9-21-2011

Idaho Wool Growers Ass'n, Inc. v. State Appellant's Brief Dckt. 38743

Docket No. 38743-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO WOOL GROWERS ASSOCIATION, INC., an Idaho corporation, individually and on behalf of its members; FRANK SHIRTS, JR., individually and as a member of the Idaho Wool Growers Association; RONALD W. SHIRTS, LESLIE SHIRTS and JOHN T. SHIRTS, individually and d/b/a SHIRTS BROTHERS SHEEP and as members of the Idaho Wool Growers Association,

Plaintiffs/Appellants,

v.

STATE OF IDAHO; IDAHO FISH & GAME COMMISSION; IDAHO DEPARTMENT OF FISH & GAME; CAL GROEN, Director of Idaho Department of Fish and Game.

Defendants/Respondents.

APPELLANTS' OPENING BRIEF

Appeal from the District Court of the Third Judicial District for Adams County State of Idaho

The Honorable Bradly S. Ford, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case involves a 1997 agreement by the State of Idaho (through the Idaho Department of Fish and Game) that Idaho domestic sheep operators would be protected economically from any harmful impacts arising from the reintroduction of bighorn sheep into Hells Canyon in 1997. Domestic sheep operators are now being forced out of business because of effects arising out of the reintroduction of the bighorn sheep and the Department of Fish and Game has ignored its 1997 promise and the related Idaho statute. The domestic sheep operators filed an Amended Complaint seeking to hold the State to its agreement and the State moved to dismiss the action. The district court agreed with the State and granted the State's motion to dismiss. This appeal follows.

B. Course of Proceedings.

The domestic sheep operators filed their original Complaint and Demand for Jury Trial on April 1, 2010. (R., p. 1). They then filed a First Amended Complaint and Demand for Jury Trial on April 20, 2010. (R., p. 9). The Idaho Department of Fish and Game ("IDFG") then moved to dismiss on May 19, 2010. (R., p. 20). After briefing and a hearing on November 10, 2010, the district court issued its Memorandum Decision and Order granting IDFG's motion to dismiss on February 4, 2011. (R., p. 171). Judgment was entered March 4, 2011 (R., p. 191) and the Notice of Appeal was timely filed on April 15, 2011. (R., p. 202).

C. Statement of Facts.

Since the district court was deciding a motion to dismiss, the facts pleaded in the First Amended Complaint are taken as true. *See Hoffer v. City of Boise,* _____ Idaho _____, 2011 W.L. 2673285 *1 (July 11, 2011) (since dealing with 12(b)(6) motion "the facts are presented here as alleged in his complaint"). The appellant, Idaho Wool Growers' Association, Inc. ("IWGA") is a non-profit Idaho association. The other appellants are Idaho domestic sheep operators and members of IWGA who have grazed sheep in the Payette National Forest for many years. (R., p.10). Appellants are together referred to as "Woolgrowers."

Bighorn sheep were extirpated from the Hells Canyon area of Idaho and Oregon by the mid-1940s. In 1996 and 1997, various federal and state agencies, including the Idaho Department of Fish and Game, joined together to consider the reintroduction of the bighorn sheep in the Hells Canyon area. (R., p.11). During this time period, IWGA and its members became concerned about the reintroduction plan and feared it would harm their sheep operations. They threatened to oppose the reintroduction plan and threatened to seek legislation in the Idaho Legislature. As a result of the threatened opposition from IWGA and its members and in an effort to resolve the dispute and eliminate these objections and the Woolgrowers' resistance to the introduction of the bighorn sheep, the governmental entities of the Hells Canyon Bighorn Sheep Restoration Committee, including the United States Forest Service, Washington and Oregon wildlife agencies and the Idaho Department of Fish and Game, signed a Letter

Agreement addressed to the IWGA. (R., p.12). (A copy of that Letter Agreement is located at R., pp. 197-98.)

The Letter Agreement dated January 16, 1997 stated that the Idaho Department of Fish and Game and the other state wildlife agencies "will also take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators." (emphasis added) The Hells Canyon Bighorn Sheep Restoration Committee, of which IDFG was a member, also "recognizes the existing domestic sheep operations in or adjacent to the Hells Canyon complex, on both National Forest and private lands ...." As a result of the execution of the Letter Agreement, IWGA and its members, understanding that the intent of the Letter Agreement was that domestic sheep operators not only would not be held responsible for losses of bighorn sheep but that IDFG would take whatever action was necessary so that domestic sheep operators would not be harmed as a result of the reintroduction of the bighorn sheep, withdrew their opposition to the reintroduction of the bighorn sheep and ceased legislative action to prohibit IDFG from participating in the program. (R., p.13).

As a result of the agreement between IDFG and the domestic sheep operators, and consistent with the January 1997 Letter Agreement, two months later on March 24, 1997 the Idaho Legislature enacted Idaho Code § 36-106(e)(5)(D), which among other things required that IDFG give notice of bighorn sheep transplants to any affected Federal grazing permittees and also stated that the existing domestic sheep operations in the area of any such bighorn sheep

transplant "are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted."

For several years all parties to the Letter Agreement honored their deal and the statute was followed. Starting around April 2007, however, various Woolgrowers began to suffer economic harm as a direct result of the introduction of the bighorn sheep. This harm included reductions in Federal domestic sheep grazing permits because of claimed losses of bighorn sheep due to domestic sheep. Specifically in 2007 (as well as in 2008, 2009, 2010 and 2011), the United States Forest Service took action to modify the grazing permits held by several of the members of IWGA and reduced domestic sheep grazing on allotments in order to prevent the alleged transmission of diseases from domestic sheep to bighorn sheep. *Western Watersheds Project v. U.S. Forest Service,* 2007 WL 1430734, at *1 (D. Idaho 2007); *see also* Defendants' Memorandum in Support of Motion to Dismiss, at R., p. 32. Those members appealed the administrative decision to the Federal District Court which concluded that "given the evidence of disease transmission between domestic sheep and bighorns, and the past failure to separate bighorns from domestic sheep on the Shirts' allotments, the Forest Service had sufficient reason to adopt a 'different approach' to 'more strictly limit grazing on that allotment.'" *Western Watersheds Project v. U.S. Forest Service,* 2007 WL 1430734 at *1 (D. Idaho 2007); *see also* Defendants' Memorandum in Support of Motion to Dismiss at R., p. 32. Therefore, as determined by the Federal Court, the basis for the reduction in grazing rights was evidence of disease transmission which the 1997 Letter Agreement had stated would not be the basis for

economic harm to the Woolgrowers and which the 1997 Idaho statute had "accepted" when recognizing the existing domestic sheep operations in the area. *See also* 1997 Letter Agreement (wherein IDFG and the other state wildlife agencies also "will assume the responsibility for bighorn losses and further disease transmission in their states.").

In response to this harm, the IDFG stood by and refused to take "whatever action that is necessary" to reduce these losses to bighorn sheep without adversely impacting the existing domestic sheep operations. The 1997 Letter Agreement did not identify the type of action that would be necessary. However, the actions could have included, but were not limited to, managing bighorn sheep in a manner that would negate conflict with domestic sheep operations (which could have included relocation of the bighorns), providing alternatives to domestic sheep operations to negate losses to bighorn sheep which could have included alternative forage sources, or providing recompense to the Woolgrowers.

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in granting IDFG's motion to dismiss the Woolgrowers' Amended Complaint for failure to state a claim?

2. Did the district court err in dismissing the Woolgrowers' claim for breach of contract in a 12(b)(6) motion?

3. Was the district court's statement in dicta that the 1997 Letter Agreement is void as a matter of law in error?

4. Did the district court err in the finding that the Woolgrowers' claim for violation of statute fails to state a claim upon which relief may be granted?

5. Did the district court err in dismissing all of the Woolgrowers' estoppel claims on a 12(b)(6) motion to dismiss?

6. Are the Woolgrowers entitled to an award of attorneys' fees under Idaho Code § 12-117?

III. LEGAL ARGUMENT

A. The District Court Erred in Dismissing the Complaint on a Motion to Dismiss.

There is a high threshold for granting a 12(b)(6) motion. The court should make "every reasonable intendment" in order "sustain a complaint against a motion to dismiss for failure to state a claim." *Idaho Commission on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973). The court looks no further than the pleadings when ruling on a motion to dismiss. *Young v. City of Ketchum,* 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claim. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995), cited in *Allied Bail Bonds, Inc. v. County of Kootenai,* _____ P.3d _____, 2011 WL 2652475 (Idaho 2011). In the present case, the district court appeared to misunderstand the difference between a Rule 56 motion for summary judgment and a Rule 12(b)(6) motion to dismiss. In its Memorandum Decision (R., p. 176) it stated that "in deciding

a motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, the district court applies the same standards applied to a motion for summary judgment. *Losser v. Bradstreet,* 145 Idaho 670, 183 P.3d 758 (2008)." The portion of *Losser* cited by the district court applies to appellate review of a lower court's decision dismissing an action pursuant to Rule 12(b)(6), and does not state the standard of review to be applied by the lower court itself when reviewing a 12(b)(6) motion. The only question before the lower court should be whether a claim for relief has been stated by the pleadings. *See Losser*, 145 Idaho at 673, 183 P.3d at 761.

The standard for appellate review is also clear. "[A] district court's dismissal of a complaint under I.R.C.P. 12(b)(6) shall be reviewed *de novo*." *Taylor v. McNichols,* 149 Idaho 826, 832, 243 P.3d 642, 648 (2010). "In reviewing a ruling on a motion to dismiss for a failure to state a claim upon which relief may be granted, the question is whether the non-movant has alleged sufficient facts in support of his claim which, if true, would entitle him to relief." *Rincover v. State of Idaho,* 128 Idaho 653, 656 917 P.2d 1293, 1296 (1996).

B. The Woolgrowers Have Stated a Claim for Breach of Contract.

The Amended Complaint alleges that in exchange for the Woolgrowers' agreement to withdraw their opposition to the bighorn sheep introduction and forbear from political action and lobbying for Idaho legislative repudiation of the reintroduction project, the IDFG entered into the Letter Agreement of 1997. The Amended Complaint alleges that the Letter Agreement obligates IDFG to protect the Woolgrowers from economic harm occurring because of the introduction of

the bighorn sheep into the domestic sheep operators' traditional grazing areas. The Amended Complaint alleges that this contract was in effect for several years but then was breached by IDFG when it refused to protect the Woolgrowers from the effects of the bighorn sheep reintroduction (particularly the loss of grazing rights) by refusing to take action to reduce the loss of sheep or to compensate the Woolgrowers for their economic losses.

The Amended Complaint therefore alleges an agreement, consideration, breach of the agreement and resulting damages. That is all that is necessary to allege in order to assert a breach of contract cause of action. Moreover, as the Memorandum Decision notes, the Defendants made a concession that the 1997 letter was to be treated as an agreement for purposes of the Motion to Dismiss argument. (R., p.174).

The district court failed to recognize that whether a contract was formed is a question of fact. *Shore v. Peterson,* 146 Idaho 903, 113, 204 P.3d 1114, 1124 (2009). The Woolgrowers allege that the consideration for the contract was their forbearance from opposing the reintroduction. Idaho law recognizes that "forbearance from exercising a right – such as the right to resort to courts to settle a dispute – in exchange for a promise to pay money constitutes consideration." *McColm-Traska v. Valley View, Inc.,* 138 Idaho 497, 502, 65 P.3d 519, 524 (2003). "A promisee's bargained-for action or forbearance, given in exchange for a promise, constitutes consideration." *Id.* at 501, 65 P.3d at 523. The Woolgrowers also assert that there was a meeting of the minds and a common understanding as evidenced by the Letter Agreement, the actions of both sides, and the mutual intent of the parties. *See Heritage Excavation, Inc. v.*

Briscoe, 141 Idaho 40, 43, 105 P.3d 700, 703 (Ct.App. 2005). "The common and distinct understanding may be express or implied." *Fox v. Mountain West Elec. Ins.* 137 Idaho 703, 707, 52 P.3d 848, 832 (2002). The manifestation of mutual intent to contract by the Woolgrowers and IDFG is evidenced by the Letter Agreement from IDFG which was directed specifically to the Executive Director of the Idaho Wool Growers Association.

This was all that the Woolgrowers needed to point to survive a motion to dismiss. The district court appeared to concede that there was a contract but then proceeded to interpret the terms of the contract. That may be appropriate in a motion for summary judgment where the parties can present evidence and argue over appropriate interpretation of the contractual terms; it is not appropriate in a motion to dismiss where the issue was never properly presented and the relevant evidence was not allowed in.

If this Court does consider the substance of the contract involved, its review is *de novo. Taylor,* 149 Idaho at 832, 243 P.3d at 648. The Woolgrowers assert that the language in the Letter Agreement supports their arguments or at the least is ambiguous such that the factfinder would be required to hear evidence as to the intent of the parties, with the ambiguities construed against the IDFG which participated in the drafting of the document. While the Woolgrowers assert that consideration of the substance of the agreement is inappropriate on a motion to dismiss, they would point out that the signatories to the Letter Agreement not only "recognized" existing domestic sheep operations around Hells Canyon on both National Forest and private land, but also "accepted" the risk of disease transmission and the state wildlife agencies,

including specifically IDFG, agreed to "take whatever action is necessary to reduce further losses of bighorn sheep without adversely impacting existing domestic sheep operators." (R., p.197). Contrary to the district court's position, the Woolgrowers do not assert that the contract was breached because IDFG failed to prevent the Forest Service from modifying the existing grazing allotments; rather, the Woolgrowers assert that IDFG failed in its promise to take whatever action was necessary to prevent adverse impacts on the existing domestic sheep operators. As the bighorns are property of the State of Idaho per Idaho Code § 36-10-3(a), IDFG could itself have managed the bighorn sheep in a manner to reduce losses associated with domestic sheep. IDFG could have provided alternative grazing allotments. IDFG could have provided alternative sources of food for the domestic sheep. IDFG could have paid the Woolgrowers for the partial or total loss of their business occasioned by the reintroduction of the bighorn sheep. IDFG did none of these; it accordingly breached the contract memorialized in the 1997 Letter Agreement.

Moreover, contrary to the district court's findings (R., p.183), nowhere in the four corners of the Letter Agreement is it suggested that "the Department [will only] be responsible for their own acts." The Letter Agreement encompasses the actions of the entire Hells Canyon Bighorn Restoration Committee which includes the Forest Service. The letter states that the Committee as a whole is interested in having the support of the Woolgrowers for the Committee's effort to repopulate Hells Canyon with bighorn sheep. The letter states that the Committee as a whole understands the impact the reintroduction will have on the domestic sheep operators. The letter

commits the state wildlife agencies, including specifically IDFG, to take whatever action is necessary to prevent any adverse impacts on the domestic sheep operators.

Under the standards of a Rule 12(b)(6) motion to dismiss, by which all reasonable intendments should be made by the court to sustain the complaint, it appears undisputable that the Woolgrowers have stated a claim for relief and should be entitled to offer evidence as to the intentions of the parties to the 1997 agreement. The district court's dismissal of the contract claim on a 12(b)(6) motion to dismiss is contrary to the applicable legal standards.

C. The 1997 Agreement Is Not Void as a Matter of Law.

The court below states in dicta that even if the Letter Agreement created an obligation on the part of IDFG, such a contract would be void because it would be an attempt to create indebtedness without proper appropriation. (R., p.183). The district court then states the Plaintiff's Amended Complaint does not allege a specific legislative appropriation for the asserted liability. Again, the court appeared to have forgotten that it was considering a Rule 12(b)(6) motion to dismiss, and not deciding the case after a full blown evidentiary hearing. Rule 8(a)(1), I.R.C.P., requires only a "short and plain statement of the claims showing that the pleader is entitled to relief."

> After reviewing all facts and inferences from the record in favor of the non-moving party, the court will ask whether a claim for relief has been stated. The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.

Losser v. Bradstreet, 145 Idaho 670, 672-73, 183 P.3d 758, 760-61 (2008).

Questions of fact or questions of credibility are not to be decided at this time. The court must look no further than the pleadings. It must conclude that it is beyond doubt that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief before granting a motion to dismiss. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 895 P.2d 561 (1995).

Idaho Code § 59-1015 prohibits state employees or boards from entering into contracts or agreements creating expense or incurring any liability in excess of the appropriation made by law. Section 59-1016 says that any "indebtedness" attempted to be created in violation of the provisions of this Chapter is void. Both of these statutes implement the provisions of Idaho Constitution, Article VII, § 13 which prohibit the withdrawal of money from the State Treasury except in pursuance of appropriations made by law.

First of all, in this early stage of litigation and on a motion to dismiss, there is no proof that the Idaho Legislature in its appropriations to the Department of Fish and Game in 1996 and 1997 did not provide monies to the Department to aid in bighorn sheep restoration. Moreover, the appropriation power and these statutes apply only to money in the State Treasury. Article VII, § 13. For example, special custodial funds held in trust by the State are not subject to appropriation. *State v. Musgrove,* 84 Idaho 77, 84-87, 370 P.2d 778 (1962). Monies received by the agency from a federal source may not be subject to appropriation. 1982 Idaho Attorney General Opinion 97, 1912 WL156267 (Idaho.A.G.). Idaho Code § 36-108 provides for a Fish

and Game Expendable Account which may be used by IDFG in the public interest and in accordance with the policies set forth in the Fish & Game Code. *See also* Idaho Code § 36-111 (Set Aside Account); Idaho Code § 36-112 (Animal Damage Control Fund); and § 36-115 (Big Game Depredation Fund); as well as Idaho Code § 36-110 (Federal Account). IDFG could have raised money through licensing, etc., sufficient to fund the amounts needed to protect the Woolgrowers without taking funds from the State Treasury. Indeed, Idaho Code § 36-408(5)(b) specifically provides for this. That section authorizes a lottery for a special bighorn sheep tag and states:

> Moneys in the [fish and game expendable trust account] from the lottery bighorn sheep tag shall be utilized by the department in solving problems between bighorn sheep and domestic sheep, solving problems between wildlife and domestic animals or improving relationship between sportsman and private landowners.

Next, it could be that there was no expectation that an appropriation be made in 1997 because in 1997 there was no way to know whether or not the introduction of the bighorn sheep would cause economic damages to the Woolgrowers or the extent of those damages or how those damages could be avoided. The 1996-1997 Legislature need not have appropriated money at that time.[1] Nor did the Letter Agreement necessarily obligate IDFG to withdraw money from the State Treasury as there are other options to protect the Woolgrowers from economic harm other than merely a monetary payout. IDFG could provide alternative grazing on State land, for example.

[1] Moreover, § 59-1015 has an exception for cases of epidemic. As IDFG and the Forest Service claim that domestic sheep cause an epidemic among bighorn sheep (through some mechanism not yet identified), then perhaps this exception comes into play to take the matter out of the scope of the statute.

If the statutes invalidate the contractual obligations contained in the Letter Agreement, as contended by IDFG, then those statutes as applied violate the United States and Idaho Constitutions. Amendment 14 of the U.S. Constitution proscribes deprivation of property rights without due process. Article I, § 10 of the U.S. Constitution denies states the power to impair contracts. The Idaho Constitution forbids the deprivation of property rights without due process of law, Article I, § 13, and Article I, § 16 provides that no law "impairing the obligation of contracts shall ever be passed."

Furthermore, the case law interpreting Idaho Constitution Article VII, § 13 notes that no set form of words is necessary to make appropriation by the Legislature and if an appropriation is made payable from a specific fund (e.g., the IDFG budget), it is not necessary to appropriate a specific sum. *Herrick v. Gallet,* 35 Idaho 13, 204 P. 477 (1922); *State ex rel. Hansen v. Parsons,* 57 Idaho 775, 69 P.2d 788 (1937).

This discussion, however, is premature and unnecessary at this stage. The issue before the district court was whether there was an agreement by which IDFG agreed to protect the Woolgrowers. It was not a question of the enforceability of a judgment. The legislature could appropriate monies in the next session if the agreement were found to be valid. But again, that is not an issue to be decided on a motion to dismiss.

D. The Amended Complaint States a Valid Statutory Claim.

Idaho Code § 36-106(e)(5)(D) provides that it "is the policy of the state of Idaho that existing sheep or livestock operations in the area of any bighorn sheep transplant or relocation

are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted." This provision is in the section creating the office of Director of the Department of Fish & Game and specifying the duties and powers of the director. The provision was enacted on March 24, 1997 and went into effect on that day as an emergency measure. Specifically, the amended portion provided:

> Upon any transplant of bighorn sheep into areas they do not now inhabit or a transplant to augment existing populations, the department shall provide for any affected federal or state land grazing permittees or owners or leaseholders of private land a written letter signed by all federal, state and private entities responsible for the transplant stating that the existing sheep or livestock operations in the area of any such bighorn sheep transplant are recognized and that the potential risk, if any, of disease transmission and loss of bighorn sheep when the same invade domestic livestock or sheep operations is accepted.

It is also important to note that the contact listed for the 1997 bill was Stan Boyd, Executive Director of the Idaho Wool Growers Association.

Section 36-106 was amended in 2009 to include a new subsection, (e)(5)(E), which requires the IDFG to develop a State management plan to maintain the population of bighorn sheep "which shall consider as part of the plan the current federal or state domestic sheep grazing allotment(s) that currently have any bighorn sheep upon or in proximity to the allotment(s)," and also directed IDFG to "cooperatively develop best management practices with the permittee(s) on the allotment(s)."

It is the Woolgrowers' contention, as supported by the legislative history, the context of the enactment and the plain language of the statute itself, that the Idaho legislature when

recognizing the "policy of the State of Idaho" that domestic existing sheep operations shall not be harmed by the reintroduction of bighorn sheep, mandated IDFG to protect domestic sheep operators from economic harm. It is apparent that IDFG has not done so. It is accordingly apparent that IDFG has not fulfilled its statutory duties as intended by the state legislature. It is clear that that breach of statutory duty is continuing even as of this date. This cause of action seeks a remedy for that continuing breach of statutory duty.

It is the Woolgrowers' contention that Idaho Code § 36-106 should be read to authorize an award of damages against the State in the amount of the economic harm sustained by the Woolgrowers. That is the plain import of the provision enacted in 1997 when the initial bighorn reintroduction was about to commence. Certainly the legislature intended to protect the domestic sheep operators from all adverse consequences of that reintroduction effort. This interpretation will be verified by testimony of the relevant witnesses as well as the relevant legislative history.

The Woolgrowers assert that even if it is determined that the statute does not explicitly authorize an award of monetary damages, the court can still find that the statute was violated and can require IDFG to provide non-monetary remedies to the Woolgrowers in the form of managing the bighorn sheep to reduce losses associated with domestic sheep, alternative domestic sheep grazing locations, feed for the domestic sheep or other arrangements which would protect their operations.

The district court, however, interpreted the statute and the legislative history to conclude that the legislature did not intend to obligate the State to indemnify the Woolgrowers for any

activities related to the bighorn sheep reintroduction. The Woolgrowers assert that this action was improper on a motion to dismiss. They should have the right at trial or even on a motion for summary judgment to elicit evidence regarding legislative intent, as their Amended Complaint contains sufficient facts to support this statutory claim.

E. The Woolgrowers Have Asserted a Viable Claim for Estoppel.

The district court did not analyze the Woolgrowers' estoppel claims to any extent. Rather, it stated that the various theories of estoppel must fail based on its finding that the 1997 Letter Agreement creates no enforceable contract. The court also stated that equitable estoppel cannot be applied against the State because it was not acting in a proprietary capacity, but rather a sovereign capacity, in dealing with the bighorn sheep reintroduction. If this Court finds that the district court should not have dismissed the contractual cause of action under the 12(b)(6) standards, then it should also resurrect the estoppel claims. The Woolgrowers also assert that even if the contractual cause of action is dismissed, it would not be appropriate to dismiss the estoppel causes of action pursuant to Rule 12(b)(6) as the Court must allow factfinding on the elements of the estoppel causes of action.

In their Amended Complaint, the Woolgrowers set out the elements of estoppel which they assert apply to IDFG's failure to live up to the promises made to the Woolgrowers in 1997. That is all that is required to defeat a motion to dismiss before the parties have a chance to bring to light the facts and the equities that apply to the situation. Instead of simply analyzing the

pleadings, as required in ruling on a Rule 12(b)(6) motion, the district court considered whether there were representations and looked at the factual background and weighed the equities of the situation. This is improper at this stage of the litigation.

The district court did recognize that while generally estoppel cannot be applied to a governmental agency, the notions of justice and fair play may require the application of estoppel to an agency. *Brandt v. State,* 126 Idaho 101, 878 P.2d 800 (Ct.App. 1994). The court then went on, however, to find there was no promise upon which the Woolgrowers could rely (R., p.191), no false representations by IDFG to the Woolgrowers (R., p.192), and no contrary position taken by IDFG (R., p.193). The Court also concluded that IDFG was acting in a sovereign capacity, and not engaging in a proprietary or commercial enterprise. (R., p. 194).

While the Woolgrowers disagree with each of those findings, their primary response is that those issues are inappropriate for determination on a motion to dismiss. They are fact-specific issues to be decided by the factfinder. The Complaint set out all of the elements of estoppel and a court may only consider the pleadings when deciding a motion to dismiss.

If this Court considers the factual questions, the Woolgrowers assert that the 1997 Letter Agreement must be considered a "promise" by IDFG – a promise which caused the Woolgrowers to drop their opposition to the bighorn reintroduction. Why else was the letter sent to IWGA by the Idaho Fish and Game Department? Indeed, IDFG conceded for purposes of the 12(b)(6) motion that there was indeed an agreement.

Similarly, it is a factual question whether IDFG made false representations to the Woolgrowers and then took a position contrary to what it had previously represented. Finally, how can a court determine whether IDFG was acting in a proprietary capacity without considering factual evidence?

The Woolgrowers submit that IDFG was acting in a proprietary or commercial capacity when it was negotiating with the Woolgrowers about the reintroduction of bighorn sheep. IDFG was interested in bringing back bighorn sheep in the Hells Canyon area for tourism and hunting purposes and was willing and anxious to cut a deal with the Woolgrowers to convince the Woolgrowers to withdraw their opposition. The Woolgrowers made a business decision as well, agreeing to withdraw their opposition in return for a promise they would be protected economically by the IDFG. If IDFG had been acting in a sovereign/governmental capacity, it would have had no reason or necessity to cut a deal with individual commercial interests such as IWGA. If a State agency is acting in its sovereign capacity, it does not cut deals with those affected by its decisionmaking. Only when a State agency acts outside of its sovereign capacity must it strike deals with affected commercial interests. Thus, estoppel does apply here as IDFG was acting in a business and proprietary manner. *See also Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 138, 997 P.2d 591, 599 (2000) ("therefore, because the SIF is undisputedly a public agency acting in a proprietary capacity, the doctrine of equitable estoppel would normally be applicable to the SIF").

Moreover, as the district court itself recognized, estoppel may be applied against the government even in its sovereign capacity under certain limited circumstances. *Brandt v. State of Idaho*, 126 Idaho 101, 878 P.2d 800 (Ct.App. 1994), noted that the control of penal institutions and parole are functions of the state as a sovereign and a claim of estoppel would ordinarily be precluded. The court went on:

> Brandt contends, however, that in some circumstances the government's conduct is such that estoppel does apply even when the government is acting as a sovereign. He refers us to *Johnson v. Williford,* 682 F.2d 868 (9th Cir.1982), where a convicted felon, sentenced to a term of ten years without possibility of parole, was mistakenly granted parole and lived at large for fifteen months. Despite his ineligibility, the prisoner in *Johnson,* was considered for parole on eight separate occasions and was eventually released on parole after a full hearing. When the mistake was discovered fifteen months later, the parole was revoked. The Ninth Circuit Court of Appeals held that the interests of justice and fair play required that the government be estopped from then denying the inmate's parole eligibility, stating:
>
> `[W]here justice and fair play require it' estoppel will be applied against the government, even when the government acts in its sovereign capacity if the effects of estoppel do not unduly damage the public interest.
>
> *Id.* at 871 *citing United States v. Lazy FC Ranch,* 481 F.2d 985, 989 (9th Cir.1973). *See also United States v. Wharton,* 514 F.2d 406 (9th Cir.1975).
>
> We note that in addition to the Ninth Circuit Court of Appeals, numerous other jurisdictions have allowed estoppel to be applied against the government in its sovereign capacity under limited circumstances. However, whatever merit there may be in this argument for application of estoppel against the government, we

> may not address it here, for Brandt did not present this issue to the magistrate.

The Idaho Supreme Court has also suggested that equitable estoppel may be applied to prevent injustice: "This Court has held that the doctrine of estoppel may be used against a highway district to prevent it from taking a position inconsistent with previous actions, in order to prevent manifest injustice. *Murtaugh Highway Dist. v. Twin Falls Highway Dist.*, 65 Idaho 260, 268, 142 P.2d 579-82 (1943)." *City of Sandpoint v. Sandpoint Ind. Hwy. Dist.,* 126 Idaho 145, 151, 879 P.2d 1078, 1084 (1994).

F. The Woolgrowers Are Entitled to an Award of Attorneys' Fees.

The Woolgrowers assert that they are entitled to an award of attorneys' fees under Idaho Code § 12-117. That section provides that attorneys' fees may be awarded against a state agency which acts without a reasonable basis in fact or law. The Woolgrowers assert that the State's motion is not supported by fact or law and the IDFG has acted unreasonably in trying to escape its contractual and equitable obligations.

IV. CONCLUSION

The issue before this Court is not whether the Woolgrowers will ultimately prevail, but whether they should be entitled to offer evidence to support their claims. *See Orthman,* 126 Idaho at 962, 895 P.3d at 563. The district court failed to follow the standards for deciding a motion to dismiss and went far beyond the pleadings.

The Woolgrowers respectfully request this Court to reverse the district court's Judgment dismissing Plaintiffs' Amended Complaint for Failure to State a Claim pursuant to I.R.C.P. 12(d)(b)(6) and remand the case for trial.

DATED this 21 day of September, 2011.

EBERLE, BERLIN, KADING, TURNBOW
& McKLVEEN, CHARTERED

By: _____
Samuel A. Diddle, of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of September, 2011, a true and correct copy of the within and foregoing document was served as follows:

State of Idaho, Office of the Attorney General Lawrence G. Wasden, Attorney General Clive J. Strong, Deputy Attorney General, Chief of Natural Resources Division Steven W. Strack, Deputy Attorney General P.O. Box 83720 Boise, ID 83720-0010	[X] [ ] [ ] [ ]	U.S. Mail Hand Delivered Facsimile (208) 854-8071 Overnight Mail

Samuel A. Diddle