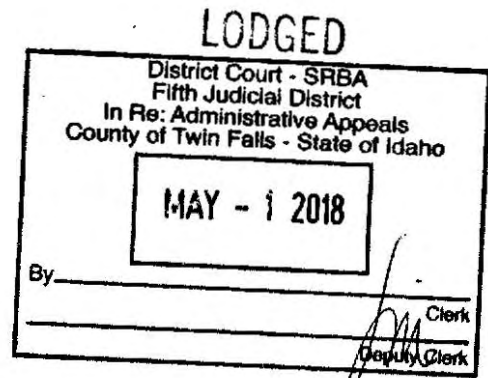


Sarah A. Klahn, I.B. #7928
White & Jankowski LLP
511 Sixteenth Street, Suite 500
Denver, CO 80202
(303) 595-9441
(303) 825-5632 (Fax)
sarahk@white-jankowski.com

Attorneys for City of Pocatello



**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CITY OF POCA TELLO,

Petitioner,

vs.

GARY SPACKMAN in his official capacity
As Director of the Idaho Department of Water
Resources; and the IDAHO DEPARTMENT
OF WATER RESOURCES,

Respondents,

and

SPARTAN PORTNEUF, LLC,

Intervenor.

Case No. CV-01-17-23146

**CITY OF POCA TELLO'S REPLY
BRIEF ON JUDICIAL REVIEW**

TABLE OF CONTENTS

SUMMARY OF ARUMENT	1
I. STANDARD OF REVIEW	2
II. THE SUBSTANCE OF THIS APPEAL IS PROPER UNDER IDAHO CODE SECTION 67-5271(2).....	2
III. THE DEPARTMENT'S JURISDICTION TO CONSIDER PROTESTS IS LIMITED BY PRINCIPLES OF STANDING AND BY ITS OWN STATUTORY AUTHORITY	5
A. Spartan does not have standing to sustain its Protest and the Director's Order should be reversed.....	5
1. Spartan's Protest is deficient because it is unrelated to the relief requested in Transfer No. 81155.....	5
2. Expanding the scope of Spartan's Protest by means of Spartan's arguments below and the Director's Order is also legally deficient.	6
a. Challenges to standing require a factual showing, not mere allegations. ...	6
b. Spartan's arguments and the Director's Order speculating that the relocation of Well 39 will result in changes in water system operation are insufficient to establish standing.....	8
B. The Department's jurisdiction to consider claims of injury in a transfer must be limited to the scope of the transfer.	9
C. Delivery Call	11
IV. IF THE MATTER IS TO BE REMANDED, THE COURT SHOULD LIMIT THE EVIDENCE REGARDING THE OPERATION OF WELL 44 TO EVIDENCE THAT FACIALLY CONNECTS WELL 44 OPERATIONS WITH THE OPERATION OF WELL 39	12
V. THE COURT SHOULD REJECT THE REQUEST FOR ATTORNEY'S FEES... 	13
A. Pocatello has acted with a reasonable basis in fact.....	14
B. Pocatello has acted with a reasonable basis in law.	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Barron v. Idaho Dep't of Water Resources</i> , 135 Idaho 414, 18 P.3d 219 (2001)	3, 11
<i>Green River Ranches, LLC v. Silva Land Co., LLC</i> , 162 Idaho 385, 397 P.3d 1144 (2017)	13
<i>Jenkins v. Jenkins</i> , 138 Idaho 424, 64 P.3d 953 (2003).....	13
<i>Jenkins v. State, Dep't of Water Res.</i> , 130 Idaho 384, 647 P.2d 1256 (1982)	10
<i>Platz v. State</i> , 154 Idaho Ct. App. 960, 303 P.3d 647 (2013)	4, 5
<i>Regan v. Kootenai County</i> , 140 Idaho 721, 100 P.3d 615 (2004)	2
<i>Sagewillow, Inc. v. Idaho Dep't of Water Res.</i> , 138 Idaho 831, 70 P.3d 669 (2003)	10
<i>Saint Alphonsus Reg'l Med. Ctr. v. Ada County</i> , 146 Idaho 862, 204 P.3d 502 (2009).....	14, 15
<i>State v. Phillip Morris, Inc.</i> , 158 Idaho 874, 354 P.3d 187 (2015).....	6, 7
<i>Williams v. State, Bd. of Real Estate Appraisers</i> , 149 Idaho 675, 239 P.3d 780 (2010)	4, 14, 15

Statutes

Idaho Code § 12-117(1)	13
Idaho Code § 42-222(1)	1
Idaho Code § 67-5271(2)	1, 3, 4

Rules

IDAPA 37.01.01.750	4
--------------------------	---

COMES NOW, City of Pocatello ("City" or "Pocatello") to reply in support of its request for judicial review.

SUMMARY OF ARGUMENT

Under Transfer No. 81155, Pocatello seeks to operate Water Right Nos. 29-02274, 29-02338, and 29-07375 ("Subject Water Rights") from relocated Well 39, located adjacent to the Pocatello Regional Airport. The Subject Water Rights were associated with Well 39 at its previous location, approximately 2 miles south of the airport and the interstate highway. Well 39—at either its original location or its new location—is more than 12 miles from Well 44, another of Pocatello's municipal wells. It is the operation of Well 44 that Spartan Portneuf, LLC ("Spartan") seeks to condition in the context of the Well 39 transfer application.

In evaluating a transfer application, Idaho statute requires "[t]he director of the department of water resources shall examine all the evidence and available information" before rendering a decision. Idaho Code § 42-222(1). The Hearing Officer found that Spartan's Protest was not among "all the information" properly considered; the Director's interlocutory order ("Director's Order") found that it was. Pocatello filed this appeal to avoid going to hearing on issues vastly expanded from the narrow subject of its Transfer, to wit, whether it may operate the Subject Water Rights out of Well 39.

Respondents' Brief does not present a persuasive basis to conclude that Spartan's Protest relates to the subject of the Well 39 transfer or that Spartan's Protest is properly among "all the information" the Director must consider; Respondents' Brief also does not provide a colorable basis to reject this appeal, given the standards applicable to appeals under Idaho Code section 67-5271(2). Further, if the Director's Order is affirmed, the definition of "all the information" has no boundaries, and there is no legal bar to sustaining transfer protests that have no visible relationship to the subject of the transfer. This expands the Department's discretion over issues

to be considered in evaluating transfers beyond any recognizable relationship to the statutory standards set forth in Idaho Code section 42-222(1).

For the reasons herein, as well as those stated in its Opening Brief, Pocatello respectfully requests that the Court entertain this appeal, and reverse the Director's Order.

I. STANDARD OF REVIEW

Pocatello agrees with the standards of review identified in Respondents' Brief. However, Respondents suggest that Pocatello's Opening Brief was deficient regarding Pocatello's efforts to connect discussion of the standard of review to the substantive points on appeal. This is incorrect and Pocatello's Opening Brief is not legally deficient. Rather than focusing on form over substance in this brief, a table connecting the applicable standards of review with Pocatello's arguments in its Opening Brief is attached as Exhibit 1 for the Court's convenience.

II. THE SUBSTANCE OF THIS APPEAL IS PROPER UNDER IDAHO CODE SECTION 67-5271(2)

The Department erroneously argues that the Court should dismiss this appeal of the Director's Order because Pocatello is merely "inconvenienced" from the remand of Spartan's Protest, and that inconvenience alone is an inadequate basis to sustain an appeal of an interlocutory order. The Department misperceives the problem: requiring Pocatello to participate in a hearing regarding a protest raising issues unrelated to the relief sought in Transfer No. 81155 is a fundamental deprivation of due process and this is an instance in which the "interests of justice" require review of the Director's Order. *Regan v. Kootenai County*, 140 Idaho 721, 725, 100 P.3d 615, 619 (2004).

In the context of a transfer proceeding under Idaho law, the applicant for the transfer bears the burden of proof requiring Pocatello to demonstrate non-injury regarding matters raised

by Spartan.¹ Spartan is alleging injury from Pocatello's operation of Well 44, not from the operation of the Subject Water Rights at relocated Well 39. Under Idaho law, if Spartan is allowed to go forward with this claim Pocatello bears the burden of proof on a variety of issues in this transfer, including non-injury. *See, e.g.,* Record at 24, Pre-hearing Conference and/or Hearing Procedure, Application for Transfer; *Barron v. Idaho Dep't of Water Resources*, 135 Idaho 414, 420–21, 18 P.3d 219, 225–26 (2001). Further, if the agency decision is adverse to Pocatello, the City must appeal that decision under a deferential standard of review—even if the basis for the adverse decision was beyond the proper scope of the transfer proceeding in the first place. This works substantial prejudice to Pocatello and interferes with its property interests.

Compounding the erroneous nature of the Department's request to dismiss this appeal, the agency cites case law rejecting petitions for extraordinary writs as legal authority for its position, arguing that the standard developed by the Idaho Supreme Court regarding extraordinary writs "applies equally" in this context, although no Idaho Supreme Court decision has so stated. As a basis for the Court to apply the legal standard used by the Idaho Supreme Court to reject writ petitions to Pocatello's request for judicial review under Idaho Code section 67-5271(2) the Department offers only that Pocatello, like petitioners who fail to obtain writs, should be content to go to trial and simply appeal any adverse decision.

To the extent Pocatello is required to go to hearing in this matter it bears the burden of proof to refute Spartan's Protest which raises issues unrelated to Transfer No. 81155. Review of the Director's Order requiring Pocatello to engage in a hearing on such issues is precisely what section 5271(2) was designed to rectify, and that is true whether or not Pocatello could have

¹At no time do Respondents acknowledge that allowing a protest to go forward that involves claims inherently unrelated to the subject of the transfer accrues to the detriment of the transfer applicant. Towards that end, suggesting as the Department does in several instances throughout its brief that the Director's Order should be affirmed because Spartan should be "entitled to create a record" is only half of the story—the other half is that Pocatello bears the burden of proof.

successfully obtained a writ of prohibition. The Court should decline the Department's invitation to adopt the same standard as the Idaho Supreme Court has applied in extraordinary writ decisions.

The Department does cite one case that involves judicial review under the Idaho Administrative Procedure Act ("IDAPA"). See Respondents' Brief at 7, 11 (citing *Williams v. State, Bd. of Real Estate Appraisers*, 149 Idaho 675, 239 P.3d 780 (2010)). *Williams* involved an interlocutory order erroneously identified as final by the State Board of Real Estate Appraisers, appealed pursuant to Idaho Code sections 67-5270 and -5272 and Justice Eismann goes to some lengths to articulate the basis for the Court's decision to reject jurisdiction including that interlocutory orders cannot be converted into final orders simply by agency fiat.² The Court concludes that it does not have jurisdiction over the matter because the order appealed was not a final order subject to review under 67-5270. *Williams*, 149 Idaho at 678, 239 P.3d at 783. Thus, to the extent the Department cites this case for the proposition that the Idaho Supreme Court affirmed rejection of an interlocutory appeal brought under section 5271(2) (see pages 7 and 11 of Respondents' Brief), this reliance is misplaced.

However, there is an Idaho appellate court decision interpreting Idaho Code section 67-5271(2) in the context of the Idaho Department of Transportation's appeal of judicial review and stay of an interlocutory decision. In *Platz v. State*, 154 Idaho Ct. App. 960, 969-70, 303 P.3d 647, 656-57 (2013), the Idaho Court of Appeals found that section 5271(2) provided an avenue for district court review of an interlocutory order denying a stay of an impending license suspension. The Court reasoned that review of such an interlocutory order was proper because of the risk of an "irremediable and unacceptable loss of driving privileges before issuance of the

²This decision appears to call into question the authority of the Department to otherwise undesignated orders into final orders via IDAPA 37.01.01.750.

hearing officer's decision, particularly in the case where the driver ultimately prevails." *Id.* at 969, 303 P.3d at 656. Requiring Pocatello to participate in a hearing on Transfer No. 81155 involving matters that are unrelated to Transfer No. 81155 similarly cannot be rectified after the fact. The Court should accept jurisdiction of this matter.

III. THE DEPARTMENT'S JURISDICTION TO CONSIDER PROTESTS IS LIMITED BY PRINCIPLES OF STANDING AND BY ITS OWN STATUTORY AUTHORITY

A. Spartan does not have standing to sustain its Protest and the Director's Order should be reversed.

Under Idaho law, standing is evaluated based on a party's positions reflected in the pleadings. As detailed below, Spartan's Protest did not articulate a connection between the relocation of Well 39 and impacts on its water rights. The Department's efforts to "restate[] Spartan's argument" (the Department's characterization, Respondents' Brief at 15) to expand Spartan's claims should be rejected. However, even the Director's restatement of Spartan's arguments fails to satisfy principles of standing under Idaho law.

1. Spartan's Protest is deficient because it is unrelated to the relief requested in Transfer No. 81155.

Pursuant to two previous transfers, Well 39 was moved from its original location south of the interstate to a location closer to the Pocatello Regional Airport. Well 39 has been operated at its new location for over two years. Both the original and new locations for Well 39 are over 12 miles away from the Spartan well. Transfer No. 81155 seeks to associate the Subject Water Rights that were associated with Well 39 at its old location, with Well 39 at its new location. The Transfer does not seek to otherwise change the operation of the Subject Water Rights or Well 39.

Spartan's Protest did not put at issue any connection between the relocation of Well 39 and the operation of Well 44. Instead, Spartan alleged:

Contemplated transfer to other well [sic], specifically city well #44 located at [legal description] will exacerbate existing problem of city's operation of well #44 has been [sic], and continues to be, injurious to well operated by Spartan Portneuf LLC under its senior right and license.

Record at 21. In response to the question on the Protest "[w]hat would resolve your protest?",

Spartan stated:

Curtailment, reduction in volume pumped by city at well #44, or call. Should conduct flow measurement study for one year prior to action by the Department.

Id. Nothing in the Protest connected Spartan's complaints about impacts from the operation of Well 44 with the relocation of Well 39. Spartan's Protest even asks, as a remedy, that the Department place a call on Well 44 or restrict pumping at Well 44. Spartan has never moved to amend its Protest or otherwise introduce a factual basis to suggest a connection between the operation of Well 39 at its new location and Spartan's water right. Spartan's Protest is inadequate to establish standing in Spartan to participate in this matter.

2. Expanding the scope of Spartan's Protest by means of Spartan's arguments below and the Director's Order is also legally deficient.

a. Challenges to standing require a factual showing, not mere allegations.

Spartan's Protest is insufficient to establish standing under Idaho law. The Department erroneously summarizes the standing test as: "a decision favorable to Spartan in the transfer proceeding would prevent injury to Spartan's water right". Respondents' Brief at 17.³ The

³The Respondents' formulation of the standing test improperly emphasizes the third prong of this quote: "Under U.S. Supreme Court jurisprudence, to establish standing a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a like[lihood] that the injury will be redressed by a favorable decision." *State v. Phillip Morris, Inc.*, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015) (internal quotation marks and citations omitted) (emphasis added). Spartan has not established parts 1 or 2 of the standing test, and the Director's Order does not remedy that situation.

Respondents' formulation of the standing test assumes the predicate—and is not the standard identified in *State v. Phillip Morris, Inc.*, 158 Idaho 874, 354 P.3d 187 (2015).⁴

In actuality, based on *Phillip Morris*, the Court set out a very different requirement and one that Spartan has not satisfied and that the Director's Order cannot remedy for Spartan. The *Phillip Morris* Court first recited United States Supreme Court's jurisprudence on the issue of standing (*see, e.g.*, note 3 above) and then went further:

The State relies on *Young v. City of Ketchum* to argue that all it must do to establish standing is *allege* an injury in fact. . . .

While we have often repeated the “allege or demonstrate” standard, this is an incomplete statement of the requirements for standing. Consistent with the federal standard, *Young* also holds that standing “requires a *showing* of a ‘distinct palpable injury’ and ‘fairly traceable causal connection between the claimed injury and the challenged conduct.’”

Phillip Morris, 158 Idaho 881, 354 P.3d at 194 (citations omitted).

[w]hen standing is challenged mere allegations are not sufficient, and the party invoking the court's jurisdiction must demonstrate facts supporting this allegation.

Id. at 882, 354 P.3d at 195 (emphasis added).

Pocatello raised the issue of Spartan's standing in its *Motion to Dismiss Protest and In the Alternative Motion In Limine* (“Motion to Dismiss”) filed June 26, 2017. At that time, Spartan could have submitted additional facts or even asked the Hearing Officer to extend briefing deadlines in order to engage in discovery in order to attempt to develop such facts. Neither its speculative allegations in its response to Pocatello's Motion to Dismiss or the Director's “restatement” of Spartan's claims in its Protest are adequate to survive this jurisdictional bar.

⁴Spartan still cannot satisfy the standing requirements by applying the Respondents' erroneous formulation: Pocatello's Transfer asks for the authority to operate the Subject Water Rights out of relocated Well 39; if after a hearing, the Department determines that the Subject Water Rights may *not* be operated from relocated Well 39, this will have no impact on Spartan's complaints of injury from the pumping of Well 44 and will not redress the claims of injury.

Based on the Record, two things demonstrate Spartan does not have standing: (1) the only change Pocatello seeks to make with regard to Well 39 is to operate the Subject Water Rights out of the new well location; and (2) Spartan has never at any time prior to its response to Pocatello's Motion to Dismiss, sought or otherwise attempted to develop any information that would show otherwise. The Court should reverse the Director's Order and find that Spartan does not have standing to sustain its Protest.

- b. Spartan's arguments and the Director's Order speculating that the relocation of Well 39 will result in changes in water system operation are insufficient to establish standing.

Both Spartan's response to Pocatello's Motion to Dismiss (Record at 44–80) and the Director's Order (Record at 215–20), argue that possibly Pocatello's transfer is not for the purposes stated on the face of the application (and reflected in the cover letter for the application and Mr. Armstrong's affidavit (Record at 105–07)). Rather, Respondents speculate that Pocatello's 2015 relocation of Well 39 over 12 miles from the Spartan well presages a fundamental shift in the operation of the Subject Water Rights that would impact or injure Spartan's senior water right. As the basis for that argument, both Spartan and the Department rely on the inadvertent⁵ omission of two points of diversion. Mr. Armstrong, in his affidavit before the Hearing Officer, attempted to explain why the two points of diversion were omitted.

Yet contrary to any facts in the Record, the Director found:

It is conceivable that Spartan could present evidence at a hearing regarding Pocatello's current operation of its system and evidence that the changes proposed by Application 81155 will cause Pocatello to shift operation of its system to demand more from Well 44 and injure the Spartan Well. Spartan's argument that

⁵The Department takes issue with the use of the adjective "inadvertent," but even if the omission is intentional (in light of the fact that the City has not owned Well 11 for many years and Mr. Armstrong misperceived that leaving off a duplicate point of diversion would be found to be abandonment) the fact is the City did not set out to abandon these points of diversion but suffered that legal result and has not challenged the determination. As Mr. Armstrong has sworn testimony that the intention was not to abandon any points of diversion, and as the result was the opposite of what the City intended, the results of this omission are at least unexpected if not inadvertent.

eliminating points of diversion and changing the location of Well 39 could possibly increase demand in Well 44 and injure the Spartan well constitutes a protest against the "proposed change" in accordance with Idaho Code § 42-222(1).

Record at 218.

The Respondents' Brief, which the Director's Order relies on, does not identify a record basis for these suggestions. However, Respondents' Brief suggests that Mr. Armstrong's affidavit raises "questions of fact . . . regarding whether Pocatello will alter operation of its system due to changes proposed in the Application." Respondents' Brief at 15 (emphasis added). Respondents provide no record citations to support the proposition that Transfer No. 81155 will result in any change to the operations of Pocatello's municipal water system. Respondents rely on Mr. Armstrong's sworn statement that the City did not intend to abandon the two points of diversion which the Hearing Officer subsequently found to have been abandoned by operation of law, but it is not clear how Respondents believe Mr. Armstrong's testimony supports the idea that the captioned transfer had some additional, secret purpose, to modify the City's municipal diversion to Spartan's detriment. Respondents also do not explain why Mr. Armstrong's sworn testimony that the purpose of the Transfer was simply to operate Well 39 under the Subject Water Rights is not dispositive.

The Department's efforts to bootstrap the arguments of Spartan in its Response to Pocatello's Motion to Dismiss are improper. However, even if it was proper the Department fails to make the causal connection required under Idaho's standing jurisprudence and Spartan's Protest should be dismissed.

B. The Department's jurisdiction to consider claims of injury in a transfer must be limited to the scope of the transfer.

Respondents' Brief argues that the Director's formulation of the Protest (that somehow the operation of relocated Well 39 will impact Spartan's water right) establishes potential water

rights injury that must be evaluated in this Transfer. In support of this position, the Department relies on *Jenkins v. State, Dep't of Water Res.*, 130 Idaho 384, 647 P.2d 1256 (1982). However, the Director's discretion to consider "all the evidence" in a transfer is still bounded by causal connections between the substance of a protest and the requested transfer. Neither *Jenkins*, nor other reported Idaho cases involving transfers, supports the idea that a transfer applicant must participate in a hearing on issues unrelated to the transfer or that the Director's discretion to define "all the evidence" can be expanded in the fashion proposed by Respondents' Brief.

In *Jenkins*, several protestants opposed a transfer requesting authority to relocate two ditch headgates associated with surface water rights on adjacent creeks. One transfer was approved and the other was denied on the grounds that the applicant had forfeited the associated water right. *Id.* at 386, 647 P.2d at 1258. The transfer applicant appealed and argued that the Director did not have jurisdiction to decide whether the water right had been forfeited. *Id.* at 386–87, 647 P.2d at 1258–59. The Court rejected this position and found that the Director had a statutory duty to consider abandonment and forfeiture in the context of a transfer as a *preliminary* step to determining whether or not the proposed transfer would injure other water rights. *Id.* at 387, 647 P.2d at 1259. *Accord Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138 Idaho 831, 70 P.3d 669 (2003) (finding that doctrines of preclusion are not effective to prevent a finding of forfeiture regarding water rights that were previously the subject of an approved transfer). Thus, the Department must determine in the first instance if the water right that is the subject of a transfer still exists as a matter of law; *Jenkins* does not stand for the proposition that the Director may effectively amend a deficient protest to create an issue of injury that was not articulated.

Even *Barron*, 135 Idaho 414, 18 P.3d 219 involved articulated objections, although no protestant. In *Barron* the transfer was denied after Department staff opposed the transfer and the applicant and the Department engaged in correspondence regarding the merits of the transfer. The transfer applicant appealed the denial of the transfer arguing, *inter alia*, that the Department's opposition to the protest on the basis of water rights injury (beginning with a staff memorandum⁶) was an insufficient basis for the agency to deny the transfer. The Idaho Supreme Court disagreed on a variety of bases, and articulated the Director's obligations under Idaho Code section 42-222 to "examine all the available evidence and information" when deciding to approve a proposed transfer. *Id.* at 420, 18 P.3d at 225. However, the context of *Barron* was a thorough (if unsatisfactory to the applicant) exchange of concerns beginning with the staff recommendation that the water rights transfer should be denied.

In this matter, Spartan protested the Transfer but, as the record reflects, there was never any indication that Spartan had any issues with the *relocation of Well 39* or even the operation of Well 39. See, e.g., Record at 91-92 (correspondence from Protestant to the City prior to the prehearing conference which focuses solely on the production capacity of Well 44 and requests a condition be placed on the operation of Well 44). Spartan's Protest is deficient and the Department does not have jurisdiction to consider claims of injury associated with the operation of Well 44 in the context of this transfer.

C. Delivery Call

If Spartan were to file a delivery call, Spartan likely does have standing to allege, and the Department does have jurisdiction to consider, the types of allegations erroneously contained in

⁶"Barron and the IDWR subsequently exchanged correspondence concerning the transfer application. On five separate occasions, the IDWR requested that Barron provide additional information to address the agency's concerns. Although Barron responded in writing to each of the Department's requests, the IDWR indicated in its final letter that Barron had still not presented sufficient information for the Department to approve his transfer application." *Barron*, 135 Idaho at 416, 18 P.3d at 221.

Spartan's Protest filed in this matter. In its Protest, Spartan stated that a delivery call was one of the remedies that would resolve its concerns with the instant Transfer.

Delivery calls remain a valid means in Idaho for senior water rights to allege injury to junior water rights and the Department's resistance to this remedy is surprising, and its position that Spartan *must* raise its injury concerns regarding operation of a well that is completely disconnected from and unrelated to Well 39 in the context of this Transfer is without basis. As demonstrated above, there is no record basis for the Respondents' position that this Transfer involves a change in the operation of the City's municipal water system. Further, the Department does not identify any case law or agency decisions which foreclose a delivery call that might involve water rights that were previously the subject of an approved transfer. Spartan has a remedy for its allegations of injury—and it is a remedy Spartan requested: to file a delivery call.

IV. IF THE MATTER IS TO BE REMANDED, THE COURT SHOULD LIMIT THE EVIDENCE REGARDING THE OPERATION OF WELL 44 TO EVIDENCE THAT FACIALLY CONNECTS WELL 44 OPERATIONS WITH THE OPERATION OF WELL 39

Pocatello's briefing in this appeal reflects its abiding position that the Director's Order should be reversed. However, if the Court remands the matter for hearing, it should limit the Well 44 evidence that can be considered to evidence that facially connects a change in Well 44 operations as the result of the relocation and operation of Well 39 at its new location. Putting the best light on the Department's efforts to create an issue of injury in this case, the Hearing Officer is still limited to considering claims of injury from operation at Well 44 arising from operation of the Subject Water Rights at Well 39. Any broader scope for evidence regarding Well 44 operations would turn this matter into a delivery call, although Spartan has not sufficiently alleged injury as required under the Conjunctive Management Rules.

The Department argues that Pocatello should lose on this point as it failed to state the proper standard for review. Respondents' Brief at 18. In fact, Pocatello's argument at page 9 of its Opening Brief addresses the three elements of an abuse of discretion examination although it is true the legal test is not stated. The Director's decision declining to limit evidence in any hearing in this matter only satisfied the first part of the abuse of discretion test: the Director properly perceived that the question of whether to order a limitation on evidence presented was within the scope of the Director's discretion. Because Spartan has failed to connect the injury it alleges from Well 44 to Pocatello's requested transfer of the Subject Water Rights to Well 39—the Director did not act within the bounds of his discretion or applicable legal standards, and did not reach the decision “by an exercise of reason.” *Green River Ranches, LLC v. Silva Land Co., LLC*, 162 Idaho 385, 392, 397 P.3d 1144, 1151 (2017). If the Court determines remand is proper, it should order limitation of the evidence to be presented by Spartan to evidence that connects the operation of Well 39 to Well 44. If, as the Department suggests, this Transfer is intended to change the operation of Pocatello's system to Spartan's detriment, Spartan should have to prove that point to start with, rather than forcing Pocatello to prove the negative.

V. THE COURT SHOULD REJECT THE REQUEST FOR ATTORNEY'S FEES

Respondents argue that the Court should award reasonable attorney's fees under Idaho Code section 12-117(1), which states that attorney's fees should only be awarded if the Court determines “that the non-prevailing party acted without a reasonable basis in fact or law.” The Idaho Supreme Court has determined that “attorney fees will not be awarded as a matter of right,” but rather will only be awarded where the “court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.” *Jenkins v. Jenkins*, 138 Idaho 424, 430, 64 P.3d 953, 959 (2003) (citations omitted). “Where

issues of first impression are raised, attorney fees will not be awarded.” *Saint Alphonsus Reg’l Med. Ctr. v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009).

A. Pocatello has acted with a reasonable basis in fact.

Inherently the dispute in this matter relates to the nature and extent of the facts that can comprise “all the evidence” to be considered by the agency in this transfer. Pocatello attempted to find—but was unable to find—a similar precedent in which a protest was dismissed by the Hearing Officer because it was in excess of the issues raised by the transfer and reversed by the Director. The discrepancy between the Hearing Officer and the Director’s views of the agency’s scope of discretion indicates that whether the Spartan Protest may properly be considered is a “colorable issue.” *Saint Alphonsus*, 146 Idaho at 863, 204 P.3d at 503. Accordingly, an award of attorney’s fees would be improper.

B. Pocatello has acted with a reasonable basis in law.

This case involves complex questions of administrative law and procedure, to wit, the Director’s discretion to define “all the evidence” in a transfer to include matters beyond the scope of the transfer. Where a case involves colorable issues and presents nuanced administrative law arguments, an award of attorney’s fees would be improper. *See Blue Lakes Trout Farm, Inc. v. Spackman*, Order Denying Request for Attorney’s Fees and Costs at 1–4, Case No. CV-WA-2010-19823 (Feb. 7, 2011), attached as Exhibit 2; *Williams*, 157 Idaho at 511, 337 P.3d at 670.

In *Blue Lakes Trout Farm* the Idaho Supreme Court also entertained a request by the Department for attorney’s fees. *Order Denying Request for Attorney’s Fees and Costs* at 1–4. The Court denied the request, concluding that the non-prevailing party had acted with a reasonable basis in fact and law. *Id.* at 3. The Court noted that “Idaho courts have refrained

from finding that a party has acted without a reasonable basis in fact or law where the case involves unsettled areas of law or issues of first impression.” *Id.* (citing *Saint Alphonsus*, 146 Idaho at 863, 204 P.3d at 503). The Court concluded that because “there [was] a colorable issue and argument” presented to the court, “attorney’s fees and costs under Idaho Code § 12-117 would be improper.” *Id.* at 3–4. Similarly, in *Williams*, the Court noted that the “issues raised by the parties were nuanced and centered on unclear aspects of administrative law” and thus determined that “it was reasonable for the parties to pursue the appeal.” 157 Idaho at 511, 337 P.3d at 670. Accordingly, the Court declined to award costs or attorney fees on appeal. *Id.*

CONCLUSION

For the reasons stated herein and in its Opening Brief, Pocatello requests that the Court reverse the Director’s Order and reinstate the Hearing Officer’s Order dismissing the Protest and approving the Transfer.

Respectfully submitted this 30th day of April, 2018.

WHITE & JANKOWSKI LLP

Attorneys for City of Pocatello

By 
Sarah A. Klahn

CERTIFICATE OF SERVICE

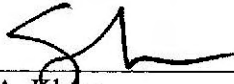
I hereby certify that on this 30th day of April, 2018 a true and correct copy of the foregoing **CITY OF POCA TELLO'S REPLY BRIEF ON JUDICIAL REVIEW** was filed with the following by the method indicated below:



Sarah A. Klahn
White & Jankowski LLP

SRBA District Court 253 3 rd Avenue North P.O. Box 2707 Twin Falls, ID 83303-2707	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-736-2121 Phone 208-736-3011 <input type="checkbox"/> Email
---	---

I hereby certify that on this 1st day of May, 2018 a true and correct copy of the foregoing **CITY OF POCA TELLO'S REPLY BRIEF ON JUDICIAL REVIEW** was served on the following by the method indicated below:



Sarah A. Klahn
White & Jankowski LLP

Gary Spackman, Director IDWR 322 East Front St P.O. Box 83720 Boise ID 83720-0098 gary.spackman@idwr.idaho.gov kimi.white@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700 Phone 208-287-4800 <input checked="" type="checkbox"/> Email
Garrick Baxter IDWR P.O. Box 83720 Boise ID 83720-0098 garrick.baxter@idwr.idaho.gov emmi.blades@idwr.idaho.gov	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile 208-287-6700 Phone 208-287-4800 <input checked="" type="checkbox"/> Email
Jim Browitt Laura Schroeder Spartan Portneuf LLC Schroeder Law Offices P.C. 1915 NE Cesar E. Chavez Blvd. Portland, OR 97212 schroeder@water-law.com j.browitt@water-law.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail – Federal Express <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

EXHIBIT 1

**TABLE OF STANDARDS OF REVIEW AND SUBSTANTIVE ARGUMENTS FROM
CITY OF POCATELLO'S OPENING BRIEF ON JUDICIAL REVIEW**

<u>STANDARDS OF REVIEW</u>	<u>PAGE CITE FROM POCATELLO'S OPENING BRIEF</u>
Idaho Code section 67-5271(2) governs interlocutory appeals. Respondents' Brief at 7.	Pages 4-5.
Idaho Code section 67-5277 governs review of an appeal from an agency decision; 67-5279(3) lays out the five part test. Respondents' Brief at 7.	Page 5 (no cite to statutory section 67-5277 but reliance on the Record implies that understanding; citation to 67-5279(3) regarding the five part test to be applied).
Abuse of discretion standard. Respondent's Brief at 7-8.	Page 7: <ul style="list-style-type: none">• "The Hearing Officer's Preliminary Order correctly identifies the scope of agency discretion";• "The Director's Order would inject speculative issues unrelated to the change sought by Pocatello"
Agency erred in a manner specified under Idaho Code section 5279(3) (the five part test) and that a substantial right of petitioner has been prejudiced under section 5279(4). Respondents' Brief at 8.	Page 7: <ul style="list-style-type: none">• "The Hearing Officer's Preliminary Order correctly identifies the scope of agency discretion";• "The Director's Order would inject speculative issues unrelated to the change sought by Pocatello" Page 8: <ul style="list-style-type: none">• "The Director's Order would authorize exercise of agency discretion that is beyond its statutory authority";• "The Director's Order improperly concluded that Spartan has standing" and applied the wrong test. Page 10: <ul style="list-style-type: none">• "The Director erred by agreeing that the inadvertent omission (and subsequent abandonment of these points of diversion) provided a basis to revive the Spartan Protest."

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

CASE NO.: CV WA 2010-19823

ORDER DENYING REQUEST FOR ATTORNEY'S FEES AND COSTS

Intervenorors.

Holding: Request for attorney's fees and costs is denied.

FACTS AND PROCEDURAL BACKGROUND

1. On October 8, 2010, this Court issued an *Order Denying Petition for Alternative Writ of Mandate* in the above-captioned action. On October 29, 2010, this Court issued an *Order Denying Petition for Peremptory Writ of Mandate* in the above-

captioned matter. The facts and procedural background set forth in those *Orders* are incorporated herein by reference and will not be repeated.

2. On November 12, 2010, Respondents / Defendants ("Respondents") filed a *Motion for Attorneys Fees, a Memorandum of Costs and Attorney Fees*, and an *Affidavit in Support*. Respondents request recovery of the attorney's fees and costs incurred in defense of this action pursuant to Idaho Code § 12-117.

3. On November 23, 2010, Petitioner / Plaintiff ("Petitioner") filed a *Memorandum in Opposition* to the request for fees and costs.

4. A hearing on the issue of attorney's fees and costs was held before this Court on January 21, 2011.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on January 21, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or January 24, 2011.

III.

DISCUSSION

Respondents seek attorney's fees and costs as the prevailing party in this matter under Idaho Code § 12-117(1), which provides:

Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Since the statute applies to the award of "witness fees and reasonable expenses," it also provides the basis for awarding court costs. *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 285, 223 P.3d 721, 732 (2010). Idaho Code § 12-117 is the exclusive means for awarding attorney fees and costs for the entities to which it applies. *Id.*; *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010).

In this case it is undisputed that Respondents are the prevailing party. The question presented is whether the Petitioner acted "without a reasonable basis in fact or law" in bringing this action. Idaho courts have refrained from finding that a party has acted without a reasonable basis in fact or law where the case involves unsettled areas of law or issues of first impression. *See e.g., Saint Alphonsus Regional Medical Center v. Ada County*, 146 Idaho 862, 863, 204 P.3d 502, 503 (2009) (request for fees under I.C. § 12-117 denied where issue of standing presented question of first impression under amended statute, so Ada County did not act without a reasonable basis in law); *Wheeler v. Idaho Dept. of Health and Welfare*, 147 Idaho 257, 267, 207 P.3d 988, 998 (2009) (a case of first impression does not constitute an area of settled law, therefore request for attorneys fees under I.C. § 12-117 is denied).

In this case, the Court cannot find that the Petitioner acted without a reasonable basis in law or fact in bringing the instant action. This case was initiated at the administrative level with the filing of a delivery call. In responding to a delivery call involving both ground and surface water, the Director applies a ground water model to simulate the effects of curtailment of junior rights determined to be impacting senior rights. In this case, the Director applied the Eastern Snake Plain Aquifer Model ("ESPA Model"). As noted by the District Court in the *Order on Petition for Judicial Review* issued on June 19, 2009 in Gooding County Case CV 2008-444, the ESPA Model has both strengths and weaknesses. The Court acknowledges that new technology and/or data will result in continued refinements to the ground water modeling process. This is consistent with the findings of the Hearing Officer in the delivery call proceeding.

However, the issue of how or when new technology and/or data pertinent to the determination of the impact of junior water users on senior rights under a ground water model may be introduced to the Director under the *Rules for Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11 ("CMR") is an unsettled area of law and an issue of first impression. Simply put, must the proponent of the new technology wait until the appellate process on the former technology has run its course or is the Director required to consider any new technology advanced during the pendency of the appeal under his on-going duty to administer water? Neither the CMR nor case law has resolved this issue. As such, for purpose of the award of attorney's fees there is a

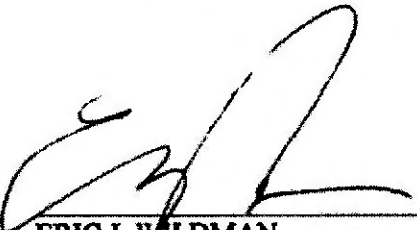
colorable issue and argument as to when and under what circumstances the new information can be put before the Director under the CMR in light of his continuing duty to administer water. It follows that an award of attorney's fees and costs under Idaho Code § 12-117 would be improper in this instance.

IV.

ORDER

For the reasons set forth above, Respondents' request for attorney's fees and costs is **HEREBY DENIED**.

Dated February 7, 2011


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING REQUEST FOR ATTORNEY'S FEES AND COSTS was mailed on February 07, 2011, with sufficient first-class postage to the following:

GARY SPACKMAN

Represented by:
BAXTER, GARRICK L
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720-0098
Phone: 208-287-4800

GARY SPACKMAN

Represented by:
BROMLEY, CHRIS M
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO - IDWR
PO BOX 83720
BOISE, ID 83720
Phone: 208-287-4800

IDAHO GROUND WATER

Represented by:
BUDGE, THOMAS J
201 E CENTER ST
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

IDAHO GROUND WATER

Represented by:
CANDICE M MC HUGH
101 S CAPITOL BLVD, STE 208
BOISE, ID 83702
Phone: 208-395-0011

BLUE LAKES TROUT FARM INC

Represented by:
CHARLES L. HONSINGER
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

BLUE LAKES TROUT FARM INC

Represented by:
DANIEL V. STEENSON
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

IDAHO GROUND WATER

Represented by:
RANDALL C BUDGE
201 E CENTER, STE A2
PO BOX 1391
POCATELLO, ID 83204-1391
Phone: 208-232-6101

BLUE LAKES TROUT FARM INC

Represented by:
S. BRYCE FARRIS
RINGERT LAW CHARTERED
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

CLEAR SPRINGS FOODS INC

Represented by:
TRAVIS L THOMPSON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

