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with the exception of two issues raised in Janicek's Response.

Janicek's Response suggests that there can be no trespass on an easement, and thus, NMID's position was frivolous. However, whether NMID held an easement for the Purdam Drain was not the gravamen of NMID's argument. Rather, NMID was pointing out that to the extent the Special Master was expecting facts supporting NMID's right of way, prescriptive rights or easement rights, facts were in the record to support such rights. Moreover, these facts were presented by Janicek in its briefing, were not disputed, and given the summary judgment standard of construing the facts in a light most favorable to the non-moving party, were not at issue in this subcase. NMID did not take the myopic position that Janicek could not create a valid water right because NMID held an easement. Rather, as previously explained in much more depth, NMID's position was based upon its construction, payment for, operation, maintenance and use of the Purdam Drain and the ditch rights and other rights which existed. Noticeable absent from Janicek's Response was any discussion of NMID's ditch rights, including the statutory and case law supporting the ditch rights being real property (I.C. § 55-101), *Rabido v. Furey*, *Kinney on Irrigation* or *Sebern v. Moore*.

Also interesting is Janicek's response, or lack thereof, to the case law which provides that attorney fees cannot be awarded under I.C. § 12-121 if one legitimate issues is raised. Janicek does not dispute the case law but rather argues that, despite the Special Master's decision to contrary, all of NMID's arguments were frivolous and unreasonable. Janicek's response then goes so far as to boldly argue that "[i]n the end, there were no legitimate, triable issues in this case." This argument is in direct conflict with the Special Master's prior decisions and is not supported by the record.

II. ARGUMENT

A. NMID's Position Was Not Frivolous, Unreasonable or Without Foundation.

As explained in NMID's prior briefing, NMID's position in this subcase was based, *inter alia*, on case and statutory law protecting the ditch rights and other rights of NMID, including, I.C. § 55-101, *Rabido v. Furey*, Kinney on Irrigation and *Sebern v. Moore*. The Special Master stated that NMID did not explain its interest acquired by operation of law, prescription or statute. NMID then explained that NMID's interests, especially any prescriptive easement or statutory right-of-way interests under I.C. § 42-1102, were not at issue due to Janicek already conceding these issues, or if not expressly conceded, issues of fact that construed in the favor of the non-moving party were not at issue in this subcase.

Janicek has now attempted to turn this issue into whether or not one can trespass on an easement. Again, absent from Janicek's Response is any discussion of NMID's claimed ditch rights, which are real property under I.C. § 55-101, *Rabido v. Furey*, which provides that a water right cannot be initiated using the ditch of another, Kinney on Irrigation, which provides that ditch rights are to be afforded the same protections as any other real property interest or *Sebern v. Moore*, which provided that the water collected in the drain was not subject to appropriation.

With respect to Janicek's arguments as to trespass upon an easement, the parties may very well have a spirited argument as to whether easement rights may be trespassed upon. For instance in *Skelton v. Haney*, 116 Idaho 511, 777 P.2d 733 (1989) the district court held that fences constructed within an easement "constituted a trespass on this easement" and the findings, conclusions and judgments of the district court were affirmed in all respects by the Idaho Supreme

Court. *Id.* at 512-513, 777 P.2d at 734-735. However, whether or not an easement may be trespassed upon is not the issue before the Special Master. Rather the issue is whether NMID had a good faith argument for its position. Put another way, the issue is not as restrictive as to whether an easement may be trespassed upon, but rather whether NMID's rights, including easement rights, ditch rights, statutory rights or other rights precluded Janicek from establishing a valid water right in the Purdam Drain. As previously noted, Janicek's Response fails to even address these other issues, rights, statutory law or case law supporting NMID's position.

B. Attorney Fees Cannot be Awarded Under I.C. § 12-121 if NMID Raised One Valid Argument.

As NMID previously explained, Idaho law is clear that attorney fees cannot be awarded under I.C. § 12-121 if one legitimate issue is raised. This is the case even if a party asserted one claim, defense or argument that could be considered unfounded and it is not appropriate for the court to segregate claims or defenses to determine which are valid and legitimate and which are not. NMID then points out that the Special Master found that with the exception of what the Special Master termed the "trespass issue" all of the remaining arguments of NMID were not frivolous, unreasonable or unfounded. Thus, attorney fees cannot be awarded under I.C. § 12-121 in this subcase.

Janicek's Response does not disagree with the Idaho law presented by NMID, but rather argues that the case law is inapposite because NMID cannot establish one legitimate, triable issue and "there were no legitimate, triable issues in this case." This argument is obviously in direct conflict with the Special Master's decision, but would also mean that all of the issues raised by BOR

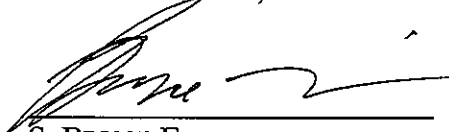
would also be frivolous, unreasonable or unfounded. As the Special Master found, this is not the case and the assertion by Janicek that there were no valid, triable issues in this case is itself an unreasonable and unfounded argument. NMID respectfully disagrees that any of its arguments were not supported by the facts and record before the Special Master for the reasons previously explained, but it is clear that there were legitimate, triable issues raised in this subcase and accordingly attorney fees may not be awarded under I.C. § 12-121.

III. CONCLUSION

For the reasons stated herein, and for the reasons previously stated, NMID requests this Court to amend its Recommendation Re: Janicek's Request for Attorney Fees. 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 Court 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 its award of discretionary costs.

DATED this 4th day of February, 2009.

RINGERT LAW, CHTD.



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2009, a true and correct copy of the foregoing was served upon all parties listed below by:

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

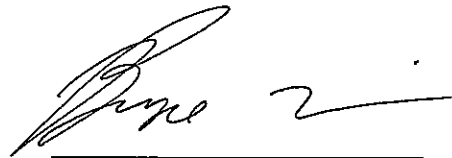
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