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FROM: Kimbell D. Gourley/Reid W. Hay

DATE: June 19, 2009

RE: SRBA Case No. 39576; Subcase 63-7539

DOCUMENTS SENT: Memorandum in Support of Challenge

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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.: 63-07539

) **MEMORANDUM IN SUPPORT OF**
) **CHALLENGE**

COMES NOW Craig Whitted, ("Mr. Whitted") by and through his counsel of record, Trout ♦ Jones ♦ Gledhill ♦ Fuhrman, P.A., and hereby files this Memorandum in Support of his Challenge to the Order Denying Motion to Alter or Amend ("Denial Order") issued April 1, 2009, by Special Master Theodore R. Booth.

FACTUAL AND PROCEDURAL BACKGROUND

Craig Whitted ("Mr. Whitted") and his wife Sheilla ("Mrs. Whitted") live in a trailer on property in Canyon County the couple received from Mrs. Whitted's grandparents. The couple's primary source of income is Mr. Whitted's work as a weed-sprayer for Ada County.

Adjacent to the Whitted's property is a feedlot owned by Sarah Jane Smith ("Ms. Smith"). In 1967, Ms. Smith's predecessors-in-interest entered without permission onto Mr. Whitted's land and, over the protests of Mr. Whitted's predecessors-in-interest, drilled a well. (Ms. Smith's predecessors-in-interest were apparently mistaken as to the location of the property line.) The initial entry onto the land to drill the well in 1967 was in trespass, but eventually Ms. Smith's and Mr. Whitted's predecessors-in-interest reached an accommodation whereby Ms. Smith's predecessors were granted revocable permission to enter what is now Mr. Whitted's property for the limited purpose of drawing water from the well.

During the following years both Ms. Smith's predecessors-in-interest and Mr. Whitted and his predecessors-in-interest made use of the well. Mr. Whitted formalized his water right as Water Right number 63-20952, with the well drilled in 1967 as the point of diversion. The priority date is December 13, 1967.

Ms. Smith obtained her land abutting Mr. Whitted's property in 2004. Ms. Smith filed a claim of water right with the Snake River Basin Adjudication ("SRBA") with a listed point of diversion being the well located on Mr. Whitted's land. Learning of this, Mr. Whitted filed a *pro se* Objection to Ms. Smith's claim. Mr. Whitted's objection stated, in pertinent part, that Ms. Smith "has no rights on this property" on which the well is located.

At a July 1, 2008 pretrial hearing in which Mr. Whitted appeared *pro se*, the parties agreed that the disputed well was on Mr. Whitted's property. Mr. Whitted asserted that Ms. Smith should be denied a water right with a point of diversion on his property because he owns the land and because Ms. Smith's predecessor's drilling of the well in 1967 was an act of trespass. Both parties filed motions for summary judgment.

In Ms. Smith's motion and supporting memorandum she asserted an easement by prescription to access the well on Mr. Whitted's property. In his own briefing (now assisted by counsel) Mr. Whitted countered Ms. Smith's claim to a prescriptive easement by pointing out, with the aid of affidavits, that Ms. Smith and her predecessors' in interest's use of the well was permissive, and thus could not satisfy the elements of an easement by prescription.

Ms. Smith then filed a motion to strike Mr. Whitted's cross motion for summary judgment and supporting documents, arguing that Mr. Whitted's assertion that use of the well was permissive was incompatible with his position that the 1967 drilling of the well was by trespass.

A hearing was held on Ms. Smith's motion to strike, and Special Master Theodore R. Booth ("The Special Master") issued a written Order denying Ms. Smith's motion to strike. *Order on Motion to Strike*[:] *Order Re: Attorney's Fees and Costs*[:] *Order Dismissing Objection*[:] *Order Vacating Hearing on Motions for Summary Judgment*[:] *Order Requesting Statement from Parties*, at 4. (Henceforth the "September 2008 Order"). However, the September 2008 Order also stated that Mr. Whitted had changed legal theories in the case because his memorandum in support of summary judgment had described Ms. Smith's use of the well as "permissive" rather than describing it as "trespass." *Id.* The Special Master thus *sua sponte* treated Mr. Whitted's cross motion for summary judgment as a request to amend the pleadings pursuant to Idaho Rule of Civil Procedure 15(a), granted the *sua sponte* request, but then ordered Mr. Whitted to pay Ms. Smith for costs and attorney fees "incurred in connection with prosecuting the case in response to Mr. Whitted's trespass theory[.]" *Id.* The Special Master based the award of costs and attorney fees on language in

Rule 15(a) permitting a court ruling on an amendment to the pleadings to “make such order for the payment of costs as it deems proper.” I.R.C.P. 15(a).

The Special Master also, *sua sponte*, dismissed Mr. Whitted’s Objection, and vacated the hearing on the cross motions for summary judgment. *September 2008 Order*, at 4. Ms. Smith was instructed to file a memorandum of costs. *Id.* at 5.

Although Mr. Whitted’s Objection was dismissed in the September 2008 Order, the Special Master determined that the question of quiet title and Ms. Smith’s prescriptive easement claim remained unresolved, which could affect whether Ms. Smith is entitled to access the disputed well listed as a point of diversion. *Id.* at 3-6. The parties were given the option to have the Special Master try the quiet title question, or to have that matter dismissed without prejudice so that the parties could re-file in Canyon County. *Id.* at 5-6. Both parties later opted to have any subsequent litigation of the quiet title question adjudicated in the District Court of the Third Judicial District for the State of Idaho, in and for the County of Canyon. *See Sarah Jane Smith’s Statement Re: Adjudication of the Prescriptive Easement Claim; Craig Whitted’s Statement Re: Prescriptive Easement Claim.* No quiet title action has yet been filed.

Ms. Smith demanded \$58.01 in costs, \$169.70 in research fees, and \$23,229.00 in attorney fees. Following a hearing on Mr. Whitted’s Motion to Disallow Costs and Fees, Special Master Booth entered an Order awarding Ms. Smith a total of \$23,140.71 in costs and fees. *Order Re: Motion to Disallow Costs and Attorney’s Fees[;] Special Master’s Report[;] Findings of Fact and Conclusions of Law for Water Right 63-07539* (Henceforth the “December 2008 Order”).

Mr. Whitted filed a Motion to Alter or Amend the award, but that motion was denied in the Special Master's *Order Denying Motion to Alter or Amend*, filed April 1, 2009. Pursuant to Administrative Order 1 ("AO1") § 13(c), Mr. Whitted then filed a timely Notice of Challenge to the Special Master's denial of Mr. Whitted's Motion to Alter or Amend. Mr. Whitted's Challenge is now before the Court.

ISSUES PRESENTED ON APPEAL

1. Did the Special Master err in imposing an award of costs and fees against Mr. Whitted pursuant to Idaho Rule of Civil Procedure 15(a)?
2. If an award of costs and fees pursuant to Idaho Rule of Civil Procedure 15(a) was proper, was the amount awarded, \$23,140.71, excessive?
3. Did the Special Master err in awarding costs and attorney fees pursuant to Idaho Rule of Civil Procedure 15(a) for costs and fees incurred both before and after Mr. Whitted's purported change in position?

STANDARD OF REVIEW

A Special Master's findings of fact are accepted unless clearly erroneous. AO1 § 13(f). To establish whether such findings are clearly erroneous, the court "must independently review the evidence to determine whether the findings were supported by substantial evidence." *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 121, 138 P.3d 316, 321 (2006). "A special master's conclusions of law, while persuasive, are not binding on the district court." *Id.*; *Clear Springs Foods, Inc. v. Clear Lakes Trout Company*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002).

ARGUMENT

The Special Master ordered Mr. Whitted to pay \$23,140.71 in costs and attorney fees pursuant to Idaho Rule of Civil Procedure 15(a). Under the circumstances of this case, however, Rule 15(a) does not support such an award.

The Special Master mistakenly took Mr. Whitted's statement that the 1967 drilling of the well was trespass to mean that all subsequent entry onto his land was also trespass – and thus that an assertion of permissive use contradicted his earlier statements. Review of the record, however, demonstrates that Mr. Whitted's "trespass" argument concerned only the drilling of the well in 1967, and, whatever its deficiencies as a legal argument, it was never a statement concerning or precluding later permissive use of the well. Therefore, Mr. Whitted's position never changed, and there was no "inconsistent position" to form the basis of an award of costs and attorney fees against Mr. Whitted pursuant to Rule 15(a).

Further, Rule 15(a) is inapplicable because that Rule concerns only the amendment of pleadings, and nothing in Mr. Whitted's sole pleading in this case was inconsistent with the assertion of permissive use of the well in the years following 1967. Finally, the award of costs and attorney fees was unreasonable, and wrongly sought to compensate Ms. Smith for fees generated both before and after Mr. Whitted was purportedly obligated to amend his pleading. These arguments are addressed below.

A. Mr. Whitted's position that the 1967 drilling of the well was an act of trespass is not inconsistent with his position that he and his predecessors-in-interest subsequently granted Ms. Smith and her predecessors-in-interest revocable permission to draw water from the well.

The Special Master's ruling proceeded from a determination that Mr. Whitted changed his position from an assertion of "trespass" to one of "permissive use" and thus was required to amend his pleading. Reasoning that Idaho Rule of Civil Procedure 15(a) permits

an award of costs in the event of an amendment to the pleadings, the Special Master ordered Mr. Whitted to pay Ms. Smith's costs and attorney fees associated with Mr. Whitted's Objection. The December 2008 Order states that "[t]he payment of costs and attorneys' fees incurred by Smith regarding Whitted's trespass position is simply the price that Whitted should pay to abandon his position and adopt a new one." *December 2008 Order*, p. 6. In other words, Mr. Whitted was ordered to pay \$23,140.71 in costs and attorney fees because he purportedly set forth a position in the case (trespass), but then changed his position and expressed a different and factually incompatible position (permissive use).

The record, however, provides no support for the proposition that Mr. Whitted changed his stance to assert an inconsistent position. It is imperative to recognize what position was actually taken by Mr. Whitted, which requires further discussion of the history of the case.

In 1967 there was a dispute between Mr. Whitted's predecessor-in-interest and Ms. Smith's predecessor-in-interest arising from Ms. Smith's predecessor-in-interest's drilling of a well on Mr. Whitted's predecessor-in-interest's property. *Transcript of July 1, 2008 Pretrial Hearing*, (henceforth "Tr.") Tr. p.26, L.8 – p.28. L.17. When the drilling rig appeared, Mr. Whitted's predecessor-in-interest objected to the trespass, but drilling was completed regardless. *Id.* It was later agreed that the well is on Mr. Whitted's property. Mr. Whitted and his predecessors-in-interest nonetheless accommodated Ms. Smith, her predecessors-in-interest, and their tenants, by granting them permissive use of the well.¹ *Affidavit of Alvin H. Race*, ¶¶ 4-6; *Affidavit of Ava M. Race*, ¶¶ 4-6; *Affidavit of Carrie*

¹ The parties disagree as to whether Ms. Smith's predecessor's use was permissive, and the Special Master did not reach a determination on that issue. For the purposes of the present Challenge, the point is noted simply for its significance in explaining Mr. Whitted's position.

Cusic-Moore, ¶¶ 4-5; *Affidavit of Sheilla Whitted*, ¶¶ 10-13; *Affidavit of Craig Whitted*, ¶¶ 24-29.

After Ms. Smith obtained ownership of the feedlot abutting Mr. Whitted's property, she filed a claim for a water right with the well on Mr. Whitted's property listed as a point of diversion. Mr. Whitted conducted his own legal research and found the Idaho Supreme Court decision in *Rabido v. Furey*, 33 Idaho 56, 190 P. 73, 75 (1920), in which the Court stated that "a valid water right cannot be initiated" in trespass. (Emphasis added). Mr. Whitted filed a *pro se* Objection stating, in relevant part, that "[t]he [putative] water right holder [Ms. Smith] has no rights on this property, SWSE 14152 W. BM." *Mr. Whitted's Standard Form 1 Objection* (attached sheet).

Mr. Whitted's position, which was stated in his responses to discovery, *Affidavit of Will Varin*, ex. A. (in which he discussed the 1967 trespass to drill the well and cited to *Rabido*), and at the July 1, 2008 Pretrial Hearing, Tr. p.7, L.10-24; p.28, L.7-11 (in which he discussed the 1967 trespass to drill the well and again cited to *Rabido*), was **that Ms. Smith should not be awarded a water right with a point of diversion on his property because any such right was initiated by the 1967 drilling of the well. The 1967 drilling was an act of trespass, and, according to *Rabido v. Furey*, "a valid water right cannot be initiated" in trespass. 33 Idaho at ___, 190 P. at 75. In other words, Mr. Whitted argued that one cannot obtain a valid water right with a point of diversion on the property of another if the putative right was first "initiated" by an act of trespass. Since Ms. Smith's putative right was "initiated" by her predecessor-in-interest's 1967 trespassory drilling, Ms. Smith could not, Mr. Whitted argued, obtain a valid water right with a point of diversion on his property.**

Notably, Mr. Whitted's argument did not include any mention of the use of the well after it was drilled, because although he knew that Ms. Smith's predecessors were given permission to use the well, he did not yet know the relevance of that fact. Mr. Whitted's view was that the fact Ms. Smith did not have rights to the property and that the well was originally drilled in trespass was determinative.

The subject of the use of the well subsequent to the 1967 drilling did, however, become an issue once Ms. Smith filed her motion for summary judgment in which she claimed a prescriptive easement leading to the well. In response, now assisted by counsel, Mr. Whitted demonstrated that the use of the well by Ms. Smith's predecessors-in-interest was permissive, and thus no prescriptive right arose.

At that juncture, the Special Master dismissed Mr. Whitted's Objection, ruling that although the question of whether a prescriptive easement exists may be a proper subject for a quiet title action, either a prescriptive right (Ms. Smith's theory) or permissive use (Mr. Whitted's view) can form a valid basis for the establishment of a water right. *See September 2008 Order*, p.3. Neither Mr. Whitted's ownership of the subject property nor the fact that the 1967 drilling was an act of trespass were determinative in light of the fact that a water right could arise based on the permissive use granted to Ms. Smith's predecessors-in-interest. Mr. Whitted has not appealed from the dismissal of his Objection on those grounds – his Challenge is only as to the award of costs and fees pursuant to Rule 15(a).

The Special Master's Order awarding costs and fees pursuant to Rule 15(a) was erroneously based on its perception that when Mr. Whitted raised permissive use as a defense to Ms. Smith's prescriptive easement claim, Mr. Whitted changed his position to assert an inconsistent set of facts. There is not, however, any basis in the record to find such

a change in positions. Mr. Whitted's position that the use of the well subsequent to 1967 was by permission was perfectly consistent with his position that the original 1967 act of drilling the well constituted trespass. Whatever the legal defects of his position with respect to the water rights dispute, his position was consistent and did not change.

Unfortunately, the Special Master appears to have read more into Mr. Whitted's statements than what Mr. Whitted actually wrote, or actually said. In particular, the Special Master appears to have read into Mr. Whitted's statements not only that the 1967 drilling of the well was trespass (which Mr. Whitted did state, repeatedly) but also that subsequent drawing of water from the well by Ms. Smith's predecessors-in-interest was in trespass (which was never Mr. Whitted's position). The Special Master may have interpreted Mr. Whitted's *pro se* argument as a more generalized argument of "trespass" and to include such additional allegations because an assertion of trespass with respect to subsequent use (if the facts supported such a claim) would have been a superior argument with respect to defeating Ms. Smith's water right claim than the position Mr. Whitted actually advanced.

However, the Special Master's award of costs and attorney fees was based not any legal defect in Mr. Whitted's argument, but instead was entered solely pursuant to Idaho Rule of Civil Procedure 15(a), and on the basis that Mr. Whitted abandoned one position to take a different and inconsistent position. *Order Denying Motion to Alter or Amend*, p.2. Mr. Whitted's position that the use of the well subsequent to drilling was permissive was not helpful with respect to the underlying water rights claim, but, regardless of its effect on the merits of the now-dismissed Objection, it does not support any allegation of inconsistency relevant to an award of attorney fees pursuant to Rule 15(a). The Order Denying Motion to Alter or Amend identified no evidence of Mr. Whitted taking

factually inconsistent positions that would require a new pleading under Rule 15(a), or permit an award of attorney fees under that Rule.

B. No award of costs and attorney fees is justified under Idaho Rule of Civil Procedure 15(a) because the rule concerns only the amendment of pleadings, and Mr. Whitted's assertion of permissive use of the well does not conflict with the text of his pleading.

Even if Mr. Whitted had adopted inconsistent positions in the present litigation (again, he did not), the solution would be the application of the doctrine of estoppel, not, as was done here, to *sua sponte* treat Mr. Whitted's legal briefs as a motion to amend the pleadings and impose costs and attorney fees pursuant to Rule 15(a) as the price of granting the never-requested motion.

Idaho Rule of Civil Procedure 15(a) concerns only the amendment of pleadings. It is not a general-purpose tool to enforce a perception of consistency in a party's arguments by the imposition of awards of costs and attorney fees.

For the purposes of the Snake River Basin Adjudication, a "pleading" is defined to include "[a]ll documents defined as pleadings by the I.R.C.P., objections, responses to objections, and notices of claims." AO1 2(r) (emphasis added). Therefore, in the present case Mr. Whitted's December 31, 2007 Objection ("Objection") to Ms. Smith's water rights claim constitutes the "pleading" at issue with respect to whether an amendment to the pleading was sought or required pursuant to Rule 15(a). No other submission by Mr. Whitted in this action constituted a "pleading" to which Rule 15(a) would apply. *See* I.R.C.P. 7(a); I.R.C.P. 15(a); SRBA A01 2(r).

Therefore, the determination of whether Mr. Whitted's assertion of "permissive use" as a defense to a prescriptive easement claim constituted a change in positions such

as to required a change in the pleadings would depend on whether an assertion of permissive use was incompatible with the language of Mr. Whitted's Objection.

The Objection Mr. Whitted lodged was a "Standard Form 1 Objection" in which, under "Reasons Supporting Objection(s)" he attached a sheet stating in pertinent part that "The water right holder has no rights on this property, SWSE 14152 W. BM." There is nothing in that Objection that conflicts with Mr. Whitted's position that the use of the well was only by revocable permission. Accordingly, Rule 15(a) had no application to the case at hand, and no award of costs and fees was merited pursuant to that Rule.

C. The award of costs and attorney fees granted below was unreasonable, and wrongly sought to compensate Ms. Smith for fees generated both before and after Mr. Whitted was purportedly obligated to amend his pleading.

An award of costs or attorney fees must be reasonable. *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 134 Idaho 259, 263, 999 P.2d 914, 918 (Ct.App. 2000). "A court is permitted to examine the reasonableness of the time and labor expended by the attorney under I.R.C.P. 54(e)(3)(A) and need not blindly accept the figures advanced by the attorney." *Craft Wall of Idaho, Inc. v. Stonebraker*, 108 Idaho 704, 706, 701 P.2d 324, 326 (Ct.App. 1985) (upholding the determination of the trial court that attorney fees in the amount of \$9,000 incurred in prosecuting a \$2,000 claim were not reasonable). Likewise, "[a]n attorney cannot 'spend' his time extravagantly and expect to be compensated" by the losing party. *Daisy Mfg. Co.*, 134 Idaho at 263, 999 P.2d at 918. Thus, "a court may disallow fees that were unnecessarily and unreasonably incurred or that were the product of attorney 'churning.'" *Id.*

In the present case, Ms. Smith was awarded \$23,140.71, of which \$22,913.00 was for attorney fees. *See December 2008 Order*, p. 10-11. The award was excessive.

Although the Order Denying Motion to Alter or Amend states that the award of fees was simply to “compensate Smith for the money she spent in defending against Whitted[’s] trespass theory,” *Order Denying Motion to Alter or Amend*, at 4, the Special Master’s Order granted Ms. Smith an award for both the \$10,103.50 in fees generated before the purportedly inconsistent permissive use defense was raised in Mr. Whitted’s Memorandum in Support of Cross Motion for Summary Judgment filed on September 9, 2008, and the \$12,809.50 in fees counsel for Ms. Smith generated after the assertion of permissive use. *See December 2008 Order*, at 11; *Sarah Jane Smith’s Verified Memorandum of Costs and Attorneys’ Fees*, ex. A. Given the logic used to support the award of attorney fees under Rule 15(a), Mr. Whitted should not be required to compensate Ms. Smith for fees incurred both before and after Mr. Whitted was allegedly required to amend his pleading.

Further, the effort expended by counsel for Ms. Smith with respect to her prescriptive easement claim was still needed regardless of the outcome of Mr. Whitted’s Objection. As noted in the December 2008 Order, no determination was reached regarding whether Ms. Smith has a prescriptive easement to actually access the well on Mr. Whitted’s property. *See December 2008 Order*, at 11. There remains a likelihood that litigation of the prescriptive easement claim will resume if this dispute is re-filed as a quiet title action. Indeed, the December 2008 Order recommended that the prescriptive easement/quiet title claims be dismissed without prejudice. *December 2008 Order*, at 11. As a general rule, dismissal without prejudice does not support an award of fees since there remains, as here, the risk of re-filing. *Oscar v. Alaska Dept. of Educ. and Early*

Development, 541 F.3d 978, 981 (9th Cir. 2008); see *Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 9, 72 845, 849 (2002).

In addition, Ms. Smith claims \$1,930.50 in attorney fees simply for creating the verified memorandum of costs and attorney fees and the supporting affidavit of counsel. *Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, ex. A, p. 7. An award of fees for preparing such a request is unreasonable, especially in that amount.

Finally, the award of attorney fees granted in this case is excessive and unreasonable when viewed as a whole. Ms. Smith's award of \$23,140.71 in costs and fees is out of proportion to the scale of the dispute and the sum of the actual work required in this instance. The amount of attorney fees awarded is, for example, several times the cost of drilling a new well to replace the one in dispute. The briefing generated by Ms. Smith's counsel was not extensive, the parties conducted only limited written discovery, and no depositions were conducted. Nonetheless, Ms. Smith's counsel is asserted to have expended 118.5 hours at billing rates of between \$170.00 and \$225.00 per hour. *Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, ex. A.

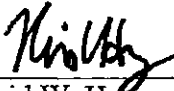
There is a difference between zealous advocacy and unreasonable extravagance. The award of attorney fees granted here falls squarely into the latter category. Any award of costs and fees must be reasonable, and a court is not required to "blindly accept the figures advanced by the attorney." *Craft Wall of Idaho*, 108 Idaho at 706, 701 P.2d at 326. Accordingly, the Court is urged to follow the guidance of the Court in *Craft Wall of Idaho, supra*, and limit such an award to that which is reasonable and proportionate to the case at hand.

CONCLUSION

Mr. Whitted respectfully requests that the Court vacate the award of costs and attorney fees issued below, or, alternatively, that the Court limit any such award to that which is reasonable and proportionate to the present dispute.

DATED this 19 day of June, 2009.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.


 Reid W. Hay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of June, 2009, a true and correct copy of the foregoing document was served as follows:

John M. Marshall J. Will Varin GIVENS PURSLEY LLP PO Box 2720 Boise, ID 83701-2720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery
Idaho Department of Water Resources, c/o Nicholas B. Spencer 322 E. Front Street Boise, Idaho 83720	☐ First Class Mail ☐ Hand Delivery ☒ Facsimile ☐ Overnight Delivery


 Reid W. Hay