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IN THE SUPREME COURT OF THE STATE OF IDAHO

COEUR D'ALENE TRIBE, Petitioner, vs. LAWERENCE DENNEY, Secretary of State of the State of Idaho, in his official capacity, Respondent.	)	Supreme Court Docket No. 43169-2015 Ref. 15-249 **MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO ENFORCE COURT ORDER FOR ATTORNEY FEES AND COSTS ON PETITION FOR WRIT OF MANDAMUS**

The message of the Court's Opinion in this case was loud and clear: Procedural deadlines matter, and actions that must be done by a date certain do not become effective if they are done too late. That is why Respondent opposes Petitioner's untimely Motion to Enforce Attorney Fees and Costs on Petition for Writ of Mandamus. In the alternative, Respondent also contests the reasonableness of some of Petitioner's claimed costs and fees. These are the facts:

FACTS

On Thursday, September 10, 2015, the Court issued its 2015 Opinion No. 88 (Opinion) in this Case. The Opinion ***ordered*** the Secretary of State to certify a bill as law and held that Petitioner was ***entitled*** to attorney fees and costs as follows:

> ... Consequently, ***the Tribe is entitled to attorney fees*** under Idaho Code section 12-117(1). However, the Tribe is only entitled to attorney fees against the Secretary of State on the substantive issues raised by the Secretary of State. The Tribe is not entitled to attorney fees against the amici because they are not parties to this action.
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> **IV. CONCLUSION**
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> For the reasons stated above, we grant the Tribe's petition for a writ of mandamus and ***order the Secretary of State to certify S.B. 1011 as law***. Attorney fees and costs to the Tribe from Respondent.

Opinion, pp. 21-22 (emphasis added).

Fourteen days passed after the Opinion was issued. Petitioner did not file a Memorandum of Costs or a claim for attorney fees with the Court on or before Thursday, September 24, 2015. Petitioner did not file a Memorandum of Costs or a claim for attorney fees on the next day, Friday, September 25, 2015. On Monday morning, September 28, 2015, eighteen days after the Court issued the Opinion, Petitioner's counsel e-mailed the Attorney General's Office about attorney fees at 11:14 a.m.:

> I need to discuss how we are going to handle the payment of the Tribe's fees ordered by the Court. I could give you a copy of my firm's invoices which the Tribe has paid, and indicate which tasks were done in response to the amici's filings, so they could be subtracted in order to arrive at a total for the State. How does that sound to you? Please let me know your thoughts.

Exhibit A, Declaration of Deborah A. Ferguson. The Ferguson Declaration does not state that there had been any previous contact with the Attorney General's Office regarding attorney fees; the Office is not aware of any such contacts.

Not wishing to hide the ball on its position, the Office of the Attorney General answered the e-mail over the lunch hour, even though the e-mail quoted above had been sent to a member of the Office who was unavailable to respond but who immediately forwarded the message to another member of the Office to answer. After citing and quoting Idaho Appellate Rules 40 and 41, the Office of the Attorney General informed Petitioner that the deadline for seeking attorney fees had passed and that under the Rules the claim for fees had been waived:

> Although Rule 40 and 41 by their terms apply only to appeals and not to writs, I am not aware that the Idaho Supreme Court treats claims for costs and fees any differently in a special writ case than in an appeal. Accordingly, the deadline for filing a Memorandum of Costs and requesting attorneys' fees expired fourteen days after the opinion was issued, i.e., on September 24, 2015, and pursuant to Idaho Appellate Rule 40(c), the Tribe has waived its claim for costs and fees when it did not file a timely Memorandum of Costs and request for attorneys' fees.

Exhibit A, Declaration of Deborah A. Ferguson.

Later that day, *i.e.*, on Monday, September 28, 2015, eighteen days after the Court's Opinion issued, Petitioner filed its Motion to Enforce Court's Order for Attorney Fees and Costs on Petition for Writ of Mandamus and the Declaration of Deborah A. Ferguson. Petitioner has yet to file a document titled Memorandum of Costs or Claim for Attorney Fees, although it appears that Motion and Declaration are intended to substitute for a Memorandum of Costs and/or Claim for Attorney's Fees. This Memorandum responds to that Motion.

ARGUMENT

Petitioner's Motion incorporates three false premises that must be discussed before the applicable legal standards are reviewed.

First, the Court's Opinion did not order Respondent to pay attorney fees.[1] The only "order" contained in the Opinion was for the Secretary of State "to certify SB. 1011 as law." He promptly did so.[2] The past participle that the Court used to describe Petitioner's claim to attorney fees was "entitled" — not "ordered" or "awarded". Opinion, pp. 21-22. To the best of Respondent's knowledge, the Supreme Court's Opinions do not "order" the payment of costs and fees for practical reasons: Costs and fees have not yet been quantified, and an "order" to pay a yet-to-be-quantified and possibly-never-to-be-quantified amount of money is no order at all.

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[1] The Motion repeatedly states that there has been an order for costs and fees. Motion, page 3 ("attorney fees and costs ordered by the Court," and "reimburse the Petitioner for its attorney fees and costs as previously ordered"); page 4 ("complying with the Court's order"); page 5 ("thwart the Court's order"); page 6 ("in furtherance of the Court's order of fees"). Indeed, the Motion itself is titled in part "Motion to Enforce Court's Order for Attorney Fees and Costs."

[2] *See* http://www.legislature.idaho.gov/legislation/2015/SB1011Certification.pdf.

E.g., there have been cases with which the undersigned is familiar in which a prevailing party did not file a Memorandum of Costs at all, and in the end no costs or fees were ordered to be paid.

Second, the Motion is not one day late, and Respondent did not say that it was one day late.[3] Assuming for the sake of argument that the Motion may substitute for a Memorandum of Costs, which would have been due fourteen days after the Opinion issued on Thursday, September 24, 2015, the Motion was filed four days later on Monday, September 28, 2015. That is what the Office of the Attorney General informed counsel on Monday, September 28, 2015: The Memorandum of Costs was due on Thursday, September 24, 2015, which was four days before.

Third, the Office of the Attorney General did not "indicate[] that the State would not pay any attorney fees and costs ordered by the Court." Motion, page 3. The Office stated that according to its reading of the Idaho Appellate Rules, Petitioner had waived its claim for costs and fees. And, as explained above, the Court has not yet ***ordered*** payment of any attorney fees. The Attorney General does not intend to advise this or any other client not to pay attorney fees that are ***ordered*** by this or any other court. It does, however, advise clients when it believes that costs and fees have been waived under the Rules or that the amounts requested are excessive.

A. Under the Natural Construction of the Idaho Appellate Rules, Petitioner Missed the Deadline to File for Costs and Fees and Waived Them

It is ubiquitous (if not universal) in Idaho's State and Federal courts and administrative agencies that once the clock starts ticking, a prevailing party who is entitled to costs and/or fees has fourteen days to file documents to support an award of costs and fees. Idaho Appellate Rules 40 and 41 (within fourteen days after filing and announcement of the Opinion); Idaho Rules of Civil Procedure 54(d)(5) and 54(e)(5) (no later than fourteen days after entry of judgment); Idaho Federal District Court Local Rules of Civil Procedure 54.1(a) and 54.2 (within fourteen days

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[3] Petitioner's Motion, page 4, states: "Respondent ... claim[s] that the request is one day late." *See also* Motion, page 5: "Petitioner respectfully requests that the Court grant it a one-day extension of time and find that this memorandum is timely," and "Petitioner has shown good cause for a one-day extension of time"; page 6: "the State construed the deadline as passed by a day," "To the extent this one-day delay is neglectful of counsel, it is excusable," and "If the request is late, it is late by a single day."

after entry of judgment); Idaho Rule of Administrative Procedure 741.02 and 741.03, IDAPA 04.11.01.741.02, -.03 (deadline of fourteen days after issuance of order awarding fees or costs unless another time is set by statute or in the order). It is also ubiquitous (if not universal) that an opinion or order authorizing an award of attorney fees is ***not*** an order to pay costs and fees because parties against whom costs and fees are awarded first have an opportunity to respond to the memorandum of costs and/or fees before the payment of costs and fees is actually ordered. I.A.R. 40(d) and 41(d); I.R.C.P. 54(d)(6) and 54(e)(6); Dist. Idaho Loc. Civ. R. 54.1(d) and 54.2(c); IRAP 741.04, IDAPA 04.11.01.741.04.

Petitioner does not contest that I.A.R. 40(c)'s and 41(d)'s fourteen-day rules would apply had the Court issued its Opinion in an appeal.[4] See Motion, pp. 3-5. Instead, Petitioner in effect argues that, alone among all of the kinds of proceedings that are covered by the rules cited in the preceding paragraph, original writs before the Supreme Court are different: For this one kind of proceeding and this one only, Petitioner argues that there is no requirement to file a memorandum of costs or similar documentation by any deadline, let alone fourteen days after the issuance of the Opinion, in order to recover costs or fees. Motion, pp. 3-4. That argument is inconsistent with the language and purpose of the Idaho Appellate Rules.

First, Rule 2(a) provides that the Appellate Rules "shall govern all appeals and petitions for special writs or proceedings in the Supreme Court." And Rule 48 provides that "In cases where no provision is made by statute or by these rules, proceedings in the Supreme Court shall be in accordance with the practice usually followed in such or similar cases." Let us take Peti-

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[4] Idaho Appellate Rule 40(c) provides:

> **(c) Memorandum of Costs.** Within 14 days of the filing and announcement of the opinion on appeal, ... any party who claims costs shall file with the Court ... a memorandum of costs. ... Failure to file a memorandum of costs within the period prescribed by this rule shall be a waiver of the right costs.

Idaho Appellate Rule 41(d) provides:

> **(d) Amount of Attorney Fees.** If the Court determines that a party is entitled to attorney fees on appeal, the party claiming attorney fees shall file a claim concurrently with, or as part of, the memorandum of costs provided for by Rule 40. The claim for attorney fees ... shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed. ...

tioner's argument that no rule explicitly prescribes a time limit for filing a Memorandum of Costs and a Claim for Attorney Fees in a special writ case to its logical conclusion: Under Rule 48, which pursuant to Rule 2(a) applies to both appeals and special writs, "the practice usually followed in such or similar cases" is to file a Memorandum of Costs and Claim for Attorney Fees within fourteen days after the Opinion is issued. The Rules do not suggest that there is no deadline for filing whatsoever. That is, however, what Petitioner asks this Court to hold.

Second, this construction of the Idaho Appellate Rules is supported by sound policy furthering the purpose of these Rules. When this Court issues an opinion on an appeal or on a special writ, it is putting some controversy to rest. That is why there are deadlines for quantifying costs and fees. Unless there is a deadline to file for costs and fees in a special writ, claims for costs and fees will be up in the air indefinitely. That is inconsistent with the Court's role in bringing finality to matters before it. As Justice Eismann said earlier this month regarding costs in the District Court: "Any party who claims costs must timely file and serve a memorandum of costs on the adverse party. I.R.C.P. 54(d)(5)." *Sky Canyon Properties, LLC v. The Golf Club at Black Rock*, LLC, 2015 Opinion No. 99, p. 7 (October 1, 2015) (concurring). The same reasoning should apply under I.A.R. 40 and 41. For these reasons, this Court should hold that Rules 40(c) and 41(d) apply and that Petitioner waived its costs and fees by not timely filing within fourteen days.

B. Petitioner Has Not Shown Good Cause (or Any Cause) for Being Relieved of the Filing Deadline

In the alternative, the Motion also urges the Court to "grant Petitioner an extension of time and find that this memorandum in support of fees is timely." Motion, p. 5. Petitioner urges, and Respondent agrees, that this Court has authority to relieve Petitioner of non-jurisdictional deadlines.[5] However, this Motion is not a good candidate for an exercise of discretion to do so.

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[5] Petitioner argues that the Court's authority to extend deadlines comes from Rule 5 and its inherent equitable powers. Motion, p. 5. The Appellate Rules, however, have an explicit source of authority for extending deadlines: "Failure of a party to timely take any other step in the appellate process [steps other than filing notices of appeal or petitions for rehearing] shall not be deemed jurisdictional, but may be grounds only for such action or sanction as the Supreme Court

First, Petitioner still has not complied with the Idaho Appellate Rules. Although the Motion and Declaration appear to be intended to function as the Memorandum of Costs and Affidavit required by Rules 40 and 41, they are neither. Rule 41 does not allow a Declaration as a substitute for an Affidavit. But see Idaho Code § 9-1406.

Second, the Motion says that "Petitioner has shown good cause for a one-day extension." But, as shown earlier, Petitioner is asking for a four-day extension. Petitioner has not shown good cause in the Motion. An "attempt to come to an agreement over the amount of the fees to be paid ... to work out the matter directly between counsel" that begins after the deadline for filing a memorandum of costs and claim for fees is hardly good cause. If that were the case, every missed deadline could be cured by calling or e-mailing opposing counsel after the deadline and attempting to negotiate over the subject matter of the missed deadline.

Third, it is not good cause to characterize a missed deadline as "late by a single day," Motion, p. 6, when in fact it is late by four days. For all of these reasons, the Court should not exercise its discretion under Rule 21 and should not accept a late filing for costs and fees that still does not comply with the procedures of Rules 40 and 41.

C. Petitioner's Costs and Attorney Fee Request Is Excessive If Considered on the Merits

Petitioner's costs and attorney fee request totals $95,057.84. The sum of costs and attorney fees reflected on the invoices attached to Counsel Ferguson's declaration is $106,194.34. Of that amount, $321.84 is attributable to costs; the remainder ($105,872.50) reflects invoiced attorney fees. Subtracting those costs from the aggregate ***requested*** sum results in an attorney fee amount of $94,736, or $11,136.50 less than the invoiced figure. The difference derives from entries designated with an "A" by Petitioner's counsel to reflect work responding to issues raised by *amici curiae*. Opinion, pp. 21-22. However, the correct amount of the "A" entries identified by Counsel Ferguson is $11,135, not $11,136.50. The amount of fees actually sought is therefore $94,737.50.

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deems appropriate ... ." I.A.R. 21.

1. **Costs.** Respondent disputes the following costs requests as outside Rule 40(b): $11.70 (06/03/2015) for "USPS-Postage" and $77.19 (08/10/2015) for "662 pages 9 copies of supplemental authority for Court filing." These items total $88.89. The costs request therefore should be in the amount of $232.95.[6]

2. **Attorney Fees.** Rule 41(d) requires attorney fee requests to "be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed." The rule does not otherwise specify the factors to be used in determining the amount of fees to be awarded. However, this Court's stated basis for the award, Idaho Code § 12-117(1), limits recovery to "reasonable attorney's fees"—as does Idaho Code § 12-121 upon which Petitioner also relied. Opinion, p. 21; *see also TracFone Wireless, Inc. v. State*, 156 Idaho 671, 682, 351 P.3 599, 610 (2015) (limiting § 12-117 to suits where a "state agency" or "political subdivision" is a party). The Court has directed trial courts to look to the standards in Civil Rule 54(e)(3) when determining fee award amounts. *See, e.g., Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 90-91, 903 P.2d 993, 996-97 (Idaho Code § 12-121). These factors likewise presumably inform this Court's exercise of its discretion under Rule 41. Petitioner did not address any of them in its fee application. Counsel instead filed a week later declarations addressing the considerations largely *in haec verba*. Second Decl. Deborah A. Ferguson ¶¶ 11-15; Decl. Craig H. Durham ¶¶ 11-15.

Among the 12 factors specified in Rule 54(e)(3), two stand out here: "The time and labor ***required***" and "Any other factor which the court deems appropriate in the particular case." *Id.* 54(e)(3)(A) and (L) (emphasis added). The first has relevance because the time devoted by Petitioner's counsel to various tasks was excessive and the second because counsel's block-billed invoice descriptions do not permit a reasoned determination as to the time devoted to responding

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[6] Petitioner's request for the costs of production of its petition and the supporting brief filed on June 3, 2015 and its response brief filed on July 9, 2015 are inappropriate on their face because they are not the amounts set out in Rule 40(b)(2). However, since the amounts requested are less than costs permitted under Rule 40(b)(2), Respondent does not object.

to issues raised by the *amici curiae*, which the Opinion excluded from attorney fee recovery.[7] Attachment A to this Memorandum is a summary taken from the information in counsels' invoices that sorts billed hours by litigation category.[8] Attachment B is an annotated version of the invoices allocating the services by category. It shows that Counsel Ferguson and Durham spent 148.6 hours preparing and filing the mandamus petition and related documents; *i.e.*, more than 3½ 40-hour workweeks. Given their substantial hourly fee rates for services, $350 (Ferguson) and $250 (Durham) and the experience associated with those rates, that is an extraordinary amount of time to prepare a 13-page petition (including the verification page), a 19-page supporting brief (excluding the caption page and tables), a three-page motion for attorney fees, and a two-page motion for expedited briefing and hearing. To the extent that Rule 54(e)(3)(A) authorizes fee recovery only for "required" time and labor, such a massive expenditure of resources cannot be justified by the issues presented or the actual work product. The $47,010 in fees

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[7] Certain other factors—particularly "The novelty and difficulty of the questions" and "The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law"— are captured in the hourly rate for Counsel Ferguson and Durham. Respondent does not dispute the rate's reasonableness. A third factor—"The time limitations imposed by the client or the circumstances of the case"—was implicated to the extent that Petitioner sought an early determination of whether Respondent had a duty to certify the legislation under Idaho Code § 67-505. Nevertheless, counsel began work on this case on May 13, 2015, three weeks before the petition was filed. The large number of hours billed by counsel, together with the relatively limited work product, further indicate that time constraints were not a significant consideration. Nor is there any suggestion that counsel was forced to ***turn away*** fee-producing work because of the need to focus on this case. Counsel Ferguson's declaration is silent on this point (¶ 14), while Counsel Durham's states that he "was required to ***put aside*** other work to focus on the time demands [*sic*] in this case" (¶ 14; emphasis added). Finally, counsel obtained a favorable outcome, but that factor carries no special weight here because there were no gradations of success on the merits; *i.e.*, either Respondent had a duty to certify the bill as law or he did not.

[8] As Attachment A indicates, the four general categories of services were work related to the preparation of the mandamus petition ("P"); work related to preparation of the response brief filed on July 10, 2015 ("R"); preparation for oral argument ("OA"); and miscellaneous activities such as client or media communications ("M"). The "A" category summaries reflect invoice entries that Counsel Ferguson attributed to services related to *amici curiae* issues through her handwritten entries. The "D" category are entries that relate to services, essentially all in connection with Petitioner's response brief, that do not permit a determination as to how much time was devoted to work related to *amici* issues.

charged for preparation of the petition and related papers should be reduced by one-half to $23,505.

So, too, is the time devoted to oral argument preparation: 49.7 hours. Counsel Ferguson is an experienced appellate advocate. *See Latta v. Otter*, No. 1:13-cv-00482-CWD, 2015 WL 4623817, at *4 (D. Idaho Aug. 3, 2015) (reducing fee request of 254.2 for Ninth Circuit oral argument by one-half from 254.2 hours to 127.1 hours; "Ms. Ferguson is no stranger to oral argument, either before the district court or the Ninth Circuit"). Respondent does not begrudge her the right to prepare as she wishes, but the reasonableness element attendant to fee-shifting restricts the extent to which the cost of that preparation can be passed through to the State. *Id.* ("[w]hile the Court appreciates counsel taking the time to polish her arguments and does not question that the amount of time recorded (or even more) was spent by counsel, the Court must remain mindful of the 'reasonableness' component when shifting fees to the non-prevailing party"). The oral argument preparation time should be halved for fee recovery purposes from $16,785 to $8,392.50.

Counsel Ferguson has designated 34.1 hours of Counsel Durham and her time as attributable to *amici*-related issues, with an attendant fee cost of $11,135, not the $11,136.50 amount that she calculated. Respondent has identified another 52.4 hours of time that either directly relates to *amici* issues[9] or may relate to *amici* issues.[10] The requested undisputed *amici*-issue exclusion therefore should be decreased by $1.50. The disputed hours, in light of the block-billing, should be attributed proportionally to *amici*-issue exclusion based upon the number of pages in the response brief devoted to Petitioner's standing—*i.e.*, 33 percent (6 of 18 pages). That reduction increases the *amici*-exclusion by $5,667.65. The total exclusion is therefore $5,666.15.

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[9] 18.6 hours: 06/19/2015 (.2 hrs.); 06/24/2015 (.5 hrs.); 06/30/2015 (4.8 hrs.); 07/01/2015 (1.2 hrs.); 07/02/2015 (6 hrs.); 07/03/2015 (3.3 hrs.); 07/04/2015 (2.5 hrs.); 07/20/2015 (.1 hrs.).

[10] 33.8 hours: (07/05/2015 (4.5 hrs.); 07/06/2015 (3.8 hrs.); 07/07/2015 (7.8 hrs.); 07/08/2015 (11.5 hrs.); 07/09/2015 (6.2 hrs.). These hours are block-billed entries related to Petitioner's response brief.