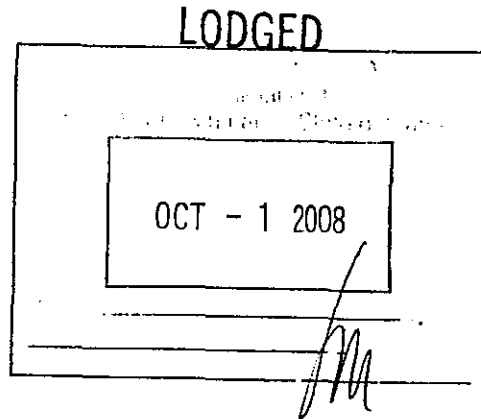


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Attorneys for Sarah Jane Smith



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

In Re: SRBA

Subcase No.: 63-7539

Case No. 39576

**SARAH JANE SMITH'S VERIFIED
MEMORANDUM OF COSTS AND
ATTORNEYS' FEES**

In compliance with Court's September 16, 2008 verbal ruling and September 17, 2008 written Order awarding her costs and attorneys' fees, Claimant Sarah Jane Smith submits this Verified Memorandum of Costs and Attorneys' Fees as follows:

I. COSTS AS A MATTER OF RIGHT

Sarah Jane Smith did not incur any costs in this matter classified by the Rules as costs as a matter of right, and therefore she is not claiming any costs as a matter of right.

II. DISCRETIONARY COSTS

A. Pursuant to Idaho Rule of Civil Procedure 54(d)(1)(D) and This Court's Ruling, Plaintiffs Are Entitled to Their Discretionary Costs.

Idaho Rule of Civil Procedure 54(d)(1)(D) provides "[a]dditional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should

in the interest of justice be assessed against the adverse party.” The determination of whether to award costs pursuant to Idaho Rule of Civil Procedure 54(d)(1)(D) is a matter of discretion with the trial court. *Roe v. Harris*, 128 Idaho 569, 917 P.2d 403 (1996). Discretionary costs may include costs such as photocopying, travel expenses and additional costs for expert witnesses. *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 313, 109 P.3d 161, 168 (2005). Plaintiffs request the following discretionary costs:

<u>DISCRETIONARY COSTS</u> – Idaho Rule of Civil Procedure 54(d)(1)(D)	
1. Long Distance Phone Charges	\$ 9.39
3. Courier Charges	\$35.51
4. Photocopies	<u>\$ 23.70</u>
TOTAL DISCRETIONARY COSTS	\$ 58.01
TOTAL COSTS AS A MATTER OF RIGHT	<u>\$ -0-</u>
TOTAL COSTS AS A MATTER OF RIGHT AND DISCRETIONARY COSTS CLAIMED	<u>\$ 58.01</u>

III. ATTORNEYS' FEES

The fee arrangement between Sarah Jane Smith and Givens Pursley is on a time and hour basis. The rates of the attorneys who worked on this matter ranged from \$170-225 and the extent and nature of the charges are set forth in detail in Exhibit A, which is a true and correct summary of Givens Pursley's billing records for this matter that is incorporated herein by reference.

The fees set forth in Exhibit A are true and correct and are submitted in compliance with Rules 54(d) and (e) of the Idaho Rules of Civil Procedure. The factors to be considered by the Court in determining the amount of a fee award are discussed in detail in the Affidavit of John

M. Marshall in Support of Claimant Sarah Jane Smith's Application for Costs and Attorneys' Fees that was filed in conjunction with this Verified Memorandum.

A. Attorneys' Fees for Contesting Motion to File Late Objection and Initial Case Preparation and Analysis.

The initial stage of this case covers the time when Whitted filed his late objection through the pretrial conference where it became apparent, at that time, that the matter could be resolved on summary judgment. This portion of the litigation involved analyzing Whitted's late objection and the appropriate legal standard and participating in the hearing to allow the late objection. After the Court allowed the objection, Sarah Jane Smith investigated the factual and legal basis for the objection, including through discovery. Based on Whitted's statement in the late objection and his answers to discovery, it was apparent that the matter was limited to a legal question. Consequently, Sarah Jane Smith prepared for and participated in the pretrial conference with the intention of vacating the trial and preparing for summary judgment.

The fees incurred up through the pretrial conference in this matter total \$8,437.00. These fees are further detailed in Exhibit A.

B. Attorneys' Fees for Preparing and Filing Summary Judgment Motion.

Based upon the parties' understanding and representations at the pretrial conference and the Court's Order, Sarah Jane Smith's counsel prepared a summary judgment motion. Preparing this motion involved substantial legal research into the legal impact of the location of the well on Whitted's property and the continuous use of the well by Sarah Jane Smith and drafting a memorandum in support. Preparation of the summary judgment pleadings also involved factual investigation, including witness interviews, and preparation of affidavits in support of the motion. The total fees incurred in preparing the motion for summary judgment were \$9,991.00. These fees are further detailed in Exhibit A.

C. Attorneys' Fees Incurred Following Summary Judgment.

Immediately following the filing of Sarah Jane Smith's motion for summary judgment, Whitted attempted to hook up to the disputed well, which resulted in a confrontation between Sarah Jane Smith's employee and Whitted. Sarah Jane Smith's counsel was required to monitor this dispute and advise Ms. Smith of her rights.

Whitted then retained counsel and on September 10, 2008, Whitted filed a cross motion for summary judgment asserting permissive use of the well in question. Sarah Jane Smith, after reviewing the cross motion for summary judgment and supporting documents moved to strike the motion as untimely and because it raised previously undisclosed legal theories and witness testimony. The total fees incurred following the filing of Sarah Jane Smith's motion for summary judgment was \$2,870.50. These fees are further detailed in Exhibit A.

D. Attorneys' Fees for Compiling and Drafting Request for Attorneys' Fees.

Pursuant to the Court's September 17, 2008 Order, Sarah Jane Smith's counsel was required to compile and review the attorney fees incurred in this matter and prepare this Verified Memorandum and supporting affidavit. The fees incurred in preparing and filing this Verified Memorandum are \$1,930.50. These fees are further detailed in Exhibit A.

E. Electronic Research.

Counsel for Sarah Jane Smith incurred \$169.70 in electronic research costs in this matter. This amount is entirely reasonable given the novel issues presented in this matter.

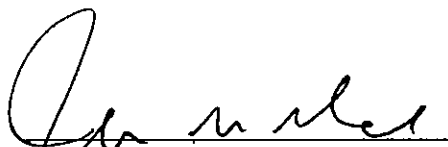
IV. CONCLUSION

The attorneys' fees charged in this matter were reasonably and necessarily incurred and, as the Court has already recognized, the fees incurred in this matter could have been avoided but for Objector Craig Whitted's actions and the inconsistent positions before this Court. Based upon the forgoing, Sarah Jane Smith requested at total costs and attorney fee award as follows:

Costs	\$ 58.01
Attorneys' Fees	\$23,229.00
Electronic Research	<u>\$ 169.70</u>
TOTAL	\$23,456.71

Dated this 30th day of September, 2008.

GIVENS PURSLEY LLP


John M. Marshall

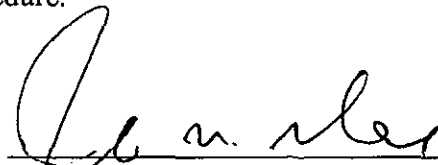
VERIFICATION

STATE OF IDAHO)
) ss:
County of Ada)

I, John M. Marshall, being first duly sworn upon oath, depose and say:

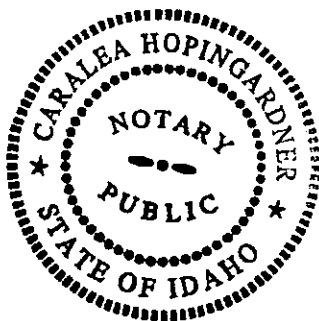
I am one of the attorneys representing Claimant Sarah Jane Smith in the above-captioned action, and as such, I have knowledge of the cost amounts itemized in the Verified Memorandum of Costs and Attorneys' Fees and the circumstances to their being incurred.

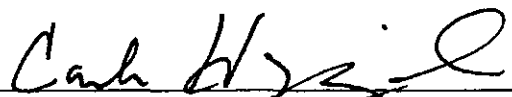
I have reviewed the foregoing Verified Memorandum of Costs and Attorneys' Fees. The costs and attorneys' fees described therein are true and correct and were reasonably and necessarily incurred in the prosecution of this action. To the best of my understanding, the costs shown herein are in compliance with the Idaho Rules of Civil Procedure.



John M. Marshall

SUBSCRIBED AND SWORN to me this 30th day of September 2008.





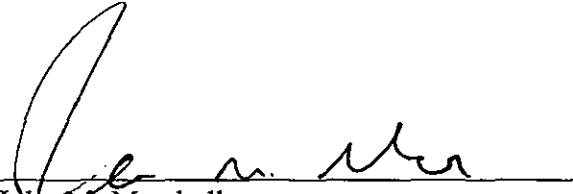
NOTARY PUBLIC FOR IDAHO
Residing at Boise, ID
My Commission Expires: 5/8/2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Kimball D. Gourley
Trout Jones Gledhill Furhman, P.A.
225 N. 9th Street, Suite 820
PO Box 1097
Boise, ID 83701-1097

☒ U.S. Mail
☐ By hand
☐ Overnight
☐ Facsimile


John M. Marshall

Date	ID	Hours	Fees Rate	Amount	Fees Description
Initial Stage of Litigation					
1/29/2008	JMM	0.40	225.00	90.00	Review court order on late objection.
2/4/2008	JMM	1.20	225.00	270.00	Review standards for late objection, call with S.J. Smith re strategy.
2/11/2008	JMM	1.00	225.00	225.00	Prepare strategy for argument on motion for late objection.
2/12/2008	JMM	2.30	225.00	517.50	Prepare for and attend hearing, prepare litigation strategy, call with S.J. Smith to discuss strategy.
2/18/2008	JMM	0.20	225.00	45.00	Review Court order on scheduling.
2/21/2008	JMM	0.20	225.00	45.00	Call with S.J. Smith re status and strategy.
5/15/2008	JMM	1.20	225.00	270.00	Review trial scheduling order, prepare discovery requests and witness disclosure, call with S.J. Smith re potential witnesses.
5/20/2008	JMM	1.00	225.00	225.00	Review Whitted witness disclosures, review file re status and outline strategy for trial preparation.
5/21/2008	JMM	0.20	225.00	45.00	Conference with W. Varin re strategy for discovery.
5/22/2008	JMM	1.50	225.00	337.50	Review old deeds and survey to determine chain of title.
5/23/2008	JMM	1.00	225.00	225.00	Continue review of surveys and deeds.
5/23/2008	JWV	1.00	170.00	170.00	Research elements of claim and procedure for special master hearing in SRBA.
5/27/2008	JMM	3.00	225.00	675.00	Review water right file in preparation for trial, review deeds for trial prep.
5/28/2008	JMM	1.00	225.00	225.00	Continue document review, conference with W. Varin re strategy and allocation of trial preparation.
5/29/2008	JMM	0.20	225.00	45.00	Conference with W. Varin re trial strategy.
5/29/2008	JWV	2.00	170.00	340.00	Review summary of chain of title prepared by J. Marshall and review original deeds from chain of title; research standards for adverse possession.
6/3/2008	JMM	0.20	225.00	45.00	Conference with W. Varin re interviews with witnesses.
6/3/2008	JWV	1.70	170.00	289.00	Phone conferences with potential witnesses, including D. Vastine, J. Chan, and C. Harris.
6/16/2008	JWV	0.60	170.00	102.00	Phone conferences with Dr. Vastine and C. Zeyer re: witness interviews.
6/23/2008	JMM	1.50	225.00	337.50	Review discovery produced by C. Whitted, conference with W. Varin re Rule 16 motion to establish undisputed facts.
6/23/2008	JWV	0.40	170.00	68.00	Analyze Mr. Whitted's discovery responses and litigation strategy for evidentiary hearing.
6/24/2008	JWV	3.00	170.00	510.00	Analyze documents received from objector; conference with J. Marshall re: litigation strategy; draft and revise motion to establish undisputed facts.

					Fees Description
6/30/2008 JMM	8.00	225.00	1,800.00		Draft Rule 16 motion; review file and establish chain of title and other undisputed facts; telephone calls with S. J. Smith re: same; conference with W. Varin re: strategy for obtaining stipulated facts.
6/30/2008 JWV	1.50	170.00	255.00		Conferences with J. Marshall analyzing litigation strategy; phone conference with client re: use of the well; review discovery documents and analyze well use through the years.
6/30/2008 MPL	0.70	185.00	129.50		Discuss water right trespass issue with J. Marshall; review cases re same issue.
6/30/2008 TLK 7/1/2008 JMM	3.00	225.00	675.00		Call with S.J. Smith re well use issues, prepare for and attend pretrial conference, call with S.J. Smith re same, direct W. Varin re preparation of a summary judgment motion.
7/1/2008 JWV 7/1/2008 JWV	2.80	170.00	476.00		Analyze issues related to well use and non-use; extended phone conference with D. Vastine re: knowledge of well use and vacating trial; analyze issues and begin research re: legal effect of location of point of diversion upon another's property; conference with M. Lawrence re: creating a water right in trespass and his research on this issue.
Sub Total			\$ 8,437.00		
Summary Judgment Fees					
7/1/2008 MPL	0.40	185.00	74.00		Discuss water right trespass issue with W. Varin.
7/9/2008 JMM	0.20	225.00	45.00		Conference with W. Varin re status and strategy.
7/14/2008 JMM	1.00	225.00	225.00		Research case law on prescriptive easements.
7/15/2008 JMM	0.20	225.00	45.00		Conference with W. Varin re status and strategy.
7/18/2008 JWV	3.00	170.00	510.00		Research Idaho law re: prescriptive easements for water rights; begin drafting and revising memorandum in support of summary judgment.
7/18/2008 PNC	3.00	100.00	300.00		Research California, Colorado, and Idaho caselaw re: prescriptive easements and groundwater
7/21/2008 JWV	4.00	170.00	680.00		Continue review and research of caselaw re: prescriptive easements and obtaining water right in trespass.
7/22/2008 JWV	1.90	170.00	323.00		Draft and revise memorandum in support of summary judgment.
7/23/2008 JWV	4.50	170.00	765.00		Continue researching, drafting and revising memorandum in support of summary judgment.
7/25/2008 JMM	1.50	225.00	337.50		Review research on summary judgment questions, edit summary judgment memorandum, conference with W. Varin re affidavits.
7/28/2008 JMM	2.50	225.00	562.50		Work on motion for summary judgment memorandum.
7/28/2008 JWV	3.00	170.00	510.00		Draft and revise affidavits of D. Vastine and S.J. Smith in support of summary judgment; review documents to be used in support of summary judgment to draft affidavits; phone conference with D. Vastine re: affidavit.
7/29/2008 JMM	6.00	225.00	1,350.00		Review and edit Vastine affidavit, review and edit S.J. Smith affidavit, continue research on cases involving trespass issues, edit summary judgment memorandum, review file to determine evidence of scope of easement.

		Rate	Amount	Fees Description
7/29/2008 JWV	3.20	170.00	544.00	Phone conferences with D. Vastine re: affidavit; revise and finalize affidavit of D. Vastine; review documents to be used in support of summary judgment, including deeds and department of water resources documentation.
7/30/2008 JMM	7.00	225.00	1,575.00	Review and edit summary judgment memorandum and associated affidavits, continue review of caselaw on water rights and trespass and refine legal analysis.
7/30/2008 JWV	2.90	170.00	493.00	Continue drafting and revising memorandum and affidavits in support of summary judgment; meeting with client re: final revisions to affidavit and executing same; conferences with J. Marshall re: summary judgment analysis.
7/31/2008 JMM	5.00	225.00	1,125.00	Finalize summary judgment documents, review C. Whitted motion.
7/31/2008 JWV	3.10	170.00	527.00	Revise and finalize memorandum and affidavits in support of summary judgment.
Subtotal			\$ 9,991.00	
Fees After Summary Judgment				
8/4/2008 JWV	1.30	170.00	221.00	Phone conference with S.J. Smith re: dispute with Whitted over the weekend and analyze issues re: same; draft and respond to electronic correspondence with J. Marshall.
8/4/2008 MCC	0.20	250.00	50.00	Office conference re: well dispute and strategy for avoiding breach of peace penalty hearing and decision on merits.
8/11/2008 JMM	0.20	225.00	45.00	Conference with W. Varin re status, review correspondence re Whitted hooking up to well.
8/19/2008 JMM	0.30	225.00	67.50	Call with Trout Jones law firm to determine whether they represent Whitted, review court correspondence with Trout Jones
8/21/2008 JMM	0.20	225.00	45.00	Review status with court, conference with W. Varin re jurisdiction issues.
9/9/2008 JMM	1.00	225.00	225.00	Review motion for summary judgment and supporting papers filed by Whitted, conference with W. Varin re strategy.
9/10/2008 Caralea				
9/10/2008 JMM	1.00	225.00	225.00	Conference with W. Varin re motion to strike and for fees, review motion.
9/10/2008 JWV	2.50	170.00	425.00	Review of cross motion for summary judgment; draft response to cross motion for summary judgment; draft motion to strike cross motion for summary judgment and motion to shorten time re: same; analyze strategy for responding to cross motion for summary judgment with J. Marshall
9/12/2008 JMM	1.00	225.00	225.00	Review most recent pleadings, conference with W. Varin re status.
9/12/2008 JWV	1.60	170.00	272.00	Analyze strategy with J. Marshall; prepare affidavit and review supporting documents in support of motion to strike; finalize motion to shorten time; review response to motion to strike.

	Hours	Rate	Amount	Fees Description
9/15/2008 JMM	1.50	225.00	337.50	Review record in case including prior court orders, review motion to strike and response, prepare outline of oral argument.
9/15/2008 JWV	0.50	170.00	85.00	Assist J. Marshall in hearing preparation on motion to strike.
9/16/2008 JMM	2.50	225.00	562.50	Prepare for and attend hearing on motion to strike, call with S.J. Smith re same, conference with W. Varin re status and strategy.
9/16/2008 JWV	0.50	170.00	85.00	Conference with J. Marshall re: hearing on motion to dismiss; phone conference with S.J. Smith re: Court's ruling.
			\$ 2,870.50	
	Fees Preparing Cost Memo			
9/17/2008 JMM	0.30	225.00	67.50	Call with S.J. Smith re potential conflicts, review cost and fee report.
9/17/2008 JWV	2.50	170.00	425.00	Begin drafting and revising verified memorandum of costs and attorneys' fees; review costs and attorneys' fees in connection with drafting same.
9/18/2008 JMM	0.50	225.00	112.50	Review and edit cost memorandum.
9/18/2008 JWV	2.20	170.00	374.00	Continue drafting and revising verified memorandum of costs and attorneys' fees and affidavit of counsel in support; research case law re: awards in similar matters and cases supporting amount of award in this matter.
9/19/2008 JWV	3.00	170.00	510.00	Continue drafting and revising verified memorandum of costs and attorneys' fees; draft and revise spreadsheet of attorneys' fees categorizing fees and costs.
9/23/2008 JWV	0.70	170.00	119.00	Revise memorandum of costs and attorneys' fees and affidavit of counsel in support.
9/29/2008 JMM	0.30	225.00	67.50	Review court order on motion to strike.
9/30/2008 JWV	1.50	170.00	255.00	Review and revise spreadsheet of attorneys' fees and verified memorandum in support; conference with J. Marshall re: same.
			\$ 2,870.50	
	Subtotal			

	Hours	Rate	Amount	Fees Description
Attorneys' Fees Summary				
Atty. Fees through Pre-trial conference			\$ 8,437.00	
Atty Fees for Preparing Summary Judgment			\$ 9,991.00	
Atty Fees Following Summary Judgment, including Motion to			\$ 2,870.50	
Atty Fees for Preparing Memo of Cost			\$ 1,930.50	
Total Atty. Fees			\$23,229.00	
Electronic Research			<u>\$ 169.70</u>	
TOTAL FEES AND ELECTRONIC RESEARCH			\$ 23,398.70	

COSTS SUMMARY

	Quantity	Rate	Amount	
Long Distance	1.00	6.02 \$	6.02	
Long Distance	1.00	1.05 \$	1.05	
Long Distance	1.00	0.12 \$	0.12	
Long Distance	1.00	1.02 \$	1.02	
Long Distance	1.00	0.18 \$	0.18	
Long Distance	1.00	0.18 \$	0.18	
Long Distance	1.00	0.15 \$	0.15	
Long Distance	1.00	0.15 \$	0.15	
Long Distance	1.00	0.12 \$	0.12	
Long Distance	1.00	0.10 \$	0.10	
Long Distance	1.00	0.05 \$	0.05	
Long Distance	1.00	0.25 \$	0.25	
		Subtotal		\$ 9.39
Photocopies	35.00	0.15 \$	5.25	
Photocopies	21.00	0.15 \$	3.15	
Photocopies	84.00	0.15 \$	12.60	
Photocopies	2.00	0.15 \$	0.30	
Photocopies	2.00	0.15 \$	0.30	
Photocopies	9.00	0.15 \$	1.35	
Photocopies	5.00	0.15 \$	0.75	
		Subtotal		\$ 23.70
Courier Service FedEx - 7/30/08	1.00	12.46 \$	12.46	
Courier Service FedEx - 7/31/08	1.00	12.46 \$	12.46	
		Subtotal		\$ 24.92

Costs Summary

COSTS AS A MATTER OF RIGHT 0

DISCRETIONARY COSTS

Long Distance \$ 9.39
Photocopies \$ 23.70
Courier Services \$ 24.92

TOTAL DISCRETIONARY COSTS \$ 58.01

TOTAL COSTS 58.01

TOTAL COSTS AND FEES**COSTS \$ 58.01****FEES \$ 23,229.00****RESEARCH \$ 169.70****\$ 23,456.71**