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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

DEC 31 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)
Case No. 39576)
_____)
MEMORANDUM DECISION AND ORDER
RE: COSTS AND ATTORNEY FEES
SUBCASE NO. 31-11845

I. FACTS & PROCEDURAL HISTORY

The water use decreed under water right 31-11845 was originally claimed under water right 31-7311 by Ben Jernberg.¹ The Idaho Department of Water Resources filed a *Director's Report* for 31-7311 to which no objections were filed. The SRBA Court issued a *Partial Decree* for 31-7311 consistent with the *Director's Report* recommendation. The *Partial Decree* elements included quantity of 4.62 cfs on a place of use of 461 acres of cultivated pasture. The elements in the *Partial Decree* did not include the quantity of water or acreage claimed for uncultivated pasture. The uncultivated pasture was addressed in the section "other provisions necessary." That section read:

Water diverted under this right, and an additional 4.00 cfs of ground water diverted from the points of diversion described above may also be diverted onto 663 acres of uncultivated pasture located in T07N, R34E, Sections 15, 16, 21 and 22, but this additional use is not an appurtenance of the land upon which it occurs.

The *Partial Decree* for 31-7311 was set aside and an *Amended Partial Decree* was issued deleting the provision regarding uncultivated pasture. IDWR then issued a *Director's*

¹ Idaho Properties LLC succeeded Ben Jernberg as the claimant. Mr. Jernberg remained in the subcase as an objector.

Report under number 31-11845 addressing the uncultivated pasture. The *Director's Report* recommended the uncultivated pasture with 4.99 cfs on 324 acres. The *Director's Report* also included a combined use limitation which read, "Right nos. 31-2395 and 31-11845 are limited to a total combined diversion rate of 6.48 cfs and to a total combined annual diversion volume of 1134 AF." The combined use language was included because the place of use for both 31-2395 and 31-11845 was identical. Claimant Ben Jernberg filed an *Objection*. The State of Idaho filed a *Response*. The parties conducted extensive discovery, pretrial motions, a site visit, and on-site testing.

Jernberg and Idaho Properties LLC moved for summary judgment regarding the number of irrigated acres. Mr. Jernberg and Idaho Properties LLC (hereafter "Objectors") asserted that approximately 663 acres of uncultivated pasture were irrigated. IDWR concluded that only 324 acres of uncultivated pasture grass were irrigated. The *Motion for Summary Judgment* was denied. Issues about soil type and topography of the place of use became focal points as the parties continued to litigate. Prior to trial, the parties reached an agreement. A *Special Master's Report and Recommendation* and a *Partial Decree* were issued. After the *Partial Decree* was issued, the State of Idaho filed a *Motion for Costs and Fees*.

II. STANDARD OF REVIEW

A. Costs Under I.R.C.P. 68 Offers of Judgment

The State of Idaho asks for costs under Idaho Rule of Civil Procedure 68. The State seeks costs incurred after the Objectors rejected Offers of Judgment in May 2006. I.R.C.P. 68(c) entitles a party who makes an Offer of Judgment to recover costs allowable under I.R.C.P. 54(d)(1), if the judgment finally obtained is not more favorable than the offer.

In cases involving claims for relief other than monetary damages, if the judgment, including attorney fees awardable under Rule 54(e)(1) incurred before service of the offer of judgment, and costs incurred before service of the offer of judgment, finally obtained by the offeree is not more favorable than the offer, the offeree must pay the offeror's costs, as allowed under Rule 54(d)(1), incurred after the making of the offer. . . .

I.R.C.P. 68(c).

In this instance, the court looks at the Offers of Judgment made by the State in May 2006. The court then compares these offers to the judgment obtained in the *Partial Decree*.

B. Attorney Fees Under I.C. § 12-121 and I.R.C.P. 54(e)

The State of Idaho also requests attorneys fees pursuant to I.R.C.P. 54(e)(1) and Idaho Code § 12-121. Idaho generally follows the “American Rule” which requires parties to pay their own attorney fees unless statutory authority or contractual rights require the payment of fees. *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).

The State of Idaho relied on I.C. § 12-121 which establishes a statutory basis for awarding attorney fees in civil cases:

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.

I.C. § 12-121. However, I.C. § 12-121 is modified by I.R.C.P. 54(e) which allows attorney fees where a case is brought or pursued frivolously, unreasonably, or without foundation.

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.

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

Thus, attorney fees are appropriate under I.C. § 12-121 only where the court finds that the party seeking attorney fees was the prevailing party and where the opposing party brought, pursued, or defended the case frivolously, unreasonably, or without foundation.

C. Attorney Fees Under I.C. § 12-123

Idaho Code § 12-123 allows recovery of attorney fees as a sanction for frivolous conduct. This section of the code defines frivolous conduct of a party or counsel where:

- 1) The conduct serves merely to harass or maliciously injure another party to the civil action; or
- 2) The conduct is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

III. ANALYSIS

A. I.R.C.P. 68/Offer of Judgment

A determination of whether Objectors should pay costs under I.R.C.P. 68 depends on whether the judgment obtained in the *Partial Decree* is more favorable than the Offers of Judgment which were rejected. The State of Idaho argues that it is entitled to costs under Rule 68 because Objectors did not obtain a judgment more favorable than the Offers of Judgment made in May 2006. The primary focus in determining whether an award of costs is appropriate is whether the results obtained in the *Partial Decree* are greater than the Offers of Judgment made in May 2006.

The First Offer of Judgment was made to the Objectors on **May 11, 2006**. (*Affidavit of David Barber*, Ex. 70) The First Offer of Judgment deleted the combined use limitation with regard to the diversion rate and increased the combined use limitation for the annual diversion volume. The combined limitation in the offer was: "Right nos. 31-2395 and 31-11845 are limited to a total combined annual diversion volume of 1160.3 AF."

The Objectors rejected the May 11, 2006, Offer of Judgment and countered with a proposal asking for substantially more diversion under water right 31-11845 (*Affidavit of David Barber*, Ex. 71).

The State of Idaho made a Second Offer of Judgment on **May 15, 2006**. (*Affidavit of David Barber*, Ex 72) The Second Offer of Judgment deleted the combined use limitation for the diversion rate, but included an annual volume of diversion on 339 acres of 593.25 acre feet. The 339 acres was determined by subtracting 324 acres from the total place of use of 663 acres. The Objectors rejected the Second Offer of Judgment in a letter dated May 17, 2006. (*Affidavit of David Barber*, Ex 73)

Next, the Objectors made an Offer of Judgment to the State of Idaho on **October 6, 2006**. (*Affidavit of David Barber*, ex. 74) This offer suggested reducing the place of use from

339 acres to 200 acres and reducing the diversion rate from 4.99 cfs to 4.0 cfs. The State of Idaho declined the offer. (*Affidavit of David Barber*, Ex. 75) The letter rejecting this offer explained that the State's soil expert had concluded that very little of the place of use could be considered irrigable due to the stony nature of the soils and topography. The State's position was reinforced by its forage expert who found sagebrush that was twenty years of age within the permissible place of use.

The Respondent State of Idaho has incurred substantial expert witness fees to date and continues to incur substantial fees on a daily basis in the amount of several thousand dollars a day. If there is going to be a settlement in this matter, it needs to occur now.

Affidavit of David Barber, Ex. 75.

1. Judgment Obtained Not More Favorable

Idaho Rule of Civil Procedure 68 requires Objectors to pay costs to the State of Idaho if the **judgment obtained** in the *Partial Decree* is not more favorable than the **May Offers of Judgment**. The court concludes that the judgment obtained in the *Partial Decree* was not more favorable than the **May Offers of Judgment**.

The **May 11 Offer** was essentially for a full water right for 331.15 acres when combined with water right 31-2395. The State's **May 15 Offer** was essentially for a full water right for 493.5 acres when combined with 31-2395. The *Partial Decree* is essentially for a full water right for only 324.5 acres. Therefore, the judgment obtained in the *Partial Decree* was less than both of the **May Offers of Judgment**. Accordingly, the court finds that the State of Idaho is entitled to costs under Rule 68.

B. Attorney Fees Under I.C. § 12-121 and I.R.C.P. 54

In addition to seeking costs under I.R.C.P. 68, the State of Idaho seeks attorney fees under I.C. § 12-121 which is modified by I.R.C.P. 54(e). Attorney fees are appropriate under I.C. § 12-121 only if the court finds the State is the prevailing party and that the Objectors brought, pursued or defended the case frivolously, unreasonably, or without foundation. The threshold issue for an award of attorney fees under I.C. § 12-121 is a determination of the prevailing party. I.C. § 12-121 establishes a statutory basis for attorney fees, allowing the court to award reasonable attorney fees to the prevailing party.

1. Prevailing Party

Idaho Code § 12-121 is modified by I.R.C.P. 54 which defines the term prevailing party. The term “prevailing party” is defined in I.R.C.P. 54(d)(1)(B) 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.

Here, the court considered the claims, the *Director's Report*, the *Objections* and *Responses*, the progress of the litigation, and the resolution of the case. The dispute in this subcase began when Objectors filed an *Objection* to the *Director's Report*. The *Director's Report* recommended 4.99 cfs on 324 acres within a permissible place of use of 663 acres. The *Director's Report* recommended a total combined annual diversion of 6.48 cfs and a total combined annual volume of 1,134 acre feet.

The Objectors disagreed with the *Director's Report* recommendation for 4.99 cfs to irrigate 324 acres (within a 663 acre permissible place of use) and a total annual volume of 1,134 acre feet when combined with water right 31-02395. The *Objection* filed asked for 8.83 cfs on 658 acres without a combined use limitation. Later, the Objectors asserted entitlement to 4.99 cfs for 663 acres. (*Reply Memo in Support of Summary Judgment* at 8) A later *Amended Director's Report* added just 0.5 acres which raised the acreage slightly and raised the total combined annual diversion volume to 1,135.8 acre feet. The final judgment was the *Partial Decree* which awarded the same volume and acreage contained in the *Amended Director's Report*. The court considered the three components of determining the prevailing party, including the multiple claims, the issues between the parties, and the extent to which each party prevailed on each issue. Ultimately, this court holds that the State of Idaho is the prevailing party.

2. Pursued or Defended

The next step in determining whether to award attorney fees under I.C. § 12-121 is to look to I.R.C.P. 54(e) which modifies I.C. § 12-121. I.R.C.P. 54(e)(1) allows attorney fees only when “the case was brought, pursued, or defended frivolously, unreasonably, or without foundation” The State of Idaho essentially asserts that the place of use was located on such marginal ground and was capable of producing such invaluable forage that Objectors pursuit of the claim and objection were frivolous. Although it is unlikely that Objectors would have prevailed at trial, it cannot be said that the case was pursued frivolously.

The main issues here were quantity, acreage, and volume. Viewing the place of use left an impression that the soil was less productive than some and that the place of use and the irrigation system were not in optimal condition. Objectors may not have prevailed on the kind of quantity, volume, or acreage associated with a more productive farm. However, the court notes that Objectors had witnesses available to testify as to the historic irrigation and productivity associated with the place of use. One of the witnesses had apparently worked on the ground for many years. Under the circumstances, the court cannot say the objections were brought, pursued, or defended frivolously, unreasonably, or without foundation. Accordingly, the court declines to award attorney fees under I.C. § 12-121 and I.R.C.P. 54.

C. Attorney Fees Under I.C. § 12-123

Idaho Code §12-123 provides for recovery of attorney fees as a sanction for frivolous conduct in civil cases. The code defines frivolous conduct under this section as conduct of a party or his counsel where:

- (i) the conduct serves merely to harass or maliciously injure another party to the civil action;
- (ii) the conduct is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

The court finds no conduct that served to harass or maliciously injure the State of Idaho in this subcase. Furthermore, the court is not convinced that Objectors’ positions were unsupported by fact or unwarranted under existing law or a good faith argument for an extension, modification, or reversal of existing law. The Objectors relied on case law

regarding beneficial use and irrigation of natural uncultivated pasture. In addition, Objectors apparently relied on a fact witness in claiming the irrigated acres as they did. Accordingly, the court declines to award attorney fees pursuant to I.C. § 12-123.

D. Costs as a Matter of Right

I.R.C.P. 54(d)(1) governs the determination of costs to the party entitled to costs under Rule 68 offers of judgment.

1. Experts

Rule 54(d) allows certain costs to the prevailing party as a matter of right, including expert fees. The State of Idaho requested Costs of Right for six experts including Dr. Robert Hill, Dr. Wayne Burkhardt, David Shaw, Norman Young, Glen Logan, and Dr. Dale Stukenholtz. *See State of Idaho's Memorandum of Costs and Attorney Fees* at 4. I.R.C.P. 54(d)(1)(C)(8) allows the prevailing party reasonable expert witness fees for an expert who testifies at a deposition or at a trial of an action not to exceed the sum of \$2,000 for each expert witness for all appearances.

The court holds that the State is not entitled to the costs of its experts where those witnesses did not testify at a deposition or at trial. The rule does not allow the State to recover the \$2,000 requested for Dr. Hill, Dr. Burkhardt, David Shaw, Norman Young, and Glen Logan. The State is awarded its costs for witness Dr. Dale Stukenholtz as claimed in the amount of **\$442.50**. Thus, the State is entitled to Costs of Right for its experts in the amount of **\$442.50**. *See State of Idaho's Memorandum of Costs and Attorney Fees* at 4.

2. Deposition Reporting/Transcribing

Idaho Rule of Civil Procedure 54(d)(1)(C) allows charges for reporting and transcribing of depositions taken in preparation for trial and for charges for one copy of any deposition taken. The State of Idaho requests costs for the depositions of Joe and Omar Llamas, Dale Stukenholtz, Bryce Contor, and Paul Stukenholtz. Objectors argue that the State is not entitled to the costs for Paul Stukenholtz's deposition because Objectors deem that deposition unnecessary.

Paul Stukenholtz was substituted for Objectors' first expert, Dr. Dale Stukenholtz. Dr. Stukenholtz died during the time period of this litigation. Objectors then identified Dr. Stukenholtz's son, Paul Stukenholtz, as their expert. Objectors assert that since Paul

Stukenholtz adopted the expert report of his father and relied on the same field data collected by his father, the deposition of Paul Stukenholtz was unnecessary. The court disagrees. Paul Stukenholtz is a different expert than Dr. Stukenholtz. Paul Stukenholtz has different education and experience than his father. Although Paul Stukenholtz was expected to adopt his father's report and to rely on the same field data as his father, the State was entitled to take his deposition and probe the bases for his expert opinions. Therefore, the State is entitled to **\$2,012.10** as requested for deposition reporting and transcribing. *See State of Idaho's Memorandum of Costs and Attorney Fees* at 4.

E. Discretionary Costs

The State of Idaho requests **\$101,226.05** in discretionary costs under I.R.C.P. 54(d)(1)(D). Under Rule 54(d)(1)(D), additional costs not enumerated as costs as a matter of right, or in amounts in excess of those allowed as costs as a matter of right are allowed if there is a showing that the costs were "necessary and exceptional costs reasonably incurred and should be assessed in the interest of justice."

The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance.

I.R.C.P. 54(d)(1)(D).

The State argues that this case was exceptional and extraordinary because it was critical to overall litigation in the SRBA relating to the State's water management. Surface water users have alleged in other cases that the State has mismanaged the Eastern Snake Plain Aquifer by allowing too many junior ground water users to pump from the aquifer. Therefore, the State feels obligated to litigate where excessive water quantities are asserted. Consequently, this subcase was litigated in order to avoid charges of mismanagement by surface water users.

The State also argued that the irrigation methods utilized by Objectors such as wild flooding with sporadic dikes presented novel issues. Based on the type of irrigation practices asserted by Objectors, the State conducted an economic analysis of whether the practices were a beneficial use. The State also hired an expert to determine whether the additional forage

produced by these methods costs more to produce than it was worth. The State asserts these costs were necessary and exceptional costs reasonably incurred under Rule 54. The main thrust of the State's argument is that this was an "exceptional and extraordinary case" because it was critical to overall litigation strategy in the SRBA. The State's argument points to allegations by other parties that the State has mismanaged the Eastern Snake Plain Aquifer by allowing excessive pumping. Thus, the State asserts that this subcase was exceptional because it raised the question of excess water. The State also urges that Objectors' unusual irrigation of stone-covered land raised exceptional issues.

The State's arguments are well constructed; however, the court views the issues in this subcase as unusual, but not "exceptional" within the meaning of I.R.C.P. 54. For example, the State's litigation strategy is undoubtedly influenced by its management role for the Eastern Snake Plain Aquifer. That management responsibility involves oversight of a huge number of water users who pump from the aquifer. It cannot be said that a connection to the aquifer is enough to convert a subcase into an "exceptional" case under Rule 54.

Next is the question of the "exceptional" nature of the issues presented. The State explains that the wild flooding methods on stone-covered land utilizing a primitive conveyance system with sporadic dikes presented novel issues. Certainly the irrigation methods used, the type of soil and land covered, and the primitive nature of the ditch system were facts which weighed in favor of the results sought by the State. Ultimately, however, the court cannot say that these facts or issues were so novel as to be "exceptional" under Rule 54. Thus, the court declines to find the additional costs were "necessary and exceptional costs reasonably incurred" which should be assessed in the interest of justice.

1. Expert Fees in Excess of Amount Allowed as a Matter of Right

The State of Idaho requested Expert Fees in the amount of **\$99,848.43** in addition to the fees requested as a matter of right and total discretionary fees (including expert fees) in the amount of **\$101,226.05**. *See State of Idaho's Memorandum of Costs and Attorney Fees* at 5. The court is not inclined to award these costs, as it finds the case was not exceptional.

2. Other Additional Costs

The State of Idaho requests additional costs for meals and lodging of its attorneys in the amount of **\$1,234.62**. See *State of Idaho's Memorandum of Costs and Attorney Fees* at 5 – 7. The court declines to award these costs since this case was not exceptional.

F. Attorney Fees

In addition to Discretionary Costs of **\$101,226.05**, the State of Idaho asks for attorney fees in the amount of **\$81,216.55**. See *State of Idaho's Memorandum of Costs and Attorney Fees* at p.7. The State asserts these fees as the prevailing party on the argument that Objectors brought and pursued the claim and *Objections* to this water right frivolously, unreasonably, and without foundation under I.C. § 12-121 and I.R.C.P. 54(e). In the alternative, the State asserts that it is entitled to attorney fees under Idaho Code § 12-123.

1. I.R.C.P. 54(e) and I.C. § 12-121

Idaho Rule of Civil Procedure 54(e)(1) does not provide an independent basis for awarding attorney fees, but allows the court to award reasonable attorneys fees to the prevailing party when provided for by any statute or contract. Rule 54(e)(1) provides for attorney fees under I.C. §12-121 if the court finds that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation.

The issues in dispute throughout the litigation were quantity, acreage, and volume. The Objectors advocated that they were entitled to irrigate 663 acres with a rate of diversion that produced 3.5 acre feet per year of water. The *Director's Report* recommended a smaller acreage with a smaller amount of water.

The State of Idaho asserts that Objectors pursued their claim to the uncultivated pasture grass or defended the *Objections* unreasonably and without foundation. The argument is that the continued pursuit of the claim and *Objections* after assessing the *Director's Reports*, State's Offers of Judgment, and the State's expert reports was unreasonable. Since the case settled, however, the court did not have the benefit of listening to the Objectors' witnesses such as the man who farmed the land.

The parties ended up settling for an acreage and quantity very close to the *Director's Report* recommendation after considerable expenditure and effort by the State. It seems unlikely, in hindsight, that Objectors would have prevailed on their assertions of acreage and

quantity. But the court cannot say that Objectors' assertions were plainly fallacious or not fairly debatable. Objectors apparently had farm employees who would testify to the claimed amount being used on the place of use. Additionally, Objectors secured an expert, Bryce Contor, to testify that the acreage asserted was appropriate. It should be noted that Mr. Contor was previously employed by IDWR. Therefore, Objectors' assertions appear to be supported by fact witnesses and an expert, and those assertions remained debatable. The court concludes that Objectors' assertions were not plainly fallacious. The court cannot conclude that the claim or *Objections* were pursued or defended frivolously, unreasonably, or without foundation. Accordingly, the court declines to award attorney fees pursuant to Rule 54(e) and I.C. § 12-121.

2. I.C. § 12-123

As set forth previously in this decision, the court does not find frivolous conduct which supports an award of attorney fees under this section. Specifically, the court found no conduct that served merely to harass or maliciously injure another party. In addition, the court did not find Objectors' conduct was unsupported in fact or unwarranted under existing law.

IV. ORDER

Based on the foregoing, it is hereby ORDERED that the *Motion for Costs and Attorneys Fees of the State of Idaho* is **GRANTED** in part and **DENIED** in part.

The State of Idaho prevailed in its request for costs under I.R.C.P. 68 because Objectors rejected the May Offers of Judgment and did not obtain a *Partial Decree* more favorable than the Offers of Judgment. Therefore, the State is entitled to recover its Costs of Right.

The State of Idaho did not prevail in its request for attorney fees under I.C. § 12-121 and I.R.C.P. 54(e) because the court determined Objectors did not bring or pursue its claim frivolously, unreasonably, or without foundation.

The State of Idaho did not prevail in its request for attorney fees as a sanction for frivolous conduct under I.C. § 12-123. The court concurred that Objectors' position on this water right claim was unlikely to prevail, but did not find the requisite frivolous conduct.

The court awards the State of Idaho Costs of Right in the amount of \$2,054.60. The State of Idaho litigated this manner with thoroughness and precision. Its presentations were

outstanding. Nevertheless, the court cannot say that the case was exceptional or extraordinary. Accordingly, the court declines to award the additional amount sought for discretionary costs or for attorney fees.

DATED December 31, 2008.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER RE: COSTS AND ATTORNEY FEES was mailed on December 31, 2008, with sufficient first-class postage to the following:

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