

RECEIVED

JUN 12 2006

DEPARTMENT OF
WATER RESOURCES

Josephine P. Beeman #1806
Beeman & Associates, P.C.
409 West Jefferson Street
Boise, ID 83702
(208) 331-0950
(208) 331-0954 (Facsimile)
jo.beeman@beemanlaw.com

Sarah A. Klahn
William A. Hillhouse II
White & Jankowski, LLP
511 16th St., Suite 500
Denver, CO 80202
303-595-9441
303-825-5632 (Facsimile)
sarahk@white-jankowski.com

Attorneys for City of Pocatello

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	
Case No. 39576	)	CITY OF POCATELLO'S REPLY BRIEF IN
	)	SUPPORT OF MOTION FOR SUMMARY
	)	JUDGMENT ON IDWR'S AUTHORITY UNDER
	)	I.C. § 42-1425

Pocatello's Motion for Summary Judgment (Motion) sought a ruling that the following condition, imposed by the Idaho Department of Water Resources (IDWR or Department) on claims the City made for "accomplished transfers" under Idaho Code § 42-1425 in certain of these subcases,¹ was improper as a matter of law:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, water was first appropriated at or used from:***

¹ See Exhibit F (first page), IDWR's 706 Report, April 13, 2006.

IDWR 706 Report, April 13, 2006 (filed in these subcases), at 16. For convenience, this condition is referred to herein as the “Condition.”²

Pocatello’s Brief in Support of Motion for Summary Judgment argued that the Condition was improper first, because the Department has failed to hold a hearing on the accomplished transfer claims, as required by § 42-1425(2)(a), and second, because § 42-1425 provides no legal basis for IDWR or its Director to impose conditions on formal transfers approved under Idaho Code § 42-222. Response Briefs were filed by the Surface Water Coalition (Coalition)³ and the State of Idaho (State).

In response to the Coalition’s and State’s briefs and in support of Pocatello’s Motion, this brief first considers the language of § 42-1425 and the authority it confers on the Director to act outside the language of the statute, specifically whether it allows the Director to disregard due process guarantees provided by the legislature to water rights holders. We then consider the changes in practice of the Department in light of these statutory requirements. Finally, we consider the interface between §§ 42-1425 and 42-222 and conclude that § 42-1425 does not provide the Department with authority to re-open § 42-222 transferred water rights.

Pocatello respectfully requests that its Motion be granted. An order is attached for the convenience of the Court.

² An earlier version of this Condition was imposed by the Department’s Recommendations relating to Pocatello’s claims under section 42-1425. *See* 706 Report at 14-15.

³ The members of the Surface Water Coalition are: A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

I. THE PLAIN LANGUAGE OF IDAHO CODE § 42-1425 REQUIRES A HEARING UPON THE FILING OF AN OBJECTION TO AN ACCOMPLISHED TRANSFER AND LIMITS THE CONTENT OF THAT HEARING TO QUESTIONS OF INJURY OR ENLARGEMENT AT THE TIME THE TRANSFER WAS MADE.

A. In electing to provide amnesty for accomplished transfers under certain factual conditions, the Legislature limited the Director's authority to condition water rights and made the general authorities provided under § 42-1411 inapplicable to claims made under § 42-1425.

The State has ably described the circumstances under which § 42-1425 was adopted by the legislature: in the wake of a finding by the SRBA court that previously adopted amnesty statutes were unconstitutional. State's Response Brief, at 3. The State goes on to properly recite the operative provisions of § 42-1425(2)(a),⁴ but then argues that the Director may condition accomplished transfers under § 42-1411, apparently even if the provisions of amnesty established by the legislature under § 42-1425(2) are met and without the hearing required by § 42-1425(2)(a). The State cites no textual basis for this argument under § 42-1425, but refers instead to another statute entirely, § 42-1411, which it says describes authority of the Director to impose conditions on "any decree, license, or approved transfer application." *Id.* at 4.

The State's reliance on § 42-1411 does not withstand analysis. By its terms, Pocatello's claims under § 42-1425 are not "decrees, licenses, or approved transfer applications," but instead are informal transfers made outside of the formal transfer process. If the legislature had intended for the Director to have the same broad authority to condition accomplished transfers, it would not have adopted the amnesty statute under § 42-1425 which, by its terms, limits the discretion of the Director to condition accomplished transfers. Although licensed, the wells Pocatello claims under § 42-1425 do not reflect the changes in point of diversion made informally prior to

⁴ First, that the change made was prior to November 19, 1987; second, that no other water rights existing *on the date of the change* were injured; and three, that the change did not result in an enlargement of the original right. See Pocatello's Opening Brief at page 4-5 for the actual statutory language of 42-1425(2).

November 19, 1987.⁵ To treat them as any other licensed rights, and ignore the effect of § 42-1425 to provide “amnesty” to what otherwise would have been informal and unapproved transfers, frustrates the purpose of the accomplished transfer statutes.

Furthermore, nowhere in the language of § 42-1411 is there mention of the Director’s authority to condition amnesty rights under § 42-1425. This absence isn’t surprising: § 42-1425 establishes specific limitations on the Department’s ability to approve, deny, or condition accomplished transfers. In other words, § 42-1425 is a specific statute vis-à-vis the broad authority provided to the Director under § 42-1411. Under rules of statutory construction, specific statutes control over general statutes. *See City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 149, 879 P.2d 1078, 1082 (1994) (stating that when there are specific statutes addressing an issue, those statutes control over more general statutes); *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968). *See also Nampa Charter School, Inc. v. DeLaPaz*, 140 Idaho 23, 28, 89 P.3d 863, 868 (2004).

B. The State’s position on the authority of the Director to impose conditions is inconsistent with the prior activities of the Department in recommending water rights for other cities in the SRBA.

The State makes a legal argument, discussed below, that the Director has authority to condition water rights claimed under § 42-1425. However, it is useful to look at the history of the Department’s understanding of a party’s ability to perfect accomplished transfers in the SRBA. Until it recommended Pocatello’s claims in the SRBA, the Department had *never before* imposed conditions on accomplished transfers claimed by other cities in the SRBA.⁶ The

⁵ With the exception of 13 points of diversion formally transferred under 42-222. *See* Exhibit 1, Affidavit of Josephine P. Beeman submitted on May 4, 2006 with Pocatello’s Motion for Summary Judgment and Brief in Support of Motion for Summary Judgment.

⁶ Prior to the Director’s Report for Basin 29, IDWR routinely recommended to the SRBA Court entry of partial decrees for claimants for alternate points of diversion for multiple water rights without the condition that is recommended for Pocatello’s wells. *See City of Aberdeen*, 35-04070, 35-04071, 35-07808; *Lamb Weston Inc*, 35-

Department's practice regarding conditioning accomplished transfers is not driven by changes in statutory language or legislative intent. There have been no changes to the accomplished transfer statute, § 42-1425, since its adoption in 1994.

Perhaps as troubling as the change in Department practice regarding conditioning of accomplished transfers, is the apparent reliance of the IDWR on its Transfer Processing Memo No. 24 (Transfer Guidelines). *See* IDWR 706 Report, April 13, 2006 (filed in these subcases), at 15. The Transfer Guidelines are a guidance document, unadopted pursuant to the Idaho APA, that the Department has used since October 2002 to make determinations on applications for formal transfers under Idaho Code § 42-222. To the extent that has informed the Department's change in practice regarding conditioning of accomplished transfers, there is no basis for the Court to grant any deference to the agency. In addition to being unadopted guidance documents, the Transfer Guidelines are—by their terms—devoted to determinations regarding *formal transfers*, and unrelated to accomplished transfers.

IDWR's change in its approach to accomplished transfers, as well as its apparent reliance on an unadopted guidance document used for formal transfers under § 42-222 demonstrates an erosion in the Department's understanding of legislative intent in granting amnesty to accomplished transfers, and an unsupportable change in its views about agency discretion over these matters. In addition to evaluating the legal arguments in this briefing, the Court should consider these changes in Department practice which, as discussed in Pocatello's opening brief and below, are without statutory basis.

02603, 35-04127, 35-12670; City of Hazelton, 36-02282, 36-04250, 36-07858; City of Jerome, 36-02518, 36-04195, 36-04196, 36-08237, 36-15361; City of Rupert, 36-04075, 36-07115, 36-07656, 36-07862, 36-07863, 36-15488, 36-15489; City of Burley, 36-02648A, 36-02729, 36-08154.

C. Section 42-1425(2)(a) grants Pocatello the right to a hearing and the Director has no authority, under any statute, to deny Pocatello due process.

Section 42-1425(2)(a) is unambiguous. If an objection is filed to a claim for accomplished transfer, the Director must seek remand from the SRBA Court, and the Court “shall remand” to hold a hearing on the objection to “determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.” Idaho Code § 42-1425(2)(a).⁷ The State’s brief neither mentions the due process requirements imposed on the Department by § 42-1425(2)(a) nor explains how the Director, whatever his discretion, can bypass such constitutional guarantees.

In Pocatello’s subcases, the only objection filed to the City’s § 42-1425 claims was Pocatello’s. Pocatello objected to the Director’s imposition of conditions on its claims for § 42-1425 accomplished transfers; however, Pocatello did not object that the transfer should be denied because of injury at the time the transfer occurred, or because of enlargement of use, the two limited areas of inquiry allowed under § 42-1425. To date, neither the Director nor any party has provided evidence of injury or enlargement of use. The 706 Report described the purpose of the conditions imposed on Pocatello’s accomplished transfers as intended “to prevent injury that **could result** from allowing this practice [of operating the wells as accomplished transfers]”.⁸ Providing no opportunity for hearing on the inquiries allowed under the statute is a denial of due process to Pocatello.

In its response brief, the Coalition agreed that § 42-1425 requires a hearing if an objection is filed to an accomplished transfer. The Court should remand the City’s claims under

⁷ “If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court **shall remand** the water right to the Director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right.” I.C. § 42-1425(2)(a).

⁸ 706 Report, at 15.

§ 42-1425 to the Director for a hearing or should hold a hearing itself. The Court should also determine, based on the language of the statute, what content may be included in such a hearing. May the Department or its proxies assert future injury from the operation of accomplished transfers, even though § 42-1425 by its terms limits the injury inquiry to that “existing on the date of the transfer”?

II. IDAHO CODE § 42-222 DOES NOT AUTHORIZE THE COLLATERAL ATTACK ON FORMALLY TRANSFERRED WATER RIGHTS.

In 1999, Pocatello formally changed three water rights pursuant to § 42-222. Those rights are the subject of claims in SRBA subcases 29-2274, 29-2338, and 29-7375. *See* Exhibit 1, May 4, 2006 Affidavit of Josephine P. Beeman. The Department’s approved transfer of these three water rights in 1999 lists the same thirteen (13) wells as authorized points of diversion for each right; eight (8) of these points of diversion were also claimed, under § 42-1425, as common points of diversion pre-dating November 1987 for an additional eighteen (18) of the City’s SRBA claims. *See* Exhibit F (first page), 706 Report. These eight (8) points of diversion may lawfully operate as alternate points of diversion, based on the Department’s 1999 Order in Transfer No. 5452 (absent any clerical errors in legal description or later-capped wells). Exhibit 1, May 4, 2006 Affidavit of Josephine P. Beeman. However, when these eight (8) points of diversion, already formally approved in 1999 under Transfer No. 5452, were also claimed as alternate points of diversion pre-dating November 1987, the Department recommended each of the 18 affected SRBA claims with the Condition. *See* Exhibit F (first page), 706 Report.

Pocatello argued in its opening brief that whatever the Department’s authority to condition accomplished transfers, it had no authority to condition rights formally transferred pursuant to § 42-222. The Coalition, for its part, agrees with Pocatello that Transfer No. 5452 cannot be collaterally attacked by IDWR in this proceeding. The Coalition continues, and

Pocatello agrees, that IDWR may be able to impose conditions on § 42-222 transferred points of diversion to the extent they are accomplished transfers for other water rights not listed among the three water rights in Transfer No. 5452. However, like other claims under § 42-1425 to which objections have been filed, such conditions can be imposed *only after a hearing*.

The State does not respond to this argument. *See* State of Idaho's Response Brief at 5. Instead, the State attaches Recommendations for the three water rights subject to Transfer No. 5452 in which the Department did *not* impose the Condition. This does not explain the Department's apparent inconsistency in not imposing the Condition on thirteen (13) points of diversion for rights transferred in 1999 under § 42-222 and then imposing the Condition on eight (8) of those same points of diversion when they are claimed as accomplished transfers, pre-dating November 1987, for 18 water rights under the amnesty provisions of § 42-1425. It is undisputed that the Condition was imposed on the eighteen (18) rights without a hearing.

WHEREFORE, Pocatello respectfully requests this Court to grant its Motion for Summary Judgment filed in this matter.

Dated this 9th day of June 2006.

BEEMAN & ASSOCIATES, P.C.
Attorneys for the City of Pocatello

By Josephine P. Beeman
Josephine P. Beeman

WHITE & JANKOWSKI, L.L.P.
Attorneys for the City of Pocatello

By Josephine P. Beeman
(for) Sarah A. Klahn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of June 2006, I caused a true copy of the foregoing **CITY OF POCA TELLO'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON IDWR'S AUTHORITY UNDER I.C. § 42-1425** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

UNITED STATES OF AMERICA REPRESENTED BY: US DEPARTMENT OF JUSTICE ENVIRONMENT & NAT'L RESOURCES 550 WEST FORT STREET, MSC O33 BOISE, ID 83724	C. TOM ARKOOSH ARKOOSH LAW OFFICES, CHTD. PO BOX 32 GOODING, IDAHO 83330
STATE OF IDAHO REPRESENTED BY: NATURAL RESOURCES DIV CHIEF STATE OF IDAHO ATTORNEY GENERAL'S OFFICE PO BOX 44449 BOISE, ID 83711-4449	W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY, IDAHO 83318
DIRECTOR OF IDWR PO BOX 83720 BOISE, ID 83720-0098	ROGER D. LING LING ROBINSON & WALKER PO BOX 396 RUPERT, IDAHO 83350
	JOHN A. ROSHOLT TRAVIS L. THOMPSON BARKER ROSHOLT & SIMPSON 113 MAIN AVE. WEST, SUITE 303 TWIN FALLS, IDAHO 83301-6167

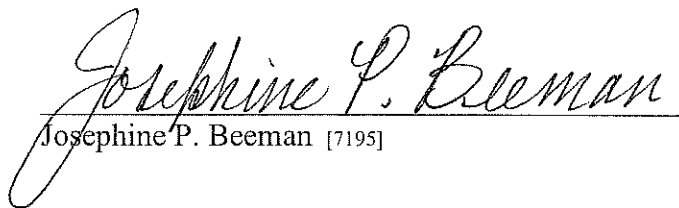

Josephine P. Beeman [7195]

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
29-07431
29-07450
29-07502
29-07770
29-07782
29-11339
29-11344
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13636
29-13637
29-13638
29-13639

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	ORDER ON POCATELLO'S MOTION FOR
Case No. 39576	)	SUMMARY JUDGMENT ON IDWR'S AUTHORITY
_____	)	UNDER I.C. § 42-1425

The City of Pocatello moved this Court to enter an order on summary judgment in this case. The Court, being fully advised, GRANTS the motion and does hereby ORDER the following:

That Pocatello's objection to IDWR's imposition of conditions on its claims for accomplished transfers triggers a hearing under Idaho Code § 42-1425 and that such hearing, because there are no proper party objectors to carry the burden of showing injury, shall be held in front of the Special Master. The hearing shall be limited to presentation of evidence on the narrow scope of issues outlined by the Idaho Legislature in § 42-1425(2).

IT IS FURTHER OREDED that no conditions shall be added to Pocatello's water rights claimed as transferred under § 42-1425 until evidence is taken pursuant to such hearing, and conditions imposed, if any, shall relate only to the narrow scope of issues outlined by the Idaho Legislature in § 42-1425(2).

IT IS FURTHER ORDERED that IDWR may not re-open Pocatello's transfers previously granted by IDWR under Idaho Code § 42-222.

ENTERED this _____ day of _____ 2006.

BRIGETTE BILYEU
SPECIAL MASTER
SNAKE RIVER BASIN ADJUDICATION COURT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____th day of June 2006, I caused a true copy of the foregoing **ORDER ON POCATELLO'S MOTION FOR SUMMARY JUDGMENT ON IDWR'S AUTHORITY UNDER I.C. § 42-1425** to be served on the following by U.S. First Class Mail unless indicated as faxed or hand delivered:

UNITED STATES OF AMERICA REPRESENTED BY: US DEPARTMENT OF JUSTICE ENVIRONMENT & NAT'L RESOURCES 550 WEST FORT STREET, MSC 033 BOISE, ID 83724	C. TOM ARKOOSH ARKOOSH LAW OFFICES, CHTD. PO BOX 32 GOODING, IDAHO 83330
STATE OF IDAHO REPRESENTED BY: NATURAL RESOURCES DIV CHIEF STATE OF IDAHO ATTORNEY GENERAL'S OFFICE PO BOX 44449 BOISE, ID 83711-4449	W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY, IDAHO 83318
DIRECTOR OF IDWR PO BOX 83720 BOISE, ID 83720-0098	ROGER D. LING LING ROBINSON & WALKER PO BOX 396 RUPERT, IDAHO 83350
JOSEPHINE P. BEEMAN #1806 BEEMAN & ASSOCIATES, P.C. 409 WEST JEFFERSON STREET BOISE, ID 83702	JOHN A. ROSHOLT TRAVIS L. THOMPSON BARKER ROSHOLT & SIMPSON 113 MAIN AVE. WEST, SUITE 303 TWIN FALLS, IDAHO 83301-6167
SARAH A. KLAHN WILLIAM A. HILLHOUSE II WHITE & JANKOWSKI, LLP 511 16TH ST., SUITE 500 DENVER, CO 80202	

Deputy Clerk

EXHIBIT A

Subcase Numbers

29-00271
29-00272
29-00273
29-02274
29-02338
29-02354
29-02382
29-02401
29-02499
29-04221
29-04222
29-04223
29-04224
29-04225
29-04226
29-07106
29-07118
29-07119
29-07222
29-07322
29-07375
29-07431
29-07450
29-07502
29-07770
29-07782
29-11339
29-11344
29-11348
29-13558
29-13559
29-13560
29-13561
29-13562
29-13636
29-13637
29-13638
29-13639