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MAY 17 2011
Department of Water Resources
Eastern Region

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 76779 IN THE NAME OF
THE CITY OF POCATELLO**

**PROTESTANT John Schwarz's
FIRST SUPPLEMENTAL
ANSWERS AND RESPONSES TO
APPLICANT CITY OF
POCATELLO'S FIRST
DISCOVERY REQUESTS**

COMES NOW Protestant John Schwarz ("Protestant"), a sentient man, sui juris (in his own right), on the land of Idaho, and pursuant to the Idaho Department of Water Resources ("IDWR" or "Department) *Order Authorizing Discovery and Notice of Status Conference*, dated February 8, 2011 (the "Order"); and the subsequent *Order Partially Granting Motion To Compel Discovery*, dated May 9, 2011 (Second Order) and hereby answers and responds to Applicant, City of Pocatello's ("Applicant" or "City") First Set of Discovery Request. I object to having lawyers invade this common law venue. Therefore, the Protestant is answering only to a common law venue. Protestant is also regarding all Attorneys and/or Lawyers as counselors. Answers and Responses to *Applicant City of Pocatello's First Discovery Requests to John Schwarz* are as follows:

I

GENERAL OBJECTIONS

Protestant has not completed its own investigation and/or discovery as of yet. Accordingly, the responses that follow are based upon the best first hand knowledge, information and reasonable and prudent belief of the Protestant at this time.

Protestant reserves the right to make further responses if it appears that any omissions or error has been made in connection with these responses or that more accurate information is or has become available. These responses are made without prejudice to Protestant's rights to use in later discovery and/or to present at hearing, evidence as may later be discovered or evaluated, as common sense, and common law allows.

Protestant also objects to the City's discovery requests and the instructions and Definitions to the extent they seem to require discovery responses beyond that required under the Department's Rules of Procedure, the Department's Order, or the Idaho Rules of Civil Procedure and common law. These responses are provided in accordance with the Department's Order, the Department's Rules of Procedure, and the Idaho Rules of Civil Procedure irrespective of any instructions and definitions that may accompany these discovery requests.

These responses are made subject to all objections as to competence, relevance, materiality and admissibility. These responses are subject to all objections that would require the exclusion of any statement, material, or information herein provided if such interrogatory were asked of or any statement, material, or information provided by witnesses present and testifying in any common law venue. All such objections are

reserved and may be interposed at the time of the hearing.

Protestant specifically objects to the discovery requests to the extent they seek information protected by the rules governing the discovery of facts of experts as set forth in Rule 26(b)(4), Idaho Rules of Civil Procedure. This objection is intended to apply to all of the discovery requests that seek such information and will not necessarily be repeated for each request to which it applies. Protestant has, to the extent possible, construed each request as requiring only information and/or documents not subject to any applicable protection.

No incidental or implied admission intended. The fact that Protestant has responded to any discover request, or any part thereof, should not be mistaken as an admission that Protestant accepts that the discovery request or the response or objection thereto constitutes admissible evidence. Protestant's answers to any discovery requests do not constitute a waiver of Protestant's rights to object to any future, additional, or supplemental discovery requests regarding the same matter.

II

ANSWER TO INTERROGATORIES AND RESPONSES TO REQUESTS FOR PRODUCTION

INTERROGATORY NO. 1: Please identify each and every ground for your protest of the Application that you may present at the hearing in this matter.

ANSWER, NO. 1: Objection. This Interrogatory exceeds the parameters of the Department's Order because it contains subparts. It also calls for potential legal conclusions which are not discoverable. Without waving my objection, Protestant, in good faith responds to the first part of the Interrogatory only. In my opinion, being reasonable and prudent, common sense tells me, the loss of recharge has the potential

to negatively effect many of the people, on the land of South Bannock County, who have no direct connection with the water that the City is applying for the Transfer of.

SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 1

OBJECTION: Improper notice on IDWR'S "ORDER PARTIALLY GRANTING MOTION TO COMPEL DISCOVERY", Order was served on the 9th of May, 2011, order stated response was due on May 16, 2011. In addition to the foregoing answer above, and without waving any objection, Protestant further answers as follows:

Evidence In support of subpart 1. - In 1994, the Department adopted rules concerning conjunctive management of ground water and surface water for the entire state. IDAPA 37.03.11.000 to 37.03.11.050. **All information was found on-line.**

IN THE SUPREME COURT OF THE STATE OF IDAHO ; Docket No. 37308-2010

Jerome, December 2010 Term
2011 Opinion No. 32
Filed: March 17, 2011
Stephen W. Kenyon, Clerk

<http://www.idwr.idaho.gov/News/WaterCalls/1000Spring%20Users%20Calls/2011/03mar/CLEAR%20SPRINGS%2037308.pdf>

In A & B Irrigation District v. Idaho Conservation League, 131 Idaho 411, 422, 958 P.2d 568, 579 (1997), it is stated, with respect to conjunctive management:

"[C]onjunctive management combines legal and hydrologic aspects of the diversion and use of water under water rights arising both from surface and from ground water sources. Proper management in this system requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources."

Subpart 2: City is using the same location, Township, Range, Section, (see Application For Transfer No. 76779, Table #4; and Water Right No. 306977, POU, Municipal Power County) as a Power County use location.

Subpart 3: City's Proof of Beneficial Use for 3100 AFA.

Conjunctive Management Rule 20.03, which provides:

These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

Subpart 4: City's Proof of Application to Beneficial Use.

Under Title 42, Chapter 2, Section 217, PROOF OF APPLICATION TO BENEFICIAL USE, Protestant could not find any supporting that the City can utilize and/or will utilize any of the waters it has so far accumulated and/or will accumulate, the City has not shown to Protestant sufficient infrastructure / acreage for all the water it has now.

IDWR Water Right and Adjudication Search

City of Pocatello
101 items

<http://www.idwr.idaho.gov/apps/ExtSearch/SearchWRAJ.asp>

Subpart 5: No Harm to any Water Right will be held against City.

In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007), we stated, "Once the initial determination is made that material injury is occurring or will occur, the junior [appropriator] then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call."

Subpart 6: City states 620 AFA in an Agreement, Application for Transfer No. 76779 become 3100 AFA.

- a) Document on file dated November 12, 2010 (*g7wq01_pdf, Attachment #2 and #3*).

pages 3 of 14), (Storage Water Agreement), AGREEMENT (2) says "620 AF over

FIVE years, "Annual Increments". How did 620 AFA turn into 3100 AFA?

b) Attachment #2 A and #3, page 6 of 14, Storage Water Agreement #10, (H)

Transfers the Rights for the City of Pocatello's (hereafter the "City(s)" use as the

City chooses with no prior authorization or consent. 1) No prior approval from

anyone to use the water as the City wants; and 2) No rights to any damages are

Reserved.

The City wants to expand the season of use to a year round use. Removing the limitation would impermissibly enlarge the water right beyond its historical

development and would violate the conditions set forth in Idaho Code § 42-1425.

In American Falls Reservoir District No. 2 v. Idaho Department of Water Resources, 143 Idaho 862, 878, 154 P.3d 433, 449 (2007), we stated, "Once the initial determination is made that material injury is occurring or will occur, the junior [appropriator] then bears the burden of proving that the call would be futile or to challenge, in some other constitutionally permissible way, the senior's call."

Protestant reserves the right to further supplement this answer as necessary during the course of this litigation pursuant to:

TITLE 67

STATE GOVERNMENT AND STATE AFFAIRS

CHAPTER 52

IDAHO ADMINISTRATIVE PROCEDURE ACT

67-5276.ADDITIONAL EVIDENCE. (1) If, before the date set for hearing, application is made to the court for leave to present additional evidence and it is shown to the satisfaction of the court that the additional evidence is material, relates to the validity of the agency action, and that:

(a) there were good reasons for failure to present it in the proceeding before the agency, the court may remand the matter to the agency with directions that the agency receive additional evidence and conduct additional factfinding.

(b) there were alleged irregularities in procedure before the agency, the court may take proof on the matter.

(2) The agency may modify its action by reason of the additional evidence and shall file any modifications, new findings, or decisions with the reviewing court.

ADDITIONAL EVIDENCE IN SUPPORT OF ANSWERS:

**Bannock County Groundwater
(Protecting Groundwater)**

http://www.bannockcounty.us/groundwater/?page_id=24

Bannock County Idaho Comprehensive Plan

<http://www.bannockcounty.us/pdf/comp1.pdf>

WHITE PAPER

**ESHMC Member Opinions of the
Eastern Snake Plain Aquifer Model**

http://www.idwr.idaho.gov/WaterInformation/Projects/espam/PDFs/ESHMC-White_Paper.pdf

Declining incidental recharge from more-efficient surface water irrigation practices causes a further reduction in available ground water supplies to meet all water demands. These facts are widely acknowledged in publications and documents prepared by the USGS and IDWR since the 1980s.

INTERROGATORY NO. 3: If you contend that the Transfer, if approved, would injure your water rights, 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.

ANSWER NO. 3: Objection. This Interrogatory exceeds the parameters of the Department's Order because it contains subparts. It also calls for potential legal conclusions which are not discoverable. Without waving my objection, Protestant, in good faith responds to the first part of the Interrogatory only. In my opinion, being reasonable and prudent, common sense tells me, using due diligence as to the duty of

water, I am domiciled on the land of Bannock County, at McCammon city proper, therefore it is my duty to honorably, with due diligence, investigate any matter which may effect, in any way and/or form, the value, of the way of life, property, and for the protection of my posterity. I could not find proper data to support my opinion, cause.

Therefore, I opine that current beneficial use and the duty of water should remain on the land that the current Water right and/or share are presently assigned to, and remain on that assigned water district. If the water in question is transferred out of the current beneficial use as municipal water, moved to wherever, whenever, however the Applicant wants, with no injury and no volume loss, while retaining the standing as to Priority Date, common sense tells me that the land will forever be injured, causing injury to Protestant, one of the People on the land. (See exhibit "A" in First Response).

SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 3

Evidence in support of No3: (see SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 1; and Evidence In support of subpart 1)

INTERROGATORY NO. 4: If you contend that the Transfer, if approved, would conflict with local public interest, please describe each and every basis for this contention and identify each fact and each document that supports, contradicts, or in any material way pertains to it.

ANSWER NO. 4: Objection. This Interrogatory exceeds the parameters of the Department's Order because it contains subparts. It also calls for potential legal

conclusions which are not discoverable. Without waving my objection, Protestant, in good faith responds to the first part of the Interrogatory only. In my opinion, being reasonable and prudent, common sense tells me, using due diligence as to the duty of water management, It would diminish the amount of water available for diversion to the current water right, and/or water share holders, of district 29A, thereby damaging the agricultural business operations of the current members to provide benefits to the City residents, all contrary to the *Idaho Constitution Article XV, Section 3 and 4; and Idaho Code Section 42-222*.

SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 4

Evidence in support of ANSWER NO 4:

**IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 37308-2010**

**Jerome, December 2010 Term
2011 Opinion No. 32
Filed: March 17, 2011
Stephen W. Kenyon, Clerk**

In *Stickney v. Hanrahan*, 7 Idaho 424, 435, 63 P. 189, 192 (1900), we said:

It is against the spirit and policy of our constitution and laws, as well as contrary to public policy, to permit the wasting of our waters, which are so badly needed for the development and prosperity of the state, and every act on the part of any individual claimant that tends to waste water is to be discouraged rather than encouraged.

The following year, the legislature enacted what is now codified as Idaho Code § 42-101 and which provides in part:

Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved.

Conjunctive Management Rule 20.03, which provides:

These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

Second, both sections only apply to water that was intended to be used or was used for agricultural purposes. Section 4 begins, “Whenever any waters have been, or shall be, appropriated or used for agricultural purposes” Section 5 begins, “Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes” Again, as Mr. Claggett explained, because people would locate farms along the line of the canal owner’s proposed ditches upon the promise that water would be available for agricultural purposes, “the water should not be allowed to be diverted from that purpose and applied to the running of manufactories or anything else of that sort.” *Id.* at 361, 122 P. at 32. Mr. Claggett further explained, “The first section [section 4] protects the person who comes in, by making it ‘an exclusive dedication’ to agricultural uses after it has been so appropriated and so used.” *Id.* **In *Mellen*, we stated that the clear intent of these two sections was that “whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental, or distribution, it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.”** *Id.* at 359, 122 P. at 31-32. (emphasis added)

INTERROGATORY NO. 5: If you contend that the Transfer, if approved, would be inconsistent with the conservation of water resources within the State of Idaho, please describe each and every basis for this contention and identify each fact and each document that supports, contradicts, or in any material way pertains to it.

ANSWER NO. 5: Objection. This Interrogatory exceeds the parameters of the Department’s Order because it contains subparts. It also calls for potential legal conclusions which are not discoverable. Without waving my objection, Protestant, in

good faith responds to the first part of the Interrogatory only. In my opinion, being reasonable and prudent, common sense tells me, using due diligence as to the duty of water management, the inconsistency with the conservation of water resources within the State lays in the fact that the Applicant's Transfer calls for delivery with no loss; and the ability to use the water as the Applicant sees fit. To a sentient individual, that has the potential to harm the current, intended, beneficial use within the State and Water District, ("District") as the Applicant could sell, lease and convey the described water to anyone, anywhere, at any agreed upon price. To the Protestant, that means it could be sold, leased and/or conveyed out of the current District, and/or State, if the Applicant wished it so.

SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 5

(see ANSWER NO. 4 above)

"In *Mellen*, we stated that the clear intent of these two sections was that "whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental, or distribution, it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes." *Id.* at 359, 122 P. at 31-32. (emphasis added); and

The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.

INTERROGATORY NO. 6: If you contend that the Transfer, if approved, would adversely effect the local economy of the Portneuf River watershed, please describe each and every basis for this contention and identify each fact and each document that supports, contradicts, or in any material way pertains to it.

ANSWER NO. 6: Objection. This Interrogatory exceeds the parameters of the Department's Order because it contains subparts. It also calls for potential legal conclusions which are not discoverable. Without waving my objection, Protestant, in good faith responds to the first part of the Interrogatory only. (See Answer No. 4 above)

SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 6

Evidence:

**IN THE SUPREME COURT OF THE STATE OF IDAHO
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**Jerome, December 2010 Term
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In this case, it would also be contrary to Article XV, § 3, of the Idaho Constitution, which states, "Priority of appropriation shall give the better right as between those using the water" Likewise, the Groundwater Users' arguments are not consistent with the definition of "Full Economic Development of Underground Water Resources" in the Conjunctive Management Rules.

The diversion and use of water from a ground water source for beneficial uses in the public interest at a rate that does not exceed the reasonably anticipated average rate of future natural recharge, in a manner that does not result in material injury to senior-priority surface or ground water rights, and that furthers the principle of reasonable use of surface and ground water as set forth in Rule 42.; and

Conjunctive Management Rule 20.03, which provides:

Conflicts between senior surface water users and junior ground water users would be ignored as long as withdrawals from the Aquifer and recharge were in balance. That argument is contrary to the current State Water Plan, which provides, "It is the policy of Idaho that where evidence of hydrologic connection exists between ground and surface waters, they are managed conjunctively in recognition of the interconnection.

” Idaho Water Resource Board, The State Water Plan 6 (1996). As we held in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), hydrologically connected surface and ground waters must be managed conjunctively.

INTERROGATORY NO. 7: If you contend that the Transfer, if approved, would significantly affect the agriculture base of the Portneuf River Watershed, please describe each and every basis for this contention and identify each fact and each document that supports, contradicts, or in any material way pertains to it.

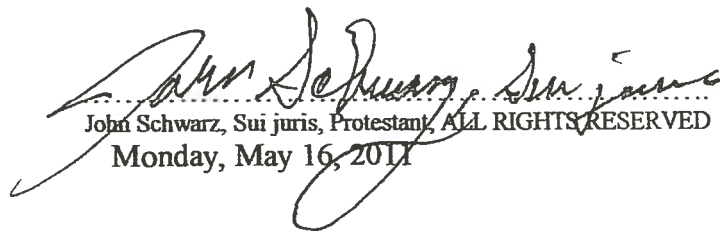
ANSWER NO. 7: Objection. This Interrogatory exceeds the parameters of the Department’s Order because it contains subparts. It also calls for potential legal conclusions which are not discoverable. Without waving my objection, Protestant, in good faith responds to the first part of the Interrogatory only. In my opinion, being reasonable and prudent, common sense tells me, using due diligence as to the duty of water management, the Transfer has the potential to cause harm to the agriculture base of the watershed mentioned above because, the *Portneuf River Settlement Agreement* (“Agreement”) storage water rights restricted its terms to the parties to the Agreement, the City was not a party. Therefore, the terms in said Agreement, including “*no conveyance loss*” should ***not*** be utilized and/or assigned to the Applicant, including the Priority Date. If the Transfer is approved, with such blatant disregard to said Agreement, it may set precedence for further contract intrusions, which could lead to further losses of any rights of re-coupment regarding Water Rights; and/or Rights under the common law.

SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 7

(see SUPPLEMENTAL ANSWERS TO INTERROGATORY NO. 4 above); and CITY'S APPLICATION FOR TRANSFER NO. 76779; and all related documents produced during Discovery, including communications between all parties; and all documents and/or opinions now in and/or may come into evidence in the near future that are pertinent to this Common law cause or Action; and Protestant Reserves All Rights to bring into evidence all such documents which show abuse of Protestants Rights

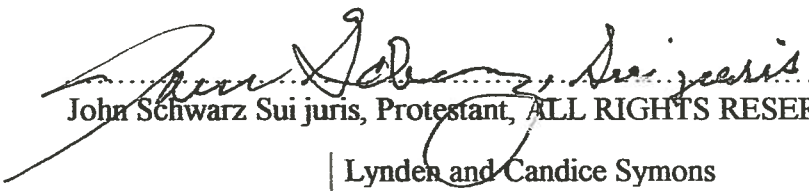
The information contained herein is given under All Rights Reserved;

By Autograph this Sixteenth day of May in the Year of Our Lord Two Thousand Eleven:


John Schwarz, Sui juris, Protestant, ALL RIGHTS RESERVED
Monday, May 16, 2011

CERTIFICATE OF SERVICE

I, John Schwarz, certify that on the 16th day of May, A.D. 2011, a true and correct copy of *Protestant John Schwarz's Answers and Responses to Applicant City of Pocatello's First Discovery Request*; and *FIRST SUPPLEMENTAL ANSWERS AND RESPONSES TO APPLICANT CITY OF POCATELLO'S FIRST DISCOVERY REQUESTS* pursuant to IDWR'S *Order Partially Granting Motion To Compel Discovery*, dated May 9, 2011 was served upon the following individuals by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed:


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