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District Court - SRBA
 Fifth Judicial District
 In Re: Administrative Appeals
 County of Twin Falls - State of Idaho

MAR - 9 2016

By _____ Clerk
 _____ Deputy Clerk

Attorneys for the Ditch Companies

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

BALLENTYNE DITCH COMPANY; et al.;

Petitioners,

vs.

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

Respondents.

**Case No. CV-WA-2015-21376
 (Consolidated Ada County Case
 No. CV-WA-2015-21391)**

**REQUEST FOR REASONABLE
 ATTORNEY FEES AND COSTS ON
 JUDICIAL REVIEW**

**IN THE MATTER OF ACCOUNTING FOR
 DISTRIBUTION OF WATER TO THE FEDERAL
 ON-STREAM RESERVOIRS IN WATER
 DISTRICT 63**

**Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County
 Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton
 Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation
 District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District,
 Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company (the
 "Ditch Companies"), by and through undersigned counsel of record and pursuant to Idaho Rule**

**REQUEST FOR REASONABLE ATTORNEY
 FEES AND COSTS ON JUDICIAL REVIEW - 1**

of Civil Procedure 84, Idaho Appellate Rules 35 and 41, and this Court's *Procedural Order Governing Judicial Review of Final Order of Director of Idaho Department of Water Resources* (Dec. 23, 2015) ("*Procedural Order*"), hereby submit this request for reasonable attorney fees and costs on judicial review and any subsequent appeal, if any, to the extent such request and argument is required in the parties' opening briefs under Civil Rule 84(r). The Ditch Companies seek their reasonable fees and costs under Idaho Code Section 12-117.

Though Civil Rule 84 does not contain an express attorney fees and costs provision within it, Rule 84(r) provides that any procedure not covered under the Rule shall then be covered as provided under the Idaho Appellate Rules. *Id.* The Court's *Procedural Order* further references and incorporates Idaho Appellate Rules 35 and 36 regarding the organization and content of the parties' briefing in this matter.

To the extent the Ditch Companies were required to present a fee request upon open, they do so now albeit (arguably) one day late. The Ditch Companies respectfully request that the Court consider this fee request and the argument that follows as though the same were included in their opening brief filed yesterday afternoon. Given the immediate correction of this potential omission, respondents should not be prejudiced in their ability to meaningfully respond given their receipt of opening briefs within the last twenty-four (24) hours.

Idaho Code Section 12-117(1) authorizes courts to award prevailing parties reasonable attorney fees and costs in actions involving as adverse parties a state agency or a political subdivision and a person upon finding that the non-prevailing party acted "without a reasonable basis in fact or law." *Id.* The Idaho Department of Water Resources meets the "state agency" definition of the statute. IDAHO CODE § 12-117(5).

In this matter, the Ditch Companies submit that the Director of the Idaho Department of Water Resources acted without a reasonable basis in fact or law in both his conduct of the contested case proceeding and in the ultimate decision reached in his *Amended Final Order*. The Director repeatedly abused his Presiding Officer status by, among other things, failing to disqualify himself, allowing the Department to participate as an adversarial party, by failing to avoid impermissible *ex parte* communications, by abusing the use of "official notice," and by circumventing the formal rulemaking requirements of IDAPA. As a creature of statute, the Department is strictly confined to acting consistently with applicable statute and its own administrative rules. *Arrow Transportation Co. v. Idaho Pub. Utilities Comm'n*, 85 Idaho 307, 379 P.2d 422 (1963). Sections V.G through H of the *Ditch Companies' Opening Brief* chronicle in detail the Director's (and the Department's) statutory and rule-based failings and are incorporated by reference herein.

Further, and by way of summary, the Director's *Amended Final Order* is not grounded in fact or law because its "paper fill"-based construct violates and frustrates the core premise of Idaho water law: beneficial use. *See, e.g., Morgan v. Udy*, 58 Idaho 670 (1938) (citing the "two essentials" for appropriation under Idaho law, diversion and end beneficial use). Water that cannot be used to fulfill the express "irrigation from storage" element of the existing storage rights (the element that perfected the rights) cannot count against those rights because holding otherwise utterly frustrates the usufruct nature of the rights—let alone violates the congressionally approved and enacted joint reservoirs operating plan negotiated and implemented by the State of Idaho and the Department, among the other stakeholders. *See, e.g., Ditch Companies' Opening Brief*, Sections V.A. through F., incorporated by reference herein.

For the foregoing, the Ditch Companies submit that the Director (and the Department) acted without reasonable basis in fact or in law. They, therefore, respectfully request their reasonable attorney fees and costs incurred in this matter under Idaho Code Section 12-117.

DATED this 9th day of March, 2016.

SAWTOOTH LAW OFFICES, PLLC

By 

Andrew J. Waldera
Attorneys for the Ditch Companies

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2016, I caused a true and correct copy of the foregoing **REQUEST FOR REASONABLE ATTORNEY FEES AND COSTS ON JUDICIAL REVIEW** to be served by the method indicated below, and addressed to the following:

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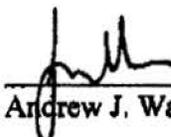
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