1-20-2010

Renzo v. Idaho State Dept. of Agr. Appellant's Reply Brief Dckt. 36672

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETER RENZO, d/b/a S.A.B.R.E. FOUNDATION, INC., Plaintiff/Appellant, vs. **IDAHO STATE DEPARTMENT OF AGRICULTURE,** Defendant/Respondent.	**SUPREME COURT DOCKET NO. 36672-2009**

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bingham County

Honorable Darren B. Simpson, District Judge presiding

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I.
STATEMENT OF THE CASE

The nature of the case and course of proceedings have been set forth in Appellants' Brief filed by Peter Renzo ("RENZO"), d/b/a S.A.B.R.E. FOUNDATION, INC. ("SABRE"). Respondent, Idaho State Department of Agriculture ("ISDA") has submitted its version of the nature of the case and course of proceedings in Respondent's Brief. Facts relevant to matters addressed in Respondent's Brief are set forth below.

The S.A.B.R.E Foundation is dedicated to the education of children and general public about Siberian tigers and other big cats, and to do whatever possible to prevent their extinction. Affidavit of Nick L. Nielson, ("Nielson Affidavit") Exhibit 1, Agency Record, R. Vol. I, p. 116. It is absolutely necessary for the mission and purpose of the Foundation to be allowed to breed its cats in order to help preserve the endangered species. R. Vol. I, pp. 86-87. However, absolutely nothing is mentioned in Respondent's recitation of the facts showing that Dr. Ledbetter considered the preservation of an endangered species when he made the decision that "spaying and neutering should be required" for acceptance of Peter Renzo's application for a possession permit. Respondent's Brief, p. 2.

In fact, the record indicates that Dr. Ledbetter could not even see how Renzo's tiger breeding would somehow benefit tigers in the wild. R. Vol. I, p. 140, Ledbetter Depo., p. 73, LL.11 - 16. Dr. Ledbetter did not talk to any third party about the benefits to the species arising from Renzo's breeding efforts. R. Vol. I, p. 140, Ledbetter Depo., p. 73, LL. 21 - 23. Dr. Ledbetter didn't even

believe that the rules pertaining to deleterious exotic animals actually required spaying and neutering. R. Vol. I, p. 132, Dr. Ledbetter Depo., p. 43, LL. 2 - 6.

In an attempt to bolster Dr. Ledbetter's review of Peter Renzo's application for a possession permit, Respondent claims that "Dr. Ledbetter spent 'in excess of a week' reviewing Renzo's Application in order to make a decision." Respondent's Brief, p. 1. Respondent fails to state Dr. Ledbetter's full testimony on this issue. When asked how much actual time was spent on the application, Dr. Ledbetter indicated that he had no way to recall that. R., Vol 1. p. 140, Ledbetter Depo., p. 74, LL. 15 - 18.

In reviewing Renzo's application, Dr. Ledbetter did not review Renzo's application for renewal of his U.S.D.A. license. R. Vol. I, p. 138, Ledbetter Depo., p. 65, LL. 20 - 25; p. 66, LL. 1 - 3. Additionally, consideration of Renzo's previous permit from the Department of Fish and Game was not a part of Dr. Ledbetter's decision to require spaying and neutering. R. Vol. I, p. 137, Ledbetter Depo., p. 63, LL. 20 - 24. Aside from the U.S.D.A inspector in Nevada, neither Dr. Ledbetter nor anyone from his office spoke with Renzo's neighbors or with any third party regarding Renzo's application. R. Vol. I, pp. 105, 138, Ledbetter Depo., p. 68, LL. 1- 8, 14 - 17.

Dr. Ledbetter understood the rules to mean that without the administrator's authority, no one, including zoos and exhibitors, could possess or propagate deleterious exotic animals. R. Vol. I, pp. 133 -134. Ledbetter Depo., p. 48, LL. 4 - 25; p. 49, LL. 1, 7 - 16. Despite this fact, a male lion was introduced to the Tautphaus Park Zoo's female lion for the purpose of breeding during Dr. Ledbetter's administration. R. Vol. I, p. 154. A lion cub was eventually born at the zoo. R. Vol.

I, p. 143, Ledbetter Depo., p. 86, LL 23 - 25; p. 87, LL. 1 - 12; R. Vol. I, p. 152. To Dr. Ledbetter's knowledge, however, the Tautphaus Park Zoo **did not obtain** a propagation permit under his or any other administration. R. Vol. I, pp. 142-143. Ledbetter Depo., p. 84, LL. 25; p. 85, LL. 1 - 7. Dr. Ledbetter **didn't know** of any breeding programs of any zoos. To his recollection, he didn't **even think** about the fact that there may be breeding in the zoos. R. Vol. I, p. 143, Ledbetter Depo., p. 85, LL. 8 - 16.

Respondent states that Dr. Ledbetter was aware of a matter involving ISDA's request of Jerry Kor to spay and neuter his exotic cats. Respondent's Brief, p. 2. Respondent appears to infer the validity of Dr. Ledbetter's decision requiring Renzo to spay and neuter his cats by stating that "Ledbetter believed in being consistent between the two cases as both involved deleterious exotic cats. Respondent's Brief, p. 2. Respondent blatantly fails to mention the fact that the **only similarity** between Korn and Renzo's circumstances was that they both involved tigers. There was no discussion in Respondent's Brief that Korn illegally possessed tigers, illegally bred tigers, illegally transferred tigers, illegally gave a tiger cub to a person not authorized by the State to possess the tiger, and repeatedly failed to cooperate with the State, while Renzo complied with **all of the requirements** in the State's rules. These facts underscore the gross negligence of Dr. Ledbetter's decision.

Respondent points out that Renzo's application indicated "Propagation" as a purpose. Respondent's Brief, p. 1. Respondent is claiming that Dr. Ledbetter addressed not only the issue of possession, but also of propagation, when he reviewed the application. However, Respondent points

to no evidence whatsoever showing that Dr. Ledbetter considered the "propagation" purpose when reviewing the application. In fact, Respondent acknowledges that discussion regarding breeding *licenses* between Renzo and Dr. Ledbetter **first occurred** after Dr. Ledbetter sent his October 17 letter. Respondent's Brief, p. 3.

Dr. Ledbetter's conditional approval of Renzo's application, as set forth in his October 17 letter, also demonstrates Dr. Ledbetter's gross negligence. There was no basis given for the sterilization of an endangered species. There was no reason given as to why Renzo's cats could not be bred in the State of Idaho with proper precautions. There were no observations of Renzo's superior program, the Foundation's secure facilities, Renzo's Exhibitor's license from the U.S. Department of Agriculture, or Renzo's longstanding experience in breeding and exhibiting the cats. R. Vol. I, p. 89. Furthermore, the word "propagation" was never mentioned. R. Vol I, p. 114.

When Renzo submitted the application for a possession permit, he didn't submit an application for a propagation permit. R. Vol. I, p.88. After he learned of the spaying and neutering requirement, Renzo spoke with Dr. Ledbetter for the **first time** about the Foundation's breeding programs and the fact that the tigers were critically endangered. R. Vol. I, p. 89. Dr. Ledbetter told him that he did not give breeding licenses to individuals and that he wasn't concerned about zoos. R. Vol. I, p. 89 - 90. Renzo reiterated that the Foundation's licensing was the same as that used for zoos. Dr. Ledbetter then said that he couldn't give licenses to individuals but that **he would have to check with the attorney general to see if he could do so**, but that he didn't expect any exceptions to the rule being made. Dr. Ledbetter never called Renzo back. R. Vol. I, pp. 89-90.

Rebecca Harris of the Foundation also spoke with Dr. Ledbetter, informing him that the Foundation couldn't spay and neuter their tigers as it was against federal law and would utterly defeat the Foundation's preservation or breeding programs. Dr. **Ledbetter replied that it wasn't his problem.** R. Vol. I, p. 97. Rebecca left the conversation feeling like she had asked Dr. Ledbetter "why are you picking on us?" and was told "Because I can." R. Vol. I, p. 98.

In light of Dr. Ledbetter's hostility, Peter Renzo retained Idaho counsel who wrote to Dr. Ledbetter on November 2, 2007, stating, "***If you have actually denied or plan to deny the issuance of a breeding permit***, I hereby request that you submit to be a written denial . . . ." Counsel also stated, "Please indicate whether such [denial] is a final agency decision . . . ." The fact that Renzo did not know if a wrongful act had occurred is abundantly clear from counsel's statements.

Evidence in the record undisputedly establishes that Dr. Ledbetter told Renzo that he would check with the attorney general to see to if he could issue a propagation permit to Renzo. This statement to Renzo clearly re-opens the issue of spaying and neutering. Dr. Ledbetter did not get back with Renzo and no evidence in the record shows that Ledbetter had checked with the Attorney general or had received a decision from the attorney general by the time he had spoken with Rebecca Harris. No decision was communicated and counsel asked for a decision.

In his November 16, 2007 letter, Dr. Ledbetter plainly acknowledged that Renzo's counsel "requested that the State of Idaho issue a propagation permit". R., Vol. 1, p. 117. Dr. Ledbetter then stated, "The State of Idaho will not issue a Propagation Permit to your client." Dr. Ledbetter subsequently stated, "[g]iven the Legislature's clear direction, as well as the rule, **ISDA will not**

issue a Propagation Permit. I **also re-affirm** the decision set forth in my October17, 2007 correspondence. ISDA will issue a Possession Permit to your client, but only if the following five requirements are met (emphasis added)." R. Vol. I, pp. 117. It is critical to note that in Dr. Ledbetter's own words, there was no "reiteration" of a denial of a propagation permit, as Respondent would have the Court believe. This was his **very first written denial** of propagation permit, as well as his **final** decision, his **final say** in the matter. Renzo Affidavit, ¶ 13, R. Vol. I, p. 145, Ledbetter Depo., p. 94, LL. 23 - 25; p. 95, LL. 1 - 8. This was **the** pronouncement that Renzo was seeking, just not the decision he wanted. **This was the decisive wrongful act.**

On December 7, 2007, Renzo's counsel sent another letter to Dr. Ledbetter requesting reconsideration of the denial. R. Vol. I, pp. 119 - 121. It is significant to note here that a reconsideration of the denial of a propagation permit was not made until Dr. Ledbetter actually denied it. Logically, had Dr. Ledbetter denied a propagation permit in his October 17 letter, a request for reconsideration would have been made then. The undeniable facts are that Dr. Ledbetter said he would check with the attorney general and then on November 16, gave his decision regarding the propagation permit, not a reaffirmation but a declaration.

Respondent stated in its Brief that neither Renzo nor his counsel had made mention of "potential contracts" in relation to Renzo's application, and that Dr. Ledbetter did not intend to cause a breach of any contract. Respondent's Brief, pp. 1, 4. Respondent apparently disregards Renzo's statements to Ledbetter that the Foundation's goal was to bring in money through tourism, a hotel and tiger show which would raise awareness of the endangered tiger. R. Vol. I, pp. 89-90.

Respondent also disregards Rebecca Harris' statements to Dr. Ledbetter that the Foundation **had an investor** lined up who wanted to build a facility that would be open to the public, similar to Bear World, with a Tiger theme that would bring tourism and business to the community. R. Vol. I, p. 97. Because the Foundation was denied possession and propagation permits, it was precluded from building a such a facility and the sponsor that had given offers/consideration to assist with the facility withdrew its offers/consideration. R. Vol. I, p. 91. Consequently the Foundation has been in serious jeopardy of ending its operations due to losing this sponsorship and funding. R. Vol. I, p. 91.

The undisputed facts show that Dr. Ledbetter intended to stop the propagation of Renzo's endangered tigers in Idaho regardless of any contracts. Dr. Ledbetter's own deposition testimony is that any knowledge of such contracts would not have changed his decision. R. Vol. I, p. 146, Ledbetter Depo., p. 99, LL. 11 - 14. Respondent cannot show that Dr. Ledbetter's actions **would have been any different** had Renzo or his counsel specifically laid out every detail of a contract.

Understandably, Respondent says little about what District Judge Ted Wood thought of Dr. Ledbetter's treatment of Renzo's application. Respondent's Brief, p. 5. Respondent doesn't touch Judge Wood's statement that, "it does appear to this Court that the administrator is basically making up the rules as he goes." R. Vol. I, pp. 186-187, Hearing Transcript, p. 5, LL. 19-25, and p. 6, L. 1.

Respondent also apparently chose not to address Judge Wood's comment that "[w]ithout standards for discerning ISDA's discretion, ISDA's decision is not subject to any meaningful review, thereby limiting the judiciary's role to rubberstamping ISDA's actions and covert reasoning." R.

Vol. I, pp. 204 - 205. Respondent's whitewashing cannot excuse the impropriety of Dr. Ledbetter's decisions as expressed in Judge Wood's findings.

II.
ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondents' request for attorney fees and costs on appeal under I.C. §6-918A must be denied.

III.
ARGUMENT
I
STANDARD OF REVIEW

When considering an appeal from a motion for summary judgment, the appellate court's standard of review is the same as the standard used by the trial court in passing on the motion. *Curtis v. Firth,* 123 Idaho 598, 610, 850 P.2d 749, 761 (1993) *citing McDonald v. Paine,* 119 Idaho 725, 810 P.2d 259 (1991); *Meridian Bowling Lanes v. Meridian Athletic Ass'n, Inc.,* 105 Idaho 509,670 P.2d 1294 (1983). The appellate court is to apply such rules to the record before it and determine whether the moving party is entitled to judgment as a matter of law. In making this determination, the appellate court is required to review and consider the totality of the motions, affidavits, depositions, pleadings and attached exhibits contained in the record. *Curtis,* 123 Idaho 610, 850 P.2d 761 *citing Anderson v. City of Pocatello,* 112 Idaho 176, 731 P.2d 171 (1986).

The role of the appellate court in reviewing the district court's decision is not to supplant the lower court's interpretation of the evidence, but to determine whether substantial and competent evidence supports the court's determinations. *McKay Construction Co. v. Ada County* 126 Idaho

923, 925 , 894 P.2d 156, 158 (Ct. App. 1995). The appellate court must construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences in that party's favor. *Van v. Portneuf Medical Center*, 2009 Opinion No. 92, Docket No. 34888. If reasonable people could reach different conclusions or inferences from the evidence, the motion must be denied. *Id.*

In addressing questions of law, the appellate court is free to draw its own conclusions from the evidence which has been presented. *Beard v. George*, 135 Idaho 685, 687, 23 P.3d 147, 149 (2001). The Court may substitute its view on a legal issue for that of the district court. *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997).

II

THE DECISIONS OF DR. LEDBETTER AND THE DISTRICT COURT FLY IN THE FACE OF THE ENDANGERED SPECIES ACT

The plain intent of Congress in enacting the Endangered Species Act of 1973 ("ESA") "was to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978). According to the *Tenn. Valley Authority* Court, this intent is "reflected not only in the stated policies of the Act, but in literally every section of the statute." *Id.*

In passing the Endangered Species Act, Congress observed:

> From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

H. R. REP. NO. 93412, at 5 (1973).

Purposes of the ESA included providing " a program for the conservation of . . . endangered species and threatened species . . ." 16 U.S.C. §1531(b). Congress declared that policy "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. §1531(c)(1). Congress defined conservation to include "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. §1532(3).

The "take" prohibition in 16 U.S.C. §1538(a)(1)(B) provides that "it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States. . . ." The ESA definition of "person" includes ". . . any officer, employee, agent, department, or instrumentality of the Federal Government, of **any State, municipality, or political subdivision of a State**, . . . any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States" (emphasis added). 16 U.S.C. §1532(13). The term "take" defined in 16 U.S.C. §1532(19) means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

The definition of "harm" within the definition of "take" in the ESA means:

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. 17.3

The definition of "harass" in the definition of "take" in the Act includes the following:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted:
>
> (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act . . . .

50 C.F.R. 17.3

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995)("Sweet Home"), the U.S. Supreme Court addressed a challenge to the definition of harm, within the definition of "take" in the ESA. Although the issue was whether the definition of "harm" included habitat modification, Justice O'Conner, in a concurring opinion, provides tremendous insight to the case at hand. Justice O'Conner stated:

> As an initial matter, I do not find it as easy as Justice Scalia does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird. To "injure" is, among other things, "to impair." Webster's Ninth New Collegiate Dictionary 5623 (1983). One need not subscribe to theories of "psychic harm," cf. post at 734-735, n. 5 to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This in my view, is actual injury.

Sweet Home, 515 U.S. at 710.

By requiring Renzo to sterilize his tigers before entry into the State of Idaho, Dr. Ledbetter required that Renzo make it impossible for the tigers to reproduce, thereby impairing the tigers' most essential physical functions and rendering the tigers and their genetic material, biologically obsolete. By requiring sterilization, the State of Idaho, through Dr. Ledbetter, demanded that an unlawful "take" occur in direct violation of ESA.[1] In this light, how can anyone argue that Dr. Ledbetter was not grossly negligent, particularly in light of the fact that no Idaho statute required sterilization?

Renzo alleged in his Complaint that the Department of Agriculture wrongfully interfered with Plaintiff's prospective economic advantage in part by using improper and unlawful means and procedures in demanding spaying and neutering. R. Vol. 1, p. 10. In addressing the harm suffered by SABRE, the district court stated:

> The fact that Ledbetter denied Renzo a permit to propagate the tigers may have alienated Renzo's ultimate purpose, but it did not interfere with the economic advantage Renzo could have enjoyed had he been able to abandon his breeding plans.
>
> * * *
>
> The harm at issue, according to Renzo, is that Renzo was precluded from building a facility for his tigers in the state of Idaho. (Footnote and citation omitted). However, Ledbetter's conduct, even if this Court assumes it was reckless, willful and wanton, did not preclude Renzo from building a facility for his tigers in the state of Idaho. It only precluded Renzo from breeding his tigers in the state of Idaho. Accordingly, this Court finds that Renzo has not raised issues of material fact which would stave off summary judgment as to Renzo's tortious interference with prospective economic advantage claim.

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[1] It should also be noted that in a post *Sweet Home* case, *Bensman v. U.S. Forest Service*, 984 F.Supp. 1242, 1247, (1997)it was decided that the taking prohibition is "broadly construed to prohibit nearly any activity which might adversely affect protected species."

R. Vol. I, pp. 243 - 245.

When the district court rendered its decision, the court had before it the affidavit testimony of Rebecca Harris indicating that the spaying and neutering required was against federal law. The direct implications of the district court's rulings are that Renzo has no prospective business advantage claim because he could have made money had he just decided to impair the biological functions of his tigers and violated the ESA. This reasoning, as previously stated in Renzo's Appellant's Brief, flies "in the face of federal laws promoting the preservation of endangered species." Appellant's Brief, p. 39.

The district court failed to address issues pertaining to endangered species in arriving at its decision. Because proper consideration of the protection of an endangered species would have resulted in a different decision, the decision must not stand.

III
THE STATE OF IDAHO OWED A DUTY TO RENZO AND WAS GROSSLY NEGLIGENT IN THE PERFORMANCE OF THAT DUTY

Respondent claims that "Renzo has not established a duty on the part of the ISDA Administrator to each applicant for a possession permit." Respondent's Brief, p. 18. Renzo asserts that Respondent has totally disregarded the evidence in the record creates a duty on the part of the ISDA toward Renzo.

Respondent makes absolutely no mention of Judge Wood order that when ISDA adopted criteria and/or rules for which possession and propagation permits in the future, it was to apply the rules and criteria "**fairly to Petitioner's application**" (emphasis added). R. Vol. I, pp. 70, 190.

Obviously, Judge Wood recognized that ISDA had a duty to apply the rules fairly. Isn't it logical that if the ISDA applied the rules fairly, and Renzo complied with all of the rules, that the ISDA would have a duty to issue a permit? If, as Respondent argues, the ISDA could "use its discretion" and deny a permit after all rules were complied with, wouldn't ISDA's actions be in violation of the mandate to apply the rules fairly? If ISDA could deny a permit after all rules were complied with, we would be right back to the issue of "making up your own rules as you go" which Judge Wood was trying to prevent.

The duty to apply the rules fairly existed before Judge Wood made his decision. Judge Wood found it necessary to order ISDA to actually perform its duties in the future . Prior to Judge Wood's ruling, Renzo complied with every single rule that had been promulgated. ISDA had a duty to issue a permit if the rules were complied with. ISDA made its own rules and breached its duty. Hence, Judge Wood ruled that ISDA's actions were in violation of the law.

In *Crown v. State Department of Agriculture*, 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994) bean growers had filed an action against the Department of Agriculture for negligent inspection of a commodities warehouse. In addressing the issue of whether immunity should be afforded to the State under I.C. §6-904B, the *Crown* Court stated that "to establish gross negligence under the statute, there must be evidence showing not only the breach of an obvious duty of care, but also showing a "deliberate indifference" to the harmful consequences of others. *Crown*, 127 Idaho at 192 - 193, 898 P.2d 1103-1104. Noticeably absent from the *Crown* decision is any discussion whatsoever as to whether a duty was owed by the Department of Agriculture to the bean growers.

The *Crown* Court went directly to the issue of gross negligence. *Crown*, 127 Idaho at 193, 898 P.2d 1103-1104. Obviously, a duty was owed by the State or the *Crown* Court would have addressed the issue. Obviously, a duty was owed by the State of Idaho to Renzo, or there would have been no reason for Judge Wood to order the State treat Renzo fairly.

Respondent argues that Renzo has "failed to show a genuine issue of material fact regarding the existence of gross negligence or reckless, willful and wanton conduct. Respondent's Brief, p. 19. Somehow, it appears that Respondent has missed, or refused to acknowledge, the following facts:

1. By ordering spaying and neutering of Renzo's tigers, Dr. Ledbetter blatantly disregarded all considerations for the protection of an endangered species. Indeed, Dr. Ledbetter did not even speak with any third party about how Renzo's breeding could protect the species. He simply refused to see how Renzo's operation could benefit the endangered species.
2. Dr. Ledbetter did not even speak with Renzo before sending his October 17 letter. Dr. Ledbetter did not take into account Renzo's qualifications, documented past performance, or experience when he denied the propagation permit.
3. Dr. Ledbetter gave absolutely no consideration to the Foundation's desires fulfill its mission and purpose through education and breeding.
4. Dr. Ledbetter compared Renzo's operations with that of Jerry Korn, a person who over the course of time repeatedly violated the law with regard to the possession and

propagation of deleterious exotic animals. Renzo, on the other hand, complied with all laws and had a U.S.D.A. license which Korn did not.

5. Dr. Ledbetter refused to grant a propagation permit to Renzo who had complied with all laws and yet didn't even think about Idaho's zoos, one of which was breeding tigers without any propagation permits whatsoever, in clear violation of State law.

Renzo has asserted and continues to assert that the above facts clearly present sufficient evidence to show deliberate indifference on the part of Dr. Ledbetter to the consequences to SABRE.

The evidence in the record establishes that the S.A.B.R.E. Foundation would have generated substantial revenues for preservation, education and breeding programs had it been allowed to enter the State. The evidence further establishes that the S.A.B.R.E. Foundation was severely and irreparably harmed when it curtailed its operations in Nevada and then lost its sponsorship. The harm caused by refusing breeding permits to a Foundation who draws its revenues in part through breeding was substantial. The State's actions were reckless, and as a direct result of this recklessness, SABRE was irreparably harmed.

Respondent also claims that a "reasonable person in a similar situation and of similar responsibility" **would not** "be inescapably drawn" to recognize a duty to issue not only a possession permit, but a propagation permit. Respondent's Brief, p. 19. Respondent State of Idaho appears to suggest that a reasonable person would not consider the plight of the endangered tigers. Respondent also seems to argue that it would not be reasonable to assist the efforts of an individual and a non-profit organization adamantly dedicated to the preservation of an endangered species. Respondent's

actions have left an unmistakable message with those desiring to protect an endangered species such as big cats in the State of Idaho through education and breeding. That message is, "Go somewhere else, you're not wanted here."

IV
THE STATE OF IDAHO, THROUGH DR. LEDBETTER, COMMITTED A WRONGFUL AND UNLAWFUL ACTION WITHOUT LEGAL JUSTIFICATION OR EXCUSE AND WITH ILL WILL

Respondent asserts that "Renzo simply has offered no evidence of an "intentional commission of a wrongful or unlawful act, without legal justification or excuse and with ill will". Respondent's Brief, p. 16. The facts undisputedly show that Dr. Ledbetter committed a wrongful and unlawful act without legal justification or excuse. The district court made no finding otherwise. R., pp. 235 - 238. The only issue in determining whether the district court erred in finding that the State was immune under I.C. §6-904(1) is whether Dr. Ledbetter acted with an ill will.

The District Court utilized *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990) as the standard for establishing ill will. R. Vol. I, p. 237 - 238. However, the central issues of *Evans* certainly **did not involve** a determination of malice on the part of the police officers. The *Evans* Court did not address the definition of "malice". Furthermore, the *Evans* decision clearly showed that the allegations of malice were not fully born out by the testimony. Thus, the district court's utilization of *Evans was* misplaced.

In *Anderson*, 112 Idaho at 187, 731 P.2d at 182 (1987) it was found that the term malice had been variously defined. The *Anderson* Court determined that the term malice as used in §6-904 must

refer to "actual malice". *Id.* This Court has indicated that actual malice is not defined as an evil intent or a motive arising from spite. *Clark v. Spokesman-Review,* 144 Idaho 427, 431, 163 P.3d 220 (2007).

While not addressing "actual malice", this Court in *Curlee v. Kootenai County Fire & Rescue*, 2008-ID 1020.142, addressed "malicious" as follows:

> The dictionary defines malicious as: "harboring ill will or enmity . . . proceeding from hatred or ill will . . . playfully or archly mischievous . . . [c]lever, cunning . . . having or done with, wicked or mischievous intentions or motives . . . [i]ll-disposed, spiteful, resentful, bitter, rancorous, sinister, unpropitious." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1367 (1966). It is clear from the record that Curlee disliked Wheeler and Sharp and resented working with them.

Curlee v. Kootenai County Fire & Rescue, 2008-ID 1020.142, p. 11.

In the case at hand, the evidence is sufficient to satisfy the requirements for a showing of ill will. Rebecca Harris repeatedly attempted to get Dr. Ledbetter to understand the nature of the Foundation. Ledbetter replied that it wasn't his problem. R. Vol. I, p. 97. Dr. Ledbetter left the undeniable impression with Rebecca that he was picking on the Foundation just because he could. Peter Renzo understood that Dr. Ledbetter was very rude to Rebecca and would not answer her questions. R. Vol. I, p. 90. Because such actions satisfy the requirements of ill will under the case law cited above, the district court's decision regarding the malice issue must therefore be reversed.

V
THE STATE OF IDAHO TORTIOUSLY INTERFERED WITH SABRE'S PROSPECTIVE ECONOMIC ADVANTAGE CLAIM

Respondent argues that "it is not reasonable that Dr. Ledbetter could anticipate that the requirement of spaying and neutering would lead to termination of Renzo's economic expectancy". Respondent's Brief, p. 21. However, the undisputed evidence in the record establishes that Dr. Ledbetter was told that the Foundation had an investor who wanted to build a facility that would be open to the public and that would bring tourism and business to the community. Is it not reasonable to presume that if an investor is lined up, a prospective economic advantage is anticipated?

Furthermore, Ledbetter was told repeatedly of the Foundation's purpose to preserve the tigers through education and breeding Is it not reasonable to presume that if the Foundation's mission is thwarted, its economic viability is also adversely affected? A fair person, without an agenda, could easily connect the two large dots and determine that the requirement of spaying and neutering would lead to termination of Renzo's economic expectancy. Dr. Ledbetter did not act reasonably, which resulted in substantial loss to Renzo.

Despite Respondent's arguments that *Highland Enterprises, Inc. v. Barker*, 133 Idaho 330, 986 P.2d 996 (1999) does not support Renzo, the *Highland* Court's language regarding intent remains very applicable. Respondent's Brief, p. 20. Addressing the element of intent, The *Highland Enterprises* Court stated:

> The substantially certain aspect of appellants' conduct allows a finding of intent. Even more, regardless of the assertion that Highland was not the intended target of their activities and saving the trees was

> the ultimate objective, intent can be shown even if the interference is incidental to the actor's intended purpose and desire, but known to him to be a necessary consequence of his action.

Highland, 133 Idaho at 340- 341, 986 P.2d at 1006-1007.

The substantially certain aspect of Ledbetter's conduct allows a finding of intent here. The demand of spaying and neutering for an organization relying on breeding is disastrous. Even if the interference in Renzo's business activities was not Dr. Ledbetter's desire, such interference was certainly incidental to Dr. Ledbetter's intended purpose and desire. As per Highland, intent has definitely been established. The district court did not apply the standards set forth in *Highland.*

Respondent claims that "Renzo has not shown how Dr. Ledbetter's discretionary decision constituted an "interference by improper means." Respondent's Brief, p. 21. For the reasons set forth below, Renzo strongly disagrees.

In its summary judgment, the district court stated:

> Furthermore, Renzo has not raised facts which would tend to support a theory that Ledbetter's denial of a propagation permit was wrongful by some measure beyond the fact of the interference itself. As noted above, this Court finds that Renzo has not shown a duty on the part of ISDA, and thus Renzo cannot establish that Ledbetter's conduct was grossly negligent.

R. Vol. I, p. 243

As shown above, the State of Idaho certainly did have a duty to apply the rules fairly. Denial of a propagation permit was wrongful by some measure beyond the denial itself. Because Dr. Ledbetter made his own unlawful rules to issue the propagation permit. Furthermore, the State of

Idaho had a duty to comply with the Endangered Species Act. Dr. Ledbetter's demand for spaying and neutering was in violation of the Endangered Species Act. The State's interference with Renzo's economic expectancy was certainly wrongful by some measure beyond the interference, as the interference violated State and Federal laws.

VI
ISDA OWED A DUTY TO RENZO TO PREVENT ECONOMIC LOSS AND BREACHED THAT DUTY

Idaho has recognized two exceptions to the economic loss rule, the "special relationship" exception and the "unique circumstances" exception. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996 (2005). Although the district court addressed the "special relationship" exception, it's analysis simply ended when it found that Dr. Ledbetter owed no duty to Renzo. R., Vol 1., pp. 247 -248. Renzo asserts by concluding that no duty was owed, the district court failed to apply the proper law, and if it had done so, summary judgment would have been precluded.

Respondent is correct in asserting that neither Renzo's Complaint nor his Notice of Clam made any claim for non-economic loss or property damage. Respondent's Brief, p. 23. However, Respondent fails to acknowledge that the basis for Renzo's economic damages stems from Dr. Ledbetter's demand that the value of Renzo's tigers be diminished through sterilization. Renzo's damages resulted from the State's breach of its duty and demand that a "take" occur in violation of the ESA. Thus, an underlying issue of property damage has been expressed in Renzo's claims from the beginning.

Renzo reasserts that the State performed the specialized function of granting breeding permits because it was the only entity which could issue breeding permits. By way of the rules then existing, the Department presented the position that it would give breed permits to qualified applicants. Through Dr. Ledbetter's statement to Renzo that he would check with the attorney general on the issuance of a propagation permit, he induced reliance. Dr. Ledbetter then refused to grant a permit, despite the reasonable information presented to him, and thereby breached the duty imposed upon the Department. The special relationship exception as set forth in *Duffin* should apply here.

Alternatively, Renzo asserts that the unique circumstances exception applies. The unique circumstances exception involves "unique circumstances requiring a different allocation of risk." *Just's Inc. v. Arrington Constr. Co.,* 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978). *Duffin v. Idaho Crop Improvement Assn.,* 126 Idaho 1002,1007-1008, 895 P.2d 1195 , 1200 - 1201(1995). The risk of economic loss should be shifted to the State because of the State's total inability to promulgate proper rules for the issuance of possession and propagation permits.

The evidence shows that Renzo relied on the rules then existing to plan for future development of the Foundation. Renzo complied with all of the rules. Then, when it was determined by Judge Wood that the State had no rules by which it could fairly issue permits, Renzo's plans were destroyed. Because the State did not have sufficient rules to begin with, the Administrator made his own rules, which were directly contrary the business plans of the Foundation and to federal laws protecting endangered species. These circumstances are unlike the circumstances

of the business lessee in *Just's Inc.* or the certification of seed potatoes in *Duffin*. The circumstances are totally unique. The unique circumstances exception should therefore apply, shifting the burden to the State for Renzo's losses.

VII
SABRE'S NOTICE OF TORT CLAIM WAS TIMELY FILED

Respondent is correct in asserting that Renzo's Notice of Tort Claim describes two alledged wrongful acts, ISDA's demand that Renzo's tigers and other cats be spayed and neutered and ISDA's refusal to issue a Propagation Permit. R. p. 10. Respondent then claims that "ISDA's letter of October 17, 2007 provided ISDA's position not only on possession, but also propagation." Respondent's Brief, p. 11. Granted, the demand to spay and neuter certainly addresses the propagation. But it does not address the request for a propagation permit. The reason the October 17 letter doesn't address a request for a propagation permit is that the issue didn't arise until Renzo's telephone conference with Dr. Ledbetter after the October 17 letter.

The evidence shows that Dr. Ledbetter informed Renzo during that conversation that he would check with the attorney general about the propagation permit. The evidence shows no response from Dr. Ledbetter regarding his inquiry to the attorney general prior to counsel's letter of November 2. On November 16, 2007, Dr. Ledbetter plainly acknowledges that counsel requested that the State issue a Propagation permit. Why would counsel request the issuance of a propagation permit if the wrongful act of denial of propagation permit had already been made? As indicated earlier, a request for reconsideration would have been made, not an initial request.

The question then arises as to whether Renzo was "reasonably put on inquiry" that Dr. Ledbetter would deny a propagation permit upon receiving the October 17 letter in light of the evidence that Dr. Ledbetter told Renzo that he would check with the attorney general after the October 17 letter? The answer is a resounding "No." The facts do not support such a conclusion. The facts in the record support the conclusion that Renzo was reasonably put on notice of the wrongful act when Dr. Ledbetter stated on November 17 that the State of Idaho would not issue a propagation permit. End of story.

Despite, the clamorings of Respondent, the district court's reliance on *Magnuson Properties Partnership v. City of Coeur D-Alene* 138 Idaho 166, 59 P.3d 971 (2002) to conclude that Renzo 's tort claim is untimely is just plain wrong. *Magnuson* did not involve two tort claims. *Magnuson* didn't involve a situation in which the City reconsidered its position and said it would do more checking into the issue. *Magnuson* involved the reiteration of the denial of one request, not the denial of one request and the reaffirmation of another request after the initial affirmation had been reopened for further review.

Dr. Ledbetter's October 17, 2007 letter to Peter Renzo was in direct response to Renzo's Deleterious Exotic Possession Permit Application. Dr. Ledbetter's denial of a propagation permit was in direct response to counsel's request for a propagation permit . R. Vol. I, p. 116. The facts simply do not render themselves to the application of *Magnuson* here. The district court's decision that the Tort claim was untimely must therefore be reversed.

VIII
RESPONDENT'S REQUEST FOR ATTORNEY FEES MUST BE DENIED

Respondent seeks attorney fees on appeal pursuant to I.C. §6-918A, asserting that Renzo exercised bad faith by asking this Court to second-guess the trial court's decision. Respondent's Brief, p. 25. This argument has no merit and is certainly not well taken.

Bad faith is defined as "dishonesty in belief or purpose." *Cordova v. Bonnevile County Joint Sch. Dist. No. 93*, 144 Idaho 637, 643, 167 P.3d 774 (2007). This definition constitutes is an exceptionally rigorous standard. *Caudle v. Bonneville County*, 2009-ID-0506.078 (Ct. App. April 30, 2009) *citing Bissett v. Unnamed Members of Political Compact,* 111 Idaho 863, 865, 727 P.2d 1291, 1293 (Ct. App. 1986). There is absolutely no way in the world that Renzo's arguments on appeal would satisfy this standard.

Renzo has not requested the Court to second-guess the trial court's decision. Renzo has argued that the district court did not apply the correct law and asks this Court to make its own conclusions from the law presented. This can in no way constitute bad faith.

Furthermore, Respondent only raised the issue of "second-guessing" once in its Brief. Respondent's Brief, p. 16. How can it now in good faith, claim that there was "second-guessing" on every issue? Respondent certainly cannot prove "bad faith" by clear and convincing evidence if it doesn't even address the issue on each of Renzo's arguments.

Renzo has raised significant and substantial questions of law. An award of attorney fees is certainly not appropriate here. *See Electrical Wholesale Supply Co. Inc. v. Nielson*, 136 Idaho 814,

41 P. 3d 242 (2002)(appeal asked the Court to reconsider the district court's findings of fact without raising significant questions of law, attorney fees were awarded). For these reasons, Respondent's request for attorney fees must be soundly rejected.

IV.
CONCLUSION

Renzo has clearly shown that the State violated laws, gave no consideration for the preservation of an endangered species, and wrongfully interfered with the S.A.B.R.E. Foundation's mission and economic growth. For these reasons, Appellant renews its request that the district court's Opinion and Order Granting Summary Judgment in Favor of Defendant and corresponding Judgment be reversed.

DATED this 19th day of January, 2010.

Nick L. Nielson, Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of January, 2010, I submitted for mailing a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF** to the person(s) listed below:

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