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**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. 01-2068 and 01-2068Y
	)	
Case No. 39576	)	STATE OF IDAHO'S
	)	POST-TRIAL BRIEF
_____	)	

The State of Idaho ("State"), by and through its counsel of record and pursuant to this Court's *Supplemental Order On Post-Trial Briefing* (Jan. 17, 2013) ("Order"), hereby files its post-trial brief.

I. THERE IS NO EVIDENCE THE CITY HAS EVER ACTUALLY USED ITS PALISADES STORAGE WATER, AND THE ONLY ACTUAL USES OF THE CITY'S STORAGE WATER ESTABLISHED BY THE RECORD ARE USES MADE BY OTHERS PURSUANT TO RENTALS THROUGH THE "RENTAL POOL."

The trial in these subcases focused on the City of Pocatello's claims and objections regarding ownership, purposes of use, places of use and periods of use for the water right for Palisades Reservoir, and especially the "key issue" of "whether there have been accomplished transfers as suggested by the City." *Order* at 1.¹ The principal trial issue was the City's claim to additional purposes of use that were not recommended by the Director: industrial, commercial, recharge, municipal, domestic and mitigation uses.² The only purposes listed in the water right license for the Palisades water right are irrigation and power,³ and it was established at trial that no formal transfer had been filed in connection with the Palisades water right.⁴ Thus, as this Special Master stated, "the trial narrowed down to a primary point: Has the City of Pocatello shown an accomplished transfer?"⁵

Trial evidence established that the City does not possess any diversion or conveyance works via which it can divert its Palisades storage water from the Snake River or apply the water to beneficial use.⁶ While there was testimony that it was theoretically "possible" for the City to receive Palisades storage water via the Fort Hall

¹ The City essentially admitted at trial that the issues in Subcase Nos. 01-2068Y and 01-2068 are the same: "the claim for 2068Y and the objections to disallow are on all fours with the objections that Pocatello filed to the recommendation of 1-2068 to the Bureau." *Report's Transcript, Trial Before Special Master Terrence Dolan, Subcase Nos. 01-2068 & 01-2068Y* (Dec. 10, 2012) ("*Transcript*"), at 12.

² *Transcript* at 28-29.

³ *Transcript* at 28-29.

⁴ *Transcript* at 42, 53, 55, 112.

⁵ *Transcript* at 208; *see also id.* at 112-13, 118-19, 209.

⁶ *Transcript* at 29, 44-45, 54-55, 74, 84, 140-41.

reservation irrigation system and the Blackfoot River,⁷ there was no evidence that this has ever actually occurred. Further, it was established that Water District 1 has no record of distributing any water from the Snake River to the City, let alone its Palisades storage water.⁸

The only evidence that the City's storage water has ever been put to actual use was that water users other than the City have occasionally made use of the City's storage water through the "rental pool."⁹ In the period from 1959 to 1982, the City's storage water was used through the "rental pool" for only two purposes: irrigation and power, the same purposes of use authorized in the water right license.¹⁰ There is no evidence in the record of any actual use being made of the City's Palisades storage water from 1982 to 1993. The only evidence in the record of actual use of the City's storage water after 1982 are documents pertaining to rental uses in 1994.¹¹

II. THE CITY'S ARGUMENT THAT THE ADDITIONAL PURPOSES OF USE SHOULD BE DECREED LACKS SUPPORT IN THE RECORD AND IS CONTRARY TO LAW.

The City's principal arguments at trial were that the additional purposes of use it claims were perfected through an accomplished transfer and actual beneficial use that occurred prior to the 1973 issuance of the water right license for Palisades Reservoir,¹² and also prior to May 26, 1969, when the City claimed it became "mandatory" to file a formal transfer application for a change of use.¹³ Even assuming for the sake of

⁷ *Transcript* at 56.

⁸ *Transcript* at 43, 54-55, 57-58, 74, 84, 140-41.

⁹ *Transcript* at 45, 55-56, 85, 129-30, 141, 143.

¹⁰ *Transcript* at 158-59.

¹¹ *Transcript* at 123-36, 157-59.

¹² *Transcript* at 210.

¹³ *Transcript* 112, 114-15.

argument the City is correct that transfer filings were not “mandatory” until May 26, 1969, the City’s arguments fail for several reasons.

First, the un-rebutted evidence is that prior to May 26, 1969, the City’s storage water was used only for the licensed purposes of irrigation and power. Further, there is no evidence in the record that the City’s storage water was used for any of the additional purposes claimed by the City after 1969 but prior to issuance of the water right license in 1973. In sum, there is no evidence in the record to support the City’s contention that prior to 1973 its storage water was used for the additional purposes the City claims in Subcase Nos. 01-2068Y and 01-2068. Thus, there is no evidence of an accomplished transfer prior to licensing or prior to the date when it became mandatory to file a formal transfer application to authorize a change in use.

Second, even if the City’s storage water had been used for purposes other than irrigation or power prior to issuance of the water right license in 1973, the issuance of the license foreclosed any SRBA claims based on pre-licensing uses. *City of Pocatello v. Idaho Dept. of Water Res.*, 152 Idaho 830, 840, 275 P.3d 845, 855 (2012) (holding that the City must file a transfer with the Department to change elements of its previously licensed water right). The City, like all other water users, may not use the SRBA as a “second opportunity” to include additional purposes of use to a water right when it already “had a full opportunity to” at licensing. *Memorandum Decision And Order On Cross-Motions For Summary Judgment Re: Streamflow Maintenance, Subcase No.63-3618) (Lucky Peak Reservoir)* (Sep. 23, 2008), at 16 (citations omitted). The City’s argument that the partial decree should include additional purposes of use that allegedly occurred prior to licensing fails as a matter of law because water right licenses may not

be collaterally attacked in the SRBA. *Id.* at 15; *Pocatello*, 152 Idaho at 840, 275 P.3d at 855 (holding that City’s claim of issuance of license in error was unavailing and City must file a transfer with the Department to change elements of its license).

Third, the un-rebutted trial evidence is that the City has never actually used its Palisades storage water: the only actual use of the City’s storage water for any purpose has been by entities other than the City, and has taken place through the “rental pool.” The “rental pool” is authorized by the “water supply bank” statutes of Chapter 17, Title 42, Idaho Code. Idaho Code §§ 42-1761, 42-1765. Under these statutes, the rental of water is “incidental” to the underlying water right. Idaho Code § 42-1764(3). The statutes provide for water to be rented for uses and in places other than those set forth in the elements of the underlying water rights without obtaining a transfer, without risk of forfeiture, and without effecting a permanent change in the underlying water right. *See id.* (“The rental of water rights from the water supply bank shall not constitute a dedication to the lands of any renter since the rental or distribution of water by the water bank is only incidental to its primary purposes listed in section 42-1761”). The trial testimony of Water District 1 Program Manager Anthony Olenichak confirms that uses of storage water made under rentals from the “rental pool” have never been recognized as a basis for changing the purpose of use of a water right.¹⁴ As a matter of law, no additional purposes of use may be added to the water right for Palisades Reservoir simply because the City’s storage water may at times have been used for purposes other than irrigation or power through the “rental pool.”

Finally, even if it is assumed solely for purposes of argument that uses made under the “rental pool” are legally sufficient to support the decree of an accomplished

¹⁴ *Transcript* at 132-33, 145, 148, 152.

transfer pursuant to Idaho Code § 42-1425, there is no evidence in the record that after licensing and prior to commencement of the SRBA the City's storage water was actually rented and used for the additional purposes claimed by the City. The only evidence of any actual use of the City's storage water after the licensing of the Palisades water right are documents pertaining to rental uses in 1994.¹⁵ This evidence is insufficient as a matter of law to support a conclusion that an accomplished transfer took place "prior to November 19, 1987." Idaho Code § 42-1425.¹⁶

In sum, there is no legal or factual merit in the City's trial arguments that the additional purposes of use it claims were perfected by actual beneficial use or an accomplished transfer. The balance of this brief address the arguments in the City's post-trial brief.

III. THE CITY'S POST-TRIAL BRIEF IS DEFICIENT AS A MATTER OF LAW AND CONSTITUTES A WAIVER OF THE CITY'S CLAIMS.

The City's post-trial brief consists of approximately one page of text that does not cite any legal authority. *City's Post-Trial Brief* at 1-2. The City's post-trial brief also is devoid of any substantive argument on the issues identified by the *Order*: "ownership, purpose of use, places of use and periods of use for Palisades Reservoir storage water," and the "key issue" of "whether there have been accomplished transfers as suggested by the City." *Order* at 1. The only matters addressed in the City's post-trial brief are two procedural matters that are outside the scope of the *Order*. The City argues: (1) that "[t]he records related to Pocatello Exhibit 522 . . . are appropriately part of the record,"

¹⁵ *Transcript* at 123-36, 157-59.

¹⁶ There is also no evidence that the Bureau as legal title holder pursuant to the license for water right no. 01-2068 and *United States v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007), consented to a change in the purposes of use of the water right. While the "title to the use of the water is held by the consumers or users of the water," *Pioneer*, 144 Idaho at 115, 157 P.3d at 609, the Bureau's consent is necessary to modify an element of the right.

City's Post-Trial Brief at 1; and (2) that “it is an error of law to require a specific uses [sic] of 1-2068 in order to recommend the purposes of use claimed by Pocatello.” *Id.* at 2.

In short, the City’s post-trial brief utterly fails to provide “any cogent argument or authority” in support of the City’s claims and objections in Subcase Nos. 01-2068Y and 01-2068. *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). The City has effectively waived its claims and objections in Subcase Nos. 01-2068Y and 01-2068 by failing to support them with argument or legal authority. *See Hart v. Idaho State Tax Comm’n*, 2012 WL 1434336, at *5 (Idaho Apr. 26, 2012) (stating the Court would not entertain an issue for which the argument “is devoid of any reasoned analysis or relevant authority.”); *Estes v. Barry*, 132 Idaho 82, 87, 967 P.2d 284, 289 (1998) (“a party waives an issue cited on appeal if either argument or authority is lacking”). This conclusion is not altered by the City’s representation that it “will include additional legal citations in its reply brief.” *City’s Post-Trial Brief* at 2. The *Order* does not authorize or contemplate that the City may file a reply brief, but rather limits each of the parties to a single post-trial brief. *Order* at 1.

IV. THE CITY’S POST-TRIAL ARGUMENTS FAIL AS A MATTER OF LAW.

A. This Special Master Has Determined That Exhibit 522 Is Not Part Of The Evidentiary Record.

In addition to being outside the scope of the *Order* and insufficient as a matter of law to support the City’s claims and objections, the arguments in the City’s brief also lack merit with respect to the procedural issues they address. The City’s contention that Exhibit 522 is “appropriately part of the record,” *City’s Brief* at 1, ignores this Special

Master's orders. This Special Master at trial sustained objections to Exhibit 522 as irrelevant because it pertained to water rights in Basin 63,¹⁷ and reaffirmed in the *Order* that "[i]ssues concerning storage water rights in basins other than Basin 01 will not be considered nor will the Special Master consider any evidence not admitted at trial." *Order* at 1. This Special Master's orders make it clear that Exhibit 522 is not part of the record in these subcases.

Further, there is no legal merit in the City's alternative argument that "the law established" in the partial decree for water right no. 63-3614 requires that Exhibit 522 be considered a part of the record. *City's Brief* at 1. The partial decree for water right no. 63-3614 does not address or reference water right no. 01-2068, much less the City's competing claim (01-2068Y). Further, the evidence presented at trial established that while the municipal purpose of use decreed in water right no. 63-3614 was authorized by a formal transfer,¹⁸ no formal transfer was sought or approved with respect to water right no. 01-2068.¹⁹ Exhibit 522 and the partial decree for water right no. 63-3614 have no legal or factual relevance to the City's claims and objections in Subcase Nos. 01-2068Y and 01-2068.

B. The City Has The Burden Of Supporting Its Claims And Objections In These Subcases.

There also is no merit in the City's assertion that "it is an error of law" to require that the City prove its Palisades storage water has actually been used for the "specific uses" asserted in the City's claims and objections in Subcase Nos. 01-2068Y and 01-

¹⁷ *Transcript* at 183-84. This Special Master stated several times during the trial documents pertaining to Basins 63 and 65 were not relevant for purposes of adjudicating the City's claims and objections in Subcase Nos. 01-2068Y and 01-1068. *See, e.g., id.* at 114, 117-19, 184-86.

¹⁸ *Transcript* at 107-09, 113-14.

¹⁹ *Transcript* at 110, 112, 114.

2068. *City's Post-Trial Brief* at 2. Under Idaho law the City has the burden of presenting evidence that the additional uses claimed by the City but not recommended by the Director actually occurred. *Pocatello*, 152 Idaho at 840, 275 P.3d at 855; Idaho Code §§ 42-1411(4)-(5); *Transcript* at 206. Thus, as a matter of law the City has the burden of proving its "key" factual contention that accomplished transfers occurred. *Order* at 1.

While the City purports to rely on the reply brief the State filed in Subcase No. 00-91017 (Basin-Wide Issue 17) as support for the City's contention that it need not support its claims and objections in these subcases, that reliance is misplaced. The State's briefing in Subcase No. 00-91017 addressed the basin-wide "refill" question designated by the Presiding Judge. The State's brief did not address accomplished transfers or the procedural question of whether a claimant/ objector such as the City has the burden of demonstrating that the Director's recommendations are incorrect.

Respectfully submitted this 22nd day of February 2013.

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