

4-16
RECEIVED
APR 17 2012
DEPARTMENT OF
WATER RESOURCES

Josephine P. Beeman #1806
Jane M. Newby #2848
BEEMAN & ASSOCIATES, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
jo.beeman@beemanlaw.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. 1-2064, 1-2064A, 1-2064B,
	)	1-2064C, 1-2064D, 1-2064E, 1-2064F,
	)	1-2064L, 1-10042, 1-10042A, 1-10042B,
Case No. 39576	)	1-10053A, and 1-10190
	)	(American Falls)
	)	
	)	Subcase Nos. 1-2068, 1-2068D, 1-2068E,
	)	1-2068F, 1-2068M, 1-2068Y, 1-10043,
	)	1-10043A, 1-10043E, 1-10191, and 1-10389
	)	(Palisades)
	)	
	)	CITY OF POCATELLO'S
	)	RESPONSE TO STATE OF IDAHO'S
	)	JANUARY 25, 2012 MOTION FOR
	)	PARTIAL SUMMARY JUDGMENT

The City of Pocatello (City or Pocatello), by and through its counsel of record, Josephine P. Beeman of Beeman & Associates, P.C., hereby responds to the first count of the State of Idaho's January 25, 2012 Motion for Partial Summary Judgment as follows:

The State of Idaho (State) filed the State of Idaho's Motion for Partial Summary Judgment (Motion) on January 25, 2012, seeking to resolve some of the issues raised in the

objections¹ and claims² regarding ownership interests in the Palisades storage water rights³ that were filed in these subcases by Pocatello, members of the Surface Water Coalition, and the Upper Valley Water Users. The first issue the State addresses in its Motion is “the ownership interest the City of Pocatello may have in storage right no. 01-2068 (Palisades Reservoir).” State’s Motion at 2. In its Memorandum in Support of State of Idaho’s Motion for Partial Summary Judgment (Memorandum), the State asserts that “the Idaho Supreme Court's decision in *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007) (*Pioneer*), is the controlling legal authority for resolving the City of Pocatello's assertion of an ownership interest in the storage water right for Palisades Reservoir. *Pioneer*, as a matter of law, requires disallowance of the City's claim for a separate water right in the City's name, and also that the

¹ On August 31, 1988 the United States Bureau of Reclamation filed a claim for water right 1-2068 in the Snake River Basin Adjudication (SRBA). Claim 1-2068 in the name of the U.S. Bureau of Reclamation only was recommended in the SRBA for storage water in Palisades Reservoir for the limited purposes of irrigation and power. On April 20, 2007 Pocatello filed an objection to the Director’s Report for 1-2068 to ensure that the full nature and extent of the City’s Palisades storage right was properly decreed in the SRBA. Among the other elements objected to, Pocatello objected to the recommended purposes of use and asserted that the uses should include all the uses from Pocatello’s contract it entered into with the U.S. Bureau of Reclamation dated January 8, 1960. Under that contract the City could use or rent its Palisades Reservoir water to other users for irrigation, power, domestic, municipal, industrial, commercial, mitigation and recharge purposes. Pocatello also argued in its objection that the conditions of approval in the Director’s Report and Recommendation for water right 01-2068 need to reflect that as a matter of Idaho constitutional and statutory law, title to the use of the water under Pocatello’s contract is held by the City of Pocatello as the consumer of the water for all these purposes. The *Pioneer* case affirmed the equitable title of those users who make beneficial use of storage water from U.S. Bureau of Reclamation facilities, but limited its examination to beneficial use of storage water for irrigation purposes.

² Pocatello had asked for and claimed a municipal purpose of use. On December 15, 2006 Pocatello filed SRBA water right claim 1-2068Y for the purposes of municipal, irrigation, power, domestic, industrial, commercial, recharge and mitigation storage. The claim was made pursuant to the contractual rights of the City under the contract it entered into the U.S. Bureau of Reclamation dated January 8, 1960 and was made to ensure that the full nature and extent of the City’s Palisades storage right was properly decreed in the SRBA. The claim was disallowed and recommended as 1-2068 for the Bureau of Reclamation but only for the limited purposes of irrigation and power. On April 11, 2007 Pocatello filed an objection to the disallowal of 1-2068Y and another objection to the Director’s Report for 1-2068, stating that the purposes of use recommended should be as claimed in 1-2068Y.

³ These storage rights include 1-2068 and 1-10043.

Palisades storage right be decreed in the name of the United States with the *Pioneer* remark. There is no legal basis for continuing dispute on these points.” State’s Memorandum at 2.

Pocatello agrees the ownership dispute can be ended, if the State’s Motion is intended to clarify that Pocatello has equitable ownership as a “consumer or user of water” for the irrigation purpose of use included in the Director’s Report for 1-2068, and for any additional purposes of use that may be decreed by the SRBA court for 1-2068 or 1-2068Y. However, Pocatello respectfully asserts that the *Pioneer* decision is controlling legal authority of an ownership interest in 1-2068, the storage water right for Palisades Reservoir, only in relation to “irrigation rights and interests” because by its own terms, “The issues in [*Pioneer*] concern irrigation rights and interests.” *Pioneer*, 157 P.3d at 603. As explained by the United States, “Some of the water rights at issue [in *Pioneer*] are used not just for irrigation, but for other purposes as well, including industrial, power, municipal, recreation, and streamflow maintenance. Only the irrigation portion of the water rights are (sic) at issue in this case.” United States’ Reply Brief in *Pioneer* at 5, fn 1. See Affidavit of Josephine P. Beeman in Support of City of Pocatello’s Response to State of Idaho’s January 25, 2012 Motion for Partial Summary Judgment (Beeman Affidavit), Exhibit C. Therefore, “Questions concerning such matters as flood control, environmental uses, or other issues are outside the scope of [the *Pioneer*] decision.” *Pioneer*, 157 P.3d at 603. To the extent *Pioneer* is controlling legal authority for resolving the City of Pocatello’s assertion of an ownership interest in the storage water right for Palisades Reservoir, that authority is limited to the irrigation portion of the storage water right. *Pioneer* did not address any other portions of United States’ storage water rights in the SRBA, including purposes of use for industrial, power, municipal, recreation, and streamflow maintenance. Pocatello’s claim for 1-2068Y and its objection to the recommendation of 1-2068 include

purposes of use for municipal, irrigation, power, domestic, industrial, commercial, recharge and mitigation.

In addition to the “purposes of use” that were outside the scope of *Pioneer* there is no explicit finding in *Pioneer* that “consumers or users of the water” includes municipalities or other non-irrigation entities. Equitable ownership in the United States’ Reclamation storage water rights in the SRBA for purposes other than irrigation is a genuine, disputed issue of material fact and law, as is the extension of *Pioneer* to non-irrigation entities. Both of these issues preclude this court from granting the State’s first count for summary judgment. For these reasons as well, Pocatello’s claim for a separate water right 1-2068Y based on Idaho law and the contract the City entered into with the U.S. Bureau of Reclamation dated January 8, 1960 should not be disallowed and disposed of in a motion for summary judgment.

In framing the issue as Pocatello’s assertion of an ownership interest in 1-2068, the *storage* water right for Palisades Reservoir, the State oversimplifies the *Pioneer* decision. *Pioneer*’s holding and remark addresses only the *irrigation* portion of the storage right and not the additional portions of the storage right claimed by Pocatello -- power, domestic, municipal, industrial, commercial, mitigation and recharge. Although the State’s motion “does not seek to resolve the City’s objection that the Palisades storage right should be decreed for additional purposes of use that were not included in the Director’s Report,” the State proposes that Pocatello’s claim 1-2068Y be disallowed and that 1-2068, the “Palisades storage right” be decreed with the *Pioneer* remark⁴ to resolve Pocatello’s ownership interest. State’s

⁴ The January 26, 2012 Stipulation to Resolve Certain Objections, which was signed by all the objecting parties except for Pocatello, agreed that “the [IDWR] recommended ownership remark shall be deleted, and instead, the following remark, as set forth in *United States v. Pioneer Irrigation District*, shall be included under the Other Provisions Necessary element of the storage rights at American Falls and Palisades: “The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the

Memorandum at 9. However, by seeking the disallowance of Pocatello's competing claim 1-2068Y and claiming Pocatello's ownership interest in the "Palisades **storage** right" – not just Pocatello's **irrigation** storage right in Palisades -- should be controlled by *Pioneer*, the State is trying to resolve Pocatello's objection that the Palisades storage right should be decreed for additional purposes of use. In other words, the State seeks the application of the *Pioneer* decision and remark to all of Pocatello's storage in Palisades without taking into account the non-irrigation purposes of use claimed by the City: power, domestic, municipal, industrial, commercial, mitigation and recharge purposes. The State's proposal does not resolve Pocatello's ownership of the non-irrigation purposes of use; nor, does the State's proposal clarify whether Pocatello or any other non-irrigation entity is a "consumer or user of water" pursuant to *Pioneer*.

Although the ownership of non-irrigation uses still remains to be definitively determined, the Idaho Supreme Court in *Pioneer* determined that as a matter of Idaho constitutional and statutory law, equitable title to the use of the water is held by the "consumers or users of the water." Pocatello would argue that a close examination of *Pioneer* and the Idaho Supreme Court's ownership "remark" reveals that there were actually two issues decided in *Pioneer*:

(1) **Equitable ownership by the "consumers or users of the water."** In

Pioneer, the Idaho Supreme Court confirmed the legal result when water is put to beneficial use under a contractual right with Reclamation. The first two sentences of the *Pioneer* ownership "remark" paragraph provide that title to the use of the water is held by the consumers or users of the water pursuant to Idaho constitutional and statutory law:

landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations." Stipulation at 5-6.

“The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho constitutional and statutory law title to the use of the water is held by the consumers or users of the water.”

Pioneer, 157 P.3d 600, 610.

“Consumers or users of the water” is not defined, except with reference to beneficial users, and thus Pocatello asserts that this term includes all “consumers or users of the water” without limitation and would include irrigators as well as industrial users and municipal users.⁵ This general language presumes and confirms title ownership to use of the water when the contract holder, such as Pocatello, is also the “consumer or user of the water.” Additional and more specific ownership language is required when the contract holder and the “consumers or users of the water” are different entities, for instance, when the contract holder is an irrigation entity and the “consumer or user of the water” is the irrigator who owns lands that receives contract water from the irrigation entity. This is the second issue.

(2) **Ownership determined between irrigation entities and the “consumers or users of the irrigation water.”** The remainder of the “remark” paragraph in *Pioneer*, with an introductory sentence, explains that the irrigator/landowners, who receive and apply water from irrigation entities, are the consumer and users and have an appurtenant legal interest not based exclusively on the irrigation entities’ contracts with the Bureau of Reclamation (Reclamation):

⁵ “While the state laws and specific contracts may differ in the above cases, the U.S. Supreme Court’s opinions provide guidance in reaching a conclusion here. A common theme throughout these cases is the recognition of the connection between beneficial use of water and ownership rights. The underlying principle of the state law, which requires application of the water to beneficial use before a water right is perfected, is the same. In Idaho the appropriator must apply the water to a beneficial use in order to have a valid water right under both the constitutional method of appropriation and statutory method of appropriation. *Basinger*, 36 Idaho at 598, 211 P. at 1086-87; I.C. §§ 42-217 & 42-219. The requirement of beneficial use is repeatedly referred to throughout the Idaho Code. Beneficial use is enmeshed in the nature of a water right . . . [citing and quoting I.C. § 42-101, I.C. § 42-104, I.C. § 42-201(1) I.C. § 42-217] (emphasis added).” *Pioneer*, 157 P.3d at 606.

“The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigations Organizations.”

Pioneer, Id.

The contract does not limit the separate appurtenant title interest of the landowners as the “consumers or users of the irrigation water”. However, in addressing the narrow issue of ownership of *irrigation* rights in contracts between Reclamation and irrigation entities, the *Pioneer* court did not address or determine ownership of other purposes of use in Reclamation contracts, such as the non-irrigation purposes of use claimed by Pocatello.⁶

Per the first issue above, the *Pioneer* decision arguably applies to contracts entered into between Reclamation and non-irrigation consumers or users of the water who should be able to claim equitable title to the irrigation use of the Reclamation water;⁷ however, as set forth in the analysis of the second issue above, the *Pioneer* case did not address ownership of non-irrigation uses.⁸ The question, therefore, is whether the SRBA decree of water rights for Reclamation

⁶ “The issues in this case concern irrigation rights and interests. Questions concerning such matters as flood control, environmental uses, or other issues are outside the scope of this decision.” *Pioneer*, 157 P.3d at 603.

⁷ Of the Reclamation rights involved in the 2007 *Pioneer* decision, water right 63-3614 had purposes of use for municipal, irrigation, power and industrial storage. In 1985 Reclamation applied to IDWR to change the nature of use to add municipal and industrial storage to Reclamation’s licensed right 63-3614 for irrigation and power storage from the Boise River. The transfer was granted in 1988 and all four purposes were claimed and decreed in the SRBA with the *Pioneer* remark. Beeman Affidavit, Ex. A, B, D.

⁸ As the United States acknowledged in its reply brief in the *Pioneer* case, “[s]ome of the water rights at issue here are used not just for irrigation, but for other purposes as well, including industrial, power,

should differentiate between the users or consumers for irrigation purposes and the users or consumers for non-irrigation purposes. While Pocatello would argue that there should not be any difference and the general, all-inclusive statements in *Pioneer* would indicate there is no difference, this issue has not been definitively and specifically addressed by any court. As the State asked in its January 19, 2012 Statement of Remaining Issues: “What ownership interest do non-irrigation entities have in the storage rights of the America Falls and Palisades Reservoirs?” State’s Statement at 2.

This uncertainty is the reason Pocatello did not sign the January 26, 2012 Stipulation to Resolve Certain Objections because the Stipulation included water right ownership and the *Pioneer* remark. Since the “second issue” in the *Pioneer* remark is only applicable to irrigation use and irrigation entities, Pocatello’s stipulation to the remark could be deemed a waiver of the City’s ownership of and claim for non-irrigation rights in Palisades reservoir.

Therefore, until these issues of fact and law regarding the existence and ownership of non-irrigation purposes of use are determined for Reclamation’s Palisades claim 1-2068, Pocatello contends that the City’s claim 1-2068Y should not be disallowed, the City’s objections to the ownership and purposes of use under Reclamation’s 1-2068 should not be dismissed, and Reclamation’s claim 1-2068 should not be decreed in the name of the United States with the *Pioneer* remark, as moved for by the State.

Based on the arguments set forth in this response, the City of Pocatello respectfully requests that this Special Master deny the first count of the States’ Motion for Partial Summary Judgment.

municipal, recreation, and streamflow maintenance. Only the irrigation portion of the water rights are (sic) at issue in this case.” Reply Brief at 5, fn 1. Beeman Affidavit, Ex. C.

Dated this 16th day of April 2012.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By Jane M. Newby
Jane M. Newby
(for) Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of April 2012, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

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

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

US DEPARTMENT OF JUSTICE
ENVIRONMENT & NAT'L RESOURCES
550 WEST FORT STREET, MSC O33
BOISE, ID 83724

JAMES C. TUCKER
IDAHO POWER COMPANY
P O BOX 70
BOISE ID 83707

ADAM DEVOE
BROWNSTEIN HYATT FARBER SHCRECK
410 17TH STREET, SUITE 2200
DENVER CO 80202

TOM ARKOOSH
CAPITOL LAW GROUP
P O BOX 32
GOODING ID 83330

ROGER LING
P O BOX 396
RUPERT ID 83350-0396

CANDICE MCHUGH
RACINE OLSON NYE BUDGE BAILEY
101 S CAPITOL BLVD, SUTIE 208
BOISE ID 83702

RANDALL C BUDGE
RACINE OLSON NYE BUDGE BAILEY
PO BOX 1391
POCATELLO ID 83204-1391

JERRY RIGBY
RIGBY ANDRUS RIGBY
P O BOX 250
REXBURG ID 83440

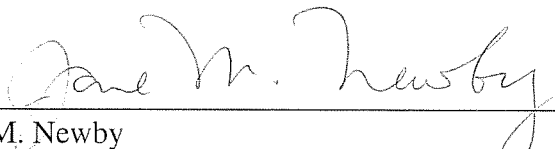
TRAVIS THOMPSON
PAUL ARRINGTON
BARKER ROSHOLT SIMPSON
P O BOX 485
TWIN FALLS ID 83303-0485

KENT FLETCHER
P O BOX 248
BURLEY ID 83318

DAVID GEHLERT
U.S. DOJ
999 18TH STREET, SOUTH TERRACE
SUITE 370
DENVER CO 80202

MATT HOWARD
BUREAU OF RECLAMATION PN 3100
1150 N CURTIS ROAD, SUITE 100
BOISE ID 83706-1234

JOHN K SIMPSON
BARKER ROSHOLT SIMPSON
PO BOX 2139
BOISE, ID 83701-2139


Jane M. Newby