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to Director
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JDR*

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION)
TO LEASE WATER FOR HYDROELECTRIC) PRE-TRIAL BRIEF
GENERATION IN THE NAME OF THE CITY)
OF POCATELLO)
_____)

The City of Pocatello ("Pocatello") hereby files its Pre-Trial Brief pursuant to Idaho Department of Water Resources, (IDWR) Rules of Procedure and the Notice of Hearing in the above matter issued by IDWR.

BACKGROUND

Petitioner, the City of Pocatello, is a municipal corporation duly organized under the laws of the State of Idaho located in the southeastern part of the State of Idaho. Pocatello is Idaho's second largest treated water provider and its fourth largest city, with a population just under 55,000 residents.

Pocatello has water rights to surface water, ground water, and storage water. In 1960, the City entered into Contract Number 14-06-100-1825 with the United States of America to secure 50,000 acre feet of storage water in the Palisades Reservoir (City Palisades Contract).

Unlike most of the Palisades storage contracts, the City Palisades Contract provides for a number of uses for its storage water. These uses include mitigation, municipal use, the right to lease the storage water, flood control, and irrigation. (See Pocatello Exhibit "A".)

In June of 2008, the City of Pocatello and the Idaho Power Company entered into a Water Lease Agreement for one year whereby the City would lease 20,000 acre feet of its Palisades storage water to Idaho Power contingent upon the City acquiring all necessary approvals required by State or Federal law. (See Pocatello Exhibit "B".)

On June 16, 2008, the City mailed an Application for Leasing of Water for Hydroelectric Generation pursuant to Idaho Code Sections 42-108A and 42-108B to the Director of the Idaho Department of Water Resources. (See Pocatello Exhibit "C".)

Pursuant to Idaho Code Section 42-108B, the Director of the Idaho Department of Water Resources published Notice of Proposed Leasing of Water for Hydroelectric Generation on July 10 and July 17, 2008, in the Post Register, the Times News, and the Idaho Statesman. (See Pocatello Exhibit "D".)

Five Protests to the Application were filed with IDWR by 5:00 p.m. on July 21, 2008. On July 24, 2008, the Director of IDWR sent out a Notice of Hearing scheduling a hearing on the Application and Protests for 9:00 o'clock a.m. on July 31, 2008, in Jerome, Idaho. (See Pocatello Exhibit "E".)

ISSUES

The Notice of Hearing published in this matter set out the issues to be addressed at the hearing on July 31, 2008. The Notice of Hearing stated:

Among the issues to be addressed at the hearing are the criteria identified in section 42-108B, Idaho Code, and other issues identified in

the notice of the Application to Lease published by the Department. The issues include:

1. What is the applicability of the provisions of section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by sections 42-1763 and 42-1765, Idaho Code?
2. What are the contractual obligations of the City of Pocatello and the U.S. Bureau of Reclamation under the City's federal storage contract and what is the effect, if any, of the contractual limitations on the City's proposed lease of water pursuant to state law?
3. If the lease is approved, could other water rights senior or junior to the leased water right be injured?

ARGUMENT

1. Criteria Identified in Idaho Code Section 42-108B

All five of the protests should be dismissed and removed from any consideration in this matter. Idaho Code Section 42-108B clearly states "anyone who desires to protest the proposed leasing of water and who has a superior right to use the water and who may suffer pecuniary loss" can file notice or protest.

There are no punctuation marks between the word "and" in this Code Section nor is the word "or" used. Basic statutory construction analysis indicates the word "and" is used conjunctively, thus requiring a protestor to have a "superior right to use the water" plus be someone who "may suffer pecuniary loss" if the lease is approved. None of the five protestors has a "superior right to use" the City's storage water. Each Palisades storage right holder is annually notified it has been allotted a specific number of acre feet of fill for its use pursuant to its contract with the United States of America. No one has a superior right to use the City's storage allotment.

Idaho Code Section 42-108A further provides that the leasing of water pursuant to Sections 42-108A and 42-108B shall not constitute a change in the nature of use of

such water nor shall the lease constitute an abandonment or forfeiture or any other diminution of such water right.

2. What is the applicability of the provisions of Section 42-108B, Idaho Code, given the requirements of the Water District 1 Rental Pool authorized by Sections 42-1763 and 42-1765, Idaho Code?

The City did not put this water into the Water District 1 Rental Pool and therefore the requirements of Idaho Code Sections 42-1763 and 42-1765 do not apply to this Lease.

3. What are the contractual obligations of the City of Pocatello and the U.S. Bureau of Reclamation under the City's federal storage contract and what is the effect, if any, of the contractual limitations on the City's proposed lease of water pursuant to state law?

None of the protestors, including the Committee of Nine, which is only an advisory body under this Contract, has the right to interfere with or interpret the language of a private contract to which they are not a party. In addition, the City is making use of its storage in compliance with its Contract with the United States of America. It is the Secretary of the United States Department of the Interior who has the sole authority to make interpretations regarding the provisions of the City Palisades Contract. (See Pocatello Exhibit A.)

4. If the lease is approved, could other water rights senior or junior to the leased water right be injured?

This should only apply when the water to be leased is not storage water. The annual allocation is already based on water right seniority. Otherwise, any use of storage water by the entity entitled to use it would cause injury in the sense that if the water was not used it would take less water to fill the reservoir the following year. Singling out this

Lease violates Idaho Code Sections 42-108A and 42-108B, is arbitrary and capricious where water is allowed to go below Milner in other instances without penalty, and constitutes the taking of a private property right interest under the United States Constitution and the Constitution of the State of Idaho.

Respectfully submitted this 31st day of July, 2008.

CITY OF POCA TELLO

A handwritten signature in black ink, reading "A. Dean Tranmer". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

A. Dean Tranmer
City Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 2008, the above and foregoing was served by hand delivery at the Hearing In the Matter of Application to Lease Water for Hydroelectric Generation in the Name of the City of Pocatello to each of the following parties in attendance:

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