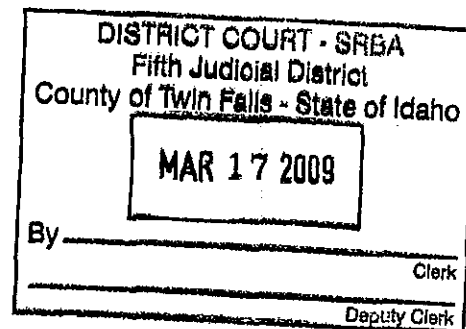


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Attorneys for Sarah Jane Smith

**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 No.: 63-7539

Case No. 39576

**SARAH JANE SMITH'S NOTICE OF
PARTICIPATION AND RESPONSE TO
WHITTED'S MOTION TO ALTER OR AMEND**

Pursuant to SRBA AOI Rule 13(a), Sarah Jane Smith hereby provides notice of her participation in Craig Whitted's Motion To Alter or Amend ("Motion to Alter" or "Motion") and responds to the Motion as follows:

I. INTRODUCTION

Through a tortured interpretation of the facts and without citing any new authority, Craig Whitted ("Whitted") again objects to the Court's award of costs and attorneys' fees and invites the Court to alter or amend its ruling. Sarah Jane Smith has previously analyzed the issues presented in Whitted's Motion to Alter and incorporates by reference her Response to Whitted's Motion to Disallow Fees, filed November 19, 2008. The Court should deny Whitted's current Motion and affirm its ruling awarding Smith her costs and attorneys' fees because Whitted has not asserted any valid justification for altering or amending the Court's recommendation concerning costs and attorneys' fees.

**SARAH JANE SMITH'S NOTICE OF PARTICIPATION AND RESPONSE TO WHITTED'S MOTION
TO ALTER OR AMEND - 1**

II. ANALYSIS

A. Whitted Changed Positions in this Litigation.

The Court properly found Whitted assumed a new position in this litigation with the filing of his Cross Motion for Summary Judgment that, for all intents and purposes, functioned as an amendment to the pleadings. The Court then exercised its discretion to allow the amendment, but required payment of Sarah Jane Smith's costs and attorneys' fees as a condition to the amendment pursuant to Idaho Rule of Civil Procedure 15(a). (*See* Order dated February 13, 2008). These findings and the award of attorneys' fees were proper. Rule 15(a) gives the Court the discretion to allow a party to amend a pleading and further allows the Court to "make such order for the payment of costs as it deems proper." *See also Curtis v. City of Ketchum*, 720 P.2d 210, 214 (Idaho 1986)

Whitted argues he only asserted the Well in question was drilled in trespass, but that after it was drilled, Sarah Jane Smith and her predecessors-in-interest used the Well by permission. (*See* Memorandum in Support of Motion to Alter or Amend at p. 2-3). This argument, however, is inconsistent with the record, especially the hearings at which Whitted made very candid admissions concerning the nature of his claim and his theory that the Well was both drilled and used in trespass.

In his Motion, Whitted again ignores and contradicts the representations he made to the Court and Sarah Jane Smith both at the hearing to allow the consideration of his untimely Objection and, more recently, at the July 1, 2008 pre-trial conference. Whitted's representations at these hearings defined the scope of his Objection. As the Court is aware, Whitted filed his Objection late, without seeking leave of Court prior to filing it. The Court, in an exercise of its discretion, held a hearing to determine whether or not to allow the Objection and, based upon Whitted's representations concerning the nature and use of the Well, consented to the filing of

the Objection. (See February 13, 2008 Order). At this hearing, Whitted unequivocally represented to the Court that his position was that Smith was using the Well in trespass.

Then, later, at the July 1, 2008 pretrial conference, the Court, counsel for Sarah Jane Smith, and Whitted,¹ met to define the scope of factual issues for trial. It was apparent at this hearing that there was not a factual dispute, and the matter likely could be resolved on summary judgment. At no time during the July 1, 2008 pretrial conference or any prior hearing or representation to the Court did Whitted assert that his trespass theory was limited to drilling of the Well. Instead, he stipulated on the record that there was a dispute concerning the ownership of the parcel surrounding the Well and the use of the Well at the time Mr. Jensen placed the well in 1967, which ownership dispute continued to the present. Had Whitted, in fact, truly limited his trespass argument to the drilling of the Well, presumably, he would not have stipulated that there was a continuing dispute over the ownership and use of the Well and the Court would not have allowed him to file his late Objection in the first place.

It is only now since Sarah Jane Smith filed her Motion for Summary Judgment and Whitted retained counsel that Whitted has asserted his trespass claim was limited solely to the timeframe surrounding the drilling of the Well. Whitted's transparent attempts to avoid paying Sarah Jane Smith's costs and attorneys' fees should be rejected.

B. Sarah Jane Smith's Requested Costs and Fees are Reasonable.

As previously discussed in Sarah Jane Smith's Response to Whitted's Motion to Disallow Costs and Fees and as the Court has already determined, the amount Sarah Jane Smith claims in costs and attorneys' fees is reasonable. Due to Whitted's Objection, Sarah Jane Smith had to

¹ Until the filing of Mr. Whitted's Cross Motion for Summary Judgment, Mr. Whitted acted *pro se* in this matter. Mr. Whitted's *pro se* status should not play any role in the Court's decision, however. A *pro se* litigant is held to the

retain counsel to protect her interest in the Well. Counsel was required to investigate the underlying facts, represent Ms. Smith in front of this Court, and conduct legal research and analysis concerning Whitted's novel claim. Sarah Jane Smith has already broken down her the fees and costs to the various stages of the litigation and a review of the cost bill reveals that all costs and fees were reasonably incurred. *Lettunich v. Lettunich*, 185 P.3d 258, 261 (Idaho 2008). "The bottom line in an award of attorney fees is reasonableness." *Id.* at 262.

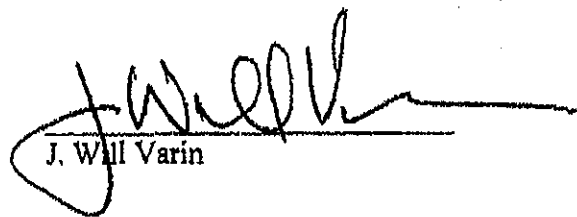
Moreover, all Whitted has done in his repeated attempts to challenge the attorneys' fee award is drive up Ms. Smith's attorneys' fees. Accordingly, should the Court deny Whitted's current Motion, Ms. Smith reserves her right to submit an amended application for costs and attorneys' fees that includes the additional fees she has incurred due to Whitted's chosen course of action.

III. CONCLUSION

For all of the foregoing reasons, Sarah Jane Smith respectfully requests the Court deny Whitted's Motion and awards her the full amount of her costs and attorneys' fees, including the fees generated in opposing Whitted's current Motion.

Dated this 17th day of March, 2009.

GIVENS PURSLEY LLP


J. Will Varin

same standard as a party represented by counsel and must adhere to the procedural rules, even though the *pro se* party may be unaware of the requirements. *Sammls v. Magnetek, Inc.*, 941 P.2d 314, 318 - 319 (Idaho 1997).

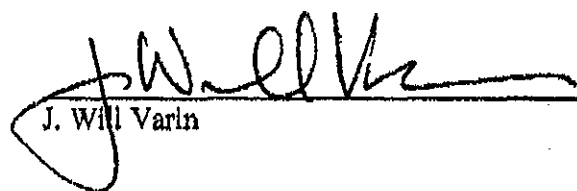
**SARAH JANE SMITH'S NOTICE OF PARTICIPATION AND RESPONSE TO WHITTED'S MOTION
TO ALTER OR AMEND - 4**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of March, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Kimball D. Gourley
Reid W. Hay
Trout Jones Gledhill Furhman, P.A.
225 N. 9th Street, Suite 820
PO Box 1097
Boise, ID 83701-1097

☐ U.S. Mail
☐ By hand
☐ Overnight
☒ Facsimile


J. Will Varin