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DEPARTMENT OF
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' RESPONSE
	)	TO MOTION TO ALTER OR AMEND
	)	RECOMMENDATION

Introduction

The City of Pocatello's Motion to Alter or Amend the SPECIAL MASTER REPORT AND RECOMMENDATION (March 6, 2013, amended *nunc pro tunc* April 15, 2013) ("Report") contends the Special Master erred by (1) not considering Pocatello's exhibit 522 pertaining to United Water Idaho's ("UWI") use of water under its own water rights; (2) requiring proof of an accomplished transfer; and (3) including the "Pioneer ownership remark" in subcase 01-2068.¹

¹ Pocatello's Brief on Motion to Alter or Amend Recommendation references water right 01-2068Y. The Special Master's Report concluded that Pocatello is not entitled to a partial decree for its claim 01-2068Y. Report

Standard of Review

Administrative Order 01 authorizes the filing of a Motion to Alter or Amend a Special Master's Recommendation. AO1, § 13.a. A Motion to Alter or Amend is directed to the discretion of the court and allows the court the opportunity to correct any errors of fact or law that had occurred in prior proceedings. *See* ORDER DENYING MOTION TO ALTER OR AMEND, Subcase 00-92002GP at 5 (Jan. 22, 2013).

I. EXHIBIT 522 WAS PROPERLY EXCLUDED.

As it did in its Post-Trial Brief, Pocatello asks this Court to reconsider its decision excluding Pocatello Exhibit 522, which relates to UWI's use of water under its various water rights. *See* Pocatello's Brief on Motion to Alter or Amend at 2 (listing content of Exhibit 522) ("Poc. Brf."). There is no reason for this Court to reconsider its decision to exclude Exhibit 522.

Pocatello contends that Exhibit 522 addresses "how the 'municipal' use occurs under Reclamation's water right 63-3614" for storage in Anderson Ranch Reservoir. *Id.* That information has no relevance here because the Anderson Ranch storage water right 63-3614 is readily distinguishable from water right 01-2068 because there was a transfer to the water right license, applied for by Reclamation and approved by IDWR in 1988 (Transfer # 3310), which served to document the municipal purpose of use decreed in that water right. Given that there was an approved transfer of the use of water right 63-3614 and there has been none for water right 01-2068, there can be no "conflict" between this Court's partial final decree and the SRBA's "records" regarding UWI's Basin 63 water rights addressed in Exhibit 522.

at 9. Pocatello's Motion does not challenge that conclusion and there is no basis for the Court to modify the partial decree for water right 01-2068Y.

Moreover, because the water rights addressed in Exhibit 522 have no relevance here, the Court had no obligation to take judicial notice of the “adjudicative facts” contained in Exhibit 522. To the contrary, *In re Estate of Conway*, 277 P.3d 380 (Idaho 2012), cited by Pocatello, re-affirmed the ability of a trial court to exclude irrelevant materials, even if those materials are court records that could be subject to judicial notice.² *Id.* at 390.

II. THE COURT DID NOT ERR IN REQUIRING AN ACCOMPLISHED TRANSFER.

Pocatello claims it need not demonstrate an accomplished transfer of water right 01-2068 because (1) it has a delivery system that allows it to receive water from the Fort Hall Irrigation Project under water rights *other than* 01-2068; and (2) its use of storage water from water right 01-2068 prior to the adoption of mandatory transfer legislation in 1969 is “documented in the Water District 01 water delivery records.” Poc. Brf. at 4-5.

Absent a permitted transfer, an accomplished transfer is the only possible means to justify a change in use for water right 01-2068. *See Freemont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996). Indeed, Pocatello’s claim that the accomplished transfer statute, Idaho Code 42-1425, provides “amnesty” for water users who did not comply with the mandatory transfer legislation appears to acknowledge this.

The accomplished transfer statute, however, 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

² Pocatello’s brief also includes a relatively long discussion of its status as an “upper valley entity” pursuant to a remark included on water right 01-2068. The United States does not dispute that Pocatello, like every other spaceholder, is “entitled to ‘delivery of water, by exchange or otherwise’ from Palisades reservoir. But Pocatello’s status as an upper valley entity does not establish that water stored in Palisades Reservoir was used for municipal purposes prior to 1987.

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.

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 stored water for any of the purposes claimed.³ 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.”⁴ Tr. at 85, ln.1-5. That testimony was uncontroverted.

In sum, this Court did not err in concluding an accomplished transfer was required, nor in finding that Pocatello has failed to demonstrate an accomplished transfer occurred.

III. THE COURT DID NOT ERR BY INCLUDING THE “PIONEER” REMARK IN ITS PROPOSED DECREE.

The Special Master's Report concluded that “The United States is entitled to a partial decree adjudicating a water right for claim 01-2068 *as described in the September 25, 2012 Stipulation* and the attached Special Master Recommendation for Partial Decree for Water

³ Because the delivery system discussed by Pocatello has never been used to divert water stored in Palisades Reservoir, it is of no relevance here.

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

Right 01-2068.” Report at 9 (emphasis added). Consistent with the Idaho Supreme Court’s instruction in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), the recommended Partial Decree for water right 01-2068 includes a remark recognizing that irrigation districts hold a beneficial interest in the irrigation use of the water right.

Pocatello claims it was improper for the Court to include the Pioneer remark because “Pocatello was not a party to the September 25, 2012 Stipulation” and “Pocatello’s objection about an ownership remark has not been resolved.” Poc. Brf. at 5. The Sept. 25, 2012 Stipulation (“Stipulation”), adopted by this Court in its ORDER ADOPTING STIPULATION, was done to resolve pending legal issues and narrow the scope of the issues to be addressed by this Court at trial. *See* Stipulation at 6-7. The Stipulation effectively resolved all of the issues raised by irrigation entities and informed the Court that only the Idaho Power Company (“IPC”) and Pocatello had remaining issues. In particular, it explained that both IPC and Pocatello had outstanding issues related to the *Pioneer* decision.⁵ Stipulation at 6; *see also Id.* at 4 & n.4. Thus the expectation was that those issues would be addressed at trial.

Regardless of the Stipulation, Pocatello could have – and should have – addressed its claim to a modified version of the Pioneer remark at trial. It did not.⁶ Pocatello could have addressed the issue in its post-trial briefing. It did not. It could have addressed the merits of the issue in the pending motion. It did not. As a result of its failure to pursue the issue, Pocatello has waived the issue: *See e.g., Pines Grazing As’n, Inc., v. Flying Joseph Ranch, LLC*, 151 Idaho 924, 930-31, 265 P.3d 1136, 1142-43 (2011) (issue not raised at trial is waived); *Rowley v.*

⁵ Idaho Power’s issue has been resolved through settlement and will be presented to the Court when the proposed settlement is formally approved by the United States.

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

Fuhrman, 133 Idaho 105, ___, 982 P.2d 940, 943 (1999) (holding that a party waives any issue not addressed in its opening brief).

In any event, the issue has been effectively resolved through this Court's rejection of the claims Pocatello did raise. As was discussed above, Pocatello has not shown that an accomplished transfer expanding the use of the Palisades storage water has occurred. As a result, the purposes of use for water right 01-0268 remain irrigation and power and there is no basis to modify the *Pioneer* remark.⁷ Accordingly, inclusion of the *Pioneer* remark is appropriate.

DATED this 30th day of May, 2013.

Respectfully submitted,

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

David W. Gehlert

⁷ As the Partial Decree notes, water stored in Palisades Reservoir is also used for power generation. However, that power generation occurs at the Palisades Powerplant owned by the United States. Accordingly, that use does not implicate *Pioneer*.

CERTIFICATE OF SERVICE

I certify that on May 30, 2013, I served true and correct copies of the foregoing UNITED STATES' MOTION TO ALTER OR AMEND PARTIAL DECREE as follows:

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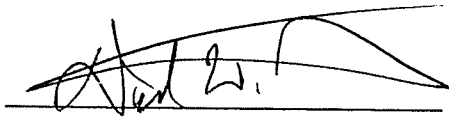
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