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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.

Case No. CV01-23-8258

IDWR Docket No. CM-DC-2010-001

MEMORANDUM BRIEF IN SUPPORT OF PETITIONERS' MOTION TO DISALLOW COSTS AND FEES SOUGHT BY IDWR AND SWC

IDAHO DEPARTMENT OF WATER RESOURCES, and GARY SPACKMAN, in his capacity as 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 COMPANY, AMERICAN FALLS RESERVOIR DISTRICT #2, and MINIDOKA IRRIGATION DISTRICT,

Intervenors.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR 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

COME NOW Petitioners, the City of Pocatello; the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell ("Coalition of Cities"); the City of Idaho Falls (collectively the "Cities"); Bingham Ground Water District; Bonneville-Jefferson Ground Water District (collectively the "GWDs"); and McCain Foods USA, Inc. ("McCain") (collectively, the "Cities/GWDs/McCain" or "Petitioners"), by and through their respective attorneys of record, and hereby submit this *Memorandum Brief in Support of Motion to Disallow Attorney's Costs and Fees Sought by*

IDWR and SWC ("Memorandum") pursuant to Idaho Rules of Civil Procedure ("I.R.C.P.") 54(d)(5) and 54(e)(6).

INTRODUCTION

This *Memorandum* responds to the *Department's Motion for Attorney Fees* and *Memorandum of Costs* filed by the Idaho Department of Water Resources ("IDWR" or "Respondents") on June 15, 2023, as well as the *Intervenors' Motion for Attorney Fees* and *Declaration of Travis L. Thompson and Memorandum of Attorney Fees and Costs,* filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company , and *Intervenors Minidoka Irrigation District's and American Falls Reservoir District #2's Memorandum of Costs and Disbursements and Claim for Attorney's Fees*, (collectively, "Intervenors" or "SWC"), filed on June 16, 2023.

The Court should disallow all of the attorney costs and fees requested for the following reasons: (1) neither IDWR nor SWC are entitled to costs or fees as they did not prevail; and (2) in any event, the Cities/GWDs/McCain's claims were not frivolous, unreasonable, or without foundation. Further, SWC's reliance solely on Idaho Code § 12-117 is a basis to reject SWC's request altogether.

PROCEDURAL HISTORY

The Cities/ GWDs/McCain's filed their *Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus* ("Complaint") in this matter on May 19, 2023. On May 31, 2023, the Intervenors filed *Surface Water Coalition's Motion to Intervene/Motion to Shorten Time*. On June 1, 2023, the Court held a hearing on various motions filed by the parties. On June 2, 2023, the Court issued its *Order Granting Motion to Intervene* as well as its *Order Denying Petition for Writ of Mandamus and Order Denying Petition for Writ of*

Prohibition. On June 7, 2023, the Petitioners filed their *Notice of Dismissal*, thereby voluntarily dismissing the action without prejudice under I.R.C.P. 41(a)(1). On June 14, 2023, the Court issued its *Order on Notice of Dismissal* and *Judgment*. The Respondents and the Intervenors filed their motions and Memoranda of Costs, along with accompanying documents, on June 15, 2023, and June 16, 2023, respectively.

ARGUMENT

I. Standards for Attorney's Fees Awards Under Idaho Code §§ 12-117 and 12-121.

IDWR moves for attorney's fees under two statutes, Idaho Code §§ 12-117 and 12-121; SWC argues for attorney's fees under only Idaho Code § 12-117.[1] Based on applicable Supreme Court decisions, both statutes impose broadly the same standards on litigants seeking fees: first, that fees are available only to prevailing parties, ***and*** second, that *all* of the claims made by the non-prevailing party against whom fees are sought must be "frivolous, unreasonable or without foundation"[2] or "without reasonable basis in factor or law"[3]. *Galvin v. City of Middleton*, 164 Idaho 642, 647, 434 P.3d 817, 822 (2019) (*Galvin)* ("The standard for awarding attorney fees under Idaho Code section 12-121 is essentially the same as that under Idaho Code section 12-117.") (internal citation omitted).

However, reliance on Idaho Code § 12-117 is of questionable value in this matter. Idaho Code § 12-117 was originally adopted—and has been amended over the years—to provide a means for state agencies and "persons" to recover attorney's fees in the context of agency actions

[1] SWC does cite to I.R.C.P. 54 in its motion, however, without supporting argument on the applicability of the standards under I.R.C.P. 54 (and by extension the statute Idaho Code § 12-121), SWC's claim under I.R.C.P. 54 fails. *Bailey v. Bailey (In re Estates of Bailey)*, 153 Idaho 526, 532, 284 P.3d 970, 976 (2012) ("the party seeking fees must support the claim with argument as well as authority") (internal citations omitted).
[2]The application of Idaho Code § 12-121 is limited by I.R.C.P. Rule 54 to circumstances where claims are found to be "frivolous, unreasonable or without foundation." *Telford Lands LLC v. Cain*, 154 Idaho 981, 993, 303 P.3d 1237, 1249 (2013) (internal citation omitted).
[3] Idaho Code § 12-117.

and judicial review of agency decision-making.[4] In *Flying "A" Ranch, Inc. v. County Comm'rs*, 157 Idaho 937, 943-44, 342 P.3d 649, 655-56 (2015) (internal citations omitted), the Supreme Court identified the dual purposes of Idaho Code § 12-117: "(1) to 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." The initial pleading in the captioned matter was a complaint, not a request for judicial review.

The avenue for an award of attorney's fees when a complaint is filed (i.e., a "civil action"), is Idaho Code § 12-121, not Idaho Code § 12-117. *See Laughy v. Idaho Dep't of Transp.*, 149 Idaho 867, 877, 243 P.3d 1055, 1065 (2010) ("A petition for judicial review is not a civil action, so fees are not available under § 12-121.") (internal citation omitted); *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 176 n.1, 207 P.3d 149, 152 n.1 (2009) ("it was error to award attorney fees pursuant to I.C. § 12-121 in connection with a petition for judicial review."); *Nw. Pipeline Corp. v. State*, 129 Idaho 548, 551, 928P.2d 898, 901 (1996) (ruling section 12-121 is inapplicable because "[a]ppeals from administrative rulings are not 'civil actions' for purposes of I.C. Section 12-121.") (internal citation omitted). Thus, IDWR's reliance on Idaho Code §12-117 should be rejected and SWC's request for attorney's fees should be denied outright, because of its reliance solely on Idaho Code § 12-117.[5]

[4] Ingrid Batey, *Attorney Fee Awards in Idaho: A Handbook*, 52 IDAHO L. REV. 583, 611-615 (2016).
[5] In this regard, SWC's reliance on the same brief in support of attorney's fees in the captioned matter and in CV01-23-8178 also has other problems insofar as it erroneously suggests that the Cities should have attorney's fees assessed against them because they have engaged in serial pre-hearing requests for relief. Of all the cities involved in the captioned matter, only Pocatello has previously sought pre-hearing relief from the district court, and that was seven years ago and related to the Director's 2016 Order designating the ESPA Ground Water Management Area.

II. IDWR is not a "Prevailing" Party[6]

The threshold issue in determining whether movants are entitled to costs and/or fees, under Rule 54 or statutory code sections, is whether they *prevailed*. "In 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." I.R.C.P. 54(d)(1)(B). "[T]he issue . . . is not who succeeded on more individual claims, but rather who succeeded on the main issue of the action." *Thornton v. Pandrea*, 161 Idaho 301, 315, 385 P.3d 856, 870 (2016) (quoting *Hobson Fabricating Corp. v. SE/Z Const., LLC*, 154 Idaho 45, 49, 294 P.3d 171, 175 (2012)).

> Mere dismissal of a claim without trial does not necessarily mean that the party against whom the claim was made is a prevailing party for the purpose of awarding costs and fees. . . . [t]hat a party [defeats] a single claim does not mandate an award of fees to the prevailing party on that claim.

Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc., 141 Idaho 716, 719, 117 P.3d 130, 133 (2005) (quoting *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 692-93, 682 P.2d at 645-46 (1984)).

An examination of the June 2, 2023 Order entered in this matter reveals only that the Court dismissed the requests for writs of mandamus and prohibition. The Court did not dismiss the matter altogether until the Cities/ GWDs/McCain filed a notice of dismissal under I.R.C.P. 41(a). Under Rule 41(a), the matter is dismissed "without prejudice," meaning that, if appropriate, the Cities/ GWDs/McCain could pursue the remaining, undecided claims in the context of judicial review of the Director's final order in the *Fifth Methodology Order* matter.

[6] Although the remainder of the brief argues against IDWR's claims for attorney fees, to the extent the Court rejects the arguments that SWC's claims fail due to its sole reliance on 12-117, all arguments should be assumed to apply against SWC's briefing as well.

However, neither the June 2 Order nor the June 14 Order on Notice of Dismissal renders IDWR a "prevailing" party.

Indeed, on numerous occasions Idaho courts have found that a party did *not* prevail when its adversary voluntarily dismissed the action. *See Jones v. Berezay*, 120 Idaho 332, 334-36, 815 P.2d 1072, (1991) (affirming trial court's denial of awarding costs and fees when the plaintiffs voluntarily dismissed action without prejudice); *Gibson v. Ada County Sheriff's Dep't*, 139 Idaho 5, 9, 72 P.3d 845, 849 (2003) ("[Defendant] has not prevailed on the merits in this matter. . . . [t]he matter is dismissed *without prejudice* and the [defendant] is not a prevailing party entitled to attorney fees or costs on appeal"); *Puckett v. Verska*, 144 Idaho 161, 170, 158 P.3d 937, 946 (2007) (affirming district court's denial of costs and fees "because no final judgment was entered after the first trial and [plaintiff's] indications for [] claim was dismissed without prejudice so she could still pursue it"); *Peterson v. Private Wilderness, LLC*, 152 Idaho 691, 697, 273 P.3d 1284, 1290 (2012) ("The district court acted within the boundaries of its discretion when it declared no prevailing party when granting [plaintiff's] motion for voluntary dismissal under I.R.C.P. 41(a)(2)"); *Kugler v. Bohus*, No. CV 08-151-E-EJL-CWD, 2009 U.S. Dist. LEXIS 84190, at *12-13 (D. Idaho Sep. 15, 2009) ("Generally, there is no prevailing party unless the merits of the lawsuit have been decided and there is a final judgment. . . . The distinction between a dismissal with or without prejudice is crucial . . .") (internal citations omitted); *Tyler v. Coeur d'Alene Sch. Dist.*, No. 2:21-cv-00104-DCN, 2022 U.S. Dist. LEXIS 48550, at *9-10 (D. Idaho Mar. 17, 2022) (denying costs under Fed. R. Civ. P. 54(d) because the defendant "was not the prevailing party as to the claims voluntarily dismissed in this case"); *but see Charney v. Charney*, 159 Idaho 62, 65, 356 P.3d 355, 358 (2015) ("A trial court has discretion to determine

whether there is a prevailing party. . . . A court can determine that a party is a prevailing party even when the proceedings against the party are dismissed without prejudice").

Because the Court did not pass on the claims for declaratory relief in the captioned matter, and because Petitioners voluntarily dismissed the captioned matter, the Court should find that IDWR is not a prevailing party.

III. Petitioners' Claims Were Not Frivolous, Unreasonable, or Without Foundation

The Court denied the Cities/ GWDs/McCain's request for writs of prohibition and mandamus. We lost. However, as *Berglund v. Dix* instructs: "Idaho Code section 12-121 does not equate a *losing* argument to a *frivolous* one." 170 Idaho 378, 390, 511 P.3d 260, 272; (2022). Courts consider the entirety of the litigation—if the non-prevailing party presented "at least one legitimate issue . . . attorney fees may not be awarded," even if it "asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Galvin,* 164 Idaho at 647. Similarly, "the award of fees pursuant to Idaho Code section 12-121 is inappropriate when a party 'in good faith raised issues of first impression.'" *Nordgaarden v. Kiebert*, 527 P.3d 486, 501 (Idaho 2023) (citing *Petrus Fam. Tr. Dated May 1, 1991 v. Kirk*, 163 Idaho 490, 503, 415 P.3d 358, 371(2018)).

Further, actions are not frivolous or unreasonable when the non-prevailing party raises "complex issues on appeal in good faith," and "submit[s] reasonable arguments in support of their position." *S Bar Ranch v. Elmore County*, 170 Idaho 282, 314, 510 P.3d 635 (2022); *Grace v. Jeppesen*, 519 P.3d 1227, 1235 (Idaho 2022).

> Determining whether the non-prevailing party had a "reasonable" argument in law requires, at a minimum, examining the legal arguments made, i.e., the *substance* of the non-prevailing party's arguments. . . . Holding otherwise . . . places a higher burden on litigants seeking to challenge questions of law—which this Court reviews *de novo*—than the language of section 12-117(1) supports. . . .

> Discouraging litigants from challenging the legal conclusions of an executive agency necessarily stunts our power to effectuate *de novo* review and determine what the law is with finality. . . . Legal challenges to the conclusions of law made by an agency, when not preordained by statute, case law, or rule, is a healthy impetus to motivating agencies into promulgating more helpful and gap-filling rules.

3G AG LLC v. Idaho Dep't of Water Res., 170 Idaho 251, 266-67, 509 P.3d 1180, (2022).

Here, Petitioners sought declaratory relief and writs of prohibition and mandamus to redress the harm from IDWR's limitation on discovery that asserted a "deliberative process" privilege that Idaho courts have specifically disavowed. *See Decision and Order* at 30, *Idaho Press Club, Inc. v. Ada County*, Case No. CV01-19-16277, (Idaho 4th Jud. Dist. Ada County., filed Dec. 13, 2019) ("There is no 'Deliberative Process' privilege in Idaho law"). IDWR has not pointed to any appellate decision in which a court has found that the scope of the Director's discretion to limit discovery is broader than what is contemplated under Idaho law, including erroneous imposition of limitations that prevented the parties in this case from seeking non-privileged information from individuals who deliberated with an agency head in crafting an agency order. While IDWR has good reason to try to keep this issue undefined, the reality is that the Director's picking and choosing what could and could not be discovered is arbitrary and capricious and an abuse of discretion, and an issue that is appropriate for consideration under judicial review. This issue was "legitimate" and raised "in good faith"; it is also arguably an "issue of first impression" in the context of an IDWR hearing.

Not only was there a question whether IDWR's restriction on discovery violated the rights of the parties, but for McCain, IDWR's lack of notice to junior water users who were non-parties to the SWC Delivery Call created a basis to seek extraordinary relief. As contained in the record before the Court, IDWR's April 21, 2023 *Final Order Regarding April 2023 Forecast Supply (Methodology Steps 1-3)* ("As-Applied Order") stated that "the Director will issue an

order curtailing the junior-priority ground water user." The letter to junior ground water users, and McCain specifically, stated that "a curtailment order is not stayed pending evaluation of a mitigation plan." Declaration of Candice M McHugh at ¶¶ 3, 6. The message was clear: the Director was going to curtail McCain, even if it submitted its own mitigation plan, and during the pendency of any hearing on that plan (which the Director stated "could take months") curtailment would not be suspended.

McCain ultimately was able to meet the May 5 deadline contained in the written orders to avoid curtailment, but the As-Applied Order was unlawful because it deprived McCain and others of notice. The due process claim (Complaint, Count II, ¶¶ 51-55) was in accord with prior holdings of this Court:

> A reasonable interpretation of the CMR reveals that curtailment of junior water rights should not occur until after the Director has an opportunity to review any mitigation plan submitted and conduct a hearing. . . . Curtailing junior water users pending the outcome of such a hearing circumvents the purpose of issuing mitigations plans in the first place.

A&B Irrigation Dist. v. Idaho Dairymen's Association, Inc., Case No. 2008-551, (Idaho Fifth Jud. Dist. Aug 23, 2010) ("*Idaho Dairymen's Assoc.*"), *Order on Petitions for Rehearing* at 11-12. *See also, Clear Springs Foods v. Spackman,* 252 P.3d 71, 97; 150 Idaho 790, 816 (2011); *Idaho Dairymen's Assoc.*, Case No. 2008-551, *Amended Order on Petitions for Rehearing; Order Denying Surface Water Coalition's Motion for Clarification* at 11-12 (Sept. 9, 2010). As with the discovery claim described above, this claim was made in good faith and not frivolous and does not form a basis for an award of fees.

CONCLUSION

For the reasons set forth above, the Petitioners move the Court to disallow all the costs and fees requested by the Movants.

Respectfully submitted 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 caused to be filed a true and correct copy of the foregoing document via iCourt E-File and Serve, and upon such filing, the following parties were served via electronic mail:

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