

RECEIVED

JUL 10 2009

DEPARTMENT OF
WATER RESOURCES

A. Dean Tranmer, I.B. #2793
City of Pocatello
P. O. Box 4169
Pocatello, ID 83201
(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn, I.B. #7928
Mitra M. Pemberton
White & Jankowski, LLP
511 Sixteenth Street, Suite 500
Denver, Colorado 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for the City of Pocatello

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

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

**CITY OF POCATELLO'S PETITION
FOR RECONSIDERATION**

The City of Pocatello ("Pocatello" or "City") hereby petitions for reconsideration of the Director's June 29, 2009 Final Order ("Order") denying the City's Motion to Dismiss Protestants as parties to this matter and also petitions for reconsideration of the Director's Final Order denying Pocatello's Application for a Lease of Water for Hydroelectric Generation ("Application") filed under I.C. 42-108A and -108B. This Petition is filed pursuant to the Idaho

Department of Water Resources (“IDWR” or “Department”) rules of procedure, IDAPA
37.01.01.740.02.

INTRODUCTION

The Department’s denial of Pocatello’s Application is inconsistent with the intentions of the legislature in adopting I.C. §§ 42-108A and -108B and amounts to governmental interference with Pocatello’s vested property rights without compensation. *Moon v. North Idaho Farmers Ass’n*, 140 Idaho 536, 96 P.3d 637 (2004). As a matter of law, City’s Palisades Contract is held by the citizens of the City of Pocatello as the users of said storage water, who have acquired a vested right to the perpetual use of this storage water. *U.S. v. Pioneer Irrigation District*, 144 Idaho 106, 157 P.3d 600 (2007); *Ickes v. Fox*, 300 U.S. 82 (1937). Effectively, the Director denied Pocatello’s Application based on administrative rules adopted by the Committee of Nine pursuant to wholly inapplicable statutory sections of the general water banking statutes, Idaho Code, I.C. § 42-1761 *et. seq.* The Director’s Order should be reconsidered, and Pocatello’s Application granted, even at this late date, because under I.C. §§42-108A and -108B the legislature intended to provide a statutory vehicle for water right holders to lease water to hydroelectric interests.

I. SECTIONS 42-108A AND -108B PROVIDE FOR A MEANS TO LEASE WATER TO HYDROELECTRIC USERS

The statutory language of I.C. §42-108A provides:

Any person having the right to the beneficial use of a water right may lease the water to a private or public utility doing business in the state of Idaho for hydroelectric generation purposes within the state of Idaho for hydroelectric generation purposes within the state of Idaho for a period not to exceed one (1) year on application to the department of water resources...

Id. (“section 108A”)¹. Pocatello filed an application to lease water to the Idaho Power Company pursuant to section 108A and consistent with the procedures of section 108B. It did not apply to lease water under the general water banking statutes, I.C. 42-1761 *et. seq.*, adopted in 1979 (“General Water Banking Statutes”). Although the legislature intended that the General Water Banking Statutes provide a means for willing lessors to contribute their water rights to a general “pool” of rights available for lease, facilitated by local boards such as the Committee of Nine, the statutory language of the General Water Banking Statutes does not foreclose the lease of storage water in Water District 01 (“WD01”) independent of the of the Water District 1 Rental Pool (“WD01 Rental Pool”) under other statutory provisions, such as section 108A. Indeed, how could it?—section 108A was adopted in 1981, two years *after* the General Water Banking Statutes, applies to a narrower category of water leases, and allows individual water right holders to enter into leases with hydroelectric interests without regard to the rental pools being operated by the Committee of Nine and others.

However, the Director’s Order concludes (without providing any legal analysis) that these earlier adopted General Water Banking Statutes permit the Committee of Nine to promulgate rules that foreclose any lease of water in WD01 pursuant to sections 108A and 108B, even if that lease does not involve the WD01 Rental Pool. Pocatello acknowledges that it is convenient for the Department and lucrative for the Committee of Nine to ignore sections 108A and 108B, but convenience and financial gain have perhaps never before in this State been a basis to deny statutory rights to the use of private property as the owner sees fit. As a matter of

¹ I.C. § 42-108B (“section 108B”) establishes the administrative process by which a water rights owner may apply to the department of water resources for a lease permit, as well as the hearing and protest procedures available for potentially opposing entities.

law, the Director should reconsider his Order, apply the plain language of section 108A and 108B, and approve Pocatello's Application.

II. THE COMMITTEE OF NINE WATER BANK RULES DO NOT APPLY TO POCATELLO'S APPLICATION

When the Idaho Legislature directed the Idaho Water Resource Board ("Board") to operate a water supply bank to facilitate the rental of water, it delegated authority to the Board to promulgate rules "governing the management, control, delivery and use and distribution of water to and from the water supply bank". I.C. §42-1762. This delegation of authority does not include the authority for the Committee of Nine to enact rules with additional substantive "safeguards" to prevent injury to other spaceholders in WD01 where the subject lease does not involve the WD01 Rental Pool. The Board clarified that in promulgating the Water Supply Bank Rules and appointing local boards like the Committee of Nine to facilitate the operation of water banks, it intended to limit their scope: "The adoption of these rules is not intended to prevent any person from directly selling or leasing water by transactions outside the purview of the Water Supply Bank Rules where such transactions are otherwise allowed by law." I.D.APA 37.02.03.001 (emphasis added).

Despite this clear limitation on the application of the Water Supply Bank Rules and concurrent jurisdiction of the local boards, the Director concluded that "[t]o avoid such direct conflict between the statutes, sections 42-108A and 42-108B should be viewed as applying only in situations where the water to be leased is not subject to the operation of rental pool approved by the Board pursuant to 42-1765, Idaho Code." Final Order, Conclusions of Law, ¶15. This conclusion is inconsistent with (and broader than) the legislature's delegation of authority to the Board and should be reconsidered by the Department and reversed.

Despite the lack of legislative authority for the Board or Committee of Nine to enact substantive standards of injury, the Director concluded that the WD01 rental pool rules applied to Pocatello's non-water bank lease: "The evidence presented at hearing demonstrated that the storage water rights of the Protestants and other spaceholders in the Upper Snake River storage system would be subject to uncompensated injury should the City's Application be approved as requested without the safeguards provided under Water District 1 Rental Pool Procedures." The Director does not identify what those "safeguards" are or how they differ from the legislative standard announced in I.C. 42-108A and 108B. The Director's conclusion that Pocatello's application is subject to the Rental Pool Procedures is without statutory support and should be reconsidered.

III. THE DIRECTOR SHOULD DECLINE TO CONSIDER THE EVIDENCE PROVIDED BY THE PROTESTANTS AS NO PARTY HAD STANDING UNDER THE THRESHOLD STANDARD PROVIDED BY SECTION 108B AND SO ANY SUCH EVIDENCE PROVIDED BY PROTESTANTS CANNOT BE RELIED UPON TO DENY POCATELLO'S APPLICATION.

Section 108B provides, *inter alia*:

The director of the department of water resources shall examine all of the evidence and available information and shall approve, in whole or in part, or upon conditions, provided no other water rights senior or junior to the water to be leased are injured thereby.

Id. (emphasis added). As a threshold matter, section 108B *requires* the Director to approve the lease Application "in whole or in part, or upon conditions" unless other water rights can show that they are "injured" by the lease. Although several protestants appeared at the hearing and provided evidence of "injury", the evidence presented involved two categories of issues: 1) allegations that Pocatello's Application would cause an increase in lease rates to the detriment of others seeking to lease the water; and 2) allegations that Pocatello's Application—which would

lease water to Idaho Power for use below Milner Dam—would cause “injury” to other water users, even though the effect of Pocatello’s lease of the very same water to water users *above* Milner Dam is indistinguishable from the effects of a lease below Milner Dam.

Further, there is no evidence of injury in the record to support a finding of injury under section 108B. Paragraphs 26-30 of the Director’s Findings of Fact summarize evidence relied upon by the Director, but the Director draws the wrong conclusions about this testimony: In fact, injury to water rights does not arise because of the discomfort water users feel over the possibility that the Upper Snake reservoir system might not fill. Further, although certain of the Protestants presented evidence and argument that Pocatello’s lease might cause a general increase in lease rates for WD01 storage water, none of the protestants have presented any legal basis for a right to lease Pocatello’s water (or any other entities’ water) at a certain rate. As such, the allegation that lease rates might be sensitive to market forces is not sufficient to support a finding of injury.

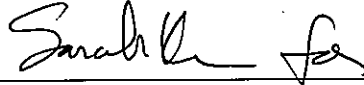
Because the Director is required to grant an application under I.C. §§42-108A and -108B *unless* a showing of injury can be made, and because the evidence provided by Protestants does not rise to the level of evidence of injury under Idaho law, the Director’s Order must be reversed: Protestant’s evidence should be disregarded and Pocatello’s Application granted as there are no facts in the record that support the findings made by the Director.

CONCLUSION

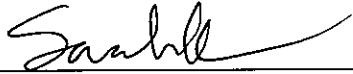
For the foregoing reasons, the Department should reconsider the Final Order and grant Pocatello’s Application for a lease under I.C. 42-108A and -108B.

DATED this 10th day of July, 2009.

CITY OF POCA TELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

By 
A. Dean Tranmer

WHITE & JANKOWSKI, LLP
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2009, I caused to be served a true and correct copy of the foregoing **City of Pocatello's Petition for Reconsideration** in the case regarding the **Application to Lease Water for Hydroelectric Generation by City of Pocatello** by electronic mail to:



Sarah Klahn, White & Jankowski, LLP

Director c/o Victoria Wigle, Administrative Assistant Idaho Department of Water Resources PO Box 83720 Boise ID 83720-0098 victoria.wigle@idwr.id.gov +++ original also being mailed	Alan Kelsch, Board Member Idaho Irrigation District 7466 South 15 th W Idaho Falls, ID 83402 akelsch@bdhsi.com
A. Dean Tranmer, Esq. Attorney for City of Pocatello PO Box 4169 Pocatello ID 83205 dtranmer@pocatello.us	Paul A. Berggren, Chairman New Sweden Irrigation District 2350 West 17 th Street Idaho Falls, ID 83402 kail@snid.myrf.net
Robert L. Harris, Esq. Holden Kidwell Hahn & Crapo PO Box 50130 Idaho Falls ID 83405-0130 rharris@holdenlegal.com	Matt Howard US Bureau of Reclamation 1150 N Curtis Road Bosie ID 83706-1234 mhoward@pn.usbr.gov
Randall C. Budge, Esq. Candice M. McHugh, Esq. Racine Olson Nye Budge & Bailey PO Box 1391 Pocatello ID 83201 rcb@racinelaw.net cmm@racinelaw.net	Lyle Swank IDWR 900 N Skyline Dr Idaho Falls ID 83402-6105 lyle.swank@idwr.idaho.gov
Jerry R. Rigby, Esq. Rigby Andrus & Moeller PO Box 250 Rexburg ID 83440-0250 jrigby@rigby-thatcher.com	