

RECEIVED

2008 MAY 28 AM 9:20

MAY 29 2008

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SELA
TWIN FALLS CO., IDAHO
FILED

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: See Attached Exhibit A
) (Pocatello State-Based)

)
) ORDER DENYING MOTION TO ALTER OR
) AMEND

I. PROCEDURAL BACKGROUND

The City of Pocatello (hereafter "Pocatello") filed claims in the SRBA to its state-based water rights. After *Director's Reports* were issued, Pocatello filed *Objections*. The State of Idaho filed *Responses* to the *Objections*. Additional parties, referred to collectively as the Surface Water Coalition, participated in earlier proceedings. The Surface Water Coalition settled with Pocatello on the opening day of trial. Pocatello and the State of Idaho continued as parties throughout the trial.

The primary issues at trial were: 1) Whether Pocatello's city wells qualified as alternative points of diversion for its senior surface water rights; 2) Whether a descriptive condition should be placed on Pocatello's groundwater rights if the rights are decreed with the city's wells as alternative points of diversion; 3) Whether three water rights should be decreed with an "irrigation" purpose of use or a "municipal" purpose of use; and 4) Whether two claims (29-13558 and 29-13639) should have earlier priority dates than recommended in the *Director's Report*.

A *Master's Report and Recommendation and Order on Motion to Reconsider* was issued October 2, 2007, and an *Amended Master's Report and Recommendation and Order on Motion to Reconsider* was issued October 30, 2007 (which corrected only the place of use to

indicate it was the service area of the City of Pocatello municipal system). Pocatello filed a *Motion to Alter or Amend*.

II. ISSUES

Pocatello filed a timely *Motion to Alter or Amend* the *Amended Master's Report and Recommendation*. The *Motion to Alter or Amend* sought a ruling on: 1) Did the *Master's Report* rule correctly on additional evidence submitted after trial; 2) Did the *Master's Report* rule correctly on I.C. § 42-1425; 3) Did the *Master's Report* rule correctly by denying Pocatello's wells as alternate points of diversion for its surface water rights; 4) Did the *Master's Report* correctly include a limitation on Pocatello's interconnected well system; 5) Did the *Master's Report* correctly determine the purpose of use for water right 29-7770; and 6) Did the *Master's Report* correctly determine the priority dates for 29-13558 and 29-13639.

Pocatello provided well-reasoned arguments regarding these issues, but after further consideration, the *Motion to Alter or Amend* is denied.

III. ANALYSIS

A. Additional Evidence

After these subcases were tried and after closing arguments by counsel, the court allowed the parties to file post-trial briefs. Pocatello submitted a post-trial brief and an *Affidavit of Josephine P. Beeman in Support of Pocatello's Post Trial Brief*. Attached to the *Affidavit* were 11 additional exhibits. Exhibit 1 is a copy of the State of Idaho's opening brief in a 1995 case which went to the Idaho Supreme Court. Exhibit 2 is a copy of the State of Idaho's reply brief in the same 1995 case. Exhibit 3 is a copy of IDWR's reply brief in a 2006 case which went to the Idaho Supreme Court. Exhibit 4 is Pocatello's federal law water right claim. Exhibit 6 is a copy of the draft statewide water management rules from 2001. Exhibits 5 and 7-11 are similar. The State of Idaho objected to the additional exhibits as impermissible additional evidence submitted after the close of Pocatello's case and in violation of the court's pretrial orders. *See State of Idaho's Brief in Support of Motion to Strike Affidavits of Josephine P. Beeman*.

The Special Master granted the *Motion to Strike* on the grounds that the *Affidavit of Josephine P. Beeman* improperly submitted evidence after Pocatello had rested its case and in violation of the court's pretrial orders. Pocatello filed *Pocatello's Motion for Reconsideration*

urging the court to consider the attachments as “legal argument,” rather than additional evidence. The Special Master **denied** the motion. Pocatello’s argument on the *Motion to Alter or Amend* is the same. As stated in the earlier *Amended Special Master’s Report and Recommendation*, this court has considered all of Pocatello’s legal arguments, including the legal arguments related to the stricken attachments. However, the post-trial evidence was not properly offered, did not comply with the pretrial orders, and should remain stricken from the record.

B. I.C. § 42-1425

The trial focused on whether Pocatello’s senior surface water rights from Mink Creek and Gibson Jack Creek were connected closely enough to the groundwater wells proposed as alternative points of diversion to be considered the same source. This became a critical focus because I.C. § 42-1425, the accomplished transfer statute, does not provide for a change in source.

The *Amended Special Master’s Report and Recommendation* held that Idaho’s accomplished transfer statute, I.C. § 42-1425, allows for certain changes in established water rights even if those changes violate the mandatory transfer procedures. The accomplished transfer statute provides for changes in “place of use, point of diversion, nature or purpose of use, or period of use.” I.C. § 42-1425. The statute does not provide for changes in source or priority elements. Pocatello argues that IDWR has recognized changes in source under this statute. However, this court adheres to the analysis that the statute does not provide for a change in the source element.

C. Pocatello’s Wells as Alternate Points of Diversion

The *Amended Special Master’s Report and Recommendation* did not recognize Pocatello’s groundwater wells as points of diversion for its oldest surface water rights out of Mink Creek and Gibson Jack Creek. This finding was made considering the evidence at trial, including the *Supplemental Director’s Report*, and the testimony of Carter Fritschle and Gregg Sullivan.

Pocatello argues that the *Amended Special Master’s Report and Recommendation* was improperly based on IDWR’s Transfer Processing Memo No. 4; Exhibit 1, *Supplemental Director’s Report*, attachment 6. Pocatello argues that the Transfer Processing Memo is not binding in SRBA proceedings.

Pocatello misunderstands the basis of the holding in the *Amended Special Master's Report and Recommendation*. The *Amended Special Master's Report and Recommendation* analyzed whether Pocatello's surface water rights were from the same source as the wells because Pocatello claimed the wells as alternate points of diversion under I.C. § 42-1425.

That section of the code does not provide for a change in source. The court's analysis was based on I.C. § 42-1425 which does not provide for changes in source. In addition, the court's analysis relied on cited case law which analyzed when water rights are considered the same or different sources. Pocatello's argument that the *Amended Special Master's Report and Recommendation* improperly followed Transfer Processing Memo 4 is incorrect. The court's analysis did not depend on Transfer Processing Memo No. 4.

D. Conditions on Interconnected Wells

Pocatello claimed the water rights associated with its large interconnected well system, claiming the other wells as alternative points of diversion. Pocatello explained that water rights in its interconnected system have used other wells as points of diversion if one well is unusable. Thus, the *Director's Report* recommended 22 wells as alternative points of diversion, but added a condition the Director deemed necessary to prevent injury to existing water rights. The *Amended Special Master's Report and Recommendation* agreed, recognizing the alternative points of diversion and requiring the condition. The condition states:

The extent necessary for administration between points of diversion for groundwater, and between points of diversion for groundwater and hydraulically connected surface sources, groundwater was first diverted under this right from Pocatello well (legal description) in the amount of ____ cfs.

The condition provides four (4) important pieces of information including the identification of the well, date of the well, quantity, and explanation of administration. IDWR concluded that other wells would be injured without this condition. The *Amended Special Master's Report and Recommendation* concurred with that conclusion. Pocatello argues that the *Amended Special Master's Report and Recommendation* improperly relied on evidence of "speculative injury" to other water rights.

Pocatello argues that IDWR Director David Tuthill's testimony provided evidence of only speculative injury. This Special Master disagrees. Mr. Tuthill's expert testimony referred to Pocatello's wells injuring existing groundwater rights by leap frogging in priority ahead of senior rights. Mr. Tuthill testified that unless information about the priority, location, and

quantity of each well was identified, the use of each well would improperly move ahead of wells with senior priority dates. The injuries to which Mr. Tuthill referred are not speculative. Where a change to a water right moves it ahead in priority, the injury to existing rights is real and immediate. In a prior appropriation state, the priority of a water right is perhaps the seminal element. A diminishment to the priority of an existing right is real and immediate. IDWR properly considered this impact. The condition was added so that the addition of alternative points of diversion did not allow the more junior rights to jump ahead in priority. Mr. Tuthill concluded, and this Special Master agrees, that allowing the alternative points of diversion without the condition would inflict a real, identifiable, and material injury on existing rights by subverting the priority dates.

E. Purpose of Use of 29-7770

Pocatello argues that the purpose of use for 29-7770 is “municipal.” The *Amended Special Master’s Report and Recommendation* concluded that the purpose for 29-7770 is “irrigation.” The *Amended Special Master’s Report and Recommendation* held that Pocatello established a biosolids program in 1981 and, based on that, recommended a “municipal” purpose for 29-7118 and 29-7119. However, 29-7770 was licensed in 2003 with “irrigation” as the purpose of use. The license date is legally significant. Even though Pocatello now leases the land associated with this right to a farmer who is required to grow crops to promote the city’s biosolids program, the 2003 licensure established the purpose as “irrigation.” Thus, the right does not qualify for a valid accomplished transfer since the right was licensed after the commencement of the adjudication.

F. Priority Dates for 29-13558 and 29-13639

Pocatello disputes the priorities for 29-13558 and 29-13639. The *Amended Special Master’s Report and Recommendation* concluded that the priority for 29-13558 was July 16, 1924. Pocatello sought an earlier date of June 30, 1905. Pocatello argues that the evidence does not contradict a finding of June 20, 1905, and urges the court to change the finding. However, the evidence is not sufficient to prove a priority of June 30, 1905. Pocatello argued that an earlier date could have been possible. But, ultimately, the court must look at the evidence presented. After weighing the evidence, the court continues to conclude that the priority date proved for 29-13558 is July 16, 1924.

The *Amended Special Master's Report and Recommendation* concluded that priority for 29-13639 was October 21, 1952. Pocatello sought an earlier date of December 21, 1940. The city argued that there is no evidence to contradict the earlier date of December 1940. However, the court starts with the *Director's Report* which recommended October 21, 1952. That date was based on the license file which described the water right with "three wells drilled and in use for varying periods." The application for permit on which the license was based is dated October 22, 1952. Since the language in the permit and license indicates the wells were already in use on October 22, 1952, IDWR recommended a date one day earlier. Thus, the priority date was recommended as October 21, 1952. The *Amended Special Master's Report and Recommendation* concurred. Pocatello argues that the priority could have been December 21, 1940, since no evidence contradicts a date that early. However, the SRBA starts with the *prima facie* weight accorded the *Director's Report* conclusion of October 21, 1952. Pocatello has the burden of production and the burden of proving the earlier date of December 21, 1940. This Special Master holds that the evidence presented was insufficient to prove the date of December 21, 1940. The priority date for 29-13639 is October 21, 1952.

IV. CONCLUSION

After considering the pleadings, evidence, testimony, and legal arguments, the *Motion to Alter or Amend* is **denied**. Pocatello's oldest water rights on Mink Creek and Gibson Jack Creek should be confirmed. However, the evidence at trial showed that the city's groundwater wells are not alternative points of diversion for these surface water rights. Pocatello's well system was largely interconnected prior to 1987, and it is appropriate to recognize the wells as alternate points of diversion as the *Director's Report* did. However, those alternative points of diversion are properly tied to a condition which identifies the location, date, and quantity of the original wells. Without such a condition, these alternative points of diversion would impermissibly subvert the priorities of existing rights.

Water right 29-7770 was licensed in 2003 with an irrigation purpose. The licensed purpose was not a mistake of law. No valid accomplished transfer can now occur under I.C. § 42-1425. Such a change would have to occur after the license and prior to the statutory deadline of 1987. Therefore, no valid accomplished transfer occurred for 29-7770. Accordingly, the purpose of use is irrigation.

Pocatello alleged earlier priorities for 29-13558 and 29-113639 than the dates recommend in the *Director's Report*. After reconsidering the pleadings, evidence, and testimony at trial, the court is persuaded that the priority for 29-13558 is July 16, 1924. The priority for 29-13639 is October 21, 1952.

THEREFORE, considering the pleadings, evidence at trial, and argument on the *Motion to Alter or Amend*, the *Motion* is denied.

Dated May 28, 2008



BRIGETTE BILYEU
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND was mailed on May 28, 2008, with sufficient first-class postage to the following:

CITY OF POCATELLO

Represented by:
A. DEAN TRANMER
CITY OF POCATELLO
PO BOX 4169
POCATELLO, ID 83201
Phone: 208-234-6148

AMERICAN FALLS RESERVOIR

Represented by:
C THOMAS ARKOOSH
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

AMERICAN FALLS RESERVOIR

Represented by:
DAVID HEIDA
301 MAIN ST
PO BOX 32
GOODING, ID 83330
Phone: 208-934-8872

CITY OF POCATELLO

Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702
Phone: 208-331-0950

STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT

Represented by:
ROGER D LING
615 H ST
PO BOX 396
RUPERT, ID 83350-0396
Phone: 208-436-4717

CITY OF POCATELLO

Represented by:
SARAH A KLAHN
WHITE & JANKOWSKI LLP
KITREDGE BUILDING
511 16TH ST STE 500
DENVER, CO 80202
Phone: 303-595-9441

MILNER IRRIGATION DISTRICT
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

UNITED STATE OF AMERICA
UNITED STATES OF AMERICA

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

MINIDOKA IRRIGATION DISTRICT

Represented by:
W KENT FLETCHER
1200 OVERLAND AVE
PO BOX 248
BURLEY, ID 83318
Phone: 208-678-3250

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

UNITED STATES OF AMERICA
US DEPT OF JUSTICE, ENRD
550 W FORT ST MSC 033
BOISE, ID 83724

EXHIBIT A POCATELLO STATE-BASED

Subcase Nos:

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