

JUL 02 2009

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Re: *SRBA Subcase No. 63-7539*  
GP File: 7383-1

Dear Gentlemen:

Enclosed please find Sarah Jane Smith's Response to Whitted's Memorandum in Support of Challenge filed on this date with the Snake River Basin Adjudication Court. Thank you.

Sincerely,



Gretchen E. Laur,  
Assistant to J. Will Varin

Enclosures

JUL 02 2009

DEPARTMENT OF  
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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.: 63-7539

**SARAH JANE SMITH'S RESPONSE TO  
WHITTED'S MEMORANDUM IN SUPPORT  
OF CHALLENGE**

Pursuant to SRBA AO1 Rule 13(e) and the Court's Amended Challenge Scheduling Order, Sarah Jane Smith responds to Objector/Challenger Craig Whitted's Memorandum in Support of Challenge as follows:

**I. INTRODUCTION**

Objector/Challenger Craig Whitted ("Whitted") objects to Special Master Theodore R. Booth's award of attorneys' fees and costs to Respondent Sarah Jane Smith ("Ms. Smith") and requests the Court overturn the award. Whitted has not challenged Special Master Booth's dismissal of his late Objection and the only issues now before the court involve the Special Master's award of costs and attorneys' fees to Ms. Smith.

Through his Challenge, Whitted asks the Court to relieve him of the consequences of his actions in filing an untimely Objection, taking an unsupported factual and legal position through his Objection that the Court and Ms. Smith relied upon to their detriment, and then, only after Ms. Smith expended a great deal of time and energy preparing and filing a Motion for Summary Judgment, taking an entirely new legal position that undermined the Court's basis for allowing the late Objection and placed into doubt the Court's jurisdiction over what had turned out to be a Canyon County property rights dispute.

Whitted should not be relieved of the consequences of his actions because (1) Special Master Booth properly perceived the factual and legal issues as Whitted had framed them in his arguments in support of his late Objection; (2) Whitted's change in legal theories greatly prejudiced Ms. Smith, and under Rule 15(a), Whitted should bear the costs of asserting a new position in the litigation; (3) even if the Court finds Rule 15(a) inapplicable, the award of attorneys' fees and costs is appropriate and should be affirmed on other grounds. Finally, the Court should affirm the amount of the award, which is completely reasonable under the circumstances of this case, and award Ms. Smith her costs and fees in opposing Whitted's challenges to the award.

## **II. FACTUAL AND PROCEDURAL HISTORY**

This dispute arises out of Ms. Smith's and her predecessors-in-interests' (for the sake of clarity, they will be referred to collectively as "Ms. Smith") use of a well for stock water purposes. The well was drilled in 1967 by Ms. Smith. At the time Ms. Smith drilled the well, and there was a dispute as to whether or not it was on Ms. Smith's property or her neighbor's, who was Whitted's predecessor-in-interest (collectively "Whitted"). In 1972, Ms. Smith applied for, and received from the Idaho Department of Water Resources, a water right permit listing the

well as a point of diversion. Ms. Smith used water from the well on a continuous basis since it was drilled.

More recently, Ms. Smith filed a claim in the Snake River Basin Adjudication seeking to validate her water right in the well. Through this process, it came to light, through GPS technology, that the well was, in fact, located on property just inside Whitted's property line. Whitted, acting *pro se*, lodged a Standard Form 1 Objection objecting to Ms. Smith's water right claim, after the period for objecting to the claim had expired. Special Master Booth, in his discretion, treated the untimely Objection as a motion to file a late objection and held a hearing on February 12, 2008 to determine whether or not the untimely Objection should be allowed. *See* Order Granting Motion to File Late Objection filed February 13, 2008.

Based upon Whitted's representations to the Court concerning the nature of his Objection and his theory that Ms. Smith was trespassing on his property and, therefore, could not establish a water right, Special Master Booth allowed Whitted's Objection to be filed and set the matter for trial. *Id.* At the hearing regarding the late filed Objection, counsel for Ms. Smith specifically discussed his concern that the SRBA was not the proper forum for a prescriptive easement/quiet title action, but that Ms. Smith would assert she had gained a prescriptive right to use the well even if it was located on Whitted's property. *Id.* at p. 3. Accordingly, Whitted was on notice that prescriptive rights could be at issue in this litigation. The Special Master granted the motion to file a late objection on the basis that Whitted's legal theory was water right based and not merely a property rights dispute between the parties.

The parties, operating under Whitted's trespass theory, conducted discovery and otherwise prepared for trial. In his written responses to Ms. Smith's discovery requests, Whitted repeatedly referred to his belief that Ms. Smith should not be granted a water right because of "trespass." *See* Affidavit of J. Will Varin, filed September 12, 2008. Through the process of

factual development, it became apparent there may not be a factual dispute and the issue presented by Whitted's Objection was a legal one that could be decided through motion practice, without the necessity and expense of a trial.

On July 1, 2008, the Court held a pretrial conference pursuant to Idaho Rule of Civil Procedure 16(c) to discuss the factual issues, if any, that remained to be resolved at trial. *See* Reporters' Transcript Subcase No. 63-07539; Order Vacating Trial and Setting Deadline for Filing of Dispositive Motions, filed July 2, 2008. At the pre-trial conference, at which Whitted again appeared *pro se*, the parties agreed there did not appear to be any material factual disputes, stipulated to certain uncontested facts where Whitted reiterated his no water rights in trespass theory, and agreed the matter could likely be resolved on summary judgment rather than at trial. *Id.* In reliance on Whitted's assertions and the parties' stipulations there were not any disputed facts, Special Master Booth then vacated the previously scheduled trial date and provided deadlines for the filing of summary judgment motions. Order Vacating Trial and Setting Deadline for Filing of Dispositive Motions, filed July 2, 2008.

Pursuant to the Court's order, Ms. Smith prepared and filed a Motion for Summary Judgment and supporting documentation, including affidavits, on July 31, 2008 explaining Ms. Smith's position in defense of Whitted's no water right in trespass theory. Whitted, still acting *pro se*, also filed his own Motion for Summary Judgment together with the Affidavit of Carrie Cusic Moore asserting, in sum, "[t]his water right should not exist on this well because it has been claimed in trespass." (Emphasis added). Ms. Moore's affidavit, the only testimony submitted in support of Whitted's Motion for Summary Judgment, stated in full:

I Carrie Cusic Moore, to the best of my recollection concerning the well under the rim on my parent's property, Earl and Doris Cusic (7120 Warren Spur Rd., Melba).

I was living at home at the time the well was drilled. My father was upset because the neighbor was setting up to drill a well. He went to the neighbor and said he was setting up the rig on his property (Earl's). The neighbor drilled the well anyway on Earl's property. My father was angry at the trespassing. Because of financial reasons he didn't pursue it, [sic] any farther [sic].

I personally seen [sic] the well rig there, and was aware of the well being drilled on my father's property.

/s/ Carrie Cusic Moore

Whitted had previously supplied Ms. Smith with this affidavit in response to discovery, and Ms. Smith had actually submitted the very same affidavit in conjunction with her Motion for Summary Judgment asserting it supported her position that she, or her predecessors-in-interest had established prescriptive ownership over the well. *See* Affidavit of J. Will Varin in Support of Sarah Jane Smith's Motion for Summary Judgment, filed July 31, 2008 (attaching Ms. Moore's affidavit at Exhibit A).

On September 10, 2008, the day responses to the parties' respective Motions for Summary Judgment were due, Whitted, now represented by counsel for the first time in the litigation, filed a new, untimely Cross Motion for Summary Judgment and various affidavits, including a new affidavit from Ms. Cusic Moore, that contradicted the trespass theory he had asserted thus far in the litigation.<sup>1</sup> In his untimely Cross Motion for Summary Judgment, Whitted abandoned his trespass theory and asserted for the first time in the litigation that Ms. Smith and her predecessors-in-interest used the disputed well pursuant to permission, which permission had only recently been revoked. In other words, upon hiring counsel, who apparently received Ms. Smith's arguments against Whitted's trespass theory, changed the case from a

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<sup>1</sup> Not only was the Cross Motion for Summary Judgment filed almost a month and a half after the scheduled summary judgment deadline of July 31, 2008, but it was also untimely under Rule 56 of the Idaho Rules of Civil Procedure because it was set for hearing with the previously scheduled summary judgment motions on September 24, 2008.

water rights case to a property rights case – which counsel for Ms. Smith stated would be inappropriate during the hearing on Whitted’s Objection.

Ms. Smith immediately moved to strike Whitted’s Cross Motion for Summary Judgment and all supporting documentation because it was untimely, violated the Court’s Order, and raised new issues after Ms. Smith had agreed to vacate the trial date based upon Whitted’s representations there were not any contested issues of fact. *See Sarah Jane Smith’s Motion to Strike Cross Motion for Summary Judgment and All Supporting Documents*, filed September 10, 2008. In the alternative, if the Court allowed the Cross Motion for Summary Judgment to stand, Ms. Smith requested “appropriate sanctions, including costs and attorneys’ fees, caused by Objector Craig Whitted’s violation of this Court’s Order.” *Id.*

A hearing was held on Ms. Smith’s Motion to Strike. At the hearing, Special Master Booth construed Whitted’s Cross Motion for Summary Judgment asserting a new theory of the case as a motion to amend his pleading, pursuant to Idaho Rule of Civil Procedure 15(a). Special Master Booth granted the motion to amend, subject to Whitted’s payment of Ms. Smith’s costs and attorneys’ fee incurred due to Whitted’s representations to the Court and his eleventh hour about face on his theory of the case. Because Special Master Booth allowed Whitted to assert his new legal theory, he denied Ms. Smith’s Motion to Strike, but dismissed Mr. Whitted’s Objection because the permissive use theory he now asserted did not provide a valid basis to object to Ms. Smith’s water right claim. *See February 13, 2008 Order* at p. 3-4. The prescriptive easement issue was left unresolved at the parties’ request so it could be addressed by the local district court. No quiet title/prescriptive easement action has been filed by either party to date.

Pursuant to the Special Master’s February 13, 2008 Order, Ms. Smith filed a Verified Memorandum of Costs and Fees requesting \$58.01 in costs, \$169.70 in electronic research costs, and \$23,229.00 in fees for a total of \$23,456.71. In her Verified Memorandum of Costs and

Fees, Ms. Smith itemized the fees into the amounts incurred through various points in the litigation. Ms. Smith incurred \$8,437.00 in fees up to the pre-trial conference; \$9,991.00 in preparing her summary judgment motion and supporting documentation; \$2,870.5 in fees following the filing of the summary judgment motion; and \$1,930.50 in fees for compiling and preparing the Verified Memorandum of Fees and supporting documentation as requested by the Special Master. *See Sarah Jane Smith's Verified Memorandum of Costs and Attorneys' Fees*, filed October 1, 2008. After a hearing, Special Master Booth awarded Ms. Smith a total of \$23,140.71 for costs and fees and issued a Recommendation consistent with his findings.

Whitted filed a Motion to Alter or Amend the Recommendation, that the Special Master denied. This Challenge followed.

### **III. ADDITIONAL ISSUES PRESENTED FOR REVIEW BY THE DISTRICT COURT**

1. Should the Special Master's Award of costs and fees to Ms. Smith be affirmed on grounds other than Idaho Rule of Civil Procedure 15(a)?
2. Should Ms. Smith be awarded her costs and fees in defending Whitted's challenges to the Special Master's Award?

### **IV. STANDARD OF REVIEW**

The parties do not dispute the applicable standard of review. Under established Idaho law, a Special Master's findings are afforded great deference. A Special Master's findings of fact are accepted unless clearly erroneous. AO1 § 13(f). "The special master's conclusions of law are not binding upon the district court, although they are expected to be persuasive." *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002).

## V. ANALYSIS

### A. Whitted Changed Positions in this Litigation.

Under the Idaho Rules of Civil Procedure, a “pleading” must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” I.R.C.P. 8(a)(1). A pleading “should be construed to do substantial justice,” but the pleading must also put the adverse party on notice of the claims brought against it. I.R.C.P. 8(f); *Youngblood v. Higbee*, 145 Idaho 665, 668, 182 P.3d 1199, 1202 (2008). In this case, Special Master Booth properly found Whitted’s pleading put Ms. Smith on notice of his trespass claim and that Whitted’s actions, up to the point he filed a Cross Motion for Summary Judgment asserting a new theory, were consistent with his trespass theory. *See* Order Denying Motion to Alter or Amend, filed April 1, 2009.

Whitted argues he only asserted the well in question was drilled in trespass, but that after it was drilled, Ms. Smith and her predecessors-in-interest used the well by permission. 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. Special Master Booth adeptly summarized Whitted’s arguments that he again asserts in this Challenge:

Whitted asserts that he gets to pick and choose which meaning he assigns to his objection based upon whether, as the lawsuit progresses, he deems it more important to challenge the validity of the elements of the subject water right or alternatively to defend an action seeking a prescriptive easement upon his land

*Id.* at pp 2-3.

Not only is this logic entirely inconsistent with the concept of notice pleading, it can be, and was in this case, extremely prejudicial to the opposing party. A pleading is not an empty vessel waiting to be filled with content as the lawsuit progresses; it must put the opposing party on notice of the claims against it from the start.

Here, Special Master Booth properly found Whitted assumed a new position in the litigation with the filing of his Cross Motion for Summary Judgment that, for all intents and purposes, functioned as an amendment to the pleadings. Special Master Booth then exercised his discretion to allow Whitted to assert his new legal theory, but required payment of Ms. 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 a court the discretion to allow a party to amend a pleading and further allows a court to "make such order for the payment of costs as it deems proper." *See also Curtis v. City of Ketchum*, 111 Idaho 27, 34, 720 P.2d 210, 214 (1986)

In his current Challenge, Whitted again ignores and contradicts the representations he made to the Special Master and Ms. Smith upon which they both relied for purposes of case planning and development. Whitted's representations to the Court and Ms. Smith defined the scope of his Objection. Whitted filed his Objection late without seeking leave of Court prior to filing it. Special Master Booth, in an exercise of his 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. Had Whitted actually asserted permissive use from the start of this case, as he now argues in this Challenge, then he would not have had any grounds to object to Ms. Smith's water right claim and his Objection would not have been allowed, and the costs and fees about which he complains now, never would have been incurred.

At the July 1, 2008 pretrial conference, the Court, counsel for Ms. Smith, and Whitted<sup>2</sup> met to define the scope of factual issues for trial. It soon became apparent at this hearing there was not a factual dispute, and the matter likely could be resolved on summary judgment. At no time during this hearing did Whitted explain that his trespass theory was limited to the drilling of the well. Instead, the Court and Ms. Smith understood Whitted asserted continuing trespass and agreed to vacate the trial and set a dispositive briefing schedule based upon Whitted's representations in this regard.

Contrary to Whitted's current arguments made in an attempt to avoid paying Ms. Smith's costs and fees, prior to the filing of his untimely Cross Motion for Summary Judgment, Whitted never asserted his trespass theory was limited to drilling of the well. It was only after Ms. Smith filed her Motion for Summary Judgment and Whitted retained counsel that Whitted asserted his trespass claim was limited solely to the timeframe surrounding the drilling of the well. The Special Master saw through Whitted's transparent attempts to avoid summary judgment and properly found he had changed theories mid-litigation, much to Ms. Smith's cost and prejudice. The Special Master's findings and legal conclusions were correct, are supported by the record in this matter, and should be affirmed.

**B. Even If The Court Finds Rule 15(a) Is Not The Appropriate Grounds to Award Ms. Smith Fees and Costs, the Award Should Be Affirmed On Other Grounds.**

In reviewing Special Master Booth's decision to award Ms. Smith her costs and attorneys' fees, this Court is essentially acting in an appellate capacity. Idaho law is clear that a

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<sup>2</sup> Until the filing of Whitted's Cross Motion for Summary Judgment, Whitted acted *pro se* in this matter. While Whitted's *pro se* status and lack of legal acumen unnecessarily added to the procedural complexities of this case and likely resulted in the situation the parties now face, Whitted's *pro se* status should not play any role in the Court's ultimate decision. A *pro se* litigant is held to the 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. *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346-47, 941 P.2d 314, 318 - 319 (1997).

court, when acting in an appellate capacity, can affirm a judgment or legal conclusion on alternate grounds. *Martel v. Bulotti*, 138 Idaho 451, 454-455, 65 P.3d 192, 195 - 196 (2003). Here, several different alternate grounds exist to affirm the Special Master's award of costs and attorneys' fees. First, if Whitted truly was asserting permissive use from the start, his objection failed to state a claim and lacked a proper basis in law or fact and dismissal, along with an award of cost and fees would have been appropriate. I.R.C.P. 11-12; I.C. § 12-121. Due to his representations to the Court, a large number of fees were incurred and these fees are more properly borne by Whitted.

Second, under the doctrine of judicial estoppel, a party cannot assume inconsistent and contradictory positions during the course of litigation, and the parties to the litigation are bound to those positions they assume. *See Sword v. Sweet*, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004) ("Judicial estoppel, sometimes known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position" (citing *Risetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)); *see also McKay v. Owens*, 130 Idaho 148, 153, 937 P.2d 1222, 1227 (1997) ("One may not assert a particular position in order to serve one purpose, then assert a wholly contrary position to serve another"). Although the Special Master did not address the issue, Ms. Smith raised the issue of doctrine of judicial estoppel with the Special Master. *See Sarah Jane Smith's Response to Whitted's Motion to Disallow Costs and Fees* at p. 4. This doctrine prevents the parties from "playing fast and loose with the courts" and "protect[s] the integrity of the judicial process." *Risetto*, 94 F.3d at 601. Therefore, the

doctrine of judicial estoppel should be applied and fees awarded due to Whitted's actions in this case.<sup>3</sup>

Finally, an award of costs and fees would be proper in this action under Rule 11 and/or Idaho Code section 12-121 because Whitted's pursued an action in this Court that was frivolous and lacked any support in fact or law. If his position truly was that Ms. Smith had permissive use of the well, he had no basis for asserting his Objection. However, because of his Objection, Ms. Smith incurred substantial costs and fees. Again, these costs and fees are most properly borne by Whitted rather than the innocent party, Ms. Smith.

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

The calculation of a reasonable attorneys' fees award is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Lettunich v. Lettunich*, 145 Idaho 746, 749, 185 P.3d 258, 261 (2008). "The bottom line in an award of attorney fees is reasonableness." *Id.* at 780, 185 P.3d at 262. In *Lettunich*, the Idaho Supreme Court analyzed a district court's attorneys' fee award. *Id.* at 749-50, 185 P.3d at 261-64. *Lettunich* arose out of dispute between two brothers, Edward ("Ed") and Mike Lettunich, involved in a limited partnership. The litigation was hotly contested, and after Mike succeeded at trial, the trial court awarded Mike attorneys' fees of \$175,854. Ed appealed and the Supreme Court upheld the award of attorneys' fees, but remanded the case for further findings concerning the reasonableness and amount of the award. *Lettunich v. Lettunich*, 141 Idaho 425, 111 P.3d 110 (2005) (*Lettunich I*).

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<sup>3</sup> Likewise, Whitted should be prevented from changing positions or should bear the consequences for his actions under the doctrine of quasi estoppel. The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Terrazas v. Blaine County ex rel. Bd. of Com'rs*, 147 Idaho 193, 202, 207 P.3d 169, 176, fn. 3 (2009).

On remand, the trial court reviewed affidavits submitted by the parties and held an evidentiary hearing to explore the amount of a proper attorneys' fees award. After reviewing the evidence the trial court awarded Mike \$168,662 in attorneys' fees prior to appeal and \$15,193.13 for attorneys' fees following remand. Ed appealed again.

Ed argued, among other things, the time Mike's counsel spent was "excessive and that it included time spent on redundant efforts." *Lettunich*, 145 Idaho at 751, 185 P.3d at 263. The Court rejected this argument. *Id.* The Court further acknowledged the trial court properly considered Ed's actions in determining the amount of time reasonably required by Mike's attorneys. *Id.*

Here, Mr. Whitted argues Ms. Smith's counsel spent exorbitant time and energy in defending her interests. A review of the previously submitted time sheets does not support this argument. For the Court's convenience, Ms. Smith divided her counsel's time based upon various segments of the litigation, *i.e.*, before the pre-trial conference, preparing the Motion for Summary Judgment, after the Motion for Summary Judgment, and time spent reviewing the timesheets and preparing the application for costs and attorneys' fees. *See Verified Memorandum of Costs and Attorneys' Fees*, filed October 1, 2008.

A review of each of these categories reveals time was properly spent developing the facts and legal theories of this case. As Mr. Marshall explained in his October 1, 2008 Affidavit, and the Court recognized in its initial Order Granting Motion to File Late Objection, the legal questions involved in determining the effect of having a point of diversion on another individual's property potentially without authorization were novel and their appeared to be little established law on the subject. Therefore, in-depth research and analysis was required to confirm the state of the law and find analogous and persuasive case law. Further, this case involved a history of almost forty (40) years, which in turn, required significant factual

investigation and development to determine the history of the point of diversion and the parties' and their predecessors-in-interests' relationships. In an attempt to keep fees reasonable, associate attorneys performed factual investigation, research, analysis, and drafting tasks at a lower billing rates whenever feasible. All time spent was reasonably and necessarily incurred in protecting Ms. Smith's interests, and Whitted has not established any basis to reduce the attorneys' fees Ms. Smith claims by any amount.

**D. Ms. Smith Should Be Awarded Her Costs and Attorneys' Fees for Defending Against Whitted's Attack on the Special Master's Award.**

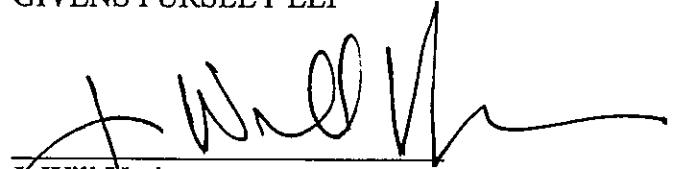
Moreover, pursuant to Idaho Code section 12-121 and Idaho Rules of Civil Procedure 11 and 54(e)(1) and/or Idaho Appellate Rule 11.1, Ms. Smith should be awarded here costs and attorneys' fees incurred in defending against Whitted's challenges to Special Master Booth's award. As discussed above, Whitted either, (1) pursued an objection that lacked foundation if his position truly was one of permissive use from the start, or (2) pursued one course of action only to later change his position resulting in great expense to Ms. Smith and the dismissal of his Objection. Under either scenario, Ms. Smith should be awarded her costs and fees incurred in defending against Whitted's attacks on the Special Master's costs and fees award.

**VI. CONCLUSION**

For all of the foregoing reasons, Sarah Jane Smith respectfully requests the Court deny Whitted's Challenge affirms the Special Master's recommendation and awards her the full amount of her costs and attorneys' fees, including the fees generated in opposing Whitted's challenges to the Special Master's initial cost and fee award.

Dated this 1 day of July, 2009.

GIVENS PURSLEY LLP

  
J. Will Varin

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1 day of July, 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:

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