

between this subcase and Subcase No. 63-3614 are the City's basis for arguing this Special Master erred in: (1) excluding Exhibit 522; and (2) determining that the City had to show an accomplished transfer, including actual diversion and use of storage water for municipal purposes, to support the City's argument that the Palisades storage water right must be decreed with a "municipal" purpose of use. *City Of Pocatello's Brief On Motion To Alter Or Amend Recommendation* (May 14, 2013) ("*City's Brief*"), at 2-3 & 4-5. The City's trial arguments and post-trial briefing relied on the same arguments, which this Special Master rejected. The City's *Motion* adds nothing new to its previous arguments, and is unavailing for the same reasons the City's trial and post-trial briefing arguments were unavailing.¹

I. The Record And Idaho Law Confirm That This Special Master Did Not Err In Excluding The City's Proffered Exhibit 522.

The Anderson Ranch storage water right was decreed in Subcase No. 63-3614 with a "municipal" purpose of use,² and the City asserts that United Water Idaho ("United Water") effectuates the "municipal" use without actually diverting any storage water, but rather by leaving the water in the river "to replace/compensate/mitigate for diversions by United Water." *City's Brief* at 2. The City argues this subcase involves "a similar use of storage water without direct diversion by the City of Pocatello." *Id.* at 3; *see also id.* at 4 ("Similar to [United Water] in the Boise drainage, Pocatello has the legal right to divert storage water from the Snake River drainage.").

The City also relied on Subcase No. 63-3614 at trial, arguing that the partial decree in Subcase No. 63-3614 is "the law of the case, Your Honor. And the facts are on all fours" with this subcase. *Reporter's Transcript, Subcase Nos. 01-2068 & 01-2068Y, Trial Before Special*

¹ The State incorporates herein by this reference pages 2 through 9 of the *State Of Idaho's Post-Trial Brief* (Feb. 22, 2013).

² Storage water right no. 63-3614 was decreed with several purposes of use, including "Municipal Storage" and "Municipal from Storage."

Master Dolan (Dec. 10, 2012) (“*Transcript*”) at 114; *see id.* at 115 (“we have in the SRBA similar facts in other basins that have gone to decree and are now the law of the case.”). As this Special Master observed, however, the subcases are not analogous because “municipal” purposes of use were added to the Anderson Ranch water right via a formal transfer proceeding, while no such transfer was sought or approved for the Palisades water right. *See id.* (“But the City of Pocatello did not file (inaudible) transfer proceedings.”). *Transcript* at 114.³ Indeed, this Special Master specifically found that “licensed water right 01-2068 has not been amended through formal transfer proceedings.” *Special Master Report And Recommendation Amended Nunc Pro Tunc* (Apr. 15, 2013) (“*Report & Recommendation*”), at 8.

The City’s *Motion* entirely fails to address or acknowledge this finding and presents nothing new on this point. The City’s *Motion* simply repeats the City’s trial arguments, the premise of which is that the formal amendment of the Anderson Ranch water right through a transfer was “not . . . important.” *See Transcript* at 114 (“it’s not [the formal transfer] that’s important.” The City argues what is important is that the City and United Water make “similar” uses of storage water:

United Water Idaho uses Reclamation’s water right 63-3614 by purchasing and leaving Reclamation water in the Boise River, *without diversion to United Water Idaho’s place of use*, in order to replace/compensate/mitigate for diversions by United Water Idaho Pocatello’s use of water right 1-2068 . . . includes a similar use of storage water without direct diversion by the City of Pocatello.

City’s Brief at 3-4 (italics in original).

Once again, the City made the same argument at trial. *See Transcript* at 118 (“Your Honor, I’m invoking [Subcase No. 63-3614] as factually similar and that those facts are relevant for the legal determination that this court makes.”). The *Motion* simply repeats the City’s trial

³ *See also Transcript* at 42, 53, 55, 107-09, 112, 113-14 (testimony that there had been a formal transfer for the Anderson Ranch water right but not for the Palisades water right).

arguments without adding anything new and without identifying any legal or factual basis for reversing or amending the Special Master's conclusion that Subcase No. 63-3614 (and Exhibit 522) have no relevance to this subcase. This subcase and Subcase No. 63-3614 are not analogous, and the fact that the partial decree for the Anderson Ranch water right includes "municipal" purposes of use is not the "law of the case" for purposes of resolving the question of whether the Palisades water right must also include "municipal" purposes of use.

II. The City Had The Burden Of Showing There Had Been An Accomplished Transfer For Municipal Use.

While the City's *Motion* argues this Special Master erred in determining that the City had to show an accomplished transfer, *Motion* at 4, at trial the City agreed its theory was "accomplished transfer":

SPECIAL MASTER DOLAN: I think you've already agreed to this, but 2068 has not been – no transfer (inaudible) were formally filed so now you're left arguing that it's been an accomplished transfer; is that right?

MS. BEEMAN: It's not that Pocatello is left with that. Like many applicants in the SRBA it has a use that predates the mandatory transfer statute. It wasn't required to file a formal transfer.

SPECIAL MASTER DOLAN: Well, that would be an accomplished transfer.

MS. BEEMAN. Yes.

SPECIAL MASTER DOLAN: So that's your argument, that the City of Pocatello has an accomplished transfer for municipal use of 2068?

MS. BEEMAN: Right. . . .

Transcript at 112-13.⁴ Thus, as this Special Master stated in the *Report & Recommendation*:

"Since licensed water right 01-2068 has not been amended through formal transfer proceedings,

⁴ As this Special Master recognized at trial, the City's contention that "it has a [municipal] use that predates the mandatory transfer statute" is nothing more than an "accomplished transfer" argument. The City's argument that its municipal uses "predate the mandatory transfer statute" is also unavailing for other reasons, as discussed in the *State Of Idaho' Post-Trial Brief* (Feb. 22., 2013). See *supra* note 1.

Pocatello argued the underlying water right had been amended via an accomplished transfer.” *Report & Recommendation* at 8.

Under Idaho law the City had the burden of presenting evidence to support its claim of “an accomplished transfer for municipal use,” *Transcript* at 113, because the Director’s recommendation in Subcase No. 01-2068 did not include “municipal” purposes of use and the Director had recommended disallowance of the City’s claim in Subcase No. 01-2068Y. *City of Pocatello v. Idaho Dept. of Water Res.*, 152 Idaho 830, 840, 275 P.3d 845, 855 (2012); Idaho Code §§ 42-1411(4)-(5); *Transcript* at 206; *see also Fremont-Madison Irr. Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 462, 926 P.2d 1301, 1309 (1996) (stating that a party claiming an accomplished transfer and aggrieved by Director’s recommendation has the burden of proof).

An accomplished transfer is shown by presenting evidence of “change of place of use, point of diversion, nature or purpose of use or period of use.” Idaho Code § 42-1425(2). This Special Master found the evidence was “clear that Pocatello never ‘diverted’ such [Snake River] water except through a rental pool. . . . there is no evidence of an accomplished transfer. . . . Pocatello has failed to overcome the presumptions the Director’s recommendations for water right 01-2068 and claim 01-2068Y are correct.” *Report & Recommendation* at 8. The facts in the record support these findings, and the City has not cited any contrary evidence.

Thus, the record and Idaho law support this Special Master’s determination that the only way the City could prevail on its claim in Subcase No. 01-2068Y and/or its objection in Subcase No. 01-2068 was by showing an accomplished transfer for “municipal” uses. The City’s *Motion* fails to provide any grounds for reversing or altering this determination.⁵ The *Motion* also

⁵ The City does not dispute this Special Master’s determination that the City failed to carry its burden of showing an accomplished transfer, and this determination is amply supported by the record.

contradicts the City's trial admission that the City's theory was "accomplished transfer." There is no merit in the City's contention that this Special Master erred in requiring the City to show an accomplished transfer for municipal purposes by presenting evidence of actual diversion and use of storage water for municipal purposes. *City's Brief* at 4-5

III. The City's Ownership Objection In Subcase No. 01-2068 Has Been Resolved.

The City's final contention is that the City's objection to a *Pioneer* ownership remark⁶ for water right no. 01-2068 has not been resolved and therefore "it is error to include the remark at this time." *City's Brief* at 5. The basis for this argument is the assertion that the City was not a party to the stipulation of September 25, 2012. *Id.* This argument ignores the record.

This Special Master ordered in October 2012 that "all" matters pending in Subcase No. 01-2068 other than the "refill" issue would proceed to trial in December. *Order Staying Further Proceedings Before Special Master On "Fill" And "Refill" Matters* (Oct. 23, 2012), at 2. The City agreed that an ownership remark was appropriate, but sought modifications of the *Pioneer* remark. The question of the exact language of the ownership remark was raised but not resolved at trial, partly on the basis of the City's representation that the language differences could be settled by agreement. *See Transcript* at 98 ("Well, that's the ownership issue. I think we're going to settle that."). This Special Master ordered that post-trial briefing should address the ownership issue. *Supplemental Order On Post-Trial Briefing* (Jan. 17, 2013).

The City had the burden of supporting its ownership objection but failed to do so at trial, did not address the issue in the City's post-trial briefing, and no settlement was reached. The Bureau moved to amend this Special Master's original recommendation⁷ to include the *Pioneer* remark, arguing that because the City's had failed to prove an accomplished transfer "there was

⁶ *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007).

⁷ *Special Master Report And Recommendation* (Mar. 6, 2013).

no basis to modify the *Pioneer* remark” and “[t]his Court implicitly accepted the United States’ argument that no modification of the Pioneer remark is appropriate.” *United States’ Motion To Alter or Amend Recommendation* (Mar. 22, 2013), at 2. This Special Master granted the Bureau’s motion. *Report & Recommendation* at 9.

There is no merit in the City’s argument that its objection in Subcase No. 01-2068 has not been resolved simply because the City was not a party to the stipulation. The City had the opportunity and obligation to support its objection at trial and/or in post-trial briefing and failed to do so. The City’s objection has been resolved and the September stipulation provides no basis for the City to argue otherwise.

CONCLUSION

For the reason discussed herein, the State requests that the City’s *Motion* be denied.

Respectfully submitted this 30th day of May 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2013, I caused the foregoing document to be filed with the Court and true and correct copies served on the following parties by the methods indicated:

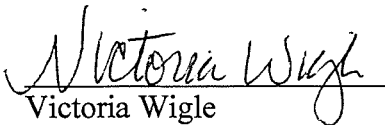
1. Original to:

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