8-31-2011

City of Pocatello v. Idaho Appellant's Reply Brief Dckt. 37723

Docket No. 37723-2010

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF SRBA CASE NO. 39576 SUBCASE NOS. 29-271 ET AL.

CITY OF POCATELLO
Appellant

V.

THE STATE OF IDAHO
Respondent

APPELLANT'S REPLY BRIEF

On Appeal from the Snake River Basin Adjudication,
Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls.

Honorable Eric J. Wildman, Presiding

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The City of Pocatello submits this Reply Brief in support of the City's May 24, 2011 Opening Brief on appeal from the April 12, 2010 *Order on Motion to Alter or Amend* entered by the Honorable John M. Melanson in the Snake River Basin Adjudication (SRBA). The State of Idaho Response Brief was filed July 25, 2011.

INTRODUCTION

The recommendation of municipal water rights in the SRBA changed in 2003. The change was implemented in the 2003 report to the SRBA Court for the City of Pocatello's municipal water rights. SRBA partial decrees already issued for similar municipal water rights did not contain the "condition" that was recommended for Pocatello. The SRBA Special Master and the SRBA Court approved the condition despite the absence of third-party objections to the City of Pocatello's SRBA claims; however, at Pocatello's request, the SRBA Court amended its Order on Challenge to include four charts to "clarify and further describe the water rights at issue and provide a more understandable record." [1] R. 5256. The facts in the charts are not contested: over 75 % of the City's culinary ground water rights and associated wells were established and operating prior to May 26, 1969. Prior to May 26, 1969, changes in point of diversion for existing water rights did not require the water user to file an application and obtain approval from the predecessor agencies to the Idaho Department of Water Resources (IDWR). The "condition" was recommended for 18 of the City's culinary ground water rights based on

[1] Four charts entitled "The 21 Water Rights for Pocatello's In-Town Interconnected System," "The 22 Interconnected Wells for Pocatello's In-Town System," "The 2 Water Rights for Pocatello's Interconnected Airport System," and "The 2 Interconnected Wells for Pocatello's Airport System" are exhibits to the *Order to Motion to Alter or Amend.* R. 5667-69.

changes in point of diversion, almost all of which occurred prior to May 26, 1969. The Order on Challenge was also amended to clarify that Pocatello argued it was an "error of law" to recommend the City's biosolids water right 29-7770 with an "irrigation" purpose of use rather than a "municipal" purpose of use.

The State of Idaho argues in its Response Brief that the "condition" on Pocatello's water rights should be upheld because any changes in points of diversion that occurred prior to May 26, 1969 for the City's culinary system – the date the administrative transfer process became mandatory in Idaho – are subject to the same no-injury requirement as post-May 26, 1969 changes in point of diversion for the City's culinary system. *Respondent's Brief* at 22. Pocatello agrees that the "no injury" requirement as to changes in point of diversion and other transfers is the longstanding common law in Idaho and has been applicable law since before 1900.[2] However, Pocatello strongly disagrees with the State's legal assumption that IDWR and, consequently, the SRBA Court have authority to make "future" injury determinations for water right transfers lawfully completed prior to May 26, 1969, particularly in the absence of any record of injury through the present time. Nor is it permissible for a condition to be included on the SRBA decree that is counter to the factual evidence before the SRBA Court. Specifically, the SRBA Court and the State assert that "injury to the priority date occurs at the time the accomplished transfer is approved." SRBA Order on Challenge, R.5171, *Respondent's Brief* at

[2] The record on appeal shows that Pocatello has SRBA claims that include changes in points of diversion that occurred before May 26, 1969 without use of the then-voluntary administrative process. Pocatello also has changes in points of diversion for its culinary system that occurred after May 26, 1969 without use of the administrative transfer process. Pocatello has recommended conditions for the culinary ground water rights which had changes in point of diversion after May 26, 1969. R. 5168.

11. Pocatello's changes in point of diversion for its culinary systems lawfully completed prior to May 26, 1969 are not transfers "accomplished" after May 26, 1969; nor could these points of diversion established prior to May 26, 1969 violate requirements that became mandatory May 26, 1969. The provisions of Idaho Code § 42-1425—the accomplished transfer statute—do not apply to Pocatello's changes in point of diversion that occurred lawfully prior to May 26, 1969. The changes are not "accomplished" transfers that need confirmation under 42-1425. They are changes in point of diversion lawfully completed before May 26, 1969 under the existing law.

In the record on appeal in this case, the State, IDWR, and the SRBA Court have all stated that it is legally permissible "to evolve" and change "mid-course" the recommendation for municipal water rights and add a condition to Pocatello's interconnected municipal ground water rights. Pocatello's water rights are real property rights. The SRBA is an *in rem* proceeding in which the City of Pocatello and thousands of other claimants have real property rights at stake.[3] The SRBA cannot "evolve" in a way which affects differently the real property rights before it. To the extent the State and IDWR support injury analyses of these real property rights, Pocatello has always supported the exercise of authority under proper administrative procedures, but the *in rem* adjudication of real property rights in the Snake River Basin Adjudication is not the legal forum where a change in water right recommendations affecting some but not all of the real property interests is legally permissible. For those purposes, the State has the Administrative Procedures Act (APA). The SRBA cannot be a vehicle for the impairment of real property rights without due process of law. The State also argues that respondents should be awarded attorney

[3] See *Montpelier Milling Company v. City of Montpelier*, 19 Idaho 212, 219, 113 P. 741 (1911).

fees and costs on appeal as Pocatello's appeal in their opinion was unreasonable and lacks foundation in fact or law. *Id* at 31. In this brief, Pocatello will address these issues and arguments raised by the State.

ARGUMENT

A. The "No Injury" Common Law Applicable to Transfers in Idaho is Well-Established; However, IDWR Had Only Limited Authority to Examine Injury in Water Right Transfers Prior to May 26, 1969, and the Legislature Has Not Retroactively Granted Authority to IDWR That IDWR Did Not Have Prior to May 26, 1969.

The State's argument that Pocatello's unobjected changes in point of diversion lawfully completed before May 26, 1969 are subject to "injury" examination by IDWR in the SRBA ignores the settled law in Idaho. Prior to May 26, 1969, the predecessor agencies to IDWR did not examine injury for changes in points of diversion unless the water user seeking to change its points of diversion filed a transfer application with IDWR. In other words, prior to May 26, 1969, a water user could transfer a water right in Idaho outside of the statutory administrative process; if another water user believed the transfer would injure his/her existing water right, the remedy was to bring an action in court and have the court decide the issue of injury. Thus, when the transfer was not sought through the statutory administrative process, the common law no-injury rule in Idaho required an objecting party to come forward to protest a transfer through court action. Prior to May 26, 1969, unless a water right transfer was filed through the voluntary administrative process, IDWR (or its predecessors) was not a party to the determination of

injury.[4] If a transfer occurred prior to May 26, 1969, without use of the statutory process, then IDWR did not have authority to make an injury determination.

On those occasions that Pocatello changed points of diversion for its culinary ground water rights prior to May 26, 1969 without filing a transfer application at IDWR, the City was acting in accordance with the law. It was also lawful for anyone who believed their existing water rights were injured by these changes in point of diversion to seek court determination of injury. Idaho Code § 42-1411 and 42-1425 do not alter that Pocatello's changes in points of diversion prior to May 26, 1969 were lawful; these code sections do not change the absence of objections to the changes in point of diversion at the time or at the SRBA Court; nor do these code sections confer authority on IDWR that did not exist when Pocatello made changes to its points of diversion for its culinary system in accordance with the law as it existed before May 26, 1969.

The State's argument that pre-1969 transfers are subject to "injury" examination by IDWR in the SRBA relies on cases that do not involve IDWR or any of its predecessor agencies. None of the cases cited by the State involve a transfer that was pursued through the administrative process prior to May 26, 1969; thus, none of the cases involve a determination of injury by any of the predecessor agencies to IDWR. Instead, each of these cases, decided prior to May 26, 1969, involves a court determination of injury because a water user filed an action alleging injury from a water right transfer. See *Montpelier Mining Company v. City of Montpelier,* Id; *Walker v. McGinness,* 8 Idaho 540, 69 P. 1003 (1902); *Bennett v. Nourse,* 22

[4] Idaho Code § 42-108 adopted the common law rule in Idaho but an objecting party went to court for a remedy and there had to be a party alleging injury and protesting a transfer.

Idaho 249, 125 P. 1038 (1912); *Crockett v. Jones*, 42 Idaho 652, 249 P. 483 (1926). The State's citation to *Barron v. IDWR*, *Respondent's Brief* at 12, is also not applicable because the case arose after the IDWR transfer statutes became mandatory on May 26, 1969 and addresses IDWR's authority to examine injury *under the mandatory process*, even if no objections were filed to the transfer application.

No water user has alleged injury for any of the City of Pocatello interconnected wells and ground water rights in operation before May 26, 1969. Pocatello has a right to have its lawful changes in point of diversion prior to May 26, 1969 confirmed in the SRBA. These are not changes in point of diversion that were "accomplished" as of or after May 26, 1969 without following the newly-mandatory transfer application and approval process at IDWR. The accomplished transfer statute 42-1425 does not apply to changes in point of diversion lawfully completed prior to May 26, 1969.

The State also argues that this Court's decision in *Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 457-58, 926 P.2d 1301, 1304-05 (1996), *Respondent's Brief* at 30, is the basis to determine that Pocatello's pre-1969 transfers will cause injury *per se* to priority, unless the condition is included. However, the injury *per se* analysis in *Fremont-Madison* arose from Idaho Code § 42-1426 enlargements where a NEW water right was established illegally, due to the failure to follow the mandatory permit procedures required to establish new ground water rights (since 1963) and new surface water rights (since 1971). The subsequent decision in *A & B Irrigation District v. Aberdeen-American Falls Ground Water District*, 141 Idaho 746, 118 P. 3d 78 (2005) also was limited to

enlargements under Idaho Code § 42-1426. *Fremont-Madison* and *A & B Irrigation District* are not applicable, as the facts of the present case do not arise from a failure to follow the mandatory permit procedures that gave rise to the "injury to priority" and "injury per se" analyses addressed by those cases.

With respect to Pocatello's pre-1969 changes in point of diversion[5] involved in the present appeal, there is no record that any water users alleged injury at the time, there is no record of court actions at the time, and there are no third-party objectors at the SRBA Court. However, IDWR, in recommending partial decrees for the City of Pocatello SRBA claims, conducted a hypothetical injury analysis on Pocatello's changes in point of diversion, including the pre-May 26, 1969 changes in point of diversion and, based on possible "prospective" injury to priority[6] to unidentified water rights, imposed a condition on 18 of Pocatello's culinary ground

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[5] See *Appellant's Opening Brief* at 10 and Appendices 1 and 2 for the list of Pocatello wells and water rights in place since before May 26, 1969. This is also confirmed by the exhibits to the *Order on Motion to Alter or Amend.* R. 5667-69. The exhibits are four charts entitled "The 21 Water Rights for Pocatello's In-Town Interconnected System," "The 22 Interconnected Wells for Pocatello's In-Town System," "The 2 Water Rights for Pocatello's Interconnected Airport System," and "The 2 Interconnected Wells for Pocatello's Airport System."

[6] The State asserts "The City of Pocatello has provided no evidence that the Court's findings of fact as to injury to priority are clearly erroneous." *Respondent's Brief* at 8. The State also argues that the District Court "adopted the Special Master's findings of fact that recommending Pocatello's rights with alternative points of diversion without the condition would cause such injury." *Id.* The injury to priority referenced is injury arising from approval of the accomplished transfer. SRBA Order on Challenge, page 14, R. 5171; *Respondent's Brief* at 11.

To understand the SRBA Court's findings of fact as to injury, the following are excerpts from the SRBA Order on Challenge and the Special Master's Amended Report and Recommendation and Order on Motion to Reconsider: SRBA Order on Challenge, pages 4, 5, R. 5161-2:

> IDWR recommended the wells as alternative points of diversion for the ground water rights as claimed based on the application of Idaho Code § 42-1425, with one exception. In order to prevent injury to existing ground water rights of third parties IDWR recommended that the following condition or remark appear in the face of the *Partial Decree* for eighteen of the water rights in the in-town service area and for two of the three water rights supplying water to the airport.
>
> > To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and

water rights. The Special Master's Findings of Fact to support the determination of injury were limited to the following statements: "The Director's Report recommended the 22 alternative points of diversion with a condition it deemed necessary to prevent injury to other water rights. IDWR would not have recommended the alternative points of diversion without the condition. (Ex. 1, Supp. Dir. Report at 13)." The Special Master's Findings of Fact were wholly adopted by the SRBA District Court. Order on Challenge, R. 5186. In addition, the SRBA court supported the Special Master's determination of injury by reference to the injury *per se* analysis in *Fremont-Madison* and *A&B Irrigation District.* R. 4750. As discussed above, the injury *per se* analyses in these decisions arose from 42-1426 enlargements that are not applicable to accomplished changes in point under 42-1425, nor would the decisions apply to Pocatello's changes in point of diversion that occurred prior to May 26, 1969.

> hydraulically connected surface sources, ground water was first diverted under this right from Pocatello well [description] in the amount of_ cfs.

IDWR's basis for recommending the condition was twofold, "number one, well interference that could happen in the future as a result of increased pumping at wells and, secondly, conjunctive administration concerns relative to diversion from one location as compare [sic] with diversion from another location." *Amended Master's Report and Recommendation and Order on Motion to Reconsider* at 17 (quoting Tuthill testimony).

SRBA Order on Challenge, page 29, R. 5186

> Pursuant to I.R.C.P. 53(e)(2) *and AOl* section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the *Special Master's Report and Recommendation* and wholly adopts them as its own.

Special Master's Amended Report and Recommendation and Order on Motion to Reconsider, Findings of Fact, page 7, R. 4750

> The Director's Report recommended the 22 alternative points of diversion with a condition it deemed necessary to prevent injury to other water rights. IDWR would not have recommended the alternative points of diversion without the condition. (Ex. 1, Supp. Dir. Report at 13).

1. **When the Legislature enacted 42-1425 for the SRBA in 1994, it did not retroactively provide authority to IDWR under 42-1425 or 42-1411 that did not exist prior to May 26, 1969.**

The passage of Idaho Code § 42-1411 in 1987 and 42-1425 in 1994 and the amendment of 42-1411 in 1994[7] did not retroactively confer on IDWR authority it did not have prior to May 26, 1969. After May 26, 1969, IDWR had the authority to examine injury in transfers that were mandated by statute to be filed with IDWR. The passage of the accomplished transfer statute 42-1425 in 1994 authorized IDWR to examine injury in SRBA claims that included transfers occurring between May 26, 1969 and November 19, 1987 (the commencement of the SRBA) that were not filed for approval with IDWR. The same 1994 act that amended 42-1411 to include the language cited by the State[8] also removed the specific reference to 42-1411 in repealing 42-1416 to enact 42-1425.

2. **The State of Idaho acknowledges that Idaho Code § 42-1425 only applies to water right transfers occurring from May 26, 1969 to November 19, 1987.**

The State's briefing before the Special Master acknowledged that the accomplished transfer state 42-1425 does not apply to changes in water rights that occurred before May 26, 1060. "Since Idaho Code § 42-1425 waived mandatory requirements regarding changes in water rights, it only applies to changes occurring from the effective date of the Act of March 27, 1969 to the date of November 18, 1987. Or stated another way, prior to the effective date of the Act of

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[7] Pocatello's arguments on the implementation of these two statutes may be found beginning on p. 34 of its *Opening Brief.* A more extensive discussion also appears in *Pocatello's Brief in Support of Motion to Alter or Amend,* R. 5162-5231.

[8] R. 2490, *State Response Memorandum in Opposition to the City of Pocatello's Motion for Summary Judgment.*

March 27, 1969, there was no requirement to file an application for approval of a transfer; thus, there was nothing for Idaho Code § 42-1425 to waive." R. 2489-90, *State Response Memorandum in Opposition to the City of Pocatello's Motion for Summary Judgment.* The effective date of the Act of March 27, 1969 was May 26, 1969 based on Idaho Code § 67-510, which at the time the Act of March 27, 1969 was enacted, provided that laws become effective sixty days after the end of the legislative session; since then 67-510 has been amended.

The State's briefing on appeal – that 42-1425 applies to water right transfers completed before May 26, 1969 – is in direct contradiction to the State's briefing before the Special Master. The Statement of Purpose accompanying H.B. 969 (which became Idaho Code § 42-1425) sheds light on the legislature's objectives. In the fiscal note section of the Statement of Purpose, the legislature indicated that the proposed legislation was intended to protect the water uses of some water users who had failed to follow the mandatory procedure for development of some of their water uses, and to "protect significant investments by water users and tax base for local governments by helping to maintain status quo water uses." *Statement of Purpose/Fiscal Note accompanying H.B. 969 (RS03976C2) (on file with the Legislative Council Library, Statehouse, Boise, Idaho).* See also Phillip J. Rassier, *Idaho's Adjudication Presumption Statutes*, 28 Idaho L. Rev. 507, 514 (1992), for a discussion of the legislative history of 42-1416A, the predecessor to 42-1425. The SRBA Court's Order on Challenge expressly confirmed this: "Idaho Code § 42-1425 authorizes changes to the place of use, point of diversion, nature or purpose of use, or period of use elements of a water right made prior to the commencement date of the SRBA (November 19, 1987) where the water right holder failed to comply with the statutorily defined

transfer requirements. *See* I.C. § 42-1425 (2)." R. 5168-69.

B. The Condition on the City of Pocatello's Pre-1969 Transfers Was Imposed Retroactively in the SRBA and Impermissibly Affects Vested Property Rights.

The "no injury" law applicable to transfers in Idaho is based on protection of important property rights. *Murray v. Public Utilities Comm'n*, 27 Idaho 603, 619, 150 P. 47, 50 (1915); *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Idaho 643, 651, 150 P. 336, 339 (1915). The cases cited by the State address this legal principle:

> The 60 inches of water awarded to appellant Jones in 1880 is a *vested right* in and to the waters of Rock Creek and is such a *property right* that cannot be taken away from him without his consent...." (emphasis added). *Crockett v. Jones,* 42 Idaho 652, 249 P. 483 (1926).

IDWR, however, changed its position and recommended a condition be imposed on Pocatello's important property rights because, according to the State, IDWR's understanding of conjunctive administration had evolved due to developments in the conjunctive management rules and decisions by this Court. The condition affects the point of diversion, priority date, and rate of diversion for Pocatello's affected ground water rights.[9] Pocatello argues that placing a condition like the one at issue in this case is a change in position that requires IDWR to follow the rule-making procedures of the Idaho Administrative Procedures Act (APA) and that Idaho Code §§ 42-1411 and 42-1425 do not confer retroactive authority to IDWR to place a condition on pre-May 26, 1969 transfers of water rights. However, the Director would impose a "condition" on Pocatello's water right without following the required procedures of the APA, and the State supports this action of the Director because "the Director must be able to bring to

[9] The condition as applied to Pocatello did not always indicate the priority date.

bear his expertise in processing water right claims, and that expertise necessarily expands and evolves with new developments in water resource management and in the law." *Respondent's Brief* at 10. The SRBA is an *in rem* proceeding to determine, as of November 19, 1987, the status of the water rights claimed in the adjudication. For this reason, the SRBA is often described as a "snapshot" in time, as of November 19, 1987, of the water rights claimed. Director Tuthill testified that the "evolution" of IDWR's knowledge should apply to all water rights; he also acknowledged that IDWR had not been able to complete successfully the rulemakings it had initiated regarding conjunctive management. Tr. 302, L. 22 - p. 303, L. 6. Pocatello respectfully asserts that this evolution of knowledge is appropriately applied to the ***administration of all water rights*** through the promulgation of rules and regulations as provided by Idaho's APA; it is not appropriately applied midway through the ***processing of water right claims in an in rem adjudication***.

Contrary to the assertions of the State, *Respondent's Brief*, at 9, the fact that other rights recommended earlier in the SRBA were not similarly conditioned is relevant. It is relevant because the IDWR investigation of the earlier recommended water rights was the same as IDWR's investigation of Pocatello's water rights. Tr. 300, Ls. 16-23.

Beeman: I understand you, you just testified that the manner in which you investigate the 42-1425 accomplished transfer and point of diversion has not changed?

TUTHILL: Correct.

Beeman: But the manner in which you recommend it has changed?

TUTHILL: Correct.

See also: Tr. 307, Ls. 12-23.

Beeman: Would you agree that these alter-point-diversion claims by the other cities are no different from Pocatello's claims? Maybe I could break that down. You indicated that your investigation was no different under 42-1425[10], accomplished –

TUTHILL: Yes.

Beeman: --points of diversion?

TUTHILL: That's correct.

It is also relevant because at the same time IDWR began recommending this condition at the SRBA court, IDWR also began including this condition on municipal water right transfers filed in the administrative process mandated by Idaho Code § 42-222, Idaho's transfer statute. See testimony of Dave Tuthill, then director of IDWR. Tr. 315, L.22 - p. 316, L.1; p. 304, Ls. 9-23; p. 305 Ls. 3-18. The simultaneous use of the same condition in SRBA proceedings and in IDWR administrative proceedings would indicate that IDWR understands it has the same authority under Idaho Code § 42-222, the mandatory administrative transfer statute, as it has under Idaho Code §42-1425, the accomplished transfer statute at the SRBA court. The authority under the two statutes is different by legislative mandate and does not support use of the condition at the SRBA court.

Prior to May 26, 1969, IDWR approval of changes in point of diversion, place of use, period of use and nature of use was not mandatory, although some changes were recorded through approved transfers. In the SRBA, the accomplished transfer statute 42-1425 only

[10] The position of IDWR is that all changes in point of diversion prior to the start of the SRBA (November 19, 1987) are 42-1425 transfers and are subject to the same examination. It is only the imposition of a condition that changed in 2003.

applies to changes in point of diversion, place of use, period of use and nature of use that were "accomplished" from May 26, 1969 to November 19, 1987 (the start of the SRBA) without seeking approval from IDWR, as required by statute. Idaho Code § 42-1425 states that "Except for the consent requirements of section 42-108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures." The legislature waived all requirements of 42-108 and 42-222. That is, the legislature waived the requirement to file transfer applications for approval by IDWR, which requirement only became mandatory on May 26, 1969. For a discussion of how 42-222 conditions and requirements cannot be used in 42-1425 proceedings at the SRBA court, see *Appellant's Opening Brief* at 35-37.

Pocatello also responds to the State's contention that "Pocatello offers no rebuttal to the assertion that, were its rights recommended without the condition, the effect would be to diminish the priority of others," *Respondent's Brief* at 8. First, the State is incorrect in its legal assumption that Pocatello's changes in point of diversion established lawfully prior to May 26, 1969 require approval of IDWR through the SRBA process, particularly when no third party has ever objected to these changes in point of diversion. Second, Pocatello did propose and offer its own condition for the City's wells and water rights that were established after May 26, 1969. See Appendix 4 from *Opening Brief.* HOWEVER, THIS DOES NOT CHANGE THE LANGUAGE OF THE LEGISLATURE AS TO THE BASIS FOR INJURY: "the continuation of the historic water use patterns resulting from these changes is in the local public interest

provided no other existing water right ***was injured*** *at the time of the change*." Idaho Code 42-1425(1)(b)(emphasis added).

The State's Response Brief refers repeatedly to the "original" point of diversion for Pocatello's water rights. However, some of these original points of diversion no longer exist—so the water rights associated with them can only be exercised at existing wells. Neither the SRBA Court nor the State addressed the fact that senior water rights will have no point of diversion during times of administration. Pocatello's important property rights will be diminished with ground water wells not being designated alternative pods for surface water rights.[11] Rejecting Pocatello's claims that its ground water wells should be alternate points of diversion for surface rights does injury to Pocatello because Pocatello cannot use its senior water rights.

Pocatello not only did not misconstrue the Director's authority under Idaho Code § 42-1425, the city also did address the Director's duty to investigate water right claims and file a report pursuant to Idaho Code § 42-1410 and 42-1411. The legislative history of those statutes and 42-1425 was set forth in previous briefing and referred to in the *Opening Brief.* The same 1994 act that amended 42-1411 to include the language cited by the State also removed the specific reference to 42-1411 in repealing 42-1416 to enact 42-1425. Director's "evidence" of

[11] In its *Respondent's Brief* at 6, the State asserts "The effect of claiming municipal rights with alternative points of diversion is to allow the City to divert any of its water rights from any of its wells." "To allow" is to imply that the City was not already diverting its water rights from its wells and that the SRBA would be allowing that. Pocatello was diverting its water rights from its wells. See Appendix 3 of Pocatello's *Opening Brief* summarizing the City's monthly well usage, and the court's decision to amend its previous decision to include the four charts provided by Pocatello detailing the 22 interconnected wells for Pocatello's delivery system, showing dates for rights and wells. *Order on Motion to Alter or Amend* at 6.

injury without the condition was testimony without facts and the State's assertion that condition "does not affect Pocatello's rights adversely" is a statement without factual basis. The priority of Pocatello's rights was not maintained by the condition because there is no certainty what will happen during administration. See the hypothetical discussion of what Pocatello can do in the future in the *Order on Challenge.* R. 5142-43.

Pocatello did more than argue that connected sources are the same source. The State's allegation that Pocatello's argument is without merit ignores the expert report and expert testimony that were presented by Pocatello. Gregory K. Sullivan, Pocatello's expert witness, testified at length about the aquifer, Pocatello's water delivery system, and the interconnection of the sources. (Tr. 750-994; 1017-1160.) Mr. Sullivan also prepared a report admitted into evidence. (R. 7220-7291.) The report and testimony established that 50-75 % of the LPRVA is supplied by Mink Creek and Gibson Jack Creek. (Tr. 801, Ls. 13-25.) This is uncontroverted in the record. The Special Master's Findings of Fact establish that the wells are within a quarter mile of the two creeks; this is directly counter to the State's allegation that Pocatello's position would enable senior priority surface water rights to be diverted from wells hundreds of miles away from the surface water point of diversion.

The "equal quantity" argument of the State, *Respondent's Brief* at 18, is based on the City's expert analysis and physical safeguards that would limit ground water withdrawals on an annual basis to the volume physically and legally available to the City on an annual basis at its senior surface water points of diversion. The State's allegation that Pocatello is asking for administration that runs counter to water right administration using the ESPA ground water

model, overlooks the fact that only one well interconnected to the City's culinary supply, withdraws water from the ESPA. Tr. 812, Ls. 4-13.

C. The State Should Not be Awarded Attorney Fees and Costs on Appeal.

The State seeks an award of attorney fees and costs on appeal under Idaho Code § 12-121, asserting that Pocatello's appeal was brought unreasonably or without foundation pursuant to I.R.C.P. 54(e)(1). *Respondent Brief* at 29. The State asserts that Pocatello has "merely sought review of the application of settled law to the facts." *Id.* As briefed above, the "no injury" law applicable in water right transfers is settled law in Idaho, but the State's support of the retroactive reopening of lawful uncontested transfers completed prior to May 26, 1969 is counter to the unambiguous legislative intent of Idaho Code § 42-1425 and to the transfer law that existed prior to May 26, 1969. This retroactive application that changes SRBA recommendations thirteen years into an adjudicatory process in the absence of any allegation of injury more than 40-70 years after the transfers occurred is not supported by the legal assumptions of injury and same source propounded by the State. Indeed, the points of law raised and asserted by Pocatello, instead of being unreasonable or without foundation, constitute "black letter law." As shown above, the State acknowledged that pre-May 26, 1969 transfers are regarded differently from post-May 26, 1969 transfers.

"A misperception of law or of one's interest under the law is not, by itself, unreasonable conduct; if it were, virtually every case controlled by a question of law would entail an attorney fee award against the losing part under Idaho Code § 12-121. Rather, the question must be whether the position adopted by the losing party was not only incorrect but so plainly fallacious

that it could be deemed frivolous, unreasonable or without foundation." *Wing v. Amalgamated Sugar Co,* 106 Idaho 905, 684 P. 2d 307 (1984); *NBC Leasing Co. v. R & T Farms, Inc., 112* Idaho 500, 733 P.2d 721 (1987). In *Han v. Syringa Realty, Inc.,* 120 Idaho 364, 816 P.2d 320 (1991), this Court found that attorney fees under I.C. § 12-121 were not appropriate where the plaintiffs' case was supported by a good faith argument for the extension or modification of the law in Idaho. In *Soria v. Sierra Pac. Airlines,* 111 Idaho 594, 726 P.2d 706 (1986), this Court also declined to award attorney fees in view of the complexity of the case. Where there are multiple claims and defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursed; the total defense of the plaintiff's proceedings must be unreasonable or frivolous to justify an award of attorney fees. *Management Catalysts v. Turbo W. Forpack, Inc.,* 119 Idaho 626, 809 P.2d 487 (1991). See also *Magic Valley Radiology Assocs. V. Professional Bus. Servs., Inc.,* 119 Idaho 558, 808 P.2d 1303 (1991).

The present case is a complex one, with many issues of fact and law. Under the standards enunciated by this Court, an award of attorney fees and costs to the State, should it prevail on this appeal, would not be appropriate.

CONCLUSION

Pocatello's changes in point of diversion remain uncontested historically or at the present. No water user has come forward to allege that their water right "was injured at the time of the change" as to any of Pocatello's culinary wells. Pocatello's changes in point of diversion that occurred prior to May 26, 1969 are not subject to re-examination in the SRBA, particularly

in the absence of any allegation of injury by another water user; Pocatello's changes in point of diversion that occurred after May 26, 1969 and did not follow the mandatory transfer procedures should be confirmed as in the local public interest. This is in accordance with legislative mandate. The only water users in Pocatello's proceedings, the Surface Water Coalition, entered into a stipulation with Pocatello, and Pocatello's expert testified at length regarding the stipulation. Although the State argues that "Pocatello ignores that the stipulation is only binding on Pocatello and the SWC, may be dissolved at the whim of the parties and is not enforceable by IDWR," *Respondent's Brief* at 8, the stipulation cannot be dissolved "at the whim of the parties," as the SWC withdrew its Responses and withdrew entirely as a party to these subcases, in consideration of the stipulation. Page 2, stipulation. The settlement requires that Pocatello seek administrative approval before increasing its well capacity. The settlement with SWC is in accordance with the facts and legal principles set forth in this brief and all the other briefs, arguments, and pleadings Pocatello has filed in these proceedings.

What could be more in the local public interest than to confirm the historical operation of the City of Pocatello's culinary water systems? The absence of any appearance by any local water user to contest Pocatello's historic operation supports the legislature's intent to preserve the status quo for purposes of the local public interest. It is not in the local public interest to limit what has been the historical operation of Pocatello's culinary wells. To the extent IDWR, who is not a party to SRBA proceedings, wants to implement changes in the administration of

water rights statewide, the promulgation of rules and regulations under the APA is the appropriate process. Presumably, the State of Idaho would also support such a rulemaking.

Pocatello respectfully requests that this Court:

1. Reverse the SRBA court's *Order on Motion to Alter or Amend*, to accord with the Pocatello-Surface Water Coalition settlement;

2. Enter partial decrees for 20 ground water rights without the limiting and unauthorized condition imposed by IDWR;

3. Enter partial decrees for 23 alternate points of diversion for four surface water rights and 21 ground water rights; and

4. Correct the errors of law made regarding the municipal purpose of use and the priority dates for three other Pocatello water rights.

RESPECTFULLY SUBMITTED this 31st day of August 2011.

BEEMAN & ASSOCIATES, P.C.
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By Josephine P. Beeman
Josephine P. Beeman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of August 2011, I caused a true and correct copy of the foregoing document to be served on the following by U.S. Mail:

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