

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov

Attorneys for Respondents

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

CITY OF POCATELLO, CITY OF IDAHO
FALLS, 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, BINGHAM
GROUND WATER DISTRICT, BONNEVILLE-
JEFFERSON GROUND WATER DISTRICT,
and MCCAIN FOODS USA, INC.,

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

A&B IRRIGATION DISTRICT, BURLEY
IRRIGATION DISTRICT, MILNER
IRRIGATION DISTRICT, NORTH SIDE
CANAL COMPANY, TWIN FALLS CANAL

Case No. CV01-23-08258

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

COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA IRRIGATION DISTRICT,

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 \$8,140.00.

BACKGROUND

On May 19, 2023, Petitioners filed *City of Pocatello, Coalition of Cities, City of Idaho Falls, Bonneville Jefferson Groundwater District, Bingham Groundwater District, and McCain Foods USA, Inc.* [“Cities”], *Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus* (“Complaint” or “Petition”).

On the same day, the Cities filed *Petitioners’ Motion for Order to Show Cause* (“Motion for Order to Show Cause”). In the motion, the Cities moved the Court “pursuant to Rule 72 of the Idaho Rules of Civil Procedure to compel Gary Spackman, Director of the Department of Water Resources, to appear and show

cause, if any he has, why the Court should not grant *Petitioners’ Petition for Writ of Prohibition* and *Petition for Writ of Mandamus* filed herewith.” *Motion for Order to Show Cause* at 2–3.

On May 23, 2023, the Cities filed *Petitioners’ Motion to Shorten Time for Hearing to Show Cause* (“Motion to Shorten Time”), wherein they “petition[ed] the [Court] to set a hearing on June 1, 2023, at 1:30 p.m. to allow Respondents to show cause, if any they may have, why this Court should not grant Petitioners’ Petition for Writ of Prohibition and Petition for Writ of Mandamus.” *Motion to Shorten Time* at 2–3.

On May 24, 2023, Petitioners filed their *Second Amended Notice of Hearing to Show Cause*, noticing a hearing for June 1, 2023, at 1:30 p.m.

On May 26, 2023, the Department filed *Respondents’ Motion and Supporting Points to Vacate Show Cause Hearing*.

On May 31, 2023, the Cities filed *Petitioners’ Response to IDWR’s Motion and Supporting Points to Vacate Show Cause Hearing*.

On June 1, 2023, the District Court held a 3.5-hour hearing. At the conclusion of the hearing the District Court orally dismissed the Cities’ application for writs of mandamus and prohibition. Baxter Decl. Ex. B, at 9. In doing so, the District Court advised among other things that:

[T]he Idaho Supreme Court has instructed and this Court has held on numerous occasions -- I went through and printed off every case where I have addressed mandamus with respect to delivery calls -- that a writ of mandate is not available to control discretionary acts of tribunals acting within their jurisdiction. A writ of prohibition is the counterpart to a writ of mandate... [and] the Idaho Supreme Court has made it clear,

it was never... the intention [that]... a writ should take the place of an appeal.

Baxter Decl. Ex. B, at 2–3.

On June 2, 2023, the District Court issued an *Order Denying Petition for Writ of Mandamus* [and] *Order Denying Petition for Writ of Prohibition* (“June 2 Order Denying Writs.”)

On June 7, 2023, Petitioners filed a *Notice of Dismissal* pursuant to I.R.C.P. 41(a)(1).

On June 14, 2023, the District Court issued an *Order on Notice of Dismissal* (“June 14 Order Denying Writs”), which advised the parties that the Court had dismissed the Cities’ Complaint, as well as a final *Judgement*.

ARGUMENT

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

A. 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.

This is a civil action as the Cities filed a complaint against the Department. *See* I.R.C.P. 3(b) (“A civil action must be commenced by filing a complaint, petition or application with the court.”) The Cities and the Ground Water Districts are

parties as they are political subdivisions of Idaho. Complaint ¶¶ 1–4. McCain Foods is a party because McCain Foods is a corporation. Complaint ¶ 5. The Department is the prevailing party as evidenced by this Court’s *June 2 Order Dismissing Writs*, *June 14 Order Dismissing Writs*, and final *Judgment* (also issued on June 14, 2023). 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 should award attorney fees under Idaho Code § 12-121 because the Cities’ writ applications were brought unreasonably and without foundation. In *Coeur d’Alene Tribe v. Denney*, the Idaho Supreme Court held that awarding attorney fees to the Petitioner (Tribe) in a writ of mandamus proceeding was proper given that the Respondent (Secretary of State) acted unreasonably by defending his refusal to perform a non-discretionary act. 161 Idaho 508, 524, 387 P.3d 761, 777 (2015).

Similarly, in this case the Cities sought extraordinary writs to compel the Director to perform purely *discretionary* acts, namely to vacate the June 6 hearing and amend his previous discovery rulings. *Motion for Order to Show Cause* at 3. Whether to continue the June 6–10 hearing is a discretionary decision by the Director. IDAPA 37.01.01.560 (“The presiding office *may* continue proceedings....”). Discovery rulings that limit the scope of discovery are likewise discretionary. IDAPA 37.01.01.521 (“The presiding officer *may* limit the type and scope of

discovery.”) The Cities’ writ application is frivolous and without foundation because writs of mandamus or prohibition “can issue only in matters where there is *no discretion to be exercised.*” *State v. Dist. Ct. of Fourth Jud. Dist.*, 143 Idaho 695, 700, 152 P.3d 566, 571 (2007) (emphasis added).

Similarly, extraordinary writs are only permissible when the petitioner lacks an adequate alternative remedy. *Beck v. Elmore Cty. Magistrate Court (In re Writ of Prohibition)*, 168 Idaho 909, 928, 489 P.3d 820, 839 (2021). The Cities had numerous alternative remedies, most notably the June 6 hearing and thereafter the right to seek judicial review. Petitioners’ writ applications were frivolous and without foundation because extraordinary writs are not a substitute for the appeal process. *Smith v. Young*, 71 Idaho 31, 34, 225 P.2d 446, 468 (1950); *see also* Baxter Decl. Ex. B, at 2–3.

2. 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.

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 Idaho Code § 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 Cities’ writ applications, for the reasons addressed above, lacked any basis in law or fact warranting fees under Idaho Code § 12-117. “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*, 161 Idaho at 525, 387 P.3d at 778.

II. The Departments’ requested attorney fees are reasonable.

The Department seeks \$8,140.00 in attorney fees. The Department’s request 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(3)(A)–(L) provides that when the court grants attorney fees in a civil case, 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 any other factor which the court deems appropriate in the particular case.

A. The time and labor required.

Undersigned counsel Garrick Baxter billed 18 hours for this case, and Pete Wood billed 18.2 hours. The hours are reasonable given the novelty of writs and the procedural errors committed by the Cities in setting their own show cause hearing. *“If the court finds that an application makes a prima facie showing for an order commanding a person to do or refrain from doing specific acts... the court must enter an order to show cause...”* I.R.C.P. 72(a) (emphasis added).

B. The novelty and difficulty of the questions.

The legal questions at issue in this case were not difficult or novel, but there were some thorny procedural questions that required additional research and drafting.

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 was performed in the arena of water law/water rights. Pete Wood has been practicing law for approximately 6 years but is inexperienced in the arena of water law/water rights. Mr. Wood does, however, have previous experience litigating

writs of prohibition and mandamus.¹

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 2–3; *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 - \$400.² 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 fee in this case was fixed at \$250 per hour for Garrick Baxter and \$200 per hour for Pete Wood. Baxter Decl. at 2–3; *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.

The Cities did not seek monetary damages. On June 2, 2023, the District Court issued an Order dismissing the Cities’ petitions for writs of mandamus and prohibition. The Court issued a Final Judgment on June 14, 2023.

¹ *See Beck v. Elmore Cty. Magistrate Court (In re Writ of Prohibition)*, 168 Idaho 909, 928, 489 P.3d 820, 839 (2021); *see also* Order Granting Verified Petition for Writ of Mandamus, *Prentiss v. Tate*, No. CV44-22-0021 (Washington County Dist. Ct. Idaho February 4, 2022) (sued in is official capacity as Weiser City Clerk).

² <https://www.contractscounsel.com/b/how-much-do-lawyers-cost>.

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 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 Cities' extraordinary writ applications are not just legally unsound, but also directly conflict with previous orders by this Court and the Idaho Supreme Court:

[T]he Idaho Supreme Court has instructed and this Court has held on numerous occasions -- I went through and printed off every case where I have addressed mandamus with respect to delivery calls -- that *a writ of mandate is not available to control discretionary acts of tribunals acting within their jurisdiction*. A writ of prohibition is the counterpart to a writ of mandate... [and] the Idaho Supreme Court has made it clear, it was never... the intention [that]... a writ should take the place of an appeal.

Baxter Decl. Ex. B, at 2–3 (emphasis added).

CONCLUSION

This Court should grant the Departments' reasonable request for \$8,140.00 in fees. The Department is the prevailing party and its fee request is more than reasonable. The Department is entitled to attorney fees under I.A.R. 5(g); or in the alternative, fees are warranted under Idaho Code § 12-121 and/or Idaho Code § 12-117 given that the Cities' writ applications 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:

Sarah A. Klahn
Maximilian C. Bricker
SOMACH SIMMONS & DUNN, P.C.
sklahn@somachlaw.com
mbricker@somachlaw.com

Candice M. McHugh
Chris M. Bromley
MCHUGH BROMLEY, PLLC
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Robert L. Harris
HOLDEN KIDWELL HAHN & CRAPO
efiling@holdenlegal.com

Skyler C. Johns
Nathan M. Olsen
Steven L. Taggart
OLSEN TAGGART PLLC
icourt@olsentaggart.com

Dylan Anderson
DYLAN ANDERSON LAW
dylan@dylanandersonlaw.com

John K. Simpson
Travis L. Thompson
MARTEN LAW LLP
jsimpson@martenlaw.com
tthompson@martenlaw.com

W. Kent Fletcher
FLETCHER LAW OFFICE
wkf@pmt.org



GARRICK L. BAXTER
Deputy Attorney General