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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

**JANICEK PROPERTIES'
RESPONSE TO NMID'S AND
UNITED STATES' OBJECTIONS
TO MEMORANDUM OF COSTS
AND REQUEST FOR ATTORNEY
FEES**

Janicek Properties, LLC, ("Janicek Properties" or "Janicek") by and through its counsel Givens Pursley, LLP, hereby responds to the Nampa & Meridian Irrigation District's ("NMID") and the United States Bureau of Reclamation's ("BOR") Motions ("Opposition Motions") opposing Janicek's Memorandum of Costs and Request for Attorney Fees ("Memorandum") filed with the Court in the above-captioned matter. For the reasons set forth in its Memorandum and herein, Janicek respectfully requests that the Court award Janicek its costs and attorney fees as a prevailing party under Idaho Rule of Civil Procedure 54(d) and (e).

INTRODUCTION

Janicek has asked the Court to award Janicek its costs and attorney fees in successfully defending its Purdam Gulch Creek water right claim against NMID's and BOR's efforts to have the water right disallowed in its entirety. NMID and BOR have objected to the requested award, setting out the following common arguments: 1) that Janicek is not a prevailing party; 2) that their objections to Janicek's claim and recommendation, and their pursuit of those objections were not frivolous, unreasonable or unfounded; and 3) that the case is not "exceptional" enough to warrant an award of discretionary costs. NMID individually takes exception to the amount of attorney fees requested, and BOR asserts that it is immune from an order requiring "any 'monetary extractions from the United States in litigation'" under the limited waiver of sovereign immunity of the McCarran Amendment. (NMID Opposition Motion at 9-10; BOR Opposition Motion at 5.)

In this Response, Janicek reminds the parties and the Court what actually was litigated at the express insistence of NMID and BOR: whether Janicek is entitled to a decree of a water right from Purdam Gulch Creek at all. NMID and BOR asserted Janicek is not entitled to a water right. Janicek demonstrated, on the basis of existing facts and law, that it is. The Special Master agreed with Janicek.

ARGUMENT

1. **Janicek is the Prevailing Party Because Janicek Prevailed on the Sole Issue Actually Litigated.**

NMID's objection to the IDWR's recommendation, BOR's response, and NMID's and BOR's briefing make clear the legal issue they came to litigate in this subcase: whether Janicek

is entitled to a decree of a water right from Purdam Gulch Creek. NMID objected to every recommended element of water right 63-27475, and asserted that the right should not exist at all.

BOR responded to each of the NMID objected-to elements and checked the box

“Recommendation: This water right should not exist.”

NMID opposed Janicek’s motion for summary judgment, arguing that it should prevail on its objection because NMID beneficially used the water in Purdam Gulch Creek, that Janicek’s claimed point of diversion was an impermissible trespass of NMID’s drain, and that Janicek was estopped from asserting otherwise. The thesis for NMID’s objection and the above arguments on summary judgment (i.e., the single issue litigated by the parties) was this:

[T]he water in the Purdam Drain is diverted, captured, conveyed, used or physically controlled by NMID in NMID’s Purdam Drain and is not subject to appropriation. As discussed, *supra*, water in Purdam Drain belongs to NMID pursuant to its contract with BOR in 1915, which provides NMID the right to the water developed in the constructed drainage system.

(NMID’s Memorandum in Opposition to Janicek Properties Motion for Summary Judgment (“NMID’s Summary Judgment Brief”) at 8 (emphasis added).)

BOR adopted the same thesis:

Janicek’s motion for summary judgment asks this court to sanction an appropriation of wastewater from a drain constructed by the Bureau of Reclamation (Reclamation) and now owned by the Nampa & Meridian Irrigation District (NMID). Janicek’s motion must be denied because the Idaho Supreme Court has directed that wastewater collected in a constructed drain is not subject to appropriation.

(United States’ Opposition to Janicek Properties’ Motion for Summary Judgment at 1-2 (emphasis added).)

BOR’s argument, consisting of a single section in its summary judgment brief, was summarized by the heading: “I. NO WATER RIGHT CAN BE RECOGNIZED IN PURDAM

DRAIN.” (*Id.* at 2.) BOR concluded its brief by stating that “. . . the water Janicek claims is not subject to appropriation and the motion for summary judgment must be denied.” (*Id.* at 7 (emphasis added).)

The Special Master’s Memorandum Decision and Order on Motion for Summary Judgment rejected every one of the above arguments as put forth in NMID’s and BOR’s pleadings and briefs, and recommended decreeing Janicek’s water right claim. Clearly, the gravamen of this subcase was whether Janicek had a valid appropriation from Purdam Gulch Creek, even though some portion of the Creek’s water was wastewater generated by BOR’s or NMID’s deliveries to irrigation, and even though NMID operates and maintains Purdam Gulch Creek as part of its drainage system. NMID and BOR argued, that under these facts, Janicek could not hold a valid appropriation. They did not prevail.

Nevertheless, both NMID and BOR would have the Court conclude that they are the prevailing parties in this subcase litigation. They base this argument on the fact that the Special Master recommended inclusion of a “wastewater remark” in Janicek’s water right decree. The Special Master is certainly aware that neither the necessity nor the wording of the recommended remark were litigated in this case. Rather, it was NMID’s position from the outset that this was not a subcase that could be resolved with a remark. NMID’s counsel expressly declared so at the proceeding where this law firm made its first appearance as counsel of record for Janicek:

SPECIAL MASTER BOOTH: . . . Mr. Farris, let me ask you: Looking at the objection, is this the -- I mean, the objection objects to pretty much all elements of the water right, including that the water right should not exist, and then it has a comment with respect to the claimed water as waste water from the Nampa and Meridian Irrigation District, so on and so forth. Is it still the position of the Nampa and Meridian Irrigation District that the water right should be disallowed or is this one of these cases where you’re seeking inclusion of a waste water remark?

MR. FARRIS: This is one of those cases that the District's position is that the water right should be disallowed.

SPECIAL MASTER BOOTH: Thank you

(Status Hearing Transcript, p. 4, Aug. 27, 2007 (attached as Exhibit A to Second Affidavit of Michael P. Lawrence in Support of Janicek's Memorandum Of Costs And Request For Attorney Fees).) Notably, BOR's attorneys attended this status conference and made no attempt to refute NMID's counsel or in any way suggest that a remark would be appropriate or would resolve this subcase. (*See generally id.*)

BOR's Notice of Error in Motion to Disallow Costs (filed with this Court on September 26, 2008) ("Notice") further demonstrates that, throughout the course of this litigation, Janicek's opponents did not consider the inclusion of a wastewater remark as an appropriate resolution to this subcase. The Notice states that BOR's Opposition Motion "incorrectly asserted that the United States' merits brief [on summary judgment] had argued that a remark should be included in any water right issued" when, "[i]n fact, the United States did not assert that a remark was appropriate until oral argument" (Notice at 1.) The stated reason for this error was that "Counsel for the United States relied on a copy of [its summary judgment brief] pulled from his electronic directory which, although not labeled as such, turned out to be a draft that varied from the memorandum that was actually filed." (Notice at 2.) This suggests that, at one time, BOR considered arguing that a wastewater remark should be included in a decree for the Janicek right, but then decided not to. In other words, BOR made a conscious decision not to present the issue,

and not to litigate the appropriateness of a wastewater remark.¹ BOR should not be able to argue now that it is a prevailing party on an issue that as a matter of trial strategy it chose not to raise.

The appropriateness of a remark was not considered in this subcase until counsels' views on the subject were elicited by a question from the bench at the conclusion of oral argument on summary judgment (presumably in anticipation of the possibility that NMID and BOR would not prevail in their efforts to disallow Janicek's water right claim). In response to the Special Master's *sua sponte* inquiry, Janicek's counsel stated that a remark would not be necessary because Idaho law already recognizes the paramount right of an original appropriator to recapture and use wastewater and the SRBA Court generally disfavors referring to existing law in individual partial decrees. As Janicek consistently argued throughout this case, an original appropriator's paramount right to recapture and reuse wastewater has been repeatedly decided in numerous Idaho court decisions and in the many wastewater subcases already heard by the Special Master in Basin 63.² Janicek did not deem this issue in dispute. Nor did Janicek dispute that Purdam Gulch Creek includes some of NMID's waste water. (See Janicek Properties, LLC's, Reply Memorandum in Support of Motion for Summary Judgment ("Janicek's Reply

¹ There are several reasonable suppositions for why BOR explored the issue and argument in a draft of its summary judgment brief but then withheld it, such as: 1) the argument was beyond the scope of the pleadings; 2) the argument would be seen as detracting from or undercutting BOR's and NMID's position that the Janicek right simply should not exist at all; or 3) the argument lacked merit.

² In its briefing on summary judgment, Janicek freely acknowledged that "Idaho cases such as *Hidden Springs*, *Sebern* and *Haga* . . . tell us that NMID's water right also includes the right to cease wasting, to reduce or eliminate seepage and to recapture water for beneficial use on the original lands for which the water right was appropriated." (Janicek's Reply Memorandum at 4); "The law concerning wastewater has been stated many times: '[S]urface waste and seepage water may be appropriated . . . subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use'" (Janicek's Reply Memorandum at 15 (emphases in original)); "Of course, the Idaho cases also make clear that such water rights relying in whole or in part on waste or seepage are subject to the rights of the 'paramount owner,' to cease wasting, but only 'so long as [the paramount owner] applies it to a beneficial use'" (Janicek's Reply Memorandum at 16).

Memorandum”) at 4-5 (“The following facts are undisputed: . . . (3) Purdam Gulch Creek contains a combination of natural flows and waste and seepage waters.”)) Because NMID’s “rights” in its own “wastewater” were never in dispute in this case, NMID and BOR cannot be considered “prevailing parties” by the inclusion of a remark restating undisputed facts and well-settled principles of law.

Indeed, it would be a strange twist if the identity of the prevailing party was determined on an issue that was undisputed. Under NMID’s and BOR’s analysis, they would be the prevailing parties if the Special Master had found that Janicek’s mailing address should have been its P.O. Box instead of its physical address, despite the fact that this issue was not in dispute or litigated by the parties.

Determination of who is a prevailing party under Rule 54 is committed to the discretion of the trial court, giving consideration to the final judgment in relation to the relief sought, the extent to which there are multiple claims or issues, and the extent to which each of the parties prevailed on a claim or issue. Idaho R. Civ. P. 54(d)(1)(B). Here, NMID initiated and pursued this litigation (with BOR’s full support) on one issue and for one purpose: to establish NMID’s absolute ownership of all water in Purdam Gulch Creek. They were singularly unsuccessful in that effort. Janicek is the prevailing party in this subcase.

2. NMID and BOR Brought and Pursued this Litigation Frivolously, Unreasonably and Without Foundation.

Janicek already has argued in its Memorandum why NMID’s and BOR’s position was frivolous, unreasonable and unfounded. NMID’s and BOR’s arguments to the contrary are responded to here.

NMID seems to argue that there can be no frivolous, unreasonable or unfounded litigation in the SRBA because, by its nature, the SRBA invites parties to litigate. It is true that the SRBA was initiated by statute requiring claimants to come forward to assert their rights or lose them. But this adjudication is no different than any other in that if one party intends to litigate an issue with another party, he is required to show up with some supporting facts and law. NMID's objection was premised on its claimed "ownership" of Purdam Gulch Creek where it crosses Janicek's property. NMID thereafter came forward with no facts supporting its title in Purdam Gulch Creek as against Janicek or in support of any legal basis for its asserted right to exclude Janicek from the Creek.

NMID's objection also was premised on its claimed ownership of all the water in Purdam Gulch Creek. NMID and BOR both presented evidence indicating that the original source of a portion of the water in Purdam Gulch Creek is seepage, surface runoff or return flows from their irrigation deliveries. But NMID, which claimed that its patrons used the (waste) water in Purdam Gulch Creek, apparently does not even require or maintain records of when or how much (waste) water might actually be used (i.e., the only facts that could have supported an "ownership of water" argument). Hence, NMID presented no facts with which to establish an exclusive right to any, let alone all, of the waters in Purdam Gulch Creek as asserted in its pleadings.

A foundational principle of Idaho water law is that the only right that can be acquired in public water is the right to beneficially use it. *American Falls Reserv. Dist. No. 2 v. Idaho Department of Water Resources*, 154 P.3d 433, 451 (2007) ("Neither the Idaho Constitution, nor statutes, permit irrigation districts . . . to waste water or unnecessarily hoard it without putting it

to some beneficial use”). No reasonable argument for modifying that principle is evident or was proposed by NMID or BOR.

NMID, with BOR’s support, brought this litigation but then did nothing else. They provided no facts to support NMID’s bare allegations of ownership of Purdam Gulch Creek or the water in it, and they proffered no basis for some extension or modification of the case law or statutes. NMID and BOR should be deemed to have pursued this litigation unreasonably and without foundation. *See e.g., Del Milam & Sons v. Bailey*, 107 Idaho 587, 691 P.2d 1202 (1984) (where party appears at trial and makes minimal attempt to support its defense, award of fees under Rule 54 was proper); *Ortiz v. Reamy*, 115 Idaho 1099, 772 P.2d 737 (Ct. App. 1989) (confirming award of attorney fees where party pursued litigation with “scant basis to continue.”).

Remarkably, NMID now goes so far as to state that the Special Master actually “found” or “concluded” that NMID was required to file an objection to protect its interests in wastewater. (*See, e.g.,* NMID Brief at 2 and 5 (“[i]t cannot be denied that this Court found that . . . it was necessary for NMID to file an objection in order to protect its interests;” “. . . since Janicek was unwilling to recognize NMID’s rights³ and since the Court found that the inclusion of a remark was necessary, and thus substantiating the need for NMID to file an objection. . .;” “NMID can just as easily argue that it is a 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.”)) These astonishing distortions of the nature of this case and the Special Master’s resolution of it are further evidence of the

³ This statement is completely false. *See supra* note 2 and accompanying text.

unfounded and unreasonable position NMID has taken, pursued and continues to pursue.

Janicek should be awarded its attorney fees and costs as requested.

NMID's suggestion that it was compelled to continue litigating to a final decision by the Special Master is simply disingenuous. As quoted, *supra*, NMID's counsel told the Court in the beginning of this subcase that the issues could not be resolved with a wastewater remark and that Janicek's water right "should be disallowed." NMID clearly did not believe that all that was necessary for it to be a prevailing party in this litigation was acknowledgement of existing law concerning the paramount rights of an original appropriator to recapture and reuse wastewater. If that had been its position, it would have had no reason to continue to pursue its claims of trespass and ownership of the water in Purdam Gulch Creek, for Janicek freely acknowledged NMID's paramount right to its own waste water, *see supra* note 2 and accompanying text, and the Court has been quite willing to accommodate parties' stipulations in this regard in numerous other subcases using various wastewater remarks negotiated between parties.

3. This is Not a Run-of-the-Mill Case.

NMID and BOR argue that this is another routine water rights case. Janicek disagrees. This is a case where the United States and one of Idaho's largest irrigation delivery entities have attempted to establish a precedent by which they could exclude a landowner from portions of his own fee property. One can imagine that, if they had prevailed, they might have required all landowners to enter into some form of license agreement by which the irrigation district purports to establish "absolutely its right to control any modification or alteration" of watercourses crossing their private land that BOR or NMID may have constructed or use as drains. (*See, e.g.*, Exhibit C to Affidavit of Bryce Farris submitted with NMID's Summary Judgment Brief.) This result would not be achievable with a simple wastewater remark.

This also is a case where the United States and one of its contract spaceholders have sought to create precedent by which they would need only to trace the ultimate source of water in a natural watercourse or constructed drain to their upgradient irrigation deliveries to assert exclusive ownership and absolute control of water regardless of whether they put it to beneficial use. One wonders where such a precedent would lead, particularly in the Boise River Basin where it has long been recognized that all water rights below the Star Bridge near Eagle, Idaho, are filled with return flows, seepage and surface runoff to the river resulting from upgradient irrigation deliveries by BOR and its contract spaceholders. The same question could be asked about water in the Snake River below Milner Dam, which is acknowledged to consist in large part of return flows from seepage, surface runoff and return flows from irrigation deliveries by BOR and its contract spaceholders. It would indeed be exceptional if all that BOR or an irrigation district might need is an aquifer model to establish “absolutely its right to control” the water flowing in watercourses and drains. That is where this case reasonably might have led if NMID and BOR had prevailed, which they did not. It certainly would have been the stepping stone to such a result.

Janicek did not incur the substantial costs it did in this case to vindicate the rights of all the appropriators below Star or Milner Dam, or to prevent what some would call “bad precedent.” Janicek was defending its water right claim against two well-heeled litigants working a coordinated, frontal attack on the validity of Janicek’s water right. Janicek prevailed.

Janicek also did not have the benefit of making common cause with dozens of other claimants facing objections by irrigation districts and BOR. To Janicek’s counsel’s knowledge, no other claimant in Basin 63 held their ground when confronted by a similar attack by an irrigation district and BOR. In fact, of all the subcases in which irrigation districts filed similar

(if not identical) objections as in this subcase, Janicek's counsel is unaware of any in which BOR and the irrigation district insisted on "disallowance" of the water right rather than settlement of the matter with a wastewater remark. Janicek did not have the benefit of a well-worn groove for settlement that other claimants may have had when facing these same parties in SRBA litigation. All of these factors make this case and the costs Janicek incurred defending its claim exceptional. Janicek should be awarded its discretionary costs.

4. Janicek's Requested Attorney Fees are Reasonable and Appropriate.

Janicek's attorney fees in this litigation are directly related to the hourly rate charged by those attorneys of the firm who were involved, and the number of hours those attorneys worked on the matter. Janicek's Memorandum, and the Affidavit of Michael P. Lawrence in support thereof, clearly set out the time worked and the matters worked on by each attorney. The schedule of fees and costs illustrate that Janicek's counsel did not duplicate efforts. For example, Janicek's attorneys participating in interoffice conferences typically did not both bill their time—the exception being conferences in which significant, substantive discussions occurred on discovery, motion practice or trial strategy and preparation. And the schedule of fees shows that the lion's share of the work on this matter appropriately was delegated to an associate attorney with a lower billing rate, under the supervision of a senior attorney with experience in litigation and water law. The time and effort given to various aspects of the litigation, including conferring with other attorneys in the firm with particular expertise or with consultants, drafting discovery requests and responses, drafting motions and briefs, and consulting with the client are commensurate with the tasks. Notably, Janicek was not billed for Mr. Creamer's time attending the hearing on summary judgment which was argued by Mr. Lawrence.

NMID holds out its own attorney's billings presumably as an example of what it believes would be a more reasonable attorney fee for a prevailing party in this matter. NMID's attorney billed approximately \$9,000 for its work.⁴ NMID's attorney, however, did not prepare and serve discovery requests on two parties, and supplemental discovery requests on one party because the initial responses were unsatisfactory. Nor did NMID write two briefs on summary judgment (initial and reply) addressing arguments made by two parties. Nor did NMID need to concern itself with legal research, analysis and arguments regarding the extent of the United States' immunity under the McCarran Amendment, which required a careful and thorough review of relevant decisions of the courts and the briefs of the parties on this issue. And, it should not be forgotten that NMID did not achieve the outcome Janicek did.

In short, Janicek's attorneys expended the time on this matter that, in their professional judgment, was necessary for the task at hand and to achieve the desired result. The time (and related expense) is commensurate with the requirements of the litigation and the results obtained. Litigation is expensive. That is why it should not be undertaken and pursued lightly, frivolously, or unreasonably.

5. The United States May be Required to Pay Janicek's Attorney Fees

Contrary to BOR's assertion, this is not "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." (See BOR's Opposition Motion at 4.) Janicek is not aware of any decision of any court holding that the United States is immune from being required to pay

⁴ NMID does not disclose what its attorneys' billing rates are, or whether they are capped or fixed under a fee agreement. NMID does not mention the extent to which some portion of the work billed by its attorneys to this matter was split or shared among other NMID SRBA claims litigation matters, or the extent to which NMID and BOR were able to allocate tasks (and time and costs) between themselves. In the end, however, NMID's attorney fees in this litigation are irrelevant. What is relevant is whether Janicek's fees are reasonable, which they are.

another party's attorney fees in McCarran Amendment litigation, nor of any decision that lumps attorney fees with costs in any context relevant to Janicek's request for fees and costs here. The BOR has not cited to any such decisions.

This immunity issue is the "elephant in the room," not only in this general stream adjudication but in others throughout the west. In the SRBA, the issue has been decided against the United States with respect to an award of attorney fees as a sanction under Rule 11. *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 (Jan. 30, 1996). That decision, which entirely undercuts BOR's position that it is immune from "any monetary exactions" in litigation (BOR Opposition Motion at 5), was not challenged by the United States as required by Administrative Order 1, and thus, is binding on the United States, if not the Court.⁵

Janicek has presented the McCarran Amendment immunity issue squarely—and fairly—to the Court, and it is ripe for decision in Janicek's favor on the merits.

CONCLUSION

For the foregoing reasons, Janicek respectfully requests that it be awarded its costs and fees as a prevailing party in the amounts requested in its Memorandum, and its fees incurred in defending its costs and fees request in an amount to be presented by supplemental request.

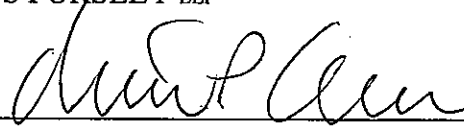
⁵ The SRBA's Presiding Judge has denied requests for attorney fees against the United States based on the express finding that the United States did not pursue the subject litigation frivolously, unreasonably or without foundation—not, as the BOR asserts, because such an award is barred by the United States' immunity from suit. *Joyce Livestock Company v. United States of America*, 156 P.3d 502, 144 Idaho 1 (2007) (appeal from SRBA Court denying request for fees against United States because case was not pursued frivolously).

DATED this 15TH day of October, 2008.

Respectfully submitted,

GIVENS PURSLEY LLP

By



FOR

Michael C. Creamer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th of October, 2008, the foregoing was filed, served, or copied as follows:

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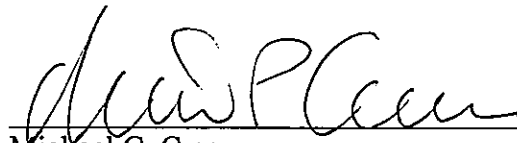
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