

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)	
AMENDMENT OF PERMIT NO. 63-12448)	
IN THE NAME OF THE CITY OF EAGLE)	FINAL ORDER DENYING
_____)	REQUESTS FOR COSTS
	AND ATTORNEYS FEES

The Estate of Eleanor I. Chase (“Chase”) filed *Memorandum of Costs and Attorney Fees* pursuant to Idaho Code § 12-117(1) and Idaho Rules of Civil Procedure 54(d) and (e) and *Brief in Support of Request for Attorney Fees and Costs Pursuant to I.C. § 12-117(1)*. In its brief, Chase also requested a hearing. The Director of the Idaho Department of Water Resources (“Director” or “Department”) denies Chase’s request for hearing and also denies Chase’s request for costs and attorneys fees. The Director determines that the City of Eagle (“Eagle”) acted with reasonable basis in fact and law in filing and pursuing its application for amendment. The Director further concludes that based on the recent Idaho Supreme Court opinion in *Rammell v. Idaho State Department of Agriculture*, No. 34927, ___ P.3d ___, 2009 WL 1507748 (Idaho, June 1, 2009) he is without authority to award attorney fees under I.C. § 12-117. The Director also denies Eagle’s requests for costs and attorneys fees in responding to Chase’s request.

BACKGROUND

An application to amend water right permit no. 63-12448 was filed by Eagle and became a contested case when protests were filed against the application for amendment. Chase was one of the protestants. The application for amendment sought to add two points of diversion to water right permit no. 63-12448.

The primary issue before the Department was whether pumping from one or both of the new points of diversion would injure other water rights. The Department reviewed information about several water rights held by Chase and determined, based on expert testimony and evidence, that the proposed diversion of ground water by Eagle would injure two water rights held by Chase for its “dairy-domestic well.” There was insufficient information available to determine whether a third water right held by Chase for its “small irrigation well” would be adversely affected by Eagle’s proposed diversion of ground water, and the Department determined that a fourth water right held by Chase for its “large irrigation well” would not be injured.

On October 6, 2005, Chase filed its request (“Request”) for costs and attorneys fees composed of *Memorandum of Costs and Attorney Fees*; *Brief in Support of Request for Attorney Fees and Costs Pursuant to I.C. § 12-117(1)*; *Affidavit of Charles L. Honsinger in Support of Memorandum of Costs and Fees*; and *Affidavit of Matt J. Howard in Support of Memorandum of Costs and Fees*. In its Request, Chase asserts that it was the prevailing party in the contested case and argues that it is entitled to costs and attorneys fees in accordance with Idaho Code § 12-117(1).

On October 19, 2005, Eagle filed its *Objection to Memorandum of Attorneys Fees and Costs* (“Objection”). In its Objection, Eagle asserts that Chase should not be entitled to an award of costs and attorneys fees because Chase was not the prevailing party and that Chase’s Request is frivolous. In the final sentence of its Objection, Eagle states that it “should be awarded the attorneys fees and costs it incurred in responding to Protestant’s frivolous motion.” Objection at p. 9. On November 14, 2005, Chase filed a *Response to Objection to Memorandum of Attorneys Fees and Costs* (“Response”).

AUTHORITY TO AWARD ATTORNEY FEES

Generally an administrative agency does not have authority to award costs and attorneys fees unless specifically authorized by statute or agreement between the parties. *See Idaho Power Company v. Idaho Public Utilities Commission*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981). Until recently, Idaho Code § 12-117(1) was construed to provide a narrow statutory exception to the general rule. Under this statute a court is authorized to award attorneys fees and other expenses to private parties who prevail in litigation with certain governmental entities. Idaho Code § 12-117(1) states:

(1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorneys fees, witness fees, and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

In 1989, the Idaho Supreme Court held that the authority to award fees and expenses under Idaho Code § 12-117(1) rests not only with a court, but also with an administrative agency. *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 822-823, 771 P.2d 41, 43-44 (1989). This reading was supported by subsequent case law. *See Ockerman v. Ada County Board of Commissions*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Ct. App. 1997); *Reardon v. Magic Valley Sand and Gravel, Inc.*, 140 Idaho 115, 118, 90 P.3d 340, 343 (2004).

Chase argues it is the prevailing party because, in approving the application, the Director found that the proposed diversion of water would injure water rights held by Chase. In contrast, Eagle contends it is the prevailing party because the Department approved its application to amend water right permit no. 63-12448. In this case, Eagle appropriately filed an application to amend an existing water right permit to serve its expanding needs. Eagle hired an expert who gave testimony presented at the hearing that ground water withdrawals from the proposed Eagle wells would reduce ground water levels at the Chase wells. The expert witnesses hired by Eagle and Chase essentially agreed regarding the potential impact of the proposed diversion of water by Eagle, although whether the existing pumping facilities at two of the wells owned by Chase were currently fully functional was at issue. The Director concludes that Eagle had a reasonable basis in fact and in law for pursuing its claims.

The Idaho Supreme Court's 1989 opinion in *Stewart* holding that an administrative agency has authority under Idaho Code § 12-117(1) to award attorney fees and expenses was reversed by the Court in *Rammell v. Idaho State Department of Agriculture*, No. 34927, ___ P.3d ___, 2009 WL 1507748 (Idaho, June 1, 2009). In reversing *Stewart* the Court in *Rammell* held:

There are two reasons to revisit *Stewart's* holding. First, we must assume that the Legislature meant what it said when it authorized the "court" to award attorney fees under the statute. If the Legislature had intended for administrative officers or agencies to award attorney fees, it would have been easy enough to insert such wording into the statute. Further, the language indicates that the award may be made where the court finds that the party against whom the "judgment" is rendered acted without reasonable basis in fact or law. The decision of an administrative officer or agency is not properly characterized as a judgment-only courts render judgments. We therefore overrule *Stewart* and hold that only a court-and not an administrative officer or agency-can award attorney fees under I.C. § 12-117.

Rammell, ___ P.3d at ___, slip op. at 9-10. Based on the holding in *Rammell*, the Director has no authority to award attorney fees under I.C. § 12-117.

In the final sentence of its Objection, Eagle states that it “should be awarded the attorneys fees and costs it incurred in responding to [Chase]’s frivolous motion” for costs and attorneys fees. Objection at p. 9. Eagle does not cite a rule or statute as a basis for its claim. The Director has no basis or authority to award costs and attorneys fees to Eagle in responding to Chase’s Request.

ORDER

IT IS HEREBY ORDERED that the request for costs and attorneys fees, filed by the Estate of Eleanor I. Chase, is DENIED.

IT IS FURTHER ORDERED that the request for costs and attorneys fees, filed by the City of Eagle in responding to the Estate of Eleanor I. Chase’s request for costs and attorneys fees, is DENIED.

IT IS FURTHER ORDERED that this is a final order of the Director issued pursuant to Idaho Code § 67-5246 and IDAPA 37.01.01.740. The available procedures and applicable time limits for seeking reconsideration or other relief are set forth in the accompanying sheet entitled “Explanatory Information to Accompany a Final Order” incorporated herein by reference.

Dated this 30th day of June, 2009.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of June, 2009, a true and correct copy of the above and foregoing document described below was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order Denying Requests for Costs and Attorneys Fees

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