

Josephine P. Beeman #1806
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
jo.beeman@beemanlaw.com

RECEIVED
FEB 20 2007
DEPARTMENT OF
WATER RESOURCES

Sarah A. Klahn
William A. Hillhouse II
White & Jankowski, LLP
511 16th St., Suite 500
Denver, CO 80202
303-595-9441
303-825-5632 (Facsimile)
sarahk@white-jankowski.com

Attorneys for City of Pocatello

**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)
	)	
	)	CITY OF POCATELLO'S TRIAL BRIEF
Case No. 39576	)	
_____	)	

I.

**STATUS OF OBJECTIONS AT THE TIME OF TRIAL:
ISSUES NOT PRESENTED FOR TRIAL**

The City of Pocatello (Pocatello) and the United States Bureau of Land Management (BLM) were the only parties to file objections to the City of Pocatello's 38 state-law water right claims recommended at the SRBA court.

The BLM objections were dismissed with prejudice. The United States of America, on behalf of BLM, was at one time an objector in 30 of these 38 subcases, but those objections were dismissed with prejudice in November 2004.¹

¹ On November 13, 2003, the United States of America acting through the Department of Interior, Bureau of Land Management, Idaho State Office, filed objections to certain elements in the Director's Report for 30 of the City of Pocatello's 38 state-law based SRBA claims (BLM Objections). The City of Pocatello and the United States of America filed on November 18, 2004 a Joint Motion to Dismiss Objections, seeking to dismiss with prejudice the BLM Objections. On November 22, 2004, Special Master Bilyeu issued an order granting the Joint Motion to Dismiss Objections. The 30 subcases were: 29-00271, 29-00272, 29-00273, 29-02274, 29-02338, 29-02382, 29-02401, 29-02499, 29-04221, 29-04222, 29-04223, 29-04224, 29-04225, 29-04226, 29-07106, 29-07322, 29-07375, 29-07450, 29-07782, 29-11339, 29-11344, 29-11348, 29-13558, 29-13559, 29-13560, 29-13561, 29-13562, 29-13637, 29-13638 and 29-13639.

The City of Pocatello's Swan Falls objections are part of a designated basin-wide issue.
See Basin-Wide Issue 91-13 (Previously Consolidated Subcase 92-00037) *Order Designating Basin-Wide Issue Re: To What Extent, if any, Should the Swan Falls Agreement be Addressed in the SRBA or Memorialized in a Decree?*, dated August 23, 2004.

The City of Pocatello's objections seeking remarks and/or general provisions related to storage, and municipal place of use have been settled. This is based on IDWR's "24-Hour Fill" rule. The City also accepted the following language in the Director's Report: "Place of Use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law."

Stipulations among the parties have eliminated objections to elements of individual water rights.

29-4221: Stipulation to resolve objection to priority date; agreed to change to 8/02/1943.

29-7450: Stipulation to resolve objection to point of diversion; agreed to T06S R33E S10 NESE within Power County and T06S R33E S15 SWNE within Power County.

29-11344: Stipulation to resolve objection to point of diversion; agreed to T06S R33E S10 NESE within Power County.

29-13636: Stipulation to resolve objection to place of use; agreed to Place of use is within the service area of the City of Pocatello municipal water supply system as provided for under Idaho Law.

29-13638: Stipulation to resolve objection to point of diversion; agreed to T06S R33E S10 NESE within Power County and T06S R33E S15 SWNE within Power County.

The City's Separate streams / separate administration general objections were withdrawn.

See *Joint Motion to Accept Stipulation and Agreement Between the City of Pocatello and the United States*, Subcase Nos. 29-00271, et al. dated May 31, 2006; *Stipulation and Agreement with the United States of America in Pocatello's SRBA Subcases 29-271 et seq.*, dated April 2006; and July 14, 2006 *Order Dismissing Portions of Objections and Responses with Prejudice*, Subcase Nos. 29-00271, et al.

Objections withdrawn as to specific issues as to individual water rights:

29-4223 (the objection as to quantity is withdrawn);

29-4226 (the objection as to quantity is withdrawn);

29-7782 (Swan Falls is only remaining issue)

29-7222 (Swan Falls is only remaining issue);

29-2354 (Swan Falls is only remaining issue);
29-7502 (Swan Falls is only remaining issue); and
29-7431 (Swan Falls is only remaining issue).

II. ISSUES PRESENTED FOR TRIAL

At the trial set to begin on Monday, February 26, 2007, the City of Pocatello will present evidence and legal argument on several substantive questions concerning the defined elements, and interrelated operation of, the City's municipal water system, along with other subsidiary matters related to these primary substantive questions that also arise from the objections that have made in the above-referenced subcases.

As to the primary questions that the city of Pocatello will raise at trial, the city will argue that the water rights represented by its system of twenty-two physically connected ground water wells should be administered according to priority under the appropriation doctrine as a single integrated system, without the "remarks" proposed by the Department for certain individual wells. The remarks identify a particular priority and quantity of use to be associated with a particular well. The City will also argue that its claimed water rights should be consistently and uniformly decreed for the broadly defined "municipal purposes," as has been defined at common law and memorialized by statute. Within the context of the comprehensive municipal purpose of its water right claims, the City will also argue that its water rights should be decreed upon the overriding premise that the City operates a single integrated water rights system, including both surface and groundwater sources, for delivery of culinary water, and that the City's water rights served by that system should be both decreed and administered based upon that overriding premise.

As further argued below, the City's claims that are at issue in the pending trial are in substantial part supported by the "accomplished transfer" statute, I.C. § 42-1425, in relation to the City's interconnected water sources; in respect to the integrated surface and ground water rights system for the City; and as to the alternate points of diversion for the waters rights that can be withdrawn by the use of any of Pocatello's 22 interconnected wells.

Cutting across all the questions to be addressed at trial is the persistent issue of identifying and adjudicating only those matters that are necessary for the definition and administration of a water right that are within the primary jurisdiction of the court, while deferring to a later day those matters that are more properly left to the administration of a decreed water right that are within the primary jurisdiction of the IDWR.

III. ACCOMPLISHED TRANSFERS UNDER I.C. § 42-1425

The City of Pocatello objects to the following remark being included on each of the water right claims diverted by the 22 interconnected wells for the purpose of defining the water right:

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:
Pocatello Well No. ____, located in [legal description] on [date] in the amount of ____ cfs.

The Supplemental Director's Report (April 13, 2006) included the following rationale for including the above-stated remark:

In its claims, Pocatello claimed all of its points of diversion on all of its rights under the theory of an accomplished transfer. *See*, Idaho Code § 42-1425. To support its claims, Pocatello provided a map showing the location of each point of diversion and the distribution system as it existed on November 19, 1987. By listing all of its points of diversion for all of its water rights, the City would be allowed to withdraw water under its most senior priority water right from any well location. The Department, in order to recommend multiple, alternate points of diversion on the City's interconnected water rights under an accomplished transfer theory, **included a condition to prevent injury that could result from this practice**. Without the condition, the Department would not have recommended the multiple, alternate points of diversion because injury to other water rights was likely.

Supplemental Report at pp. 12-13 (emphasis added).

The city opposes the imposition of the remark as not required for the definition of a water right; as not supported by the accomplished transfer statute, I.C. § 42-1425; and that the Department

does not have legal authority to impose the remark for the purposes it has stated in the Amended Director's Report.

This dispute puts directly at issue the question of whether the Department can place the proposed remark on these water rights, as a matter of law, and not violate the provisions of the accomplished transfer statute, I.C. § 42-1425, which in relevant part, provides as follows:

(2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 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 requirement of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures:

(a) 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.** After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right.

(Emphasis added).

Until it recommended Pocatello's claims in the SRBA, the Department had *never before* imposed conditions on accomplished transfers claimed by other cities in the SRBA. Prior to the Director's Report for Basin 29, IDWR routinely recommended to the SRBA Court entry of partial decrees for claimants for alternate points of diversion for multiple water rights without the condition that is recommended for Pocatello's wells. See City of Roberts, 35-04241, 35-07886; City of Aberdeen, 35-04070, 35-04071, 35-07808; Lamb Weston Inc., 35-02603, 35-04127, 35-12670; City of Hazelton, 36-02282, 36-04250, 36-07858; City of Jerome, 36-02518, 36-04195, 36-04196, 36-08237, 36-15361; City of Paul, 36-04083, 36-07206, 36-07899; City of Rupert, 36-04075, 36-07115,

36-07656, 36-07862, 36-07863, 36-15488, 36-15489; City of Twin Falls, 36-02603A, 36-02646; City of Burley, 36-02648A, 36-02729, 36-08154; Union Pacific Railroad Co, 36-04203, 36-04204.

The Department has clearly predicated the placement of this remark upon the water rights associated with these wells upon the hypothetical occurrence of some “future” injury arising from the exercise of Pocatello’s water rights.

The City will argue that the proposed remark is being placed for an improper purpose in further defining an accomplished transfer water right by a means not recognized by the statute; and that under that statute the only injury that is relevant is whether any injury arose as a result of the accomplished transfer as of November 19, 1987. Further, that inquiry is only appropriate after an allegation of injury to an identified water right.

The city of Pocatello will establish at trial the absence of facts demonstrating injury to any identified water right – as of November 19, 1987 – or the present - as a result of Pocatello’s use of the alternate points of diversion at these wells under these water rights prior to that date. The city of Pocatello will also argue that the placement of these remarks within these water rights exceeds the legal authority granted by statute for the definition of a water right.

The SRBA district court has recognized, specifically in respect to conjunctive management issues, that its decrees do not make all factual determinations necessary for conjunctive administration of surface and ground water rights.

IDWR is charged with the duty of administering water rights in accordance with the prior appropriation doctrine and determine specific interrelationships based on information not necessarily contained in the partial decree. . . . The partial decree need not contain information regarding how each particular water right on the source physically affects one another for purposes of curtailing junior rights in the event of a delivery call. Rather, IDWR makes this determination based on its knowledge and data regarding how the water rights are physically interrelated.

Order on Basin-Wide Issue 5 at 19.

Simply stated, water right adjudications do not decide all the factual questions relevant to administration, but rather leave many such issues to the administrative process. *See e.g. Tudor v. Jaca*, 164 P.2d 680, 686 (Or.1946) (“The court, having established the priorities, should not attempt to anticipate exigencies which may arise in administration of the decree, but should leave such matters to the water master, whose duty it is to preserve the priorities and the quantities consistently with the highest duty of water, as applied to all concerned”) (internal quotation marks and citation omitted).

This is particularly true in determining to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.” *A&B Irr. Dist.*, 131 Idaho at 422, 958 P.2d at 579. These matters are left to IDWR because the SRBA cannot make all these technical determinations, as the SRBA district court has observed:

the scope of these proceedings should not include a factual determination of the specific interrelationships or the degree of connectivity between specific water rights (i.e. which particular junior water rights will be curtailed in the event a delivery call by a senior). Factually, the Court could not make findings as to exact relationships. As indicated by IDWR, the technology and the data do not presently exist for making such determinations. Even if the technology and data did exist the task of making such factual determinations would be monumental in terms of scope. Lastly, the specific interrelationships are dynamic as opposed to static. Therefore, any factual determinations made by the Court would be subject to change depending on climatic conditions and future geological activity.

Order on Basin-Wide Issue 5 at 19.

The Director is “the expert on the spot [with] the primary responsibility for a proper distribution of the waters of the state,” not a special master or referee who resolves delivery calls under judicial procedures developed for private water rights litigation. *Keller v. Magic Water Co.*, 92 Idaho 276, 283, 441 P.2d 725, 732 (1968) (internal quotation marks and citations omitted). The Director is at times called upon to exercise judgment and decide questions but, when his or her judgment is exercised as a means of administering the law, those acts are administrative, rather than judicial. *Speer v. Stephenson*, 16 Idaho 707, 718, 102 P. 365, 369 (1909); *see also Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 395-96, 283 P. 522, 525-26 (1920) (holding that the commissioner of reclamation determines when an appropriator is able to beneficially use water and may either deliver or refuse to deliver water, even though he decree made the appropriator the judge of when water could be so used); *A & B Irr. Dist.*, 131 Idaho at 415, 958 P.2d at 572 (1997) (“The Director has the administrative duty and authority . . . to prevent wasteful use of water by irrigators).

The proposed remark should be stricken from the water rights associated with these wells.

IV. MUNICIPAL WATER RIGHTS

The city of Pocatello is a municipality organized under the laws of the state of Idaho. Its surface and ground water rights are derived from interconnected sources. The city uses water under these water rights for all purposes allowed by law for a “municipal” water right.

Municipal water rights are broadly defined under Idaho common law as encompassing a broad spectrum of valid uses of water by a municipality. The city of Pocatello has submitted its

POCATELLO’S TRIAL BRIEF – PAGE 7

water right claims within the broad category of “municipal” water rights available for year-round use. All of the water rights at issue for trial fall within the uses, and related purposes, included within the common law category of municipal use, as at least partially codified in I.C. § 42-202B(6). All of the uses, as described, fall within the broad category of “municipal use.” Idaho common law and statutes have provided for this broad and all-encompassing category for the benefit of the many different uses of water that are made by a typical Idaho municipality. Just because a municipality specifically uses water to accomplish waste disposal does not provide a legal basis for the elimination of those water uses from the classification of municipal use.

The reason for establishing the “municipal use” category was to provide municipalities with the flexibility over time to shift and adjust water use and application within the various categories that are included in “municipal use.” The proposed exclusion of certain of the city’s water rights from the municipal use category is not supported by law, and does not advance any public policy purpose in the efficient development use of Idaho’s water. The decision to omit water rights 29-7118, 29-7119, and 29-7770 from the “municipal use” category is without support in Idaho law. The error of law in the licensing of these water rights as “irrigation use” is not binding. Pocatello’s water rights 29-7118, 29-7119, and 29-7770 should be decreed for “municipal use.”

V. WATER RIGHTS FROM INTERCONNECTED SOURCES

The Department, in recommending Pocatello’s water rights have has asserted that both the City and the State are bound by provisions of a 1999 transfer accomplished under the authority of I.C. § 42-222, which failed to recognize the interconnection of Pocatello’s points of diversion and contained numerous errors of fact. The Department, by its administrative actions, cannot perpetuate mistakes of law or fact. *See, Kelso & Irwin, P.A. v. State Insurance Fund*, 134 Idaho 130, 138, 997 P.2d 591, 599 (2000).

Pocatello’s diversion of its surface water rights and ground water rights from the City’s interconnected culinary system is not a source of injury to other water users. Therefore, the City’s surface water rights and ground water rights for its interconnected culinary system should be decreed with the 22 wells as alternates point of diversion.

VI. MISCELLANEOUS DISCRETE FACTUAL ISSUES

The rate of diversion for 29-4222, the priority date for 29-13558, and the priority date for 29-13639 will be addressed individually at trial.

VII. CONCLUSION

The Court should determine that:

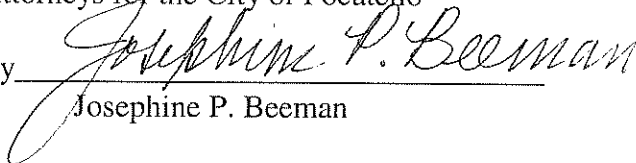
1. Water rights 29-7118, 29-7119, and 29-7770 be decreed for "municipal purposes."
2. The remark imposed by IDWR under the accomplished transfer statute, I.C. § 42-1425 should be removed from every affected water right.
3. The City's interconnected wells are alternate points of diversion for the City's four surface water rights.
4. The rate of diversion for 29-4222, the priority date for 29-13558, and the priority date for 29-13639 should be decreed as claimed.

DATED this 15TH day of February 2007.

BEEMAN & ASSOCIATES, P.C.

Attorneys for the City of Pocatello

By


Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15TH day of February 2007, I caused a true copy of the foregoing **CITY OF POCA TELLO'S TRIAL BRIEF** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

UNITED STATES OF AMERICA REPRESENTED BY: US DEPARTMENT OF JUSTICE ENVIRONMENT & NAT'L RESOURCES 550 WEST FORT STREET, MSC O33 BOISE, ID 83724	C. TOM ARKOOSH ARKOOSH LAW OFFICES, CHTD. PO BOX 32 GOODING, IDAHO 83330
NATURAL RESOURCES DIV CHIEF STATE OF IDAHO ATTORNEY GENERAL'S OFFICE PO BOX 44449 BOISE, ID 83711-4449	W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY, IDAHO 83318
DIRECTOR OF IDWR PO BOX 83720 BOISE, ID 83720-0098	ROGER D. LING LING ROBINSON & WALKER PO BOX 396 RUPERT, IDAHO 83350
	JOHN A. ROSHOLT TRAVIS L. THOMPSON BARKER ROSHOLT & SIMPSON 113 MAIN AVE. WEST, SUITE 303 TWIN FALLS, IDAHO 83301-6167

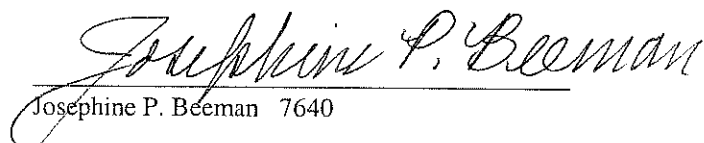

Josephine P. Beeman 7640

EXHIBIT A

Subcase Numbers

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