

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548
Email: wkf@pmt.org

*Attorney for American Falls Reservoir
District #2 and Minidoka Irrigation District*

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
MARTEN LAW LLP
163 Second Ave. West
P.O. Box 63
Twin Falls, Idaho 83303-0063
Telephone: (208) 733-0700
Email: jsimpson@martenlaw.com
tthompson@martenlaw.com

*Attorneys for A&B Irrigation District, Burley
Irrigation District, Milner Irrigation District,
North Side Canal Company, and Twin Falls
Canal Company*

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

IDAHO GROUND WATER
APPROPRIATORS, INC., ET AL.,

Petitioners,

vs.

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

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER
TO VARIOUS WATER RIGHTS HELD BY AND
FOR THE BENEFIT OF A&B IRRIGATION
DISTRICT, AMERICAN FALLS RESERVIOR
DISTRICT NO. 2, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION DISTRICT,
MINIDOKA IRRIGATION DISTRICT, NORTH
SIDE CANAL COMPANY, AND TWIN FALLS
CANAL COMPANY,

Intervenors.

Case No. CV01-23-8187

**JOINT BRIEF IN SUPPORT OF
AWARD OF ATTORNEY'S
FEES AND COSTS**

Comes now, A & B Irrigation District, American Falls Reservoir District No. 2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (“Coalition”), by and through counsel of record, and submit this Joint Brief in support of the Coalition’s Memoranda of Costs and supporting documents seeking an award of attorney’s fees. In the interest of judicial economy, and since the issues authorizing the award of attorney’s fees and costs are similar, identical Briefs are being filed in the *City of Pocatello, et al. v. IDWR* Case, CV01-23-8258 (referred to as “8258”) and *Idaho Ground Water Appropriators, Inc., et al. v. IDWR* Case, CV01-23-8187 (referred to as “8187”). Since the issues in the *City of Pocatello, et al. v. IDWR* Case, CV01-23-8306 were substantially identical and the hearings on all of the cases were combined, the Coalition is not seeking an award of fees and costs in CV01-23-8306.

BACKGROUND

On April 21, 2023, the Director of the Idaho Department of Water Resources (IDWR) filed a 5th *Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable in Season Demand and Reasonable Carryover and Final Order Regarding April 20, 2023 Forecast Supply (Methodology Steps 1-3)* (“Orders”). Anticipating that parties may seek a hearing on the Orders, the Director issued a Notice of Hearing, Notice of Pre-hearing Conference, and Order Authorizing Discovery on the same date. The hearing on the Director’s Orders was set for June 6 through 10, 2023. All of the ground water entities and the Coalition filed requests for hearing. The ground water entities filed Motions seeking a continuance which were denied.

On May 19, 2023, IGWA and two (2) of its affiliated ground water districts filed Case 8187 including a Petition for Judicial Review, Motion to Compel, Motion for Order to Show Cause, Motion for Stay, Motion for Injunctive Relief, Motion for Expedited Decision, and Brief.

Even though a hearing had not been held, the pleadings requested judicial review of the Director's Orders, requested that the Court order the Director to administer water rights under a prior methodology order, asked the Court to continue the hearing until a date into the future, asked the Court to order the Director to disclose documents and allow depositions of certain witnesses, asked the Court to prohibit the attorney for the Director to instruct IDWR deponents to not answer questions pertaining to the Director's deliberative process, and requested vacation of the Director's Notice of Hearing. The Briefs filed in support of the pleadings argued that the Director's Orders were issued in violation of due process and the APA, that exhaustion of administration remedies wasn't required, that the APA requires the Director to hold a hearing before issuing an order, that an emergency was required to issue an order before a contested hearing, and made arguments concerning the Director's duties concerning disclosure of documents and the Director's authority to restrict witnesses.

Also on May 19, 2023, the City of Pocatello and other cities, Bonneville Jefferson Ground Water District, Bingham Ground Water District, and McCain Foods USA, Inc. filed a Complaint for Declaratory Relief, Petition for Writ of Prohibition, and Petition for Writ of Mandamus. In addition, they filed a Motion for Order to Show Cause and a Notice of Hearing to Show Cause. The pleadings filed in the Pocatello Case differed slightly because the remedy requested was different, however, the grounds for relief are almost identical to the IGWA case. The Petitioners argued that they are not required to exhaust their administrative remedies before bringing a court action, that the Director's Orders do not comply with the APA, that the Director's proposed action violates due process, and that the Director's limit on the scope of discovery was unlawful.

The Coalition and IDWR opposed the relief being requested in all cases. The Court held an expedited hearing on the matters on June 1, 2023. At the conclusion of the hearing the Court

denied all requested relief and granted the Coalition's and IDWR's Motions to Dismiss. An Order Granting Motions to Dismiss and Judgment were entered in Case 8187 on June 2, 2023. On June 2, 2023 an Order Denying Petitions for Writ of Mandamus and Writ of Prohibition was entered in Case 8258, followed by a Voluntary Notice of Dismissal filed by the Petitioners on June 7, 2023 and an Order on Notice of Dismissal and Judgment on June 14, 2023.

STANDARD OF REVIEW

Whether attorney's fees should be awarded in this matter is governed by the language of Idaho Code § 12-117(1):

12-117. Attorney's fees, witness fees and expenses awarded in certain instances. (1) 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)

A recent Idaho Supreme Court case *3G Ag, LLC v. IDWR*, 170 Idaho 251, 509 P.3d 1180 (2022) addressed how to apply the language contained in Idaho Code § 12-117(1) against a request for an award of attorney's fees. In *3G Ag*, the Court held that the standard set forth in *Rangen, Inc. v. IDWR*, 159 Idaho 798, 367 P.3d 193 (2016) incorrectly rendered every nonprevailing legal argument per se unreasonable, regardless of its merits, and discouraged litigants from challenging conclusions of law made by agencies because doing so would require litigants to repeat the same legal argument until they receive a final answer from the Court. The Court returned to the standard set forth in *Castrigno v. McQuade*, 141 Idaho 93, 105 P.3d 419 (2005), which the Court stated focused on the substance of the nonprevailing arguments to determine whether there was a reasonable basis in law to make the arguments:

The reasonableness of a challenge to an agency's conclusions of law, when considering fees under Section 12-117(1), turns on the substance of the non-prevailing party's legal arguments – not on whether the arguments were merely repeated or repackaged from below.

3G Ag, 170 Idaho at 267, 509 P.3d at 1193

ARGUMENT

It is the position of the Coalition that, when applying the *Castrigno* standard, the arguments made by the Petitioners in both cases were made without a reasonable basis in fact or law and were contrary to multiple rulings by this Court in which some of the same participants were parties. Although seeking different remedies, the arguments made by the Petitioners revolved around lack of due process, the Director exercising unlawful restrictions on discovery, violations of the APA, including issuing an order before a hearing, and other similar arguments that have been made to this Court many times.

For example, in *Idaho Ground Water Appropriators, Inc. v. IDWR*, Jerome County Case CV27-22-00945, almost all of the same parties participated and the Petitioners requested almost identical relief. In the Order Granting Motion to Dismiss dated December 8, 2022, this Court found that the Court lacked jurisdiction under the doctrine of exhaustion and that due process does not require a predetermination hearing. Even though all of the same Petitioners, except McCains, were parties to that decision, they raised the same issues once again in cases 8187 and 8258.

At the conclusion of the hearing on June 1, 2023, after a lengthy analysis of prior cases, the Court issued an oral decision including the following language:

And I'm going to add one final conclusion here.

You know, after reviewing the issues raised in these cases and preparing for these hearings, as I had mentioned earlier, I went back and reviewed the

numerous opinions that have been addressed by this Court where substantially the same if not the same issues were raised in the context of conjunctive management delivery calls, including this same delivery call brought by the Surface Water Coalition. The issues are not new, and my reading of the prior decisions explicitly sets forth and reiterates the overriding principles that govern these types of matters. And I'm aware in every single one of those, parties attempt to distinguish that particular set of circumstances to justify the requirement of exhausting administrative remedies.

But the issues raised -- and based on my review, the issues raised today in these cases are no different. And these include that the director's statutorily charged with administering water in priority; time is of the essence in responding to delivery calls; the director must act quickly to avoid injury to senior rights; due process is required but must account for the exigencies of the circumstances; the director has discretion in limiting the scope and timing of the hearings; and unless a statute or rule otherwise provides for a hearing, the director may issue an order and conduct a hearing after issuance of the order.

If a hearing has been requested or otherwise set, administrative remedies have not been exhausted, thereby depriving this Court of jurisdiction. The director must first have the opportunity to rule on the issues raised by the order. This process is set forth plainly in Idaho Code Section 42-1701A(3). Further, writs of mandate cannot issue for acts that are discretionary with the director. Staying hearings and holding them after the irrigation season where the director has predicted material injury to seniors is unworkable as juniors will be permitted to pump out of priority during the irrigation season.

So that is my ruling.

CONCLUSION

As found by the Court at the time of the hearing, the Petitioners did not raise any new legal issues pertaining to the substance of their arguments. The Petitioners acted without a reasonable basis in fact or law. Even though they unsuccessfully made the same arguments in other cases, some within the past year, they filed multiple pleadings seeking multiple remedies and all actions were dismissed. The Coalition as one of the prevailing parties is entitled to an award of the

attorney's fees and costs incurred defending against the filings and the arguments made by the Petitioners pursuant to the provisions of Idaho Code § 12-117(1) and other applicable law.

DATED this 16th day of June, 2023.

FLETCHER LAW OFFICE



W. Kent Fletcher

*Attorneys for American Falls Reservoir
District #2 and Minidoka Irrigation
District*

MARTEN LAW LLP

s/ Travis L. Thompson

Travis L. Thompson

*Attorneys for A&B Irrigation District,
Burley Irrigation District, Milner
Irrigation District, North Side Canal
Company, and Twin Falls Canal
Company*

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2023, the foregoing was filed electronically using the Court's e-file system, and upon such filing the following parties were served electronically.

Director Gary Spackman
Garrick Baxter
Sarah Tschohl
Idaho Dept. of Water Resources
322 E Front St.
Boise, ID 83720-0098
*** service by electronic mail
file@idwr.idaho.gov
gary.spackman@idwr.idaho.gov
garrick.baxter@idwr.idaho.gov
sarah.tschohl@idwr.idaho.gov

Matt Howard
U.S. Bureau of Reclamation
1150 N. Curtis Rd.
Boise, ID 83706-1234
*** service by electronic mail only
mhoward@usbr.gov
emcgarry@usbr.gov

Tony Olenichak
IDWR – Eastern Region
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402-1718
*** service by electronic mail only
tony.olenichak@idwr.idaho.gov

T.J. Budge
Elisheva M. Patterson
Racine Olson, PLLP
P.O. Box 1391
Pocatello, ID 83204-1391
*** service by electronic mail only
tj@racineolson.com
elisheva@racineolson.com

Sarah A. Klahn
Diane Thompson
Somach Simmons & Dunn
2033 11th Street, Ste. 5
Boulder, CO 80302
*** service by electronic mail only
sklahn@somachlaw.com
dthompson@somachlaw.com

David Gehlert
ENRD – DOJ
999 18th St.
South Terrace, Ste. 370
Denver, CO 80202
*** service by electronic mail only
david.gehlert@usdoj.gov

Rich Diehl
City of Pocatello
P.O. Box 4169
Pocatello, ID 83201
*** service by electronic mail only
rdiehl@pocatello.us

Robert E. Williams
Williams, Meservy & Larsen LLP
P.O. Box 168
Jerome, ID 83338
*** service by electronic mail only
rewilliams@wmlattys.com

Corey Skinner
IDWR – Southern Region
650 Addison Ave. W., Ste. 500
Twin Falls, ID 83301
*** service by electronic mail only
corey.skinner@idwr.idaho.gov

Robert L. Harris
Holden, Kidwell PLLC
P.O. Box 50130
Idaho Falls, ID 83405
*** service by electronic mail only
rharris@holdenlegal.com

Kathleen Carr
US Dept Interior, Office of Solicitor
Pacific Northwest Region, Boise
960 Broadway, Ste. 400
Boise, ID 83706
*** service by electronic mail only
kathleenmarion.carr@sol.doi.gov

Candice McHugh
Chris Bromley
McHugh Bromley, PLLC
380 South 4th Street, Ste. 103
Boise, ID 83702
*** service by electronic mail only
cbromley@mchughbromley.com
cmchugh@mchughbromley.com

Randall D. Fife
City Attorney, City of Idaho Falls
P.O. Box 50220
Idaho Falls, ID 83405
*** service by electronic mail only
rfife@idahofallsidaho.gov

John K. Simpson
Travis L. Thompson
Marten Law LLP
P.O. Box 63
Twin Falls, Idaho 83303-0063
***service by electronic mail only
jsimpson@martenlaw.com
tthompson@martenlaw.com

COURTESY COPY TO:
William A. Parsons
Parsons, Smith & Stone LLP
P.O. Box 910
Burley, ID 83318
*** service by electronic mail only
wparsons@pmt.org

Dylan Anderson
Dylan Anderson Law
P.O. Box 35
Rexburg, Idaho 83440
***service by electronic mail only
dylan@dylanandersonlaw.com

Skyler Johns
Nathan Olsen
Steven Taggart
Olsen Taggart, PLLC
P.O. Box 3005
Idaho Falls, ID 83404
*** service by electronic mail only
sjohns@olsentaggart.com
nolsen@olsentaggart.com
staggart@olsentaggart.com
Matt Howard
US Bureau of Reclamation
1150 N. Curtis Road
Boise, Idaho 83706-1234
***service by electronic mail only
mhoward@usbr.gov



W. Kent Fletcher