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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

**JANICEK'S RESPONSE TO NAMPA &
MERIDIAN IRRIGATION
DISTRICT'S MOTION TO ALTER OR
AMEND**

Janicek Properties, LLC, ("Janicek"), by and through its counsel Givens Pursley LLP, hereby responds to Nampa & Meridian Irrigation District's ("NMID") January 9, 2009 *Motion to Alter or Amend Special Master's Report and Recommendation Re: Janicek's Request for Attorney Fees* ("NMID's Motion"). For the reasons stated below, NMID's Motion should be denied.

INTRODUCTION

The Special Master has recommended that Janicek is entitled to an award of its attorney fees and costs as against NMID. *See Special Master's Report and Recommendation Re:*

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IRRIGATION DISTRICT'S MOTION TO ALTER OR AMEND**

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Janicek's Request for Attorney Fees. ("Special Master's Recommended Order"). Janicek sought reimbursement of its attorney fees and costs following the issuance a fully-dispositive order that granted Janicek summary judgment on its water right claim and held that Janicek is entitled to a water right despite NMID's position that "no water right should exist." See *Memorandum Decision and Order on Motion for Summary Judgment, In re SRBA Case No. 39576, Subcase No. 63-27475* (May 2, 2008) ("Summary Judgment Order").

In its objection to IDWR's recommendation of Janicek's water right claim, NMID asserted that

The claimed water right is within the boundaries of Nampa & Meridian Irrigation District ("NMID") and the source of said claim is a drain which was constructed or enlarged by or for NMID. Said drain is owned, operated, maintained and controlled by NMID and the water within said drain is seepage or waste water that has been developed, captured and/or controlled by NMID. Therefore, said water is not subject to appropriation, would amount to an impermissible trespass, and this claimed water right should not exist. (Emphasis added).

The Special Master's Recommended Order allowed Janicek a portion of its requested attorney fees and costs based on the Special Master's conclusion that

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.

Special Master's Recommended Order at 8.

The gravamen of NMID's objection was that Janicek's water right could not exist because it was diverted by way of an alleged trespass on NMID's claimed ownership of Purdam

Gulch Creek and all of the water that flows in it. The Special Master correctly concluded that 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.” Special Master’s Recommended Order at 8.

NMID now argues that Janicek conceded enough facts to make NMID’s objection legitimate (or at least non-frivolous). NMID is wrong. Janicek has never conceded any fact relevant to NMID’s asserted exclusive ownership of Purdam Gulch Creek. Nor does Janicek agree that the cases cited in NMID’s Motion warrant a change to the Special Master’s recommended award of costs and attorney fees to Janicek.

ARGUMENT

1. Janicek Has Not Conceded Any Relevant Facts Concerning NMID’s Claimed Ownership of Purdam Gulch Creek or the Water In It.

In NMID’s Motion, it argues that Janicek’s summary judgment motion and briefing “established the factual and legal basis for NMID’s easement for the Purdam Drain.” NMID Motion at 2. NMID then lists six alleged concessions of fact that it believes demonstrate the existence of an easement or right-of-way, which NMID then argues sufficiently established its claim of ownership of Purdam Gulch Creek and its waters, and provided a basis for its objection that Janicek’s Water Right “should not exist.”

Notably, NMID’s Motion is the first instance in which NMID has asserted that it claims or holds an easement in Purdam Gulch Creek. In the context of this litigation, which has proceeded through granting of summary judgment and the issuance of a partial decree in favor of Janicek, NMID’s new easement argument is as incongruous as its earlier assertion that it was the prevailing party.

Through discovery, Janicek attempted to discern the basis for and nature of NMID's ownership claim. Janicek propounded requests for admission and interrogatories going specifically to this issue. In response, NMID denied that its claimed title, if any, was limited to a prescriptive easement, and asserted that Janicek's interrogatory asking it to describe any legal interest or right it claimed to Purdam Gulch Creek at Janicek's point of diversion sought "information that is not calculated to lead to the discovery of admissible evidence." NMID proffered only two documents in response to Janicek's production request on this issue: a copy of R.D. Schmidt's February 2008 "Summary of Purdam Drain Hydrologic Investigations," and a copy of NMID's 1915 contract with USBOR governing USBOR's construction of Arrowrock Reservoir and a drainage system within NMID's boundaries, and NMID's repayment obligations to USBOR. However, NMID never attempted to explain how either of these gave it a legal interest in Purdam Gulch Creek or what that interest might be. NMID provided the same responses to the following Janicek Interrogatory:

INTERROGATORY NO. 16.2: Please describe any legal interest or right claimed by [NMID] to Purdam Gulch Creek at Janicek's point of diversion, and set forth each and every fact your [sic] are aware of that supports or tends to support that claim, and further describe the scope of any such legal interest or right, including but not limited to its nature, duration, physical extent, dimensions, and the degree of exclusivity.

See Affidavit of Michael C. Creamer filed contemporaneously herewith. These responses show that, far from asserting that it held an easement (or any legal interest), NMID apparently did not think the issue was relevant to the case.

In any event, Janicek has never conceded that NMID held any interest in Janicek's property, let alone an exclusive ownership interest that would preclude Janicek's appropriation. In its briefing, Janicek conceded only that "at best, the United States only held (and could only

convey) a right-of-way for drainage across the Janicek Property,” and “at most then, NMID could only have acquired a right-of-way through Mr. Janicek’s property coincident with the course of Purdam Gulch Creek for carrying away drainage water. That is a far cry from ownership of the Creek itself.” *Janicek’s Memorandum in Support of Summary Judgment* at 6-7. After again noting in its Reply Memorandum that NMID and USBOR had failed to explain the nature or source of any claimed interest in Purdam Gulch Creek, Janicek stated that “it is conceivable that NMID holds a prescriptive easement across Janicek’s property for conveying drainage water away from its irrigated lands. . . . Whatever interest USBOR had and that NMID may have acquired, it was subject to Janicek’s existing rights.”¹ *Janicek’s Reply Memorandum in Support of Summary Judgment* at 12 (“Reply Memorandum”).

But even if Janicek had conceded, admitted or stipulated that NMID owns a drainage easement, the existence of a drainage easement across Janicek’s property does not begin to establish that Janicek’s diversion of water from Purdam Gulch Creek “would amount to an impermissible trespass, and this claimed water right should not exist.” It was incumbent on NMID to present relevant evidence in support of its objection. It failed to do so. The Special Master appropriately found that NMID pursued its litigation frivolously and without foundation.

2. Cases Cited by NMID are Inapposite to Its Argument.

NMID argues that as long as it proffered at least one issue that was not “frivolous” then it can avoid paying a prevailing party’s attorney fees for defending against the frivolous ones. In support of this argument, NMID inappropriately relies on several Idaho attorney fees opinions. *See Seineger Law Office v. North Pacific Insur. Co.*, 145 Idaho 241, 178 P.3d 606 (2008), *Nampa & Meridian Dist. v. Washington Federal Savings*, 135 Idaho 518, 20 P.3d 702 (2001);

¹ In a footnote, Janicek added: “Janicek does not concede this point.”

Turner v. Willis, 119 Idaho 1023, 812 P.2d 737 (1991). Although the facts in each of these cases vary, they are consistent on two relevant points. First they, of course, recognize the right to an award of attorney fees to a prevailing party where the non-prevailing party pursued the litigation frivolously. Second, they establish the principle that a non-prevailing party may be held liable for attorney fees unless it pursued at least one legitimate, triable issue. NMID cannot establish that it did so. The Special Master's enumeration of three sub-issues notwithstanding, NMID consistently pursued its objection on one basis alone—its exclusive ownership of Purdam Gulch Creek and all the water in it.

NMID's "easement" argument could not have been a "triable issue" since it makes its first appearance now in NMID's Motion. To be clear, this litigation was *never* about whether NMID or USBOR held an easement across Janicek's property. NMID never alleged in the main case that it claimed an easement interest in the Janicek property that supported its ownership/trespass position. But even if NMID had, it would not have been a triable issue since, as discussed in Janicek's Reply Memorandum at 12, the law is well-settled that one cannot "trespass" on an easement.

NMID complains that the Special Master appears "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." NMID Motion at 4. Janicek points out, however, that it is hard to criticize an explanation that NMID never offered.

NMID further suggests that since Janicek had already "conceded" NMID's interest in Purdam Gulch Creek, NMID simply needed to litigate whether Purdam Gulch Creek was a natural watercourse—an issue it now characterizes as a disputed issue of fact that should have

precluded summary judgment. In doing so NMID glosses over the fact that Janicek began its reply brief on summary judgment with the following statement:

NMID incorrectly asserts that the premise of Janicek's claim is that Janicek has made an appropriation from a natural water course. And both NMID and USBOR have made a considerable attempt to create disputed facts on this issue. But to be very clear, as a matter of law, Janicek's appropriation is valid regardless of whether Purdam Gulch Creek is a natural water course.

Janicek Reply Memorandum at 3. (Emphasis added.). In any case, this dispute over attorney fees is not the appropriate place to re-litigate the Special Master's Summary Judgment Order.

Nor is this the appropriate place to challenge whether the Special Master properly interpreted *Sebern v. Moore*. As the Special Master found in his Summary Judgment Order, "[NMID's] interpretation of the statement in *Sebern* essentially creates a license for the continued wasting of water." Summary Judgment Order at 9. Such an interpretation is contrary to well-settled principles of Idaho water law, including the beneficial use of water without waste as acknowledged by the Special Master. As a result, this was not a triable issue.

In the end, there were no legitimate, triable issues in this case. NMID's entire Objection that "said water is not subject to appropriation, would amount to an impermissible trespass, and this claimed water right should not exist" was fully and finally disposed of by way of summary judgment and a partial decree confirming Janicek's claim to a water right out of Purdam Gulch Creek. Consequently, there is no remaining, legitimate, triable issue in this case. Indeed, if NMID thought there was, one would expect that it would have challenged the Special Master's Summary Judgment Order—but it did not. Whether NMID or USBOR hold an easement does not affect this outcome in the least.

This case appears to present the flip-side of the question presented in *Turner v. Willis*, *supra*. There, the District Court had awarded attorney fees to a plaintiff where it found that the

defendant had failed to offer to pay any of the plaintiff's medical costs prior to trial even though its had no basis to pursue and did not pursue a defense to liability at trial, and the trial proceeded on the issue of damages. *Id.*, 812 P.2d at 737-38. On appeal, the Supreme Court styled the issue as follows:

[w]hether or not attorney fees may be awarded under I.C. § 12-121 and I.R.C.P. 54(e)(1) when there is a legitimate, triable issue of fact to be submitted to a jury, but one (or perhaps both) of the parties assert legal or factual issues which have no support in the law or the facts. Stated another way, will the insertion of a factual or legal issue, which has no foundation in the evidence or in the legal jurisprudence of this state authorize a trial court to award attorney fees against a party submitting such an unsupported legal or factual claim in a case which does contain a legitimate, triable issue of fact or law?

Id., 812 P.2d at 738.

Here, the issue as pursued by NMID was whether it owned Purdam Gulch Creek and all the water in it, such that Janicek's diversions of water were a trespass and would not effect a valid appropriation. NMID's attempt to backfill its frivolous litigation strategy by now inserting an easement theory into the concluded case does not alter the objectionable manner in which it continued to press its trespass theory before the Special Master. In any event, as a matter of Idaho law, even if NMID had pursued and established the nature and extent of any easement or other "ditch rights" it might claim—which it did not—that still would have been insufficient support for its trespass argument. *See Luce v. Marble*, 142 Idaho 264, 274, 127 P.3d 167, 177 (2005) (under Idaho law, trespass is the wrongful interference with the right of exclusive possession of real property).

CONCLUSION

NMID'S Motion to Alter or Amend should be denied. The Special Master's Recommended Order correctly concluded that NMID pursued its claim of exclusive

ownership/trespass frivolously and without foundation. NMID's attempt to insert a new issue in a concluded case (easement), and to suggest it did not even need to "pursue" it because Janicek had conceded it, is untimely, self-serving, and ultimately, irrelevant to the result in this case. The Special Master's Recommended Order granting Janicek's request for and award of its attorney fees and costs as against NMID should stand.

Respectfully submitted this 21st day of January, 2009.

GIVENS PURSLEY LLP

By

 FOR

Michael C. Creamer

Attorneys for Janicek Properties LLC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st of JANUARY, 2009, the foregoing was filed, served, or copied as follows:

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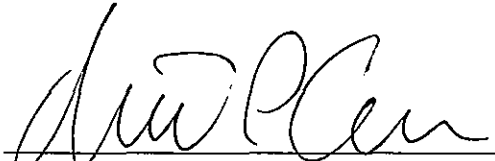
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