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AUG 29 2008

DEPARTMENT OF
WATER RESOURCES

**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

Case No. 39576

Subcase No. 63-27475

**MEMORANDUM OF COSTS AND
REQUEST FOR ATTORNEY FEES**

Janicek Properties, LLC ("Janicek"), by and through its counsel Givens Pursley LLP, as a prevailing party in the above-captioned subcase, hereby files this Memorandum of Costs and Request for Attorney Fees seeking reimbursement of its costs and fees against the Objectors Nampa & Meridian Irrigation District ("NMID) and the United States Bureau of Reclamation ("BOR") (collectively "Objectors"). This Memorandum is filed pursuant to Rule 54 of the Idaho Rules of Civil Procedure and the authority cited herein, and is supported by the accompanying *Affidavit of Michael P. Lawrence* ("Lawrence Affidavit"). Janicek seeks to recover \$3,939.41 in discretionary costs and \$43,320.50 in attorney fees.

I. THIS MOTION IS TIMELY

Idaho Rule of Civil Procedure 54(e)(5) states

At any time after the verdict of a jury or a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but such memorandum of costs may not be filed later than fourteen (14) days after entry of judgment A memorandum of costs prematurely filed shall be considered as timely.

This Memorandum is timely because it comes after a decision of the court and prior to the fourteen-day deadline following the entry of judgment. The pertinent decision of the court was the *Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA Case No. 39576, Subcase No. 63-27475* (May 2, 2008) (“*Order*”). This *Order*, however, was not an entry of final judgment and neither was the accompanying *Special Master’s Recommendation for Partial Decree*. The entry of final judgment will occur when the SRBA Court’s Presiding Judge issues an order of partial decree pursuant to Idaho R. Civ. P. 54(b)—an event that has not yet occurred.¹

II. DISCRETIONARY COSTS²

Janicek is entitled to an award of discretionary costs under Rules 54(d)(1)(A), (B) and (D). These provisions allow for an award of discretionary costs to the prevailing party “upon a

¹ That the order of partial decree is the entry of final judgment in an SRBA subcase is clear from the following language contained in the standard 54(b) certificate:

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for the delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.
(Emphases added.)

² This Memorandum includes only discretionary costs allowed pursuant to Rule 54(d)(1)(D). Janicek has not incurred costs that prevailing parties are entitled to as a matter of right under Rule 54(d)(1)(C).

showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.” Idaho R. Civ. P. 54(d)(1)(D). In awarding discretionary costs, it is sufficient for a court to “[e]xpress findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interests of justice.” *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

Janicek’s requested discretionary costs are as follows:

DESCRIPTION	AMOUNT
Professional Fee: TitleOne Corporation – title research	\$500.00
Professional Fee: SPF Water Engineering – water flow study	\$3,183.44
Photocopies	\$155.40
Long Distance Telephone Calls	\$9.61
Courier Service	\$22.28
Messenger Services	\$25.00
Facsimile charges	\$19.00
Copy Expense	\$24.68
TOTAL	\$3,939.41

As discussed below, Janicek’s request satisfies the standards for an award of discretionary costs.

A. Janicek is the prevailing party.

Janicek is the prevailing party in this case. Rule 54(d)(1)(B) states “[i]n 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.” This Court granted Janicek’s Motion for Summary Judgment in full and recommended that Janicek be decreed a water right with the elements recommended by the Idaho

Department of Water Resources ("IDWR"). *Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA Case No. 39576, Subcase No. 63-27475* (May 2, 2008)

("Summary Judgment Decision"). This result is entirely the opposite of the result sought by NMID and BOR in this subcase. Their position was that Janicek's water right "should not exist." *NMID Objection at 2; BOR Response at 2*. NMID and BOR have not sought to alter or amend the Summary Judgment Decision and the Special Master's Recommendation. Janicek clearly is the prevailing party in this subcase.

B. Janicek's discretionary costs were exceptional.

All of Janicek's requested costs were exceptional costs, in large part because the nature of this case was exceptional. The Idaho Supreme Court "has always construed the requirement that a cost be 'exceptional' under I.R.C.P. 54(d)(1)(D) to include those costs incurred because the nature of the case was itself exceptional." *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 168. On summary judgment, Janicek established that the Objectors' position was unfounded as a matter of law. Nevertheless, the manner in which the Objectors pressed their position required Janicek to retain a hydrologist consultant to evaluate and be prepared to respond to the Objectors' ground water modeling and stream discharge data, and to independently collect discharge data, and review and prepare various diagrams, maps and expert reports in the course of discovery and trial preparation.

Moreover, the allegation that NMID owned Purdam Gulch Creek required Janicek to incur the cost of retaining a title examination by TitleOne Corporation to be able to properly refute this assertion. This cost was particularly appropriate (and exceptional) inasmuch as NMID failed, in response to Janicek's discovery requests or otherwise, to produce relevant or substantial evidence of its own supporting its claimed legal title to Purdam Gulch Creek. In

other words, NMID made the bare assertion of its adverse title, and of Janicek's trespass, but left it to Janicek to incur the expense to develop relevant facts.

The nature of proof that potentially would be required should a trial have ensued in this subcase also is exceptional in comparison with other civil matters and in comparison with other SRBA matters. This is a water rights case involving a unique body of law that derives from the common law of the western states, statutes, unique administrative procedures and decisions, and the developing body of law in the SRBA itself. This case also involved a not insubstantial amount of historical research concerning the Janicek property in particular, and irrigation development under federal reclamation in the Treasure Valley generally.

Unlike most SRBA subcases, which involve challenges to particular elements of a water right or claims of forfeiture or abandonment, this subcase essentially involved NMID's and BOR's asserted claims of adverse title to Janicek's real property and the water Janicek diverts. NMID asserted that the source of water in Purdam Gulch Creek was solely from irrigation water delivered by BOR and used by NMID patrons. BOR then proffered a supporting brief and an expert to provide supporting testimony to that effect. NMID further asserted (without providing any quantitative facts) that its patrons beneficially used the water in Purdam Gulch Creek under a paramount right to Janicek's.

Also, unlike the numerous subcases in Basin 63 where irrigation districts have objected to water rights on the assertion that the rights are based on use of the districts' "waste water," here NMID and BOR did not pursue a waste water remark.³ Instead they argued that Janicek's water right "should not exist" at all. *NMID Objection* at 2; *BOR Response* at 2 (emphasis added).

³ The possibility of such an approach never arose in this case until BOR's attorney raised it for the first time at the summary judgment hearing. At the August 28, 2007 status conference, NMID's attorney stated flatly

All of these factors contributed to making this subcase and the costs Janicek incurred defending its water right claim exceptional.

C. Janicek's discretionary costs were necessary and reasonable.

Discretionary costs under Rule 54(d)(1)(D) "may include 'long distance phone calls, photocopying, faxes, travel expenses' and additional costs for expert witnesses." *Hayden Lake*, 141 Idaho at 314, 109 P.3d at 168, citing *Auto. Club Ins. Co. v. Jackson*, 124 Idaho 874, 880, 865 P.2d 965, 971 (1993); *Bailey v. Sanford*, 139 Idaho 744, 755, 86 P.3d 458, 469 (2004); *Turner v. Willis*, 116 Idaho 682, 686, 778 P.2d 804, 808 (1989).

As set forth in the *Lawrence Affidavit*, the photocopying and copy expenses were necessary to prepare briefing and discovery responses in this matter. *Lawrence Affidavit*, ¶ 8. In addition, long distance telephone and facsimile charges were necessary to communicate with NMID, BOR, and the SRBA Court, as were the courier and messenger charges. *Id.* As discussed above, the professional/consultant fees for title research, water flow analysis and critical review of BOR's expert's conclusions were necessary to reasonably defend against NMID's Objection and BOR's Response. *Id.*

D. An award of discretionary costs is in the interests of justice.

This has been a "David versus Goliath" subcase. On one side stands Janicek, a small limited liability company owned and managed by Brad and Lou Ann Janicek to operate their family farm. This is an entity with limited funds to defend itself against legal attacks. On the other side stands the federal government (BOR), represented and assisted by attorneys from the United States Attorney General's Office, the Department of Justice and the Solicitors' Office of

that this subcase was different from the other Basin 63 waste water cases where inclusion of a standard remark was the practice for settling the objections.

the Department of Interior. Alongside BOR is NMID, a quasi-governmental irrigation district with an assessment base of nearly 70,000 irrigated acres.

Ironically, because Janicek is a taxpayer and a patron of NMID, its own taxes and assessments have helped fund the litigation against it. Janicek, in other words, has been paying for both sides of litigation that Janicek did not bring. Janicek was forced to defend the essential validity of a water right that has been diverted from Purdam Gulch Creek and beneficially used on its land for nearly sixty years, *and* to defend its title in that irrigated land against an attack that the Court found to be “without merit.” While the cost of engaging in litigation like this might be insignificant to NMID and BOR, it is very significant to Janicek. The interests of justice are served by awarding Janicek its discretionary costs.

III. ATTORNEY FEES PURSUANT TO IDAHO CODE § 12-121

A. Janicek is entitled to an award of attorney fees.

Idaho Rule of Civil Procedure 54(e)(1) and Idaho Code Section 12-121 give this Court discretion to award attorney fees to the prevailing party.⁴ The test for awarding attorney fees is whether “the case was brought, pursued or defended frivolously, unreasonably or without foundation.” Idaho R. Civ. P. 54(e)(1); *In Re SRBA Case No. 39576, Subcase Nos. 65-02949A*

⁴ Idaho Rule of Civil Procedure 54(e)(1) states:

In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, 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; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Idaho Code Section 12-121 states:

In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney’s fees.

and 65-02949B, *Order Recommending Attorney Fees and Denying Motion to Disallow Attorney Fees*, slip op. at 3 (Sep. 17, 2002) (citing *Owner-Operator Independent Drivers Ass'n, Inc. v. Idaho Public Utilities Comm'n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994)).

B. Janicek indisputably is the prevailing party.

Janicek is the prevailing party in this subcase. *See discussion, supra*. As discussed below, Janicek is entitled to an award of attorney fees in the amount of \$43,320.50 because NMID and BOR brought and pursued this subcase frivolously, unreasonably and without foundation.

C. NMID's and BOR's position was frivolous, unreasonable and without foundation.

NMID's objection to Janicek's water right recommendation was based on its entirely novel theory (which BOR both directly and tacitly joined in) that Janicek established its water right by trespassing on a drain (i.e., Purdam Gulch Creek) "owned" by NMID, and that Janicek was diverting water that NMID "owned." *NMID Objection* at 2; *NMID Memorandum in Opposition* at 2, 6-11; *BOR Opposition to Janicek's Motion for Summary Judgment* at 2. As this Court found, this position was "without merit." *Order* at 12 (emphasis added).

Neither NMID nor BOR advanced any facts to support NMID's assertion that it owns Purdam Gulch Creek. *See Order* at 12 ("neither the NMID nor the BOR have produced any recorded instruments showing a real property interest in Janicek's real property"). They also made no attempt to describe the nature of NMID's interest in Purdam Gulch Creek, except to say that NMID "owns" it. Although it was not disputed that BOR undertook substantial earthwork in excavating Purdam Gulch Creek to facilitate drainage in the early 1900's, and that NMID and/or BOR periodically undertook additional drainage maintenance work in Purdam Gulch Creek thereafter, these facts did not rise to the level of establishing any interest in Purdam Gulch Creek,

let alone an extent of title coming close to the outright ownership NMID claimed.

Consequently, this Court could not determine the nature of NMID's interest in Purdam Gulch Creek, except to say that it did not "own" it. *See, id.* ("whatever the precise nature of the [NMID's right] to use Janicek's property . . . , Janicek's water right was not initiated, and has not been maintained in trespass").

Importantly, the meritless trespass allegation (i.e., as against NMID's ownership of a drain and all of the water in it) was the only argument pursued by NMID and BOR against Janicek. Unlike numerous other objections brought by irrigation districts attempting to define their interests in water running in channels constructed or used by them as drains, NMID did not base its objection on the source being waste water. In these other "waste water" subcases of which counsel is aware, the irrigation districts and BOR were satisfied with a remark on the decree identifying the source either in whole or in part as "waste water." Throughout this subcase, however, NMID asserted that its objection to Janicek's water right was different than these "waste water" subcases. NMID, backed by BOR, was ardent in maintaining that Janicek's diversion was in trespass.

They were far less ardent when it came to proffering supporting facts, however. This is significant. It is one thing to press in good faith for an extension, modification or reversal of existing law. Idaho Code § 12-123(1)(b). However, given the clear statements of authority governing the issue in this subcase, including the express statutory right to appropriate water from natural streams and from drains (I.C. §§ 42-101-107), and the oft-stated principle that a water right is only the right to beneficially use water, the legal question pressed by the Objectors was not a close one.

NMID's and BOR's apparent lack of effort in attempting to further their position bears directly on whether they pursued it frivolously, unreasonably and without foundation. Granted, BOR employed a hydrologist who would have opined as to the source of water in Purdam Gulch Creek, but neither BOR nor NMID presented *any* evidence concerning the actual extent to which they or their patrons beneficially used water (i.e., the only right in water that can be "owned") water in Purdam Gulch Creek, or that Janicek's use of the water infringed on anyone else's beneficial use. These are facts that must be established if one is to assert title in water, paramount or otherwise.

Rather than providing such evidence, in its first responses to Janicek's discovery requests seeking information on this issue NMID asserted only that one subdivision used some undisclosed amount of Purdam Gulch Creek water and that some other unknown amount is redelivered via the Kennedy Lateral to unspecified NMID lands. *See Lawrence Affidavit, Ex. D.*⁵ Because of the lack of clarity as to the extent, if any, of NMID's use of Purdam Gulch Creek waters (i.e. whether it beneficially used all of the waters potentially identifiable as waste waters), Janicek filed supplemental discovery requests. In response to these requests, NMID conceded that "NMID does not divert and put to beneficial use all of the water in the Purdam Drain." *Lawrence Affidavit, Ex. E.* In short, it took Janicek two rounds of discovery requests to obtain the information necessary to reach the conclusion that should have been apparent to NMID and BOR all along under well-settled prior appropriation principles—that NMID cannot "own" all of the water in Purdam Gulch Creek because neither it nor its patrons use it all.

⁵ It is unclear whether the subdivision or the other lands to which NMID claims to deliver its Purdam Gulch Creek waste waters lie within NMID's service area. This, of course, would be necessary to claim a paramount right to waste waters. *Thompson v. Bingham*, 78 Idaho 305, 308, 302 P.2d 948, 949 (1956) ("seepage water or waste water . . . may be intercepted and taken by such owner at any time and used on the land to which it is appurtenant").

No evidence suggesting that NMID owned Purdam Gulch Creek or its waters was offered. In other words, the Objectors' position apparently was to "throw something at the wall and see what sticks." In dozens of other subcases this strategy may have worked, presumably because the claimants were not willing or financially able to resist, and so they settled. Here that strategy required Janicek to incur substantial costs to show that NMID's and BOR's position lacked any adhesive qualities.

The Court found the trespass allegation to be "without merit." Because NMID and BOR brought and pursued this entire action unreasonably and without foundation, Janicek should be awarded its attorney fees as requested.

IV. RULE 54(E)(3) ATTORNEY FEE AWARD FACTORS

Rule 54(e)(3) enumerates factors that the Court must consider to determine the amount of attorney fees to award. Based on these factors discussed below, this Court should award Janicek its full requested amount of attorney fees.

(A) The time and labor required.

To defend against NMID's and BOR's allegations, Janicek's attorneys spent substantial time evaluating the factual and legal basis for NMID's, BOR's, and Janicek's respective claims of interest to Purdam Gulch Creek, and researching the body of law governing waste water appropriations. Additional time was spent preparing and reviewing supplemental discovery requests and responses to discern what facts, if any, would suggest that Janicek was diverting water from Purdam Gulch Creek that otherwise would have been used by NMID patrons or others. No such facts were obtained. Janicek's attorneys devoted substantial time to briefing these issues on summary judgment. The actual time spent by Janicek's attorneys on this matter is set forth in detail in the *Lawrence Affidavit* and the exhibits thereto.

(B) The novelty and difficulty of the questions.

As discussed above, the issue raised by NMID and BOR in this case was at least unique, albeit unfounded. Unlike other subcases where irrigation districts conceded that water right claimants at a minimum have a right to appropriate alleged “waste water,” Janicek had to prove, first and foremost, that it was entitled to a water right at all. As posed, the issue required Janicek to incur expenses to be prepared to establish the extent of its title to the bed and banks of Purdam Gulch Creek where it crosses its property, to confirm that water was available in Purdam Gulch Creek sufficient to support its appropriation, and that Idaho law allows Janicek’s appropriation. Janicek’s attorneys’ efforts included researching the factual and legal basis for NMID’s, BOR’s, and Janicek’s respective claims of interest to Purdam Gulch Creek and its waters, and researching the body of law governing waste water appropriations. Janicek respectfully submits that the novelty and difficulty of the issues raised by NMID and BOR supports a full award of attorney fees.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

This case presented issues with significant potential adverse impacts on Janicek’s business. Janicek was referred to attorney Michael Creamer at Givens Pursley LLP by Janicek’s general business counsel, in large part due to Mr. Creamer’s knowledge of Idaho water law and his experience with irrigation districts and BOR project developments and operations in the Treasure Valley and elsewhere. This was an important factor in Janicek’s defense of the objections, particularly inasmuch as NMID and BOR also were represented by counsel experienced and skilled in these areas. Janicek respectfully submits that this factor supports a full award of attorney fees.

(D) The prevailing charges for like work.

As set forth in the *Lawrence Affidavit*, the prevailing rates for this kind of work in Ada County, Idaho, are between \$175 and \$300 per hour. The rates actually charged by Janicek's counsel are within that range. The overall cost of the representation also is appropriate given the nature and course of the litigation.

(E) Whether the fee is fixed or contingent.

The attorney fee paid by Janicek is based upon the time actually worked by Janicek's attorneys on this matter.

(F) The time limitations imposed by the client or the circumstances of the case.

There were no particular time limitations.

(G) The amount involved and the results obtained.

The fees incurred by Janicek to successfully defend its water right against the objections by NMID and BOR were commensurate with the result obtained. The result of Janicek's success on summary judgment is that Janicek holds a 1951-priority water right to divert 1.4 cubic feet per second to irrigate a seventy acre farm. Had Janicek not prevailed, it would not hold a water right to irrigate these seventy acres and would have to obtain another water source to ensure an adequate irrigation season supply. This might have required purchasing an existing water right. Accordingly, it was reasonable to incur \$43,320.50 in attorney fees to obtain the result in this subcase.

(H) The undesirability of the case.

This subcase arguably was undesirable given the significant disparity of resources available to defend Janicek's position when compared with the resources of the parties marshaled against it.

(I) The nature and length of the professional relationship with the client.

This is the first matter for which Givens Pursley LLP has represented Janicek.

(J) Awards in similar cases.

Janicek's counsel is not aware of any subcases similar to this one. That is, this is the only subcase of which Janicek's counsel is aware in which an irrigation district and BOR alleged that a claimant was not entitled to a water right at all because of alleged trespass. Janicek's counsel is also not aware of any other "waste water" subcases involving irrigation districts and BOR where attorney fees were requested or awarded. Janicek's requested attorney fees and costs are, however, comparable to fees incurred in other civil litigation Janicek's counsel have been involved in with multiple parties, use of experts and analysis of technical data, discovery, motion practice and oral argument as was the case here.

(K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

Janicek's counsel did not use or charge Janicek fees for automated legal research.

(L) Any other factor which the court deems appropriate in the particular case.

Janicek respectfully submits that the above factors, in and of themselves, warrant this Court's award of Janicek's attorney fees.

V. ATTORNEY FEES MAY BE AWARDED AGAINST BOR

The Court may award attorney fees against BOR under Rule 54(e) and Idaho Code Section 12-121. Although the issue has not been squarely decided in Idaho or elsewhere, Janicek contends that the McCarran Amendment, 43 U.S.C. § 666, does not prohibit such an award.

Here, there was no justification for BOR's position that Janicek was not entitled to a water right. As this Court has concluded, the argument that Janicek trespassed on a drain owned

by NMID was “without merit.” *Order* at 12. BOR did not provide any evidence to support the assertion that Janicek was trespassing. Of course, BOR did not file the original objection against Janicek (NMID did), but it did file a response supporting NMID’s objection, as well as briefing opposing Janicek’s motion for summary judgment. Also, it appears that BOR generally assisted and supported NMID in this litigation by providing affidavits and expert analysis. *See, e.g., NMID Memorandum in Opposition* at 3-4 (*citing* Affidavit of Jerry Gregg, Area Manager for BOR’s Snake River Area Office). BOR was thus complicit in NMID bringing and pursuing its objection, and it should be responsible for paying Janicek’s attorney fees.

A. The McCarran Amendment does not preclude an award of attorney fees against BOR.

Janicek anticipates that BOR will argue that the McCarran Amendment precludes an award of attorney fees against the United States. However, to Janicek’s knowledge, no court has ever held as much.

The McCarran Amendment provides:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(43 U.S.C. § 666, emphasis in original.)

The scope of the McCarran Amendment’s “cost proviso” was addressed by the U.S. Supreme Court in *United States v. Idaho, Ex Rel Dir, Dept. of Water Res.*, 508 U.S. 1 (1993). In that case, the Court discussed whether the “cost proviso” prohibited the State of Idaho from charging the federal government filing fees for SRBA claims. In reaching its holding, the Court

agreed with the Idaho Supreme Court's observation that "'fees' and 'costs' mean two different things in the context of lawsuits." *Id.* at 8. But, because it found that the "fees" for filing SRBA claims were indistinguishable from other court "costs," the Court found that the McCarran Amendment precluded charging the federal government "the sort of fees that Idaho sought to exact." *Id.* In that case, the "fees" were intended to help finance the administrative costs of the SRBA.

The upshot, however, is that the U.S. Supreme Court agreed that "costs" and "fees" are different, and that the McCarran Amendment's "cost proviso" applies to only those fees that are actually costs. Idaho statutes and case law recognize the distinction between costs and fees also.

In particular, Idaho decisions and statutes make a clear distinction between "costs" and "attorney fees." Clearly the distinction is intended to be meaningful. "The general rule is that costs do not include attorney fees unless attorney fees are expressly included in the definition of the term costs." *Noble v. Ada County Elections Board*, 135 Idaho 495, 504, 20 P.3d 679, 688 (2000) (citing 20 AM. JUR. 2D *Costs* § 1 (1995) and 20 C.J.S. *Costs* § 125 (1990)). See also, Idaho Code 42-1423 (prohibiting judgment for costs *or* award of attorney fees against the State of Idaho in general stream adjudication); Idaho R. Civ. P. 37(a)-(f) (allowing award of attorney's fees, costs *or* expenses as sanctions); Idaho R. Civ. P. 11 (providing for payment of a party's expenses *and* reasonable attorney's fee as a sanction); *Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984) (recognizing American rule that attorney fees are to be awarded only where authorized by statute or contract); *Jones v. Berezay*, 120 Idaho 332, 815 P.2d 1072 (1991) (award of costs and attorney fees, *or either*, is not a prerequisite to an order granting voluntary dismissal pursuant to Rule 41(a)(2)); *Joyce Livestock Company v. United States of America*, 156

P.3d 502, 144 Idaho 1 (2007) (analyzing SRBA court's denial of attorney fees award as against the United States in McCarran Amendment litigation where claim not pursued frivolously).

There is one instance where the consistent and clear demarcation between costs and attorney's fees may appear blurred — Idaho R. Civ. P. 54(e)(5), which states that when attorney fees are “allowable by statute or contract they shall be deemed as costs in an action and processed in the same manner as costs and included in a memorandum of costs.” This Rule, then, instructs litigants and the courts as to how attorney fees, when allowable to a prevailing party, are to be presented to and processed by the Court — i.e., “in the same manner as costs.” Rule 54 does not, however, transmute attorney fees into costs or define them as such.

In previous attorney fee litigation in the SRBA, the United States has struggled to read Rule 54(e)(5) to eliminate the distinction altogether. But the effort makes sense only because it was attempting to avoid the risk of an attorney fee judgment by forcing “attorney fees” into a “cost” pigeon hole of the McCarran Amendment — something neither the Idaho Rules of Civil Procedure nor the McCarran Amendment contemplate. Because neither Idaho statutes nor the McCarran Amendment's “cost proviso” expressly include attorney fees in a definition of costs, they do not prohibit an award of attorney fees against BOR. *Noble*, 135 Idaho 495, 504, 20 P.3d 679, 688 (2000) (costs do not include attorney fees unless attorney fees are expressly included in the definition of the term costs).

The United States' argument that the McCarran Amendment's “cost proviso” exempts it from an attorney fee judgment has been expressly rejected at least once already in the SRBA. *See In re SRBA*, Case No. 39576, *Amended Memorandum Decision and Order on the United States' Motions to Withdraw and Defer Claim and Costs' Motion for Conditions on Any Dismissal and Motion for Sanctions*, pp. 8-14 (filed by Special Master Brigitte Bilyeu on Jan.

30, 1996) (awarding attorney fees to a private party against the United States pursuant to I.R.C.P. 11 and concluding that *United States v. Idaho, Ex Rel Dir, Dept. of Water Res.*, 508 U.S. 1 (1993), did not hold that the McCarran Amendment exempted the United States from attorney fees under Idaho Rules of Civil Procedure, but rather exempted it only from certain fees for administrative and judicial expenses incurred in the SRBA)." *Id.* at 8.

Accordingly, because BOR is a non-prevailing party in this subcase, Idaho Code Section 12-121 allows an award of attorney fees against it. The McCarran Amendment does not prohibit such an award. Janicek respectfully submits that BOR may be required by this Court to pay Janicek's attorney fees.

VI. CONCLUSION

Janicek respectfully submits that the interests of justice warrant this Court awarding Janicek its reasonable, necessary, and exceptional discretionary costs in the total amount of \$3,939.41 and its attorney fees in the amount of \$43,320.50 because Janicek is the prevailing party and NMID and BOR brought and pursued this litigation frivolously, unreasonably, and without foundation. To the best of Janicek's knowledge and belief, the items listed herein as costs and attorney fees are correct, were reasonably incurred by Janicek in defense of its water right claim, and the costs and attorney fees claimed are in compliance with Idaho Rules of Civil Procedure 54(d) and 54(e).

DATED this 28th day of August, 2008.

Respectfully submitted,

GIVENS PURSLEY LLP

By


Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th of August, 2008, the foregoing was filed, served, or copied as follows:

ORIGINAL FILED

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