because the water uses fit within the broad definition of "municipal uses" defined by statute and by common law.

Idaho Code § 42-202(b)(6) defines “municipal purposes” as “residential, commercial, industrial, irrigation of parks and open space, and related purposes.” Water rights 29-7118, 29-7119, 29-7770, and 29-7431 are used on land near the city’s airport and wastewater treatment plant. *Supplemental Director’s Report* at 7, 19. These water rights come from groundwater wells used to irrigate growing crops. The wells are not connected to the city’s interconnected well system. The *Director’s Reports* recommended the purpose of use as irrigation, not municipal. *Id* at 7.

All four water claims are based on licenses. The licenses list “irrigation” as the purpose of use. In fact, Pocatello initially claimed purpose of use was “irrigation” for all four rights, but later amended the claims to assert a “municipal” purpose. The *Director’s Reports* considered a possible municipal purpose for these rights, but concluded the proper purpose was irrigation. Water rights 29-7118 and 29-7119 are used by a local farmer who leases Pocatello’s land to grow crops near the airport. Water right 29-7431 uses water and effluent to grow crops on land near the city’s wastewater plant. IDWR concluded the use was for agricultural cropland, not municipal purposes. Thus, the *Director’s Reports* gave purpose of use as irrigation.

It is possible that the water use relating to 29-7118 and 29-7119 could fit within the broad statutory and common law definitions of “municipal use,” since the rights are owned by a municipality and because the definition of municipal use is fairly broad. Pocatello may offer proof at trial that the purpose of use changed after the rights were licensed. Therefore, genuine issues of material fact remain for trial.

Summary Judgment is **denied** as to purpose of use for 29-7118 and 29-7119.

Water Right 29-7770 was licensed in 2003 with irrigation as purpose of use. The *Director’s Report* found irrigation as the purpose. IDWR considered the 1984 application which identified the water as necessary for irrigating crops. *Supplemental Director’s Report* at 21. Furthermore, IDWR considered Pocatello’s 1987 request to define purpose of use as domestic, commercial, municipal, and industrial or “DCMI.” IDWR declined to label the purpose DCMI. *Id* at 21. The *Director’s Report* concluded that purpose is irrigation. The motion for summary judgment seeking a municipal purpose for 29-7770 is **denied**.

Water Right 29-7431 was licensed to Pocatello in 1987. The license determined irrigation as the purpose of use. Pocatello now asserts a municipal purpose and seeks to change the source from groundwater to wastewater.

The prior license for this right is evidence of the elements of the right. A party may not collaterally attack the licensing determination in the SRBA. The proper remedy for a party who disagrees with a licensing decision is an appeal of that decision. Nevertheless, a license is not conclusive proof of the elements of a right, since changes to a right may occur after a license. Here, Pocatello could offer proof of a transfer under I.C. § 42-222 or proof of an accomplished transfer under I.C. § 42-1425. If there is no I.C. § 42-222 transfer for this right, Pocatello has a relatively narrow time frame for a change in purpose or source. Such a change would have to occur after the date of the license (June 11, 1987) and prior to the deadline established in I.C. § 42-1425 (November 19, 1987). However genuine issues of material fact remain, because a change occurring after the license issued may have occurred.

Summary Judgment is **denied** as to 29-7431.

B. Interconnection

Pocatello seeks a ruling that Mink Creek, Gibson Jack Creek, LPRVA (identified by Pocatello as the Lower Portneuf River Aquifer), the Snake River, and the Eastern Snake Plain Aquifer are interconnected. At the hearing, Pocatello clarified that it was not seeking a holding that would result in a final determination of the elements of any water rights, but is asking the court to clarify which facts are without controversy. Presumably, Pocatello refers to the court's authority pursuant to I.R.C.P. 56(d).

Idaho Rules of Civil Procedure 56(d) allows a court to ascertain which facts exist without substantial controversy:

[T]he court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

I.R.C.P. 56(d).

The SRBA court has long recognized the general interconnection of water rights. For example, the *Commencement Order* (Nov. 23, 1987) for the SRBA defined the boundaries of the SRBA as those parts of the state where the water is tributary to the Snake River. Water rights in the SRBA are presumed to be generally "interconnected" or related. *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411 (1997). This "interconnected" relationship of water

rights is presumed, but is so general that it usually doesn't resolve many issues. The degree of the interconnectedness is what is significant. In these subcases, for example, the crux of the disagreement is whether the surface water rights (Mink Creek and Gibson Jack Creek) are so closely connected to groundwater sources, such as the Eastern Snake Plan Aquifer, that wells may be added as alternative points of diversion. A determination of general connectedness is insufficient to support such a finding.

The Surface Water Coalition appears to define "interconnection" as a basic hydrological nexus between water rights or water sources. Pocatello appears to define "interconnection" as a very direct and immediate hydrological connection between surface water and groundwater sources. Pocatello and the Surface Water Coalition apparently disagree over the meaning and application of "interconnection"; however, they do not appear to actually disagree about the existence of a general interconnection.

Pocatello seeks the addition of its groundwater wells as alternative points of diversion for its surface water rights. *Supplemental Director's Report* at 10. IDWR concluded that the wells should not be alternative points of diversion because allowing them would incorrectly permit Pocatello to withdraw water from wells utilizing the early priority associated with the surface water rights. In addition, IDWR declined to add the wells because it requires a showing of an "immediate and direct hydrological connection" between the source and the wells. *Id* at 11-12; IDWR Transfer Processing Memo No. 24(Oct. 30, 2002). IDWR also requires the existing point of diversion (surface) and the proposed point of diversion (groundwater) to be so closely connected that "diversion and use of water from the proposed point of diversion would have substantially the same effect on the hydrologically connected source as diversion and use of water from the original point of diversion." *Supplemental Director's Report* at 12.

On the other hand, Pocatello supplied an expert report that concludes diversion of Pocatello's surface water rights at the city's wells "will not injure the surface water coalition water rights." *Affidavit of Celeste Thane*, attachment B at 3.

In conclusion, genuine issues of material fact remain as to whether the connection between Pocatello's surface diversions and groundwater diversions are close enough to justify adding its wells as alternative points of diversion for its surface rights. It is important to note that the connection must be so close that the groundwater and surface water are essentially the same source. That is because I.C. § 42-1425 does not authorize an accomplished change of

sources. However, there is no substantial controversy regarding a *general interconnection* between these sources.

C. Injury

Pocatello urges the court to determine that its groundwater wells may be added as alternative points of diversion to its surface water rights. It argues these alternative points of diversion should be added as a matter of law because their addition was part of an accomplished transfer and no injury was shown.

Pocatello argued in its *First Summary Judgment* that the *Director's Reports* improperly placed conditions on these rights because the subcases were not “remanded” to IDWR as set forth in I.C. § 42-1425(2)(a). The subcases have now been remanded to IDWR; no changes were made to the *Director's Reports*.

Pocatello has 22 wells connected to a municipal water system that provide culinary water within its service area. *Pocatello's Motion for Summary Judgment* at 4. The 22 wells are claimed as alternative points of diversion for surface water rights held by Pocatello. Pocatello urges the court to determine as a matter of law that these wells be added as points of diversion. Pocatello alleges that no injury to other rights has been shown by other parties. Pocatello's expert report supports the contention that adding wells as points of diversion results in no injury. The report contends “once the depletions from groundwater use reach a steady state, they are essentially the same as depletion that would have resulted had the water right continued to be diverted at the original points.” *Affidavit of Celeste Thane*, attachment B at 3. Pocatello's expert report concludes that the overall impact of adding points of diversion may have little injury. “As a result, exercise of the city's surface water rights at the groundwater alternate points of diversion will not result in a material change in the seasonal timing of stream depletions to the detriment of downstream surface water users.” However, that opinion is rebutted.

The *Director's Reports* and the *Supplemental Director's Report* determined that injury to existing water rights would occur if the 22 wells were added as points of diversion without any conditions. The *Director's Reports*, therefore, added the following condition:

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.

Without this condition, Pocatello could “withdraw water from its wells under the priority dates associated with its surface water rights.” *Supplemental Director’s Report* at 10-11. The *Director’s Reports* concluded that adding the 22 wells without restriction would injure existing water rights. The *Director’s Reports* opined that adding the wells would improperly move water with later priorities ahead of the priority line. “Without the condition, IDWR would not have recommended the multiple, alternative points of diversion because injury to other water right was likely.” *Id* at 12-13. The condition “maintain[s] the historical [priority] relationship between various water users.” *Id* at 15.

Pocatello contends that no injury has been shown. To the contrary, the *Director’s Reports* and *Supplemental Director’s Report* adding alternate points of diversion squarely contradict the conclusion reached by Pocatello’s expert. The *Director’s Reports* conclude that adding the points of diversion would injure existing water rights. Pocatello’s expert concludes that adding the points of diversion would not injure existing water rights. These opposing opinions create a classic situation where genuine issues of material fact remain for trial.

It should be pointed out that if there are intervening rights appropriated by other users from the same source after Pocatello appropriated its surface right but before drilling its wells for the alternate points of diversion, injury to junior rights is presumed.

Summary Judgment as to injury is **denied**.

V. SURFACE WATER COALITION’S MOTION

The Surface Water Coalition argues that Pocatello is prohibited as a matter of law from changing its points of diversion for 29-271, 29-272, and 29-273. The Surface Water Coalition asserts that would be an impermissible collateral attack of a prior decree. The Surface Water Coalition explains that points of diversion for these rights were previously decreed.

A. Mink Creek Rights (29-271, 29-272, and 29-273)

Pocatello has three rights located on Mink Creek: 29-271, 29-272, and 29-273. These rights were previously decreed in *Smith et. al. v. City of Pocatello* (Bannock Co. Dist. Court) (June 5, 1926). The *Smith* court decreed these rights with surface water points of diversion; no wells were included. The *Director’s Reports* concluded Pocatello’s wells should not be added as additional points of diversion. Pocatello filed objections for 29-271, 29-272, and 29-273 seeking to include both the original surface water points of diversion and “all groundwater points of

diversion for the City of Pocatello's municipal rights." Although Pocatello filed objections to the point of diversion element, it did not amend its claims to add groundwater points of diversion.

Prior decrees have long been treated in the SRBA as persuasive evidence of the elements of a water right. The court has repeatedly ruled that the SRBA is not an appropriate forum for collaterally attacking a license or prior decree. The appropriate forum for asserting a prior decree is in error is an appeal of that decree. However, prior decrees are not conclusive proof of the elements of a water right. The SRBA court has consistently recognized that change of use or failure to use a water right can sometimes change a right after it is decreed. *Memorandum Decision and Order on Challenge and Order Disallowing Water Right Based on Federal Law* (Subcase No. 29-11609) (Oct. 6, 2006). For example, a decree can be forfeited or abandoned. The elements of a right can be changed by an administrative transfer under I.C. § 42-222 or an accomplished transfer under I.C. § 42-1425.

The *Director's Reports* concluded that Pocatello's wells should not be alternate points of diversion for the Mink Creek water rights. One reason for the conclusion is that IDWR found the Mink Creek rights are not closely related to the wells either geographically or hydrologically. "Pocatello's point of diversion from Mink Creek is approximately six miles away from the closest Pocatello well." *Supplemental Director's Report* at 11. Pocatello's expert concluded that the wells and surface water are connected and related. Additionally, Pocatello argued it could change points of diversion without filing a transfer for changes prior to enactment of I.C. § 42-222.

Therefore, Pocatello may provide evidence of a pre-1969 transfer, a valid I.C. § 42-222 transfer or a valid I.C. § 42-1425 accomplished transfer showing a change occurred after the *Smith Decree*. Genuine issues of material fact remain for trial. Summary Judgment is **denied**.¹

¹ The Surface Water Coalition correctly notes that Pocatello filed objections to the point of diversion element for 29-271, 29-272 and 29-273, but failed to amend its claims for those rights. The SRBA Administrative Order requires parties to amend their claims if seeking changes to place of use or point of diversion not included in the original claims. "A claimant may not amend a claim by filing an objection or a response." *AOI* 4(d)(1)(b). However, this rule in *AOI* was established to ensure notice to other parties. The manner in which the claims, amendments, and objections were filed here was somewhat confusing. But there is no doubt the parties to these subcases had notice that Pocatello intended to claim well diversions for their Mink Creek rights. The court declines to strike the objections; and Pocatello will be allowed to amend its claims prior to trial.

B. Irrigation Rights (29-7118 and 29-7119)

Water rights 29-7118 and 29-7119 were licensed in 1975 with irrigation as the purpose of use. The administrative licenses were not appealed. Pocatello filed claims for these two rights in 1990, listing irrigation as the purpose of use. Pocatello later objected to purpose of use, asserting a municipal purpose.

The licenses for these two rights determined a specified acreage and defined the place of use. Pocatello's original claims listed the place of use as licensed. In 2003, Pocatello amended its claims and now seeks a purpose of use as "municipal" and a place of use as Pocatello's municipal service area. The *Director's Reports* for these two rights recommended an irrigation purpose of use and the acreage and place of use as licensed.

Prior licenses are evidence of the elements of a water right. In addition, the *Director's Reports* are evidence of the elements of a water right. However, Pocatello may still allege that a change in purpose occurred after the licenses issued. If a valid transfer pursuant to I.C. § 42-222 or a valid accomplished transfer pursuant to I.C. § 42-1425 occurred, it is possible for Pocatello to meet its burden of proof on the purpose and place of use elements. Therefore, genuine issues of material fact remain for trial, and summary judgment is **denied**.

C. Waste Water Right (29-7431)

Pocatello obtained a license for water right 29-7431 on June 11, 1987. This right was licensed for irrigation purpose of use for 777 acres. In 1990, Pocatello claimed the right as licensed. The *Director's Report* recommended the right with an irrigation purpose of use. Pocatello now seeks to prove a right with a municipal purpose of use and with wastewater as the source, rather than groundwater. Here, Pocatello may offer proof of a transfer under I.C. § 42-222 or an accomplished transfer under I.C. § 42-1425. If Pocatello seeks an accomplished transfer, it must assert a change after licensing on June 11, 1987, and before the deadline of November 19, 1987, set forth in the statute.

Pocatello will face evidence of the *Director's Report* and the prior license at trial. However, genuine issues of material fact remain because valid changes which occurred after the license issued may change the elements of a water right. Summary Judgment for 29-7431 is **denied**.

D. Water Right 29-7770

This water right was licensed in 2003 for irrigation purposes. Pocatello seeks a municipal purpose and a place of use as the city's "service area."

Licenses are persuasive proof of the elements of a water right, but are not conclusive proof. Changes occurring after the license may provide evidence to support a change in the elements. Typically, the post-licensing changes are a valid transfer or accomplished transfer. There is no evidence of record that an administrative transfer occurred. In order to overcome the licensed elements, Pocatello must show a valid accomplished transfer under I.C. § 42-1425.

The statute allows SRBA claimants to assert water rights with changes to elements if three factors exist:

1. The change was made prior to November 19, 1987;
2. No other water rights existing on the date of the change were injured; and
3. The change did not result in an enlargement of the right.

Under the unique procedural history of this case, Pocatello cannot show a valid accomplished transfer. This right was licensed in 2003. Pocatello may not collaterally attack that license in the SRBA. The only way to change the elements from the license would require a valid post-licensing change to the water right. Pocatello cannot make a case for an accomplished transfer under I.C. § 42-1425 because accomplished changes to elements of a right are required by statute to have occurred prior to November 19, 1987. Since the license was issued in 2003, any change after the license would not comply with the statutory deadline of 1987. A valid accomplished change could not be alleged.

Therefore summary judgment is **granted** as to 29-7770.

VI. ATTORNEY FEES

Pocatello argues that it is entitled to attorney fees against the Surface Water Coalition related to this *Summary Judgment Motion* and for the Surface Water Coalition's failure to admit to an interconnection between sources. Pocatello did not cite rules of procedure or a statutory basis for its request. Without a clearer understanding for the basis of the request, this Special Master is not inclined to award attorney fees. No party has prevailed on the interconnection issue because a general interconnection is presumed for water rights in the SRBA. The Surface Water Coalition does not appear to have alleged that those water rights are hydrologically

independent. The conflict during discovery occurred because the parties were at odds over the definition of the term "interconnection."

VII. CONCLUSION

Pocatello's Second Motion is **denied** as to whether purpose of use is municipal. Although Pocatello has set forth facts supporting a municipal purpose of use, those are contrasted by prior licenses and the conclusions of the *Director's Reports* concluding purpose of use is irrigation. Because genuine issues of material fact remain, summary judgment is **denied**.

Pocatello's Second Motion is **granted** as to the issue of interconnection; however, the holding is only that there is a general relationship between the sources and water rights at issue. It is understood that this general interconnectedness does not resolve the issue of injury or prove that Pocatello's wells may be added as alternate points of diversion.

Summary judgment is **denied** as to injury on *Pocatello's Second Motion*. Pocatello's expert report comes to a conclusion diametrically opposed to the conclusion of the *Supplemental Director's Report*. Genuine issues of material fact remain.

The Surface Water Coalition's motion is **denied** as to the points of diversion for 29-271, 29-272, and 29-273. Although a prior decree determined the point of diversion elements, Pocatello may offer proof of post-decree changes.

The Surface Water Coalition's motion is **denied** as to purpose of use for 29-7118, 29-7119, and 29-7431. Although these rights were previously licensed with an irrigation purpose of use, Pocatello may offer proof of post-licensure changes to support its contention of a municipal purpose.

The Surface Water Coalition's motion is **granted** as to 29-7770. This right was licensed in 2003. No I.C. § 42-222 transfer was alleged. Pocatello cannot make a case for an accomplished transfer under I.C. §42-1425 because such a change would have to occur after licensure (2003) and prior to the 1987 deadline imposed by I.C. §42-1425. A valid accomplished transfer case cannot be made.

Dated February 16, 2007.


Brigitte Bilyeu
Special Master

EXHIBIT A

Subcase Nos:

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

(Subcase list: BEEMANGP)
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CERTIFICATE OF MAILING

FEB 20 2007

I certify that a true and correct copy of the ~~DEPARTMENT OF~~ ~~INTERIOR~~ ~~SECOND ORDER~~
ON SUMMARY JUDGMENT was mailed on February 15, 2007, with sufficient
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