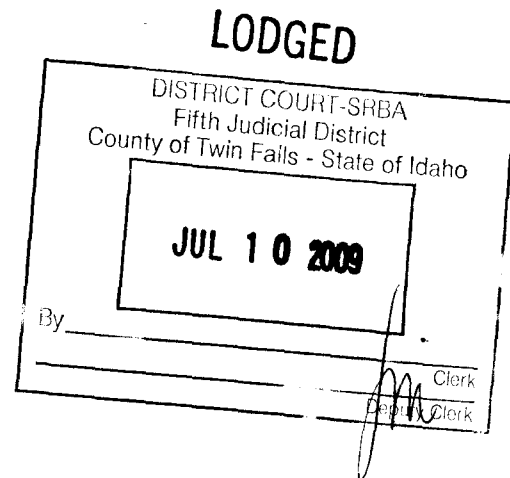


Kimbell D. Gourley/ISB #3578
 Reid W. Hay/ISB #7550
 TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.
 The 9th & Idaho Center
 225 North 9th Street, Suite 820
 P.O. Box 1097
 Boise, ID 83701
 Telephone: (208) 331-1170
 Facsimile: (208) 331-1529
 Email: kgourley@idalaw.com
 Email: rhay@idalaw.com

Attorneys for Craig Whitted



**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

) **REPLY 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 Reply 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.

ANALYSIS

In Sarah Jane Smith's ("Ms. Smith") brief in response ("Response Brief") to Mr. Whitted's Challenge to the Special Master's Order, Ms. Smith asserts that: (1) Mr. Whitted changed positions in the litigation; (2) that if Idaho Rule of Civil Procedure 15(a) does not provide appropriate grounds for the award of costs and attorney fees then some other rationale not raised below could be used to

justify the award; (3) that the award of \$23,140.71 was reasonable; and (4) that Ms. Smith should similarly be granted costs and fees on appeal. Ms. Smith's arguments are addressed below.

A. Mr. Whitted's position that the 1967 drilling of the well was trespass was not factually incompatible with his position that subsequent use of the well was pursuant to permission.

Ms. Smith continues to assert that Mr. Whitted's position that the use of the well at issue by Ms. Smith's predecessor's-in-interest was permissive was incompatible with his position that the 1967 drilling of the well was trespass, and thus represented a change in position meriting an award of costs and attorney fees pursuant to Rule 15(a).

Ms. Smith writes: "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 the claim and his theory that the well was both drilled and used in trespass." *Response Brief*, at 8 (emphasis added).

This is a remarkable assertion. According to Ms. Smith, the record reveals that Mr. Whitted made "very candid admissions" that precisely contradict his argument presented in the present Challenge. Notably, however, Ms. Smith declines to direct the Court's attention to where in the record these "very candid admissions" might be found. Indeed, Ms. Smith's assertion is followed no citation to the record whatsoever. The record contains a host of affidavits, motions, briefs, and other documents, including the full transcript of the July 1, 2008 pretrial hearing. If the record actually contained such "very candid admissions" from Mr. Whitted with respect to both drilling and use of the well at issue being in trespass (it does not), then it seems likely that counsel for Ms. Smith would have discussed these admissions, or at least specified where others could locate them. The absence of such a citation is telling. Ms. Smith was unable to find any such statements because they simply do not exist.

The closest thing in the Response Brief to a discussion of the record pertaining to drilling and subsequent use of the well was with respect to Mr. Whitted's responses to Ms. Smith's interrogatories and accompanying his *pro se* motion for summary judgment. Ms. Smith's Response Brief asserts that "[i]n his written responses to Ms. Smith's discovery requests, [Mr.] Whitted repeatedly referred to his belief that Ms. Smith should not be granted a water right because of 'trespass.'" *Response Brief*, at 3. Mr. Whitted's written responses to Ms. Smith's discovery requests appears in the record as exhibit A in the Affidavit of J. Will Varin. That document (for which neither Mr. Whitted nor Mr. Varin provided the interrogatory questions) states in full:

My knowledge of where the well is located.
 My surveys.
 Other recorded surveys.
 The adjudication applications.
 The owner did not use the water for more than 12 years 7 months. Water right is
 forfeit after 5 years of no use. 92.07.17 05.02.19 05.03.02
 The trespass of the person who had the well drilled,
 He had full knowledge of the trespass and told not to drill the well before drilling was
 started.
 Supreme court case Rabido et al v Farey IDAHO 1920 page 4 line 17
 And any other laws or court cases that says water rights cannot be developed in
 trespass.
 My witnesses will testify in person on the trespass of the person who drilled the well,
 other than the Dept. of Water Resources.

Affidavit of J. Will Varin, ex. A.

Viewing the document, one observes that Mr. Whitted's discovery responses did indeed allege trespass, but only with respect to the original drilling of the well in 1967. Mr. Whitted asserted "trespass of the person who had the well drilled" and stated that the driller "had full knowledge of the trespass and [was] told not to drill the well before drilling was started." He proposes to present witness who will testify to trespass, but only "of the person who drilled the well[.]" Because Mr. Whitted's discovery responses allege trespass only with respect to the 1967 drilling of the well (which the parties agree was trespass) nothing in those responses is inconsistent

with Mr. Whitted's position that subsequent use of the well was pursuant to permission granted by Mr. Whitted and his predecessors-in-interest.

With respect to Mr. Whitted's *pro se* motion for summary judgment, Ms. Smith quotes from Mr. Whitted's very short handwritten motion that "[t]his water right should not exist on this well because it has been claimed in trespass." *Response Brief*, at 4 (quoting *Motion for Summary Judgment*). From this, Ms. Smith appears to suggest that Mr. Whitted was asserting trespass with respect to subsequent use, rather than Mr. Whitted's actual argument that no water right arose because any such right was initiated by the trespassory 1967 drilling of the well, and a valid water right could not be initiated by an act of trespass pursuant to *Rabido v. Furey*, 33 Idaho 56, 190 P. 73, 75 (1920). Ms. Smith's quotation from Mr. Whitted's statement, however, was selective – not even including the entire sentence from which it drew. The full text of the motion was as follows:

This water right should not exist on this well because it has been claimed in trespass because of the Supreme Court case Rabido et al v. Furey Idaho 1920 says that 'a valid water right cannot be initiated by using anothers ditch against his will, or by any other trespass.'

Motion for Summary Judgment. Viewing Mr. Whitted's statement in context, it does not support the meaning Ms. Smith would read into it. This is especially true in conjunction with the concurrently filed first Affidavit of Carrie Cusic Moore, in which Ms. Cusic Moore's statements pertained only to the 1967 drilling of the well, and made no mention of subsequent use. (First) *Affidavit of Carrie Cusic Moore.*

Ms. Smith, however, suggests that the first and second affidavits of Ms. Cusic Moore demonstrate Mr. Whitted's alleged assertion of factually incompatible positions. *Response Brief*, at 5. In her Response Brief, Ms. Smith quotes the first Affidavit of Carrie Cusic Moore (filed when Mr. Whitted was *pro se*) which stated:

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, any farther.

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

(First) *Affidavit of Carrie Cusic Moore* (quoted in *Response Brief*, p. 4-5).

Ms. Smith argues that Ms. Cusic Moore's second affidavit, however, "contradicted" Mr. Whitted's position. *Response Brief*, at 5. Ms. Cusic Moore's second affidavit stated, in pertinent part, that:

4. In the late 1960s, your affiant remembers a conversation between Earl Cusic and Jesse Peavey, the owner of Canyon Cattle Co., Inc., the feedlot operator on the adjacent property, regarding use of the well on the Whitted Property.

5. Permission was given by my father, Earl Cusic, to Jesse Peavey and his company to use the water on a non-exclusive basis, and my father also continued to use the well.

6. I also remember my father watering horses from the well with a hose into a small stock tank. This way my father would not have to bring the horses up every day. It was easier that way to keep the horses and milk cows segregated.

(Second) *Affidavit of Carrie Cusic-Moore*, ¶¶ 4-5.

Contrary to Ms. Smith's representations, there is nothing about Ms. Cusic Moore's affidavits that conflict in any way, or are factually incompatible with Mr. Whitted's argument that the 1967 drilling of the well without permission was trespass. There is no factual or logical incompatibility with a well having been drilled in trespass, but subsequent use being allowed by revocable permission. Mr. Whitted's position and his interpretation of *Rabido v. Furey* may have been legally inadequate to prevail with respect to his Objection, but the Special Master's award of

costs and attorney fees was not based on any legal defect in Mr. Whitted's argument, but instead was entered solely pursuant to Rule 15(a), and on the basis that Mr. Whitted allegedly abandoned one position to take a different and factually incompatible position. Neither the Special Master nor Ms. Smith, however, have identified any change in positions that would support such an award.¹

B. The Special Master's *sua sponte* award of costs and attorney fees pursuant to Rule 15(a) cannot be upheld on alternative grounds.

Ms. Smith asserts that since in this Challenge the Court is acting in its appellate capacity, if the Special Master's award of costs and attorney fees cannot be upheld pursuant to Rule 15(a), then the Court could affirm on some other, alternate grounds. *Response Brief*, at 10-11. Ms. Smith now proposes Idaho Rule of Civil Procedure 11 or Idaho Code § 12-121. *Response Brief*, at 11-12. Neither of those alternative grounds were employed by the Special Master, and neither of them were raised in the proceedings below.

Contrary to Ms. Smith's argument, although in many instances an appellate court can affirm a ruling on alternate grounds, there is a recognized due process based exception concerning awards of costs and fees. *Fournier v. Fournier*, 125 Idaho 789, 791-92, 874 P.2d 600, 602-03 (Ct.App. 1994). "[A]ny theory upon which an award of attorney fees is based, either used in the trial court to award fees or selected on appeal as the 'correct theory' to uphold a correct result, must be advanced

¹ In her Response Brief, Ms. Smith claims that at the July 1, 2008 pretrial hearing the parties stipulated that there were not any disputed facts. *Response Brief*, at 4. There was never any such stipulation. See *Order Vacating Trial and Setting Deadline for Filing of Dispositive Motions* (expressing the Special Master's expectation that there "might well" be an absence of disputed facts, but not recording any stipulation that there were no disputed facts). Instead, the parties stipulated to three very specific facts; not, as Ms. Smith would have it, that there were no disputed facts. Tr. p. 26, L. 3 – p. 29, L. 8.

An additional point in need of clarification arises from the Special Master's statement that "at the [July 1, 2008] pretrial conference this Special master specifically inquired of the parties as to whether there was a factual issue regarding permission to be determined at trial. Whitted stated nothing in response to this inquiry." *Order Denying Motion to Alter or Amend*, at 3. The Special Master was working from memory of a hearing held months before. In actuality, the transcript of that hearing demonstrates that no such question was put to Mr. Whitted. The closest the Special Master and Mr. Whitted came to such an exchange regarding "permission" involved only the question of whether permission was granted for the 1967 drilling of the well. Tr. p. 8, L. 9 – p. 10, L. 6. Further, the Special Master's statement was not in the form of a question. Tr. p. 8, L. 9 – p. 10, L. 6.

at the trial level by the party seeking fees. If a particular statute, rule or contract is not advanced below, it cannot be the basis for upholding the award later on appeal.” *Id.*; *Bingham v. Montane Resource Associates*, 133 Idaho 420, 424, 987 P.2d 1035, 1039 (1999). Consequently, since here the proposed alternative grounds were not advanced below, they cannot be used as a basis for upholding the Special Master’s award in the present appeal.

Aside from the question of “alternative grounds,” the due process rule expressed by the Idaho Court of Appeals in *Fournier* and the Idaho Supreme Court in *Bingham* also prohibits the Special Master’s *sua sponte* award of costs and attorney fees pursuant to Rule 15(a). In *Bingham*, the Idaho Supreme Court reversed an award of attorney fees because it had been granted *sua sponte* on grounds that had not already been raised by the prevailing party. *Bingham*, 133 Idaho at 423-24, 987 P.2d at 1038-39. Specifically, the Court in *Bingham* ruled that a trial court lacks the power to grant attorney fees *sua sponte* on grounds not previously raised by the party to whom the award would be granted. *Id.* The Idaho Supreme Court wrote that:

The district judge’s underlying assumption that he had the power to award fees on a basis not asserted by Montane is erroneous. In order to be awarded attorney fees, a party must actually assert the specific statute or common law rule on which the award is based; the district judge cannot *sua sponte* make the award or grant fees pursuant to a party’s general request.

Id. Later, the Court wrote that “[t]he district judge is not empowered to award fees on a basis not asserted by the moving party.” *Id.* at 424, 987 P.2d at 1039.

In the present case, following a hearing on a motion to strike the Court *sua sponte* awarded costs and attorney fees to Ms. Smith, basing its ruling on Rule 15(a). Ms. Smith, however, never asserted a claim for attorney fees pursuant to Rule 15(a). As a result, the Court acted outside its powers and the award was granted in error. *Id.* at 423-24, 987 P.2d at 1038-39.

In response to Mr. Whitted's quotation and discussion of the rule from *Bingham*, the Special Master wrote that: "Rule 15(a) became applicable when Whitted changed his position, and the response of the opposing party, or even a lack of response does not affect the applicability of the rule." *Order re: Motion to Disallow Costs and Attorneys' Fees*, at 8. The Special Master did not, however, articulate why his confidence in the applicability of Rule 15(a) would trump Mr. Whitted's due process right to present counter-arguments before granting the award, as required by the Idaho Supreme Court in *Bingham*. *Bingham*, 133 Idaho at 424, 987 P.2d at 1039 ("a request for attorney fees should alert the other party to the basis upon which attorney fees are requested in order that the other party may have a sufficient opportunity to object. Moreover, the district judge cannot award attorney fees, on what he determines to be the correct basis, without providing the nonmoving party with an opportunity to raise relevant facts and legal principles in its defense. Regardless of whether the award would have been proper if the party had requested fees on that basis, it is patently unfair to deprive the opposing party of an opportunity to present arguments against the award").

Even if Idaho Rule of Civil Procedure 11 or Idaho Code § 12-121 could be considered at this juncture as alternative grounds for an award of costs and attorney fees, no such award would be merited. Mr. Whitted's objection was not frivolous, and it was presented in good faith and not for any improper purpose. It is common in litigation that one side prevails, and another does not – that outcome does not generally result in an award of attorneys' fees. "Courts in the United States have long adhered to the 'American Rule' of awarding attorney fees. Each side is to pay his own fees except in a limited number of circumstances." *Fournier*, 125 Idaho at 791, 874 P.2d at 602. "A misperception of the law, or of one's interest under the law is not, by itself, unreasonable." *Snipes v. Schalo*, 130 Idaho 890, 893, 950 P.2d 262, 265 (Ct.App. 1997).

Moreover, in the present case Mr. Whitted filed his Objection after discovering that Ms. Smith's proposed point of diversion, the well, was improperly listed as not being on Mr. Whitted's property. In his Order Granting Motion to File Late Objection, the Special Master wrote that:

As to the cause of the untimely filing of Mr. Whitted's objection, the *Director's Report* for this water right listed the subject point of diversion as not being on Mr. Whitted's property. The *Director's Report* was based upon the license issued for the claimed water right, which apparently was issued with an error as to the location of the subject point of diversion.

Order Granting Motion to File Late Objection[;] Trial Scheduling Order, at 2 (emphasis in the original). The Special Master went on in a footnote to observe that:

Should the facts of this subcase show that Sara[h] Jane Smith does have a valid water right with a point of diversion on Mr. Whitted's property, Mr. Whitted should be allowed to pursue his objection if for no other reason than to be allowed participation in a subcase that will likely be relevant to any determination of the scope and extent of the claimant's use of Mr. Whitted's property.

Order Granting Motion to File Late Objection[;] Trial Scheduling Order, at 2 n.1. Since here Mr. Whitted's Objection followed the erroneous listing of his well, which is on his property and is the point of diversion for his own adjudicated water right, as not being on his property, and since the Special Master recognized that even if Ms. Smith is determined to have a valid water right his participation would be relevant to any determination of the scope and extent of the claimant's use of his property, Mr. Whitted's Objection was not frivolous or improper.

In her Response Brief, Ms. Smith next argued that pursuant to the doctrine of estoppel (Ms. Smith mentioned both judicial estoppel and quasi-estoppel) Mr. Whitted should have been barred from asserting his allegedly inconsistent positions below. *Response Brief*, at 11-12. As discussed in section A above, Mr. Whitted did not assert inconsistent positions, but, even so, Ms. Smith raises an excellent point. Indeed, Mr. Whitted has repeatedly raised a similar point. *E.g.*,

Memorandum in Support of Challenge, at 11; *Memorandum in Support of Motion to Alter or Amend*, at 4. If, as Ms. Smith contends, Mr. Whitted asserted inconsistent positions, the solution would have been 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.

Ms. Smith's discussion of the doctrine estoppel went off course, however, when she proposed that pursuant to the doctrine she should be awarded costs and attorney fees. *Response Brief*, at 11-12. In Idaho, there is no general equitable authority to award attorney fees. *Bingham*, 133 Idaho at 424, 987 P.2d at 1039. Any such award must be grounded in authority granted by statute, rule, or contract. *Fournier*, 125 Idaho at 791, 874 P.2d at 602. The doctrine of estoppel is not an independent grounds for an award of attorney fees, and so no award can be granted on that basis. See generally Hon. Jesse R. Walters, *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1 (2001).

C. Ms. Smith is not entitled to an award of costs and attorney fees on appeal.

Ms. Smith seeks attorney fees on appeal pursuant to Idaho Code § 12-121, Idaho Rules of Civil Procedure 11 and 54(e)(1) and Idaho Appellate Rule 11.1. No such award is merited because the present Challenge is not frivolous, and was not filed for any improper purpose. Indeed, the present Challenge is well grounded and is entitled to prevail.

Further, the arguments Ms. Smith presents in support of such an award, would, even if they were valid, apply only to the merits of the initial Objection – not the present Challenge, which concerns only the question of whether an award of costs and attorney fees pursuant to Rule 15(a) was reasonable and appropriate. In addition, no published case in Idaho (nor, as far as can be determined, in any jurisdiction) has considered the propriety of imposing an award of

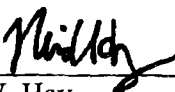
attorney fees pursuant to Rule 15(a) in the novel fashion employed by the Special Master below. As a result, this case presents a question of first impression and "[w]here issues of first impression are raised, attorney fees will not be awarded." *Saint Alphonsus Regional Medical Center v. Ada County*, 146 Idaho 862, 862, 204 P.3d 502, 502 (2009).

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 10th day of July, 2009.

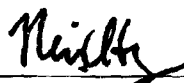
TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.


Reid W. Hay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of July, 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