

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
TO APPROPRIATE WATER NO. 27-12155	)	
IN THE NAME OF THE CITY OF SHELLEY	)	ORDER DENYING
	)	MOTION FOR SUMMARY
		JUDGMENT

The City of Shelley ("Shelley") moved for summary judgment. Shelley asserts the following as uncontested facts: (1) Shelley will limit its annual volume diverted for any permit issued for application to appropriate water no. 27-12155 to the annual volume of water authorized by its existing water rights; and (2) Shelley is a member of the Bingham Ground Water District and is required to provide mitigation for depletions caused by its diversions of water.

Inclusion of the Proposed Point of Diversion in a Moratorium Area

Protestants to application no. 27-12155 (A&B Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, and Milner Irrigation District) responded to the motion for summary judgment. In their response, the protestants cited and attached an *Amended Moratorium Order*, dated April 30, 1993, issued by the Idaho Department of Water Resources ("Department"). The April 30 *Amended Moratorium Order* restricted appropriations of water within the Eastern Snake River Plain Area, depicted on a map attached to the order as "Exhibit A." The point of diversion sought by application no. 27-12155 lies outside the boundary of the Eastern Snake River Plain Area. As a result, the April 30 *Amended Moratorium Order* does not affect application no. 27-12155.

On January 6, 1993, the Department issued a *Moratorium Order* for the Non-Trust Water Area. The Non-Trust Water Area is an area located east and south of the Eastern Snake River Plain Area previously referenced. The point of diversion sought by application no. 27-12155 is located within the Non-Trust Water Area. The January 6 *Moratorium Order* stated in its conditions:

1. The moratorium shall be in effect on and after its entry and shall remain in effect until December 31, 1997.

As a result of the above condition, the January 6 *Moratorium Order* has expired, and the restrictions on appropriation of water contained in the January 6 *Moratorium Order* are no longer effective.

Additional Flow Rate With No Increase in Alleged Authorized Annual Volume

For purposes of determining the annual volume of water authorized by its existing water rights, Shelley argues that a municipal water right grants entitlement to the full volume of water that would accrue by continuously diverting the existing water rights at the authorized flow rates for an entire year.

Shelley argues, based on a presumption that it is entitled to the annual volume described above and the volume is not exceeded by an increased flow rate, that the protestants cannot be injured.

The Idaho Department of Water Resources ("Department") can grant a water right to a municipality that does not specify an annual volume limitation. Some municipal water rights are granted without an express annual volume. In contrast, other municipal water rights limit the annual volume. The absence of an annual volume on a municipal water right does not create an absolute expectation that the annual volume is established and is only limited by the volume calculated by continuous accrual of the flow rate over the period of a year. The extent of a water right is bounded by the beneficial use of the water under the water right. A municipality has the ability to grow into its water right within reasonable limits. These limits include the express components that define the municipal water rights. One of these components is the flow rate. A reasonable exercise of a municipal water right is the construction of additional storage or additional delivery line capacity to address relatively short term demands on the system. These reasonable expansions of a municipal system are recognized within the expansion flexibility of a municipal system.

Shelley argues, however, that a new water can authorize significant additional flow rate, and that any additional volume diverted would, as a matter of law not injure another water user even though the increased volume could not have been physically diverted under the flow rate authorized by the existing water rights. Adoption of this argument by the Department could result in a license to significantly increase the flow rate, and correspondingly increase the annual volume diverted beyond what was reasonably expected under the existing municipal water rights, even if the rights do not expressly fix a volume limitation.

Based on the above, the issue presented by Shelley is an issue of fact. The issue is one of whether the increase in flow rate will cause an increase in the annual volume of water diverted that could not be reasonably expected under Shelley's existing municipal water rights. For instance, if the extra flow rate were sought simply to supply fire protection flows to satisfy a fire protection standard, and the only additional volume would be diverted to fight an existing fire, the facts would probably dictate a conclusion that there is no injury. On the other hand, if additional flow rate would double the total annual volume diverted under the existing municipal water rights, it is more probable that injury could occur.

Membership in a Ground Water District

Shelley also asserts that its membership in the Bingham Ground Water District, and the obligations of the district to provide mitigation for delivery calls by the protestants provides

sufficient mitigation to offset any injury caused by Shelley in the future, and is grounds for the Department to grant summary judgment against the protestants.

An applicant seeking a new water right bears the burden of proof to establish all the factors the Department must consider under Idaho Code § 42-203A, including whether the proposed use will "reduce the quantity of water under existing water rights" and whether the water supply is sufficient for the purpose sought. The file contains information about modeled reductions in gains to the Snake River caused by the proposed diversion of water in reaches of the Snake River that, at times, are fully appropriated. Idaho Code § 42-203A requires that each criterion in the statute must be applied specifically to the pending proposal and must be satisfied at the time appropriation is sought, not after a water right is approved. If the Department determined that participation in a ground water district is grounds for dismissal of a protest, the Department would be ignoring its responsibility to specifically apply the Section 42-203A factors to the proposal, the ability to assess the application would be diluted by the involvement of many other water users in the delivery call, and the burdens of bringing an action and of proving injury would shift, at least partially, to the protestants.

ORDER

IT IS HEREBY ORDERED that the City of Shelley's Motion for Summary Judgment is Denied.

DATED this 30th day of October, 2008.



GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

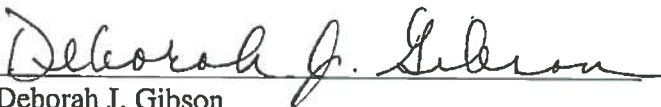
I HEREBY CERTIFY that on this 31st day of October, 2008, a true and correct copy of the above and foregoing document described below was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: ORDER DENYING MOTION FOR SUMMARY JUDGMENT

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