RECEIVED
MAY - 3 2010
DEPARTMENT OF
WATER RESOURCES

Josephine P. Beeman #1806
Beeman & Associates, P.C.
409 W. Jefferson St.
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (fax
jo.beeman@beemanlaw.com

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION FOR TRANSFERS NO. 75352 and 75353,	)	
Visser Holsteins dba Eagle View Farm, Applicant,	)	**CITY OF POCATELLO'S WITHDRAWAL OF PROTEST**
USDI-Bureau of Land Management, and City of Pocatello	)	
Protestants.	)	

The City of Pocatello hereby withdraws its Protest to Applications for Transfer Nos. 75352 and 75353, in the name of Visser Holsteins dba Eagle View Farm (Visser transfers), subject to review of the final conditions for the approved transfers.

Pocatello's Protest identified an issue regarding whether restrictive conditions would be placed on the Visser transfers related to the addition of common wells as alternate points of diversion for multiple ground water rights:

> Pocatello files this protest out of an interest in the conditions that will be placed on the ground water rights as a result of the transfer, which involves the addition of common wells as alternate points of diversion.

> Pocatello's interest in the Department's administrative treatment of transfers involving the addition of common wells as alternate points of diversion stems from the pending SRBA proceeding affecting 30 of the City's state-law SRBA claims. One of the issues in that proceeding concerns the application of restrictive conditions to water rights as a result of the addition of common wells as alternate points of diversion.

The day before the IDWR Joint Prehearing Conference on the Visser transfers, Pocatello provided recent documents from the SRBA court's ongoing review of the restrictive condition IDWR recommended for the City's ground water rights. Pocatello also explained the role of IDWR Transfer Processing Memo No. 24 (Oct. 30, 2002) in IDWR's recommendation of the restrictive condition to the SRBA court.

> The attached Nov 9, 2009 SRBA order on challenge and Pocatello's Dec 9, 2009 brief on motion to alter or amend discuss the issue of whether Pocatello's interconnected municipal ground water rights are subject to conditioning in the SRBA for purposes of future conjunctive administration.
>
> Pocatello does not support the condition. Pocatello monitors the SRBA statewide and also monitors all applications and transfers filed at IDWR (statewide).
>
> The SRBA trial established that IDWR Transfer Processing Memo No. 24 (Oct. 30, 2002) guided development and recommendation of the condition for Pocatello's interconnected municipal ground water rights. The condition was not recommended for any ground water rights at the SRBA court prior to 2003. The Transfer Processing Memo was actually developed for transfers that are filed at IDWR, not the SRBA court.
>
> The Visser Holstein transfer 75352 at IDWR includes multiple existing ground water rights that will now have common points of diversion. This is very similar to Pocatello's situation at the SRBA court, although the City's use of its common points of diversion predates November 1987. Pocatello wants to understand whether the approval of transfer 75352 will have a condition similar to that proposed for Pocatello's ground water rights; and if not, how the Pocatello and Visser factual situations differ regarding imposition of the condition.

At the time of the prehearing conference for the Visser transfers on February 23, 2010, the IDWR Transfer Processing Memo No. 24 from Oct. 30, 2002 had been superceded[1] and the IDWR Transfer Processing Memo No. 24 dated December 21, 2009 mandated conditions for municipal ground water right transfers involving alternate points of diversion from ground water for a common delivery system. The mandate (underlined below) was added to otherwise unchanged language from 2002 addressing "unreasonable effort or expense", a part of IDWR's injury analysis when processing a transfer application prior to hearing.

> Unreasonable Effort or Expense. Whether the holder of an existing water right will be forced to an unreasonable effort or expense to divert water under the existing water right.
>
> Existing ground water rights are subject to reasonable pumping level provisions of Section 42-226, *Idaho Code,* as well as applicable court decisions (e.g., Parker v. Wallentine, 103 Idaho 506, 650 P.2d 648 (1982), regarding in part the obligation to pay increased costs to divert an existing right).
>
> <u>An application for transfer that is approved to provide alternate points of diversion from ground water under one or more municipal water rights to develop or expand a common delivery system shall include conditions of approval to identify the point(s) of diversion authorized under each right prior to the transfer. The purpose of the condition is to provide for future administration of water rights in situations where increased municipal pumping over time is determined to cause injury through interference with other nearby wells.</u>

The Visser transfers did not involve municipal ground water rights, so the mandatory condition was not considered.

---

[1] At the time the Visser transfers were filed at IDWR on January 8, 2009, IDWR was just completing revisions to the original IDWR Transfer Processing Memo No. 24 from Oct. 30, 2002. The original IDWR Transfer Processing Memo No. 24 was superceded by a January 21, 2009 version which was then superceded by a December 21, 2009 version.

The following legal issues remain unresolved:

- IDWR Transfer Processing Memo No. 24 is neither a rule nor order of IDWR.
- The first two paragraphs under "unreasonable effort or expense" address standards from statutes and/or existing IDWR rules and regulations.
- The third paragraph does not address authority based on statute or IDWR rule.
- IDWR must apply existing law (statute, rule, or order).

Pocatello wants to resolve these legal issues and allow continued processing of the Visser transfers. In withdrawing its Protest, Pocatello reserves the right to address these legal issues by Petition for Declaratory Action under 67-5232 and IDWR Rules of Practice and Procedure, Rule 400.

DATED this 30th day of April 2010.

BEEMAN & ASSOCIATES, P.C.
Attorneys for City of Pocatello

By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April 2010, I caused a true copy of the foregoing City of Pocatello's Withdrawal of Protest to be served by U. S. Mail on:

Visser Holsteins d/b/a Eagle View Farm
P.O. Box 665
Castleford, ID 83321-0665

Rob Williams
P. O. Box 168
Jerome, ID 83338-0168

Charles E. Brockway
Brockway Engineering, PLLC
2016 N. Washington Street, Ste. 4
Twin Falls, ID 83301

Josephine P. Beeman

Josephine P. Beeman