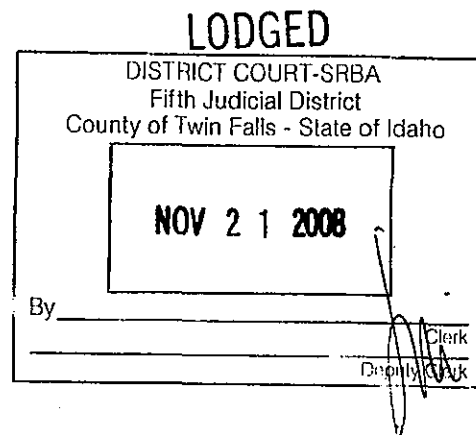


Kimbell D. Gourley/ISB #3578
Reid W. Hay/ISB #7550
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.
The 9th & Idaho Center
225 North 9th Street, Suite 820
P.O. Box 1097
Boise, ID 83701
Telephone: (208) 331-1170
Facsimile: (208) 331-1529
Email: kgourley@idalaw.com

Attorneys for Craig Whitted



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.: 63-7539

**CRAIG WHITTED'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISALLOW COSTS AND
FEES**

COMES NOW Craig Whitted ("Mr. Whitted"), by and through his counsel of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman, P.A., and hereby files this reply memorandum in support of motion to disallow costs and fees.

I. ANALYSIS

Sara Jane Smith's ("Ms. Smith") Response to Mr. Whitted's Motion to Disallow Costs and Fees ("Response") raises several matters, but for the sake of brevity, and without waiving any issues or arguments, this memorandum will restrict itself to addressing one issue.

In part II(B)(1) of her Response, Ms. Smith asserts that the Court properly exercised its discretion in awarding costs and attorney fees. The difficulty with Ms. Smith's assertion is that a court's discretionary powers do not extend to granting attorney fees *sua sponte* in the fashion done here. *Bingham v. Montane Resource Associates*, 133 Idaho 420, 423-24, 987 P.2d 1035, 1038-39 (1999).

In *Bingham*, the Idaho Supreme Court reversed an award of attorney fees because it had been granted *sua sponte* on grounds that had not already been raised by the prevailing party. *Id.* Specifically, the Court in *Bingham* ruled that a trial court lacks the power to grant attorney fees *sua sponte* on grounds not previously raised by the party to whom the award would be granted. *Id.* The Court wrote that:

The district judge's underlying assumption that he had the power to award fees on a basis not asserted by Montane is erroneous. In order to be awarded attorney fees, a party must actually assert the specific statute or common law rule on which the award is based; the district judge cannot sua sponte make the award or grant fees pursuant to a party's general request.

Id. (emphasis added). Later, the Court wrote that "[t]he district judge is not empowered to award fees on a basis not asserted by the moving party." *Id.* at 424, 987 P.2d at 1039.

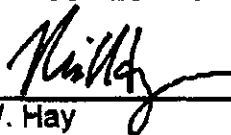
In the present case, following a hearing on a motion to strike the Court *sua sponte* awarded costs and attorney fees to Ms. Smith, basing its ruling on I.R.C.P. 15(a). Ms. Smith, however, had never asserted a claim for attorney fees pursuant to I.R.C.P. 15(a). As a result, the Court acted outside its powers and the award was granted in error. *Id.* at 423-24, 987 P.2d at 1038-39.

II. CONCLUSION

Mr. Whitted respectfully requests that there be no award of costs or attorney fees in this case, and/or that the Court limit any such award to that which is reasonable and proportionate to the present dispute.

DATED this 21st day of October, 2008.

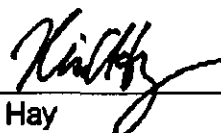
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Reid W. Hay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of October, 2008, a true and correct copy of the foregoing document was served as follows:

John M. Marshall J. Will Varin GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83701-2720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery
Idaho Department of Water Resources, c/o Nicholas B. Spencer 322 E. Front Street Boise, Idaho 83720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery


Reid W. Hay