

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 on PWUA on February 18, 2011. PWUA responded to the discovery request on March 4, 2011. PWUA objected to each one of the Applicant's interrogatories on the basis that each interrogatory "exceeds the parameters of the Department's Order because it contains subparts." (See Exhibit A to Applicant's Motion to Compel) Citing its subpart objection, PWUA only responded to the first portion of each interrogatory. (See id.)

4. On March 24, 2011, the Applicant filed a Motion to Compel Discovery Responses of PWUA. In its motion, the Applicant argued the interrogatories served on PWUA did not contain

subparts and that PWUA should be compelled to respond to each interrogatory in full. The motion also identified four specific interrogatory responses of PWUA (4, 6, 8, and 10) that were evasive or incomplete. Finally, the motion argued PWUA had not produced any of the documents requested and that PWUA should be compelled to produce the requested documents.

5. PWUA responded to the Applicant's Motion to Compel on April 5, 2011. In support of its response, PWUA provided evidence showing that attorneys for PWUA sent emails to the Applicant discussing the Applicant's discovery requests and providing further explanation of PWUA's responses. PWUA argued the Applicant's interrogatories do contain subparts, in that they ask for a description of the basis for a particular contention and also ask PWUA to identify all facts relating to the contention.

6. On April 1, 2011, a status conference was held in this matter to discuss pre-hearing deadlines. During the status conference the parties confirmed that, since the time the Motion to Compel was filed, the Applicant has been provided access by PWUA to documents responsive to the Applicant's requests for production. The Applicant and PWUA agreed the motion to compel was no longer needed as it relates to the Applicant's Request for Production of Documents.

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. PWUA should be compelled to answer the interrogatories in full.

4. The Applicant's argument that PWUA's responses to interrogatories 4, 6, 8, and 10 are evasive and incomplete is not persuasive. Given the further clarification contained in the email from Andy Waldera to Michael Creamer (March 21, 2011 5:54 pm) and PWUA's recent production

of documents, PWUA responses to interrogatories 4, 6, 8, and 10 are not evasive or incomplete. PWUA may still be required to respond to the entire scope of interrogatories 4, 6, 8, and 10, as described above. However, the responses provided so far, along with the further clarification contained in the Waldera email, are not deficient and do not require specific action by the Department.

ORDER

IT IS HEREBY ORDERED that the Applicant's Motion to Compel Discovery Responses of Protestant PWUA is GRANTED to the extent that the Applicant's interrogatories do not violate the restriction on subparts stated in the February 3, 2011 Order and is DENIED in all other respects.

IT IS FURTHER ORDERED that PWUA shall provide complete responses to all of the Applicant's interrogatories on or before April 25, 2011 and shall supplement its 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 PWUA's responses or appropriate supplements thereto will be barred from being offered as evidence by PWUA at the hearing.

The Applicant's and PWUA's requests for attorneys fees are denied.

Dated this 8th day of April, 2011.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of April 2011, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed to the following:

Document Served: Order Partially Granting Motion to Compel Discovery

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
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Mc Cammon ID 83250

Portneuf Watershed Users Association Inc
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