

RECEIVED

AUG 11 2008

DEPARTMENT OF
WATER RESOURCES

Jerry R. Rigby (ISB #2470)
of RIGBY, ANDRUS
& MOELLER, Chartered
Attorneys at Law
25 North Second East
Rexburg, ID 83440
Telephone: (208) 356-3633
Facsimile: (208) 356-0768

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

IN THE MATTER OF APPLICATION	)	
TO LEASE WATER FOR	)	
HYDROELECTRIC GENERATION IN	)	CLOSING ARGUMENT AND
THE NAME OF THE CITY OF	)	POST TRIAL BRIEF
POCATELLO	)	
_____	)	

Comes now, Protestant Committee of Nine, by and through its counsel of record, Jerry R. Rigby, of Rigby, Andrus & Moeller, Chtd., and hereby files its Closing Argument and Post Trial Brief in above entitled matter.

I. Pocatello Failed to Use the Water District 01 Rental Pool Procedures.

On or about June 19, 2008, Applicant, City of Pocatello (hereinafter "Pocatello"), filed its application with the Department of Water Resources for its proposed lease under Idaho Code §§ 42-108A and 42-108B, also known as the hydroelectric generation lease statutes. It seeks to lease "up to" 20,000 acre feet of storage water to Idaho Power Company at a price of \$35.00 per acre foot.

However, as established at the hearing on the said application held on July 31, 2008, by testimony of Watermaster Lyle Swank of Water District 01, and as acknowledged by Pocatello, the Committee of Nine, presently has in place duly adopted Rental Pool Procedures promulgated

pursuant to *Idaho Code* § 42-1761, et. seq. As set forth in *Idaho Code* § 42-1765, the Committee of Nine is the duly appointed “local committee” which has received approval of its current rental pool procedures for the rental of stored water (hereinafter “Procedures”) by the Idaho Water Resource Board as is required by the said statutes.

As a result of the approved Procedures, the said statutes grant the right to the rental of stored water under the Procedures to the Committee of Nine as follows: “. . . When so appointed, the committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the board. . .” see *I.C.* § 42-1765. Pocatello failed to go through the established process for leasing its water provided by the Water District 01 Procedures.

By failing to proceed under the Procedures, Pocatello’s application sought to bypass the protections the Procedures afford other spaceholders. This protection is implicit within the approved Procedures and required of the Water Board Rental Pool Rules as duly adopted (see IDAPA 37.02.03.001.02). Furthermore, this is made clear by a reading of the requirements of *I.C.* § 42-1763, which sets forth the minimum requirements of the Director of the Department of Water Resources when approving an application to lease water from the Water Board’s Rental Pool (i.e. for rental of natural flow water):

The director of the department of water resources may reject and refuse approval . . . where the proposed use is such that **it will reduce the quantity of water available under other existing water rights, the water supply involved is insufficient for the purpose for which it is sought, the rental would cause the use of water to be enlarged beyond that authorized under the water right to be rented, the rental will conflict with the local public interest as defined in section 42-202B, Idaho Code, or the rental will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water**

originates. The director shall consider in determining whether to approve a rental of water for use outside of the state of Idaho those factors enumerated in subsection (3) of section 42-401, Idaho Code. (Emphasis added)

Because the uncontradicted evidence at the hearing established that allowing significant water to be rented below Milner would wreak havoc on the entire storage system [thus requiring orderly Procedures to maintain the integrity of the entire system], to now allow a rental system outside of the Procedures would not only undermine their integrity but result in an utter failure of the Procedures. This is especially true when procedures DO have a reasonable and appropriate methodology for rental of stored water for “hydroelectric generation” as is the case with these Procedures.

In further support of this argument, one only needs to read said Chapter 17. The State of Idaho has clearly expressed the importance of the water supply bank and the purpose to “make use of and **obtain the highest duty for beneficial use** from water, provide a source of adequate water supply to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies.” *I.C. § 42-1761* (Emphasis added). In other words, the State recognizes that even though one entity might temporarily benefit from a high priced lease, it is necessary under duly adopted Procedures to protect the **whole** reservoir system in order to “obtain the highest duty for beneficial use from water” in storage. Therefore, Pocatello’s application should be denied on its face.

II. Pocatello Failed To Contradict Clear Evidence of Injury to Other Water Rights.

Pocatello also clearly failed to contradict the substantial evidence introduced at the hearing which established that other water rights would be injured by the proposed rental of its storage water to Idaho Power Company as required by *I.C. §42-108B* even if Pocatello’s failure

to go through the Procedures for its proposed storage lease is affirmed. In fact, the requirement of said statute goes well beyond the normal test of protecting *senior* water rights, by requiring approval only “provided no other water rights **senior or junior** to the water to be leased are injured thereby.” (Emphasis added)

During the hearing, Watermaster Swank set forth in detail the complicated storage system of Water District 01 and how even one rental can significantly impact the storage rights of many or all other storage rights. Mr. Swank also testified how water diverted and used above Milner is “re-used” by others down stream and that to send the water down the river without diversion and over Milner would injure those other historical uses and diversions. It is precisely these complications that require Procedures which take into consideration all of the impacts to senior and junior storage water right holders in order to insure that no one “class” of storage right holder is unduly impacted and/or injured without consideration being made which will provide either money from an impact fund (as is the case with the 50,000 acre foot general rental pool under the Procedures), or a more punitive obligation of a one year “last to refill” obligation (as is the case with private leases under the Procedures).

Furthermore, Mr. Swank testified that to allow Pocatello’s proposed application would certainly injure the storage rights of other spaceholders because it would open the “Pandora’s Box” to rentals below Milner which would then grant the right to any other spaceholder to “follow suit” and “follow the money” resulting in the storage system’s destruction as far as its primary purpose - meeting the watering needs of water users above Milner. Not only did Mr. Swank testify to this unavoidable consequence and result but Mayor Chase also recognized that if Pocatello could rent its storage under this manner, then he saw no reason why all other storage

water users couldn't rent their water in the same fashion and that because of the ability of hydroelectric generation to pay rental fees higher than most other users (especially agriculture), such rentals could destroy the present storage capabilities for the primarily agriculture system.

Mr. Swank also testified that this type of use would reduce carry-over storage and at the very least cause significant pressure to increase the rental price of all other rentals to the point that most present uses could not afford to rent water. It is important to note that the Procedures DO take into account the hydroelectric generation demands and DO provide for such rentals providing the primary purposes and needs are satisfied through an appropriate priority system. Therefore, the argument that the Procedures do not provide for rentals below Milner is incorrect.

Bottom line to Pocatello's application and the primary reason for the Committee of Nine's protest is that in order to preserve the primary purpose for which the storage systems were created and in order to provide for an orderly rental system which is based upon protection of all storage uses as a whole, it requires rentals be accomplished only through these Procedures which are drafted by the very water right holders themselves who are best knowledgeable and equipped to insure the integrity of a complicated storage system. Pocatello failed to establish that its rental would not cause injury to other storage water rights. To the contrary, the evidence clearly established that such injury would certainly occur if Pocatello's application was approved.

Conclusion

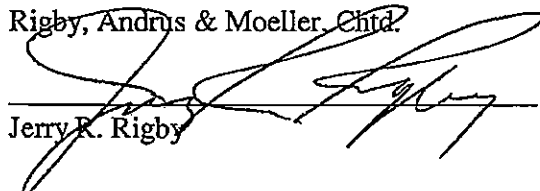
Because Pocatello has failed to comply with the Procedures, it's proposed lease should be denied. Furthermore, even if Pocatello's failure to go through the Procedures for its proposed storage lease were otherwise allowed as claimed by Pocatello, it has nevertheless failed to counter the clear evidence that its proposed lease would cause substantial injury to other storage

water rights. Therefore and again, Pocatello's application must be denied.

Respectfully submitted this 8th day of August, 2008.

Rigby, Andrus & Moeller, Chtd.

Jerry R. Rigby

A handwritten signature in black ink, appearing to read "Jerry R. Rigby", is written over a horizontal line. The signature is stylized with a large, looping initial "J" and a long, sweeping tail.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 8th day of August, 2008, a true and accurate copy of the foregoing was sent by U.S. Mail postage pre-paid and addressed to the following:

A. Dean Tranmer
City of Pocatello
PO Box 4169
Pocatello, Idaho 83205

Robert L. Harris
Holden Kidwell Hahn & Crapo
PO Box 50130
Idaho Falls, Idaho 83405-0130

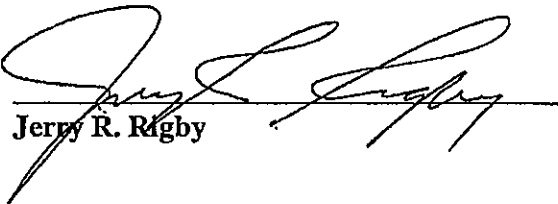
Paul A. Berggren, Chairman
New Sweden Irrigation District
2350 W. 17th Street
Idaho Falls, Idaho 83402

Alan Kelsch, Board Member
Idaho Irrigation District
7466 S. 15th W.
Idaho Falls, Idaho 83402

Randy Budge
Candice McHugh
Racine Olson
PO Box 1391
Pocatello, Idaho 83201-1391

Matt Howard
US Bureau of Reclamation
1150 N. Curtis Road
Boise, Idaho 83706

Lyle Swank
IDWR
900 N. Skyline Drive
Idaho Falls, Idaho 83402-6105



Jerry R. Rigby