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DISTRICT COURT OF THE STATE OF IDAHO

FOURTH JUDICIAL DISTRICT

ADA COUNTY

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.

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

Case No. CV01-23-08187

Ground Water Districts' Brief in Opposition to Department's Motion for Attorney's Fees and Intervenors' Motion for Attorney Fees

IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

Idaho Ground Water Appropriators, Inc., Bingham Ground Water District, and Bonneville-Jefferson Ground Water District (collectively, the "Ground Water Districts") submit this brief in opposition to *Department's Motion for Attorney Fees* filed by the Idaho Department of Water Resources and its Director, Gary Spackman (collectively, the "Department"), and in opposition to *Intervenors' Motion for Attorney Fees* filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively, "Intervenors").

LEGAL STANDARD

The Department moves for fees pursuant to Idaho Code §§ 12-121 and 12-117(1), applying the standard of I.R.C.P. 54. Intervenors move for fees pursuant to I.C. § 12-117(1) only.

As to Idaho Code § 12-121, the Idaho Supreme Court recently ruled that fees are not available in "proceedings initiated by a petition for judicial review of an agency's final order." *3G AG LLC v. Idaho Dep't of Water Res.*, 170 Idaho 251, 267 (2022) (citing *Travelers Ins. Co. v. Ultimate Logistics LLC, (In re Idaho Workers Comp. Board)*, 167 Idaho 13, 24 (2020)).

Under Idaho Code § 12-117(1), a court may award fees to the prevailing party "if it finds that the non-prevailing party acted without a reasonable basis in fact or law." The purpose of this statute is to "(1) deter groundless or arbitrary agency action; and (2) to provide 'a remedy for persons who have borne an unfair and unjustified financial burden attempting to correct mistakes agencies should never have made.'" *Flying A Ranch, Inc. v. Cnty. Commissioners of Fremont Cnty.*, 157 Idaho 937, ___, 342 P.3d 649, 655–56 (2015) (internal citations omitted).

I. The Department and Intervenors waived claims of attorney fees on appeal.

Petitions for judicial review of agency action are governed by Idaho Rule of Civil Procedure 84. Rule 84 does not address claims for attorney fees. However, subsection (r) provides that any procedure not addressed by Rule 84 must be in accordance with the Idaho Appellate Rules. Appellate Rule 41 governs the procedure for seeking attorney fees:

> (a) **Application for Attorney Fees – Waiver.** Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5); provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.

The opening briefs filed by the Department and the Intervenors took the form of motions to dismiss. Neither the Department's motion and supporting brief nor the Intervenors' motion requests attorney fees. Therefore, both the Department and Intervenors have waived claims of attorney fees in this proceeding.

II. Intervenors are not adverse to the Department; therefore, they cannot seek fees or costs under Idaho Code § 12-117(1).

Intervenors' motion for fees relies solely upon Idaho Code § 12-117. However, fees are available to intervenors under this statute only if they are adverse to a state agency. *Sylte v. Idaho Dep't of Water Res.*, 165 Idaho 238, 247 (2019). In *Sylte*, the prevailing intervenors were denied fees because they sought to enforce Department determinations against an adverse party. *Id.* The Court explained, "While intervenors may request attorney fees under Idaho Code section 12-117, this statute still requires an entity and a state agency to be adverse parties." *Id*. (citing *Lake CDA Investments, LLC v. Idaho Dep't of Lands*, 149 Idaho 274, 284 (2010), *City of Blackfoot v. Spackman*, 162 Idaho 302, 310-11 (2017), and *Neighbors for Pres. of Big & Little Creek Cmty. v. Bd. of Cnty. Comm'rs of Payette Cnty*., 159 Idaho 182, 191 (2015).

Like the intervenors in *Sylte*, the Intervenors here are not adverse to the Department. Rather, they simply supported the Department's enforcement of the *Fifth Methodology Order* against the Ground Water Districts and the Department's opposition to the procedural remedies sought by the Ground Water Districts. Therefore, their motion for fees should be denied.

III. The procedural and discovery issues raised in *Ground Water Districts' Petition for Judicial Review* have a reasonable basis in fact and law.

The *Ground Water Districts' Petition for Judicial Review* sought judicial review of two procedural issues, on which the Director had made a final decision, and for which exhaustion of administrative remedies was futile: (1) the Director's issuance of the *Fifth Methodology Order* without holding a prior evidentiary hearing, despite there being no emergency requiring immediate action, followed by a rushed after-the-fact hearing that did not afford adequate time to properly address all of the issues; and (2) the Director's issuance of orders that blocked the

parties from discovering relevant information possessed by the Department and from presenting such information as evidence at the after-the-fact hearing, based apparently on claim of "deliberative process privilege."

The Ground Water Districts raised these issues with the Director prior to seeking judicial review. The Director denied motions for reconsideration and invited the parties to seek judicial review, stating: "if the parties disagree with that timing, if they think that I'm not affording them due process, then I think there is an alternative route, if the parties want to go there, to seek a stay from the courts and establish that in front of that Court that I'm not affording the parties due process." *Decl. of Thomas J. Budge in Supp. of Ground Water Districts' Br. in Opp. Dept.'s Mot. for Atty. Fees and Intervenor's Mot. for Atty. Fees*, Ex. A at p. 21.

Under the Idaho Administrative Procedures Act, "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy." Idaho Code § 67-5271(2). In addition, the Idaho Supreme Court has held that exhaustion of administrative remedies is not required "when the interests of justice so require." *Regan v. Kootenai Cty*., 140 Idaho 721, 725 (2004) (citing *Arnze v. State*, 123 Idaho 899, 906 (1993)).

With regard to the Director's orders blocking discovery and the presentation of relevant evidence at the hearing, these issues have not been addressed in prior delivery call cases. Moreover, they appear to be based on the assertion of a "deliberative process privilege" which does not exist in Idaho. Waiting until after the hearing was not an adequate remedy because: (1) these are not the types of errors that may be remedied at the hearing, since they prevented the parties from discovering and presenting relevant evidence; and (2) the motion to stay the hearing becomes moot after the hearing. Therefore, the Ground Water Districts did not act without a reasonable basis in law and fact in seeking immediate judicial review of these issues to address the unfairness of the scheduled hearing.

Regarding the Director's failure to hold an evidentiary hearing before issuing the *Fifth Methodology Order*, this case is factually very different from other cases where this Court required affected parties to exhaust administrative remedies before seeking review. Most of the prior cases required immediate action by the Department in order to distribute water. For instance, the original Surface Water Coalition (SWC) delivery call was urgent because the Department had to develop, for the first time, a SWC-tailored method for administering water

rights under the Conjunctive Management Rules. Similarly, the Wood River delivery call case involved water distribution under acute drought conditions where no methodology had been developed by the Department.

Other cases where the court required the parties to exhaust their right to a hearing before IDWR are distinguishable for other reasons. In Gooding County Case CV-2010-382, the court found that the Director's denial of the parties' request for a hearing under Idaho Code § 42-1701A did not violate due process because the parties were previously afforded an evidentiary hearing before Hearing Officer Schroeder, and Section 42-1701A is reserved for those who were previously denied an opportunity for hearing. *Memorandum Decision*, p. 35-36 (Sep. 9, 2014). Issues regarding discovery were not raised in that matter, and unlike here, those petitioners sought an additional post-order hearing before the Director. In Ada County Case CV01-16-23173 and CV01-17-67, the court found that where the parties sought review of the merits of the Director's order, without first conducting a post-order hearing under Idaho Code § 42-1701A to develop the evidentiary record, that the parties had not exhausted their administrative remedies. *See CV01-17-67 Order on Motion to Determine Jurisdiction and Order Dismissing Petition for Judicial Review* (Feb. 16, 2017). Unlike this present petition, Ground Water Districts did not ask the court to review the merits of the Director's orders or seek to develop the evidentiary record elsewhere; rather they sought either a pre-order or post-order agency hearing that allowed a reasonable amount of time for the parties to prepare. In Jerome County Case CV27-22-945, IGWA argued that a post-order hearing remedy was not necessary because interpreting the IGWA-SWC Settlement Agreement was outside the Director's statutory authority. The court held otherwise. *Order Granting Motion to Dismiss* (Dec. 8, 2022).

Here, there was no urgency or extraordinary situation that required the Director to issue the *Fifth Methodology Order* without first holding an evidentiary hearing. The methodology order simply defines the process of water distribution under the SWC call. While the Department's application of the process (i.e., implementation of the steps of the methodology) is time-sensitive based on contemporary water supply conditions, the process itself is not. The initial development of the methodology was time-sensitive because it was a prerequisite to water distribution, but subsequent revisions to the methodology are not. The Director can review and revise the methodology order at any time of year. There is no reason the Director could not have held an evidentiary hearing before issuing the *Fifth Methodology Order*, he simply elected not to.

As argued in the *Ground Water Districts' Brief in in Support of Motion for Stay, Motion for Injunctive Relief, Motion to Compel, Motion for Expedited Decision, and Application for Order to Show Cause*, in the absence of an emergency, both due process and the Idaho Administrative Procedures Act require the Director to hold a hearing before issuing orders in a contested case. Since there was no emergency that required issuance of the *Fifth Methodology Order* without a prior hearing, and since Idaho Code § 42-1701A(3) must be applied in a manner that preserves due process, the Ground Water Districts had a reasonable basis in asserting that the Director's process violated due process and the APA.

When an agency fails to comply with due process, courts may instruct the agency "to vacate the Final Order … and hold a new hearing that complies with due process." *Citizens Allied for Integrity & Accountability, Inc. v. Schultz*, 335 F. Supp. 3d 1216, 1230 (D. Idaho 2018). There is a huge difference between a new hearing that complies with due process and an after-the-fact hearing that does not. A new hearing provides a clean slate whereas an after-the-fact hearing is intrinsically biased toward justifying the pre-hearing order. Indeed, any significant change made after-the-fact shows that the initial order was mistaken. This naturally creates pressure on the Department not to make any significant changes, particularly where the initial order had enormous consequences. It would be extremely difficult for any human to admit an error that wrongly exposed hundreds of thousands of acres of farmland to curtailment and forced junior-priority groundwater users to needlessly spend millions of dollars renting storage for mitigation. Whether consciously or subconsciously, when a decision is made before a hearing is held, the evidence presented after-the-fact can no longer be viewed by the decisionmaker in a neutral manner, but with an aim to justify the original order. It is human nature. This is precisely why due process requires a hearing first, in the absence of an emergency or extraordinary circumstance requiring immediate agency action.

Given this reality, it was not unreasonable as a matter of law or fact for the Ground Water Districts to ask this Court to intervene and vacate the *Fifth Methodology Order* or, at a minimum, require the Director to afford due process in an after-the-fact hearing.

Conclusion

In *A&B Irrigation Dis v. Aberdeen-American Falls Ground Water Dist. (In re SRBA Case No. 39576)*, 141 Idaho 746 (2005), a claim for attorney fees was denied due to the presentation of "difficult and some previously unresolved issues." Similarly, fees were denied in Gooding

County Case No. CV-2005-600. *Order on Plaintiffs' Motion for Summary Judgment* (June 2, 2006), p. 126.

The Department's and Intervenors' motions for attorney fees should be denied because (i) they waived their fee claims pursuant to I.R.C.P. 84(r) and Idaho Appellate Rule 41, (ii) Intervenors are not adverse to the Department with respect to the *Ground Water Districts' Petition for Judicial Review*, and (iii) the procedural and discovery issues raised in the *Ground Water Districts' Petition for Judicial Review* had a reasonable basis in fact and law.

DATED this 29th day of June, 2023.

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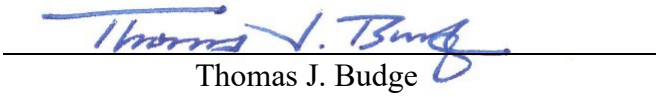
CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2023, I served the foregoing document on the persons below via email or as otherwise indicated:



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