

Fritz Haemmerle, ISB No. 3862
HAEMMERLE LAW, PLLC
P.O. Box 1800
Hailey, ID 83333
Telephone: 208/578-0520
Facsimile: 208/578-0564
haemmerlefilings@gmail.com

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DEPARTMENT OF
WATER RESOURCES

Matthew J. McGee, ISB No. 7979
SPINK BUTLER, LLP
251 E. Front Street, Suite 200
Boise, ID 83702
P.O. Box 639
Boise, ID 83701
Telephone: 208/388-1000
Facsimile: 208/388-1001
mmcgee@spinkbutler.com

Attorneys for City of Mountain Home

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

Case No. 39576.

) Subcases 63-33734A and 63-33734B; 63-
) 303, 63-3613, 63-3614 and 63-3618
)
) REPLY IN SUPPORT OF MOTION TO
) PARTICIPATE AND OBJECTIONS:
) RESPONSE BRIEF TO THE STATE'S
) MOTION TO STRIKE SF-1
) OBJECTIONS
)

COMES NOW, the City of Mountain Home (the "City"), by and through undersigned counsel, hereby submits a reply to the State of Idaho's Response to the City's Motion to Participate, which it designated as the State of Idaho's Reply Brief Re: City of Mountain Home's Motion to Participate in "Late Claims."

Furthermore, the City incorporates this Reply as to the Responses filed by the Suez Water Idaho Inc. and the Irrigation Entitles' Joint Opposition to the City of Mountain Home's Motion

REPLY IN SUPPORT OF MOTION TO PARTICIPATE AND OBJECTIONS: RESPONSE
BRIEF TO THE STATE'S MOTION TO STRIKE SF-1 OBJECTIONS - 1

to Participate in the Late Claims.

This Brief also constitutes a Response to the Motion to Strike SF-1 filed by the State.

I. REPLY

A. Water rights 63-33734A and 63-33734B are two water rights, which required separate Director's Reports.

The State argues that there is no need to file separate Director's Reports for water rights 63-33734A and 63-33734B. In an attempt to side-step the requirements of having two separate claims and two separate Director's Reports, the State refers to the "A" and "B" water rights as "subparts." The water rights are not "subparts." They are two distinct and separate water rights. There are no claims for 63-33734A and 63-33734B. There is only one Claim under subcase 63-33734.

The State is not allowed to make or construct two separate water rights out of a single claim. The State's own Adjudication Administrative Rules state: "a single claim can describe only one water right. A claim that describes more than one (1) water right will be rejected and returned along with any fees paid, **and must be refiled as multiple claims.**" IDAPA 37.03.01.060.01.

In this case, again, it is undisputed that the settling parties are proposing two separate water rights. It is also undisputed that there is only one claim, which is under 63-33734. If the State proposes to decree two separate water rights, then it should follow its own Administrative Rules by filing separate claims. The separate claims would then trigger separate Director's Reports for each claim.¹

¹ In addition, there is some dispute as to what Director's Report was filed for water right 63-33734. The City cited a Director's Report in its footnote to the attached Brief in Support of I.R.C.P. Motion to Dismiss State's Motion to decree water rights 63-33734A and 63-33734B; and State's Motion to Alter or Amend 63-303, 63-303, 63-3613, 63-3614 and 63-3618. The State argues that the City cited the wrong Director's Report. The State points to the *Affidavit of Michael C. Orr*, Exhibit 25, as containing a

Moreover, in addition to utilizing the term “subpart,” the State does not explain the authority to accomplish such splits of water rights, which have been recommended as disallowed without the submission of a new Director’s Report. Again, IDAPA 37.03.01.060.01 states that a single claim can only generate a single water right. Each and every water right claimed in the SRBA requires an individual Director’s Report. I.C. § 42-1411. If new water rights are generated from a single claim, then the new water right require separate claims. Even small changes to reported water rights with respect to splitting ownership or changing the nature of the water rights requires the Court to stay proceedings in order for the Department to submit Amended Director’s Reports reflecting the changes in split ownership or in the nature of a water right. *See*, AO1.17.

If a mere changes of ownership requires an administrative proceeding to be completed while SRBA proceedings are stayed, and mandates the submission of an Amended Director’s Report (“*shall* file with the court . . . an attached Amended Director’s Report”), the split or division process employed here via private negotiation; where multiple water rights are generated from a single claim; without any rule-based support; such a process demands that new Director’s Reports be filed.²

In this case, the Settling Parties bypassed the legal requirements of filing multiple claims for multiple water rights. They also bypassed the requirements of submitting the multiple claims to the Department for the filing of Director’s Reports. Instead, the parties had separate water

Director’s Report for water right 63-33734. Exhibit 25 (the Director’s Report) references 63-33734 as simply being disallowed.

² The Director of IDWR is required to file recommendations to the Court as set forth under 42-1401B. Section 42-1401B also expressly prohibits the Director from being a party to the case. As to water rights 63-33734A and 63-33734B, the Director has not expressed any opinion through any Director’s Reports, which constitute the recommendation of the Director. Rather, the Director seems to be presenting its case through the other State of Idaho, by and through Attorney General’s Office, Office of Natural Resources.

right reports created, and they all agreed to the reports. They then submitted the reports to the Court without the benefit of any judicial scrutiny of the factual or legal basis for the issuance of the rights.³

B. The settlement of the two separate water rights is not between the parameters of the Director's Report and Claim.

Ignoring the fact that there are two separate water rights, which required two separate claims and Director's Reports, the State argues that the "subparts" are valid because the ultimate settlement is within the parameters of the Director's Report and Claim. This argument lacks merit for several reasons.

First, as previously indicated, there are no claims for 63-33734A and 63-33734B. There are also no Director's Reports. Accordingly, there are no parameters to consider.

Second, if the Court should look to the Claim in 63-33734⁴ as having any relevance, that Claim did not contain the following subordination clause:

This water right is subordinate to all water rights established pursuant to Idaho law for uses within IDWR Administrative Basin 63, except water rights to store more than 1,000 acre feet of surface water permitted or licensed after April 15, 2019. This water right shall not be administered as subordinate to water rights permitted or licensed for managed ground water recharge after April 15, 2019 or any water rights for the storage or use of water for power purposes.

Of course, the Director's Report recommended 63-33734 as disallowed, so subordination of the right, in whole or in part, of 63-33734 was not at issue. Therefore, it cannot possibly be argued that the subordination provision is within the parameters of the Claim and Director's Report for water right Claim 63-33734. There is no way the City of Mountain Home could have anticipated this particular subordination provision. See e.g., *Memorandum Decision and Order*

³ Given these facts, it is hard to arrive at any scenario where there is even a rebuttable presumption for the existence of water rights 63-33734A and 63-33734B.

⁴ The Claim for water right 63-33734 is contained in Exhibit 1 to the *Affidavit of Michael C. Orr*. The Director's Report for water right 63-33734 is contained in Exhibit 25 to the *Affidavit*.

on Challenge, Subcase Nos. 36-00061, 36-00062 and 36-00063 (hereinafter "Morris"), p. 16 of 30, fn. 10 & 12.

Third, even if the subordination clause was within the parameters of the Claim and Director's Report, the need for the subordination clause presents a question of law. Generally, as this Court is well aware, remarks or other matters may be included in a water right if those provision are necessary for the definition or administration of the water right. I.C. § 42-1411(2)(j). As a question of law, litigants who were not parties to the subcase should be able to argue about the propriety of matters of law. *See, Morris*, p. 16 of 30, fn. 12.

In *Morris*, the Court acknowledged that even if participants do not file Objections or otherwise participate, those parties still can file Motions to Alter or Amend to challenge questions of law. The trouble in the case of water rights 63-33734A and 63-33734B is that the Claims have not been presented to the Special Master for consideration, and therefore, there is no opportunity to file a Motion to Alter or Amend.

Here, the State fails to point out that the "subordination" clause negotiated by the parties is awkward self-serving language that is tantamount to state policy specifically protecting and favoring only very local interests. The State disingenuously notes that the "subordination" remark subordinates the water right to "almost all" existing and future water rights. *See State's* Brief at 14. It follows this "almost all" explanation by noting certain statutory exceptions, express and implied. It neglects, however, to mention the arbitrary geographic limitation embedded in the condition. Instead of the simple "subordination" language the State touts in its explanation of the settlement, the language provides, in part, that "Refill 1" "is subordinate to all water rights established pursuant to Idaho law for uses within the IDWR Administrative Basin 63, except water rights to storm more than 1,000 acre feet of surface water permitted or licensed

after April 15, 2019.”

The City did not, and could not, reasonably foresee that a subordination provision would not apply to similarly situated uses of water rights outside of Basin 63. No rational legal basis for subordination to uses only within Basin 63 is apparent under Idaho law. The only rationale to limit subordination to uses within Basin 63 in such a fashion is to exclude, for example, the City of Mountain Home from the benefit of future water right development of unappropriated water on the river in question that it may pursue in accordance with Idaho law. The failure to protect similarly situated parties results in a deprivation of Equal Protection guaranteed by the United States and Idaho Constitution. *Anderson v. Spalding*, 137 Idaho 509, 513, 50 P.3d 1004, 1008 (2002); *see also, Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).⁵

Obviously, through no fault of its own, and as a result of the bare presentation of a Motion to Decree to this Court, the posture of this case does not afford the City an opportunity to present its legal positions in a Motion to Alter or Amend, or otherwise. However, there is no plainly discernable rationale for the exclusive subordination language in the proposed water rights. A record relating to that issue has not been developed for the Court’s consideration, and the City should be allowed a chance to present its legal position as to that issue here.

Again, in sum, even assuming that there was adequate notice of the claimed quantities, points of diversion, places of use and priority dates, and even assuming it was reasonable for the City to anticipate that a settlement may be reached as to such elements, it was not reasonable to expect an entirely unsupported, legally deficient, and blatantly protectionist subordination remark that very simply and practically impacts only the development of water resources in and around the City of Mountain Home. The City of Mountain Home was not, and could not have

⁵ The City could have anticipated that the Settling Parties would construct a subordination provision that deprives other similarly situated parties having uses outside of Basin 63 their Equal Protection.

reasonably anticipated that outcome, and should be afforded the opportunity to be heard prior to such outcome regardless of the years of litigation and negotiation out of which the Stipulation resulted. The blatant water grab embodied in such protectionist subordination language, and sanctified by the State and the Department with their signatures, should not be rubber-stamped as a decreed water right in this case.

C. The Court should not Alter or Amend 63-303, 63-3613, 63-3614 and 63-3618.

The State seeks to alter or amend water rights 63-303, 63-3613, 63-3614 and 63-3618. This requires the Court to set aside the Decrees which were entered on June 28, 2007. Again, the Court did not retain these water rights in the Final Decree.

The State seeks to set aside these water rights to add administrative provisions. In its *Memorandum Decision and Order on Challenge and Order of Recommitment to Special Master*, Subcases Nos. 63-33734 et. seq., this court clearly held that it would not allow decrees to be set aside to add administrative provisions. The Court stated:

Indeed allowing a water right holder to come back into the SRBA after the right has been decreed and then argue that it should be administered according to some particular methodology not otherwise provided for in the partial decrees would constitute an impermissible collateral attack on the partial decree. *Rangen*, 159 Idaho at 806, 367 P.3d at 201. Moreover, it would ignore the finality of the partial decree as well as the final unified decree in which the partial decree was incorporated.

Id. at 6-7.

Evidently, the State is the only party who can ignore Court Decisions and do what no other party is allowed to do – that is to reopen decrees to add remarks and other administrative provisions.

II. CONCLUSION

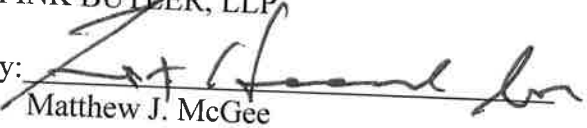
For the foregoing reasons, the City respectfully requests:

1. An Order allowing the City to Participate in water right claims 63-33734A and 63-33734B, and in 63-00303, 63-3613, 63-3614 and 63-3618; and/or
2. An Order allowing the City to file Objections, as set forth in the SF-1's for water rights 63-33734A and 63-33734B;
3. An Order requiring the Department to file Claims for 63-33734A and 63-33734B;
4. An Order requiring the Department to file Director's Reports for 63-33734A and 63-33734B; and
5. An Order dismissing the Motion to Strike filed by the State.

DATED this 31st day of May, 2019.

SPINK BUTLER, LLP

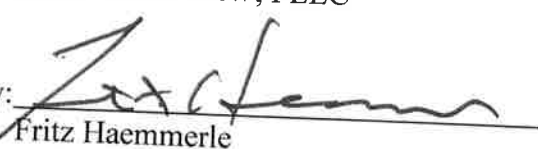
By:


Matthew J. McGee

Attorneys for City of Mountain Home

HAEMMERLE LAW, PLLC

By:


Fritz Haemmerle

Attorneys for City of Mountain Home

CERTIFICATE OF MAILING

I certify that on May 31, 2019, I mailed the copies of this document to the following persons:

Clerk of the District court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

☒ HAND DELIVERY

David W. Gehlert
Environment & Natural Resources
U.S. Department of Justice
999 18th St.
South Terrace Ste 370
Denver, CO 80294

☒ U.S. Mail, postage prepaid

Director of IDWR
IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

☒ U.S. Mail, postage prepaid

Chief, Natural Resources Division
Office of Attorney General
P.O. Box 83720
Boise, ID 83720-0010

☒ U.S. Mail, postage prepaid

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

☒ U.S. Mail, postage prepaid

Albert Barker
Shelley Davis
John Simpson
Travis Thompson
BARKER ROSHOLT
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139

☒ U.S. Mail, postage prepaid

Andrew J. Waldera
Daniel Steenson
S. Bryce Farris
SAWTOOTH LAW OFFICES, PLLC
1101 W. River St., Ste. 110
P.O. Box 7985
Boise, ID 83707

☒ U.S. Mail, postage prepaid

Christopher Meyer
Michael P. Lawrence
GIVENS PURSLEY
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

☒ U.S. Mail, postage prepaid

USDI Bureau of Reclamation
By: US Department of Justice
Environmental & Natural Resources
550 West Fort Street, MSC 033
Boise, ID 83724

☒ U.S. Mail, postage prepaid

Candice McHugh
Chris Bromley
MCHUGH BROMLEY, PLLC
380 S. 4th, Ste. 103
Boise, ID 83702

☒ U.S. Mail, postage prepaid

Sarah Klahn
SOMACH SIMMONS & DUNN
2701 Lawrence, #113
Denver, CO 80205

☒ U.S. Mail, postage prepaid



Signature of Attorney