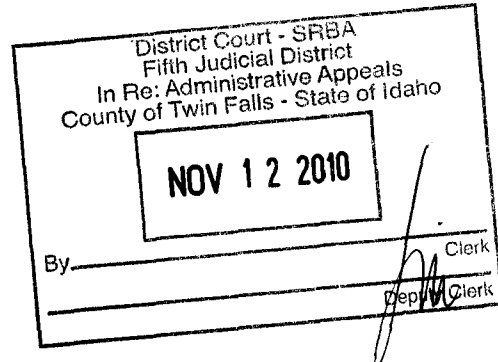


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Attorneys for the Respondents/Defendants

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

BLUE LAKES TROUT FARM,)
INC.,)
)
Petitioner/Plaintiff,)
)
vs.)
)
GARY SPACKMAN, in his official)
capacity as Interim Director of the Idaho)
Department of Water Resources,)
and the IDAHO DEPARTMENT)
OF WATER RESOURCES,)
)
Respondents/Defendants.)
_____)

Case No. CV-WA-2010-19823
MOTION FOR ATTORNEY FEES

COME NOW, Respondents/Defendants, Idaho Department of Water Resources and Gary Spackman, Interim Director of the Idaho Department of Water Resources, (collectively referred to as "Department") and submit this *Motion for Attorneys Fees* ("Motion"). This *Motion* is supported by the *Memorandum of Costs and Attorney Fees* and the *Affidavit of Garrick Baxter*, submitted herewith.

INTRODUCTION

The Department is entitled to its reasonable attorney fees in this matter. The very arguments raised by Blue Lakes Trout Farm, Inc. ("Blue Lakes") in its *Application for Peremptory Writ of Mandate* ("Application") were considered and rejected by Judge John Melanson in his *Order Granting in Part Motion to Enforce Orders*, Gooding County Case No. 2008-444 (May 12, 2010). Blue Lakes did not appeal or seek reconsideration Judge Melanson's decision. Instead, Blue Lakes attempted to relitigate the same issues in this proceeding, hoping this Court would give different answers to the same questions considered and rejected by Judge Melanson. As this Court recognized in its *Order Denying Application for Peremptory Writ of Mandate*, Blue Lakes failed to point to any exception or legal authority which would give this Court authority to issue a writ of mandate ordering the Department to address the issues raised and rejected before Judge Melanson. Because the Department has been forced to defend against an action that has no reasonable basis in law or fact, the Department is entitled to an award of its attorneys' fees pursuant to Idaho Code § 12-117.

FACTS AND PROCEDURAL HISTORY

On April 12, 2010, Blue Lakes filed a *Motion to Enforce Orders* with Judge John Melanson in Gooding County Case No. 2008-444 (commonly referred to as the Spring Users'

delivery call case). Blue Lakes sought an order from Judge Melanson requiring IDWR to allow Blue Lakes to present “evidence of updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes’ water rights.” *Motion to Enforce Orders* at 4. Specifically, Blue Lakes wanted to present evidence regarding the trim line and the modeling results. In response, Judge Melanson held that the Department was not required to relitigate issues already determined and not remanded back to the Department. Judge Melanson found Blue Lakes’ request to be outside the scope of his jurisdiction:

This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction to “take any action or enter any order required for the enforcement of any judgment, order or decree.” While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders*. The prior *Orders* affirmed the Director’s use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand.

Gooding County Case No. 2008-444, *Order Granting in Part Motion to Enforce Order*, p. 3 (May 11, 2010).

While Judge Melanson rejected Blue Lakes’ request to relitigate the issues of trim line and spring allocation, he did order the Department to move forward on the issue of seasonal variability. *Order Granting in Part Motion to Enforce Order* at 4. In response to Judge Melanson’s Order, the Department issued its order on seasonal variability on July 19, 2010 (“*Seasonal Variability Order*”). The parties filed petitions for hearing on the Order soon after. The Department agreed that a hearing should be held and issued an order setting the hearing. Consistent with Judge Melanson’s *Order Granting in Part Motion to Enforce Order*, the Department’s order setting the hearing included language restricting the ability of Blue Lakes and Clear Springs to relitigate the issues of 10% model uncertainty, the trim line, and ability of

the model to predict effect on a particular spring. *Order Setting Hearing Schedule and Order Limiting Scope of Hearing* at 4.

On October 12, 2010, Blue Lakes filed its *Application* with this Court. The *Application* sought the exact same relief that Blue Lakes sought before Judge Melanson. Blue Lakes asked this Court to issue an order “compelling [the Department] to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Plaintiff’s water rights... .” *Application* at 1. Under the guise of “new data”, Blue Lakes sought to revisit the same issues of the 10% model uncertainty, the trimline, or other issues related to the use or application of the ground water model. *Verified Complaint, Declaratory Judgment Action and Petition for Writ of Mandate* at 4 (“Plaintiff contends that its evidence provides a better technical basis for determining the extent of injury and mitigation obligation than the ‘trimline’ and ‘spring allocation’ determinations of the Director.”).

A hearing on the *Application* was held on October 28, 2010 and on October 29, 2010, this Court issued an order denying Blue Lakes’ *Application*, holding that a writ of mandate will not issue because Blue Lakes has a plain, speedy and adequate remedy at law. *Order Denying Application for Peremptory Writ of Mandate* at 3-4. Furthermore, the Court concluded that it lacked jurisdiction to issue the requested writ of mandate. The Court recognized that Blue Lakes’ *Motion to Enforce* raised the exact same issues that Blue Lakes raised in the *Application*: “Blue Lakes’ [Motion to Enforce] sought, among other things, to have the district court order the Director to permit Blue Lakes to present the same evidence which it now seeks this Court to order the Director to consider.” *Order Denying Application for Peremptory Writ of Mandate* at 5. This Court recognized that “in essence, Blue Lakes is asking this Court to modify Judge

Melanson's Order." *Id.* This Court concluded that Blue Lakes failed to point to any exception or legal authority which would allow the Court to issue the writ of mandate ordering the Department to address the issues raised and rejected before Judge Melanson. *Id.*

APPLICABLE STATUTE

Idaho Code § 12-117(1) 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.

STANDARD OF REVIEW

An award of attorney fees under Idaho Code § 12-117 is not discretionary. *Sunnyside Indus. and Professional Park, LLC v. Eastern Idaho Public Health Dist.*, 147 Idaho 668, 671, 214 P.3d 654, 657 (Idaho App. 2009) (citing *Rincover v. State, Dept. of Fin.*, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999)). Under Idaho Code § 12-117, the Court shall award attorney fees to a prevailing party if the Court finds that the nonprevailing party acted without a reasonable basis in fact or law. Idaho Code § 12-117(1); *In re Estate of Elliott*, 141 Idaho 177, 184, 108 P.3d 324, 331 (2005). The purpose of Idaho Code § 12-117 is two-fold: First, it serves as a deterrent to groundless or arbitrary action; and second, it provides a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges. *See Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343, (2004).

ARGUMENT

I. **THE DEPARTMENT IS ENTITLED TO ITS ATTORNEYS' FEES BECAUSE THE DEPARTMENT IS THE PREVAILING PARTY AND BLUE LAKES ACTED WITHOUT A REASONABLE BASIS IN FACT OR LAW.**

A prevailing state agency shall be awarded reasonable attorney's fees if the nonprevailing party acted without "a reasonable basis in fact or law." Idaho Code § 12-117(1). This sets up a two-part test. First, the Court must determine if the Department is the prevailing party. Second, the Court must determine if Blue Lakes acted without "a reasonable basis in fact or law."

A. The Department is the Prevailing Party.

In its *Application*, Blue Lakes asked this Court to issue a peremptory writ of mandate compelling the Department to allow Blue Lakes to revisit the issue of model uncertainty, the timeline, or other issues related to the use or application of the ground water model in the seasonal variability hearing. This Court denied Blue Lakes' *Application* on multiple grounds. There can be no question the Department is the prevailing party in this case.

B. Blue Lakes acted without a reasonable basis in fact or law.

Blue Lakes acted without a reasonable basis in fact and law because its *Application* sought to evade Judge Melanson's earlier decision on the same issues and constituted an improper attempt by Blue Lakes to shop its previously rejected arguments before a new court. The *Application* sought to relitigate the very same issues decided by Judge Melanson. Before Judge Melanson, Blue Lakes argued it should be allowed to present "evidence of updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Blue Lakes' water rights." *Motion to Enforce Orders* at 4. Judge Melanson,

rejected these arguments, holding that the Department was not required to relitigate issues already determined and not remanded back to the Department. Judge Melanson found Blue Lakes' request to be outside the scope of his jurisdiction:

This Court's *Orders* are currently on appeal to the Idaho Supreme Court and under Idaho Appellate Rule 13(b)(13), this Court has jurisdiction to "take any action or enter any order required for the enforcement of any judgment, order or decree." While this Court has jurisdiction to enforce its *Orders* on remand, this Court does not have jurisdiction to order action be taken outside the scope of the prior *Orders*. The prior *Orders* affirmed the Director's use of the trimline and the spring allocation determinations. Accordingly, neither is within the scope of the prior *Orders* on remand.

Gooding County Case No. 2008-444, *Order Granting in Part Motion to Enforce Order*, p 3 (May 11, 2010).

In the *Application* filed with this Court, Blue Lakes raised the exact same argument it raised before Judge Melanson. Blue Lakes asked this Court to issue an order "compelling [the Department] to consider updated, improved and/or new data, analysis and methods for determining the impact of junior ground water diversions on Plaintiff's water rights... ." *Application* at 1. The fact that Blue Lakes was simply attempting to relitigate decisions of Judge Melanson was recognized by this Court when it stated that Blue Lakes' *Application* seeks the "exact same relief which Judge Melanson concluded that he did not have jurisdiction over" because the issues were on appeal to the Idaho Supreme Court. *Order Denying Application for Peremptory Writ of Mandate* at 5. In its Order, this Court recognized that the filing of the *Application* was an improper attempt by Blue Lakes to get around Judge Melanson's decision: "In essence, Blue Lakes is asking this Court to modify Judge Melanson's Orders." *Id.* The Court held that Blue Lakes was legally precluded from raising the same issues again and rejected

Blue Lakes attempts to shop for a new decision: “Judge Melanson’s ruling is not only law of the case, but this Court concurs with the ruling.” *Id.*

An award of attorney’s fees under Idaho Code § 12-117 is appropriate where a party cannot point to authority authorizing a court to take jurisdiction of a case. In *Giltner Dairy, LLC v. Jerome County*, the Idaho Supreme Court held that the award of attorney fees to Jerome County under Idaho Code § 12-117 was appropriate where the dairy “could not point to any statute authorizing judicial review.” *Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008)(partially overruled by *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 207 P.3d 149 (2009)¹). Similarly, as this Court recognized, Blue Lakes cannot point to any authority which authorizes this Court to take jurisdiction of the matters previously decided by Judge Melanson and currently on appeal to the Idaho Supreme Court. Blue Lakes is simply trying to relitigate the same issues before a new court. Here, instead of appealing Judge Melanson’s decision, Blue Lakes tried to get another court to second-guess Melanson’s decision by raising the exact same issues in another proceeding. Blue Lakes has no legal basis for forging the appropriate appeal process and then trying to get another court to rule on issues that are already law of the case in another proceeding. Blue Lakes provided no authority for overruling or modifying Judge Melanson’s order. Blue Lakes simply wanted a different answer and hoped that this Court would provide it. This backdoor attempt to relitigate the issues already decided by Judge Melanson is the very type of “groundless or arbitrary” action that Idaho Code § 12-117

¹ The award of attorney fees to Respondent Golf Ranch in *Giltner* was subsequently overruled by the Idaho Supreme Court in *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 207 P.3d 149 (2009). However, the Court in *Neighbors* did not reverse the award of attorney fees to Respondent Jerome County under Idaho Code § 12-117.

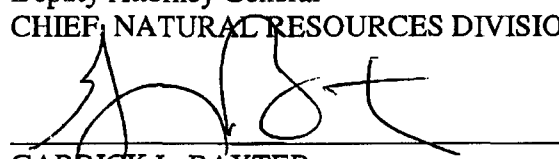
was created to serve as a deterrent against. Because Blue Lakes' actions in this case lack a basis in law or fact, the Department is entitled to its attorneys fees.

CONCLUSION

The State of Idaho does not as a matter of course request an award of attorney's fees in water right proceedings. The State decided to seek attorney fees here because of the frivolous nature of this action. As this Court recognized, Blue Lakes' *Application* is an attempt to revisit issues already decided by Judge Melanson and that Judge Melanson's ruling is law of the case. *Order Denying Application for Peremptory Writ of Mandate* at 5. Because the Department has been forced to expend money and resources to defend against this action that has no reasonable basis in law or fact, the Department is entitled to an award of attorneys fees pursuant to Idaho Code § 12-117.

DATED this 12th day of November, 2010.

LAWRENCE G. WASDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
CHIEF, NATURAL RESOURCES DIVISION




GARRICK L. BAXTER
Deputy Attorney General
Idaho Department of Water Resources

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of ~~October~~^{NOVEMBER}, 2010, I caused a true and correct copy of the foregoing MOTION FOR ATTORNEYS' FEES to be filed with the Court and served on the following parties by the indicated methods:

<p><i>Original to:</i> SRBA Court 253 3rd Ave. North P.O. Box 2707 Twin Falls, ID 83303-2707</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Email
<p>Daniel V. Steenson Charles L. Honsinger S. Bryce Farris RINGERT LAW CHARTERED 455 South 3rd P.O. Box 2773 Boise, ID 83701-2773 dan@ringertclark.com clh@ringertclark.com bryce@ringertclark.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com flt@idahowaters.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

<p>Jeffrey C. Fereday Michael C. Creamer Michael P. Lawrence GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jeffereday@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Michael S. Gilmore Deputy Attorney General Idaho Attorney General's Office P.O. Box 83720 Boise, ID 83720-0010 (208) 334-2830 mike.gilmore@ag.idaho.gov</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Justin May MAY SUDWEEKS & BROWNING LLP 1419 W. Washington Boise, ID 83702 jmay&may-law.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Robert E. Williams WILLIAMS MESERVY LOTHSPREICH LLP 153 E. Main St. P.O. Box 168 Jerome, ID 83338-0168 rewilliams@cableone.net</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Allen Merritt Cindy Yenter IDWR -Western Region 1341 Fillmore St., Ste 200 Twin Falls, Id 83301-3033 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email


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