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

IDAHO GROUND WATER
APPROPRIATORS, INC., BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and BINGHAM GROUND WATER
DISTRICT,

Petitioners,

vs.

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

Respondents,

and

CITY OF POCATELLO, CITY OF BLISS,
CITY OF BURLEY, CITY OF CAREY, CITY
OF DECLO, CITY OF DIETRICH, CITY OF
GOODING, CITY OF HAZELTON, CITY OF
HEYBURN, CITY OF JEROME, CITY OF
PAUL, CITY OF RICHFIELD, CITY OF
RUPERT, CITY OF SHOSHONE, CITY OF
WENDELL, A&B IRRIGATION DISTRICT,
BURLEY IRRIGATION DISTRICT,
MILNER IRRIGATION DISTRICT, NORTH

Case No. CV01-23-08187

**DEPARTMENT'S BRIEF IN
SUPPORT OF MOTION FOR
ATTORNEY FEES**

SIDE CANAL COMPANY, TWIN FALLS
CANAL COMPANY, AMERICAN FALLS
RESERVOIR DISTRICT #2, MINIDOKA
IRRIGATION DISTRICT, and MCCAIN
FOODS USA, INC.,

Intervenors.

IN THE MATTER OF THE DISTRIBUTION
OF WATER TO VARIOUS WATER RIGHTS
HELD BY AND FOR THE BENEFIT OF
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

Respondents, the Idaho Department of Water Resources and its Director, Gary Spackman (collectively, “Department”), file *Department’s Brief in Support of Motion for Attorney Fees*. Respondents are the prevailing party and seek reasonable attorney fees in the amount of \$8,440.00.

BACKGROUND

On May 19, 2023, the Idaho Ground Water Appropriators, Inc. (“IGWA”), Bonneville-Jefferson Ground Water District, and Bingham Ground Water District (collectively the “Ground Water Districts”) filed the *Ground Water Districts’ Petition for Judicial Review* (“Petition”). Within the petition for judicial review case, numerous motions were concurrently filed—*Ground Water Districts’ Motion for Stay*, *Ground Water Districts’ Motion for Injunctive Relief*, *Ground Water Districts’ Motion for Expedited Decision*, *Ground Water Districts’ Motion to Compel*; and *Ground Water Districts’ Motion for Order to Show Cause*. The purpose of each of

these motions was an attempt to persuade the District Court to step in and stop the administrative hearing set for June 6–10, 2023.

On May 25, 2023, the Ground Water Districts filed an *Amended Notice of Hearing* for their various motions to be heard on June 1, 2023, at 1:30 P.M.

On June 1, 2023, the District Court held a 3.5-hour hearing. At the conclusion of the hearing the Court ruled from the bench and dismissed the Petitioners' petition for judicial review as well as the Petitioners' various motions owing to the Court's lack of jurisdiction pursuant to Idaho Code § 42-1701A and the doctrine of exhaustion. Baxter Decl. Ex. B, at 9–10. The Court further advised that:

The Court notes that it has come to the same conclusion previously in several similar cases involving premature petitions for judicial review, and I'll cite a few of them. In preparation for this hearing, I went in and printed off every one of them, and I have a stack of them here. But that includes the Order Dismissing Petition for Judicial Review in Ada County Case CV01-17-67, issued February 16, 2017; Order Dismissing Petition for Judicial Review in Ada County Case CV01-16-23173, also issued February 16, 2017; and an Order Granting Motion to Dismiss in Jerome County Case CV27-22-945, issued December of 2022. Therefore, based on the foregoing reasons, the Court will grant the motion to dismiss.

Baxter Decl. Ex. B, at 10–11.

On June 2, 2023, the Court issued an Order granting the Department's *Motion to Dismiss* the Groundwater Districts' *Petition for Judicial Review* as well as a final *Judgement*.

ARGUMENT

I. The Department is entitled to attorney fees under Idaho Code §§ 12-117 and/or 12-121.

A. Idaho Code § 12-117.

Idaho Code § 12-117(1) provides that:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, 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.

A petition for judicial review is a “proceeding” pursuant to Idaho Code § 12-117. *3G AG LLC v. Idaho Dep't of Water Res.*, 170 Idaho 251, 267, 509 P.3d 1180, 1196 (2022). Idaho Code § 12-117(1) clearly mandates that when an individual or entity sues a political agency, the Court “*shall* award the prevailing party reasonable attorney’s fees... if it finds that the nonprevailing party acted without a reasonable basis in fact or law.” I.C. § 12-117(1) (emphasis added). The purpose for awarding attorney fees under I.C. § 12-117 “is to deter groundless or arbitrary agency action and to provide a remedy for persons who have borne unfair and unjustified financial burdens attempting to correct mistakes agencies should never have made.” *Musser v. Higginson (In Re General Adjudication of Rights)*, 125 Idaho 392, 397, 871 P.2d 809, 814 (1994).

Here, the Respondent is the prevailing party as evidenced by this Court, on June 2, 2023, issuing an Order granting Respondents’ motion to dismiss as well as a final *Judgement*. Idaho Rule of Civil Procedure 54(1)(B) provides in pertinent part

that “[i]n determining which party to an action is a prevailing party and entitled to costs, the trial court must, in its sound discretion, consider the final judgment or result of the action in relation to the relief sought by the respective parties”

The Court must award attorney fees given that Petitioners’ request for judicial review and corresponding flurry of motions lacked a reasonable basis in law. *See* I.C. § 12-117(1). The case law is clear. The doctrine of exhaustion requires a case “run the full gamut of administrative proceedings before an application for judicial relief may be considered.” *Regan v. Kootenai Cty.*, 140 Idaho 721, 724, 100 P.3d 615, 618 (2004). The Ground Water Districts had an available administrative remedy—a hearing under Idaho Code § 42-1701A(3)—rendering their petition for judicial premature. Because the Respondents failed to exhaust their administrative remedies, the court lacked jurisdiction pursuant to Idaho Code § 42-1701A and the doctrine of exhaustion. *Regan*, 140 Idaho at 726, 100 P.3d at 620; *see also* Order Granting Mot. to Dismiss, *Idaho Ground Water Appropriators, Inc. v. Idaho Department of Water Resources*, No. CV27-22-00945 (Jerome Cnty. Dist. Ct. Idaho Dec. 8, 2022) (an example of a failure to exhaust administrative remedies).¹

As the Court concluded at the June 1 hearing, Petitioners’ have repeatedly been warned under substantially similar facts that filing premature petitions for judicial review was improper. Baxter Decl. Ex. B, at 10–11 (citing inter alia “Order

¹ Available at: <http://www.srba.idaho.gov/Images/AdminApp/CV27-22-00945/021-Order%20Granting%20Motion%20to%20Dismiss.pdf>.

Dismissing Petition for Judicial Review in Ada County Case CV01-17-67, issued February 16, 2017; Order Dismissing Petition for Judicial Review in Ada County Case CV01-16-23173, also issued February 16, 2017; and an Order Granting Motion to Dismiss in Jerome County Case CV27-22-945, issued December of 2022.”).

At the conclusion of the June 1 hearing, this Court reiterated that the same issues presented in this case were addressed in previous court cases:

And I'm going to add one final conclusion here. You know, after reviewing the issues raised in these cases and preparing for these hearings, as I had mentioned earlier, I went back and reviewed the numerous opinions that have been addressed by this Court where substantially the same if not the same issues were raised in the context of conjunctive management delivery calls, including this same delivery call brought by the Surface Water Coalition. The issues are not new, and my reading of the prior decisions explicitly sets forth and reiterates the overriding principles that govern these types of matters. And I'm aware in every single one of those, parties attempt to distinguish that particular set of circumstances to justify the requirement of exhausting administrative remedies. But the issues raised -- and based on my review, the issues raised today in these cases are no different. And these include that the director's statutorily charged with administering water in priority; time is of the essence in responding to delivery calls; the director must act quickly to avoid injury to senior rights; due process is required but must account for the exigencies of the circumstances; the director has discretion in limiting the scope and timing of the hearings; and unless a statute or rule otherwise provides for a hearing, the director may issue an order and conduct a hearing after issuance of the order.

Baxter Decl. Ex. B, at 11–12.

Because Petitioner’s arguments are “not new” and the issues raised “in these cases are no different” from the issues raised in previous cases, the Ground Water Districts have acted without a reasonable basis in law warranting fees under Idaho Code § 12-117. Attorney fees are properly awarded against a party for raising

questions which are “not novel” and “governed by clear Idaho precedent.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 138 Idaho 611, 614, 67 P.3d 90, 93 (2003).

B. Idaho Code § 12-121.

Idaho Code § 12-121 provides that:

In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation. This section shall not alter, repeal or amend any statute that otherwise provides for the award of attorney’s fees. The term “party” or “parties” is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

In this case, the Ground Water Districts’ *Petition for Judicial Review* and corresponding motion were, for the reasons addressed above, frivolous and without foundation warranting fees under Idaho Code § 12-121. “The standard for awarding attorney fees under Idaho Code section 12–121 is essentially the same as that under Idaho Code section 12–117.” *Coeur D’Alene Tribe v. Denney*, 161 Idaho 508, 525, 387 P.3d 761, 778 (2015). For the reasons cited above, the Department is entitled to its reasonable attorney fees under Idaho Code § 12-121.²

II. The Department’s requested attorney fees are reasonable.

The Department seeks \$8,440.00 in attorney fees. The Department’s request

² While the Department believes Idaho Code § 12-117 is the appropriate code section for an award of attorney fees in this case, the Department also cites Idaho Code § 12-121 out of an abundance of caution. See Stephen L. Adams, *Which Statute Applies? An Update on Attorney Fee Statutes in Governmental Entity Cases*, 66 Advocate 26, 29 (2023) (“[B]ecause it is unclear which statute may apply, the practitioner should ask the court for findings under each potential statute.”).

is reasonable. I.R.C.P. 54(e)(5) advises that, when allowed by a statute, attorney fees are processed in the same manner as costs and included in the memorandum of costs. I.R.C.P. 54(e)(3)(A)–(L) provides that when the court grants attorney fees, it must consider the following in determining the amount of such fees: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law; the prevailing charges for like work; whether the fee is fixed or contingent; the time limitations imposed by the client or the circumstances of the case; the amount involved and the results obtained; the undesirability of the case; the nature and length of the professional relationship with the client; awards in similar cases; the reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case; and (L) any other factor which the court deems appropriate in the particular case.

A. The time and labor required.

Undersigned counsel Garrick Baxter billed 24 hours for this case, and Pete Wood billed 12.2 hours. The hours are reasonable given that the Ground Water Districts improperly filed not only a *Petition for Judicial Review*, but also a *Motion for Stay*, *Motion for Injunctive Relief*, *Motion for Expedited Decision*, *Motion to Compel*, and *Motion for Order to Show Cause*.

B. The novelty and difficulty of the questions.

The legal questions at issue in this case were neither difficult nor novel.

C. The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

Undersigned counsel has been practicing law for 22 years, the majority of which have been in the arena of water law/water rights. Pete Wood has been practicing law for approximately 6 years but is inexperienced in water law.

D. The prevailing charges for like work.

Undersigned counsel Garrick Baxter charged \$250.00 per hour. Pete Wood charged \$200.00 per hour. Baxter Decl. at 3; *see also* Dep't's Mem. of Costs. While hard numbers are difficult to unearth, anecdotally \$250 and \$200 per hour is low for Idaho attorneys. For example, the website "contract counsel" advises that average attorney rates in Idaho are between \$195 - \$400.³ The Attorney General's Office is currently in the process of updating its attorney fees schedule.

E. Whether the fee is fixed or contingent.

The fees in this case were fixed at \$250 per hour for Garrick Baxter and \$200 per hour for Pete Wood. Baxter Decl. at 3; *see also* Dep't's Mem. of Costs.

F. The time limitations imposed by the client or the circumstances of the case.

The Department had adequate time to prepare and file responsive pleadings.

G. The amount involved and the results obtained.

Petitioners did not seek monetary damages. On June 2, 2023, the District

³ <https://www.contractsounsel.com/b/how-much-do-lawyers-cost>.

Court dismissed the Groundwater Districts' *Petition for Judicial Review* and issued a final *Judgement*.

H. The undesirability of the case.

This was not an undesirable case.

I. The nature and length of the professional relationship with the client.

Undersigned counsel Garrick Baxter has known and represented the Respondent for 19 years. Pete Wood has known and represented the Respondent for approximately 8 months.

J. Awards in similar cases.

Undersigned counsel is unaware of analogous cases and is thereby unaware of analogous awards.

K. The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

Undersigned counsel does not charge the Department for access to Westlaw.

L. Any other factor which the court deems appropriate in the particular case.

As noted above, the Ground Water Districts' premature *Petition for Judicial Review* was substantially similar to the "stack" of previous petitions filed by Petitioners—which this Court also summarily denied. *See* Baxter Decl. Ex. B, at 10–11 (citing inter alia "Order Dismissing Petition for Judicial Review in Ada County Case CV01-17-67, issued February 16, 2017; Order Dismissing Petition for Judicial Review in Ada County Case CV01-16-23173, also issued February 16, 2017;

and an Order Granting Motion to Dismiss in Jerome County Case CV27-22-945, issued December of 2022.”).

CONCLUSION

This Court should grant the Departments’ reasonable request for \$8,440.00 in fees. The Department is the prevailing party, and its fee request is more than reasonable. The Department is entitled to fees under Idaho Code § 12-117 and/or Idaho Code § 12-121 given that the Groundwater Districts’ *Petition for Judicial* and corresponding motions were frivolous and without a basis in law or fact.

DATED this 15th day of June 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



GARRICK L. BAXTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June 2023, I caused to be served a true and correct copy of the foregoing *Department's Brief in Support of Motion for Attorney Fees*, via iCourt E-File and Serve, upon the following:

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