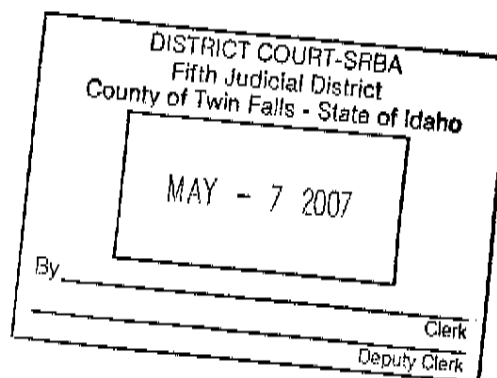


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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase Nos. 29-00271, et al. (see attached Exhibit A)
	)	
	)	Pocatello's Motion for Reconsideration of Order
	)	Granting State's Motion to Strike
Case No. 39576	)	
_____	)	

COMES NOW the City of Pocatello, by and through its counsel of record, Beeman & Associates, P.C., and hereby respectfully moves this court to reconsider its order granting the State's May 3, 2007 *Motion to Strike Affidavit of Josephine P. Beeman in Support of Pocatello's Post-Trial Brief*.

Pocatello does not oppose the *Motion to Strike* to the extent that Pocatello was trying to provide the Court with any evidence regarding Pocatello's water rights. None of the materials attached to the affidavit address Pocatello's water rights as such and are not evidentiary.

However, Pocatello does oppose the *Motion to Strike* and is asking the Court to reconsider its order granting the motion to the extent that the State is attempting to prevent Pocatello from making legal arguments based, in part, upon showing that the State's legal arguments in these subcases differ from and are inconsistent with the State's and IDWR's legal arguments in cases that have gone to the Idaho Supreme Court. Pocatello's overarching legal issue is that the State and IDWR have changed their position with respect to I.C. 42-1425

accomplished transfers in the SRBA and have done so counter to their arguments and the decisions in Idaho Supreme Court cases.

Pocatello is not aware of any rule of evidence or principle of law that precludes one party from pointing out as part of its legal arguments the opposing party's legal inconsistencies or changes in position.

Exhibits 1, 2, and 3 to the *Affidavit of Josephine P. Beeman* are pleadings filed by the State of Idaho and IDWR in prior litigation. These documents reflect a change in IDWR's position regarding burdens of proof on injury and the standard for interconnection.

The State argues Pocatello is "engaging in a trial by ambush,"¹ but an "ambush" would require an element of surprise on the part of the State. Pocatello is not raising a belated legal argument that would catch the State by surprise. The present situation is wholly and factually distinguishable from *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978) where the plaintiff first announced his heart attack was causally connected to the automobile accident on the first day of jury selection. *Id.* at 1155. Throughout these SRBA proceedings related to its state law claims, Pocatello has repeatedly raised an overarching legal issue that IDWR changed its position regarding accomplished transfers under I.C. 42-1425.² This is not a novel argument. Assuming *arguendo*, that at this stage in the litigation, Pocatello were to present new evidence on priority dates for a water right; that would be a "trial by ambush" as described in *Shelak*. At present however, Pocatello is simply using prior pleadings submitted by the State and IDWR to illustrate discrepancies between those prior pleadings and the State's and IDWR's legal positions with respect to Pocatello's I.C. 42-1425 accomplished transfers in these subcases.

Exhibit 4 to the *Affidavit of Josephine P. Beeman* is provided as a courtesy and for the same purpose it was previously quoted in the record before this court.

Exhibit 4 is Pocatello's federal law SRBA claim, which is on file with the SRBA court. In addition, in these subcases, on December 23, 2004, Pocatello filed a *Motion to Stay State Law Claims* and a *Memorandum in Support of Motion to Stay State Law Claims* to this court. These

¹ *State of Idaho's Brief in Support of Motion to Strike Affidavit of Josephine P. Beeman in Support of Pocatello's Post Trial Brief*, page 4.

filings placed specific content of Pocatello's federal law water right claim before this court. Pocatello attached a copy of the claim as Exhibit 4 to the *Affidavit of Josephine P. Beeman* as a courtesy to this court.

Exhibits 5 and 6 to the *Affidavit of Josephine P. Beeman* also relate to the overarching legal issue of the State's and IDWR's change in position with respect to I.C. 42-1425 accomplished transfers in the SRBA.

Exhibit 5 is IDWR's official provision of a subsequent draft of the Water Management Rules regarding "Continued Negotiation of General Water Management Rules, IDAPA Docket NO. 37-0313-9701. Exhibit 6 is IDWR's compilation of the content and comments on an earlier version of the same rulemaking which IDWR provided as material for a water law seminar of the Idaho Water Users Association.

It is not a matter of evidence to show how a statute has changed or how case law has changed or how rules have changed; that is, how the law has changed or how an agency's interpretation of the law has changed. The exhibits all go to establishing what the law is or how IDWR interprets or changes its interpretation of the law.

Exhibits 7 and 8 also relate to the overarching legal issue of the State's and IDWR's change in position with respect to I.C. 42-1425 accomplished transfers in the SRBA.

Exhibit 7 is a copy of Pocatello's original state law SRBA claims from April 19, 1990. Exhibit 8 is a copy of IDWR's February 18, 2003 Preliminary Recommendations of Pocatello's state law SRBA claims. Pocatello is not providing these documents to establish the evidentiary truth of any fact discussed in them, but only to show how IDWR has changed its legal position in the SRBA with respect to I.C. 42-1425 accomplished transfers.

Exhibit 11 to the *Affidavit of Josephine P. Beeman* is admissible as a transcript of proceedings before this court.

On January 17, 2007, Special Master Bilyeu presided over a hearing on summary judgment in the present subcases. Exhibit 11 to the *Affidavit of Josephine P. Beeman* is a

² See Tr. Vol. II, p. 246, pp. 255-258, pp. 301-303, pp. 330-335. See, *City of Pocatello's Trial Brief*.
POCATELLO'S MOTION FOR RECONSIDERATION— PAGE 3

certified copy of the transcript of these audiotaped proceedings. On May 7, 2007 the transcript of audiotaped proceedings of January 17, 2007 was lodged with the SRBA Court.

DATED this 7th day of May 2007.

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

By Josephine P. Beeman
Josephine P. Beeman

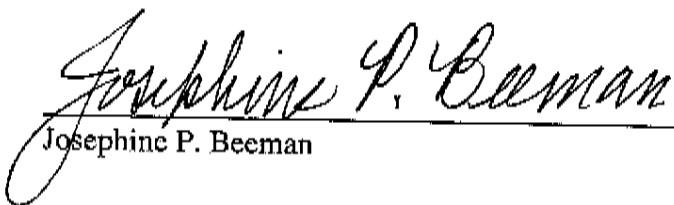
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of May 2007, I caused a true copy of the foregoing **Pocatello's Motion for Reconsideration of Order Granting State's Motion to Strike** 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

STATE OF IDAHO
REPRESENTED BY:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098


Josephine P. Beeman

ZA1776\100\LIT Post-TRIAL\7800

EXHIBIT A

Subcase Numbers (30)

29-00271
29-00272
29-00273
29-02274
29-02338
29-02401
29-02499
29-04221
29-04222
29-04223
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29-07118
29-07119
29-07322
29-07375
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