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

In Re SRBA	)	Subcase No. 31-11845
	)	
	)	BRIEF IN SUPPORT OF THE STATE OF IDAHO'S
	)	MEMORANDUM OF COSTS AND ATTORNEY FEES
Case No. 39576	)	
	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorneys general, and in accordance with the provisions of Idaho Rules of Civil Procedure 54 and 68, submits this *Brief in Support of the State of Idaho's Memorandum of Costs and Attorney Fees* in the above-entitled subcase.

STATEMENT OF THE CASE

I. THE NATURE OF THE CASE

The present dispute is limited to an objection to payment of costs and attorney fees after the substantive dispute was resolved by execution of a Standard Form 5.

II. THE COURSE OF THE PROCEEDINGS

A. A BRIEF SUMMARY OF THE OFFERS OF JUDGMENT MADE BY THE PARTIES

The State of Idaho ("State") made an offer of judgment to the Objectors pursuant to I.R.C.P. 68 and I.R.E. 408 on May 11, 2006. (June 27, 2007 Barber Aff. Ex. 70.)¹ The offer of judgment deleted the combined use limitation with regard to the diversion rate and increased the combined use limitation for the annual diversion volume. The proposed limitation read as follows: "Right nos. 31-2395 and 31-11845 are limited to a total combined annual diversion volume of 1160.3 AF." *Id.* The letter further stated that "[t]he offer of judgment will expire on May 25, 2006." *Id.* This offer of judgment was prepared before the attorneys for the State had viewed the place of use.

The Objectors rejected the offer of judgment in a letter sent May 11, 2006 and proposed a substantial increase in the amounts authorized for diversion under water right no. 31-11845. (June 27, 2007 Barber Aff. Ex. 71.)

The State made a revised offer of judgment to the Objectors on May 15, 2006. (June 27, 2007 Barber Aff. Ex. 72.) This revised offer of judgment deleted the combined use limitation and described the annual volume of diversion for 339 acres as 593.25 acre feet. The letter further stated that "[t]he offer of judgment will expire on May 29, 2006." *Id.* The number of

¹ The *Affidavit of David J. Barber dated June 27, 2007*, authenticates the following letters: (1) Letter from Barber to Ling of 5/11/2006; (2) Letter from Tribe to Barber of 5/11/06; (3) Letter from Barber to Tribe of 5/15/06; (4) Letter from Tribe to Barber of 5/17/06; (5) Letter from Tribe to Barber of 10/6/06; (6) Letter from Barber to Ling of 10/16/06, (7) Letter from Barber to Ling of 10/30/06, (8) Letter from Tribe to Barber of 10/30/06, (9) Letter from Barber to Ling of 10/31/06, and (10) Letter from Tribe to Barber of 11/20/06.

339 acres was calculated by subtracting 324 acres from the gross place of use of 663 acres. The annual volume of diversion was the product of 339 acres and 1.75 acre feet per acre. Essentially, the offer was to provide the Objectors one-half a water right volume for the remaining 339 acres. The Objectors rejected this offer of judgment in a letter dated May 17, 2006. (June 27, 2007 Barber Aff. Ex. 73.) This offer of judgment was prepared before the attorneys for the State had viewed the place of use; it was hand delivered to the Objectors during the field exam on May 15, 2006 and sent to them by U.S. Mail as well.

The Objectors made an offer of judgment to the State on October 6, 2006. (June 27, 2007 Barber Aff. Ex. 74.) The Objectors offered to reduce the net place of use from 339 acres to 200 acres and to reduce the diversion rate from 4.99 c.f.s. to 4.0 c.f.s. The State declined the offer of judgment in a letter dated October 16, 2006 and stated as follows:

The experts for the State of Idaho have conducted an extensive review of the amount of beneficial use that has occurred within the permissible place of use for water right no. 31-11845. Our expert on soils has concluded that very little of the land, which is classified as soil type 93 within the permissible place of use, can be considered irrigable because of the extreme stony nature of the soils, among other reasons. The acreage of this soil type 93 with the permissible place of use is 351.9 acres. Furthermore, the analysis of topography by the Idaho Department of Water Resources establishes that much of the permissible place of use cannot be physically irrigated with the existing ditch system. The inability of the existing ditch system to irrigate much of the permissible place of use is confirmed by Idaho's forage expert. He found sagebrush that was twenty years of age within the permissible place of use. The existence of this sagebrush within the permissible place of use shows that irrigation of that land has not occurred.

The experts for the Respondent State of Idaho are continuing to work on their expert reports. **The Respondent State of Idaho has incurred substantial expert witness fees to date and continues to incur substantial fees on a daily basis in the amount of several thousand dollars a day. If there is going to be a settlement in this matter, it needs to occur now.**

(June 27, 2007 Barber Aff. Ex. 75 (emphasis added).)

The Objectors made on the telephone a revised offer of judgment to the State on October 26, 2006. The State responded in a letter dated October 30, 2006 as follows:

The Respondent, State of Idaho, reviewed the following offer of judgment from Michael Tribe by telephone on October 26, 2006: 'Right nos. 31-2395 and 31-11845 are limited to the irrigation of a combined total of ~~324.5~~ 474.5 acres in a single irrigation season.' The State of Idaho understands that no other changes were proposed. The State of Idaho declines the offer of judgment

Again, the Respondent State of Idaho has incurred substantial expert witness fees to date and will continue to do so as its experts are deposed and its experts prepare for trial. If there is going to be a settlement in this matter, it needs to occur now.

(June 27, 2007 Barber Aff. Ex. 76 (emphasis added).)

The Objectors responded in a letter dated October 30, 2006:

The offer of judgment is that Right nos. 31-2395 and 31-11845 would be limited to the irrigation of a combined total of 474.5 acres. Right nos. 31-2395 and 31-11845 would be limited to a total combined rate of 6.48 cfs and to a total combined annual diversion volume of 1134 AF.

(June 27, 2007 Barber Aff. Ex. 77.) The State rejected this offer of judgment in a letter dated October 31, 2006. (June 27, 2007 Barber Aff. Ex. 78.)

B. A SUMMARY OF OTHER RELEVANT PORTIONS OF THE COURSE OF PROCEEDINGS

The Snake River Basin Adjudication District Court entered a partial decree for water right no. 31-2395 on February 22, 2002. The quantity was limited to 3.65 c.f.s. and 1,134 AFY.

The Director recommended water right no. 31-11845 with a quantity of 4.99 c.f.s. and with a combined use limitation that read as follows: "Right nos. 31-2395 and 31-11845 are limited to a total combined diversion rate of 6.48 cfs and to a total combined annual diversion volume of 1134 AF." The basis for the combined use limitation was that the places of use for water right nos. 31-2395 and 31-11845 were identical.

The Objectors objected to the quantity described for water right no. 31-11845 and to the combined use limitation.

The Court entered its *Order Granting Motion Requesting Additional Time and Second Amended Trial Schedule* on April 5, 2006. The *Order* directed that "[t]he parties shall schedule a

field examination the 3rd week of May or shortly thereafter, depending on weather.” A field examination occurred on May 15, 2006.

The Objectors filed a *Motion for Summary Judgment, Affidavit of Michael P. Tribe, Affidavit of Ben D. Jernberg, and Affidavit of Bryce A. Contor* on April 28, 2006 and lodged a *Memorandum in Support of Motion for Summary Judgment*. The *Affidavit of Bryce Contor* stated that “this affiant found 1100 acres were being irrigated in my photo-analysis of Mr. Jernberg’s ranch [using a 1987 photo]. . . . Your affiant found nothing that would contradict IDWR’s 1986 finding that Mr. Jernberg was irrigating 1124 acres.”² The *Affidavit of Ben D. Jernberg* stated “[t]hat when water is available, **this affiant flood irrigated the entire 663 acres** of pasture that was originally listed in the conditions of Water Right no. 31-7311.” *Id.* at 1 (emphasis added).

On May 26, 2006, the State lodged a *Brief in Opposition to Motion for Summary Judgment* and filed the *Affidavit of Carter Fritschle Dated May 19, 2006* in support of its brief. Both documents included pictures taken from the field examination on May 15, 2006 to show the present condition of the place of use.

On May 26, 2006, the Idaho Department of Water Resources (“IDWR”) filed a *Supplemental Director’s Report Regarding Subcase No. 31-11845*. The *Supplemental Director’s Report* stated: “[t]he field inspection also led the Department to believe that much of the pasture land is at a little higher elevation than the ditches and thus, cannot be watered with the distribution system in place.” (*Supplemental Director’s Report* at 13.)

On May 30, 2006, the Objectors filed an *Affidavit of Joe Llamas in Support of Motion for Summary Judgment* and a *Second Affidavit of Michael P. Tribe in Support of Motion for Summary Judgment* and lodged a *Reply Memorandum in Support of Motion for Summary*

² This statement applied to the entire acreage then previously licensed under water right no. 31-7311.

Judgment. Mr. Joe Llamas stated that “[w]hen water was available, I helped pump the full capacity of Mr. Jernberg’s two wells onto all of the pasture and dry graze owned by Mr. Jernberg.” (*Llamas Aff.* at 2.) The *Reply Memorandum* argued that “[a]ny evidence the State has produced regarding the current condition of the uncultivated pasture is irrelevant. . . . A true picture of the beneficial use cannot be gleaned from the photographs taken by Fritschle” (*Id.* at 5–6.) Counsel for the Objectors argued at the summary judgment hearing that “when water has been put to that field, the grass grows high enough that it even covers most of that space.” (June 2, 2006 Hr’g Tr. at 23, L. 19–21.)

The IDWR filed a letter dated June 1, 2006 with the Court that advised the Court of an additional field inspection to prepare a topographic map of the place of use. The Department conducted the field inspection and sent its topographic map to the parties on June 27, 2006.

The Court held a status conference on June 28, 2006. Counsel for the State addressed the issue of the topographic map in the following statement at the status conference: “The problem that I have with the map, it’s got a lot of wonderful information on it, but it appears to be missing data along the elevations, . . . so you can’t really tell, make some final conclusions, about some of the aspects of what can be taken down the ditch and what can’t be.” (June 28, 2006 Hr’g Tr. at 5, L. 9–15.) Ms. McHugh, IDWR attorney, responded as follows: “The department is aware of and has taken note of Mr. Barber’s concern and actually had some discussion, but we just hadn’t had a chance to have a meeting. But this afternoon we discussed some concerns that we also had here about whether we needed some supplemental information, we would do that and then provide it to the court and the parties with a final copy of the map along with a brief explanation of what the department’s conclusions would be from the map.” (June 28, 2006 Hr’g Tr. at 9, L. 10–22.)

Counsel for the State also made the following statement about the soils at the permissible place of use: "As I advised the court and the parties in the informal discussion, a day or two before our last status conference, I made a determination to get a copy of the soil survey for this area. When I did that and looked at it, it appeared that most of the land that was within the place of use for this water right was classified by the soil conservation service at the time as not irrigable." (June 28, 2006 Hr'g Tr. at 6, L. 6-14.) Counsel for the State continued later in the hearing: "I think, though, to assist Mr. Tribe and Mr. Ling, the soil stuff I need to get that to him. And I will represent to the court, I will make my best effort to get the map I have prepared along with the descriptions or the soil copied . . . and send a letter to Mr. Tribe and Mr. Ling today so they can look at the evidence that will at least be offered by the state of Idaho." The State transmitted that information to the Objectors on June 28, 2006 by facsimile and by U.S. Mail. (Letter from Barber to Ling of 6/28/06, at 1)

The State served the following expert reports on the Objectors on October 31, 2006:

1. Dr. J. Wayne Burkhardt, *Vegetation Reconnaissance of the Jernberg Property Relative to Irrigation Water Rights Claims* [hereinafter *Exhibit 24: Expert Report of Dr. J. Wayne Burkhardt*]. A true and correct copy of *Exhibit 24: Expert Report of Dr. J. Wayne Burkhardt* is lodged with this brief.³
2. Glen H. Logan, *Expert report of Glen H. Logan, Professional Soil Scientist, regarding the Physical and Chemical Characteristics of soils on 672.9 acres of land in Jefferson County, Idaho* [hereinafter *Exhibit 25: Expert Report of Glen H. Logan*]. A true and correct copy of *Exhibit 25: Expert Report of Glen H. Logan* is lodged with this brief.
3. Robert W. Hill, Ph.D., P.E., *Expert Report of Dr. Robert W. Hill Regarding the Snake River Basin Adjudication Case No. 39576; Subcase No. 31-11845; Evaluation of Beneficial Use of Uncultivated Land near Mud Lake in Southeastern Idaho* [hereinafter *Exhibit 26: Expert Report of Robert W. Hill, Ph.D., P.E.*]. A true and correct copy of *Exhibit 26: Expert Report of Robert W. Hill, Ph.D., P.E.* is lodged with this brief.
4. David B. Shaw and Norman C. Young, *Expert Report of David B. Shaw and*

³ The State of Idaho retained the numbering assigned to these expert reports from its *Second Amended Exhibit List*.

Norman C. Young Evaluating Diversion and Beneficial Use of Water Under Claim No. 31-11845 (Idaho Properties, LLC.) [hereinafter Exhibit 27: Expert Report of David B. Shaw and Norman C. Young]. A true and correct copy of Exhibit 27: Expert Report of David B. Shaw and Norman C. Young is lodged with this brief.

(Notice of Service of State of Idaho's Reports of Expert Witnesses at 1–2.)

The Objectors served the expert report of Dale Stukenholtz on the State on October 31, 2006.

On November 29, 2006, the Objectors filed a *Motion in Limine and Request for Expedited Hearing* and lodged a *Memorandum in Support of Motion in Limine*. The motion sought to exclude the expert reports of Glen Logan and Dr. Wayne Burkhardt “because the danger of unfair prejudice, confusion of the issues or waste of time substantially outweigh their probative value.” (Objectors’ Mem. Supp. Motion in Limine at 2.)

C. STATEMENT OF FACTS

Dr. Dale Stukenholtz testified at a deposition on November 9, 2006. Counsel for the State conducted the following examination of Dr. Stukenholtz:

Q. [Examination by Mr. Barber] Let’s go back to the front part of Mr. Logan’s report. And he has a statement of opinions on the first two pages. He has 6 opinions stated there.

...

Q. Can you go over those. And if you have a disagreement with any of his opinions, can you tell me what that disagreement is.

...

Q. Let’s go on to Opinion Number 2.

A. Okay. Number 2. Well again I have about the same comments. I don’t really think it’s necessary to have the subsurface drainage first, for the same reasons as I said before. If you have a center-pivot type of system where you’re adding water very, very uniformly everywhere, rather than in a canal system or with wild flooding where it can really cause an increase in water tables—because with a center pivot, your flow is downward is a little bit more than what your evaporation is. You’re not going to be contributing very much to the groundwater with center-pivot type irrigation.

Q. Let me ask you some questions about that. Did you find any evidence that they had irrigated the permissible place of use with a center pivot while you were out there?

A. No.

Q. Okay.

A. If they have, I didn't see it.

Q. Do you have an opinion as to whether they could beneficially use water with the existing dike system out that you observed as irrigation?

A. Not very good. I think they'd have to pipe the water so there's no chance for seepage, to the various center pivots and pressurize them and irrigate.

(Nov. 9, 2006 Dep. Tr. of Dale Stukenholtz, Ph.D. at 80, L. 5–7; 80, L. 16–18; 84, L. 1–25; 85, L. 1.)

ARGUMENT

I. IDAHO RULE OF CIVIL PROCEDURE 68(c) REQUIRES THE OBJECTORS TO PAY THE COSTS INCURRED BY THE STATE OF IDAHO AFTER MAY 11, 2006.

The Objectors' duty to pay the costs incurred by the State after May 11, 2006 is mandatory. *See Masters v. Dewey*, 109 Idaho 576, 580, 709 P.2d 149, 153 (Ct. App. 1985). I.R.C.P 68(c) is clear and unambiguous; it entitles a defendant who has made an offer of judgment under I.R.C.P 68 to recover its costs, as allowable under I.R.C.P 54(d)(1), incurred after the making of the offer if the judgment finally obtained by the offeree is not more favorable than the offer. *Mountain Rest. Corp. v. Parkcenter Mall Associates*, 122 Idaho 261, 269, 833 P.2d 119, 127 (Ct. App. 1992). I.R.C.P 68(c) reads:

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.

There is no doubt that the judgment ultimately obtained in this subcase was not more favorable than the State's offer presented on May 11, 2006. (June 27, 2007 Barber Aff. Ex. 70.)

A. FINAL JUDGMENT

This Court's *Administrative Order No. 1* could not be clearer, a partial decree, such as the

one entered in this subcase on April 10, 2007, is to be considered a final judgment. AO1 § 14 (“Partial decrees are final judgments”). Objectors argument that “no judgment was entered” in this matter, (Objection to State’s Mem. Costs and Att’y Fees at 2.), is simply frivolous and without foundation.

B. VOLUME

This subcase revolved around volume, *see* Objectors’ Pretrial Br. at 1–2 (“The focus of this trial will be on what the appropriate volume of water is for the 339 acres of uncultivated pasture not included in Water Right No. 31-2397 [sic] which allows 324 acres to be irrigated within the combined place of use of 672.9 acres that Water Right Nos. 31-2397 [sic] and 31-11845 share.”),⁴ and in the end, the Objectors agreed to a volume figure substantially less than that offered in settlement by the State nearly eleven months earlier. The Director’s Report for water right no. 31-11845 dated April 22, 2005 recommended a total annual volume of 1,139 acre feet *when combined with* right no. 31-2395. The Supplemental Director’s Report dated May 24, 2006 recommended a total annual *combined* volume of 1,135.8 acre feet. A second supplemental Director’s Report was issued on September 27, 2006 upholding the 1,135.8 acre feet figure previously recommended. Ultimately, the Objectors agreed to the total annual *combined* volume of 1,135.8 acre feet that was recommended by IDWR.

Nearly eleven months before the Objectors filed their SF-5 in this subcase, the State made two offers for more volume than that which was ultimately decreed. On May 11, 2006 the State offered the Objectors a total combined volume of 1,160.3 AFY. (June 27, 2007 Barber Aff. Ex. 70.) On May 15, 2006 the State made an even more generous offer, offering to the Objectors 593.25 AFY, *without any combined volume limitation*, which in effect amounted to a

⁴ Because of their history and interrelationship, water right nos. 31-11845 and 31-02395 cannot be discussed in isolation. These two water rights share an identical place of use and are served by the same irrigation delivery system. The Objector’s Pre-Trial Brief incorrectly labeled water right no. 31-2395 and water right no. 31-2397.

total combined annual volume of 1,727.25 acre feet (when combined with right no. 31-2395). (June 27, 2007 Barber Aff. Ex. 72.)

Both of the State's volume offers were more favorable than that agreed to and decreed. *See* I.R.C.P. 68(c). Both of the State's volume offers occurred well before the State incurred the costs and attorney fees that it now seeks to recover. *See Gilbert v. City of Caldwell*, 112 Idaho 386, 398, 732 P.2d 355, 367 (Ct. App. 1987) ("[I.R.C.P. 68] is designed to encourage settlement and to avoid the expense and time of unnecessary trials."). And as evidenced by the ultimate result in this subcase, both of the State's volume offers were more than reasonable.

C. ACREAGE SERVED

The importance of volume lies in its translation to serviceable acreage, and the State's two May 2006 offers were more favorable in that regard as well. A full water right for irrigation purposes in this location amounts to an annual diversion volume of 3.5 acre feet per acre. (Supplemental Director's Report at 9.) The State's May 11, 2006 offer translates into a full water right for 331.15 acres (when combined with water right no. 31-02395). The State's May 15, 2006 offer translates into a full water right for 493.5 acres (when combined with water right no. 31-02395). The partial decree entered on April 10, 2007 in this subcase amounts to a full water right for only 324.5 acres. Again, the recovery in this matter was less favorable than that offered by the State on two previous occasions.

II. THE STATE OF IDAHO IS THE PREVAILING PARTY PURSUANT TO IDAHO RULE OF CIVIL PROCEDURE 54

In addition, or in the alternative, the State is also entitled to costs as the prevailing party in this matter pursuant to Idaho Rule of Civil Procedure 54. The determination of which party has prevailed is left to the discretion of the trial court. I.R.C.P. 54(d)(1)(B). Here, there can be no doubt that the State is the prevailing party. This dispute arose out of the Objectors'

disagreement with the Director's April 22, 2005 recommendation for 4.99 cfs to irrigate 324 acres within a 663 acre permissible place of use with a total combined annual diversion rate of 6.48 cfs and total combined annual volume of 1,134 acre feet (when combined with water right no. 31-02395). The recommendation was then amended on May 24, 2006 to add an additional 0.5 acres served, raising the total combined annual diversion volume limitation to 1,135.8 acre feet.

Nearly eleven months after the filing of the Supplemental Director's Report, this Court entered a partial decree for exactly the same volume recommended therein—1,135.8 acre feet. The volume decreed was a far cry from the volume sought by the Objectors throughout the course of this litigation. I.R.C.P. 54(d)(1)(B) states: "In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties." In their May 18, 2005 Objection, the Objectors asserted a right to 8.83 cfs for 658 acres, or 3,222.63 acre feet per year, *without any combined limitation*. (Objection at 2.) A year later in May 2006, the Objectors asserted a right to 4.99 cfs for 663 acres or 1,821.17 acre feet per year, again *without any combined limitation*. (Objectors' Reply Memo. Supp. Summ. J. at 8 ("[T]here is no material issue of fact that the amount of acres and the rate of diversion that was originally found by IDWR during the original licensing period (4.99 cfs and 663 acres) should be the amount that Jernberg is entitled to and should be decreed under Water Right No. 31-11845.")) The Objectors' maintained their opposition to the Director's recommendation until the eve of trial, asserting that at least 1,856 to 3,713 acre feet per year was necessary to irrigate the 663 acres of pastureland. (Objectors' Pretrial Brief at 6.) Again, what was ultimately agreed to and what was ultimately decreed was a total combined annual volume of 1,135.8 acre feet.

As discussed above, Objectors' assertion that "the State should not be viewed as the prevailing party" because "the Claimants willingly withdrew their claims and because no judgment was entered," Objection to State's Mem. Costs and Att'y Fees at 2, is simply unreasonable and without foundation. *See* AO1 § 14 ("Partial decrees are final judgments.").

III. GIVEN THE EXCEPTIONAL NATURE OF THIS SUBCASE AND THE ISSUES RAISED THEREIN, THE DISTRICT COURT SHOULD AWARD THE STATE OF IDAHO THE DISCRETIONARY COSTS CLAIMED

A. INTRODUCTION

I.R.C.P. 54(d)(1) governs the allowance of costs to the prevailing party and I.R.C.P. 68 incorporates the standards of I.R.C.P. 54(d)(1) in determining the allowance of costs under I.R.C.P. 68(c). After the award of costs as a matter of right, I.R.C.P. 54(d)(1)(D) states that "[a]dditional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party."

B. THE NATURE OF THIS SUBCASE AND THE ISSUES RAISED HEREIN WERE EXCEPTIONAL AND EXTRAORDINARY

The discretionary costs claimed, including those for expert witness fees, were exceptional given the magnitude and nature of this subcase. Objectors argued that "[t]he State used excessive recourses [sic] for a small case with relatively straightforward legal issues. The hiring of a soil expert, botanist, and other experts was unreasonable for this case." (Objection at 6–7.) The State disagrees in the strongest terms with the characterization of this matter as a "small case." This matter needs to be put into perspective. Surface water users of the Snake River have alleged that the State has mismanaged the Eastern Snake River Plain Aquifer by allowing too many junior ground water users to pump water from the Eastern Snake River Plain Aquifer,

which would otherwise contribute to the surface flow of the Snake River and provide those surface water users with water they need.⁵ Here, after the State conducted its investigation of the place of use, it concluded that at most the permissible place of use contained about 160.7 acres of land with a valid water right.⁶ Notwithstanding this determination, this land has a full water right for 324.7 acres. Accordingly, the State's conclusion is that the PPU had twice as much water as it needed. If the State had agreed to more water after it acquired its present understanding of the facts, it would have provided support for the charges of mismanagement by the surface water users.⁷

The nature of, and the factual issues involved with, this subcase were both exceptional and extraordinarily complex. The Idaho Supreme Court has held that the requirement that a cost be "exceptional" under I.R.C.P. 54(d)(1)(D) "include[s] those costs incurred because the nature of the case was itself exceptional." *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). Here, the irrigation of arid or semi-arid native vegetation by wild flooding with sporadic dikes and ditches over a large stone-covered area that had not been cleared for irrigation presented novel issues. Could the area be irrigated at all with the existing dikes and ditches? What benefit do you get from irrigation of an arid or semi-arid native plant? How do you compare the benefits and costs of that irrigation? Dr. Robert Hill's economic analysis of the practices on the Objectors' property demonstrates the complexity that arises when

⁵ Recently, the Idaho Supreme Court issued its opinion in *American Falls Reservoir Dist. No. 2 v. Idaho Department of Water Resources*, Docket Nos. 33249, 33311, 33399. This is simply another iteration of the conflict over management of the Eastern Snake River Plain Aquifer.

⁶ This total is the sum of 21.7 acres classified as irrigable by the Soil Conservation Service and the 139 acres of grain field in the southwest corner of the PPU. This sum is overly generous. The objector did develop a water right on the 139 acres of grain field, which the Soil Conservation Service classified as non-irrigable. The Soil Conservation Service took a longer term view. It concluded that the soil in the grain field could not sustain irrigation on a long term basis in its native condition because of the lack of drainage. This lack of drainage does show up in the soil investigation by Idaho's expert. Slick spots with little plant growth were found in the field, and photographs of some slick spots were included in the report.

⁷ The State of Idaho's offer of judgment were made or prepared prior to a view of the premises. That first view of the permissible place of use in May 2006 fundamentally changed the State of Idaho's perspective on this matter.

dealing with such an uncommon assertion of beneficial use. Dr. Hill calculated both the benefit of the additional forage that would be produced by irrigating the uncultivated pastureland and the costs of producing the same (i.e., the cost of pumping the water to irrigate the uncultivated pastureland using 1986 figures). Dr. Hill found that the cost of energy alone to produce an AUM of grazeable dry matter was more than four times the value of the resulting AUMs produced—this can hardly be considered a beneficial use of water. Dr. Hill's analysis exposes the exceptional nature of this subcase and of the issues raised herein.

C. ALL COSTS CLAIMED WERE REASONABLY REQUIRED TO RESPOND TO THE COMPLEX FACTUAL ISSUES RAISED IN THIS MATTER.

The Objectors have stated a large number of objections to the State's costs as being excessive and not reasonably incurred. These objections may be subdivided into two categories: (1) the charges for Idaho's experts were excessive and unreasonable; and (2) the charges for Idaho's attorneys were excessive and unreasonable.

i. All expert reports were reasonably required to respond to the complex factual issues raised in this matter.

The State hired its experts to assist with the extraordinary and complex factual issues raised in this matter. A determination of whether the expenses incurred in producing the State's expert reports were reasonably incurred cannot be made in isolation. The Court necessarily needs an opportunity to review those expert reports to determine whether they would have assisted the Court in evaluating the water right claimed in this matter. Accordingly, the State is also lodging with this brief a copy of each of its expert reports. The State has retained the numbering system for the expert reports that is contained in its *Second Amended Exhibit List*. The State will now respond to each complaint of the Objectors.

a. **Expert report of Glen Logan, Soil Scientist.**

The Idaho Supreme Court has concluded that “[t]he **duty of water depends upon the character and condition of the soil**, and in determining the duty of water, reference should always be had to lands that have been prepared and reduced to reasonably good condition for irrigation.” *Wash. State Sugar Co. v. Goodrich*, 27 Idaho 26, 44, 147 P. 1073, 1079 (1915) (emphasis added). Paul Stukenholtz, who was a designated expert witness for the Objectors, testified on this subject at his deposition as follows:

Q. [By Mr. Barber] With respect to irrigation of any crop out there, **how important is it to understand the soil conditions** in terms of deciding what you do with the irrigation of that crop that you propose to grow?

A. **It’s very important.**

(Mar. 13, 2007 Paul Stukenholtz Dep. at 15, L. 114–20 (emphasis added).) Therefore, the record is clear that soils are an important consideration in determining the amount of water that may be beneficially used on a parcel. A major factual conflict existed between the Jefferson County Soil Survey and the Objectors’ claim to a water right here. The Soil Survey classified only 21.7 acres of the entire place of use for water right no. 31-11845 as irrigable. The Objectors’ have stated repeatedly that they have beneficially used water on the entire 663 acres. The hiring of a soils expert to address this conflict was eminently reasonable.

The Objectors also objected to the soils expert because the soils examination occurred in 2006 about twenty years after the original beneficial use examination by IDWR. They argued that this examination was not relevant because the examination relied upon contemporary data. (*Mem. Supp. Motion in Limine* at 3.) The Objectors demonstrate their ignorance of a soils examination and of the record in this case. The Jefferson County Soil Survey, which was issued in December 1979, provides another snapshot in time at the condition of the soils. If the Jefferson County Soils Survey in 1979 and a contemporary examination of soils in 2006 both

conclude that the soils are not irrigable, a reasonable inference is that those soils were not irrigable in 1986. Moreover, the Objectors are suggesting a relevance limitation on a soils examination that does not exist. Soils develop from parent materials over a long period of time and provide a history of soil forming events at each site. A contemporary examination of soils will provide information about that past history. The Objectors had no reasonable basis to object to an examination of the permissible place of use by a soil scientist.

The opinions to be offered by Idaho's soil scientist would have assisted in the determination of this matter at trial. This report contained the following opinion:

1. Soils on the Ben Jernberg/Idaho Properties, LLC subject property are developed in lake-laid sediments, water-laid alluvial deposits, and minor areas of wind-laid parent materials. **The soils have developed under high fluctuating groundwater conditions resulting in alkali surface and subsoil conditions.** The majority of soils, approximately 52% of the total 672.9 acres, have very stony and bouldery-covered surfaces. **Alkali soils cannot be beneficially irrigated if subsurface drainage and land leveling are not provided first.** The very stony and bouldery condition of the major area of soils on the subject will preclude installation of a subsurface drainage system or land leveling operations.

(See Exhibit 25: *Expert Report of Glen H. Logan* at 3–4.)

b. Expert report of Dr. J. Wayne Burkhardt, Range Scientist.

The decision by the State to initially hire an expert on range management was based on statements made by the Objectors and their attorneys. A few representative statements suffice to demonstrate the concern. The Objectors in their *Summary Judgment Reply Memorandum* argued “[a]ny evidence the State has produced regarding the current condition of the uncultivated pasture is irrelevant. . . . A true picture of the beneficial use cannot be gleaned from the photographs taken by Fritschle.” (Objectors’ Summ. J. Reply Mem. at 5–6.) Counsel for the Objectors argued at the summary judgment hearing that “when water has been put to that field, the grass grows high enough that it even covers most of that space.” (June 2, 2006 Hr’g Tr. at 23, L. 19–21.) It was very obvious that, if a trial occurred, the Objectors would likely make

some overstated claims about the productivity of the native grasses on the permissible place of use. Based on these statements, the State decided that it needed a review by an expert that could respond to such statements. It needed an expert that could address the plant species present and the palatability of those species to domestic livestock and could state an opinion on whether the irrigation of such uncultivated fields with the species present on the permissible place of use constituted an agricultural practice considered productive today.

The State hired Dr. J. Wayne Burkhardt, a range consultant with extensive practical and academic experience.⁸ Dr. Burkhardt's review provided invaluable information about the irrigation of the uncultivated pasture. Some of his opinions are restated below:

2. Current vegetation on the subject property (excluding grain field) is composed of either native, arid site rangeland plant species of lot to no forage value or palatability to cattle or plant species that are invasive or noxious weeds.
3. Most of the plant species currently growing on the uncultivated portion of the subject property evolved under arid to semi-arid rangeland environments and are not adapted to saturated soil conditions during late spring and summer growing season. **Repeat application of flood irrigation during the summer growing season would drown out most of these native plant species (both palatable and unpalatable species).** . . .
4. **Irrigation of arid and semi-arid native rangeland vegetation is not normal or customary practice. It has not proven to be beneficial or productive economic practice.**

(*Exhibit 24: Expert Report of Dr. J. Wayne Burkhardt* at 3 (emphasis added).) The bottom line is that these opinions about the native, arid and semi-arid plant species would have provided the Court invaluable information about the extent of beneficial use claimed in this matter. **His conclusion that the claimed irrigation would have drowned out the native plants obviously is a very significant conclusion regarding the beneficial use claimed by the Objectors in this**

⁸ Dr. J. Wayne Burkhardt was awarded a bachelors of science degree in Forestry from the University of Idaho in 1964, a master of science degree in range management from the University of Idaho in 1967, and a Ph.D. in range management in 1969. He managed rangelands for eight years for the Idaho Department of Lands. He also taught college courses on rangeland management. See *Exhibit 24: Expert Report of Dr. J. Wayne Burkhardt* at 22–24.

matter. Simply put, the decision by the State to hire a range consultant was a reasoned response to some gross overstatements about the productivity of the permissible place of use.

Dr. Burkhardt also provided other information invaluable to an evaluation of the claimed beneficial use on the permissible place of use. The Objectors alleged that the entire 663 acres was beneficially irrigated. Dr. Burkhardt found live sagebrush in the bottom of the ditches and in the fields. The age of the sagebrush in the ditches varied from 8 to 18 years; the age of sagebrush in the fields varied from 13 to 26 years. *Exhibit 24: Expert Report of Dr. J. Wayne Burkhardt*, at 18-19 (Emphasis added). Since sagebrush does not tolerate water, the existence of this live sagebrush demonstrated that the Objectors' statements about the irrigation of the entire permissible place of use were contrary to fact.

c. Expert report of David B. Shaw and Norman C. Young.

IDWR identified an additional issue after the field examination in May 2006—the irrigation system could not physically irrigate the entire permissible place of use because the elevation of the permissible place was above the area that could be served by the existing ditches and dikes. IDWR requested an opportunity for an additional field inspection in a letter dated June 1, 2006. Ms. McHugh, deputy attorney general for IDWR, described the request as follows:

Your Honor, just basically, until we were on the ground, it wasn't apparent to us that the elevation on the ground appeared to be different and was an issue. And when we had that observation, it became what we felt was an important factual issue as to how the water was distributed over the land.

(June 2, 2006 Hr'g Tr. at 27, L. 12–18.) Ultimately, the IDWR produced a topographic map with various elevations throughout the PPU.

The State hired ERO Resources to assist in the evaluation of the beneficial use at the permissible place of use for water right no. 31-11845. This evaluation included a detailed summary of the water right development on the property where three water rights have already

been decreed for portions of the permissible place of use or for adjacent property. Since duplications exist in the places of use, a careful review of this historical data was necessary. Mr. Norman C. Young, former administrator with IDWR for over thirty years, prepared the summary in the expert report.

ERO Resources also undertook an independent review of the topographic and elevation data collected by the IDWR. ERO Resources took this data to determine capacities of various ditches. The end results of this data analysis were the following opinions, among others:

1. The irrigation system was built without detailed technical layout and design procedures to optimize the area served and the efficiency of water conveyance
2. The bottoms and banks of many of the ditches comprising the irrigation system were not constructed and have not been maintained to uniform cross-sections and profiles.
...
4. The irrigation system, as it existed in the mid-1980's, could not distribute water to more than 258 acres of the PPU.

(*Exhibit 27: Expert Report of David B. Shaw and Norman C. Young* at 1.) These conclusions would obviously have assisted the Court in determining the issues in this subcase.

d. Expert report of Dr. Robert W. Hill.

The Objectors made repeated statements about the irrigation of the entire permissible place of use. Statement of the Case, hereinafter "SOC" at 5-6. The State hired Dr. Robert W. Hill to evaluate the benefits to be derived from irrigating the PPU and the energy costs to provide those benefits in 1986, the date that the beneficial use examination took place for water right no. 31-7311. The State also asked for this evaluation to address the Objectors' objections that the analysis of this water right needed to focus on the time frame of the 1986 beneficial use exam by IDWR.

Dr. Hill began his analysis by using the potential annual vegetative dry matter production for the forage species identified in the Jefferson County Soil Survey for years when the

precipitation amounts were described as unfavorable (8 inches per year), normal (10 inches per year) and favorable years (12 inches per year).⁹ Through a series of calculations and conversions he determined that the storage of one acre inch of water in the root zone of an acre of the uncultivated pasture in soil units 56, 59 and 93 would produce 51 pounds of grazeable forage on an acre and that the value of this additional forage was \$0.63.

Dr. Hill also uses the Objector's description of past operation of the wells for irrigation of the PPU to derive an estimate of the cost of producing the benefits described above in 1986. Dr. Hill's analysis takes into account the seepage losses from the various ditches, application efficiency for the irrigation system, and energy costs that existed in 1986. This analysis underestimates the actual cost because his analysis ignored other operation and maintenance costs. He determined that the estimated energy cost of storing an acre inch of water in the root zone of an acre of uncultivated pasture was \$2.80. Finally Dr. Hill concludes that the cost of energy alone to produce an AUM of grazeable dry matter was more than four times the value of the resulting AUMs and that such use does not constitute a beneficial use of water. These conclusions would also have assisted the Court in resolving the amount of beneficial use for permissible place of use.

e. Dr. Hill's weather work was reasonably incurred.

The Objector's also argued that "[i]f the Court does allow an award of expert fees for Dr. Hill it should be reduce [sic] from the claimed amount because it appears that a significant portion of this work was for collecting weather data. The Court earlier denied the State access to the Objectors' land to conduct weather exams because it was not rationally related to the case." (Objection at 7.) Counsel for the State inadequately explained the need for weather data and for

⁹ The potential annual vegetative dry matter production is a total amount that includes palatable and unpalatable species. The proportion of palatable species on soil units 56, 59, and 93 is 68 per cent; it is 85 per cent for soil unit 55.

the temporary weather station at the hearing on August 18, 2006. That fact should not preclude recovery for the analysis that Dr. Hill undertook regarding weather to prepare his expert report. The need for such data is straightforward. A plant has a certain total need for water. The irrigation requirement for a plant is reduced by the amount of water that the existing environment provides. A review of weather data is necessary to determine what the environment provides. As is normally the case, the weather station with the long history of available data is not located at the precise place of use. Therefore, the analysis of that data requires a review to determine how well correlated the weather station data is to the weather observations at the precise place of use. The temporary weather station provided some data to correlate the weather stations with a long history of data to the precise place of use. Some data is better than no data at all. In the time frame of the trial schedule, this was the best that could be done. The Court should award the costs associated with the weather data analysis.

f. The cost of analysis for Dr. Hill's soil samples was reasonably incurred.

The Objectors argue that "Dr. Hill also ran tests of the soil samples in addition to Logan's samples; the same work was performed more than once." (Objection at 8.) Dr. Hill did have the Utah State University Laboratory analyze a limited number of soil samples that were collected by Glen Logan. These samples were from the same horizons that were analyzed by Western Laboratories for Glen Logan. Objectors are correct that a small amount of duplication of soil analysis occurred. Simply put, disputes regarding collection of field data can always include factual disagreements over the quality of laboratory work. Analysis by two separate laboratories of the same sample provides a litigator an opportunity to respond to such allegations. When the samples were analyzed, the State did not know whether such a dispute would occur, and the State

obviously would not have the opportunity to take additional samples if such a dispute occurred. This limited duplication was a reasonable response to a matter that was in litigation.

ii. The expenses incurred by the attorneys were reasonably incurred.

The Objectors argue that the costs for the attorneys were excessive as follows:

The State claims cost in the amount of \$1,234.62 for meals and lodging. These costs would not serve the interests of justice if the Claimants were forced to pay these costs. First, the State made multiple unnecessary visits to the proposed place of use in Mud Lake. Second, the amount of trips taken by the State to the place of use was unreasonable and unnecessary. Third, the State's attorneys always traveled together and billed their time together. There was no reason that any visits to Mud Lake, the hearings in Twin Falls or depositions needed to be attended by two attorneys.

...

The State has also added a charge of \$8.47 for a disposable camera with no explanation as to why this was deemed necessary and why the Claimants should be responsible for such cost.

Furthermore, the Claimants should not be punished for the fact that the State's attorneys, who were assigned to this case, live in the Boise Area but still chose to both always attend all court hearings in person, when appearing telephonically was available.

(Objection at 8-9.) The State had prepared a complex factual case in this matter as evidenced by the four expert reports. Part of the trial preparation for the attorneys begins when your experts are in the field. The attorneys are not experts and yet they are expected to acquire sufficient technical understanding to conduct that direct examination and redirect of its own experts. That technical understanding is most expeditiously acquired by a dialogue between the attorneys and their experts in the field. The visits to Mud Lake were fully justified by the complexity of this matter.

Both attorneys for the State attended the deposition of Dale Stukenholtz, Joe Llamas, Omar Llamas, Bryce Contor, and Paul Stukenholtz, the site visit by the court on October 26, 2006, and most of the court proceedings after July 31, 2006. Prior to that date, deputy attorney general David J. Barber had worked on the case by himself. The addition of a second attorney

on the litigating team was recognition that there was more work to be done than one attorney could handle. Initially, the State had perceived this matter as a simple case, much like the Objectors' present description of this matter. That perception changed dramatically when the following issues arose: (1) non-irrigable soils, (2) capacity of irrigation ditches, (3) relative elevation of the place of use and the irrigation ditches, (4) suitability of irrigation of arid and semi-arid native plants, and (5) the cost of irrigation and the benefits from such irrigation. The State needed to put together a complex case in a very short period of time. Both attorneys needed to participate or be present at significant litigation events. These costs were reasonably incurred.

Norman C. Young, an expert with ERO Resources, asked deputy attorney general David Barber to take some pictures of various portions of the canal system during the date of the court site visit on October 26, 2006. The purposes of the pictures were to resolve factual discrepancies about the water delivery system. Deputy attorney general David Barber took the pictures and delivered the camera to Mr. Young. (June 27, 2007 Barber Aff. at 3.) This expense was related to preparation of the expert report and was reasonably incurred.

Appearance at court hearings whether by telephone or in person is a litigation decision. Counsel for the State uses both methods to participate in court hearings before the Snake River Basin Adjudication District Court. Appearance in person should not be foreclosed by the fear that a court will later second guess a litigator that an appearance by telephone would have sufficed. This matter is an important case to the State. We needed to prepare an adequate factual record to support legal arguments that we intended to make, if this matter were litigated fully. When the Objectors rejected the very generous offers of judgment made by the State, there was a potential that the Objectors would have a less favorable result. The consequences of that

rejection are that the State is entitled to recover its reasonable expenses, including attorney fees. Second guessing every little litigation decision made in the course of that litigation does not serve the purposes of I.R.C.P. 68. When a party receives an offer of judgment, it deserves serious consideration with the understanding that if it is not accepted and the result is not more favorable, the party will be responsible for those reasonable litigation expenses. The Court should reject the Objectors objection to these expenses.

D. THE EXPENSES FOR THE STATE'S EXPERT WITNESSES WERE NOT EXCESSIVE.

The Objectors argued that "[t]he State hired five high priced experts from both inside Idaho and out. All of the experts lived far from the place of use and like charged for their travel to and from the place of use." (Objection at 6.) The hourly charges for Idaho's experts were as follows: \$75.⁰⁰/hour for Glen Logan, \$100.⁰⁰/hour for Dr. Wayne Burkhardt, \$110.⁰⁰/hour for Robert Hill, Ph.D., P.E., \$115.⁰⁰/hour for David Shaw, and \$110.⁰⁰/hour for Norman Young.¹⁰ These hourly rates are on average less than the rates charged by the Objector's expert, Dr. Dale Stukenholtz. When the State took the deposition of Dr. Dale Stukenholtz, the Objectors requested the State of Idaho to pay a bill from Dr. Dale Stukenholtz, which is attached to the *Affidavit of David J. Barber Dated June 27, 2007*. The Objectors requested payment at a rate of \$100.⁰⁰/hour for Dr. Stukenholtz's review of the State's expert reports. For the time spent in the deposition, the Objectors requested a total of \$435.⁰⁰/hour for 3.5 hours of deposition time, which is equivalent to about \$125.⁰⁰/hour. The hourly rates of Idaho's experts compare favorably with the Objectors' expert and are very reasonable rates for the expertise of the respective individuals.

The Objectors' objections to charges for travel time to and from the Jernberg Ranch by Idaho's experts are baseless and represent one more example of a frivolous claim by the

¹⁰ Each expert report contained a statement of the fees charged by the respective expert.

Objectors. Objectors cite no case or other authority that such charges are improper, and the State is aware of none.

IV. ATTORNEY FEES PURSUANT TO IDAHO RULE OF CIVIL PROCEDURE 54(E)(1) AND IDAHO CODE §§ 12-121, -123.

As the prevailing party in this matter, the State is entitled to reasonable attorney fees pursuant to Idaho Rule of Civil Procedure 54(e)(1) and Idaho Code § 12-121, because the Objectors brought and pursued their claim to this water right unreasonably and without foundation. In addition, or in the alternative, the State is also entitled to reasonable attorney fees pursuant to Idaho Code § 12-123, because the prosecution of the claimed water right constituted frivolous conduct not supported by the facts. The amount of the claimed fees is as follows:

1.	David Barber 376.15 hours * \$150.00/hour:	\$56,422.50
2.	David Stanish 260.99 hours * \$95.00/hour:	<u>\$24,794.05</u>
	TOTAL ATTORNEY FEES:	\$81,216.55

At the outset, the State needs to make clear that it does not as a matter of course request an award of attorney's fees. The State has sought such fees in only a very few limited cases. Because of the unreasonable pursuit of this water right claim, the State determined to do so here.

The unreasonable pursuit of this water right claim was not supported by the facts that became known early in this litigation. *See Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 92, 803 P.2d 993, 998 (1991) (upholding the findings of the trial court that the plaintiffs' theory as to the source of a fire and the defendant's responsibility was unreasonable and without foundation based upon "(1) the improbability or inconsistency of the testimony of some of the plaintiffs' witnesses, (2) evidence that the fire started before the condition the plaintiffs contended was the cause of the fire occurred, and (3) the inconsistency of the physical

evidence with the cause advanced by the plaintiffs"). The IDWR, as technical adviser to the Court, advised the Court and the parties in the Supplemental Report that a portion of the permissible place appeared to be higher in elevation than the existing canal system could serve. The IDWR advised the parties and the Court of its intention to conduct an additional field inspection in a letter dated June 1, 2006. The IDWR sent the topographic map produced from the field inspection on June 27, 2006. Counsel for the State advised the Court and the Objectors at the status conference on June 28, 2006 that the Soil Survey for this area classified most of the permissible place of use as not irrigable. That information was sent to the Objectors by facsimile and by U.S. Mail on that same date. SOC at 7. Thus, by the end of June 2006, the Objectors knew that IDWR had concluded the place of use could not be irrigated as they claimed and that only 21.7 acres of the place of use was considered irrigable by the Soil Conservation Service. These two facts should have caused the re-evaluation of their claim that ultimately resulted in execution of the Standard Form 5 ten months later. This re-evaluation should also have included some immediate input from the Objectors' own soil scientist. But it did not. Instead the Objectors waited and delayed. Instead, the Objectors chose to sit back and allow the State to continue to make or, in this case, break their case for them.

The next major milestone was digging of the soil pits in September 2006. Objectors' soils expert had the opportunity to examine the soils on the subject property, to take soil samples from the various soil pits, and to observe the existing ditch and dike system. Dr. Stuckenholtz made a very significant observation about the past irrigation of the permissible place of use during his deposition.

Q. Let me ask you some questions about that. Did you find any evidence that they had irrigated the permissible place of use with a center pivot while you were out there?

A. No.

Q. Okay.

A. If they have, I didn't see it.

Q. Do you have an opinion as to whether they could beneficially use water with the existing dike system out that you observed as irrigation?

A. Not very good. I think they'd have to pipe the water so there's no chance for seepage, to the various center pivots and pressurize them and irrigate.

(Nov. 9, 2006 Dale Stukenholtz Dep. Tr. at 80, L. 5–7; 80, L. 16–18; 84, L. 1–25; 85, L. 1.)

Accordingly, the Objectors own witness contradicted the litigation position of the Objectors that they could irrigate the entire permissible place of use. Dr. Stukenholtz's conclusion was that the only feasible way to irrigate the permissible place of use was with sprinklers and that there was no evidence that the Objectors had ever done so. None of the affidavits of the various farm hands or of Ben Jernberg ever claimed any irrigation of the permissible place of use with sprinklers. Therefore, a simple interview by the Objectors of their own expert would have disclosed he would testify contrary to the Objectors' litigation position in this matter.

The final milestone event was the submission of the expert reports at the end of October 31, 2006. While this brief has already described some of the findings from these expert reports, some of that information needs to be briefly restated in this argument. At the end of October, the following information was now clearly on the table:

- The State's soil scientist had reiterated in 2006 the findings of the Soil Conservation Service in 1979 that most of the permissible place of use was not irrigable.
- The State's range management expert had concluded that the permissible place of use had not been irrigated because of the presence of sagebrush older than twenty years of age, a plant not tolerant of irrigation, in the permissible place of use and in the bottom of ditches. He also stated an opinion that irrigation of arid and

semi-arid plants was not a normal or customary practice, because it would drown out most of the native species.

- The State's engineers had concluded that most of the place of use could not be irrigated by the existing ditches and dikes because of insufficient capacity and lack of head.
- The State's engineer had also concluded that even if they had been able to irrigate the entire place of use, the pumping cost alone of producing an animal unit month (AUM) of forage exceeded the benefit from such forage by over four times.
- The Objectors' own soils expert concluded that the permissible place of use could only be irrigated with sprinkler equipment and that there was no evidence that such equipment had been used on the permissible place of use. Statement of Facts at 8-9.

The State reminded the Objectors in letters dated October 16, 2006 and October 31, 2006 that it was incurring substantial expert witness costs and that the Objectors needed to settle. The Objectors responded with only unacceptable offers that the State rejected.

I.R.C.P. 54(e)(1) and Idaho Code §§ 12-121 and 12-123 are intended to promote settlement by providing consequences when a party litigant acts in an unreasonable manner in litigation. These provisions also provide a remedy for those injured by such unreasonable conduct. Here, the State incurred substantial attorney's fees in prosecuting this matter to a conclusion.¹¹ The interests of justice would not be served if the party that caused this substantial expense was not required to pay for the consequences of its unreasonable and frivolous conduct in this litigation.

¹¹ It has only asked for reimbursement for a portion of those attorney's fees. The *State of Idaho's Memorandum of Cost and Attorneys Fees* only includes time for deputy attorney general David J. Barber beginning on June 22, 2006. Any time prior that date is not claimed.

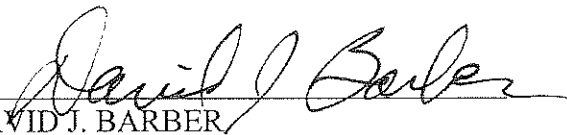
CONCLUSION

For all the reasons stated, the State of Idaho respectfully requests the Court to enter an order awarding the costs and attorney fees claimed.

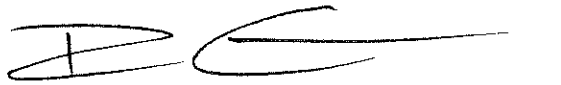
RESPECTFULLY SUBMITTED this 27th day of June 2007.

STATE OF IDAHO
LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
CHIEF, NATURAL RESOURCES DIVISION



DAVID J. BARBER
Deputy Attorney General
Natural Resources Division



DAVID I. STANISH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on this 27th day of June, 2007, I caused to be served the original and/or copy of this BRIEF IN SUPPORT OF STATE OF IDAHO'S MEMORANDUM OF COSTS AND ATTORNEY FEES on the following persons by the indicated methods:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☒ Federal Express
☐ Facsimile: (208) 736-2121
☐ Statehouse Mail

2. Copies to

Special Master Brigitte Bilyeu
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☒ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
☐ Facsimile: _____
☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

(not applicable)

Ben D. Jernberg
Idaho Properties LLC
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DAVID J. BARBER
Deputy Attorney General