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WATER RESOURCES

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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.: 01-02068 &
	)	01-02068Y
Case No. 39576	)	
	)	UNITED STATES'
	)	POST-TRIAL BRIEF
_____	)	

Introduction

At issue in these subcases are the City of Pocatello's ("Pocatello") objections to the Director of the Idaho Department of Water Resources' ("Director") recommendations for claimed storage water rights for Palisades Reservoir. The Director recommended that storage water right 01-2068 be decreed to the United States with only power and irrigation uses. Because the Director recommended water right 01-2068 to the United States, he recommended that Pocatello's claim to an independent storage right, 01-2068Y, be disallowed.

Pocatello's objections to the Director's Reports in both subcase 01-2068 and 01-2068Y address the same issues: ownership of the water right, purpose of use, period of use and place of use. Trial Transcript ("Tr.") at 34, ln. 22 – 36, ln. 5. In essence, Pocatello's objections

ask this Court to do two things: (1) decree purposes of use, and related changes to the period of use, that were neither claimed by Reclamation nor recommended by the Director;¹ and (2) recognize that Pocatello has either complete ownership of a Palisades storage water right (01-2068Y) or a beneficial interest in the storage water right held by the United States (01-2068).

This Court's ORDER ON POST-TRIAL BRIEFING ("Order"), allowed the parties to address any of those issues, with two caveats. The Court explained that it will not consider "storage water rights in basins other than Basin 01 . . . nor will the [Court] consider any evidence not admitted at trial." Order at 2. In addition to imposing those limits, the Court's Order reiterated what had been made apparent at trial: because there is no permitted transfer for Palisades storage water rights, the "key issue" to be decided is whether there has been an accomplished transfer. *Id.* As is shown below, Pocatello has not presented substantial evidence – or any relevant evidence – supporting its claim to an accomplished transfer.

Standard of Review

It is well established that the Director's Report constitutes *prima facie* evidence of the nature and extent of the state-law based water rights addressed in the Report. *See Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (Idaho 2002) (citing *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745-46, 947 P.2d 409, 418-19 (1997)). As a result, Pocatello carries the "the burden of going forward with evidence to establish any element of a water right which is in addition or inconsistent with the description in a director's report." *Id.* (citing I.C. § 42-1411(5)); *see also Hagerman Water Right*

¹ Pocatello's objection to the place of use in subcase 01-2068 can be thought of as a request to clarify the place of use claimed by Reclamation. Pocatello asks to have its service area specifically identified in the place of use even though that place of use lies within the place of use claimed by Reclamation. *See* Tr. at 53, ln. 6-13. Pocatello did not pursue its place of use objection at trial, nor did it address the issue in its Post-Trial Brief. As is explained below, Pocatello's failure to raise the issue constitutes a waiver of the issue.

Owners, 130 Idaho at 746, 947 P.2d at 419 (“The director's report is presumed to be correct until such time as a water claimant produces sufficient evidence to rebut that presumption.”).

Rebutting that presumption requires “substantial evidence.” *Id.* (citing *Bongiovi v. Jamison*, 110 Idaho 734, 738, 718 P.2d 1172, 1176 (1986)). Substantial evidence is defined “as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance.” *Id.* (citing *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934, 939 (1993)). Thus to carry its burden and prevail on its objections, Pocatello must present substantial evidence of an accomplished transfer and the creation of an ownership interest in water stored in Palisades Reservoir. As is shown below, Pocatello fails on both counts.

I. POCATELLO HAS NOT SHOWN AN ACCOMPLISHED TRANSFER OCCURED.

Anthony Olenichak, Program Manager for Water District 1, testified that there is no basis for an accomplished transfer of Reclamation’s storage water right (01-1068) because Pocatello has never diverted water for any of the purposes claimed. Tr. at 45, ln. 22 – 46, ln.1. Indeed, he testified that he could find no record water had *ever* been delivered to Pocatello from Palisades Reservoir. Tr. at 42, ln. 25 – 43, ln. 11. As Mr. Olenichak explained, “[t]he only records of the usage of the City of Pocatello’s storage is through the rental pool, not through diversion to the city itself.”² Tr. at 85, ln.1-5.

Mr. Olenichak’s testimony is uncontroverted as Pocatello has not presented any evidence that it actually used storage water from Palisades Reservoir prior to 1987. Instead, Pocatello’s Post-Trial Brief appears to be arguing that Pocatello need not have actually used water to have effectuated an accomplished transfer. According to Pocatello, it would be “an

² Even that use was rare, occurring only approximately three times between 1959 and 1982. Tr. at 130, ln. 4-9.

error of law to require a specific uses (sic) of 1-2068 in order to recommend the purposes of use claimed by Pocatello.” Pocatello Post-Trial Brief at 2. Pocatello supports this argument with cryptic references to positions taken by the State in briefing Basin-Wide Issue 17 (“BWI 17”).³ The lack of actual argument in Pocatello’s brief means the United States can only speculate on why Pocatello believes the State’s arguments in BWI 17 support the City’s position in this case.

But no matter. The accomplished transfer statute makes it clear that actual use for the purposes claimed is a predicate to recognizing an accomplished transfer. Indeed, the entire premise of the accomplished transfer statute is to protect changes “to the use of water,” done without formal compliance with the transfer provisions of I.C. §§ 42-108 and 42-222, provided that (1) those changes in use occurred prior to the commencement of the SRBA on November 19, 1987, and (2) do not constitute an enlargement of the water right. *See* I.C. § 42-1425(1)(a) and (2). Thus absent actual use, there can be no accomplished transfer. Absent an accomplished transfer, Pocatello’s objections to the recommended Purpose of Use, Place of Use and Period of Use all must fail.

Nonetheless, Pocatello appears to be asking this Court to reconsider its decision excluding Pocatello Exhibit 522, which relates to a transfer of the United States’ storage water rights for Anderson Ranch Reservoir.⁴ Pocatello claims the Exhibit is “appropriately part of the record in 1-2068 and 102068Y (sic) because 63-3614 [the United States’ water right for

³ Pocatello also asserts that it “will include additional legal citation in its reply brief.” Pocatello is barred from doing so. This Court’s Order does not allow Pocatello to file a reply brief. *See* Order at 2.

⁴ The United States is uncertain exactly what documents are included within Exhibit 522. Counsel did not receive a copy at trial and an e-mail request to Ms. Beeman has gone unanswered.

Anderson Ranch Reservoir] has a municipal purpose of use already decreed in the SRBA.”

There is no reason for this Court to reconsider its decision to exclude Exhibit 522.

As was discussed at trial, the Anderson Ranch storage water right 63-3614 is readily distinguishable because there was a transfer to the water right license, applied for by Reclamation and approved by IDWR in 1988, which served as the basis for the decreed purpose of use.⁵ Moreover, what United Water may – or may not – have done with the water it receives from Anderson Ranch storage is independent of the question of whether Pocatello has met the requirements for an accomplished transfer.

In sum, this Court must evaluate Pocatello’s claim to an accomplished transfer based on facts applicable to Pocatello. Those facts demonstrate that Pocatello has never beneficially used water stored in Palisades Reservoir. Accordingly, its claim to an accomplished transfer must fail.

III. POCATELLO’S “OWNERSHIP” CLAIMS FAIL.

A. Pocatello Waived its Opportunity to Address Ownership.

At trial, Pocatello did not directly address “ownership,” the application of *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007) to the City of Pocatello’s water

⁵ At trial, Pocatello suggested the decree in 63-3614 is “law of the case” binding in this proceeding. That is not the case. First, in Idaho law of the case is only applied to decisions of appellate courts. *See e.g., Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000) (holding that doctrine can be applied to decisions of any appellate court, not just the Idaho Supreme Court). Second, law of the case only applies to “a single case and its subsequent progress.” *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, ___ n. 7, 278 P.3d 943, 951 n.7 (2012). Each SRBA subcase is the functional equivalent of an independent case. *See LU Ranching v. United States*, 138 Idaho 606, 609-10, 67 P.3 85, 88-89 (2003) (noting that a decree in a subcase is the “result of a distinct litigation tract and distinct decision by the SRBA judge.”). Thus, a decision in one subcase does not constitute law of the case in another subcase.

use.⁶ Nor, despite this Court's Order identifying "ownership" as one of the issues to be addressed in post-trial briefing, did Pocatello's Post-Trial Brief address the issue. As a result, Pocatello has waived its ability to pursue that issue.⁷ See e.g., *Rowley v. Fuhrman*, 133 Idaho 105, ___, 982 P.2d 940, 943 (1999) (holding that a party waives any issue not addressed in its opening brief). This rule is rooted in simple fairness. If a party is allowed to raise new issues in a reply brief, the responding party is denied an opportunity to address those issues. See *Wright*, 139 F.3d at 552. The rule should apply with even more force here, where the Court has specifically identified the issues to be addressed in Post-Trial briefs and allowed each party only one opportunity to address those issues.

B. Pocatello's Ownership Claims Fail on the Merits.

1. There is No Basis to Modify the Standard Pioneer Remark for Pocatello.

In *Pioneer*, the Idaho Supreme Court recognized that irrigation districts hold a beneficial interest in Reclamation's storage water rights used for irrigation purposes and instructed that Reclamation's irrigation storage water rights will bear a remark recognizing that interest, commonly referred to as the "*Pioneer* remark." See *Pioneer*, 157 P.3d at 609. Water right 01-2068 includes irrigation as a use and accordingly will bear the *Pioneer* remark.

Pocatello seeks a modified version of the *Pioneer* remark to reflect the additional, non-irrigation, uses it has claimed. But as was discussed above, Pocatello has not shown that an

⁶ Pocatello's sole mention of the ownership issue was to inform the Court that it had withdrawn from a proposed settlement with the United States. See Tr. at 11, ln. 22 - 12, ln. 1, & 17, ln. 17 - 18, ln. 13

⁷ Federal courts also recognize that a failure to raise an issue in an opening brief constitutes waiver of the issue. See e.g., *Rail Passenger Ass'n v. Federal Transit Admin.*, 843 F.Supp.2d 1150, 1171 (D. Colo. 2011) (citing *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009)); *Wright v. United States*, 139 F.3d 551, 552 (7th Cir. 1998).

accomplished transfer expanding the use of the Palisades storage water has occurred.

Accordingly, there is no basis for this Court to modify the standard Pioneer remark.

2. Pocatello's Claim to an Independent Storage Water Right in Palisades Reservoir (01-2068Y) Fails.

While the *Pioneer* decision recognized that irrigation districts hold a beneficial interest in the United States' storage water rights used for irrigation purposes, the decision also affirmed that the United States holds legal title to those water rights. *Id.* at 609. By affirming Reclamation's title to the storage water rights, the court precluded claims to an independent storage water to the same supply.⁸ Consistent with the *Pioneer* decision, every irrigation entity involved in the litigation of water right 01-2068 agreed to dismiss its competing claim to a storage water right. *See* SPECIAL MASTER REPORT & RECOMMENDATION, Subcases 01-2064 *et al.* at 2 (Jan. 9, 2013).¹ As the irrigators and this Court's REPORT have recognized, as a result of the *Pioneer* decision there can be no "competing claims" to storage water rights in Palisades Reservoir. Accordingly, Pocatello's claim to a storage water right in Palisades Reservoir (01-2068Y) fails as a matter of law.⁹

⁸ Indeed, during the *Pioneer* proceedings, then-Presiding Judge Melanson expressly affirmed IDWR's disallowal of the competing claims filed by the irrigation entities. *See* Memorandum Decision, Consolidated Subcase 91-63 at 31-32 (Sept. 2, 2004). That aspect of the decision was not appealed.

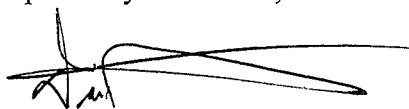
⁹ Moreover, even if the claim did not fail as a matter of law, it would fail as a matter of fact. In order to establish a valid water right in Idaho, a potential appropriator must apply the water to a beneficial use. *Pioneer*, 157 P.2d at 604. Pocatello has failed to establish it has either stored water in Palisades Reservoir or made beneficial use of water stored in Palisades. Accordingly, there is no factual basis for Pocatello's claim to a storage water right.

Conclusion

Pocatello has failed to produce any evidence that it has ever applied Palisades storage water to beneficial use. As a result, Pocatello has not overcome the presumption that the Director's Reports on water rights 01-2068 and 01-2068Y are correct.

DATED this 22nd day of February, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David W. Gehlert', written over a horizontal line.

David W. Gehlert

CERTIFICATE OF SERVICE

I certify that on February 22, 2013, I served true and correct copies of the foregoing UNITED STATES' POST TRIAL BRIEF as follows:

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