



U.S. Department of Justice

Environment and Natural Resources Division

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SEP 15 2008

DEPARTMENT OF
WATER RESOURCES

September 12, 2008

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

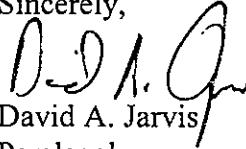
Re: SRBA Case No. 39576
Subcase No. 63-27475

Dear Ms. Delaney:

Enclosed for filing in the above listed subcase is the following original document:

1. **UNITED STATES' MOTION TO DISALLOW COSTS AND OPPOSITION TO REQUEST FOR ATTORNEY FEES**

Sincerely,


David A. Jarvis
Paralegal

Enclosure

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SEP 15 2008

DEPARTMENT OF
WATER RESOURCES

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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

Case No. 39576

) Subcase No. 63-27475
)
)
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)
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**UNITED STATES' MOTION
TO DISALLOW COSTS AND
OPPOSITION TO REQUEST
FOR ATTORNEY FEES**

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In Re SRBA	)	Subcase No. 63-27475
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Case No. 39576	)	UNITED STATES' MOTION
	)	TO DISALLOW COSTS AND
	)	OPPOSITION TO REQUEST
	)	FOR ATTORNEY FEES

Introduction

Janicek Properties, LLC ("Janicek") seeks an award, pursuant to Rules 54(d)(1) and 54(e)(1) of the Idaho Rules of Civil Procedure, of discretionary costs and attorney fees incurred in defending against the United States' Response to the Nampa and Meridian Irrigation District's ("NMID") Objection to Janicek's claim. Janicek cannot recover either the discretionary costs or the attorney fees it seeks from the United States.

The United States is participating in this adjudication pursuant to the waiver of its sovereign immunity in the McCarran Amendment, 43 U.S.C. § 666. Janicek's claims must fail because the McCarran Amendment does not waive the United States' immunity to actions

seeking costs and attorney fees. To the contrary, the Amendment precludes such an award. The United States' Supreme Court has directed that prohibition against "costs" in the McCarran Amendment precludes exactly what Janicek seeks to recover - "expense[s] incurred in litigation that a prevailing party is allowed by rule to tax against the losing party." In other words, the Court has instructed that the Amendment's prohibition against "costs" applies to both the discretionary costs and attorney fees Janicek seeks.

Second, even if Janicek's motion were not barred by sovereign immunity it must be disallowed because it is meritless. In order to obtain attorney fees under Idaho law, Janicek must show that the United States pursued its response in a manner that was frivolous, unreasonable or without foundation. Perhaps because it realizes the arguments the United States made were reasonable – and even successful – Janicek essentially ignores those arguments and instead attempts to argue the United States should be liable for attorney fees because it was "complicit" in the "trespass" argument advanced by NMID. Regardless of the merits of the trespass argument, the United States did not make or join that argument and it cannot serve as a basis to hold the United States liable. In any event, the Idaho Supreme Court has instructed that United States' success in obtaining the remark it sought is itself, alone, enough to preclude an award of attorney fees against the United States.

Nor has Janicek made the showing required to obtain "discretionary costs." Far from being "exceptional," this case is a rather run-of-the-mill water rights case that merely required hydrologic and document review of the sort that is frequent in water rights cases. Further, the interests of justice do not support awarding costs against the United States because doing so would chill the assertion of arguments, which like the United States' request for a

remark, were valid.

Argument

I. THE UNITED STATES IS IMMUNE TO THE RECOVERY OF BOTH THE DISCRETIONARY COSTS AND ATTORNEYS FEES JANICEK SEEKS.

The United States is immune from suit unless it consents to be sued. *E.g.*, *United States v. Sherwood*, 312 U.S. 584, 586 (1941). This immunity bars requests for litigation costs and attorneys fees unless the government has waived its immunity. *E.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). Congress alone may waive the government's immunity and any waiver must be "unequivocally expressed" in the statutory text. *See United States v. Idaho, ex rel. Director, Idaho Dept. of Water Resources*, 508 U.S. 1, 6 (1993) (hereinafter "*United States v. Idaho*"). Moreover, a waiver of the Government's sovereign immunity will be strictly construed in favor of the sovereign. *See, e.g.*, *United States v. Williams*, 514 U.S. 527, 531 (1995); *Joyce Livestock Co. v. United States*, 144 Idaho 1, ___, 156 P.3d 502, 518 (2007); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied").

Claims seeking to extract money from the government are held to a particularly exacting standard. It is not enough that the United States' has waived its immunity to allow its participation in an action; to allow monetary extractions against the United States, the waiver of sovereign immunity must extend unambiguously to such claims. *See Lane v. Pena*, 518 U.S. 187, 196 (1996); *United States v. Idaho*, 508 U.S. at 8-9 (a specific waiver of sovereign immunity is required before the United States may be held liable for monetary extractions). Consequently, on numerous occasions the Supreme Court has rejected efforts to assess monetary

liability against the United States for what would be normal incidents of litigation between private parties. *Id.* at 7 (citing e.g. *United States v. Chemical Foundation Inc.*, 272 U.S. 1, 20-21 (1926) (assessment of costs); *Library of Congress v. Shaw*, 478 U.S. 310, 323 (1986) (recovery of interest on judgment)).

This is yet another case where a request to assess litigation expenses against the United States must be rejected because it is barred by the United States' immunity from suit. Not only does the McCarran Amendment *not* include a specific waiver of immunity to allow the recovery of litigation costs and fees from the United States, the United States Supreme Court has instructed that it *prohibits* such recovery.^{1/}

A. Janicek Cannot Recover Discretionary Costs or Attorneys Fees from the United States Because There Has Been No Specific Waiver of the United States' Immunity To Allow Such Recovery.

Janicek wholly ignores the requirement that it identify an unequivocally expressed waiver of the government's immunity from monetary extractions before it may recover either the discretionary costs or attorneys fees it seeks.^{2/} Even had Janicek acknowledged that requirement,

^{1/} Like the United States, the State of Idaho has also declined to waive its sovereign immunity to allow recovery of costs, including attorney fees. After the state was assessed attorneys fees in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994), the Idaho legislature passed I.C. § 42-1423, which "expressly refuse[d]" to waive the immunity of the State and all state agencies from awards of all costs, including attorney fees, other than the costs imposed by I.C. § 42-1414 for appearing in an adjudication.

^{2/} Because Janicek wholly ignores the Supreme Court's instructions regarding sovereign immunity, its argument attempts to turn the governing standard on its head. *See* MEMORANDUM OF COSTS AND REQUEST FOR ATTORNEY FEES ("Janicek Brf.") at 17 (claiming that Janicek can be awarded attorney fees because the McCarran Amendment does not expressly address attorney fees). Rather than directly address the government's immunity, Janicek argues that the McCarran Amendment's express prohibition against the recovery of costs from the United States does not preclude Janicek from recovering *attorneys fees*. Janicek Brf. at 15-16. By limiting its argument to attorney fees, Janicek effectively concedes that the recovery of discretionary costs is

the complete absence in the McCarran Amendment of a specific waiver allowing for the recovery of any “monetary extractions from the United States in litigation” is fatal to Janicek’s claims.^{3/}

United States v. Idaho, 508 U.S. at 8-9; *see also e.g., Lane*, 518 U.S. at 196.

B. Janicek Cannot Recover Discretionary Costs Or Attorneys Fees From The United States Because Such Recovery Is Expressly Prohibited By The McCarran Amendment.

Because the absence of any unequivocal expression of intent to waive the United States’ immunity from recovery of any form of litigation expense standing alone is fatal to Janicek’s claims, Janicek’s tortured effort to escape the plain instruction of the United States Supreme Court in *United States v. Idaho* is moot. *Cf.* Janicek Brf. at 15-18. Nonetheless, because Janicek is so clearly wrong in suggesting attorney fees do not fall within the “cost proviso” of the McCarran Amendment, the United States will briefly address the issue.

The McCarran Amendment expressly provides that “no judgment for costs shall be entered against the United States in any such [adjudication] suit.” Janicek Brf. at 15 (quoting 43 U.S.C. § 666). As Janicek correctly suggests, the “upshot” of the United States Supreme Court’s discussion of that proviso in *United States v. Idaho* is that it “applies only to those fees

barred by the McCarran Amendment. In any event, as is explained below, Janicek’s effort to distinguish attorneys fees from costs, in this context, has been rejected by the United States Supreme Court.

^{3/} It is also significant that at the time the McCarran Amendment was enacted, the United States was generally immune from any method of cost-shifting in litigation, whether by a judgment for costs or by otherwise requiring litigants to pay expenses, attorney’s fees, or interest. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20-21 (1926) (recognizing the United States’ “sovereign prerogative not to pay costs”); *accord The Antelope*, 25 U.S. (12 Wheat.) 546, 550 (1827). If Congress had intended to waive the United States’ longstanding immunity from costs and fees, it would have done so explicitly. *See Joyce Livestock*, 156 P.3d at 518.

that are actually costs.” Janicek Brf. at 16. Once again, however, Janicek ignores the Supreme Court’s critical instruction:

[C]osts are those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against the losing party.

United States v. Idaho, 508 U.S. at 8.

Here Janicek seeks to recover discretionary costs and attorneys fees from the United States, pursuant to Idaho Rules of Civil Procedure, on the basis that it was the prevailing party. *See* Janicek Brf. at 7. In other words, Janicek is plainly attempting to do exactly what the United States Supreme Court has directed it cannot.

Janicek, oblivious to both the United States Supreme Court’s plain instruction and logic, suggests that State law should be used to define the scope of the United States’ immunity. *See* Janicek Brf. at 16 (suggesting the cost proviso is inapplicable because “Idaho decisions and statutes make a clear distinction between ‘costs’ and ‘attorneys fees.’”). Not surprisingly, given that the doctrine of sovereign immunity would be rendered a nullity if State statutes and decisions were allowed to define the terms of the federal government’s immunity, the courts have uniformly held that the scope of the United States’ immunity from suit is a matter of Federal law not State law.^{4/} *E.g., Lucas v. United States*, 807 F.2d 414, 417 (5th Cir. 1986)

^{4/} Not only does Janicek err in asserting State law is applicable, it errs in interpreting state law. Janicek attempts to twist the meaning of Idaho R. Civ. P. 54(e), but the plain language of the rule could not be more clear: “[a]ttorney fees, when allowable by statute or contract, *shall be deemed as costs in an action*.” *Id.* (emphasis added). Here, the attorneys fees Janicek seeks are allowable pursuant to statute, I.C. § 12-121, and therefore must be deemed as costs. Janicek also ignores the Idaho Supreme Court’s direction in *Idaho Dept. of Water Resources v. United States*, 122 Idaho 116, 122 (1992), *rev’d* 508 U.S. 1 (1993), which defined “costs” in a manner almost identical to the United States Supreme Court. *See* 122 Idaho at 122 (“‘Costs’ are a pecuniary allowance or a reimbursement made to the prevailing party in a lawsuit and are recoverable from the losing party.”). Thus even if Idaho law were somehow relevant, both Rule 54 and the Idaho

(State law does not and cannot determine the extent to which the federal government has waived its sovereign immunity); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 377-78 (1990) (to the extent state law suggests a substantive disagreement over the scope of sovereign immunity, “that disagreement cannot override the dictates of federal law.”).

In short, the United States Supreme Court has plainly stated that the prohibition against costs in the McCarran Amendment precludes Janicek’s attempt to recover attorney fees, as well as costs, from the United States. Accordingly, Janicek’s claims for both attorney fees and discretionary costs are barred.

II. EVEN IF THE UNITED STATES WERE NOT IMMUNE, NO RECOVERY OF ATTORNEYS FEES WOULD BE WARRANTED.

Idaho is an “American rule” state requiring each party to bear the costs of their own attorney fees absent statutory authorization or contractual right. *Owner-Operator Indep. Drivers Assoc. v. Idaho Public Util. Comm’n*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994) (citing *Heller v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984)). I.C. § 12-121 provides statutory authorization for the award of attorney fees in certain limited circumstances. *Id.* at 825. I.R.C.P. 54(e)(1), in turn, establishes a framework for applying I.C. § 12-121.

Supreme Court instruct that Janicek *still* could not prevail.

Finally, Janick errs in suggesting that Special Master Bilyeu has already addressed the United States’ immunity from attorney fees in Subcases 34-02598 *et. al.* Cf. Janicek Brf. at 17. To the contrary, Special Master Bilyeu addressed a very different question: whether the United States is immune from sanctions under I.R.C.P. 11. See *Sun Valley Shopping Center v. Idaho Power Co.*, 119 Idaho 87, 96, 803 P.2d 993, 1002 (1991) (noting that the reasons supporting an award under Rule 11 are entirely distinct from those supporting an award of attorney fees under Rule 54(e)). In any event, Special Master Bilyeu’s decision is not binding on this Court and erred in not giving effect to the United States Supreme Court’s command that a specific waiver of immunity, unequivocally reaching monetary claims, is required to authorize any monetary extraction from the United States. See *United States v. Idaho*, 508 U.S. at 8.

Robison v. State, Dep't of Health and Welfare, 107 Idaho 1055, 695 P.2d 440 (Id. App. 1985).

The rule provides in pertinent part:

In any civil action the court may award reasonable attorney fees to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided by any statute or contract. *Provided*, attorney fees under section 12-121, Idaho Code, may be awarded *only* when it finds, from the facts presented to it, that the case was brought, pursued or defended *frivolously, unreasonably or without foundation...*

I.R.C.P. 54(e)(1) (emphasis added)

An award of attorney fees is not a matter of right; in order to obtain fees a party must do more than show it prevailed. *See Owner-Operator Indep. Drivers*, 125 Idaho at 408, 871 P.2d at 825. A court may only award fees when it "is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Id.* (citing *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979)); *see also* ORDER DENYING MOTION FOR ATTORNEY FEES (Subcases 57-10486 *et al.*) at 3 (Jan. 28, 2000) (citing *e.g. Turner v. Willis*, 119 Idaho 1023, 1025, 812 P.2d 737, 739 (1991)).

The Idaho Code defines a frivolous action as one "obviously serv[ing] merely to harass or maliciously injure another party" or "not supported in fact or warranted under existing law and [which] cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." I.C. § 12-123(1)(b). *See also Bear Island Water Association, Inc. v. Brown*, 125 Idaho 717, 726, 874 P.2d 528, 537 (1994) (action frivolous and unreasonable where it relied on clearly incorrect factual assertion).

The basis for Janicek's claim to attorney fees from the United States is its erroneous contention that Reclamation "directly and tacitly joined" in NMID's theory that

“Janicek established its right through trespass and was diverting water that NMID owned.”⁵⁷ Janicek Brf. at 8; *see also Id.* at 9 (“The meritless trespass allegation was the only argument pursued by NMID and BOR against Janicek.”). Thus, in essence, Janicek seeks to have this Court hold the United States liable for an argument asserted by NMID, rather than for any of the arguments the United States presented in its brief.

Janicek presumably ignores the arguments the United States actually raised because those arguments demonstrate that the United States cannot be assessed attorney’s fees regardless of whatever the merits of the trespass argument are. The United States’ brief made two points. First, the United States argued that Janicek was not entitled to a water right “because the Idaho Supreme Court has directed [in *Sebern v. Moore*, 44 Idaho 410, 258 P. 176, 178 (1927)] that wastewater collected in a constructed drain is not subject to appropriation.” U.S. Brf. at 2. Second, the United States asserted that “even if a water right could issue, the water right would need to carry an appropriate remark acknowledging that Mr. Janicek’s water right is subject to the right of the original appropriators, in this case the United States and NMID to cease wasting water and/or recapture it.” *Id.* (footnote omitted).

As Janicek concedes, the United States prevailed on its argument that a remark

⁵⁷ Janicek contends it is entitled to attorney fees because NMID’s trespass theory is “meritless.” Janicek Brf. at 8. The United States will leave it to NMID to defend the merits of the trespass argument because, as is shown below, the United States neither directly nor tacitly joined the argument. Moreover, even if the Court were to conclude that the United States somehow “tacitly” supported the argument, that would be insufficient to support an award of attorney fees because an agency relationship is required to impose vicarious liability for the arguments made by another party. *See City of Aurora ex rel. Utility Enterprise v. Colorado State Engineer*, 105 P.3d 595, 621-22 (Colo. 2005).

was required. That alone is enough to preclude an award of fees against the United States.⁹ *Nampa & Meridian Irr. Dist. v. Washington Federal Savings*, 135 Idaho 518, 524-25, 20 P.3d 702, 708-09 (2001) (The litigation as a whole must be evaluated in considering an award of attorneys fees, if a party raises one legitimate issue, fees may not be awarded even if other claims are frivolous); ORDER DENYING MOTION FOR ATTORNEY FEES (Subcases 57-10486 et al.) at 5 (Jan. 28, 2000) (“Since the entire action was not pursued frivolously or without foundation, as a matter of law this is not an appropriate case for attorney fees.”).

Even if the United States’ presentation of non-frivolous arguments did not preclude an award of attorney fees, an award could not be justified because the United States did not “directly” or “tacitly” join NMID’s trespass argument. There is absolutely no basis for Janicek’s assertion that the United States “directly” joined the argument. The word “trespass” does not even appear in the United States’ brief. Moreover, this Court’s decision recognizes that only NMID advanced the trespass argument Janicek now complains of. Decision at 11.

Janicek appears to believe the United States “tacitly” joined the argument because

⁹ Moreover, there is no question that the United States’ argument premised on the *Sebern* decision was not frivolous, even if it was ultimately unsuccessful. *Cf. Gulf Chemical Employees Federal Credit Union v. Williams*, 107 Idaho 890, 894, 693 P.2d 1092, 1096 (Id. App. 1984) (a claim is not necessarily frivolous just because it is unsuccessful). The question of the ramifications of the court’s language was one of first impression. Accordingly, attorney’s fees are not appropriate. *Saint Alphonus Regional Medical Center, Inc. v. Board of County Commissioners*, ___ P.3d ___, 2008 WL 2404738 * 4 (Idaho 2008). Further, even if that were not the case, no fees could be awarded. This Court essentially ruled that the United States took the *Sebern* court’s statement regarding appropriation from previously constructed drains too literally. *See* Decision at 7 (the statement relied on by the United States “presupposes that the person who constructed a ditch to collect seepage and waste water did so with the intent of beneficially using all of he water so collected.”). An argument which takes a State Supreme Court’s decision at face value simply cannot be deemed frivolous. *Cf. Williams*, 107 Idaho at 894, 693 P.2d at 1096 (a claim must be so plainly fallacious that it can be termed frivolous, unreasonable or without foundation).

NMID submitted an affidavit from Jerry Gregg, Area Manager of Reclamation's Snake River Area Office (SRAO). Mr. Gregg serves as the records custodian for the SRAO. Affidavit of Jerry Gregg at ¶ 2. Thus when NMID decided to present Reclamation records to the Court, Mr. Gregg was the Reclamation official best qualified to authenticate them and speak to the content of Reclamation's files.⁷ See *Id.* at ¶¶ 3-12.

Affidavit or other testimony by public officials on behalf of other parties is not unusual. See e.g., *Graves v. Wimpy*, 372 S.W.2d 812, 816 (Ark. 1963). Indeed, IDWR does it with some regularity in the the SRBA. See e.g., AFFIDAVIT OF DAVID R. TUTHILL JR., (Consolidated Subcase No. 67-13701) (Aug. 1, 2002) (noting that Mr. Tuthill had been asked to provide the affidavit by the United States). A finding that such testimony somehow makes a governmental agency liable for fees would chill this desirable practice. Further, as a matter of law, Mr. Gregg's Affidavit could not have presented the United States' legal arguments because only the Department of Justice may advance legal arguments on behalf of the United States. 28 U.S.C. § 516.⁸ In short, Mr. Gregg's Affidavit cannot represent the United States "tacit" endorsement of the "trespass" argument. Accordingly, even if this court were to find the argument frivolous, there would be no basis to compel the United States to pay attorneys fees.

⁷ Janicek wrongly asserts that Mr. Gregg's Affidavit was proffered by the United States. Janicek Brf. at 5. The caption of the Affidavit clearly demonstrates that it was submitted by NMID.

⁸ The United States did cite to Mr. Gregg's Affidavit to establish the factual predicate for its legal argument, premised on the *Sebern* decision, that the wastewater claimed by Janicek was not subject to appropriation because the construction of the drain predated his use of the water. See U.S. Brf. at 4. This Court agreed that essentially all the water in the drain was wastewater, Decision at 3, and that Janicek's appropriation was established "under conditions as they essentially exist today, not under the conditions that existed prior to the excavation of the drain." *Id.* at 7 n. 2.

III. EVEN IF THE UNITED STATES WERE NOT IMMUNE, NO RECOVERY OF DISCRETIONARY COSTS FROM THE UNITED STATES WOULD BE WARRANTED.

Even if the McCarran Amendment did not expressly preclude Janicek from recovering discretionary costs from the United States, Janicek's request must fail because there is no basis under Idaho law for an award of costs. Idaho Rule of Civil Procedure 54(d)(1)(D) authorizes a court to award discretionary costs to a prevailing party where that party is able to show the costs "are necessary and exceptional, reasonably incurred and should in the interests of justice be assessed against the adverse party." Id. R. Civ. P. 54(d)(1)(D). Here the costs incurred by Janicek were not exceptional, nor do the interests of justice support an award of costs.

Janicek argues it is entitled to costs because the nature of this case was exceptional. It was not. In *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005), the Idaho Supreme Court reiterated that whether a case is exceptional turns on how a particular case compares to other cases of the same nature. Thus the Court observed that "[c]ertain cases, such as personal injury, generally involve copy, travel and expert witness fees such that these costs are considered ordinary rather than "exceptional" under I.R.C.P. 54(d)(1)(D)." Id. (citing *e.g. Inama v. Brewer*, 132 Idaho 377, 384, 973 P.2d 148, 155 (1999); *see also Fish v. Smith*, 131 Idaho 492, 494, 960 P.2d 175, 177 (1998) (affirming a trial court's finding that a personal injury case requiring testimony by "various sorts of doctors of medicine, accident reconstructionists, vocational experts and so on" as well as "travel and lodging expenses for expert witnesses and attorneys and photocopy expenses" was not exceptional because such expenses were "common 'in a case of this nature.'").

The facts of *Hayden Lake* are instructive on this point. That class action case had far greater consequences than this case; it potentially affected “over one thousand local businesses and involve[d] potential damages of over \$50,000,000.00.” *Hayden Lake*, 109 P.3d at 168-69. Despite the enormous potential magnitude of the suit, the district court found that costs for expert witnesses was *not* exceptional because experts were an “essential but ordinary part” of class action challenges to insurance practices. *Id.* at 169. The Idaho Supreme Court affirmed because “[c]omplex business litigation often relies on expert witnesses to explain alternative management schemes and/ or financing.” *Id.*

Here Janicek complains of having to “retain a hydrologist consultant,” “independently collect discharge data” and “review and prepare various diagrams, maps and expert reports.”^{9/} Janicek Brief at 4. As this Court has no doubt learned through experience, such expenses are not at all unusual in water rights litigation and therefore do not make a case “exceptional.” See e.g., *Sagewillow, Inc. v. Idaho Dept. of Water Resources*, 138 Idaho 831, 70 P.3d 669 (Idaho 2003) (expert participation); *Farmers Reservoir and Irr. Co. v. City of Golden*, 44 P.3d 241 (Colo. 2002) (testimony by hydrologist); *In re General Adjudication of All Rights to Use Water in Gila River System*, 857 P.2d 1236 (Ariz. 1993) (same).

Finally, the interests of justice do not support an award of costs. Here the United States had a legitimate basis for objecting to Janicek’s claim and prevailed on one of the two

^{9/} Janicek also asserts that the cost of retaining a title examination to refute the allegation that NMID owned Purdam Gulch Creek was exceptional because of alleged deficiencies in NMID’s discovery responses and evidence. Janicek Brf. at 4. By tying its claim to NMID’s conduct, Janicek effectively concedes that title examinations are not “exceptional” in a water rights case. Regardless, Janicek’s need for a title examination is unrelated to any argument made by the United States and thus cannot be the basis for an award of costs from the United States.

arguments it presented to the Court. The interests of justice do not favor requiring the United States to pay for Janicek's discretionary costs because doing so would discourage parties from pursuing actions which, like the United States's response, achieved some success. *See e.g., Associated Indemnity Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985) (*en banc*).

Conclusion

Janicek's request to recover attorneys fees and costs from the United States must be rejected because the McCarran Amendment does not include a specific waiver of the United States' immunity suits seeking monetary extractions. To the contrary, the Amendment prohibits the recovery of such litigation expenses from the United States. Even were that not the case, there would be no basis for an award of either attorneys fees or costs from the United States. Attorney fees cannot be awarded because Janicek has utterly failed to show that the United States' response was frivolous. Similarly, costs cannot be awarded because Janicek has not shown that this proceeding was "exceptional" or that the interests of justice support an award.

DATED this 12th day of September, 2008.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on September 12, 2008, I mailed true and correct copies of the foregoing **UNITED STATES' MOTION TO DISALLOW COSTS AND OPPOSITION TO REQUEST FOR ATTORNEY FEES** as follows:

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Snake River Basin Adjudication
253 Third Avenue North
Twin Falls, Idaho 83303
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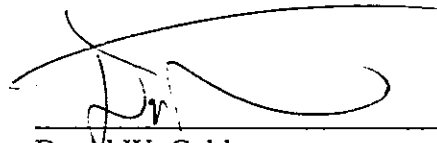
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