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ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF WATER)	
TO VARIOUS WATER RIGHTS HELD BY OR FOR)	
THE BENEFIT OF A&B IRRIGATION DISTRICT,)	POCATELLO'S RESPONSE
AMERICAN FALLS RESERVOIR DISTRICT #2,)	TO SURFACE WATER
BURLEY IRRIGATION DISTRICT, MILNER)	COALITION'S PETITION
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)	FOR RECONSIDERATION
DISTRICT, NORTH SIDE CANAL COMPANY,)	OF HEARING OFFICER'S
AND TWIN FALLS CANAL COMPANY)	ORDER AND TO
_____)	RECLAMATION'S
	PETITION

Pursuant to the Idaho Department of Water Resources Rule of Procedure 720.c, the City of Pocatello ("Pocatello") hereby files its Response to the Surface Water Coalition's ("SWC") Petition for Partial Reconsideration of the Hearing Officer's Recommended Order ("SWC Petition" or "Petition").

INTRODUCTION

On April 29, 2008, Hearing Officer Gerald F. Schroeder, issued his Opinion Constituting Findings of Fact, Conclusions of Law, and Recommendation (the

“Recommendations”). On May 12, 2008, the United States Bureau of Reclamation (“BOR”) filed Reclamation’s Petition for Reconsideration seeking clarification of five issues. On May 13, 2008, the Surface Water Coalition filed the Surface Water Coalition’s Petition for Partial Reconsideration of Hearing Officer’s Recommended Order Requesting Partial Reconsideration seeking clarification and reconsideration of two issues. On May 13, 2008, Pocatello filed its Initial Memorandum of Exceptions Re: Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation in order to meet the deadline of the Department’s Administrative Rules. In that filing, Pocatello also reserved the right to file a response to the Motions for Reconsideration.

RESPONSE TO SWC’S PETITION

I. THE HEARING OFFICER’S CHARACTERIZATION OF THE SWC WATER RIGHTS DOES NOT REQUIRE CLARIFICATION.

The SWC suggests that the Hearing Officer’s characterization of the SWC water rights in the Opinion Constituting Findings of Fact, Conclusions of Law and Recommendation (“Recommendations”) is deficient. The SWC suggests that the Recommendations may, in some way, interfere with determinations of the SWC’s water rights in the Snake River Basin Adjudication (“SRBA”). SWC Petition at 2-3. The SWC links its water rights claims in the SRBA with the Hearing Officer’s Recommendation that resolution of a delivery call should exclude non-irrigated acres. This is an erroneous construction of the Recommendation and the SWC’s request for clarification is unnecessary.

As a preliminary matter, the Hearing Officer elected to follow the lead of the May 2, 2005 Order entered by the Department in this matter, and set forth basic information regarding the SWC’s water rights and the claims made by SWC in the SRBA. To the

extent the Recommendations fail to identify the differences between the SWC claims in the SRBA and the IDWR recommendation clarification can easily be made by inserting the following language in the Recommendations:

At page 8, paragraph II.5.: Milner has filed certain objections to its water rights claims that are found at Exhibits 9723-9729.

At page 9, paragraph II.8.: TFCC has filed for irrigation of 202,691 acres. IDWR recommended 196,162 acres. TFCC delivers water to 202,690 shares. TFCC has filed certain objections to its claims that are found at Exhibit 9723-9729.

However, the SWC does not stop with asking for clarification of the recitations made in the Recommendations regarding its claims and objections in the SRBA. The SWC also links the Hearing Officer's finding that non-irrigated acres should not be considered in determining the irrigation supply necessary for SWC members (*see* section XIV.7.e. "Average Yearly Irrigation Supply") with their SRBA claims. SWC Petition at 3. The SWC's argument seems to be that if the SRBA determines, for example, that TFCC was irrigating 196,162 acres in 1987 for purposes of the adjudication, then that is the irrigated acre number to be used by the Department in administering a delivery call. In fact, as the Hearing Officer properly found, the amount of irrigated land (and, by the same token, non-irrigated land) is likely to be a dynamic value that changes each season. Recommendations at 53. The Hearing Officer relied upon certain analyses of aerial photos conducted by IGWA's experts to conclude that the amounts of irrigated land used by the Director in the May 2 Order and subsequent orders likely included non-irrigated acres. *Id.* ("IGWA has established that at least 6600 acres claimed by TFCC in its district are not irrigated"). The Hearing Officer properly found that "these amounts [of non-

irrigated land] may, of course, change as acreage is removed from irrigation or possibly added back.” *Id.*

Regardless of the amount of land that the SRBA determines to be “irrigated” for purposes of the adjudication, the Hearing Officer has recommended that the Department look at the amount of irrigated land on an annual basis and answer a delivery call based on the amount of water planted for irrigation in a given year. This practice of annual evaluation of irrigated acres is common in other basins; for example, it is the basis of a settlement between Wyoming and Nebraska in the interstate dispute involving allocation of the North Platte River. *Nebraska v. Wyoming*, 534 U.S. 40 (2001)¹.

No “clarification” or other modification of the Hearing Officer’s Order is necessary with regard to the findings that any delivery call should limit evaluation of the senior’s demand for water only by reference to irrigated land.

II. THE HEARING OFFICER CORRECTLY DETERMINED THAT TWIN FALLS CANAL COMPANY SHOULD BE LIMITED TO 5/8 INCH INSTEAD OF 3/4 INCH.

A. The Hearing Officer properly found that if a “full headgate supply” concept is used by IDWR in resolving a delivery call, that TFCC’s must be assumed to be 5/8 inch.

Again, as above, the context of the Hearing Officer’s determinations regarding the proper amount of the TFCC “full headgate supply” bears mention. The Hearing Officer found that any assumptions made by the Department in administering a delivery call should limit TFCC’s “full headgate deliveries” to 5/8 inch rather than the ¾ inch.

Recommendations, Section XIV.7.g. and XV.4. In Section XIV, the Hearing Officer set forth his recommendations for determining “Average Yearly Irrigation Supply”. Those

¹ See also, http://www.dnr.state.ne.us/NorthPlatte/Settlement/Exhibit_4.pdf describing the methodologies for determining actually irrigated acres in a given irrigation year.

include: a) rejecting the water budget method (*see*, XIV.3- 5); b) rejecting the “minimum full supply” approach relied on in the May 2, 2005 Order (*see*, XIV.6); and c) setting forth the Hearing Officer’s recommended considerations for IDWR in arriving at a different method (*see*, XIV.7, generally).

In recommending an alternative method to resolve delivery calls, the Hearing Officer found:

- ❖ “It is appropriate to use historical information when crops were adequately irrigated and to test that information to determine if the usage involved waste.” XIV.7. at 51.
- ❖ The baseline amounts of 1995 should be adjusted based on evaluation of precipitation and temperature. XIV.7.a.
- ❖ Adjustments should be made to reflect cropping changes. XIV.7.b.
- ❖ Conversions to sprinklers, which will generally reduce the amount of water needed should be considered. XIV.7.c.
- ❖ Analysis of soil conditions and soil moisture reservoirs must be made. XIV.7.d.
- ❖ Non-irrigated acres should be excluded from any assumptions regarding senior water demand. XIV.7.e.
- ❖ Calculation of water budgets should be based on acres not shares. XIV.7.f.
- ❖ For TFCC, a delivery per acre of 5/8 inch instead of 3/4 inch should be assumed. XIV.7.g.

The Hearing Officer also made findings about whether the diversion and conveyance practices of the SWC members were “reasonable”. *See*, Section XV. In this context, the Hearing Officer found:

- ❖ That TFCC’s “full headgate delivery” should be 5/8 inch instead of 3/4 inch. XV.4.

While Pocatello objects to much of the substance of Sections XIV and XV (objections it will lodge by filing timely Exceptions to the Hearing Officer’s Recommendations), it agrees with the finding that it is *per se* unreasonable for IDWR to assume 3/4 of an inch is “full headgate delivery” for TFCC in light of the evidence received.

However, SWC suggests that these findings regarding TFCC delivery rate are either a “readjudication” of its water right, (Petition at 3), or else a requirement that it accept an “alternative duty of water depending on the water supply,” (Petition at 5). Moreover, the SWC seems to suggest that to the extent delivery of 3/4 inch is consistent with TFCC water rights (i.e., 3000 cfs plus other in-sundry water rights it asserts as a basis for its call) this works some injustice to TFCC. All of these assertions are inconsistent with the context of these findings in the Recommendations and, as such, are insufficient to support modifying the Recommendations.

B. Whether or not 3/4 inch is the decreed amount of TFCC’s water right is in dispute, but in any event the finding that IDWR should use 5/8 inch instead is not a readjudication of TFCC’s rights.

Although the Supreme Court ruled early in this litigation that the decreed amount is the maximum amount to which the right holder may be entitled (*AFRD#2 v. IDWR*, 143 Idaho 862, 154 P.3d 433, 879), SWC continues to question whether IDWR may require (and whether the Hearing Officer may recommend) the delivery of amounts smaller than the decreed amount in answering a delivery call. Under *AFRD #2*, and the

Hearing Officer's Recommendations, seniors may be required to accept an amount smaller than the amounts on the face of their decrees based on the Department's beneficial use analysis (and consistent with the methods laid out in the Recommendations Section XIV and XV or other methods yet to be decided upon by the Director). Such reduction from the decreed amount for purposes of answering a delivery call is not a readjudication of the decrees; instead, it is the means by which Idaho law provides for "optimum use" and "reasonable use" of a scarce resource. *Id.*

C. The Hearing Officer's Ruling that TFCC is entitled only to 5/8 inch rather than 3/4 inch was based on evidence received at the hearing and SWC has not articulated a record-based reason for modification.

The Hearing Officer had ample evidence to limit TFCC's "full headgate deliveries" to 5/8 inch. Testimony by TFCC's manager demonstrated that TFCC's conveyance system "becomes taxed if [it] delivers over 3/4 of a miners inch...To try to deliver more than that amount would put the canal system in jeopardy and dramatically raise both the potential for breaks and catastrophic property damage." Exhibit 4610; Alberdi Transcript, Vol III. at 1693-94, lns. 5-1. Thus, 3/4 inch is a *maximum* delivery rate for TFCC shareholders and, based on the testimony, an imprudent amount to deliver absent unusual conditions. Additionally, the evidence presented demonstrated not only that the TFCC Operating Policy states that the water right is 5/8 inch², but also that the management within TFCC believed that 5/8 inch would satisfy its shareholders needs. Exhibit 4610; Alberdi Transcript Vol III. at 1696-97.

RESPONSE TO RECLAMATION'S PETITION FOR RECONSIDERATION

To avoid duplicative argument, Pocatello adopts the arguments of the Idaho Groundwater Appropriators regarding Reclamation's Petition for Reconsideration, made

² Alberdi Transcript, Vol III. at 1602.

in IGWA's pleading captioned, Response to the Surface Water Coalition's Petition for Partial Reconsideration and to Reclamation's Petition for Reconsideration.

CONCLUSION

Pocatello respectfully requests that, with the exception of the possible modifications to the Recommendations suggested in Part I.*infra*, the SWC's Motion to Reconsider be denied. Pocatello also respectfully requests, based on the arguments made in IGWA's Response brief, that Reclamation's Petition for Reconsideration be denied.

Dated this 27th day of May, 2008.

CITY OF POCATELLO ATTORNEY'S OFFICE

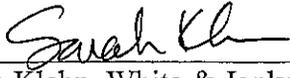
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2008, I caused to be served a true and correct copy of the foregoing **Pocatello's Response to Surface Water Coalition's Petition for Reconsideration of Hearing Officer's Order and to Reclamation's Petition** by electronic mail and/or facsimile to:



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