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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

**MOTION TO ALTER OR AMEND
SPECIAL MASTER'S REPORT
AND RECOMMENDATION RE:
JANICEK'S REQUEST FOR
ATTORNEY FEES**

COMES NOW Nampa & Meridian Irrigation District (NMID), by and through its attorneys of record, Ringert Law Chartered, and moves this Court to amend its Special Master's Report and Recommendation Re: Janicek's Request for Attorney Fees issued in this subcase on December 22, 2008. This Motion is supported by the record already before the Court, including the parties summary judgment briefs, affidavits and NMID's Memorandum in Opposition to Janicek Properties' Request for Attorney Fees and Costs.

MOTION TO ALTER OR AMEND SPECIAL MASTER'S REPORT AND
RECOMMENDATION RE: JANICEK'S REQUEST FOR ATTORNEY FEES - Page 1

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I. INTRODUCTION

On or about August 28, 2008, Janicek Properties (Janicek) submitted a Memorandum of Costs and Requests for Attorney Fees seeking to recover \$3,939.41 in discretionary costs and \$43,320.50 in attorney fees against NMID and the United States Bureau of Reclamation (BOR). Janicek's request is premised on the assertion that the position of NMID and BOR were frivolous, unreasonable and without merit. Following responsive briefing by the parties and a hearing, on December 22, 2008, the Special Master's issued a Report and Recommendation Re: Janicek's Request for Attorney Fees which found that NMID pursued one of the major issues addressed in the *Summary Judgment Decision* without foundation, and the Special Master awarded \$20,038.25 in attorneys' fees and \$627.99 in discretionary costs.

NMID is moving the Court to amend the Recommendation because its position was not frivolous, unreasonable or unfounded. Contrary to the Special Master's Recommendation, facts supporting NMID's interest in the Purdam Drain were presented by both Janicek and NMID. In fact, NMID's interest in the Purdam Drain was established and/or conceded by Janicek in its opening briefing. Janicek's summary judgment motion and briefing established the factual and legal basis for NMID's easement for the Purdam Drain, including the following: (a) NMID's contractual rights with BOR to the Purdam Drain; (b) that the Purdam Drain was constructed by BOR for NMID; (c) that NMID received benefits from the construction, deepening or widening of the Purdam Drain; (d) that NMID paid the construction; (e) that as a direct result of the construction of the Purdam Drain additional water was developed; and (f) that NMID had a right to the water developed in the Purdam Drain.

Thus, before NMID even filed a responsive brief or affidavit, NMID's interest in the Purdam Drain had been established. Nevertheless, NMID presented these same facts, and more, establishing: (a) NMID's continuous operation and maintenance of the Purdam Drain since it was constructed; (b) the fact that the Purdam Drain was a constructed drain at the location of Janicek's point of diversion; and c) that NMID did beneficially use the water in the Purdam Drain for delivery to its landowners. All of these facts were in the record, and it is important to keep in mind that this matter came before the Court as a result of Janicek's motion for summary judgment. Thus, at summary judgment stage, all facts are to be liberally construed in the favor of the non-moving party/NMID.

With respect to NMID's position as to the law, NMID's position was well supported by statutory and case law. NMID never claimed a fee title ownership in the Purdam Drain, but rather that it held ditch rights in the Purdam Drain based upon the above-mentioned facts including the construction, operation, maintenance of the Purdam Drain by NMID, payment for the construction by NMID, contracts which apportioned the water developed in the drain to NMID and NMID's use of the water in the Purdam Drain. This position was supported by Idaho law, including: (a) I.C. § 55-101 which provides that ditch rights are real property; (b) *Rabido v. Furey*, which provides that a valid water right cannot be initiated by using the ditch of another against his will; c) *Kinney on Irrigation*, providing that "ditch rights" are real property which may be maintained as any other real property; and (d) *Sebern v. Moore*, where there has been no appropriation of waste water prior to the construction of the drain, the water is in the possession of the "owner of the drain" and is not subject to appropriation.

In addition, this Court analyzed each argument made by NMID and determined that, with the exception of what the Court termed the “trespass” issue, NMID’s position and arguments were NOT brought or pursued frivolously, unreasonably or without foundation. Idaho law is clear that each allegation, argument, cause of action or defense is not analyzed to determine whether each is without foundation. Rather, “if there is a legitimate, triable issue of fact, attorney fees **may not** be awarded under I.C. § 12-121, even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.” *Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518, 20 P.3d 702 (2001) (emphasis added). Here, the Court has determined that NMID’s other arguments were not frivolous, unreasonable or without foundation and thus attorney fees under I.C. § 12-121 may not be awarded.

II. ARGUMENT

A. NMID’s Position was Not Frivolous, Unreasonable or Without Foundation.

This Court’s Recommendation included the following statement regarding NMID’s position as a basis for awarding attorney fees:

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)?

Recommendation, pg. 5 of 12. In other words, the Court is critical of NMID’s explanation of its ownership interest in the Purdam Drain acquired by agreement or operation of law such as prescription or statute. However, NMID’s interest in the Purdam Drain via a right-of-way or easement was not disputed by Janicek, was in fact conceded by Janicek, and was not an issue in this

subcase. This view is supported by the summary judgment standard in which all facts are to be liberally construed in favor of the non-moving party/NMID.

1. Facts Supporting NMID's Position were Presented/Conceded by Janicek.

Janicek's opening Memorandum in Support of Summary Judgment provided that "NMID, at most, holds an easement in Purdam Gulch Creek." *Janicek's Memorandum*, pg. 6. Janicek goes on to explain that the patent for the property was subject to "a reservation of a right-of-way for ditches and canals constructed by the United States." *Id.* Janicek further concedes that this would include "a statutory easement or right-of-way such as recognized by Idaho Code § 42-1102 for the delivery of irrigation water. . . ." *Id.*¹ Janicek then presented argument that NMID was conveyed whatever interest the United States may have had "in ditches, canals and other **facilities that the United States originally constructed** within NMID's boundaries, including whatever interest it may have had in a right-of-way for drainage coincident with the course of Purdam Gulch Creek." *Id.* at 6-7 (emphasis added). Thus, Janicek, in his own briefing, had conceded NMID's easement and right-of-way interests in the Purdam Drain, including statutory rights under I.C. § 42-1102. Whether or not Janicek's argument was in the alternative or not, given the summary judgment standard construing all facts in NMID's favor, it was not necessary for NMID to present additional facts as to what interest NMID acquired through operation of law, statute or prescription.

It was also not disputed by Janicek that the Purdam Drain was constructed via deepening and straightening "by BOR or NMID to facilitate drainage." *Id.* at 7. While Janicek may have disputed

¹ Janicek attempts to suggest that I.C. § 42-1102 only applies to the delivery of irrigation water. First, it was undisputed that the Purdam Drain is used for the delivery of irrigation water. Second, I.C. § 42-1107 provides that right of way for drains shall be regarded as equal to irrigation canals.

whether there was a natural watercourse prior to construction, Janicek presented the 1915 Contract between NMID and BOR which provided for the construction and NMID's payment for the Purdam Drain. *Id.* at 7-8; see also *Exhibit C to the Affidavit of Michael Lawrence*. Janicek made it clear that "[t]here is no dispute that the BOR actually deepened and straightened Purdam Gulch Creek to facilitate drainage of lands waterlogged by inefficient irrigation practices." *Id.* at 8. Thus, not only did Janicek concede NMID's easement and right-of-way rights in its opening brief, but Janicek also conceded that the Purdam Drain was constructed, or at least deepened and straightened, for NMID's benefit. Janicek also presented facts that NMID paid for such a benefit and Janicek presented the 1915 Contract which contemplated the development of water in the drainage system, and provided NMID the right to such developed water.

Accordingly, prior to NMID filing a responsive brief in this matter, facts were presented by Janicek to establish NMID's interest in the Purdam Drain, including: (a) NMID's easement and right-of-way rights; (b) NMID's contractual rights with BOR; c) the Purdam Drain was deepened and widened by BOR or NMID; (d) NMID received benefits from the construction, deepening or widening of the Purdam Drain; (e) NMID paid the construction; (f) as a direct result of the construction of the Purdam Drain additional water was developed; and (g) NMID had a right to the water developed in the Purdam Drain. Again, these facts were presented by Janicek, were to be liberally construed in the favor of NMID, and for this Court to determine that NMID presented no facts to support its interest is incorrect.

2. NMID Responded to Facts Presented by Janicek which Remained in Dispute.

NMID did not take a “cavalier approach,” as characterized by the Special Master, with respect to its position in this subcase. Even though Janicek had already conceded NMID’s easement and right-of-way rights, the construction of the Purdam Drain via at minimum deepening and widening, and presented the 1915 Contract for the construction, payment and apportionment of the water developed in the Purdam Drain, NMID still provided factual background and affidavits supporting the very same facts.² In addition, NMID responded to the issues which remained in dispute. For example, while Janicek conceded that the Purdam Drain was deepened and widened by BOR or NMID, Janicek suggested that the Purdam Drain was a natural watercourse. In response, NMID presented facts, via an Affidavit of Jerry Gregg, that the relevant reach where Janicek’s claimed point of diversion is located did not exist prior to 1916 and did not exist prior to the construction of the drain. *NMID’s Memorandum*, pg. 4. Thus, Janicek’s argument that the Purdam Drain was a natural watercourse containing water which was subject to appropriation was disputed by NMID via Janicek’s own concessions and evidence that the drain did not exist at the location of Janicek’s diversion prior to the construction of the drain. At the very least, construing the facts in NMID’s favor, there existed disputed facts which precluded summary judgment on this issue. While the Special Master determined that whether the Purdam Drain is a natural watercourse is immaterial, Janicek argued that it was a natural watercourse subject to appropriation and NMID presented facts

² NMID also presented evidence of a License Agreement entered into with the claimant that involved the Sky Pilot Drain which was also part of the 1915 Contract and which also involved the construction, operation, maintenance and payment for the drain by NMID. *See Affidavit of S. Bryce Farris*. The License Agreement provided that NMID is the “owner” of the drain together with an easement. While the Court did not agree that this estopped Janicek in this subcase because of a distinction, evidence was presented of NMID’s ownership which was not disputed.

and argument in dispute.

In its opening briefing Janicek also argued that NMID did not beneficially use any of the water in the Purdam Drain. *Janicek Memorandum*, pg. 10. This argument was incorrect, and NMID presented facts in dispute which demonstrated that NMID did use the Purdam Drain to deliver water to its landowners. *See Affidavit of John Anderson*. Again, NMID focused on the facts which were in dispute and not the facts which had already been presented and/or conceded by Janicek.

3. NMID's Position was Supported by the Facts and Law.

NMID never argued that it owned a fee title strip of land underneath the Purdam Drain. Rather, NMID argued that:

The Purdam Drain, which was constructed and/or paid for by NMID in 1915 is no different from NMID's Ridenbaugh Canal or other laterals. As with those facilities, the Purdam Drain is a facility owned, operated and maintained by NMID and a landowner cannot simply stick a pump in NMID's facilities and create their own independent water right. Indeed, it is a well settled rule of Idaho law that an appropriation of water cannot be made or a water right issued to appropriate water acquired through trespass upon the land of another. *Idaho Power Co. v. Buhl*, 62 Idaho 351, 111 P.2d 1088 (1941); *Jones v. McIntire*, 60 Idaho 338, 344, 91 P.2d 373 (1939). **Nor can a valid water right be initiated by using the ditch of another against his will.** *Rabido v. Furey*, 33 Idaho 56, 62, 190 P. 73 (1920). "Where there has been no appropriation of waste or seepage water prior to the construction of the drain in which such water collects, **said water is in the possession of the owner of the drain**, and is therefore not subject to appropriation under C.S., sec. 5562 [now I.C. § 42-107]." *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927). In this case, the drains, i.e. the Purdam Drain, were constructed and enlarged for NMID and such construction was paid for by NMID.

NMID's Memorandum at 6 (emphasis added).

Again, the facts supporting this argument were either already presented by Janicek or further established by NMID. This argument was also supported by Idaho law. As explained in NMID's Memorandum in Opposition to Janicek's request for attorney fees NMID's position was supported

by:

Idaho law regarding **ditch and drainage rights** and the case of *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927) and in particular the last sentence of the decision which provided that water collected in the drain was the “owner of the drain” and not subject to appropriation. In that case the “owner of the drain” was the drainage district and which was someone other than the fee title landowner. It is possible for an entity to own the ditch/drain and not own the fee title land. **Indeed, ditch rights, which are distinguishable from water rights, have been held to be real property, owned by irrigation entities and the water within them is not subject to appropriation.**

NMID’s Memorandum in Opposition, pgs. 7-8 (emphasis added).

In *Sebern*, there was no fee title ownership of the drain, but rather the “owner of the drain” was the drainage district which constructed, operated and maintained the drain. As such, the Court held that the water collected in the drain belonged to the owner/drainage district and was not subject to appropriation. The Court’s holding, and NMID’s interpretation of *Sebern*, is consistent with I.C. § 55-101 which provides that “ditch rights” are real property. This position is also consistent with the case law cited by NMID that a valid water right cannot be initiated by using the ditch of another against his will. *Rabido v. Furey*, 33 Idaho 56, 62, 190 P. 73 (1920). The basis of ditch rights being real property, subject to the same protections of as any other real property or estate or land is explained by Kinney on Irrigation as follows:

The works constructed for the means of use of water, consisting of ditches, canals, flumes, or reservoirs, are not in themselves easements, but are land. . . . What the appropriator acquires in this instance is not a ditch or canal as an easement, but an easement for a ditch or canal or other works as the case may be. . . .

[T]he character of property in a ditch, canal, reservoir, or other means of diversion and use of water, is not in and of itself an easement, or servitude, but is a corporeal estate or land, and relative to which any action at law or in equity will lie, which may be maintained as to any other real property.

Kinney on Irrigation and Water Rights, 2d ed., p. 1460-1462, § 833.

With all due respect to this Special Master's decision, NMID's respectfully disagrees that a drain which has been constructed, paid for, operated, maintained and utilized does not include ditch rights which cannot be utilized against its will according to *Rabido*, and according to *Sebern* the water in said drain is in the possession of the owner and not subject to appropriation. NMID is not necessarily attempting to re-argue the merits of this case, but rather to fully explain NMID's position, and to show that NMID's position was well founded by the facts presented in the record and by Idaho law. This Court may determine that NMID read the *Sebern* decision too literally or may determine that drain does not include ditch rights which are protected under *Rabido*, I.C. § 55-101 or Kinney on Irrigation, but that does not mean that NMID's position was unfounded.

B. This Court Cannot Award Attorney Fees Under I.C. § 12-121 if NMID Raised One Valid Argument.

NMID respectfully disagrees that any of the arguments raised by NMID in this subcase were frivolous, unreasonable or without foundation. However, even if this Court declines to amend its Recommendation for such reasons, this Court may not award attorney fees under I.C. § 12-121 due to the Court's own determination that the remaining arguments of NMID were not frivolous, unreasonable or without foundation. Idaho law is clear that:

When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees **may not** be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.

Nampa & Meridian Irrigation District v. Washington Federal Savings, 135 Idaho 518, 20 P.3d 702

(2001) (emphasis added).³ In other words, the “total defense of a party’s proceedings must be unreasonable or frivolous” to award attorney fees under I.C. § 12-121 and “it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued.” *Turner v. Willis*, 119 Idaho 1023, 1025, 812 P.2d 737, 739 (1991) (quoting *Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.*, 119 Idaho 558, 563, 808 P.2d 1303, 1308 (1990)). Recently in *Seiniger Law Office, P.A. v. North Pacific Insurance Company*, 2008 Ida. LEXIS 10, 178 P.3d 606 (2008), the Court held that “I.C. § 12-121 applies to the case as a whole. Were there are multiple claims and defenses, it is not appropriate to segregate those claims and defenses for purposes of awarding attorney fees under I.C. § 12-121.” *Id.* at 21, 178 P.3d at 615.

In this subcase, the Court determined that a remark was necessary despite the fact that Janicek opposed a wastewater remark. In addition, this Court found that with respect to issue Nos. 1, 2 and 4, NMID’s position was not frivolous, unreasonable or unfounded. Accordingly, it is clear that NMID did raise valid/legitimate arguments and attorney fees under I.C. § 12-121 cannot be awarded even if this Court determines that issue No. 3 was unfounded. This Court cannot apportion attorney fees based upon different arguments made by NMID and therefore its decision should be reversed.

³ *Nampa & Meridian Irrigation District v. Washington Federal Savings* was cited in BOR’s briefing in opposition to Janicek’s request for attorney fees and was specifically argued and addressed by counsel for NMID and BOR at the hearing. However, both Janicek and the Court have failed to address the argument and Idaho case law.

C. The Court Inappropriately Considered Other Subcases and/or the Parties Settlement Discussions.

This Special Master stated in the Recommendation that “[u]nlike 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.” *Recommendation*, pg. 7 of 12 (emphasis added). First, it is inappropriate for the Special Master to consider NMID’s position with regard to other subcases when determining attorney fees in this subcase. The context of each and every subcase NMID may be involved, including the specific facts for each subcase and the discussions between the claimant, claimant’s attorneys and NMID were not before the Special Master.

Second, it is inappropriate for this Court to consider the settlement discussions, or lack thereof, between the parties to this subcase pursuant to Rule 408 of the Idaho Rules of Evidence. As stated in *Ross v. Coleman*, 114 Idaho 817, 836, 761 P.2d 1169, 1188 (1988), “[t]here is no authority in a trial court to insist upon, oversee, or second guess settlement negotiations, if any.” Furthermore, it is inappropriate to consider settlement negotiations as a basis for an award of attorney fees. *See Turner v. Willis*, 116 Idaho 682, 778 P.2d 804 (1989). Accordingly, this Court should not consider whether the parties settlement discussions, or whether NMID “sought to settle” with the claimant. Another reason the Special Master could not consider settlement negotiations is that the Special Master was not aware of what settlement discussions were conveyed by either party, including whether or not Janicek sought to settle the subcase with the inclusion of a wastewater remark. In fact, the Special Master’s decision notes that when counsel for Janicek was asked

whether a remark would be necessary, “Counsel for Janicek argued that no such remark would be necessary.” *Memorandum Decision*, pg. 9 of 14. Thus, not only is it inappropriate for the Special Master to consider any settlement discussions, but the Special Master’s criticism of NMID for not “seeking to settle” with Janicek is misplaced by the Special Master’s own decision in which Janicek opposed the inclusion of such a wastewater remark. The bottom line is that the Special Master could not consider NMID’s approach to other wastewater subcases, nor the settlement discussions between NMID and Janicek. Any criticism of NMID regarding its seeking to settle or not is inappropriate.

D. Discretionary Costs.

The Special Master determined that Janicek should be awarded \$500.00 in discretionary costs for title research. First, for the reasons previously stated and those stated herein, NMID disagrees that title research was necessary. Again, NMID never claimed fee title ownership of the real property below the Purdam Drain. Rather, as previously explained, NMID’s position was based upon the ditch rights in the Purdam Drain, its easement and right-of-way rights conceded by Janicek, the construction of the drain, payment for the construction by NMID and the contract apportioning the water developed in the drain and the case law of *Sebern* and *Rabido*. Thus, it was not necessary for Janicek to incur any title research costs.

Second, the expense incurred for title research must be exceptional in relation to similar cases in the SRBA. While NMID contends that title research was not necessary in this subcase, it is not uncommon in the SRBA for a party to review title records to address different issues, claims or objections. The SRBA involves water rights which are real property and which are appurtenant to real property and it is common for a party to conduct title research to resolve issues in the SRBA.

Accordingly, title research in the SRBA is not exceptional and the Court should not have awarded such costs.

In addition, the Special Master awarded photocopy, long distance charges, etc. as discretionary costs. When ruling on a request for discretionary costs the Court “is instructed to make express findings as to why each specified item should be allowed” or not allowed. *Nampa & Meridian Irrigation District v. Washington Federal Savings*, 135 Idaho 518, 20 P.3d 702 (2001) (citing I.R.C.P. 54(d)(1)(D)). The Special Master made no such finding that Janicek’s claim of discretionary cost for “photocopies, long distance charges, etc., – amount to a sum of \$255.97” were exceptional in this case. Instead, the Special Master simply divided the amount in half as a “fair resolution” based upon the premise that some of the costs were incurred in relation to the “trespass” issue.

This determination is in error because the standard applied under I.C. § 12-121 is different than the standard applied to a determination of discretionary costs. This Court cannot award discretionary costs because of speculation that some may have related to a “trespass” issue. To award discretionary costs, the Court must determine that these costs were necessary and exceptional under I.R.C. P. 54(d)(1)(D). With respect to Janicek’s claim for photocopies, long distance charges, facsimile charges, copy expense, courier service and messenger service, the Special Master made no finding that such costs were necessary and exceptional. Moreover, Janicek has not presented any argument as to why such routine expenses would be exceptional in an SRBA subcase. As explained in NMID’s prior brief, “Katy Bar the Door” if the Court is going to start awarding photocopy and long distance charges as exceptional costs in the SRBA. Accordingly, this Court should amend its

Recommendation and deny Janicek's claim for discretionary costs.

E. Prevailing Party.

NMID will rely on its prior briefing and the record with respect to the Special Master's decision as to the prevailing party. However, NMID would like to point out that the Special Master's statement that "[n]either NMID nor BOR prayed for alternative relief in the form of a request for a wastewater remark" is incorrect. The standard objection in the SRBA includes a check the box of the particular elements which are in dispute. It is not the same as a civil case where one can make several counts in a complaint or raise multiple affirmative defenses in response. That being said, NMID does not dispute that its front line argument was that the water right should be disallowed because it was from an NMID facility that was constructed, operated, maintained, paid for and utilized by NMID. However, as the Special Master noted in its Memorandum Decision, "Counsel for NMID argued that any right of Janicek to use the waste water of NMID should be qualified by a remark." *Decision*, 9 of 14. Thus, in the alternative that the Special Master did not disallow the right, this Special Master's own decision confirmed that NMID requested a remark in the alternative.

The Special Masters Recommendation on attorney fees also stated that NMID's rights to its own wastewater were never in dispute and that NMID should have sought to settle this case with a wastewater remark. While the parties settlement negotiations were not before the Special Master for the reasons previously explained, it is clear in the Special Master's own Decision that "Counsel for Janicek argued that no such remark would be necessary." *Id.* Thus, the record is clear that despite this Court's decision that a remark was necessary, Janicek opposed it. NMID's rights in its own

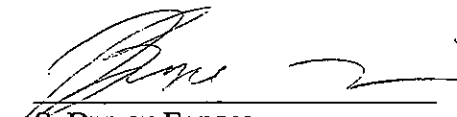
wastewater were in dispute, Janicek opposed recognizing such rights in a remark, and the Special Master found that it was necessary to recognize those rights in a remark in order to protect NMID's paramount rights from future injury. NMID respectfully contends that because NMID's rights were protected and the Special Master did not agree with Janicek's position that "no such remark would be necessary," there should be no prevailing party in this subcase.

III. CONCLUSION

For the reasons stated herein, NMID requests this Court to amend the Special Master's Recommendation Re: Janicek's Request for Attorney Fees. As explained herein, NMID's position was well founded on the facts presented by both Janicek and NMID and was well founded under existing Idaho law. Furthermore, the fact that the Special Master found that all of NMID's arguments, with the exception of one, were valid/legitimate precludes an award of attorney fees under I.C. § 12-121. Idaho law is clear that it is reversible error for a trial court to award attorney fees under I.C. § 12-121 if there is a one valid/legitimate claim or defense. Lastly, this Court should reverse the award of discretionary costs.

DATED this 9th day of January, 2009.

RINGERT LAW, CHTD.


S. BRYCE FARRIS
Attorneys for the NMID

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

☒ U. S. mail, postage prepaid
☐ hand delivery

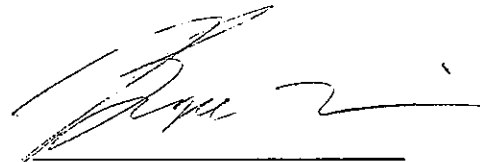
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