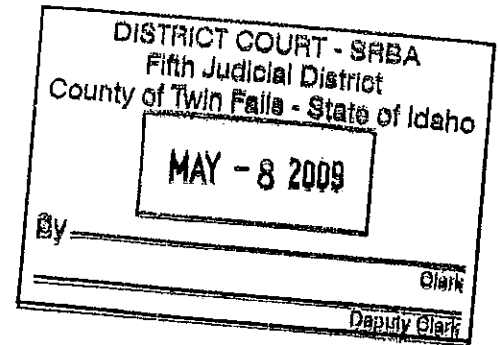


RECEIVED

MAY 11 2009

DEPARTMENT OF
WATER RESOURCES



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 63-27475
) (Janicek Properties, LLC)
)
) ORDER GRANTING IN PART AND
) DENYING IN PART NMID'S MOTION
) TO ALTER OR AMEND
)
) ORDER GRANTING IN PART AND
) DENYING IN PART JANICEK'S
) MOTIONS TO SUPPLEMENT COSTS
) and MOTION TO ALTER OR AMEND
)
) AMENDED SPECIAL MASTER'S
) REPORT AND RECOMMENDATION
) RE: JANICEK'S REQUEST FOR
) ATTORNEY FEES

Summary of Recommendation: This Special Master reconfirms the previous finding that NMID pursued without foundation one of the two major issues addressed in the *Summary Judgment Decision*. The finding that Janicek is the prevailing party is also reconfirmed. However, this Special Master erred in segregating the issues into those which were brought frivolously, unreasonably, and without foundation from those issues that were not.

I. PROCEDURAL HISTORY

The procedural history of this subcase was detailed in the previous *Special Master's Report and Recommendation Re: Janicek's Request for Attorney's Fees* and will not be repeated here. Since that time, on January 9, 2009, Janicek Properties, LLC ("Janicek") filed a *Motion to Supplement Memorandum of Costs and Request for*

Attorney Fees; Motion to Alter or Amend Special Master's Recommendation, together with a *Supplemental Memorandum of Costs and Request for Attorney Fees*. These filings by Janicek seek an award of \$193.52 in discretionary costs and \$3,032.25 in attorney fees incurred since August 28, 2008. On January 15, 2009, the Nampa and Meridian Irrigation District ("NMID") filed a *Motion to Alter or Amend Special Master's Report and Recommendation Re: Janicek's Request for Attorney Fees*. On January 22, 2009, Janicek filed *Janicek's Response to Nampa & Meridian Irrigation District's Motion to Alter or Amend*, together with the *Affidavit of Michael C. Creamer in Support of Janicek's Response to Nampa & Meridian Irrigation District's Motion to Alter or Amend*.

III. ISSUES RAISED

In its *Motion to Alter or Amend*, the NMID advances the following arguments: (A) that NMID's position regarding Janicek's alleged trespass upon the real property interests of the NMID in the Purdam Gulch Creek drain was not frivolous, unreasonable, or unfounded; (B) that Idaho law prevents an award of attorney fees under I.C. § 12-121 and I.R.C.P. 54(e) unless all of the claims and/or defenses advanced by a party are frivolous, unreasonable, or without foundation; (C) that this Special Master inappropriately considered other subcases and/or the settlements that may have been reached in those subcases; (D) that the costs sought by Janicek were not exceptional and were improperly awarded, and; (E) that Janicek was not the prevailing party. Each of these arguments is discussed below.

Janicek's *Motion to Alter or Amend* does not assert any error in the prior proceedings, but rather simply seeks its costs and fees incurred subsequent to August 28, 2008.

III. ANALYSIS

A. NMID's trespass allegation was unfounded, both in fact and in law.

In its *Motion to Alter or Amend*, the NMID argues that this Special Master erred in finding that the NMID did not present any facts to explain the origin of its claimed interest in the Purdam Gulch Creek drain. The factual basis of the real property interest asserted to be held by NMID is summarized in NMID's *Motion to Alter or Amend* as follows:

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.

NMID's *Motion to Alter or Amend* at p. 2. In addition, the NMID supports its argument by referring to *Janicek's Memorandum in Support of Motion for Summary Judgment* wherein Janicek purportedly "conceded" that the NMID has an interest via a right of way or easement in the Purdam Gulch Creek drain. Specifically, the NMID asserts that *Janicek's Memorandum* concedes such an interest by explaining that the patent issued for the Janicek property was subject to a right of way for ditches and canals constructed by the United States¹; and further that Janicek's property is subject to a statutory easement for the conveyance of water under Idaho Code section 42-1102.

This argument advanced by the NMID misses the point. Irrespective of whether Janicek "conceded" that the NMID has a real property interest in Janicek's land in the location of the Purdam Gulch Creek drain, and irrespective of whether the existence of such an interest was even in dispute, the NMID never presented any facts to show or

¹ The Patent issued for Janicek's land states: "...subject to any vested and accrued water rights for mining, agricultural manufacturing, or other purpose, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts" Abstract of Patent, *Exhibit A to the Affidavit of Michael P. Lawrence*. The NMID has not explained how this reservation in Janicek's patent, which was issued on May 8, 1896, would be relevant to

explain that the nature of its property interest was such that it could be said that Janicek (the fee simple owner) trespassed against the NMID's lesser interest in the property. NMID's trespass argument is that NMID has a property interest in the Purdam Gulch Creek drain, and the nature of this property interest is such that the owner of the underlying fee simple estate, Janicek, can be said to have trespassed upon the land in the placement and maintenance of his diversion works. NMID did not and has not set forth any particular facts that would explain how NMID's alleged interest in the Purdam Gulch Creek drain is such that an allegation of trespass could be brought against the owner of the underlying fee simple estate.

Indeed, the facts set forth by NMID appear to be largely irrelevant to determining the relationship between NMID's property interest and Janicek's property interest in the subject real property. For example, although NMID asserts that its property interest stems, in part, from "NMID's contractual rights with BOR to the Purdam Drain," NMID does not explain how a contract between it and the BOR defines the relationship relative to an assertion of trespass between the NMID and a non-party to the contract, Janicek (or its predecessors). The NMID further does not explain how its relationship with Janicek is defined by the asserted facts: that the drain was constructed by BOR for NMID; that the NMID received benefits from said construction; that NMID paid for the construction; that additional water was developed; and that as between the BOR and the NMID, the NMID has the right to such developed water.

As to the legal basis for NMID's trespass theory, NMID has not heretofore explained how existing Idaho law would support an allegation of "trespass" by the owner of a prescriptive² easement as against the owner of the underlying fee simple estate. Nor

a right of way or easement for a drain that was constructed pursuant to a contract between the BOR and the NMID dated June 1, 1915.

² In the discovery materials submitted in the *Affidavit of Michael C. Creamer in Support of Janicek's Response to Nampa & Meridian Irrigation District's Motion to Alter or Amend*, the NMID denies that its claim of title to the Purdam Drain at the location of Janicek's point of diversion is limited to a prescriptive easement. The term "prescriptive" as used above by this Special Master is intended to have the broadest possible connotation, meaning an easement that is created before (pre) it is put into writing (scribe). The use of the word "prescriptive" is not intended to pigeon-hole NMID's interest in the real property as being derived pursuant to the statute of limitations set forth in Idaho Code § 5-206, or any other source of law, whether state, federal, statutory, or common law, regarding property rights created via adverse user. What

has NMID argued for a good-faith extension of Idaho law in that regard. Under Idaho case law, “trespass” has been defined to apply to the wrongful interference with the right of exclusive possession of real property. *Moon v. North Idaho Farmers Ass’n*, 140 Idaho 536, 541 96 P.3d 637, 642 (2004) (citing *Mock v. Potlatch Corp*, 786 F. Supp. 1545 (D. Idaho 1992)). NMID admits that it is not the fee simple owner of the Purdam Gulch Creek drain. Therefore it cannot be said that NMID has and right to the “exclusive possession” of the drain as against Janicek. This is not a case where it was some third party, with no interest in the real property, who diverted water from the drain and claimed a water right based upon such a diversion. To the contrary, it was the fee simple owner of the servient estate (Janicek) that is alleged to have trespassed upon the property interests of dominant estate (NMID).

At oral argument on NMID’s *Motion to Alter or Amend*, counsel for the NMID asserted that its objection had been “morphed” (presumably by this Special Master) into including a stand-alone issue of trespass. However, in reviewing the documents filed by NMID it is unmistakable that the NMID alleged Janicek’s water right claim was invalid based upon trespass. The NMID’s position did not get transformed by this Special Master or by Janicek into something it was not.

The objection filed by NMID in this subcase states:

This 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.

NMID’s *Standard Form 1 Objection* filed April 21, 2006 (emphasis added). In NMID’s *Memorandum in Opposition to Janicek Properties Motion for Summary Judgment*, NMID states: “Janicek’s claimed point of diversion is an impermissible **trespass** of NMID’s Purdam Drain, and Janicek has not obtained the permission of NMID.” NMID’s

is important to note, however, is that there are no written agreements in the record that would shed light upon the nature of the relationship between the real property interest of the parties hereto.

Memorandum at p. 2 (emphasis added). *NMID's Memorandum* goes on to state "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 though trespass upon the land of another." *NMID's Memorandum* at p. 6 (citing *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)), (emphasis added). NMID asserts that "[t]he drains are owned, operated and maintained by NMID and any claimed water rights within said drains after 1915 would amount to a trespass." *NMID's Memorandum* at pp. 6-7 (emphasis added). If NMID did not mean trespass, one is left wondering why the NMID repeatedly used the word "trespass" to mean something other than trespass.

Both the objection and the summary judgment briefing filed by NMID, as quoted above, clearly assert the invalidity of Janicek's claimed water right based upon a factual allegation of trespass coupled with the tenant of Idaho law that prevents a water right from being created where the appropriation involved the trespass upon the land of another. However, NMID's *Motion to Alter or Amend* is now subtly distanced from this position. The NMID has shifted its focus to one of its property interests in the Purdam Gulch Creek drain as being ditch rights, coupled with the tenant of Idaho law that prevents a water right from being created by using the ditch of another against his will. Despite NMID's subtle shift in focus, the facts remain that NMID clearly asserted that Janicek's point of diversion was in trespass; that Janicek's lawyers spent their time and Janicek's money arguing to the contrary; and that this Special Master properly analyzed the issue as one of trespass in the *Memorandum Decision and Order on Motion for Summary Judgment*.

Based upon the foregoing analysis, this Special Master reconfirms the previous finding and conclusion that the NMID brought and pursued its trespass theory without providing an adequate foundation, both in fact and in law, for said theory.

B. Idaho law prevents an award of attorney fees under I.C. § 12-121 and I.R.C.P. 54(e) unless all claims are frivolous, unreasonable, or without foundation.

In its *Motion to Alter or Amend*, the NMID argues that Idaho law prevents an award of attorney's fees where a party raised a legitimate, triable issue of fact, even though such party may have also asserted factual or legal claims that are frivolous, unreasonable, or without foundation. This Special Master agrees with the NMID, and herein concludes that the previous ruling was in error.

In *Management Catalysts v. Turbo West Corpac, Inc.*, the Idaho Supreme Court stated:

Attorney fees are not appropriate under I.C. § 12-121 and I.R.C.P. 54(e) unless all claims brought or all defenses asserted are frivolous and without foundation. Where there are "multiple claims and multiple defenses, it is not appropriate to segregate those claims and defenses to determine which were or were not frivolously defended or pursued. The total defense of plaintiff's proceedings must be unreasonable or frivolous."

Management Catalysts v. Turbo West Corpac, Inc., 119 Idaho 626, 630, 809 P.2d 487 (1991) (quoting *Magic Valley Radiology Associates, P.A. v. Professional Business Services, Inc.*, 119 Idaho 558, 808 P.2d 1303 (1990)). In other words, under Idaho law, the raising of one solid issue by a party cleanses an entire course of proceeding from the taint of any frivolous, unreasonable, or unfounded issues that are brought or pursued by that party. One bad apple may not spoil the whole barrel, but in Idaho one good apple can save the whole barrel.

In the *Special Master's Report and Recommendation Re: Janicek's Request for Attorney Fees*, this Special Master stated:

With respect to issue No.1 above, -- whether the water in Purdam Gulch Creek was subject to appropriation -- this Special Master finds that this issue was not brought or pursued by either the NMID or the BOR frivolously, unreasonably, or without foundation. The gravamen of the argument made by the NMID and the BOR was a statement in *Sebern v. Moore*, 44 Idaho 410, 258 P. 176 (1927), regarding the appropriation of waste or seepage water that is collected in a constructed drain. In the *Summary Judgment Decision*, this Special Master held that the *Sebern* statement did not prevent Janicek's predecessors-in-interest from making a valid appropriation of a water right, albeit wastewater, from Purdam Gulch Creek. That being said, it was not frivolous, unreasonable, or lacking in

foundation for NMID and the BOR to have tested the application of the *Sebern* case to the facts surrounding Janicek's water right claim.

Id. at p. 8 of 12. Janicek argues that notwithstanding this Special Master's enumeration of three sub-issues, "NMID consistently pursued its objection on one basis alone – its exclusive ownership of Purdam Gulch Creek and all the water in it." *Janicek's Response* at p. 6. In other words, Janicek argues that the issue described in the *Summary Judgment Decision* as "Issue No. 1" (i.e. the *Sebern* issue) is premised upon NMID's unfounded claim to a property interest in the drain that includes the right to exclude Janicek. It is the opinion of this Special Master that the issue of trespass (Issue No. 3) and the *Sebern* issue (Issue No. 1) are separate issues, and that the *Sebern* issue does not rely on NMID's assertion of an ability to exclude Janicek through the law of trespass from the access to the Purdam Gulch Creek drain.

Regarding the effect of a trespass upon the private land of another, the Idaho Supreme Court stated in *Marshall v. Niagara Springs Orchard Co., Ltd.*:

While the constitution and laws of this state specifically recognize the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, and that such right shall never be denied, still such provisions of the constitution and statute do not authorize a person to go upon private property of another for the purpose of making an appropriation. The constitution and laws of this state specifically recognize the right to divert and appropriate the unappropriated waters of any natural stream to a beneficial use, and that such right shall never be denied, but this does not mean that a person is given the right to go upon private property of another for the purpose of making an appropriation, without the license or consent of the owner, or before such right is given by proceedings for condemnation.

Marshall v. Niagara Springs Orchard Co., Ltd., 22 Idaho 144, 153-154, 125 P. 208 (1912).

This case goes on to hold that the water right asserted in that case had not been legally acquired and was void based upon the fact that the appropriator had trespassed in making the appropriation.³ In other words, the invalidation of the water right claim is the

³ It should be noted that in the *Niagara Springs Orchard Co., Ltd.*, case, the trespass occurred when respondent Frank Marshall or his agents went upon the land of appellant Niagara Springs Orchard Co., Ltd., for the purpose of surveying, mapping, and gathering information in connection with applying for a permit to appropriate water from springs originating upon appellants land. The Niagara Springs Orchard Co., Ltd., had not appropriated the water from said springs, and had installed no diversion or conveyance

appropriate remedy in a case where a trespass is found to have occurred. The NMID made an allegation of trespass in its objection, and sought the remedy of having Janicek's water right claim declared invalid in the SRBA.

The *Sebern* issue, on the other hand, involved a determination as to whether the water that collected in the Purdam Gulch Creek drain - which was constructed by the BOR and is maintained by the NMID - was subject to appropriation under Idaho law. Under this issue, trespass was not a factor in determining whether the water in the drain could have been appropriated by Janicek. Rather the *Sebern* issue involved analyzing and synthesizing Idaho law to determine whether Janicek could have made a valid appropriation of the surplus water that collects in the drain but is not beneficially used by the NMID. This Special Master found that Idaho law does allow Janicek's appropriation. Regarding Janicek's claim for attorney fees, this Special Master found that the legal position taken by the BOR and the NMID - i.e. that Idaho law does not allow Janicek's appropriation - was not a position taken frivolously, unreasonably, and without foundation. This Special Master herein reconfirms that finding.

The NMID raised two distinct and separate major issues, one of which was unfounded, and one of which was not. That being said, Idaho law prevents segregating claims and/or defenses into those that are frivolous, unreasonable, or unfounded, and those that are not. Accordingly, NMID's *Motion to Alter or Amend* is **granted** regarding Janicek's claimed for attorney fees under I.C. § 12-121 and I.R.C.P. 54(e).

C. This Special Master did not consider settlements in other subcases.

The NMID correctly asserts that whether the NMID may have settled other subcases in the SRBA cannot be considered regarding the issues involved in this subcase. This Special Master agrees. The NMID complains about the following sentence in the *Special Master's Report and Recommendation Re: Janicek's Request for Attorney Fees*: "Unlike 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

works. In other words, an allegation of trespass in connection with the appropriation of water does not depend upon a trespass against any diversion or conveyance infrastructure, or any property interests that

[Janicek's] water right claim should be disallowed rather than seeking to settle with the claimant by including a wastewater remark on the partial decree." *Recommendation* at p. 7 of 12, referencing Transcript of Status Conference, P. 4, attached to the *Amended Second Affidavit of Michael P. Lawrence*.⁴ This statement immediately precedes an explanation stating that the *Summary Judgment Decision* addressed three issues raised by the parties in the summary judgment proceedings, and another issue (being whether the partial decree for Janicek's water right should contain a wastewater remark) that was raised by this Special Master at oral argument on summary judgment. The above-quoted statement is not followed by any analysis regarding how settlement in some other subcase may be relevant to the instant subcase. Indeed, the NMID is correct – settlement in some other subcase cannot be considered for any reason regarding this subcase.

The above-quoted statement, although perhaps inartful, was intended to demonstrate how the "wastewater remark" issue arose. In other words, the statement was simply meant to clarify that the NMID has never prayed for relief in the form of inclusion of a wastewater remark. Additionally, the record in this subcase reflects that not only did the NMID not seek a wastewater remark in its SRBA pleadings, it also did not explain to Janicek that the NMID would be willing to consider the inclusion of a wastewater remark rather than disallowance of the right. (Clearly the NMID was not so willing.) Stated another way, the NMID cannot be said to have "sought" a wastewater remark through informal discussions with Janicek.

At the November 17, 2008, hearing on costs and fees, Mr. Farris voluntarily described in general terms how the NMID had been approaching settlement in other "wastewater" subcases, and stated that the approach taken by NMID varied depending on whether the claimed water right had a priority date before or after 1915. Mr. Farris went

may be associated therewith.

⁴ At the August 27, 2007 status conference, counsel for the NMID confirmed that it was only seeking disallowance of the right, not a wastewater remark:

SPECIAL MASTER BOOTH: Is it still the position of the Nampa and Meridian Irrigation District that the water right should be disallowed or is this one of these cases where you're seeking inclusion of a waste water remark?

MR. FARRIS: This is one of those cases that the District's position is that the water right should be disallowed.

Transcript of Status Conference, p. 4, attached to *the Amended Second Affidavit of Michael P. Lawrence*.

on to state that the NMID had made a settlement proposal to Janicek to which Janicek did not respond other than by filing its motion for summary judgment.⁵ Mr. Farris did not state the terms of the settlement offer, but later in the November 17, 2008, hearing Mr. Creamer represented that the settlement offer had nothing to do with a wastewater remark. During the same hearing, Mr. Farris also stated that the check-the-box pleading forms in the SRBA do not lend themselves to pleading alternative positions.⁶

Again, and as correctly stated by the NMID, it is completely inappropriate for this Special Master to consider any settlement offers that may have been exchanged between the parties, and no such settlements were so considered. What is relevant, however, is a consideration of how the “wastewater remark” issue arose in this subcase. The record is clear that the NMID never sought a wastewater remark, either in formal pleading nor in informal discussions with Janicek.

D. Janicek’s is entitled to costs as previously found plus \$193.52 discretionary costs set forth in *Janicek’s Supplemental Memorandum*.

This Special Master previously found that Janicek was entitled to an award of \$627.99 in discretionary costs, with \$500 of said sum stemming from title research and the remainder stemming from Janicek’s miscellaneous claimed discretionary costs. Janicek now seek an additional \$193.52 in discretionary costs.

Regarding a claim for discretionary costs, I.R.C.P. 54(d)(1) allows such costs “upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.” I.R.C.P. 54(d)(1)(D). The trial court is required to make “express findings as to why such specific item of discretionary cost should or should not be allowed.” *Id.* The term “exceptional” in I.R.C.P. 54(d)(1)(D) is construed in Idaho to include costs “incurred

⁵ It is curious as to why counsel for NMID voluntarily made these statements regarding settlement at the November 17, 2008 hearing, in light of its adamant (and correct) assertion in *its Motion to Alter or Amend* that consideration of settlement is inappropriate.

⁶ This Special Master disagrees that the standard objection form in the SRBA prevents a party from pleading alternative causes of action and/or praying for alternative relief. Parties in the SRBA often attach additional pages to an objection which explain, in detail, the basis of their objection. The “check boxes” represent the minimum quantum of information that must be included, not a ceiling on the maximum amount.

because the nature of the case itself was exceptional.” *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005).

NMID argues that this Special Master erred in recommending an award of costs to Janicek. As to the \$500 expense incurred by Janicek for title research, the NMID argues that it is not uncommon for a party to have to conduct title research in SRBA subcases, and therefore such title-research expense by Janicek cannot be said to be “exceptional.” While this Special Master agrees with the general proposition the title research is not uncommonly necessary in the SRBA, what is exceptional in this subcase is that the title research arose because the objector pursued an unfounded allegation of trespass asserting that Janicek trespassed upon a NMID’s claimed right of way which lies upon Janicek’s own land. That is an exceptional cause of action in the SRBA.

As to Janicek’s remaining amount of \$255.97, and the newly claimed amount of \$193.52, the NMID argues that this Special Master failed to make any express findings as to why such routine costs are exceptional. Additionally, the NMID’s argument is that such routine expenses could never be considered “exceptional” because such expenses are incurred in any lawsuit. This Special Master disagrees. What makes a particular cost “exceptional” is whether the genesis of the cost was “exceptional” i.e. out of the ordinary. Again, the trespass allegation brought and pursued by the NMID against Janicek was truly out of the ordinary. In reviewing the body of law presented by the lawyers in this subcase, and all of the law independently reviewed by this Special Master, there is nothing that would support a claim that a fee simple property owner could commit a trespass upon an easement or right of way located upon his own land.

To the extent that this Special Master’s previous findings were insufficient to support an award of one-half of Janicek’s routine expenses, this Special Master hereby specifically finds that such costs were necessarily incurred, and that the exceptionality of such costs is a direct result of the extraordinary trespass claim brought and pursued by the NMID. Accordingly, and pursuant to I.R.C.P. 54(d)(1)(D), and in a exercise of discretion, this Special Master finds that one-half of Janicek’s claimed miscellaneous costs should, in the interest of justice, be assessed against the NMID. The amount such

of costs is the \$627.99 referenced in the December 22, 2008, *Recommendation*, plus the \$193.52 requested in Janicek's *Supplemental Memorandum*, for a total of \$821.51.

E. Janicek is the prevailing party.

The NMID argues that Janicek is not the prevailing party because this Special Master recommended that the partial decree for Janicek's water right include a wastewater remark. This argument is not persuasive. As previously stated in the *Special Master's Report and Recommendation Re: Janicek's Request for Attorney Fees*, the NMID never sought relief in the form of a wastewater remark, and I.R.C.P. 54(d)(1)(B) requires the trial court consider the result of the action "in relation to the relief sought by the respective parties." *Id.* It cannot be said that the NMID prevailed simply because this Special Master recommended that Janicek's partial decree include a wastewater remark that the NMID never asked for, and that simply restates Idaho law.

VI. ORDER

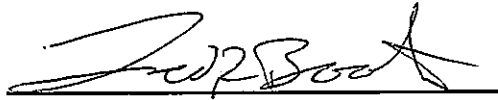
The NMID's *Motion to Alter or Amend* is **granted** regarding Janicek's claim for attorney's fees based upon Idaho law that prevents segregating claims and/or defenses for purposes of determining which were and which were not brought or pursued frivolously, unreasonably, or without foundation. The NMID's *Motion to Alter or Amend* is **denied** regarding Janicek's claimed discretionary costs. Janicek's *Motion to Supplement Memorandum of Costs and Request for Attorney Fees* and *Motion to Alter or Amend* is **granted** regarding its claimed supplemental discretionary costs; and **denied** regarding its claimed supplemental attorney fees.

VI. AMENDED RECOMMENDATION

Based upon the file and record herein, and upon the foregoing analysis, IT IS RECOMMENDED that the SRBA District Court enter a final order **denying** Janicek's claim for attorney fees. However, IT IS RECOMMENDED that the SRBA District Court

enter a judgment for discretionary costs against the NMID and in favor of Janicek in the amount of \$821.51.

Dated May 8, 2009

A handwritten signature in black ink, appearing to read 'T. Booth', written over a horizontal line.

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS TO SUPPLEMENT FEES was mailed on May 08, 2009, with sufficient first-class postage to the following:

JANICEK PROPERTIES LLC

Represented by:
MICHAEL P LAWRENCE
PO BOX 2720
BOISE, ID 83701
Phone: 208-388-1200

NAMPA AND MERIDIAN

Represented by:
S. BRYCE FARRIS
RINGERT LAW CHARTERED
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

PIONEER IRRIGATION DISTRICT

Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

USDI BUREAU OF RECLAMATION

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

ORDER

Page 1 5/08/09

FILE COPY FOR 01333


Deputy Clerk