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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
DEC 22 2008	
By _____	Clerk
_____	Deputy Clerk

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 63-27475
	) (Janicek Properties, LLC)
Case No. 39576	)
	) SPECIAL MASTER'S REPORT AND
	) RECOMMENDATION RE: JANICEK'S
	) REQUEST FOR ATTORNEY FEES
	)

Summary of Recommendation: Janicek is the prevailing party. Janicek should be awarded \$627.99 in discretionary costs. Of the two major issues addressed in the *Summary Judgment Decision*, the NIMD pursued one of them without foundation, resulting in the recommendation herein that Janicek be awarded \$20,038.25 in attorneys' fees. No costs or attorneys' fees should be assessed against the United States (BOR).

I. PROCEDURAL HISTORY

On May 2, 2008, this Special Master issued a *Memorandum Decision and Order on Motion for Summary Judgment; and Special Master's Report and Recommendation* (hereinafter "*Summary Judgment Decision*"), holding that the wastewater of the Nampa & Meridian Irrigation District ("NMID") that collects in the drain which is the source of water for Janicek Properties, LLC's ("Janicek") water right is subject to appropriation, and recommending that Janicek's water right be decreed in the SRBA as reported in the *Director's Report*, with the addition of a remark regarding wastewater. No party challenged this recommendation to the SRBA Presiding Judge, and a *Partial Decree* for the water right was issued as recommended on October 6, 2008.

On August 29, 2008, Janicek timely filed its *Memorandum of Costs and Request for Attorney Fees*, together with the *Affidavit of Michael P. Lawrence* in support thereof, seeking to recover \$3,939.41 in discretionary costs and \$43,320.50 in attorney fees. Janicek made its request pursuant to Idaho Rules of Civil Procedure 54(d)(1) and

54(e)(1), and Idaho Code § 12-121, and under the assertion that Janicek is the prevailing party, and that the NMID and the Bureau of Reclamation ("BOR") brought and pursued the entire action frivolously, unreasonably, and without foundation.

On September 11, 2008, NMID filed its *Memorandum in Opposition to Janicek Properties' Request for Attorney Fees and Costs*, together with the *Affidavit of S. Bryce Farris*. NMID asserts that Janicek is not the prevailing party, and that NMID's position was not frivolous, unreasonable, or unfounded. On September 15, 2008, the BOR filed the *United States' Motion to Disallow Costs and Opposition to Request for Attorney Fees*, asserting, *inter alia*, that Janicek cannot collect costs and attorney fees from the United States because there has been no waiver of the sovereign immunity as to such claims.

On October 16, 2008, Janicek filed its *Response to NMID's and United States' Objections to Memorandum of Costs and Request for Attorney Fees*, together with the *Second Affidavit of Michael P. Lawrence*. On November 5, 2008, Janicek filed the *Amended Second Affidavit of Michael P. Lawrence*. A hearing on the matter was held on November 17, 2008.

II. APPLICABLE LAW

A. Costs.

Janicek seeks an award of discretionary costs in the amount of \$3,939.41 pursuant to Idaho Rule of Civil Procedure 54(d)(1)¹. The relevant provisions allow for an award of discretionary costs to the prevailing party "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." I.R.C.P. 54(d)(1)(D). In awarding discretionary costs, "[t]he trial court must make express findings as to why a party's discretionary costs should or should not be allowed." *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168. Compliance with this requirement is met by making "[e]xpress findings as to the general character of requested costs and whether such costs are necessary, reasonable, exceptional, and in the interest of justice" *Id.*

¹ Janicek is not claiming any costs that prevailing parties are entitled to as a matter of right under Rule 54(d)(1)(C).

B. Attorney Fees.

Janicek seeks an award of attorneys' fees in the amount of \$43,320.50 pursuant to I.R.C.P. 54(e)(1) and I.C. § 12-121. Idaho follows the "American Rule" which requires parties to litigation to pay their own attorney fees unless there is statutory authority or a contractual right to the contrary. *Owner-Operator Indep. Drivers Assoc. of Idaho v. Idaho Public Util. Comm'n.*, 125 Idaho 401, 871 P.2d 818 (1994); *Great Plains Equip. Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999); I.R.C.P. 54(e).

Idaho Code § 12-121 provides a statutory basis for an award of attorney fees in civil cases as follows:

Attorney's Fees - In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121, however, is subject to the terms of I.R.C.P. 54(e)(1) which states:

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; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Idaho Rule of Civil Procedure 54(d)(1)(B) defines the term "prevailing party" as follows:

Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Therefore, attorney fees can only be awarded upon a finding by the trial court: (1) that the party requesting the fees is the prevailing party; and (2) that the case was brought, pursued or defended frivolously, unreasonably or without foundation by the opposing party.

C. Exercise of Discretion.

In addition to the foregoing, the award of attorney fees is committed to the sound discretion of the court. I.R.C.P. 54(d)(1)(B) and (C), and 54(e)(1). The standard applicable to court discretion in Idaho is: “(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.” *Sun Valley Shopping Center, Inc., v. Idaho Power Company*, 119 Idaho 87, 803 P.2d 993 (1991).

III. ANALYSIS

A. Determination of Prevailing Party.

In considering a request for an award of both costs and attorney fees, the Rules require a determination of “prevailing party.” For the reasons set forth below, this Special Master finds that Janicek is the prevailing party in this subcase.

SRBA Presiding Judge Melanson has issued a *Partial Decree* for this water right with the elements as recommended in the *Director’s Report*. NMID argues that Janicek did not prevail because this Special Master recommended, and the *Partial Decree* included, a “wastewater” remark. NMID’s argument ignores, however, the directive of I.R.C.P. 54(d)(1)(B), which requires the trial court to consider the result of the action “*in relation to the relief sought* by the respective parties.” *Id.* (emphasis added). Neither the NMID nor the BOR prayed for alternative relief in the form of a request for a wastewater remark, rather both took the position that Janicek’s right should not exist. Furthermore, the wastewater remark recommended in the *Summary Judgment Decision* was not intended to alter the substantive elements of Janicek’s water right, but rather it was intended to restate Idaho law that would apply to Janicek’s water right even if not stated

on the face of the *Partial Decree*. Lastly, as stated by Janicek in its *Response* brief, “[b]ecause 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.” *Response to NMID’s and United States’ Objections to Memorandum of Costs and Request for Attorney Fees*, p. 7.

B. Express Findings as to the General Character of Janicek’s Costs and Whether Such Costs are Necessary, Reasonable, Exceptional, and in the Interest of Justice.

Janicek requests an award of the following discretionary costs:

<u>DESCRIPTION</u>	<u>AMOUNT</u>
Professional Fee: TitleOne Corporation – title research	\$500.00
Professional Fee: SPF Water Engineering – water flow study	\$3,183.44
Photocopies	\$155.40
Long Distance Telephone Calls	\$9.61
Courier Service	\$22.28
Messenger Service	\$25.00
Facsimile Charges	\$19.00
Copy Expense	<u>\$24.68</u>
TOTAL	3,939.41

Janicek argues that all of the above costs are exceptional, reasonable, necessary, and that an award of such costs is in the interest of justice. For the reason set forth below, this Special Master agrees with Janicek as to the \$500 cost for title research, but disagrees as to the cost for the water flow study conducted by SPF Water Engineering .

NMID pursued an argument in this case that the Purdam Gulch Creek drain is owned by the NMID, that Janicek trespassed thereon in its diversion of water, and therefore under Idaho law Janicek’s water right is invalid. NMID did not, however, present any facts into the record on summary judgment to back-up its assertion that it “owns” the drain, nor did NMID explain the origin of its “ownership” interest – e.g. was NMID’s asserted ownership acquired by agreement with the landowner, or was it acquired through operation of law (prescription, adverse possession, or statute)? This

cause of action pursued by NMID is certainly excepted from the ordinary. Furthermore, in the absence of NMID pointing to the origin of its asserted ownership interest, Janicek really had no choice but to examine its chain-of-title to ascertain whether NMID's assertion might be supported by some forgotten agreement between NMID and Janicek's predecessors-in-interest. Accordingly, this Special Master finds that Janicek's \$500 expense incurred for title research is exceptional, necessary, reasonable, and an award thereof is in the interest of justice.

As to the \$3,183.44 Janicek incurred for the preparation of a water flow study by SPF Water Engineering, this Special Master finds that this expense, although reasonable and necessary, was not exceptional. One of the arguments made by Janicek in support of its motion for summary judgment was that the Purdam Gulch Creek was a natural watercourse prior to being deepened and widened by the BOR; that the work done on said natural watercourse for the purpose of collecting drainage water did not change its character from natural watercourse to artificial channel; and because Purdam Gulch Creek is a natural watercourse its waters are subject to appropriation under Idaho law. See Janicek's *Memorandum in Support of Motion for Summary Judgment* at p. 8. To support its assertion that Purdam Gulch Creek is / was a natural watercourse as defined by Idaho law, Janicek filed the *Affidavit of Scott N. King* (Senior Project Engineer at SPF Water Engineering, LLC). In the SRBA, it is not exceptional for a claimant to be required to show that the claimed source of water is diverted from a natural watercourse. In the *Summary Judgment Order*, this Special Master agreed with Janicek's alternative argument that the water in Purdam Gulch Creek was subject to Janicek's appropriation irrespective of whether the Creek is a natural watercourse or an artificial channel, and as such no factual findings needed to be made in that regard. Nevertheless, Janicek's cost of procuring an expert's opinion as to the hydrology of Purdam Gulch Creek is not an exceptional cost.

The remaining items on Janicek's list of claimed discretionary costs – photocopies, long distance charges, etc., - amount to a sum of \$255.97. It is impossible to discern from the billing records submitted by Janicek in the *Affidavit of Michel P. Lawrence in Support of Janicek's Memorandum of Costs and Request for Attorneys' Fees* which of these costs may relate to the "trespass" issue and which do not, and as such

which are exceptional and which are not. It is the opinion of this Special Master, and in the exercise of discretion, that a fair resolution would be to award Janicek 50% of such costs (\$127.99) based upon the premise that an unknown portion of these costs had to have been reasonably incurred in relation to the “trespass” issue.

In accordance with the forgoing, it is the recommendation of this Special Master that Janicek be awarded the sum of \$627.99 in discretionary costs. This award should be against NMID only, because as discussed elsewhere herein, the BOR did not join with NMID in the “trespass” issue.

C. Findings Re: Whether the Case was Brought and Pursued Frivolously, Unreasonably, or Without Foundation.

The objection filed by the NMID to the *Director's Report* for Janicek's claim to a water right in this subcase asserted that the water right should not exist. The response filed by the BOR also asserted that Janicek's water right should not exist. Unlike numerous other subcases where the NMID objected to water right claims with a source of water that includes NMID's wastewater, NMID steadfastly asserted that the water right claim should be disallowed rather than seeking to settle with the claimant by including a wastewater remark on the partial decree. *See Transcript of Status Conference, p. 4, attached to the Amended Second Affidavit of Michael P. Lawrence.*

In the *Summary Judgment Decision*, this Special Master addressed three issues pertaining to why Janicek's water right should (or should not) exist. As stated therein, those issues are:

1. Was the water in Purdam Gulch Creek – which is a drain constructed by the Bureau of Reclamation (“BOR”) pursuant to a contract between the BOR and the Nampa & Meridian Irrigation District (“NMID”) dated June 1, 1915 – subject to appropriation on March 1, 1951.
3. Was Janicek's claimed water right initiated in trespass and therefore invalid?
4. Is Janicek estopped to assert a water right from the Purdam Gulch Creek drain by reason that one of the members of Janicek Properties, LLC (Bradley Janicek) had previously entered into a license agreement with the NMID for the use of water out of the Sky Pilot drain?

Summary Judgment Decision at p. 5. In addition to the above-issues, the *Summary Judgment Decision* addressed the following issue:

2. Should the partial decree issued for Janicek's water right contain a remark for the purpose of defining, clarifying, or administering the right?

The issue of whether to include a "wastewater" remark was not briefed by any of the parties on summary judgment, but rather the issue was raised and briefly addressed by the parties at oral argument on summary judgment.

With respect to issue No.1 above, -- whether the water in Purdam Gulch Creek was subject to appropriation -- this Special Master finds that this issue was not brought or pursued by either the NMID or the BOR frivolously, unreasonably, or without foundation. The gravamen of the argument made by the NMID and the BOR was a statement in *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), regarding the appropriation of waste or seepage water that is collected in a constructed drain. In the *Summary Judgment Decision*, this Special Master held that the *Sebern* statement did not prevent Janicek's predecessors-in-interest from making a valid appropriation of a water right, albeit wastewater, from Purdam Gulch Creek. That being said, it was not frivolous, unreasonable, or lacking in foundation for NMID and the BOR to have tested the application of the *Sebern* case to the facts surrounding Janicek's water right claim.

With respect to issue No. 3 above -- i.e. the "trespass" issue pursued by NMID -- this Special Master finds, in the exercise of discretion, that NMID brought and pursued this issue without foundation. As described above, and as discussed in the *Summary Judgment Decision*, NMID made the assertion that it "owns" the Purdam Gulch Creek drain, but NMID did not thereafter present any facts supporting this assertion or in support of the legal basis for NMID's asserted right to exclude Janicek from the Creek.

Regarding Issue No. 4 above -- i.e. the estoppel argument made by NMID (but not by the BOR) -- this appears to have been a relatively minor issue in terms of the amount of attorney time devoted thereto. Janicek's *Memorandum of Costs and Request for Attorney Fees* does not provide an analysis of the frivolity or unreasonableness of this assertion. It is the opinion of this Special Master, therefore, that this issue was not pursued by NMID frivolously, unreasonably, or without foundation. It is further the opinion of this Special Master that in apportioning costs and attorney fees attributable to

the foundationless “trespass” issue, the amount of costs and attorney fees that may be attributable to the “estoppel” issue should be disregarded.

Lastly, with respect to issue No. 2 above – the “wastewater remark” issue, no costs or attorney fees are attributable to this issue because it was not raised or briefed by the parties prior to oral argument on summary judgment.

Based upon the foregoing, it is the opinion of this Special Master, and in the exercise of discretion, that an award attorney fees should be provided to Janicek, and against the NMID, for the fees incurred by Janicek relative to the “trespass” issue. As stated above with respect to costs, it is impossible to discern from the billing records submitted by Janicek what portion of the attorneys’ fees incurred by Janicek relate to the “trespass” issue. This Special Master also acknowledges that in the ordinary course of representation it is not possible or feasible for a lawyer to exactly apportion the amount of time devoted to individual issues within a cause of action. In the opinion of this Special Master, a fair resolution would be to award Janicek 50% of allowable attorneys’ fees. The BOR did not make or join the NMID in the “trespass” assertion, and accordingly the lack of foundation for that argument as found herein cannot serve as a basis to hold the BOR liable for Janicek’s costs and attorneys’ fees.

IV. OBJECTIONS TO COSTS AND FEES BY NMID

Pursuant to I.R.C.P. 54(d)(6), failure to timely object to the items in the memorandum of costs shall constitute a waiver of all objections to the costs claimed. In addition to asserting that Janicek should not be awarded any fees and costs, *NMID’s Memorandum in Opposition to Janicek Properties’ Request for Attorney Fees and Costs* also objects to the claimed fees on two grounds. First, NMID makes the general assertion that the approximately \$43,000 that Janicek seeks to recover in attorney fees is unreasonable. NMID backs-up this argument by asserting that NMID was only charged \$8,448 for its attorneys’ work on this subcase. NMID also asserts that the \$9,397.50 in fees incurred by Janicek from May 7, 2008 until August 28, 2008 – which fees relate solely to legal work done in connection with claiming fees and costs – is also not

reasonable. NMID did not object to the billing rates of Janicek's lawyers, and NMID did not make any specific objections to any billing entries.

With respect to NMID's comparison between the fees incurred by it and those incurred by Janicek, it needs to be remembered that the NMID was aligned in this subcase in many respects with the BOR. Many of the affidavits submitted in connection with the NMID's and the BOR's opposition to Janicek's motion for summary judgment were prepared by the BOR. Additionally, this Special Master agrees with Janicek regarding the several differences pointed out in Janicek's *Response* brief as to why the attorney fees incurred by Janicek are greater than those of NMID. *Response to NMID's and United States' Objections to Memorandum of Costs and Request for Attorney Fees* at p. 13. When these factors are considered, and in the absence of any specific objections by the NMID, the fees incurred by Janicek are not unreasonable when compared to the fees incurred by NMID.

As to the fees incurred by Janicek after the issuance of the *Summary Judgment Decision*, it is the opinion of this Special Master that the billing entries that deal with researching legal issues involved in seeking fees from the United States (BOR) should be disallowed for the reason the no costs and fees are recommended herein to be charged to the United States. The NMID should not be required to pay for the attorney fees incurred by Janicek for researching an issue that does not apply to the NMID. The billing entries that appear to relate to this issue are as follows:

<u>DATE</u>	<u>AMOUNT</u>
May 7, 2008	\$250.00
August 7, 2008	\$666.00
August 12, 2008	\$275.00
August 19, 2008	\$375.00
August 26, 2008	<u>\$975.00</u>
TOTAL	\$3,244.00

It is therefore the recommendation of this Special Master that the above-listed items not be awarded to Janicek. Additionally, consistent with the above-analysis that only the "trespass" issue was brought and pursued without foundation, the remaining attorney fees incurred on or after May 7, 2008, should be reduced by 50%.

V. Rule 54(e)(2) FINDINGS and Rule 54(e)(3) FACTORS

Idaho Rule of Civil Procedure 54(e)(2) requires a court to make written findings as to the basis and reasons for awarding attorney fees. The findings and conclusions set forth in this document constitute those findings. In addition, as a generally stated basis and reason for awarding costs and attorneys' fees to Janicek in this matter, this Special Master notes that the NMID took a rather cavalier approach in asserting that it "owns" Purdam Gulch Creek and all the water therein. NMID offhandedly asserted its ownership interest, provided no facts to support its position, and provided no explanation as to how such an outright ownership interest could coexist with Janicek's undisputed fee simple title of the land underlying his point of diversion. For this reason, it is in the interest of justice that Janicek be awarded his costs and attorneys' fees incurred in defending his water right against NMID's assertion of ownership and trespass.

With respect to the factors to be considered pursuant to Rule 53(e)(3), this Special Master has carefully reviewed the analysis thereof set forth in Janicek's *Memorandum of Costs and Request for Attorney Fees* (pages 11-14 therein) and fully agrees with said analysis. The attorney's fees and related expenses incurred by Janicek are commensurate with the requirements of the litigation and the results obtained. However, in accordance with the findings set forth above that only the "trespass" issue was brought and pursued without foundation by the NMID (but not by the BOR), an award of the full amount requested by Janicek is not warranted in this subcase.

VI. RECOMMENDATION

Based upon the file and record herein, and upon the foregoing analysis, IT IS RECOMMENDED that the SRBA District Court enter a judgment in favor of Janicek Properties, LLC, and against the Nampa & Meridian Irrigation District, in the amount of **\$20,666.24**. This figure is derived as follows: (1) \$627.99 in allowable discretionary costs; (2) \$16,961.50 for one-half of attorneys' fees incurred prior to May 7, 2008; and (3) \$3,076.75 for one-half of attorneys' fees incurred on or after May 7, 2008, less \$3,244.00 for fees incurred in researching whether costs can be assessed against the United States. Because no fees are recommended herein to be assessed against the

United States (BOR) it is not necessary to address BOR's arguments relative to sovereign immunity and the operation of the McCarran Amendment.

Dated Dec. 12 2008

A handwritten signature in black ink, appearing to read "Theodore R. Booth", written over a horizontal line.

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT AND RECOMMENDATION RE JANICEK'S REQUEST FOR ATTORNEY FEES was mailed on December 22, 2008, with sufficient first-class postage to the following:

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