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DEPARTMENT OF
WATER RESOURCES

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Ben D. Jernberg and Idaho Properties, LLC

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In re: 36596	)	Subcase No.31-11845
	)	
Case No. 39576	)	OBJECTION TO STATE'S
	)	MEMORANDUM OF COSTS
	)	<u>AND ATTORNEY FEES</u>
	)	

COMES NOW Ling, Robinson, and Walker the attorneys of record for
Objector/Claimants, Ben D. Jernberg and Idaho Properties, LLC, (hereinafter "Claimants") and
do hereby object to the *State of Idaho's Memorandum of Costs and Attorney Fees* for the reason
that the State was not the prevailing party in this matter as contemplated by Idaho Rule of Civil
Procedure 54 and 68 and, in the alternative, the State's offer of judgment does not entitle it to
attorney's fees or other costs in contravention to the rules of the state.

I. The State is Not a Prevailing Party Under Rule 54

The determination of whether a litigant is the "prevailing party" is committed to
the discretion of the trial court. *Gilbert v. City of Caldwell*, 112 Idaho 386, 399, 732 P.2d 355,
368 (Ct.App.1987); as cited in *Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho

259, 262, 999 P.2d 914, 917 (Ct.App.2000). Under I.R.C.P. 54(d)(1)(B), there are three principal factors the trial court must consider when determining which party, if any, prevailed: (1) the final judgment or result obtained in relation to the relief sought; (2) whether there were multiple claims or issues between the parties; and (3) the extent to which each of the parties prevailed on each of the claims or issues. The "result obtained" may be the product of a court judgment or of a settlement reached by the parties. *Jerry J. Joseph C.L.U. Assoc., supra*; *Ladd v. Coats*, 105 Idaho 250, 668 P.2d 126 (Ct.App.1983); *Daisy Manufacturing Co., Inc.*, 134 Idaho at 262, 999 P.2d at 917.

In this case, the Claimants voluntarily entered into a Standard Form 5 to resolve the matter. The Claimants did so after carefully weighing the pros and cons of proceeding with the action or entering into the stipulation. The decision to enter into a stipulation resolved the matter and prevented further costly trial expenses to both parties. The Claimants had not determined all the elements of their case at the time the State made its offer of judgment in May of 2006 and Idaho Properties LLC had recently purchased the disputed property and was unsure how it would use the land. Decisions to settle and stipulate should not be discouraged, which is what will happen if the Court penalizes the Claimants for resolving the matter short of trial. Because the Claimants willingly withdrew their claims and because no judgment was entered, the State should not be viewed as the prevailing party under Idaho Rule of Civil Procedure 54(d)(1)(C).

II. If State is Prevailing Party it is not Entitled to all Claimed Costs and Fees

If the Court finds that the State is the prevailing party and entitled to fees and

costs based upon Rule 68, the amount claimed by the State is excessive and not supported by the Idaho Code, the Idaho Rules of Civil Procedure or Idaho case law. Rule 68 provides that:

At any time more than 14 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, which offer of judgment shall be deemed to include all claims recoverable, including any attorneys fees awardable under Rule 54(e)(1), and any costs awardable under Rule 54(d)(1), which have accrued up to the date of the offer of judgment.

Subsection (c) of Rule 68 states:

In cases involving claims for relief other than monetary damages, if the judgment, including attorney fees awardable under Rule 54(e)(1) incurred before service of the offer of judgment, and costs incurred before service of the offer of judgment, finally obtained by the offeree is not more favorable than the offer, the offeree must pay the offeror's costs, as allowed under Rule 54(d)(1), incurred after the making of the offer. If the judgment including such attorney fees and costs is more favorable than the offer, the offeror must pay all costs of the offeree allowable under Rule 54(d)(1) both before and after the making of the offer.

The award is limited to the offeror's costs, as allowed under Rule 54(d)(1) that were incurred after making the offer. Those costs are limited to the following items:

1. **Costs as a Matter of Right**

a. **Rule 54(d)(1)(C)(8) – Expert Fees**

The first cost as a matter of right claimed by the State is expert fees. Pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C)(8), the prevailing party is entitled to reasonable expert witness fees for an expert who testifies at a deposition or at a trial of an action not to exceed the sum of \$2,000 for each expert witness for all appearances. The provision is clear and

unambiguous – the expert must testify at a deposition or trial. None of the experts listed at page four (4) of the State’s Memorandum testified at a deposition or trial. If this rule was to be read as the State requests, that experts are to be paid for any work done after being retained, then the state legislature could have drafted it so that it read that all costs incurred by experts, whether they testified at a deposition or at trial shall be recovered as a matter of right. That is not the case and the rule must be strictly construed against the party requesting such costs. Therefore, the \$10,000 claimed for the states five (5) experts should be denied as they did not testify at trial or deposition.

In addition, the State has requested payment for \$442.50 for expert fees paid to Dr. Dale Stukenholtz, who was the Claimants’ witness. The Claimants are not responsible for the cost of the late Dr. Stukenholtz’s deposition that was arranged and taken by the State. The State paid for the time Dr. Stukenholtz spent being deposed pursuant to Rule 26(b)(4)(C). Rule 54(d)(1) cannot force a party to pay for a deposition of its own expert and essentially swallow the provisions of Rule 26(b)(4)(C), which is what the State is seeking to do.

Therefore, because the State’s experts were not deposed and were not called to testify, there can be no fees as a matter of right pursuant to Rule 54(d)(1)(C)(8). In addition, the amount paid to Dr. Stukenholtz, who was the Claimants’ expert cannot be included under Rule 54(d)(1)(C)(8) as a cost as a matter of right.

b. Rule 54(d)(1)(C)(9) & (10) – Deposition Reporting/Transcribing

Pursuant to Rule 54(d)(1)(C)(9) & (10) a party is entitled for charges for reporting and transcribing of a deposition taking in preparation for trial and for the charges for one copy of

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3 any deposition taken. Again, if the State is found to be the prevailing party it is entitled to the
4 costs it incurred in taken depositions and transcribing one copy of each deposition. However, in
5 this case, the deposition of Paul Stukenholtz should not be charged to the Claimants because but
6 for his father's unfortunate passing, Paul Stukenholtz's deposition would not have been
7 necessary. In addition, the deposition was unnecessary as Paul Stukenholtz had reported that he
8 would essentially adopt the findings of his late father making a deposition unnecessary.
9

10 Under this rule, notwithstanding the determination that a particular party is
11 entitled to costs as a matter of right under Rule 54(d)(1)(C) in an action, the Court may, upon
12 proper objection, disallow any of the costs upon a finding that the costs were not reasonably
13 incurred. The costs for Paul Stukenholtz's deposition were not reasonably undertaken. In the
14 Claimants' *Written Statement Regarding New Expert Opinion* they disclosed that they would
15 substitute the testimony of Dr. Dale Stukenholtz for that of Paul Stukenholtz. It was further
16 reported in the *Written Statement* that after consulting with Paul Stukenholtz he reported that he
17 would adopt the findings of the expert report of Dr. Stukenholtz and that such adoption included the
18 amendments to the expert report made during the deposition of Dr. Stukenholtz. Also, Paul
19 Stukenholtz was going to rely on the field data collected by Dr. Stukenholtz, the deposition taken
20 by the State and other material in Dr. Stukenholtz's file with regard to this subcase for the basis of
21 his testimony at trial.
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24 Based on the above, it was clear that Paul Stukenholtz would not provide any
25 testimony that differed from Dr. Stukenholtz's deposition testimony. The Deposition was not
26 reasonably incurred and all costs for the Deposition of Paul Stukenholtz should not be charged to
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the Claimants. Therefore, if the State is found to be the prevailing party it is entitled to only \$1625.35 for the deposition reporting and transcription of Joe and Omar Llamas and Bryce Contor.

2. Discretionary Costs

The State has claimed \$101,226.05 in discretionary costs under Rule 54 (d)(1)(D). Pursuant to Rule 54(d)(1)(D), additional items of costs not enumerated in, or in an amount in excess of that listed in the subsection dealing with costs as a matter of right may be allowed only upon a showing that the costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.

The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

Rule 54(d)(1)(D).

a. Expert Fees in Excess of Those Warranted as a Matter of Right

The State in its *Memorandum of Costs and Attorney Fees* has neither shown why the costs for the experts were necessary or exceptional. The case was essentially one of determining what acres had been irrigated on the Claimants' property and what amount of water was suitable to irrigate uncultivated pasture. The State hired five high priced experts from both inside Idaho and out. All of the experts lived far from the proposed place of use and likely charged for their travel to and from the place of use. The total of \$99,848.53 for expert witness fees was neither necessary nor reasonably incurred. The State used excessive recourses for a

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3 small case with relatively straightforward legal issues. The hiring of a soil expert, botanist and
4 other experts was unreasonable for this case. The Court should not grant the discretionary costs
5 claimed by the State for its expert witnesses. In addition, the Claimants' decision to settle the
6 matter before trial saved a significant amount of money for the State as it prevented the
7 preparation, travel and testimony of the State's expert witnesses and the accrual of additional
8 expert fees.
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10 The Sate has provided a detailed expense report for Dr. Hill but no others. If the
11 Court does allow an award of expert fees for Dr. Hill it should be reduce from the claimed
12 amount because it appears that a significant portion of his work was for collecting weather data.
13 The Court earlier denied the State access to the Claimants' land to conduct weather exams
14 because it was not rationally related to the case. That rationale continues to all work Dr. Hill
15 performed in collecting whether data and the State cannot recoup any expenses for such work.
16 Page five of exhibit B of the State's *Memorandum* shows that he made several trips to weather
17 stations in the vicinity of Mud Lake. These included Rexburg, Hamer, Montevue and I15 exit
18 143. Dr. Hill spent additional time researching weather related information. Such efforts are
19 evidence by the times slips for July 7, 2006, July 10, (National Weather Service data), July 11,
20 July 12, July 25, July 31, August 19, August 21 and September 20.
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23 Dr. Hill took measurements of the weather in Mud Lake despite the Court's denial
24 permitting he State to actually bring the equipment on the Claimants' property because the Court
25 did not believe it would be relevant to the case or if the science was something usually relied on.
26 Any recent weather data was not relevant to this case and all costs associated therewith were not
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3 reasonably or necessarily incurred. Dr. Hill charged for setting up a portable weather station in
4 his back yard on August 19, installing the weather station on the 21st, and discussing additional
5 weather information on September 30 with a technician. Dr. Hill also made a second visit to the
6 disputed property in September of 2006. This trip was duplications as Glen Logan, another of
7 the State's experts, was already there to take soil samples from certain test pits.

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9 Dr. Hill also ran tests of the soil samples in addition to Logan's samples; the same
10 work was performed more than once. Also apparent is that Dr. Hill and the State's other experts
11 spent a great deal of time consulting together – this was not as large a case as the State made it
12 out to be. The expenses incurred by Dr. Hill and the other experts was out of proportion to the
13 nature of the case, the amount of acres involved and the amount of water at issue. The State is
14 not entitled to recovery the fees of its expert for performing work that is incurred unreasonably
15 such as collecting weather data and repeated consultations with the State's other experts.

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17 b. Attorney Costs

18 The State claims cost in the amount of \$1,234.62 for meals and lodging. These
19 costs would not serve the interests of justice if the Claimants were forced to pay these costs.
20 First, the State made multiple unnecessary visits to the proposed place of use in Mud Lake. The
21 Claimants should not be punished because the State's attorneys live in Boise and had to travel
22 approximately 10 hours round trip from Boise to Mud Lake. Second, the amount of trips taken
23 by the State to the place of use was unreasonable and unnecessary. Third, the State's attorneys
24 always traveled together and billed their time together. There was no reason that any visits to
25 Mud Lake, the hearings in Twin Falls or depositions needed to be attended by two attorneys. It
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3 was a waste of time for them to travel together. Fourth, the State's attorneys always drove to
4 Twin Falls for all scheduled hearings. This was unreasonable and unnecessary as each of the
5 hearings was made available telephonically by the Court.

6 David Barber made five trips to the place of use (5/15/06, 7/5/06, 8/21/06,
7 9/18/06, 10/25/06), David Stanish made three visits (8/21/06, 9/18/06, 10/25/06). These trips
8 were not necessary nor, with the cost associated with the trips, reasonably incurred. The one site
9 visit of October 25, 2006 and was for the benefit of the Court, however it was instigated by the
10 State and should not be charged to the Claimants.

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12 The State also unnecessarily brought two attorneys to the Deposition of Joe and
13 Omar Llamas on October 25, 2006, and to the Depositions of Dr. Dale Stukenholtz on November
14 9, 2006 and Bryce Contor on the 10th day. The deposition of Dr. Stukenholtz was in Twin Falls
15 and the Deposition of Mr. Contor was in Idaho Falls. Again, there is no way that the interests of
16 justice require these double bills for attorney costs should be assessed against the Claimants. The
17 State has also added a charge of \$8.47 for a disposable camera with no explanation as to why this
18 was deemed necessary and why the Claimants should be responsible for such cost.

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20 Furthermore, the Claimants should not be punished for the fact that the State's
21 attorneys, who were assigned to this case, live in the Boise Area but still chose to both always
22 attend all court hearings in person, when appearing telephonically was available. The interests of
23 justice would not be served by forcing the Claimants to pay for state employees to eat and lodge
24 while on unnecessary day trips, when the phone was available for the hearings and when one
25 attorney would have sufficed for the depositions. The \$1,234.62 for meals, lodging and the
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disposable camera should be rejected by this Court.

3. Attorney Fees Pursuant to Rule 54(e)(1), I.C. § 12-121 & § 12-123

The State is not entitled to an award of attorneys' fees under either the Idaho rules of Civil Procedure or the Idaho Code. Rule 54(e)(1) does not provide an independent means for the Court to award attorney fees. It merely allows that at its discretion, the Court may award reasonable attorneys' fees to the prevailing party when provided for by any statute or contract. Rule 54(e)(1) also states that attorney fees under I.C. §12-121 may be awarded by the Court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation. That is not the case. There were genuine issues of disputed fact in this case, as the Court is well aware. This included whether all 663 acres were historically irrigated, whether Jernberg owned all of the land included in the recommendation and what the proper amount of water was allowable to irrigate natural pastureland.

Idaho Code §12-121 grants the Court the authority to award attorney fees in any civil action. Attorney fees should be awarded under I.C. §12-121 only if the position advocated by the nonprevailing party is plainly fallacious and, therefore, not fairly debatable. *Associates N.W. v. Beets*, 112 Idaho 603, 733 P.2d 824 (Ct.App.1987). In this case, the Claimants' took the position that they were entitled to irrigate 663 acres with a rate of diversion that produced 3.5 acre feet per year. The issue narrowed to historical use and the duty of water. Both parties expended a great deal of resources because the issues were debatable. The Claimants settled the matter prior to the commencement of trial, not because their position was plainly fallacious but after considering all relevant factors they believed they would best be served by settling. The

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3 State cannot make the claim that the Claimants' position was plainly fallacious. Another factor,
4 is that a new owner purchased the disputed acres. That new owner, Idaho Properties LLC., had
5 different goals for the land and different views on the dispute.

6 Idaho Code §12-123 allows recovery of attorney fees as a sanction for frivolous
7 conduct in a civil case. The section defines frivolous conduct as:

8 [C]onduct of a party to a civil action or of his counsel of record
9 that satisfies either of the following:

10 (i) It obviously serves merely to harass or maliciously injure
11 another party to the civil action;

12 (ii) It is not supported in fact or warranted under existing law and
13 cannot be supported by a good faith argument for an extension,
14 modification, or reversal of existing law.

15 The State has presented no conduct by the Claimant that serves to "merely harass or maliciously
16 injure" the State in this case. Provision (ii) cannot be met because the Claimants provided case
17 law that supported its positions as to the irrigation of natural pasture. They also provided
18 witnesses who testified at deposition in support of the Claimants' position as to the number of
19 irrigated acres and the creation and capability of the diversion structures. The claims had merit
20 and were founded on the law.

21 Section 2(a) of I.C. §12-121 states that an award of reasonable attorney's fees may
22 be made by the court upon the motion of a party to a civil action, but only after the court does the
23 following:

24 (i) Sets a date for a hearing to determine whether particular conduct
25 was frivolous; and

26 (ii) Gives notice of the date of the hearing to each party or counsel
27 of record who allegedly engaged in frivolous conduct and to each

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3 party allegedly adversely affected by frivolous conduct; and
4 (iii) Conducts the hearing to determine if the conduct was
5 frivolous, whether any party was adversely affected by the conduct
6 if it is found to be frivolous, and to determine if an award is to be
7 made, the amount of that award. In connection with the hearing,
8 the court may order each party who may be awarded reasonable
9 attorney's fees and his counsel of record to submit to the court, for
10 consideration in determining the amount of any such award, an
11 itemized list of the legal services necessitated by the alleged
12 frivolous conduct, the time expended in rendering the services, and
13 the attorney's fees associated with those services. Additionally, the
14 court shall allow the parties and counsel of record involved to
15 present any other relevant evidence at the hearing.

16 (c) The amount of an award that is made pursuant to this section
17 shall not exceed the attorney's fees that were both reasonably
18 incurred by a party and necessitated by the frivolous conduct.

19 (d) An award of reasonable attorney's fees pursuant to this section
20 may be made against a party, his counsel of record, or both.

21 If the State seeks to pursue an award of attorney fees, it must follow the provisions of I.C.
22 §12-123, which it has not. Because the action was not brought, pursued or defended frivolously
23 the State is not entitled to an award of attorney fees. This fact is evidenced by the concessions
24 the Claimant made early in the case with regards to the rate of diversion. The Claimant
25 originally claimed a diversion rate of over 8 cfs. The Claimant eventually stipulated to a rate of
26 diversion of 4.99 cfs based upon the ambiguous provisions of license for Water Right No. 45-
27 7311, which impermissibly found the water right to not be appurtenance to the 663 acres but
28 which was later overturned. The Claimants have attempted to work with the State from the
beginning of this case.

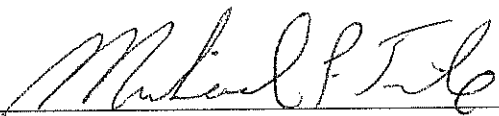
IV. Conclusion

29 The State of Idaho should take nothing from its Memorandum of costs and fees as
30 it was not the prevailing party. If the Court does find that the State was the prevailing party in is

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3 not entitled to recoup expert fees as a matter of right because the experts did not testify at trial or
4 deposition. Furthermore, the State should not be entitled to reimbursement for taking the
5 deposition of the Claimants' witness Paul Stukenholtz or fees incurred by its experts that were
6 unnecessary and unreasonable. The State should also not be permitted to recoup its costs for its
7 attorney costs as they made numerous unnecessary and duplicative trips. Finally, the Court
8 should not grant an award of attorney fees because the action was never brought, pursued or
9 defended furiously.
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11 DATED this 4th day of May, 2007.
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13 LING, ROBINSON & WALKER

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15 By: 
16 Michael P. Tribe
17 Attorneys for Objectors/Claimants,
Ben D. Jernberg and Idaho Properties, LLC
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CERTIFICATE OF MAILING

I hereby certify that on the 4th day of May, 2007, I caused to be served a true and correct copy of the foregoing *Objection to State's Memorandum of Costs and Attorney Fees*, by the method indicated below, and addressed to the following :

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

- ☐ U.S. Mail, Postage Prepaid
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☐ E-mail

2. Copies to:

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Boise, Idaho 83720-0098

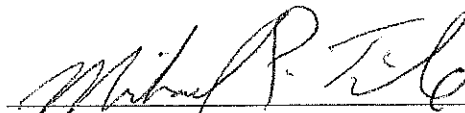
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Michael P. Tribe