

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NO. 76779 IN THE NAME)	ORDER PARTIALLY GRANTING
OF THE CITY OF POCA TELLO)	MOTION TO COMPEL DISCOVERY
_____)	

This matter having come before the Idaho Department of Water Resources ("Department") as a result of an application for transfer, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On November 12, 2010, the City of Pocatello ("Applicant"), represented by Michael C. Creamer of Givens Pursley LLP, filed an Application for Transfer No. 76779 with the Department. The application was advertised to the public and protests were filed by Portneuf Watershed Users Association Inc. ("PWUA"), represented by Scott Campbell of Moffatt Thomas Barrett Rock & Field Chtd., Symons Farm and Ranch, John Schwarz, McCammon Ditch Company, represented by James Spinner of Service & Spinner, and Twin Falls Canal Company, Milner Irrigation District, A & B Irrigation District, Burley Irrigation District and North Side Canal Company, represented by Travis Thompson of Barker Rosholt & Simpson LLP.

2. A pre-hearing conference was held in this matter in Pocatello on February 3, 2011. During the conference, the parties agreed to engage in limited discovery as determined by the hearing officer. On February 8, 2011, the Department issued an Order Authorizing Discovery and Notice of Status Conference. The Order stated the parties were authorized to engage in discovery immediately with the following limitations:

Written requests for discovery must be interrogatories or requests for documents. Requests for admission are not allowed. No more than fifteen (15) interrogatories may be served by any party (or the attorney for several parties) on another party. Division of a single interrogatory into multiple sub-questions is not permissible. All written discovery requests shall be served on or before April 30, 2011.

3. The Applicant served a first set of discovery to Mr. Schwarz on March 28, 2011. The discovery contained ten interrogatories. Mr. Schwarz responded to the discovery request on April 6, 2011. In his responses to Interrogatories 1-9, Mr. Schwarz objected to the interrogatories on the basis that each one "exceeds the parameters of the Department's Order because it contains subparts." (*See* Exhibit A to Applicant's Motion to Compel) Citing his subpart objection, Mr. Schwarz stated that he only responded to the first portion of each interrogatory. (*See id.*)

4. On April 8, 2011, the hearing officer partially granted a separate Motion to Compel filed by the Applicant. Within that order, the hearing officer determined that certain interrogatories

drafted by the Applicant, which are very similar to those served on Mr. Schwarz, did not violate the restriction on subparts and ordered protestant PWUA to respond to those interrogatories in full. On April 25, 2011, the Applicant filed a Motion to Compel Discovery Responses of Mr. Schwarz. In its motion, the Applicant cited the previous order relating to interrogatories drafted by the Applicant, and argued that Mr. Schwarz should be compelled to fully respond to all of the interrogatories served. Mr. Schwarz did not file a response to Applicant's Motion to Compel.

CONCLUSIONS OF LAW

1. Discovery is not automatic within a Department administrative proceeding. Rule 521 of the Department's Rules of Procedure (IDAPA 37.01.01) states that parties may only engage in discovery after an order is issued authorizing discovery or upon agreement of all parties that discovery may be conducted. The Department may limit the scope of discovery through an order authorizing discovery. (See IDAPA 37.01.01.520.02) The presiding officer also sets the schedule for discovery, but the schedule need not conform to the timetables of the Idaho Rules of Civil Procedure.

2. In this matter, the Order Authorizing Discovery limited the scope of discovery available to the parties. The parties were limited to 15 interrogatories with no sub-questions (subparts). Because the Department established the discovery limitations, which are more stringent than those set forth in the Idaho Rules of Civil Procedure, the Department may determine whether a specific interrogatory is in violation of the limitations.

3. Most of the Applicant's interrogatories follow the same pattern: "If you contend X, please describe the basis for this contention and identify each fact, and each document that supports, contradicts, or in any material way pertains to it." Although this interrogatory has two separate portions, each portion is ultimately seeking the same information. The interrogatory could easily be re-written into a single portion interrogatory: "If you contend X, please describe the basis for this contention, including in your description each fact and each document that supports, contradicts, or in any material way pertains to it." Therefore, the interrogatories do not violate the restriction pertaining to sub-questions. Interrogatories 1, 3, 4, 5, 6 and 7 follow this pattern. Mr. Schwarz should be compelled to answer these interrogatories in full.

4. Interrogatory No. 2 is ambiguous. It is unclear what information is being sought. No further response to Interrogatory No. 2 should be required from Mr. Schwarz.

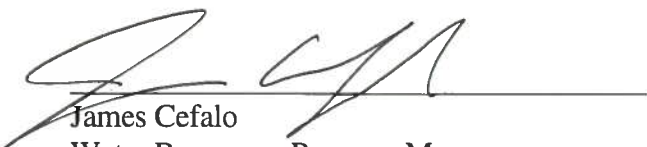
5. Although Mr. Schwarz's discovery responses to Interrogatories 1-9 state that he only responded to the first part of each interrogatory, in some cases, his responses are complete as written. For example, Interrogatory 8 states: "Please state the name and address of each person you intend to call as a lay witness at the trial in this matter, and for each such person describe the substance of the facts and opinions to which he or she is expected to testify and identify the underlying facts and data and documents upon which the opinion and testimony is based." Mr. Schwarz objected to the interrogatory based on the subpart argument. However, his response was "[a]t this time the Protestant does not intend to call any lay witnesses in this matter." This statement is fully responsive to the interrogatory. Mr. Schwarz's responses to Interrogatories 8, 9, and 10 are fully responsive as written. No further response should be required from Mr. Schwarz.

ORDER

IT IS HEREBY ORDERED that the Applicant's Motion to Compel Discovery Responses of Protestant John Schwarz is partially GRANTED. Mr. Schwarz shall provide complete responses to Applicant's Interrogatories 1, 3, 4, 5, 6 and 7 on or before May 16, 2011 and shall supplement all of his discovery responses thereafter as additional information is obtained.

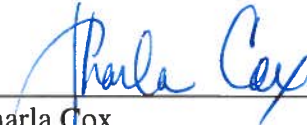
IT IS FURTHER ORDERED that any evidence, which falls within the scope of the Applicant's discovery requests, not provided in Mr. Schwarz's responses or appropriate supplements thereto will be barred from being offered as evidence by Mr. Schwarz at the hearing.

Dated this 9th day of May, 2011.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2011, I mailed a true and correct copy, postage prepaid, of this document to the applicant(s) and protestant(s) listed below:



Sharla Cox
Administrative Assistant

U.S. MAIL

Moffatt Thomas Barrett Rock & Field Chtd
C/O Scott Campbell
PO Box 829
Boise ID83701-0829

Symons Farm and Ranch
PO Box 604
Lava Hot Springs ID 83246

John Schwarz
Box 240
Mc Cammon ID 83250

Portneuf Watershed Users Assoc
8742 S Sunnyside Rd
Lava Hot Springs ID 83246

Barker Rosholt & Simpson LLP
Attn: Travis Thompson
PO Box 485
Twin Falls ID 83303-6167

James Spinner
PO Box 6009
Pocatello ID 83205-6009

Givens Pursley
Michael C. Creamer
PO Box 2720
Boise ID 83701

Mark Bennett, Secretary
Portneuf-Marsh Valley Canal Co
3670 E. Richards Rd
Downey ID 83234

Racine Olson Nye Budge & Bailey
Randall C. Budge
PO Box 1391
Pocatello ID 83204-1391

Tom Barnes, President
Portneuf-Marsh Valley Canal Co
22465 S. Cambridge Rd
Downey ID 83234