6-26-2012

Syringa Networks v. Idaho Department of Administration Respondent's Cross Appellant's Reply Brief Dckt. 38735

IN THE SUPREME COURT OF THE STATE OF IDAHO

SYRINGA NETWORKS, LLC, an Idaho limited liability company,

Plaintiff-Appellant-Cross-Respondent,

vs.

IDAHO DEPARTMENT OF ADMINISTRATION; J. MICHAEL "MIKE" GWARTNEY, in his personal and official capacity as Director and Chief Information Officer of the IDAHO DEPARTMENT OF ADMINISTRATION; JACK G. "GREG" ZICKAU, in his personal and official capacity as Chief Technology Officer and Administrator of the Office of the CIO;

Defendants-Respondents-Cross-Appellants,

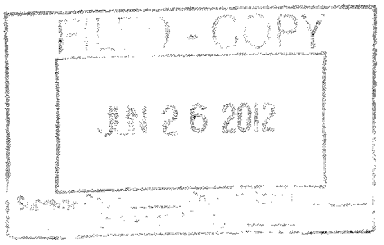
and

ENA SERVICES, LLC, a division of EDUCATION NETWORKS OF AMERICA, INC., a Delaware corporation; QWEST COMMUNICATIONS COMPANY, LLC, a Delaware limited liability company;

Defendants-Respondents.

Supreme Court No. 38735

District Court No. CV-OC-0923757



STATE RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the
Fourth Judicial District, in and for the County of Ada

Honorable Patrick H. Owen, District Judge, Presiding

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I.
INTRODUCTION

The Idaho Department of Administration ("IDA"), J. Michael Gwartney, and Jack G. Zickau (collectively, the "State Respondents") submit this Reply to the briefing filed by Syringa Networks, LLC ("Syringa") in response to two issues raised by the State Respondents in their opening brief : Syringa's lack of standing and the State Respondents' entitlement to attorney fees.

Regarding the first issue, Syringa fails to offer any substantive response to the State Respondents' argument that it lacks standing because it was not a bidder. Syringa acknowledges that it cannot have standing to challenge IDA's contract award absent statutory authorization, yet the only statute to which Syringa points does not confer standing. As a result, Syringa has failed to identify any basis upon which it has standing to bring counts two and three against the IDA. This Court should affirm the dismissal of such counts, consistent with the Legislature's intent to limit standing to actual bidders.

As for attorney fees, Syringa's response has narrowed and clarified the issue for this Court to address. On that issue, there can be no question that Syringa is wrong. Syringa's sole argument is that Idaho Code §§ 12-120(3) and § 12-121 were effectively preempted by § 12-117, per this Court's proclamation regarding the exclusivity of Idaho Code § 12-117 in *Potlatch Educ. Ass'n v. Potlatch Sch. Dist.*, 148 Idaho 630, 226 P.3d 1277, 1282 (2010). Notably, Syringa does not dispute that, if § 12-117 does not preempt § 12-120(3) -- i.e., if § 12-120(3) still applies in a civil proceeding involving a state agency -- the State Respondents are entitled to an award of attorney fees against Syringa. As a result, the sole issue for this Court is whether § 12-117 preempts either or both of §§ 12-120(3) and 12-121. Given that the District Court and Syringa each relied solely on *Potlatch* (and decisions echoing *Potlatch*) the issue squarely before this

Court is whether *Potlatch's* proclamation regarding the exclusivity of § 12-117 was a correct statement of the law. Because the State Respondents believe that § 12-117 cannot possibly be the exclusive basis for attorney fees in civil cases involving state agencies due to other statutes allowing attorney fees, this appeal requires this Court to revisit how § 12-117 interacts with other attorney fee provisions in the Idaho Code. In particular, this Court should clarify that, consistent with the unambiguous statutory language and clear legislative intent (and numerous pre-*Potlatch* decisions from this Court), §§ 12-120(3) and 12-121 -- or at least § 12-120(3) -- continue to apply in cases involving state agencies and political subdivisions. And, in particular, § 12-120(3) applies here and compels an award of attorney fees in favor of the State Respondents both at the trial level and on appeal.

II.
ARGUMENT

A. Syringa Lacks Standing to Bring Counts Two and Three of its Complaint Because the Legislature has Granted Standing to Challenge IDA Bid Awards to Bidders Only.

Syringa offers only a terse, ineffectual response to the State Respondents' argument that Syringa lacks standing to bring counts 2 and 3 because it was not a bidder. As a result, Syringa fails to provide any substantive response.

1. Syringa has Failed to Identify Any Statutory Grant of Standing.

In their opening brief, the State Respondents explained the law of standing in the context of government contracting, generally, and, in particular, with respect to potential challenges to IDA's bid awards. The State Respondents described how a disappointed bidder has no standing to challenge a government bid award absent authorizing legislation, how Idaho has provided for such challenges in limited circumstances pursuant to I.C. § 67-5733, and how Syringa, as a potential subcontractor to a bidder -- rather than a bidder itself -- was not authorized by that

section to challenge IDA's bid awards and therefore lacked standing. In response, Syringa does not dispute that it lacks standing under § 67-5733, nor that it was anything more than a subcontractor.[1] Syringa does not contend that the State Respondents' exposition of the law regarding standing to challenge government bid awards was wrong. Indeed, Syringa accepts that it must point to a statute granting it standing, and it points to one -- and only one -- statute, Idaho Code § 10-1202.[2]

Syringa's reliance on § 10-1202 is misplaced, however, for two reasons. First, setting aside issues of standing, Syringa fails to make a reasoned argument that § 10-1202 otherwise applies in these circumstances. Syringa merely asserts that it is a "person" under I.C. § 10-1202 because, "as a subcontractor to ENA, it incurred an admitted injury in fact that is directly related to the unlawful split of the IEN project." Response at 5. Even if Syringa is such a "person" -- and the State Respondents do not concede that it is -- § 10-1202 only provides for a declaratory judgment to determine a "question of construction or validity arising under the instrument, statute, ordinance, contract or franchise...." Syringa fails to identify how counts two and three of its Complaint come within the limitations of § 10-1202. And it is not at all evident how the

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[1] Whether Syringa is properly considered a subcontractor or a potential subcontractor is of no moment in the standing analysis -- either way, Syringa was not within the ambit of § 67-5733, which by its terms applies only to a "vendor whose bid is considered" because Syringa admits that it did not submit a bid. Syringa's Opening Brief at 32. For this reason, and in the interest of brevity, the State Respondents present this argument as if Syringa was actually a subcontractor of ENA rather than merely a potential subcontractor. The State Respondents continue to maintain, however, that Syringa was merely a potential subcontractor of ENA, and to the extent that this Court finds the difference between subcontractors and potential subcontractors meaningful with regards to its standing analysis, the State Respondents urge the Court to conclude that Syringa was merely the lattter. Of course, the State Repondents' argument that Syringa lacks standing even if it was a subcontractor applies with even more force if Syringa was merely a potential subcontractor.

[2] Syringa's statement that neither Qwest nor ENA dispute Syringa's standing is a non-sequitir.

act that Syringa complains of -- the supposed "unlawful split of the IEN project" -- raises a "question of construction or validity" under § 10-1202.

Second, even if § 10-1202 applies to Syringa, it does not provide it with a basis for standing. Although § 10-1202 "bestows the authority to declare rights, status, or other legal relations, that authority is circumscribed by the rule that 'a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists.'" *Schneider v. Howe*, 142 Idaho 767, 772, 133 P. 3d 1232, 1237 (2006) (quoting *Harris v. Cassia County,* 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). Because standing is a sub-category of the question of justiciability, *id.*, the authority bestowed by § 10-1202 is circumscribed by the requirement that a litigant demonstrate that it has standing. Put another way, § 10-1202 "does not relieve a party from showing that it has standing to bring the action in the first instance." *Martin v. Camas County,* 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011) (quoting *Schneider*, 142 Idaho at 772, 133 P.3d at 1237). Nor does it permit a party to circumvent the administrative process. *See Westway Constr., Inc. v. Idaho Transp. Dep't,* 139 Idaho 107, 115, 73 P.3d 721, 729 (2003) ("Actions for declaratory judgment, or to recover damages, are not a substitute for statutory administrative procedure..."). Syringa's claims against the IDA are simply not justiciable.

2. Syringa's Reliance on the Generalized Constitutional Standing Inquiry and its Alleged Injury is Misplaced.

Syringa nevertheless argues that it has standing because, it asserts, it has suffered an injury. Even assuming, arguendo, that Syringa was injured, its argument for standing misses the point because it focuses solely on the general requirements for constitutional standing. In the specific context of a challenge to IDA's award of a contract -- as opposed to, for instance, an agency's promulgation of a generally applicable rule -- a showing of particularized injury is insufficient for standing. Indeed, it is not even the relevant inquiry. Rather, the relevant inquiry

is whether Congress, or the state legislature, as the case may be, has granted standing by statute, because, in the absence of such an authorizing statute, there is no standing. *See* State Respondents' Opening Brief at 10-12.

a) The Idaho Legislature has Granted Standing to Challenge IDA Bid Awards Only to Bidders.

In Idaho, the only parties upon whom the Legislature has conferred standing to challenge a contract award by IDA are vendors whose bids were considered, and only then after such bidders have exhausted the administrative remedies provided in § 67-5733. In other words, only statutorily authorized entities may challenge IDA contract awards, and the only such entities in Idaho are the bidders themselves.

The Idaho Legislature has specifically granted standing to different entities to challenge different IDA actions. In § 67-5733, the Legislature created specific mechanisms for challenges to IDA's actions related to government contracting. That section provides for both pre- and post-award challenges by certain enumerated parties: "any vendor, qualified and able to sell or supply the items" can challenge bid specifications, § 67-5733(1)(a), but only a "vendor whose bid is considered" -- i.e., a bidder -- can challenge the actual award of the bid itself, § 67-5733(1)(c). For both pre- and post-award challenges, § 67-5733 also sets forth a particular mechanism for making an administrative appeal, including specified time limits.

Together with § 67-5729, § 67-5733 lays out the only route to the courthouse for a party seeking to challenge IDA actions taken in connection with government contracting. Section 67-5729 expressly limits judicial review to "appeals conducted as contested cases pursuant to section 67-5733(1)(c)(iii), Idaho Code." Therefore, because only a bidder can initiate an appeal under § 67-5733(1)(c), only a bidder has standing to challenge government contracting decisions in a court of law, and then, only after it has exhausted its administrative remedies. *See Fieldturf,*

Inc. v. State, 140 Idaho 385, 388, 94 P.3d 690, 693 (2004) (holding that bidder "waived its right to contest the process by failing to follow both procedures for contesting errors, inconsistencies, and ambiguities within the bidding documents and by failing to follow the statutory appeal process [in § 67-5733] to challenge the bid documents or DPW's determination").

Idaho Code § 67-5729 also provides standing for intervenors, but again limits that standing to actual bidders. In the event a determinations officer is appointed under § 67-5733 in response to an appeal by a bidder, other bidders shall "have standing to intervene in the proceeding as a party...." I.C. § 67-5729.

Sections 67-5729 and 67-5733 together limit standing to bidders who either initiate an administrative appeal under § 67-5733 or who wish to intervene after another bidder has initiated such an appeal. Either way, only a "vendor whose bid is considered" has standing to challenge IDA's award of a contract, consistent with the Legislature's Statement of Purpose for S.B. 1536, which amended § 67-5729 and added § 67-5733 in 1978:

> The proposed legislation also will clarify those parties entitled to join into an administrative appeal, and further clarifies those parties who have standing to initiate appeals or petitions in the state district court.

(Emphasis added.) Notably, such clarification was necessary because the prior version of § 67-5729 granted standing more broadly, to any "registered vendor showing an interest...." But since the 1978 amendment, the Legislature has decreed that only bidders have had standing to contest IDA's bid awards.

As a vendor but not a bidder, Sryinga had the ability to challenge the bid specifications but not the actual award. Syringa did not choose to challenge those specifications, despite the fact that they established that the IDA might award the contract to more than one bidder.

b) Policy Considerations Demonstrate the Unworkability of Syringa's Suggested Approach.

While the upshot of this statutory scheme may be that a subcontractor such as Syringa has no ability -- administrative or judicial -- to challenge a bid award, that is the result intended by the Legislature when it decided to grant standing for such challenges only to actual bidders. That is the consequence accepted by Syringa when it decided not to be a bidder itself but, rather, to put its eggs into ENA's basket. Moreover, Syringa could have – but chose not to – challenge the bid specifications making clear that the IEN contract might be awarded to multiple bidders. Syringa was not without a remedy in this particular instance -- it sued the bidder, ENA.

Syringa's position – that it has standing to sue IDA because the contract award allegedly affected it more than a generalized member of the public – is deeply problematic, as a matter of policy and equity. If Syringa had its way, any entity with an interest somehow distinguishable from the general public would have standing to challenge bid awards in court and would have no requirement to first exhaust administrative remedies. Such a system would severely undermine the statutory and administrative scheme for challenging IDA bid awards in at least two related ways.

First, Syringa's argument would, quite literally, throw open the doors to the courthouse to numerous additional entities who could demonstrate any form of potential injury related to a bid award. As a result, not only would any subcontractor have standing, but so would any potential subcontractor or supplier, as well as employees of the bidder, subcontractor, supplier, or potential subcontractor or supplier, and any other entity who could demonstrate a closer connection to the contract at issue than a member of the general public. The net result would be far more litigation over government contracts and, as a result, a dramatically increased burden on the state's ability to award contracts, which would be contrary to the public interest. *See, e.g.*,

Groves v. Dep't of Corr., 295 Mich. App. 1, 7 (Mich. Ct. App. 2011) ("Litigation aimed at second-guessing the exercise of discretion by the appropriate public officials in awarding a public contract will not further the public interest; it will only add uncertainty, delay, and expense to fulfilling the contract.... Opening the floodgates of litigation... would serve neither the interests of the government nor of the citizen-taxpayers that the bidding process is designed to advance."); *Shook Heavy & Envtl. Constr. Group v. City of Kokomo*, 632 N.E.2d 355, 359 (Ind. 1994) ("there is a clear public interest in expeditious construction of public works projects. Nowhere is time money more than in the construction field. And prompt completion of public construction projects is often important from a public safety standpoint. .... the cost of litigating contracts awarded under competitive bidding statutes -- perhaps multiple lawsuits in respect of a single contract award if more than one unsuccessful bidder seeks relief -- could pose a serious threat to public treasuries.").

Second, by opening the courthouse doors, Syringa's approach would confer upon each tangentially related entity greater rights and abilities to challenge a bid award than the actual bidder itself. Under Syringa's theory, although the actual bidder -- the entity with whom IDA interacts and the entity most impacted by IDA's bid award -- would be required to comply with the administrative process under § 67-5733 before filing suit, mere subcontractors, suppliers, employees and, potentially, sub-subcontractors, suppliers of subcontractors, potential contracting parties with subcontractors, etc., could bypass the administrative process entirely and go straight to the courthouse upon merely a showing that a contract award affects them more than it affects a member of the public at large. This would be relatively easy under Syringa's theory: any entity that had entered into a contract or contingent agreement with a bidder or with any of the bidder's subcontractors or partners or employees who could potentially receive work if the bidder

received the government contract could meet the test for particularized injury and gain access to the courthouse free of the necessity for first attempting to resolve the matter with IDA.

This result would seriously undermine the legislative intent to narrowly limit the ability to challenge government contracting decisions to bidders. It would also subvert the administrative procedures enacted to enable IDA to address, in the first instance, challenges to its contracting-related actions, and it would seriously burden the state's ability to enter into contracts. *See, e.g., Sabre Constr. Corp. v. County of Fairfax*, 256 Va. 68, 73 (1998) (narrowly interpreting section 11-70 of Virginia's Public Procurement Act and holding that bidder could not challenge administrative body's finding that the bid was non-responsive because to do so "would be creating a right of action against public bodies broader than that anticipated by the General Assembly."). Moreover, it is supremely illogical: it makes no sense to require bidders, who are most impacted by government contracting decisions and with whom the IDA directly interacts, to pursue administrative remedies prior to gaining standing to file a complaint but grant unfettered access to the courtroom to those with whom IDA does not directly interact.

The result urged by Syringa would also render superfluous I.C. § 67-5278. That section provides that a declaratory judgment regarding the validity or applicability of rules "may be rendered whether or not the petitioner has requested the agency to pass upon the validity or applicability of the rule in question." If Idaho law generally allowed any party not subject to the administrative process to file a declaratory judgment to challenge an administrative act, there would be no need for § 67-5278. That section is necessary precisely because the Legislature has not otherwise authorized a party to challenge an administrative act in the courts without first challenging the act through the administrative channels. *See Bradbury v. Idaho Judicial Council,* 149 Idaho 107, 116, 233 P.3d 38, 47 (2009) ("it is not to be presumed that the legislature

performed an idle act of enacting a superfluous statute") (quoting *Sweitzer v. Dean*, 118 Idaho 568, 571-72, 798 P.2d 27, 30-31 (1990)).

These problems illustrate that the result urged by Syringa is unworkable, in addition to being contrary to the statutory scheme. They also illustrate the wisdom behind the Legislature's decision to limit standing for challenging bid awards to the bidders themselves. Adopting Syringa's argument would severely undermine the statutory scheme and the IDA's ability to contract efficiently and cost effectively.

B. The State Respondents are Entitled to Attorney Fees.

Syringa asserts that Sections 12-120(3) and 12-121 do not apply in this case. Like the District Court, Syringa bases that assertion solely upon *Potlatch's* proclamation about the exclusivity of § 12-117 and the post-*Potlatch* cases echoing the proclamation.

Because the statement in *Potlatch* that "I.C. § 12-117 is the exclusive means for awarding attorney fees for the entities to which it applies," is the sole basis upon which the District Court denied fees to the State Respondents and the basis of Syringa's argument on appeal, the accuracy of *Potlatch's* proclamation, is squarely before this Court. Because that proclamation is not merely wrong, but manifestly wrong, this Court should reverse the District Court's ruling denying attorney fees to the State Respondents and award attorney fees at both the trial level and on appeal.

1. Potlatch is Manifestly Wrong

If *Potlatch's* proclamation about the exclusivity of § 12-117 is an accurate statement of the law, the necessary conclusion -- and the conclusion that Syringa urges -- is that attorney fees cannot be awarded under any provision other than § 12-117 "in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a

person." I.C. § 12-117 (emphasis added). As a result, it is not merely §§ 12-120(3) and 12-121 that *Potlatch's* proclamation would negate *sub silentio*, but also every other basis for awarding attorney fees in civil actions pitting a state agency or political subdivision against a person, including, to name a few, I.C. § 63-3049(d) (attorney fees for judicial review of tax commission rulings), I.C. § 6-918A (attorney fees under Idaho Tort Claims Act), and I.C. 9-344(2) (attorney fees for actions pursuant to the Idaho Public Records Act).

This cannot be. At minimum, such a holding would be tantamount to superseding and negating numerous other attorney fee statutes, something this Court has acknowledged it cannot do. *See, e.g., State v. Doe (In re Doe),* 147 Idaho 326, 329, 208 P.3d 730, 733 (2009) ("We are not free to rewrite a statute under the guise of statutory construction."). It would also effectively overrule, *sub silentio,* numerous pre-*Potlatch* decisions in which this Court awarded attorney fees in civil actions involving state agencies pursuant to statutes other than § 12-117, including -- but not limited to -- §§ 12-120(3) and 12-121. *See* State Respondents' Opening Brief at 43-44.

Indeed, although Syringa's entire argument regarding the State Respondents' request for attorney fees is premised on its assertion that the Potlatch proclamation is *right*, Syringa tacitly admits that the *Potlatch* Court was *wrong*. In fact, Syringa acknowledges, as it must, that I.C. § 6-918A controls over § 12-117. *See* Response at p. 43. This is consistent with the statutory language of § 6-918A, which, unlike § 12-117, actually contains an exclusivity provision: "The right to recover attorney fees in legal actions for money damages that come within the purview of this act shall be governed exclusively by the provisions of this act and not by any other statute or rule of court...." (Emphasis added.) *See Beehler v. Fremont County*, 145 Idaho 656, 661 (Ct. App. 2008) (holding that § 12-117 does not apply because "Section 6-918A is the exclusive provision for awarding attorney fees under the ITCA, including claims on appeal."). Section 12-

117 has no such exclusivity provision; in fact, it has just the opposite. Instead of providing for exclusivity, § 12-117 actually begins by deferring to other statutes. This Court cannot write into § 12-117 an exclusivity provision that the Legislature did not include. *See Magic Valley Newspapers, Inc. v. Magic Valley Reg'l Med. Ctr.*, 138 Idaho 143, 146, 59 P.3d 314, 317 (2002) ("we do not have the authority to rewrite the statute to include such a provision"). As acknowledged by Syringa, Idaho Code § 6-918A applies instead of § 12-117 in "civil judicial proceedings" involving tort claims against state agencies or political subdivisions; that alone is sufficient to demonstrate that the *Potlatch* Court's statement about the exclusivity of § 12-117 was manifestly wrong.[3]

This Court has also tacitly acknowledged that *Potlatch's* proclamation was wrong. In *Henry v. Taylor*, -- Idaho --, 267 P.3d 1270, 1276-1277 (2012), this Court held that § 9-344(2) was the exclusive basis for an attorney fee award in a proceeding to enforce compliance with the Idaho Public Records Act and that, as a result, § 12-117 did not apply:

> Idaho Code section 9-344(2) sets forth the standard for awarding reasonable costs and attorney fees in actions pursuant to the Public Records Act. To base an award on some other statute would be contrary to the legislature's intent in including in the Act an attorney fee provision with a specified standard for awarding attorney fees in proceedings to enforce compliance with the Act. That statute is the exclusive basis for such an award. Therefore, Idaho Code sections 12-117 and 12-121 do not apply.

It goes without saying that *Henry* cannot be correct unless *Potlach* was wrong.

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[3] When the Legislature actually intends to make § 12-120(3) inapplicable, it has done so expressly. *See Primary Health Network v. Dep't of Admin.*, 137 Idaho 663, 670, 52 P.3d 307, 314 (2002) (quoting I.C. § 49-1839(4), which stated, at that time "Section 12-120, Idaho Code, shall not apply to any actions involving insureds and insurers..."). Of course, § 12-117 has no such provision.

There are numerous additional reasons that *Potlatch's* proclamation was manifestly wrong. As set forth in the State Respondents' opening brief, *Potlatch* ignored the "unless otherwise provided" language in § 12-117 as well as the express intent of the Legislature that §§ 12-120(3) and 12-121 be applicable to state agencies, as evidenced by the statutory definition of "party" in each. *See* State Respondents' Opening Brief at 42-43. Before *Potlatch*, this Court had routinely upheld and granted attorney fees in cases involving "the entities to which [§ 12-117] applies" pursuant to provisions other than § 12-117, *see, e.g., id.* at 43-44 (citing cases), including as recently as the 2009, the year before Potlatch. *See City of McCall v. Buxton*, 146 Idaho 656, 664-65, 201 P.3d 629, 637-38 (2009) (holding that district court did not err in awarding attorney fees pursuant to § 12-120(3)).[4] The *Potlach* Court ignored all of this. That Court ignored the statutory definition of "party" in §§ 12-120(3) and 12-121 and the exclusivity provision in § 6-918A. It also ignored the "unless otherwise provided" language in § 12-117; in fact, it omitted such language from its quotation of that section.

To be clear, the *Potlatch* Court made an unnecessarily broad statement that, if given effect, would negate numerous other statutes and numerous prior decisions of this Court.

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[4] Although there were also two older cases in which this Court had stated that § 12-117 was exclusive, in both of those cases, this Court stated merely that § 12-117 was the exclusive provision for awarding fees against a state agency. *Westway Constr., Inc. v. Idaho Transp. Dep't*, 139 Idaho 107, 116, 73 P.3d 721, 730 (2003) and *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 723, 947 P.2d 391, 396 (1997). Moreover, the *Westway* court's terse analysis simply stated that section 12-117 is the "exclusive" basis for awarding attorney fees against government entities, and it cited only *Hagerman* for that proposition. *Hagerman* was decided before the 2000 amendment to section 12-117, which added an "[u]nless otherwise provided by statute" qualification to the applicability of section 12-117. *Westway* (like *Potlatch*) fails to discuss that important statutory language at all, much less to explain why section 12-120(3) is not a statute that "otherwise provide[s]" for awards of attorney fees in civil actions based on a "commercial transaction" that involve state agencies or political subdivisions.

Moreover, that Court did so without any analysis or reasoning, by ignoring the language of other attorney fee statutes and its own prior decisions giving them effect, and through selective quotation of § 12-117 and selective reliance on outlying cases. If the Court had really intended to work such a fundamental change in the law, it needed to do more than that: this Court is not at liberty to disregard and negate numerous other statutes, let alone to do so *sub silentio*. *See, e.g., Rogers v. Household Life Ins. Co.*, 150 Idaho 735, 739, 250 P.3d 786, 790 (2011) ("This Court may not ignore or amend unambiguous statutes"). *Potlatch's* proclamation was manifestly wrong, and it needs to be corrected by this Court.

2. Syringa's Arguments in Response Lack Merit.

Syringa's response suffers from numerous additional infirmities beyond being based upon a false premise -- that this Court should defer to *Potlatch's* proclamation. Most fundamentally, Syringa's response utterly fails to address the State Respondents' primary argument demonstrating that Potlatch was manifestly incorrect -- the unambiguous statutory language of § 12-120(3), which makes it irrefutably clear that the statute applies to state agencies. Like the *Potlatch* Court, Syringa neither acknowledges nor attempts to explain away the clear language of § 12-120(3). This is the "obvious principle of law" at stake here -- that this Court is not free to disregard the unambiguous language of § 12-120(3), let alone to announce a rule of law that would effectively rewrite that statute as well as numerous other statutes and prior decisions and undermine the clear Legislative intent.

a) Post-*Potlatch* Case Law Demonstrates Only that Potlatch Has Destablized the Jurisprudence and Introduced Uncertainty into Attorney Fee Requests.

Syringa claims that the six cases that have cited or quoted *Potlatch's* proclamation "settle the matter." Response at 39. But in none of those cases did this Court engage in any analysis of whether *Potlatch's* proclamation was correct. Indeed, each of the six merely echoes *Potlatch* without addressing its error. This Court has "stated frequently that we will not follow prior incorrect decisions merely because the cases exist." *Greenough v. Farm Bureau Mut. Ins. Co.*, 142 Idaho 589, 593, 130 P.3d 1127, 1131 (2006). Because those decisions represent no more than "blindly following" *Potlatch*, *id.*, they do not cure the manifest error of the *Potlatch* court and are entitled to little consideration: "when the judicial interpretation of a statute is manifestly wrong, stare decisis does not require that we continue an incorrect reading of the statute." *Id.*[5]

Moreover, whatever minimal force those decisions might otherwise have is undermined by the post-*Potlatch* decisions from this Court awarding[6] or evaluating whether to award[7]

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[5] Syringa asserts that this Court refused to overrule *Potlatch* in *Sopatyk v. Lemhi County*, 151 Idaho 809, 264 P.3d 916, 926 (2011), and that such refusal means that the State Respondents are "doubly barred" by *stare decisis*. Response at 41. Syringa overlooks the fact that *Sopatyk* concerned a different issue -- namely, whether *Smith v. Washington County* was correctly decided as to attorney fees in administrative appeals. That holding has no application here, where the issue is attorney fees in a civil action.

[6] Syringa avers that the State Respondents "incorrectly contend" that this Court awarded attorney fees to the Hagerman Highway District pursuant to § 12-121 in *Zingiber Investment, LLC v. Hagerman Highway District*, 150 Idaho 675, 249 P.3d 868 (2011). Not so. Syringa cites a portion of that opinion in which this court awarded attorney fees to Hagerman Highway District pursuant to § 12-117. But Syringa somehow overlooks the fact that the Court also awarded attorney fees to Hagerman Highway District pursuant to § 12-121. *Id.* at 687, 249 P.3d at 880 ("this Court also awards attorney fees on appeal to the District...under I.C. § 12-121"). Indeed, the fact that this Court awarded attorney fees under both § 12-117 and § 12-121 undermines Syringa's argument that the two statutes conflict. *See also Harris v. State ex rel. Kempthorne*, 147 Idaho 401, 406-407, 210 P.3d 86, 91-92 (2009) (evaluating whether to award attorney fees under both § 12-117 and § 12-121); *Sacred Heart Med. Ctr.*

attorney fees under provisions other than § 12-117 in cases where § 12-117 could apply.[8] *See* State Respondents' Opening Brief at 44 (citing cases)[9]. Moreover, Syringa has not cited a single case where a court has held that § 12-120(3) no longer applies in the circumstances at issue here -- a fee request by a state agency or political subdivision pursuant to § 12-120(3).

Ultimately, the final tally of post-*Potlatch* decisions is less important than what those decisions reveal: that the law is, at the moment, unsettled, and that the Court has, on multiple

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v. Boundary County, 138 Idaho 534, 537, 66 P.3d 238, 241 (2003) (same); *Clark v. Dep't of Health & Welfare*, 134 Idaho 527, 532, 5 P.3d 988, 993(2000) (same).

7 Syringa contends that *Stoddard v. Pocatello School Dist. #25*, 149 Idaho 679, 687, 239 P.3d 784, 792-93 (2010) "does not conflict with *Potlatch*" because in that case this Court declined to award fees under § 12-121. Response at 44, n.12. But the salient point is that the Court evaluated whether fees should be awarded pursuant to § 12-121, not § 12-117, and its decision not to award fees was based on the merits of the claim under § 12-121, not on any supposed preemption by § 12-117. In other words, the *Stoddard* Court applied § 12-121, in contravention to *Potlatch's* proclamation.

8 Syringa's argument that *Potlatch's* proclamation was not dicta misses the point. An expression of opinion on a question not before the Court is dictum. *Long v. State Ins. Fund*, 60 Idaho 257, 260-261 (1939). In *Potlatch*, the Court was presented only with claims for attorney fees under §§ 12-117 and 12-121; as a result, its proclamation about the exclusivity of § 12-117 was overbroad and therefore dictum as to any provision other than § 12-117. Whether the *Potlatch* proclamation was dictum is, however, ultimately of little consequence. Because the Court made that statement, and, as Syringa points out, it has been echoed in subsequent decisions, the underlying accuracy of it needs to be substantively addressed regardless of whether it was dictum. And regardless of how it is addressed, the result is the same: if the *Potlatch* proclamation was dictum with regard to provisions other than § 12-121, this Court can simply clarify its overbreadth; if it was "a holding establishing binding precedent on a question of law," this Court should correct it because it is "manifestly wrong." *Farber v. Idaho State Ins. Fund*, -- Idaho --, 272 P.3d 467, 473 (2012).

9 Since the State Respondents filed their Opening Brief, this Court has continued to evaluate or award attorney fees under provisions other than § 12-117 in cases where that section could apply. *See Pioneer Irrigation Dist. v. City of Caldwell*, 2012 Ida. LEXIS 110, 25-26 (Idaho Apr. 27, 2012) (evaluating whether to award attorney fees under §§ 12-117 and 12-121); *Hart v. Idaho State Tax Comm'n*, 2012 Ida. LEXIS 99, 13-14 (Idaho Apr. 26, 2012) (awarding attorney fees to State Tax Commission pursuant to I.C. § 63-3409(d)).

occasions since *Potlatch*, awarded fees or evaluated whether to award fees pursuant to attorney fee provisions other than § 12-117 in situations where § 12-117 applies. In the face of this unsettled post-*Potlatch* law, Syringa's argument against reexamining the issue crumbles. Syringa argues that this Court should not revisit or overrule *Potlatch* because it is "a settled point of law" and to do so would be "to embrace ambiguity over order." Response at 40-41 (citing *Idaho Falls v. Fuhriman*, 149 Idaho 574, 579, 237 P.3d 1200, 1205 (2010)). But with multiple post-*Potlatch* decisions from this Court awarding attorney fees pursuant to provisions other than § 12-117, the present state of the law is ambiguity, not the "order" that the *Fuhriman* Court cautioned against disturbing. Indeed, *Potlatch* itself caused the ambiguity. Prior to that decision, the "order" that Syringa lauds was in place. There was no dispute whether, in a civil action, a state agency could recover attorney fees under § 12-120(3). The ambiguity that presently exists in the law is the result of *Potlatch's* declaration.

As a result, Syringa's argument against revisting *Potlatch* actually further illustrates why this Court must revisit -- and overrule or clarify -- *Potlatch*. Simply put, *Potlatch* is the problem. *Potlatch* violated the principles of *stare decisis*, not merely by purporting to make new law contrary to precedent, but by doing so *sub silentio*, absent any reasoning or authority in support, let alone any attempt to explain the obvious tension with the statutory language. *Potlatch* destabilized the law by introducing a new element of uncertainty about attorney fee awards to prevailing state agencies -- an uncertainty reflected in the contradictory results in post-*Potlatch* decisions. Indeed, neither *Potlatch* nor Syringa cites any case decided prior to *Potlatch* holding that § 12-117 precludes the application of any other attorney fee provision in a case involving a

prevailing state agency. Prior to Potlatch, there was no ambiguity in the law regarding attorney fees for prevailing state agencies. That was settled law.[10]

b) Syringa's Arguments that Potlatch is not Manifestly Wrong are Misguided and Ineffectual.

Syringa asserts that *Potlatch* is not manifestly incorrect. But Syringa's arguments in support are ineffectual and suffer from three serious deficiencies.

First, Syringa fails to address the statutory language of § 12-120(3) making clear that the Legislature intended that section to apply to state agencies. Indeed, Syringa completely ignores the State Respondents' primary argument demonstrating *Potlatch's* error, that the Legislature defined "party" to include state agencies because it intended that § 12-120(3) would apply to state agencies. And the "obvious principle of law or justice" that Syringa claims is lacking is the principle identified by the State Respondents in their opening brief: the Court cannot rewrite a statute, let alone rewrite multiple statutes. In other words, the Court cannot rewrite § 12-117 to add an exclusivity provision that the Legislature excluded -- let alone rewrite the exclusivity provision out of § 6-918A. Nor can it rewrite § 12-120(3) or § 12-121 to make either inapplicable to state agencies in the face of the express language making them so applicable.

Second, Syringa conflates §§ 12-120(3) and 12-121 and purports to address the former while in reality addressing only the latter. For this reason, to the extent that Syringa's arguments have any force, they do so only with respect to § 12-121, not to § 12-120(3).

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[10] In its eagerness to prop up *Potlatch*, Syringa attributes to that Court a nonexistent "rationale." Response at 40. According to Syringa, "the [*Potlatch*] Court's rationale was clear: 'I.C. § 12-117 is the exclusive means for awarding attorney's fees for the entities to which it applies.'" This, however, is no more than a declaratory statement, completely devoid of any rationale. And that is precisely the point: the *Potlatch* Court purported to announce a completely new rule of law -- a rule contrary to the express language of numerous statutes

Syringa's argument about the resolution of conflicting statutes is emblematic of the degree to which it conflates §§ 12-120(3) and 12-121. Syringa claims that "the State Respondents' proposed interpretation would render either § 12-121 or the relevant section of § 12-117 duplicative and superfluous," but it fails to explain how, even if correct, that argument would apply to § 12-120(3), which does not apply to frivolous litigation Response at 42. Syringa begrudgingly admits that § 12-120(3) allows fees in favor of a public entity. Response at 42. But Syringa's argument that § 12-117 controls over § 12-120(3) is premised upon the unsupported -- and incorrect -- assertion that §§ 12-117 and 12-120(3) conflict. Syringa fails to explain how there is any conflict between a statute that permits fee awards in cases involving commercial transactions and contract disputes (§ 12-120(3)) and a statute that addresses fee awards for frivolous litigation (§ 12-117). Small wonder, because there is no such conflict: the two apply to different situations and for different reasons.

Indeed, this Court has evaluated attorney fee requests under both §§ 12-117 and 12-120(3) in the same case -- something the Court would presumably refrain from doing if the two actually conflicted. *See, e.g., Cantwell v. City of Boise*, 146 Idaho 127, 138, 191 P.3d 205, 216 (2008). In reality, the only apparent conflict is between the unnecessarily broad *Potlatch* statement about the exclusivity of § 12-117 and the clear language of § 12-120(3). That is not a conflict between statutes at all. Rather, it is a conflict that, rather than buttressing *Potlatch's* proclamation, actually further illustrates that it is erroroneous.

Syringa's attempt to divine the "mind" of the Legislature, and its conclusion therefrom, suffers from the same defect. Even assuming, arguendo, that Syringa was correct in its

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and prior Court decisions -- without any rationale in support.

divination of the "mind" of the Legislature, i.e., that § 12-117 is the "exclusive means by which a public agency could obtain fees for frivolous litigation," that would apply only to § 12-121, not to § 12-120(3). In other words, Syringa's argument about the Legislature's "mind" fails on its own terms because, even if correct, it would establish only that § 12-117 was meant to displace other statutes addressing attorney fees for frivolous litigation, not those addressing other circumstances. For this same reason, Syringa's argument about the "duplicative and superfluous" effect of applying §§ 12-117 and 12-121 gets it nowhere. Even if that argument was correct, it would lead only to the conclusion that § 12-117 preempted § 12-121, not that it also preempts § 12-120(3) or any other attorney fee statute. As a result, these arguments fail to demonstrate that *Potlatch's* proclamation was not manifestly incorrect; at most, they might suggest that it might not have been manifestly incorrect with respect to § 12-121.

Third, Syringa's argument is inherently self-contradictory. Syringa offers an alternative interpretation for the prefatory language of § 12-117 ("Unless otherwise provided by statute..."), one that attempts to explain away the inconsistency between that language and *Potlatch's* proclamation by suggesting that it was meant to defer to attorney fee provisions such as § 6-918A. But, as discussed above, by conceding that § 12-117 is not exclusive, Syringa's explanation is in fact a concession that *Potlatch* is wrong.

Potlatch's proclamation was and is manifestly wrong. Syringa's arguments do nothing to change that conclusion. At most, they offer some support for the notion that if the Potlatch Court had merely stated that § 12-117 preempts § 12-121, such a statement might not have been manifestly wrong. But that is not what the Potlatch court said -- if its proclamation had been so limited, there would be no question that the State Respondents would be entitled to attorney fees under § 12-120(3). Rather, the *Potlatch* court made an expansive statement that, if given effect,

would effectively rewrite or negate numerous other statutes and, by doing so, undermine the Legislature's intent in adopting the various attorney fee provisions. This the Court cannot do.

III.
CONCLUSION

For the foregoing reasons, Syringa lacks standing to bring counts two and three, and the State Respondents are entitled to attorney fees pursuant to § 12-120(3) and/or § 12-121.[11] As a result, this Court should affirm the District Court's dismissal of counts two and three but reverse the District Court's determination that the State Respondents were not entitled to attorney fees, remand for a determination of such fees, and award the State Respondents attorney fees for this appeal.

RESPECTFULLY SUBMITTED THIS 26th day of June, 2012.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
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[11] The State Respondents continue to maintain that they are also entitled to attorney fees under § 12-117, but that argument is not addressed here because it is not the issue on which the State Respondents filed a cross-appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2012, I caused to be served a true copy of the foregoing STATE RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF by the method indicated below, and addressed to each of the following:

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