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APR 29 2010

Department of Water Resources

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
APR 28 2010	
By _____	Clark
Deputy Clerk	

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	) Subcase 63-18957
	)
Case No. 39576	) SPECIAL MASTER'S REPORT AND
	) RECOMMENDATION RE: OWYHEE
	) MOTORCYCLE CLUB'S REQUEST
	) FOR ATTORNEY FEES
	)
_____	) ORDER ON MOTIONS TO STRIKE

I. PROCEDURAL HISTORY

The *Director's Report* for the Owyhee Motorcycle Club's (hereinafter "OMC") water right recommended a quantity of 0.16 cubic feet per second (cfs) and an annual diversion volume of 142.40 acre-feet per year (afy), with a source of groundwater, for domestic and commercial use. The commercial use is for a club house and for dust control on the motorcycle tracks. The domestic use for one home (including up to ½ acre of irrigation) and the club house. The domestic use is limited to 13,000 gallon per day pursuant to Idaho Code § 42-111. The recommended priority date was March 1, 1963. The claim is based upon diversion and application to beneficial use.

An objection was timely filed by The Terteling Company, Inc. (hereinafter "TTCI"). TTCI's objection asserted that the quantity should be: "Only Domestic Quantity"; that the priority date should be: "Only domestic priority"; and that the point of diversion "Is recommended in the wrong ¼ ¼ section." The objection states: "There is insufficient evidence to establish the priority date recommended. Point of Diversion is in the wrong ¼ ¼ section."

of \$11,932.00; for a total of \$15,507.73. the *Motion* is made pursuant to Idaho Code § 12-121, and asserts that OMC is the prevailing party in this subcase, and that TTCI pursued its objection frivolously, unreasonable, and without foundation.

On December 9, 2009, TTCI filed its *Objection to Owyhee Motorcycle Club's Motion for Attorneys' Fees and Costs*, together with the *Affidavit of Charles L. Honsinger in Support of Objection to Owyhee Motorcycle Club's Motion for Attorney's Fees and Costs*. Also on December 9, TTCI filed a *Motion to Strike*, seeking to have stricken from the record portions of the *Memorandum of Costs and Attorney Fees* and the *Affidavit of Attorney* on the grounds that the same contains settlement communications excluded from evidence pursuant to I.R.E. 408, and that such documents contain hearsay excluded from evidence pursuant to I.R.E. 802.

On March 30, 2010, the OMC filed the *Owyhee Motorcycle Club's Response to Motion to Strike*, together with the *Affidavit of Paul E. Drury*. On March 31, 2010, OMC filed the *Owyhee Motorcycle Club's Reply Memorandum in Support of Motion for Attorneys' Fees and Costs*, together with the *Affidavit of Julie Klein Fisher*.

On April 5, 2010, TTCI filed a *Motion to Strike Affidavit of Julie Klein Fischer Dated March 31, 2010*.

A hearing on the matters was held on April 6, 2010.

II. APPLICABLE LAW

A. Costs.

OMC seeks an award of costs as a matter of right in the amount of \$597.85 pursuant to I.R.C.P. 54(d)(1)(C); and discretionary costs in the amount of \$2,977.88 pursuant to I.R.C.P. 54(d)(1)(D). With respect to the claimed costs as a matter of right, I.R.C.P. 54(d)(1)(D) allows the recovery of certain costs to the prevailing party. The costs claimed as a matter of right by the OMC are for deposition reporting and transcribing fees, which is one of the enumerated costs allowed to the prevailing party as a matter of right

As to discretionary costs, I.R.C.P. 54(d)(1)(D) allows for an award of discretionary costs to the prevailing party "upon a showing that said costs were necessary

Idaho Rule of Civil Procedure 54(d)(1)(B) defines the term “prevailing party” as follows:

Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

Therefore, attorney fees can only be awarded upon a finding by the trial court: (1) that the party requesting the fees is the prevailing party; and (2) that the case was brought, pursued or defended frivolously, unreasonably or without foundation by the opposing party.

In making a determination as to whether a party pursued its case frivolously, unreasonably, or without foundation, the entire course of litigation is to be examined. 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. 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)).

C. Exercise of Discretion.

In addition to the foregoing, the award of attorney fees is committed to the sound discretion of the court. I.R.C.P. 54(d)(1)(B) and (C), and 54(e)(1). The standard

IV. ANALYSIS RE: COSTS AND FEES

A. Determination of Prevailing Party.

In considering a request for an award of both costs and attorney fees, the Rules require a determination of “prevailing party.” For the reasons set forth below, this Special Master finds that OMC prevailed in part.

In making a determination of “prevailing party,” I.R.C.P. 54 directs the trial court to consider “the final judgment or result of the action in relation to the relief sought by the respective parties.” The final judgment in this subcase is the previously issued *Partial Decree*. The relief sought by the parties is set forth in the Notice of Claim filed by OMC, and by the objections filed by both parties to IDWR’s recommendation of the elements of the water right.

With respect to the quantity element, OMC claimed 0.27 cfs (0.04 cfs for domestic purposes, and 0.23 cfs for commercial purposes). A volumetric limitation was not claimed, nor was such required to be claimed. The *Director’s Report* recommended a quantity of 0.16 cfs (0.04 for domestic purposes and 0.16 cfs for the commercial purposes). Both OMC and TTCI objected to quantity. OMC objected on the grounds that the rate of diversion should have been 0.27 cfs as claimed, and TTCI objected that the quantity should only be a domestic quantity.² In its briefing, TTCI asserts that its objection to quantity included an objection to the recommended volumetric limitation of 142.4 afy. TTCI’s *Objection to OMC’s Motion for Attorneys’ Fees and Costs*, p. 4.

As to the rate of diversion component of the quantity element, the rate of diversion set forth in the *Partial Decree* remained unchanged from the rate of diversion recommended in the *Director’s Report* (0.16 cfs). Accordingly, neither party prevailed on this particular issue.

² The objection filed by TTCI does not elaborate as to what is meant by the term “domestic quantity.” Idaho Code § 42-111 defines domestic purposes. With respect to quantity, I.C. § 42-111 does not provide a specific limit in terms of cubic feet per second, rather domestic uses for homes, organization camps, public campgrounds, and livestock, including other purposes in connection therewith, is limited to 13,000 gallons per day. A domestic right for any other uses is limited to 2,500 gallons per day. Converting these daily limitations into annual limitations expressed in terms of acre feet per year, a use of 13,000 gallons per day is equal to 14.57 afy; and a use of 2,500 gallons per day is equal to 2.80 afy. In addition, it is the understanding of this Special Master that it is a policy of IDWR to limit the recommendations for domestic water rights to 0.24 cfs, which would provide two (2) hours of use to reach the 13,000 gallon per day limit.

OMC argues that all of the above costs were necessary and exceptional costs reasonably incurred, and that an award of such costs is in the interest of justice. For the reason set forth below, this Special Master finds that such costs are not exceptional.

With the exception of approximately \$120 in copy, postage, and courier fees, the lion's share of the OMC's claimed discretionary costs are the consulting fees paid to ERO resources. The report prepared by ERO resources for the OMC is attached to the Affidavit of Paul E. Drury, P.E. The ERO report discusses the flow measurement tests conducted by ERO and also provides an estimated annual volume limit. The report does not discuss any issues with respect to the priority date of the water right, nor does it discuss any issues regarding the point of diversion.

OMC's water right claim is based upon diversion and application to beneficial use. In other words, there has not heretofore been any determination of the extent of beneficial use through a prior decree, nor has there ever been a beneficial use field exam that would have been required had the right been licensed. As the claimant of the right, OMC bears the ultimate burden of persuasion for each element of the right. I.C. § 42-1411(5). OMC claimed a higher rate of diversion than was recommended in the *Director's Report*, and OMC filed an objection to the *Director's Report* as to the recommended quantity. As stated above, the *Director's Report* was in error as to the recommended annual diversion volume.

With respect to the annual diversion volume, this Special Master notes that the purpose of use for the OMC right is fairly unique or uncommon. The purpose of use of dust control is unlike an irrigation purpose of use, where IDWR routinely estimates annual diversion volumes based upon standard calculations for irrigation use for different areas of the state (for example, in the Treasure Valley area IDWR utilizes an amount of 4.5 acre feet per acre for irrigation use). Unlike an irrigation water right, an estimation of the extent of beneficial use for OMC's water right would necessarily entail a more particularized determination of the historical extent of beneficial use of the right. See *Supplemental Director's Report Regarding Subcase No. 63-18975* pp. 4-7. Again, the claimant OMC bears the ultimate burden of persuasion to support its claim.

foundation for such an objection can be found on the face of the *Director's Report* itself, without reliance on any extrinsic foundation for the objection.

In viewing this case in its entirety, it cannot be said that TTCI pursued its objection frivolously, unreasonably, or without foundation. TTCI's objection raised a legitimate, triable issue of fact, i.e. what is the annual volumetric limitation of OMC's water right? Therefore, in accordance with Idaho law, attorney's fees cannot be awarded pursuant to I.C. § 12-121.

V. RECOMMENDATION

Based upon the file and record herein, and upon the foregoing analysis, IT IS RECOMMENDED that the SRBA District Court enter a judgment in favor of the Owyhee Motorcycle Club and Against The Terteling Company, Inc., in the amount of \$298.93. together with a final order denying the remainder of the costs and attorneys' fees sought by OMC.

Dated April 28, 2010



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State

APR 28 2010

By _____

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)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

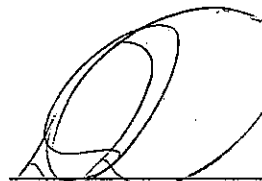
Water Right(s): 63-18957

On April 28, 2010, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

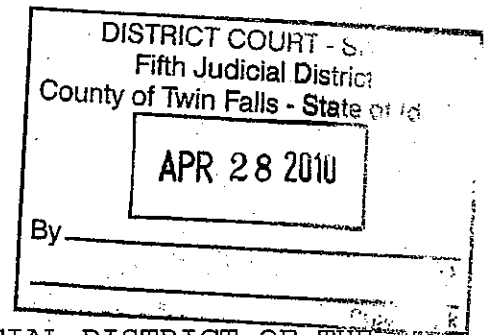
Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED April 28, 2010.



DIANA R DELANEY
Deputy Clerk



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)
_____)

CERTIFICATE OF MAILING

Water Right(s): 63-18957

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on April 28, 2010, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

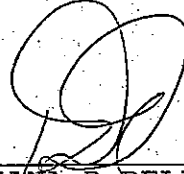
THE TERTELING CO INC
Represented by:
CHARLES L. HONSINGER
455 S THIRD ST
PO BOX 2773
BOISE, ID 83701-2773
Phone: 208-342-4591

EDWARDS FAMILY LLC
Represented by:
DANA L. HOFSTETTER
608 WEST FRANKLIN STREET
BOISE, ID 83702
Phone: 208-424-7800

CERTIFICATE OF MAILING

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04/28/10

OWYHEE MOTORCYCLE CLUB INC
Represented by:
JULIE K. FISCHER
332 N BROADMORE WAY, STE 102
NAMPA, ID 83687
Phone: 208-475-2200



DIANA R DELANEY
Deputy Clerk