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WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

SHASTA KILMINSTER-HADLEY (ISB #7889)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 334-2690

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	)	STATE OF IDAHO'S RESPONSE TO CITY OF
	)	POCATELLO'S POST-HEARING BRIEF
	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorney general and submits the STATE OF IDAHO'S RESPONSE TO THE CITY OF POCATELLO'S POST-HEARING BRIEF in the above-entitled matter.

- 1. The City of Pocatello's Post-Hearing argument that a change in source is permissible under Idaho Code § 42-1425, raises a new issue that is not properly before the Court.**

SRBA Administrative Order #1 states that a notice of challenge shall contain a detailed description of the issues, and that "[o]nce raised and detailed, the issue(s) on challenge may not be amended to include additional issue(s) not specifically identified in the Notice of Challenge except on motion and leave of the court." AO1 § 13(c). In its Opening Brief on Challenge

STATE OF IDAHO'S RESPONSE TO CITY OF POCATELLO'S POST-HEARING BRIEF

(“Opening Brief”), the City of Pocatello articulated three challenges to Special Master Bilyeu’s determination that its groundwater wells could not be designated alternative points of diversion for its surface water rights at Mink Creek and Gibson Jack Creek. First, the City argued that the Special Master erred as a matter of law in considering the degree of interconnection between the City’s ground and surface water rights under American Falls. Second, the City argued that the Special Master erred in applying the standards of the Clear Springs case and IDWR’s Transfer Processing Memo No. 24 to the City’s water rights. Third, the City argued that it was an error as a matter of law for the Special Master to conclude that the sources were not interconnected because Pocatello’s expert testimony sufficiently rebutted IDWR’s prima facie evidence.

Nowhere in its Opening Brief did Pocatello argue that the Special Master erred in concluding that Idaho Code § 42-1425 does not authorize a change in source. Rather, the City argued that the Special Master applied the wrong standards in determining whether its groundwater and surface water rights diverted from the same source.

[W]hen evaluating whether the surface water and groundwater sources were sufficiently interconnected to be the same source, an inquiry which should not have been undertaken according to the Court in American Falls, the Special Master applied standards which should not have been applied to Pocatello’s accomplished transfers. The Special Master applied the law from the *Clear Springs* case, but *Clear Springs* dealt with the degree of interconnection between two surface sources, not to the interconnection of surface and groundwater. Because the two situations are highly distinguishable, the standard should not be applied to Pocatello’s request for accomplished transfers.

Opening Brief, p. 13-14. In fact, in the State’s Response to the City of Pocatello’s Opening Brief on Challenge (“Response Brief”), it pointed out that, “Pocatello does not appear to dispute that a change in source is not authorized by Idaho Code § 42-1425, rather it claims that because its Basin 29 rights are connected, there would be no change in source if its ground water wells were used to divert water under its surface water rights.” Response Brief at 12. Pocatello did not rebut

the State's assertion. Thus, the issue of whether Idaho Code § 42-1425 authorizes a change in source is therefore not properly before this Court and should not be decided in this consolidated subcase.

Similarly, Pocatello's attempt to supplement the record with partial decrees that the city offers in support of its claim on this new issue is improper. In its Post-Hearing Brief, Pocatello attaches two partial decrees not introduced into evidence during the trial and not previously presented to this court on challenge. The decrees are offered in support of the City's position on an issue that is not properly before the Court. Furthermore, even if the issue had been properly raised in Pocatello's challenge, if counsel wanted to submit additional evidence, counsel should have sought to open the record to additional evidence. This was not requested in the notice of challenge. The opportunity to do this was not provided for in the court's Challenge Scheduling Order and was not requested at the oral argument on the challenge. Attempting to get this court to entertain new evidence after we have already had the hearing on the challenge is improper. The court should disregard Pocatello's attempts to improperly supplement the record in this way.

- 2. The Special Master properly determined that Pocatello's ground water wells cannot be designated as alternative points of diversion for its surface water rights under Idaho Code § 42-1425 because such a change would amount to a change in source.**

Pocatello asserts its ground water wells as alternative points of diversion for its senior surface water rights, claiming an accomplished transfer under Idaho Code § 42-1425. Idaho Code § 42-1425 (2006) (2) states in part as follows:

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 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, [1] prior to November 19, 1987, . . . may be claimed in the applicable general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided

[2] no other water rights existing on the date of change were injured and [3] the change did not result in an enlargement of the original right.

Id. (emphasis added). The statute allows for the change in every element of a water right *except* the source element. Pocatello argues in its Post-Hearing Brief that the omission of “source” from the listed elements permitted to be changed should not be read to disallow changes in source. “However, since a change in source necessarily includes a change in point of diversion, this statutory language is not to be interpreted as prohibiting changes in source.” Post-Hearing Brief, p. 6. This inductive reasoning is simply wrong; changes in points of diversion that draw from the same source are explicitly permitted. Changes that would result in the new point of diversion drawing from a *different water source*, are not.

IDWR has not taken an unreasonably narrow reading of the statute. The Department has recognized that there are hydrologic scenarios in which a groundwater right and a closely connected surface water right are actually diverting the *same water*. In those cases, IDWR may recognize a change in point of diversion from surface to groundwater, because the actual source of the water is the same.

Pocatello’s groundwater rights divert from the Lower Portneuf River Valley Aquifer (“LPRVA”), while the surface water rights divert from Mink Creek and Gibson Jack Creek. Pocatello’s expert testified as to how the creeks and the aquifer are hydraulically connected. IDWR’s witness testified that, while the sources were hydraulically connected, the distance between the wells and the creeks was great enough that the wells could not be said to be drawing the same water as the surface rights would. After reviewing the testimony of both witnesses, the Special Master concluded

“[a] showing that two separate water rights have independent sources or are fed by different springs supports a finding of a separate source...the city wells, although closely connected to the surface creeks, derive water from a different source when they draw from the LPRVA. Although the LPRVA derives a large

portion of its water from the two creeks, it derives a significant portion of water from other sources.”

Amended Report, p. 12.

The Special Master’s findings of fact should be adopted by this Court unless they are clearly erroneous. I.R.C.P. 53(e)(2). Pocatello has presented no evidence to support rejecting the Special Master’s findings of fact. Rather, the city claims that it was an error as a matter of law for the Special Master to investigate whether Pocatello’s water rights divert from the same source. On the contrary, the SRBA is charged with determining the nature and scope of water rights, including the water source. The Special Master properly undertook an analysis of the source elements of Pocatello’s groundwater and surface water rights to determine if an accomplished transfer of alternative points of diversion was authorized by Idaho Code § 42-1425. After hearing the expert testimony of Pocatello’s witness and the Department’s witness, the Special Master concluded that such alternative points of diversion would amount to a change in source, which is not authorized by the statute. As Pocatello has presented no evidence that the Special Master’s findings were clearly erroneous, the Court should uphold the Amended Report.

3. **The Special Master properly determined that even if the proposed transfer was otherwise proper under Idaho Code § 42-1425, it would cause injury to existing water users, and is therefore impermissible under the statute.**

Idaho Code § 42-1425 states that certain changes may be claimed “provided no other water rights existing on the date of the change were injured and the change did not result in the enlargement of the original right.” In her amended report, Special Master Bilyeu determined that the proposed transfer would result not only in an impermissible change in source, but also would cause injury to existing water rights.

Finally, even though the ground and surface sources are connected, the city could not transfer its point of diversion to groundwater without injuring

junior ground water pumpers who appropriated prior to the city establishing its wells. The significance of the connection between the groundwater and surface water is not such that groundwater pumping results in depletions to surface flow. Accordingly, in times of shortage to surface flows, the city could not initiate a delivery call against prior groundwater pumpers. However, allowing the city to transfer its alternative source to groundwater would allow the city, in times of shortage, to initiate a call against groundwater pumpers based on the priority for its surface rights. This results in injury to junior groundwater pumpers. Under the “no injury rule” juniors are entitled to the conditions as they existed at the time of appropriation. *Crockett v. Jones*, 47 Idaho 497, 277 P. 550 (1929); *Bennett v. Nourse*, 22 Idaho 249, 125 P. 1038 (1912). A senior may not change an element of its right, including a point of diversion, if the change would result in injury to a junior. *Id.* This is exactly what would occur if the city were permitted to treat its wells as alternative points of diversion for its senior surface rights instead of treating the wells as new appropriations.

Amended Report p. 12.

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 priority dates extending back to before 1900. 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. The effect of the City’s proposal to designate its groundwater wells as alternative points of diversion for its surface water rights is to transform an unreliable surface water supply to a ground water supply that will always be there.

The City’s surface water rights on Mink Creek and Gibson Jack Creek are naturally curtailed in times of severe drought when those tributaries run dry. Allowing Pocatello to designate its groundwater wells as alternative points of diversion for those rights would

essentially allow the City to divert groundwater under surface water rights that would not normally be satisfied in times of low flows. Additionally, 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. Likewise, if we look at the entire water system, this change would add a water demand that, under the priority system, would have otherwise been cut-off during the drought. That additional demand will operate to the injury of water users downstream of the City.

CONCLUSION

Pocatello has failed to demonstrate, both in its previous briefing and in oral argument that the Special Master committed any errors of law. Neither did Pocatello present any evidence that the Special Master's findings of fact were clearly erroneous. The Court should therefore uphold the Special Master's recommendations and issue partial decrees for the subject water rights in accordance with the Amended Master's Report and Recommendation.

RESPECTFULLY SUBMITTED this 18th day of September 2009.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

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

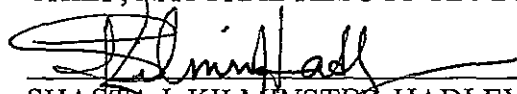

SHASTA J. KILMINSTER-HADLEY
Deputy Attorney General
Natural Resources Division

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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CERTIFICATE OF SERVICE

I certify that on this 18th day of September 2009, I caused to be served the original and/or copy of the **STATE OF IDAHO'S RESPONSE TO CITY OF POCA TELLO'S POST-HEARING BRIEF** 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
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2. Copies to

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

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

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

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United Water Idaho
City of Nampa
City of Blackfoot
c/o Christopher H. Meyer
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720

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Minidoka Irrigation District
c/o W. Kent Fletcher
1200 Overland Ave.
PO Box 248
Burley, ID 83318

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A & B Irrigation District
Burley Irrigation District
c/o Roger D. Ling
PO Box 396
Rupert, ID 83350-0396

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Milner Irrigation District
Northside Canal Company
Twin Falls Canal Company
c/o Travis L. Thompson
113 Main Ave., W., Ste. 303
PO Box 485
Twin Falls, ID 83303-0485

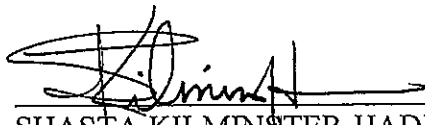
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Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable


SHASTA KILMINSTER-HADLEY
Deputy Attorney General