

2013 DEC -9 P 4: 22

CLERK DISTRICT COURT



**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER**

MARC GROSKREUTZ, a single person;)	CASE NO. CV-2013-0001488
and JAN S. NUNAMAKER, a single person,)	
)	JUDGMENT OF DISMISSAL
Plaintiffs,)	
)	
)	
vs.)	
)	
THE IDAHO DEPARTMENT OF LANDS;)	
AND THE IDAHO STATE BOARD OF LAND)	
COMMISSIONERS (C.L. "BUTCH" OTTER,)	
Governor, BEN YSURA, Secretary of State;)	
LAWRENCE E. WASDEN, Attorney General,)	
BRANDON WOOLF, State Controller, and)	
TOM LUNA, Superintendent of Public)	
Instruction) in their official capacities; AND)	
TOM SCHULTZ in his official capacity as)	
Director for the Idaho Department of Lands;)	
AND THE STATE OF IDAHO,)	
)	
Defendants.)	

THIS MATTER came before the Court on November 20, 2013, for a hearing on Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(1) and 12(b)(6), and Motion for Summary Judgment Pursuant to I.R.C.P. 56(c), filed on October 18, 2013.

NOW, THEREFORE, for the reasons set forth in the Memorandum Decision and Order

Granting Defendants' Motion to Dismiss and Motion for Summary Judgment, entered on December 9, 2013, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT this matter is hereby DISMISSED WITH PREJUDICE, with each party to bear their own costs and attorney's fees.

DATED this 9 day of December, 2013.



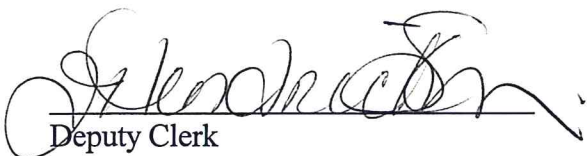
Barbara Buchanan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 12 day of December, 2013, to:

J. Scott Miller
LAW OFFICES OF J. SCOTT MILLER, P.S.
201 W. North River Drive, Suite 500
Spokane, WA 99201

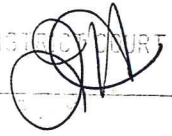
Steven W. Strack
Deputy Attorney General
Natural Resources Division
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010



Deputy Clerk

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2013 DEC -9 P 1:22

CLERK DISTRICT COURT


IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

MARC GROSKREUTZ, a single person;)	CASE NO. CV-2013-0001488
and JAN S. NUNAMAKER, a single person,)	
)	MEMORANDUM DECISION
Plaintiffs,)	AND ORDER GRANTING
)	DEFENDANTS' MOTION TO
vs.)	DISMISS AND MOTION FOR
)	SUMMARY JUDGMENT
THE IDAHO DEPARTMENT OF LANDS;)	
AND THE IDAHO STATE BOARD OF LAND)	
COMMISSIONERS (C.L. "BUTCH" OTTER,)	
Governor, BEN YSURA, Secretary of State;)	
LAWRENCE E. WASDEN, Attorney General,)	
BRANDON WOOLF, State Controller, and)	
TOM LUNA, Superintendent of Public)	
Instruction) in their official capacities; AND)	
TOM SCHULTZ in his official capacity as)	
Director for the Idaho Department of Lands;)	
AND THE STATE OF IDAHO,)	
)	
Defendants.)	

THIS MATTER came before the Court on November 20, 2013, for a hearing on Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(1) and 12(b)(6), and Motion for Summary Judgment Pursuant to I.R.C.P. 56(c), filed on October 18, 2013. The defendants were represented by Steven W. Strack, Deputy Attorney General, Natural Resources Division, Office

of the Attorney General. Plaintiff Jan S. Nunemaker¹ was represented by Attorney J. Scott Miller. Plaintiff Marc Groskreutz was voluntarily dismissed from the case on October 16, 2013.

I. INTRODUCTION

The facts of this case, as set forth in the *Defendants' Brief in Support of Motion to Dismiss* (filed October 18, 2013), at pp. 2-5, are incorporated herein by reference. The agency actions at issue are the determination by the Idaho State Board of Land Commissioners (“Board” or “Land Board”) that cottage sites with conflict applicants would not be reappraised, and the denial of a petition for rulemaking addressing administrative appeals of cottage site appraisals. The Idaho Department of Lands (“IDL”) is the state agency conducting the business of the Land Board, as provided by state law.² The cottage site occupied by Nunemaker had more than one applicant, and is thus, not eligible for reappraisal and is subject to a conflict auction.

On September 9, 2013, Nunemaker filed a Complaint for Declaratory Relief, Injunctive Relief and Damages. On September 17, 2013, she filed an Amended Complaint, claiming that: (1) the defendants are in breach of contract (i.e., the existing lease agreements); (2) conducting a conflict auction, after refusing her requests for a reappraisal, excluding her from participation in a land exchange, and effectively forcing her to sell the lessee owned improvements should she fail to place the high bid at the auction, would be a violation of her rights to due process and equal protection under the Idaho and U.S. Constitutions, and would be an unconstitutional taking of private property; and (3) the defendants failed to engage in administrative rulemaking to provide an effective method of administrative appeal from an inaccurate appraisal.

¹ The plaintiff is listed in the caption of the Amended Complaint as “Jan S. Nunamaker.” However, from the documents in the record, it appears that the correct spelling is “Jan S. Nunemaker.” Therefore, this Court will use the correct spelling of “Nunemaker” in this Decision.

² The Land Board and IDL are used interchangeably in this Decision.

On October 18, 2013, the defendants responded by filing a Motion to Dismiss Pursuant to I.R.C.P. 12(b)(1) and 12(b)(6), and Motion for Summary Judgment Pursuant to I.R.C.P. 56(c). The defendants request that the Court enter an order dismissing for lack of subject matter jurisdiction under Rule 12(b)(1) all the plaintiff's claims asserting harm from the defendants' decisions to (1) conduct lease auctions for lease sites with conflicting lease applications without first reappraising the value of the lease sites, (2) deny the plaintiff the opportunity to participate in an exchange of her lease site, and (3) deny a petition for rulemaking addressing administrative appeals of cottage site appraisals. Or, if jurisdiction is found to be present, the defendants seek an order dismissing all the plaintiff's claims under Rule 12(b)(6) based upon the plaintiff's failure to state any claims upon which relief can be granted. If the Rule 12(b)(6) motion is deemed a motion for summary judgment, the defendants contend that the affidavits and supporting documents filed in support of the motion show the lack of any genuine issues of material fact, and that summary judgment should be entered in favor of the defendants dismissing all the plaintiff's claims. The defendants also request attorney's fees and other expenses incurred in bringing this action, pursuant to Idaho Code §§ 12-117, 12-120 and 12-121.

II. LEGAL STANDARDS

Idaho Rule of Civil Procedure 12(b)(6) provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, **except that the following defenses shall be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party, (8) another action pending between the same parties for the same cause.** If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or

fact to that claim for relief. **If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.**

I.R.C.P. 12(b)(6). (Emphasis supplied).

In *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 302 P.3d 341 (2012), the Idaho Supreme Court stated:

This Court reviews *de novo* a district court's dismissal of a complaint under I.R.C.P. 12(b)(6) for failure to state a claim. *Hoffer v. City of Boise*, 151 Idaho 400, 402, 257 P.3d 1226, 1228 (2011). Rule 8 requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." I.R.C.P. 8(a). **Accordingly, on review of a dismissal this Court determines "whether the non-movant has alleged sufficient facts in support of his claim, which if true, would entitle him to relief."** *Hoffer*, 151 Idaho at 402, 257 P.3d at 1228 (quoting *Orrock v. Appleton*, 147 Idaho 613, 618, 213 P.3d 398, 403 (2009)). **In doing so, the Court draws all reasonable inferences in favor of the non-moving party. *Id.* The interpretation of an unambiguous contract or statute is a question of law subject to free review.** *Bakker v. Thunder Spring–Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005); *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 647 (2011).

Id. at 716, 302 P.3d at 345. (Emphasis supplied).

In *Jones v. Healthsouth Treasure Valley Hospital*, 147 Idaho 109, 206 P.3d 473 (2009), the Idaho Supreme Court set forth the summary judgment standard:

When reviewing an order for summary judgment, this Court applies the same standard of review as was used by the trial court in ruling on the motion for summary judgment. *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007). **Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."** I.R.C.P. 56(c). "If there is no genuine issue of material fact, only a question of law remains, over which this Court exercises free review." *Cristo*, 144 Idaho at 307, 160 P.3d at 746 (quoting *Infanger v. City of Salmon*, 137 Idaho 45, 47, 44 P.3d 1100, 1102 (2002)).

"It is axiomatic that upon a motion for summary judgment the non-moving party may not rely upon its pleadings, but must come forward with evidence by way of affidavit or otherwise which contradicts the evidence submitted by the moving party, and which establishes the existence of a material issue of disputed fact." *Zehm v. Associated Logging Contractors, Inc.*, 116 Idaho 349, 350, 775 P.2d 1191, 1192 (1988). **This Court liberally construes all disputed facts in favor of the nonmoving party, and all reasonable inferences drawn from the record will be drawn in favor of the nonmoving party.** *Cristo*, 144 Idaho at 307, 160 P.3d at 746. If reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

Id. at 112, 206 P.3d at 476. (Emphasis supplied).

III. DISCUSSION

A. The Court Lacks Subject Matter Jurisdiction To Review The Land Board's (1) Decision To Conduct Conflict Auctions Without Reappraising The Lease Sites; (2) Decision To Not Exchange Lease Sites With Pending Conflict Applicants; And (3) Denial Of The Petition For Rulemaking To Address Appeals Of Appraisals.

Idaho Code § 67-5273, which governs the time for filing a petition for judicial review, provides that "[a] petition for judicial review of a final agency action other than a rule or order must be filed within twenty-eight (28) days of the agency action, except as provided by other provision of law. ..." I.C. § 67-5273(3). "The failure to file a timely petition for judicial review is jurisdictional and causes automatic dismissal of the petition. I.R.C.P. 84(n). Idaho Code § 67-5273 confines the courts' jurisdiction to those petitions filed within the prescribed time period." *City of Eagle v. Idaho Dept. of Water Resources*, 150 Idaho 449, 454, 247 P.3d 1037, 1042 (2011).

At the November 20th hearing on the defendants' motion, counsel for the defendants' argued that each decision being challenged by the plaintiff in this case is a final agency action because it is not subject to modification or rehearing, nor can any administrative remedy change the action. Further, Nunemaker in her Amended Complaint stated that she had "exhausted

available administrative remedies,” *Amended Complaint*, at ¶ 2.4, and that the “IDL refused to engage in rule making, which is a final agency action.” *Id.* at ¶ 3.8.7.4.1. This Court agrees with the defendants and finds that each decision being challenged in this case is a final agency action.

Nunemaker claims that she is harmed by the Land Board’s decision to conduct lease auctions without first reappraising the value of the conflicted lease site, and its decision to not allow exchange of her lease site due to a pending conflict application. Regarding these two claims, the final agency action being challenged is the Land Board’s directive “that the Department [of Lands] schedule a conflict auction for those cottage sites where a conflict application has been filed,” which was issued at the May 21, 2013, Land Board meeting. *Affidavit of Steven W. Strack, Exhibit 5, Meeting Minutes, State Bd. of Land Comm’rs, May 21, 2013*, at p. 6. This directive by the Board on May 21, 2013, for the IDL to schedule an auction, precluded the reappraisal of Nunemaker’s cottage site. A land exchange was also precluded because implicit in the Board’s directive was the requirement that the conflicted lease sites remain under state ownership and subject to lease. The plaintiff’s Complaint challenging the Land Board’s May 21, 2013, decision was filed 111 days later on September 9, 2013. Thus, the action was untimely under Idaho Code § 67-5273(3) as to the claims of violation of due process and equal protection under the Idaho and U.S. Constitutions, and the claim of unconstitutional taking of property. Thus, these claims are dismissed for lack of subject matter jurisdiction.

Nunemaker also claims that she was harmed by the Land Board’s decision to deny a petition for rulemaking addressing administrative appeals of cottage site appraisals. Specifically, Nunemaker alleges that on or about April 18, 2013, certain lessees demanded that “the IDL comply with I.C. § 67-5230 and promulgate administrative rules and regulations for determination of the relative rights and responsibilities associated with appeals from appraisals

of cottage lots at Priest Lake,” *Amended Complaint*, at ¶ 3.8.7.4, and that “[b]y letter dated May 14, 2013 IDL refused to engage in rule making, which is a final agency action.” *Id.* at ¶ 3.8.7.4.1. *See Strack Affidavit, Exhibits 20 and 21.* Idaho Code § 67-5230 provides that “[a]n agency decision denying a petition [for adoption, amendment, or repeal of a rule] is a final agency action.” The plaintiff’s Complaint was filed on September 9, 2013, 118 days after IDL’s denial of the rule making petition. Accordingly, this claim of failure to engage in required administrative rulemaking is untimely and is dismissed for lack of subject matter jurisdiction.

Because the Court lacks subject matter jurisdiction over the foregoing claims, the plaintiff’s claims for declaratory and injunctive relief, including requests for writs of prohibition and mandate, and for damages, are dismissed

B. Plaintiff’s Breach of Contract Claims Are Dismissed.

Nunemaker makes two contract claims based upon the terms of her lease with the Land Board. First, that she had a “contract right of continuation, as provided in the written lease agreement as well as state statute,” *Amended Complaint*, at ¶ 3.5.11; and second, that she had a contractual “right to appeal the valuation of the leased cottage lot determined by IDL.” *Id.* at ¶ 3.3.4. The defendants do not assert a lack of subject jurisdiction over the plaintiff’s breach of contract claims because of the ruling in *Wasden v. State Bd. of Land Com'rs* (“*Wasden II*”), 153 Idaho 190, 199, 280 P.3d 693, 702 (2012), that a claim based upon the interpretation of an agency contract was not subject to the requirement of exhaustion of administrative remedies. Rather, the defendants assert that Nunemaker’s contract claims should be dismissed because the plain terms of the contractual documents and the applicable constitutional and statutory provisions do not provide the rights asserted by the plaintiff.

1. Nunemaker Does Not Have A “Contractual Right Of Continuation” Beyond The Expiration Of The Current Lease Term.

Nunemaker claims that she was assured by IDL representatives that she “had a contract right of continuation, as provided in the written lease agreement as well as state statute.” *Amended Complaint*, at ¶ 3.5.11. This claim is not only irreconcilable with the plain terms of the lease, it would require the Land Board to violate constitutional and statutory provisions requiring a lease auction. *See Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002) (“The general rule is that a contract prohibited by law is illegal and unenforceable.”).

Section C.1.1 of the 2001-2010 cottage site lease, as incorporated by reference into the 2012-2013 lease, states unambiguously that “[t]he term of this lease shall be for no more than ten (10) years pursuant to Idaho Code (I.C.) § 58-307(1), and ... Renewals of this lease may be granted by the LESSOR as determined by the LESSOR at the LESSOR’S discretion pursuant to I.C. § 58-310A.” *Stracker Affidavit, Exhibit 11*. The incorporation of Idaho Code § 58-310A into the language of the lease did not provide Nunemaker with a “right of continuation” past the expiration of the lease term. Section 58-310A prohibited conflict auctions of cottage site leases, but did not mandate renewal of cottage site leases. Moreover, the 2012-2013 cottage site lease acknowledges the ongoing litigation “over the constitutionality of Idaho Code § 58-310A and whether the current lease terms are consistent with applicable statutory and constitutional requirements.” *Stracker Affidavit, Exhibit 15*, at ¶ 11. The 2012-2013 lease further states that “[n]othing herein is intended nor shall be construed as waiving any legal rights or remedies of the LESSOR or LESSEE with respect to any legal dispute regarding the constitutional or statutory sufficiency of the 2001-2010 Cottage Site Lease, 2011 Renewal Lease, or this Agreement.” *Id.*

In short, the plain terms of the 2012-2013 lease provided that any renewal of the lease was entirely at the discretion of the Land Board, and further acknowledged that any implied right of renewal without a conflict auction pursuant to Idaho Code § 58-310A was currently the subject of litigation, in which the Board contested the constitutionality of the statute and sought to make the cottage site leases subject to public auctions. The plaintiff was thus put on notice that the Board was not waiving the right to submit the leases to public auction upon expiration.

Further, even if the lease could be construed to provide a right of continuation past the expiration of the lease, such right is unenforceable as a matter of law given the Idaho Supreme Court's recent determination that the Idaho Constitution prohibits the Board from offering a lease renewal to a cottage site lessee without first making the lease available for public auction. *Wasden II*, 153 Idaho at 198, 280 P.2d at 701. An agency cannot act outside the authority granted it by the state constitution or statutes. *See* Idaho Code § 67-5279(2)(b) (Agency actions are to be set aside if "in excess of the statutory authority of the agency."); *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 310, 216 P. 250, 253 (1923) ("... a contract made with a public officer in excess of the provisions of the statute authorizing the contract is void, so far as it departs from or exceeds the terms of the law."); *Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002) ("The general rule is that a contract prohibited by law is illegal and unenforceable."). Thus, the claim that Nunemaker is contractually entitled to continue her lease without facing a conflict auction is dismissed as a matter of law. *See id.* ("Whether a contract is illegal is a question of law for the court to determine from all the facts and circumstances of each case.").

2. Nunemaker Did Not Have A Contractual Right To Appeal The Appraisal Of The Cottage Site After A Conflicting Application Was Submitted.

Nunemaker claims that she had a contractual right under the 2012-2013 lease to “appeal” the appraisal of her lease site. However, the terms of the 2012-2013 lease do not address the adjustment of appraisals conducted for the purpose of advertising the property for a public lease auction. Section D.1.5.a of the 2001-2010 cottage site lease, which was incorporated by reference into the 2012-2013 lease, provides generally that “[t]he property shall be valued each five (5) years, and updated annually by indexing based on market data, after the first readjustment, which shall occur between 2003 and 2006.” *Strack Affidavit, Exhibit 11*. Section D.1.5.a.i, which applies specifically to Priest Lake, states that there would be a valuation “readjustment period between 2003 and 2006 ... based on valuation of the current market value of the lots.” *Id.* It then provides that “[l]ot value readjustments will be done every five (5) years from the date of the first readjustment and updated annually by indexing based on market data, after the first readjustment.” *Id.* Lessees were provided the right to appeal these valuations. However, the appeal provision of section D.1.5.b. must be read in *pari materia* with the valuation provisions of section D.1.5.a.i. When read together, they provided the lessees a procedure for appealing the valuations that were performed every five years during the 2001-2010 lease term and any extensions thereof. *See Strack Affidavit, Exhibit 11*. The Court accepts the defendants’ assertion that, at the time, IDL contemplated tendering lease extensions to the current lessees based on the terms of Idaho Code § 58-310A, which prohibited conflict auctions for cottage site leases, as was acknowledged in section X.1.10 of the 2001-2010 lease.

However, due to the ongoing litigation over the constitutionality of statutes and lease provisions, the contemplated ten year lease extension of the 2001-2010 lease did not occur.

Rather, two short-term extensions were offered to lessees while the constitutionality of the public auction ban was litigated. *See Strack Affidavit, Exhibits 13 and 15.* The 2012-2013 lease acknowledged that the short-term extension of the 2001-2010 lease did not waive any “rights or remedies” regarding the constitutionality of the 2001-2010 lease. *Strack Affidavit, Exhibit 15,* at ¶ 11. It further provided that the parties agreed to “read the 2001-2010 Cottage Site Lease terms and conditions flexibly and consistently with the intent and purpose of this Agreement.” *Strack Affidavit, Exhibit 15,* at ¶ 10. Thus, the Board explicitly retained its authority to take any actions necessary to comply with the Idaho Supreme Court’s holding in *Wasden II.* Because *Wasden II* requires public auctions, those lease provisions in the 2001-2010 lease intended to implement Idaho Code § 58-310A, including provisions for appeal of valuations conducted to adjust rent for lease extensions, can no longer be applied.

In short, under the plain language of the cottage site lease, the appraisal appeal provisions do not apply to valuations performed for the purpose of establishing a base rental for conflict auctions. The appeal provisions apply only to the five year value readjustments described in section D.1.5.a of the lease. Valuation of the property for public auction is distinguishable from the valuation process in the lease because valuation for public auction establishes a basis for calculating rent that is offered to all potential bidders for application in a new lease, rather than for rental readjustment during the current lessee’s lease term and any extensions thereof.

Accordingly, as to Nunemaker’s contract claims, this Court finds that plain terms of the contractual documents and the applicable constitutional and statutory provisions do not provide the rights asserted by the plaintiff. Because there are no genuine issues of material fact as to these claims, summary judgment is granted dismissing Nunemaker’s contract claims.

C. No Attorney's Fees Are Awarded.

The defendants are the prevailing party in this case, and they seek an award of attorney's fees and reasonable expenses incurred in bringing this action under Idaho Code §§ 12-117, 12-120 and 12-121. Section 12-117 provides, in relevant part:

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.**

I.C. § 12-117. (Emphasis supplied).

In *Idaho Wool Growers Ass'n, Inc. v. State*, 154 Idaho 716, 302 P.3d 341 (2012), the Idaho Supreme Court explained:

Idaho Code § 12–117(1) allows for an award of attorney fees in any “proceeding involving as adverse parties a state agency or a political subdivision and a person” if the court “finds that the nonprevailing party acted without a reasonable basis in fact or law.” Here, this Court finds that the district court's Rule 12(b)(6) dismissal was proper, and also finds an award of attorney fees in favor of the respondents—the prevailing party—is appropriate. As explained above, although the Wool Growers' complaint alleges that IDFG failed to “block” the Forest Service from modifying their grazing permits, they later conceded that IDFG had no power to do so and that such a claim should be dismissed. Thus, they not only made allegations without reasonable basis in law, but they did so knowingly.

Further, a look at the plain language of the 1997 letter and I.C. § 36–106(e)(5)(D) is all that is needed to see that the Wool Growers' claims for indemnity are neither factually nor legally meritorious. As discussed above, assuming the letter is a contract, it is at most a hold harmless agreement in which IDFG assumed the risk of loss to bighorns—not domestic sheep. It contains no promise that IDFG would affirmatively act to protect the Wool Growers, much less a promise to indemnify them against actions of an independent federal agency over which the Wool Growers knew IDFG had no control. The statute contained even less language on which to base a claim for indemnification, and the equitable claims appear to be nothing more than a final shot in the dark. Because the weakness of the Wool Growers' case was plain to see on the face of the letter and

the statute, they acted without a reasonable basis in law and fact in pursuing this appeal. Thus, IDFG is awarded attorney fees under I.C. § 12–117.

Id. at 723-724, 302 P.3d at 348-349. (Emphasis supplied).

Because the constitutional and statutory issues surrounding the public auction of the cottage site leases have been the subject of ongoing litigation, and unsettled constitutional questions remained until the Idaho Supreme Court’s recent decision in *Wasden II*, this Court does not find that the nonprevailing party, Nunemaker, acted without a reasonable basis in fact or law. Therefore, the Court declines to award attorney’s fees under Idaho Code § 12-117. For the same reason, this Court declines to award the defendants attorney’s fees under Idaho Code § 12-121, because “attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; ...” I.R.C.P. 54(e)(1). This Court does not find that the case was brought, pursued or defended frivolously, unreasonably or without foundation.

Finally, the Court declines to award attorney’s fees under Idaho Code § 12-120. Section 12-120(1) is not applicable to this case, because no specific amount of damages was pled. The Idaho Supreme Court explained in *Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6 (1996):

Under I.C. § 12–120(1), reasonable attorney fees are awarded to the prevailing party if the amount pleaded is less than \$25,000.00. Henderson did not plead any specific amount of damages, which precludes an award of fees under this provision. *Cox v. Mueller*, 125 Idaho 734, 736, 874 P.2d 545, 547 (1994) (prevailing party cannot claim an entitlement to attorney fees under I.C. § 12–120(1) unless damages of \$25,000.00 or less have actually been plead).

Under I.C. § 12–121 and I.R.C.P. 54(e), attorney fees will generally only be awarded when the court is left with the belief that the appeal was brought, pursued, or defended frivolously, unreasonably, or without foundation. I.C. § 12–121; I.R.C.P. 54(e)(1); *Balderson*, 127 Idaho at 54, 896 P.2d at 962. The magistrate made no findings or conclusions that Smith's defense of this action was frivolous or unreasonable as required under the Idaho Rules of Civil Procedure. I.R.C.P. 54(e)(1), (e)(2). Without findings by

the magistrate, this Court has no basis upon which to provide a meaningful review of the magistrate's award of attorney fees.

Id. at 444, 915 P.2d at 14. (Emphasis supplied).

Further, section 12-120(3), which authorizes the award of attorney's fees in "any commercial transaction," is also inapplicable to this case, because "[t]he term 'commercial transaction' is defined to mean all transactions except transactions for personal or household purposes." I.C. § 120(3). The lease agreement in this case is not a commercial transaction, rather a transaction for personal or household purposes.

IV. CONCLUSION AND ORDER

NOW, THEREFORE, based on the foregoing, IT IS HEREBY ORDERED THAT the Defendants' Motion to Dismiss Pursuant to I.R.C.P. 12(b)(1) and 12(b)(6), and Motion for Summary Judgment Pursuant to I.R.C.P. 56(c) is GRANTED. Accordingly, this matter will be dismissed with prejudice, with each party to bear their own costs and attorney's fees.

IT IS SO ORDERED.

DATED this 9 day of December, 2013.

A handwritten signature in black ink, appearing to read 'Barbara Buchanan', written over a horizontal line.

Barbara Buchanan
District Judge