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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 24 2013	
By _____	Clerk
Deputy Clerk	

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	)	Subcases 01-2068 (USDI/BOR) and
	)	01-2068Y (City of Pocatello)
	)	
Case No. 39576	)	ORDER DENYING MOTION TO ALTER
	)	OR AMEND RECOMMENDATION
	)	
	)	
_____	)	

Background

A quick review of the facts and issues in these two subcases may be helpful. The BOR was issued a license for Palisades Reservoir water right 01-2068 in 1973, for 1,200,000 afy for year-round irrigation and power storage and power from storage plus irrigation from storage from March 15 to November 15 with a priority date of July 28, 1939.

Pocatello filed its parallel claim, 01-2068Y, seeking 50,000 afy for municipal, irrigation, power, domestic, industrial, commercial, recharge and mitigation uses for the same priority date of July 28, 1939, based on "Decree, Contract with the U.S. – Court decree: *Aberdeen-Springfield Canal Co et al v Henry Eagle* (7th Jud. Dist. 03/12/1969)." In its *Notice of Claim*, Pocatello described the diversion works as "Palisades Reservoir and related project works." Under remarks, Pocatello wrote:

This claim is made pursuant to the contractual rights of the City of Pocatello under the contract it entered into with the U.S. Bureau of Reclamation under Contract No. 14-06-100-1825 dated January 8, 1960. . . . Under the Contract, the City of Pocatello is entitled to 4.1667% of the reservoir capacity, which is 50,000 acre feet at the estimated active capacity of 1,200,000 acre feet. This water was acquired by the City to mitigate and replace to the Snake River . . . depletions attributable to the City's diversion of ground water and surface water for

municipal uses within the City's service area. . . [W]ater withdrawn from the City's wells or diverted at the City's headgates is replaced to the Snake River using the City's Palisades Reservoir water. In addition, the City may rent its Palisades Reservoir water to other users for irrigation, power, domestic, municipal, industrial, commercial, mitigation, and recharge purposes on an annual basis pursuant to the terms of the Contract.

The U.S. Bureau of Reclamation has filed a claim (No. A01-02068) in the SRBA for storage water in Palisades Reservoir to be used for the limited purposes of irrigation and power. Pursuant to Article 24 of the Contract, this claim is necessary to ensure that the full nature and extent of the City's Palisades storage right is properly decreed in the SRBA.

Pocatello's *Notice of Claim to a Water Right*, 01-2068Y, at 1-5.

Following the December 10, 2012 trial and filing of post-trial briefs, on April 15, 2013, the Special Master entered a ***Report and Recommendation Amended Nunc Pro Tunc***. It noted water right 01-2068 was licensed to the BOR without objection and exclusively for irrigation and power uses; Pocatello has been entitled to its share of Palisades stored water for over 53 years based on its 1960 contract with the BOR; license 01-2068 has not been amended through formal transfer proceedings; Pocatello has never diverted its share of Palisades water; and its use of such water for non-licensed purposes and places of use has occurred solely by its participation in a rental pool ("water supply bank").

The Special Master concluded there was no evidence of an accomplished transfer of 01-2068; Pocatello failed to overcome the presumptions the IDWR Director's recommendations for water right 01-2068 and claim 01-2068Y are correct; and its objections in subcase 01-2068 lack merit and fail as a matter of law. Therefore, the Special Master recommended the BOR be decreed a water right for claim 01-2068 and Pocatello's claim 01-2068Y be disallowed.

Motion to Alter or Amend

Pocatello filed its *Motion to Alter or Amend Recommendation* on April 29, 2013. It alleged three errors. First, it was error to exclude Pocatello's Trial Exhibit 522 entitled:

Part 1, United Water Idaho Water Rights Associated with Municipal Purpose of Use Under Reclamation Water Right 63-3614: United Water Idaho Water Right 63-2892 Records – including SRBA decree 63-2892, SRBA claim 63-2892, SRBA Withdrawal of Objection 63-2892, IDWR Back File 63-2892

[and]

Part 2, United Water Idaho Water Rights Associated with Municipal Purpose of Use Under Reclamation Water Right 63-3614: United Water Idaho Water Right

63-31797 Records – including SRBA decree 63-31797, SRBA claim 31797, SRBA Withdrawal of Objection 31797.

The second alleged error was the Special Master's determination "that an accomplished transfer and the diversion of storage water by the City under water right 1-2068 or 1-2068Y were necessary for the inclusion of a municipal purpose of use under water right 1-2068 or 1-2068Y." Pocatello's *Motion*, at 2.

The third alleged error was inclusion in the ***Report and Recommendation*** of the *Pioneer* remark because Pocatello was not a party to the September 25, 2012 *Stipulation*. In that *Stipulation*, parties to twelve Basin 01, 21 and 25 reservoir subcases (including 01-2068) and IDWR agreed certain remarks and elements would be included in partial decrees for those water rights. Pocatello was not a party to the agreement. Pocatello lodged its *Brief on Motion to Alter or Amend Recommendation* on May 14, 2013.

The *Pioneer* remark refers to language agreed to by the parties to the *Stipulation* and included in the Special Master's ***Recommendation***. The remark was mandated by the Idaho Supreme Court in *United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). It states:

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 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.

Pioneer, 144 Idaho at 115 and 157 P.3d at 609.

United States' Response

The U.S. filed its *Response to Motion to Alter or Amend Recommendation* on May 30, 2013. It argued Pocatello's Exhibit 522,

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 right.

...

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 [citation omitted].

U.S. *Response*, at 2-3.

Next, the United States argued absent a permitted transfer, an accomplished transfer is the only possible means to justify a change of use for water right 01-2068. It noted "actual use for the purposes claimed is a predicate to recognizing an accomplished transfer." U.S. *Response*, at 3. However, the U.S. recalled that Water District 01 Program Manager Anthony S. Olenichak testified no Palisades water was ever delivered to Pocatello; hence, Pocatello failed to demonstrate an accomplished transfer.

Finally, the U.S. argued inclusion of the *Pioneer* remark in the Special Master's ***Recommendation*** was appropriate because the 2012 *Stipulation*, signed by all the parties except Pocatello, narrowed issues to be heard at trial – Pocatello's and Idaho Power's concerns of ownership of water stored in Palisades Reservoir. Even so, the U.S. suggested Pocatello failed to address the issue of ownership at trial, in post-trial briefing and in its *Motion to Alter or Amend*. Therefore, Pocatello waived the issue which was effectively resolved when the Special Master rejected Pocatello's claim 01-2068Y obviating any reason to modify the *Pioneer* remark included in BOR's water right 01-2068.

State of Idaho's Response

The State filed its *Response to City of Pocatello's Motion to Alter or Amend Recommendation* on May 30, 2013. Like the U.S., the state reminded the parties the Anderson Ranch Reservoir storage water right 63-3614 is not analogous with Pocatello's claim: "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." State's *Response*, at 3. While Pocatello argued formal amendment or transfer of the water right was not important, it offered no legal or factual basis for such an argument.

Finally, the State recalled the December 10, 2012 trial addressed *all* matters pending in subcase 01-2068 other than the "refill" issue. Nevertheless, while Pocatello argued a modified *Pioneer* ownership remark was necessary, it failed to support its objection at trial and in its post-trial briefing. Hence, Pocatello's argument the issue has not been resolved simply because it was not a party to the September 25, 2012 *Stipulation* lacks merit. BOR's water right 01-2068 was recommended with the *Pioneer* remark as required by the Idaho Supreme Court, without Pocatello's suggested modification, and Pocatello's objection has been resolved.

Hearing

The hearing on Pocatello's *Motion to Alter or Amend* was held on June 6, 2013, at the SRBA Courthouse in Twin Falls, Idaho. David W. Gehlert appeared for the BOR, along with E. Gail McGarry; Josephine P. Beeman appeared for Pocatello; Michael C. Orr appeared for the State of Idaho; Travis L. Thompson appeared for the Surface Water Coalition¹; Jerry R. Rigby appeared for the Upper Valley Irrigators; and Chris M. Bromley appeared for IDWR.

At the hearing, Pocatello argued it applied groundwater for municipal use before Palisades Reservoir was built in 1959 / 1960 and it was entitled to the same 1939 priority date licensed to the BOR because of the "relation back" doctrine. Plus, Pocatello alleged Idaho has had a transfer statute since statehood allowing municipal use to be added to Palisades licensed water rights.

The United States argued Pocatello's use of storage water to mitigate its groundwater pumping for municipal use does not change purposes of use licensed under water right 01-2068 (irrigation and power). Pocatello's participation in a rental pool does not change the license. Besides, Pocatello failed to address the merits of the *Pioneer* remark which by its very language precludes Pocatello's claim 01-2068Y. Finally, Pocatello showed no evidence of direct use of Palisades storage water for municipal use, only non-storage water rights it holds.

The State suggested Pocatello offered nothing new at the hearing. Pocatello presented no evidence of a hydrologic connection between water stored in Palisades and groundwater and conjunctive management has never been an issue in these subcases. The State added Pocatello

¹ The Surface Water Coalition includes: A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company and Twin Falls Canal Company.

failed to cite any authority for its "common law transfer" theory. Its arguments in support of its claim 01-2068Y are based solely on its contract with BOR.

Discussion

Pocatello has offered no sound reason to alter or amend the April 15, 2013 *Report and Recommendation Amended Nunc Pro Tunc*. Pocatello essentially repeated arguments it made at trial last December while offering nothing new.

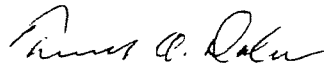
The exclusion of Pocatello's Trial Exhibit 522 reviewing United Water's water right 63-2892 was correct because municipal use was added to that Anderson Ranch Reservoir license by formal transfer proceedings, not a "common law transfer" as Pocatello argued in the Palisades license. As such, the evidence has no relevance to the circumstances presented here. Next, there was no legal or factual evidence to conclude there was any transfer or amendment of the Palisades license to add municipal use under water right 01-2068 or 01-2068Y. Besides, no Palisades water was ever delivered to Pocatello. Finally, even though Pocatello was not a party to the September, 2012 *Stipulation*, it was proper to include the *Pioneer* remark in the *Report and Recommendation* for the simple reason the Idaho Supreme Court requires such.

The conclusions of law stated in the *Report and Recommendation* remain valid: 1) the United States is entitled to a partial decree for water right 01-2068 pending final resolution of Basin-Wide Issue 17; and 2) Pocatello is **not** entitled to a partial decree for its claim 01-2068Y.

Order

THEREFORE, IT IS ORDERED that Pocatello's *Motion to Alter or Amend Recommendation* is **denied**.

DATED June 24, 2013.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND RECOMMENDATION was mailed on June 24, 2013, with sufficient first-class postage to the following:

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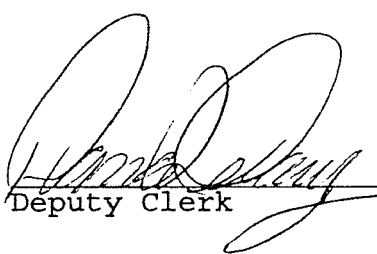
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