

S. BRYCE FARRIS (ISB #5636)
RINGERT LAW CHARTERED
 455 South Third Street
 P.O. Box 2773
 Boise, Idaho 83701
 Telephone: (208) 342-4591

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

**NMID'S MEMORANDUM
IN OPPOSITION TO JANICEK
PROPERTIES' REQUEST FOR
ATTORNEY FEES AND COSTS**

COPY

because “the legal question pressed by the Objectors was not a close one” and this case involved “well-settled prior appropriation principles.” However, NMID respectfully disagrees that the issues presented in this subcase were “not a close one” or that the legal principles were “well-settled.” In fact, Janicek’s rhetoric clashes with the suggestion that this case was unique, that costs should be awarded because “the nature of this case was exceptional” and the fact that Janicek’s attorneys apparently billed more than \$43,000.00 on well settled principles and issues that were not close.

Janicek is asking this Court to award attorney fees and costs when the Court itself found that the objection was meritorious and necessary to protect NMID’s paramount rights and interests. Janicek laches on to the fact that NMID position that water in the Purdam Drain was not subject to appropriation was rejected, however, it cannot be denied that this Court found that a remark was necessary to protect NMID’s interests, that such a remark was not included in Director’s Report for this right, and that it was necessary for NMID to file an objection in order to protect its interests. NMID ultimately prevailed on its objection. Thus, not only is Janicek not the prevailing party in this case, but there is no basis for the assertion that NMID’s position was not warranted to protect its interests, or that its position was frivolous, unreasonable or without merit.

II. STANDARD OF REVIEW

In *In Re SRBA Case No. 39576, Subcase No. 65-03702, Order Denying Attorney Fees and Granting Motion to Disallow Attorney Fees* (Sept. 23, 2002), this Court has set forth the standard of review for requests for attorney fees. A prevailing party may recover reasonable attorney fees where the criteria established by I.R.C.P. 54(e)(1) are met. Idaho Rule of Civil Procedure 54(e)(1) provides, in pertinent part:

Rule 54(e)(1). Attorney Fees. – 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. . . .

Rule 54(d)(1) requires a court to consider “the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, . . . or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issues or claims.” I.R.C.P. 54(d)(1).

I.R.C.P. 54(e)(2) provides that when a court awards attorney fees under I.C. § 12-121, it shall make written findings as to the basis and reasons for awarding such attorney fees. The amount of attorney fees granted by the court shall be considered pursuant to the factors set forth in I.R.C.P. 54(e)(3). In reviewing the request by Janicek for attorney fees, the following factors should be considered: a) whether Janicek was the prevailing party; b) whether attorney fees are provided for by statute; c) whether NMID and/or BOR brought, pursued or defended its objection frivolously, unreasonably, or without foundation; and d) the factors set forth in I.R.C.P. 54(e)(3).

III. ARGUMENT

A. Prevailing Party.

The first question that must be addressed in order to award attorney fees is whether Janicek was the prevailing party. Janicek contends that it was the prevailing party because the “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.”

Janicek Memo. at 3-4. This statement is not accurate because this Court did not recommend that the water right be decreed as recommended by IDWR. Instead, this Court recognized that “NMID is the paramount appropriator of the water that can be so identified, and as such the right of NMID to capture and re-use this water is superior to Janicek’s right in two respects.” The Court went on to hold that:

despite the fact that no waste water remark was included in the *Director’s Report*, for purposes of the administration of both Janicek’s right and the NMID’s paramount right(s), this Special Master finds and concludes that the partial decree issued for Janicek’s water right should contain the following remark:

This Special Master finds that **the remark is necessary to define Janicek’s right to show that the right is not subject to the same panoply of rights associated with a water right with a source that does not include waste water. Furthermore, **such a remark prevents any injury resulting to the paramount appropriator.****

Memorandum Decision, pg. 11 of 14 (emphasis added).

As recognized by this Court, “Counsel for Janicek argued that no such remark would be necessary. Counsel for the NMID argued that any right of Janicek to use the waste water of the NMID should be qualified by a remark.” *Memorandum Decision*, pg. 9 of 14. In other words, despite Janicek’s opposition, this Court held that the recommendation of IDWR for this right must include a remark to recognized NMID paramount rights and to prevent any injury to the paramount appropriator.

NMID does not disagree that this Court rejected its position that Janicek’s water right should be disallowed, however, NMID’s objection was clearly warranted in order to recognize and protect its paramount rights and to prevent any injury resulting. For Janicek to now argue that the Court

granted its Motion for Summary Judgment in full and that the right is the same as recommended by IDWR is incorrect, fails to consider this Court's recognition and the need to protect NMID's paramount rights, and fails to consider this Court's conclusion that a remark in the water right is necessary to do so.

Obviously, on the one hand, Janicek has argued that since NMID's position that the right should be disallowed was rejected then Janicek should be the prevailing party. However, on the other hand, NMID can just as easily argue that it is the prevailing party because Janicek's position that no remark was necessary and the Court's conclusion that the objection was warranted because of the "necessary" inclusion of a remark to protect NMID's paramount rights. Indeed, applying Rule 54(d)(1), NMID could and should be characterized as the prevailing party in this case. The ultimate remedy sought by NMID, which was to protect its paramount rights, protect its rights to recapture and re-use the waste water in the Purdam Drain and recognition of its rights being paramount to Janicek's claim, was the result reached in this case. NMID's requested remedy and the remedy fashioned by this Court are different but arguably the same result because the intent of the remark is still to protect NMID's rights and prevent future injury. At a minimum, since Janicek's argument that a remark is not necessary was rejected, since Janicek was unwilling to recognize NMID's rights and since the Court found that the inclusion of a remark was necessary, and thus substantiating the need for NMID to file an objection to the Director's Report, there should be no prevailing party in this case.

B. NMID's Position Was Not Frivolous, Unreasonable or Unfounded.

The SRBA is set up so that all claimants must file claims to their respective water rights and

all persons or entities objecting to those claims must do so or the objections will be deemed waived.

In other words, the SRBA essentially invites litigation by requiring parties to present and litigate their respective positions in subcases. Obviously there can be, and have been, circumstances where a claim or objection is brought frivolously, unreasonably and without foundation. However, the SRBA Court has encountered numerous subcases in which claims and/or objections were withdrawn after further facts or laws were discovered, and has encountered numerous subcases which involve unique legal issues that may be of first impression for the Court. This Court cannot award attorney fees and costs simply because a particular legal theory was rejected, especially considering the fact that the objection was found to be warranted by the inclusion of a remark necessary to protect the objector's rights. Because of the very nature of the SRBA, it is an extremely harsh result to award attorney fees and costs in any subcase. NMID is not suggesting that attorney fees and costs may not be warranted in any SRBA subcase, but the Court cannot award fees and costs in a situation when the objection was found to be warranted and necessary just because a portion of the legal position was rejected.

As this Court has previously stated:

An award of attorney fees is not a matter of right, and a court should award fees under I.C. § 12-121 only where the court is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation.

An action is not deemed frivolous by a court merely because it ultimately fails.

“[I]n deciding whether an award of attorney's fees is proper, ‘the sole question is whether the losing party's position is plainly fallacious as to be deemed frivolous, unreasonable, or without foundation.’” Also, I.C. § 12-123(b) defines “frivolous conduct” as conduct that **obviously serves merely to harass or maliciously injure or is not supported in fact or warranted under existing law or a good faith argument for modifying the existing law.**

In Re SRBA Case No. 39576, Subcase No. 65-03702, Order Denying Attorney Fees and Granting

Motion to Disallow Attorney Fees (Sept. 23, 2002) (citations omitted) (emphasis added).

In this case, as previously discussed under the “prevailing party” analysis, NMID did not ultimately fail on its objection. However, even if it can be suggested that NMID ultimately failed on its objection because a portion of its argument was rejected, that does not deem the objection as frivolous. *Id.* Moreover, there is no evidence that NMID objected to Janicek’s rights merely to harass or maliciously injure. With respect to whether NMID’s position was supported in fact or warranted under existing law or a good faith argument for modifying the existing law, the answer is clearly yes that NMID’s position was warranted under existing law or was a good faith argument to modify existing law. NMID respectfully disagrees with Janicek’s contentions that “the legal question pressed by the Objectors was not a close one” and this case involved “well-settled prior appropriation principles.” *Janicek Memo.* at 9 and 10.

This Court is well aware of the issues presented in this subcase as the subcase was thoroughly brief and argued. However, because NMID’s position is at issue, it is necessary to address Janicek’s current arguments.

NMID argued that the Purdam Drain was constructed by NMID and is owned operated and maintained by NMID and therefore the water in the Purdam Drain was not subject to appropriation. NMID’s position was supported by the contracts for the construction of the drain, the allocation of the water collected in the drains provided in said contracts, Idaho law regarding ditch and drainage rights and the case of *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), and in particular the last sentence of the decision which provided that water collected in the drain was the “owner of the drain” and not subject to appropriation. In that case the “owner of the drain” was the drainage

district and which was someone other than the fee title landowner. It is possible for an entity to own the ditch/drain and not own the fee title land. Indeed, ditch rights, which are distinguishable from water rights, have been held to be real property, owned by irrigation entities and the water within them is not subject to appropriation. This Court interpreted *Sebern* to mean that in the event the appropriator is unable to use all the water in the drain, then any remaining balance is subject to appropriation. This interpretation of *Sebern* was an issue of first impression, and NMID disagrees that the issue “was not a close one.” This Court held that the Purdam Drain was distinguishable from NMID’s delivery canals, which are facilities owned by NMID and not subject to appropriation, because the delivery canals have some type of infrastructure at the point of diversion to regulate the amount diverted. However, there are water rights which do not have such an infrastructure and where the water is private water not subject to appropriation due to the development and control of the water (i.e. storage facilities/dams and private ponds in which no such infrastructure exists, there is no precise point of diversion, water is intercepted and collected, and the water is not subject to appropriation). NMID is not trying to re-argue this subcase, but rather points out that despite Janicek’s assertions that this was “not a close one” or that it involved “well settled principles of law” there are varying points of views and interpretations of the law, *Sebern* and this Court’s decision.

Moreover, even though NMID’s argument that the water was not subject to appropriation was rejected by the Court, the Court made it abundantly clear that NMID is the paramount appropriator, that a remark was necessary to prevent “any injury resulting to the paramount appropriator [NMID].” As previously discussed, *supra*, NMID’s objection cannot be found to be frivolous when it ultimately prevailed in obtaining a remark to prevent any injury.

Janicek has also suggested that NMID's position was frivolous because of NMID's and other irrigation district's position on other drainage claims or its failure to pursue a waste water remark. *Janicek Memo.* pg. 5, note 3. First, NMID's position and approach with regard to different subcases is inadmissible and irrelevant to this particular subcase. Second, the parties negotiations or discussions, or lack thereof, are inadmissible under Rule 408 of the Idaho Rules of Evidence. However, to the extent the Court is inclined to consider Janicek's arguments, it should be noted that it is not incumbent upon NMID to suggest resolutions. NMID could just as easily assert that Janicek never suggested any settlement, never recognized NMID's paramount rights and never requested a remark or even requested mediation. Moreover, it should be noted that NMID did submit a written settlement offer to Janicek before its current counsel became involved which included a right to divert from the Purdam Drain for irrigation purposes. This offer was not met with any written counter-proposal or request for mediation, but rather with a motion for summary judgment filed by Janicek. The point is that to the extent Janicek argues that NMID's approach to this subcase or the possible resolution of this subcase was unreasonable, such an argument is not supported.

C. Amount is Unreasonable.

NMID contends that Janicek's request for attorney fees and discretionary costs should be rejected for the reasons stated herein. Accordingly, this Court should not need to decide the issues of whether the requested fees are reasonable. However, in the alternative, and because NMID would likely waive its objection if it did not raise it, NMID objects to Janicek's requested fees as being unreasonable.

Janicek seeks to recover more than \$43,000.00 in attorney fees for this subcase. Keep in mind

that this subcase included no depositions and did not go to trial. By comparison, NMID spent \$8,488.00 during the same time period on this particular subcase. *See Affidavit of S. Bryce Farris*. Thus, Janicek's attorney charged it more than five (5) times the amount of attorney fees incurred by NMID for the same subcase. This Court is well aware of the facts and issues presented in this case and it simply does not follow that Janicek's requested fees in excess of \$43,000.00 were reasonable under any of the factors enumerated in Rule 54(e)(3).¹

In addition, a review of the detailed transaction file for the attorney fees incurred by Janicek shows that from May 7, 2008 to August 28, 2008 these fees relate solely to the current memorandum for fees and costs. Adding up the fees during that period shows that Janicek has been charged \$9,396.50 for the memorandum of fees and costs alone. Thus, Janicek's attorney fees for this current memorandum of fees and costs amounts to more than NMID has incurred to date for this entire subcase. It is axiomatic that Janicek's requested fees are not reasonable.

D. Discretionary Costs.

During this part of Janicek's memorandum, Janicek suggests that the costs incurred were exceptional because "this case was exceptional" and because this case involved a "unique body of law." *Janicek's Memo.* at 5. Again, this argument obviously conflicts with Janicek's arguments that this case was not a close one or that this case involved well settled principles of law. Nonetheless, this Court should deny Janicek's request for discretionary costs.

First, for the reasons previously stated, *supra*, Janicek is not the prevailing party in this

¹ As previously mentioned, the unreasonable amount attorney fees requested by Janicek clashes with Janicek's suggestion that this case was not a close one and that it involved well settled principles of law.

subcase. At the end of the day, Janicek's recommendation was modified to include a remark which was necessary to protect NMID's paramount rights and interests. Accordingly, Janicek is not a prevailing party entitled to an award of costs.

Second, an award of costs to be paid by NMID and/or BOR is not warranted in this subcase. As previously explained, the SRBA is set up to invite litigation in order for claimants and objectors to resolve any and all differences. Some claims get dismissed and some objections get rejected by the SRBA Court, but the Court does not and cannot award costs in every instance. Especially when, like in this subcase, the objection was found to be warranted. It is not uncommon for claimant or objector to incur costs in order to support and/or defend their respective positions. The discretionary costs claimed by Janicek include administrative costs such as copying, courier services and long distance charged which are clearly not exceptional costs, and then engineering costs and a title report which are commonly incurred by claimants and objectors in the SRBA. There is nothing exceptional about these costs and it is not uncommon in the SRBA for parties to incur such costs to support their positions. If the SRBA Court is going to begin awarding copying charges, title report charges and engineering costs then "Katy bar the door" because every claimant and/or objector will be claiming the same.

In support of its claim for discretionary costs, Janicek characterizes this case as a "David versus Goliath" and that Janicek "is an entity with **limited funds** to defend itself against legal attacks." This assertion by Janicek is unsupported and completely irrelevant to the issues at hand. To the extent this Court is inclined to consider such a suggestion, whether intentionally or not, it should be noted that Janicek owns a minimum of seventy acres in the heart of the development of

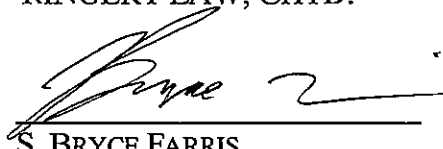
Meridian, Idaho, at the location where the new I-84/Ten Mile Interchange is proposed and the property is likely valued in the millions of dollars. If Janicek is going to make unsupported contentions that it has "limited funds" then both the Court and NMID should be entitled to discover evidence supporting such an allegation.

IV. CONCLUSION

For the reasons stated herein, Janicek's request for attorney fees and discretionary costs should be denied. NMID does not dispute that its position that the water in the Purdam Drain was not subject to appropriation was rejected, but this case does not warrant an award of costs and fees against NMID. NMID's position was not frivolous, unreasonable or unfounded. To the contrary, NMID's objection was necessary as this Court found to protect its paramount rights and interests. NMID prevailed in obtaining a remark, which this Court's recognized as necessary to protect its rights and interest and avoid future injury. Moreover, Janicek's discretionary costs were not uncommon or exceptional for a contested water rights subcase in the SRBA.

DATED this 10th day of September, 2008.

RINGERT LAW, CHTD.



S. BRYCE FARRIS
Attorneys for the NMID

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2008, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U. S. mail, postage prepaid
☐ hand delivery

☐ express mail
☐ facsimile

Janicek Properties, LLC
c/o Michael P. Lawrence
Givens Pursley, LLP
601 W. Bannock Street
P.O. Box 2720
Boise, ID 83701-2720

USDI Bureau of Reclamation
Represented by:
US Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 033
Boise, Idaho 83724

Director of IDWR
P.O. Box 83720
Boise, Idaho 83720-0098

Pioneer Irrigation District
c/o Scott L. Campbell
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701-0829



S. Bryce Farris