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DEPARTMENT OF
WATER RESOURCES

**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

Subcase Nos.: 63-2500, 63-2874, 63-
7067 and 63-19456

**UNITED WATER IDAHO INC.'S
MEMORANDUM IN SUPPORT OF
OBJECTIONS**

This Memorandum addresses the objections filed by United Water Idaho Inc. to the Idaho Department of Water Resources' recommendations to the above-captioned water rights claimed by United Water. These subcases present the narrow legal issue of whether the amnesty provided by Idaho Code § 42-1425 (the "Accomplished Transfer Statute") applies to water rights that are the subject of a transfer approved by the IDWR after the commencement of the adjudication. In this memorandum United Water argues the Accomplished Transfer Statute should apply in the particular circumstances of these subcases to allow for decrees that include United Water's claimed alternate points of diversion.

BACKGROUND

United Water claimed its ground water rights in the SRBA with alternate points of diversion for each of the wells in United Water's interconnected municipal water system existing as of the November 19, 1987 adjudication commencement date. The Department recommended

all but a handful of United Water's rights with the same list of 42 alternate points of diversion that indentify the pre-commencement wells. The subcases at issue here are those rights that IDWR did not recognize as having the alternate points of diversion. United Water filed objections and has worked with IDWR to narrow the issue to the one presented above.

United Water filed application for transfer no. 4998 on December 13, 1996 seeking approval of four alternate points of diversion for each of the four water rights at issue here.¹ The Department approved the transfer on January 9, 1998 with conditions that, among others, limited the rights to a combined total of 9.8 cfs. United Water was satisfied with the transfer approval, including its conditions of approval, and therefore did not seek judicial review of the transfer approval.

In the SRBA, United Water seeks decrees for the four rights at issue with the same 42 alternate points of diversion the Court has decreed for the other United Water ground water rights pursuant to the Accomplished Transfer Statute. The Department originally recommended these four water rights with the 42 alternate points of diversion. However, following the objection and response period, the Department issued new recommendations that replaced the 42 points of diversion with only the four wells approved in the transfer. The Department believes its new recommendations are required by the *River Grove* line of SRBA decisions, which hold that the claimants in the SRBA are not permitted to collaterally attack administrative licensing decisions in the SRBA where the claimants failed to seek timely judicial review of the administrative order issuing the license.² *Memorandum Decision and Order on Challenge*;

¹ The application originally requested five wells, but United Water drilled one less well than originally proposed, so in the end, only four wells were requested.

² The Department has not identified any specifics about the rights at issue that would preclude granting the alternate points of diversion other than the collateral attack legal issue.

Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge (River Grove Farms) (Subcases NO. 36-8099) (January 11, 2000) and *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* (Subcases 36-02048 et al.) (December 29, 1999). The Department believes the same rationale from these cases precludes recognition of an accomplished transfer in the SRBA that is different from an administratively approved post-commencement transfer. United Water's position is that the *River Grove* line of cases is distinguishable and that its request for the 42 alternate points of diversion is not a collateral attack on transfer approval no. 4998.

ARGUMENT

1. SEEKING AN ADDITIONAL TRANSFER UNDER THE AMNESTY STATUTE IS NOT A COLLATERAL ATTACK ON A POST-COMMENCEMENT TRANSFER.

These subcases present the issue of whether River Grove and related cases broadly preclude use of the Accomplished Transfer Statute to recognize an accomplished transfer for any right that has been the subject of a post-commencement transfer approval. We argue here that there is no basis for such an expansive legal rule concerning transfers, and that a case-by-case analysis is necessary to determine whether a proposed use of the Accomplished Transfer Statute is a collateral attack.

A. THE COLLATERAL ATTACK DOCTRINE SHOULD APPLY ON A CASE-BY-CASE BASIS IN THE ACCOMPLISHED TRANSFER CONTEXT, NOT AS AN INFLEXIBLE RULE.

The application of the collateral attack doctrine in the SRBA is explained in the *River Grove* line of cases. These cases hold that claimants who failed to exhaust administrative remedies, as a general rule, should not be allowed to alter licensed water rights through the adjudication. Applying this rule, the Court rejected River Grove's attempt to amend license 36-8099 to remove a licensed condition that subordinated the hydropower purpose of use to future, non-power water rights. *River Grove Decision* at p. 21. In similar fashion, the Court rejected

requests by holders of licensed rights to remove a “facility volume” remark that existed on their licenses. *Fish Facility Decision* at p. 15. In both cases, and in several other SRBA decisions that have followed, the Court found that the changes requested in the SRBA are really belated attempts to seek judicial review by water right holders for which there is no legal authority.

These subcases present a different situation. Here there is legal authority for the requested change by way of the amnesty provided by the Accomplished Transfer Statute for right holders that had failed to follow the mandatory transfer process. By seeking the benefits of the Accomplished Transfer Statute, United Water is not seeking to collaterally attack the existing administrative transfer approval for its rights, but rather to use the amnesty provided by the statute to recognize that it accomplished a different, larger transfer prior to the commencement of the adjudication. There is no dispute that this larger transfer occurred. It is the same transfer that the Court has recognized in decreeing the 42 alternate points of diversion for over 60 other United Water ground water rights. The question is whether the law is flexible enough to allow the Court to determine whether the particular situation in this case, and others like it, are permissible uses of the Accomplished Transfer Statute without collaterally attacking an administrative decision. The alternative is a rule that the exhaustion of remedies doctrine so broadly applies that a case-by-case analysis is not allowed any time there has been a post-commencement transfer approval. We believe law and policy both favor the case-by-case approach.

Even in the license situations discussed in the *River Grove* line of cases above, where there is no authority for making changes to an existing license, the SRBA Court has found situations where it can decree language not included in a license notwithstanding the exhaustion doctrine. For example, in the 2007 *Kandler* Decision, the Court allowed objectors to pursue

inclusion of a clarifying remark on the source element of a water right even though they did not pursue the inclusion of this remark in the administrative licensing proceedings. *Memorandum Decision and Order on Motion for Summary Judgment* (Subcase 63-8447) (August 28, 2007) at p. 7. The Court found that the objectors were not required to exhaust their administrative remedies because the further clarification they sought in the SRBA was “not an issue required to be raised or decided in the administrative proceeding. Simply put, there was no problem to remedy.” *Id.*

The subcases at hand present a similar situation. United Water did not seek to remedy the administrative transfer approval because there was no problem with it. The approval dealt only with the four rights and wells United Water framed by its transfer application. United Water was satisfied with the approval and still is. Indeed, United Water accepts that all of the conditions of approval of transfer 4998 should be included in the decrees for the four rights at issue. United Water does not seek to undo or alter anything the Department did in its order approving transfer 4998. United Water is simply asking the Court to recognize that United Water, as a matter of undisputed fact and pursuant to law, accomplished a separate transfer that added additional points of diversion to the same four water rights. This is not a collateral attack.

The situation would be different if United Water sought to use the Accomplished Transfer Statute to achieve something it was unable to accomplish in the administrative proceeding. For example, say United Water had applied for many alternate points of diversion in transfer no. 4998 that the Department denied on the basis of injury. If United Water sought to add those administratively rejected points of diversion in the SRBA, this would properly be viewed as an improper collateral attack. The same would be true if United Water was seeking through the Accomplished Transfer Statute to remove the 9.8 cfs combined use limit that it a

condition of approval of transfer no. 4998. But here, there is no attempt to alter the transfer conditions, or to accomplish something the Department did or should have considered. United Water framed the administrative proceeding by applying for four alternate points of diversion for four water rights. The Department considered this application and made its ruling. There is no reason to deem a request to recognize a different transfer, made pursuant to a different law, as a collateral attack on the Department's approval of transfer no. 4998.

The analysis above shows that a case-by-case approach is appropriate rather than a broad application of the exhaustion rule and is appropriate in situations where there has been a post-commencement transfer approval. Adopting a broad based rule would in practical effect eliminate the benefits of the Accomplished Transfer Statute for anyone who made an administrative transfer to their water right while waiting the processing of their right in the adjudication, which in United Water's case, has taken two decades. Public policy certainly would frown on such a result. The legislature surely did not intend to impose such a penalty on diligent water right holders.

The unfairness of this would be particularly acute in this case. United Water undeniably has been a driving force, in collaboration with the Department, for the development of municipal water law in Idaho. It is fair to say that absent the work United Water has done with the Department in helping to refine and define municipal water law policy, the theory of alternate points of diversion for municipal providers in the SRBA through accomplished transfers likely would not be available. It is also fair to say that as of the 1996 filing date of the transfer no. 4998, it was far from certain that the Department would recognize alternate points of diversion for municipal providers in its SRBA recommendations. It would be most unjust to now hold that United Water is precluded from having its alternate points of diversion recognized for some of

its most senior rights under the accomplished transfer theory that it helped pioneer because it elected to file an interim transfer while the policy was being developed.

All the above weighs in favor of this Court adopting a balanced, case-by-case approach to the collateral attack issue in analyzing the applicability of the Accomplished Transfer Statute. In United Water's case, there is no collateral attack, and the Court should decree the requested alternate points of diversion.

B. THE POCATELLO SUBCASES DID NOT ADDRESS THE COLLATERAL ATTACK ISSUE IN DEPTH AND FORM NO BINDING PRECEDENT ON THE ISSUE.

We found no SRBA Court level decisions holding that the collateral attack doctrine applies to broadly preclude use of the Accomplished Transfer Statute where there has been a post-commencement transfer. Based on the rationale described above, we believe the Court would reject such a rule and adopt the case-by-case approach.

We did find some analysis of the issue in the Pocatello subcases, but only in cursory fashion in the midst of other highly contested and complex issues. The issue was not briefed in detail; nor was the situation analyzed for whether the requested accomplished transfer actually collaterally attacked the administrative transfer order.

In the Pocatello case, the Department recommended three water rights with only 12 of 22 requested points of diversion because a 1999 transfer approval recognized only 12 wells. In its report to the Court, the Department merely stated as follows: "Because there was a post-1987 final administrative action on these three water rights, the Department recommended them as transferred." *Supplemental Director's Report Regarding City of Pocatello's Basin 29 State-Based Water Rights* (April 13, 2006) at p. 13. There is no further explanation or legal analysis. United Water did not find any substantive argument on the collateral attack issue in Pocatello's briefing. The State of Idaho, who advocated the Department's position in the Pocatello subcases,

addressed the issue only in cursory fashion in its briefing. The extent of the legal argument on the subject in its 35-page brief was as follows: “Simply put, if the City cannot collaterally attack a license in the SRBA, it cannot also attack a valid transfer of those rights either. The Director correctly applied Transfer No. 5454 in the definition of [the subject water rights].” *State of Idaho’s Post-Trial Brief*, subcases 29-00271 et al. (April 27, 2007) at p. 27. Consistent with the limited argument on the issue, Special Master Bilyeu recited that the Department recommended the rights with 12 points of diversion because of the previous administrative transfer and then ruled that “[s]ince Transfer No. 5452 was issued in 1999 with only 12 points of diversion, Pocatello cannot meet the requirement of a pre-1987 change established by I.C. § 42-1425.” *Master’s Report and Recommendation and Order on Motion to Reconsider* (October 2, 2007) at p. 20. Judge Melanson did not address the issue in a subsequent challenge of Special Master Bilyeu’s decision to the SRBA Court.

It appears that Special Master Bilyeu’s decision on the issue, consistent with the very limited attention paid to the issue by the parties, was that the general collateral attack rule for licenses should also apply to transfers. The more detailed analysis above shows that in the transfer context, particularly given the existence of the Accomplished Transfer Statute, is distinguishable from the license context discussed in the prior SRBA decisions prohibiting collateral attacks. Moreover, and perhaps more importantly, United Water has demonstrated that under its particular circumstance it is not collaterally attacking the post-commencement transfer approval at issue in these subcases. In any event, there is no binding precedent that would prevent this Special Master from adopting a case-by-case approach to analyzing whether United Water has effectively accomplished a transfer under the Accomplished Transfer Statute.

C. UNITED WATER DOES NOT SEEK TO COLLATERALLY ATTACK A PRIOR TRANSFER APPROVAL.

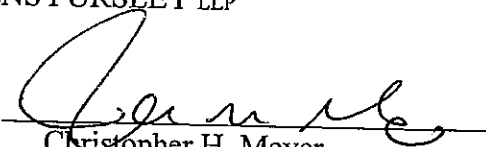
In conclusion, there is no basis for a broad-based legal rule that says use of the Accomplished Transfer Statute is per se a collateral attack on a prior transfer approval. The Court should adopt a case-by-case approach to determine whether the SRBA claimant is attempting what amounts to a belated judicial review of the administrative decision. That is not the case in these subcases. United Water makes no attempt to undermine the prior administrative approval of transfer 4998. United Water simply seeks judicial recognition under the legislatively enacted amnesty that it also accomplished a more comprehensive transfer that included additional points of diversion for the four water rights at issue. The Court has authority to decree these additional points of diversion under the Accomplished Transfer Statute and should decree rights 63-2500, 63-2874, 63-7067 and 63-19546 with the same list of 42 alternate points of diversion that it has decreed for United Water's other ground water rights.

DATED March 23, 2010.

Respectfully submitted,

GIVENS PURSLEY LLP

By



Christopher H. Meyer
John M. Marshall

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2010, the foregoing was filed, served, or copied as follows:

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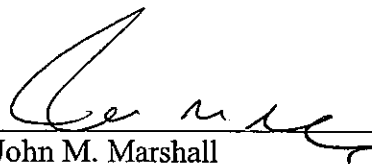
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