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DEPARTMENT OF  
WATER RESOURCES

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| DISTRICT COURT - SRBA<br>Fifth Judicial District<br>County of Twin Falls - State of Idaho |
| MAY 17 2010                                                                               |
| By _____ Clerk                                                                            |
| 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 63-31194A and 63-31194B |
|                | )                                 |
| Case No. 39576 | ) SPECIAL MASTER'S REPORT AND     |
|                | ) RECOMMENDATION RE: SUNDANCE     |
|                | ) INVESTMENTS LTD. PARTNERSHIP'S  |
|                | ) REQUEST FOR ATTORNEY FEES       |
|                | )                                 |
|                | )                                 |

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I. PROCEDURAL HISTORY

On July 8, 2009, this Special Master issued a *Memorandum Decision and Order Granting Motion for Summary Judgment; Special Master's Report and Recommendation* (hereinafter "*Summary Judgment Order*"). The procedural history of these subcases is set forth therein and will not be repeated here. On October 15, 2009, the SRBA District Court issued a *Partial Decree* for water right claim 63-31194B in the name of Sundance Investments Ltd. Partnership (hereinafter "Sundance"). Also on that date the SRBA District Court entered a *Final Order Disallowing Water Right Claim* 63-31194A, claimed by L. Darwin McKay (hereinafter "McKay").

On October 29, 2009, Sundance filed its *Memorandum of Costs and Affidavit of Attorney Fees*, seeking costs and attorneys' fees pursuant to Idaho Code §§ 12-120 and 12-121, and pursuant to the Purchase and Sale Agreement that was involved in this action. Sundance seeks costs as a matter of right in the amount of \$126.00, and attorneys' fees in the amount of \$17,594.50. On November 6, 2009, McKay filed his *Motion to Disallow* the claimed costs and fees.

A hearing on the matter was held on March 30, 2010.

## II. APPLICABLE LAW

### A. Costs.

Sundance seeks an award of costs as a matter of right in the amount of \$126.00 pursuant to I.R.C.P. 54(d)(1)(A), which allows the recovery of certain costs to the prevailing party. The costs claimed as a matter of right by Sundance are for deposition reporting and transcribing fees, which is one of the enumerated costs allowed to the prevailing party as a matter of right.

### B. Attorney Fees.

Sundance seeks an award of attorneys' fees in the amount of \$17,594.50 pursuant to I.R.C.P. 54(e)(1) and I.C. §§ 12-120(3) and 12-121, and also pursuant to the Purchase and Sale Agreement.

Idaho follows the "American Rule" which requires parties to litigation to pay their own attorney fees unless there is statutory authority or a contractual right to the contrary. *Owner-Operator Indep. Drivers Assoc. of Idaho v. Idaho Public Util. Comm'n.*, 125 Idaho 401, 871 P.2d 818 (1994); *Great Plains Equip. Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 979 P.2d 627 (1999); I.R.C.P. 54(e).

**(1) I.C. § 12-120(3).** Idaho Code § 12-120(3) provides a statutory basis for an award of attorney fees in civil cases. It states in relevant part:

**Attorney's fees in civil actions.** - . . . (3) In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, or contract relating to the purchase or sale of goods, wares, merchandise, or services and in any commercial transaction unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney's fee to be set by the court, to be taxed and collected as costs.

The term "commercial transaction" is defined to mean all transactions except transactions for personal or household purposes.

(2) I.C. § 12-121. Idaho Code § 12-121 also provides a statutory basis for an award of attorney fees in civil cases as follows:

**Attorney's Fees** - In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Idaho Code § 12-121, however, is subject to the terms of I.R.C.P. 54(e)(1) which states:

**Attorney Fees.** In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

Therefore under Idaho Code § 12-121, 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)).

**(3) Prevailing Party Defined.** For purposes of I.C. §§ 12-120 and 121, 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.

**(4) Purchase and Sale Agreement.** Sundance also claims attorneys’ fees pursuant to the Purchase and Sale Agreement which states:

10. DEFAULT; ATTORNEY FEES. If either party default under this Agreement, the non-defaulting party shall be entitled to all such rights as are available at law or in equity, all of which shall be cumulative. In the event of any controversy, claim or action being filed or instituted between the parties to this Agreement to enforce the terms and conditions of this Agreement, or arising from the breach of any provisions thereof, the prevailing party will be entitled to receive from the other party all costs, damages, and expenses, including reasonable attorneys fees, incurred by the prevailing party, whether or not such controversy or claim is litigated or prosecuted to judgment. The prevailing party will be that party who is awarded judgment as a result of trial or arbitration, or who receives a payment of money or other concession or agreements from the other party in settlement of claims asserted by that party.

*Anderson Aff.*, Ex. C.

### **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 applicable to court discretion in Idaho is: “(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer

boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.” *Sun Valley Shopping Center, Inc., v. Idaho Power Company*, 119 Idaho 87, 803 P.2d 993 (1991).

### **III. 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.” 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(s) in these subcases are the previously issued *Partial Decree* for water right 63-31194B in the name of Sundance, and the *Final Order Disallowing Water Right Claim* for 63-31194A. The parties to these subcases, Sundance and McKay, both claimed ownership of the same water right. The water right has been decreed in the name of Sundance, and McKay’s claim has been decreed disallowed. Therefore, Sundance is the prevailing party.

#### **B. Sundance’s Costs as a Matter of Right.**

Sundance claims \$126.00 (M&M Court Reporting Service – Jack Miller Deposition) as cost allowable as a matter of right pursuant to I.R.C.P. 54(d)(1)(A) and (C). In accordance with the “prevailing party” analysis in the preceding section, Sundance is the prevailing party and therefore is entitled to an award of this amount.

#### **C. Sundance’s Claim for Attorney Fees under I.C. § 12-120(3).**

Sundance asserts that this action involved a “commercial transaction” as that term is defined by the statute. This special Master agrees. The gravamen of the dispute between the parties was a commercial transaction, and as such Sundance is entitled to recover attorney fees pursuant to I.C. § 12-120.

McKay argues that the dispute over ownership of the subject water right was not a commercial transaction, but rather it is more properly characterized as a quiet title action. This Special Master recognizes that there are a line of cases in Idaho that distinguish actions involving the determination of property rights from actions where the gravamen of the case is a commercial transaction. See *C & G, Inc v. Rule*, 135 Idaho 763, 769, 25 P.3d 76 (2001) (holding that a dispute involving the interpretation of deeds executed by the parties predecessors in interest was not a commercial transaction); citing *Jerry J Joseph C.L.U. Ins. Assoc. v. Vaughn*, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990) (denying attorney fees under I.C. § 12-120(3) in an action where property owner sought a judgment compelling adjoining property owners to reimburse it for irrigation assessments, to record an instrument establishing an easement, and to remove a fence hindering its use of the easement and where after settlement, adjoining property owners breached the settlement agreement); *Chen v Conway*, 121 Idaho 1006, 829 P.2d 1355 (Ct. App. 1991) (determining that a quiet title action involving a prescriptive easement was not a commercial transaction under I.C. § 12-120(3)); *Durrant v. Christensen*, 117 Idaho 70, 785 P.2d 634 (1990) (holding that an action in which landowners sought adjudication of water rights and a permanent restraining order prohibiting the defendant from interfering with their diversions and use of water determined was not based upon a commercial transaction as defined in I.C. § 12-120(3)); *Sun Valley Hot Springs Ranch v. Kelsey*, 131 Idaho 657, 962 P.2d 1041 (1998) (stating that an action to determine ownership and easement rights did not fall within the meaning of a commercial transaction under I.C. § 12-120(3) and therefore attorney fees were properly denied.)).

The above-cited line of cases do not stand for the proposition that any civil action that involves a determination over property rights is automatically not within the scope of the statutory definition of a commercial transaction. There is no question that the dispute between McKay and Sundance involved a determination of property rights, but the gravamen of the action was the contractual relationship between the parties as memorialized in the Purchase and Sale Agreement. In *Brooks v. Gigray Ranches*, 128 Idaho 72, 910 P.2d 744 (1996), the Idaho Supreme Court described a two part analysis to determine whether a prevailing party could be awarded attorney fees under I.C. § 12-

120(3): First, “there must be a commercial transaction that is integral to the claim”; and second “the commercial transaction must be the basis upon which recovery is sought.” *Brooks*, 128 Idaho at 78, 910 P.2d at 750. In the instant case, the commercial transaction is not only integral to Sundance’s claim, but it is also forms the basis for Sundance’s claim.

At oral argument, counsel for McKay argued that Mr. McKay was not bound by the Purchase and Sale Agreement for the reason that McKay did not sign it, but rather Jack Miller signed the Agreement on behalf of the cotenants pursuant to the document entitled “Action by Cotenants” (*Anderson Aff.* Ex. D); and that Jack Miller was not authorized thereunder to bind McKay with respect to the subject water right. Assuming *arguendo* that Mr. McKay was not bound by the Purchase and Sale Agreement, it is still the opinion of this Special Master that the conveyance of the real property and the subject water right was a commercial transaction within the statutory definition. A contract is not a necessary prerequisite to a commercial transaction. In *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 136 Idaho 466, 36 P.3d 218 (2001) the court stated:

Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a commercial transaction. The Court has held that “[t]he critical test is whether the commercial transaction comprises the gravamen of the lawsuit; the commercial transaction must be integral to the claim and constitute a basis on which the party is attempting to recover.”

*Id.*, at 472, quoting *Bingham v. Montane Resource Associates*, 133 Idaho 420, 426, 987 P.2d 1035, 1041. In the instant subcase, the purchase of the subject real property and water rights used thereon by Sundance from the cotenants, including McKay, is within the statutory definition of “commercial transaction.” This subcase is not analogous to the situation presented in *C&G, Inc. v. Rule*, where the transactions that resulted in the deeds being interpreted by the court occurred approximately 100 years before the action was filed, and involved the predecessor-in-interest to the parties to the civil action. Thereofre, Sundance should be awarded attorney fees pursuant to I.C. § 12-120.

#### **D. Sundance’s Claim for Attorney Fees under the Purchase and Sale Agreement.**

As noted above, the Purchase and Sale Agreement (*Anderson Aff.* Ex. C) contains a clause that allows the prevailing party in any controversy or claim between the parties to the Agreement to recover attorneys' fees from the other party. In the opinion of this Special Master Sundance is entitled to recover its reasonable attorney fees from McKay under this clause.

With respect to making a determination as to prevailing party, the Agreement defines prevailing party as follows: "The prevailing party will be the that party who is awarded judgment as a result of trial or arbitration, or who receives a payment of money or other concession or agreements from the other party in settlement of claims asserted by that party." *Anderson Aff.* Ex C. Sundance was adjudged in the SRBA to be the owner of the subject water right and therefore is the prevailing party under this definition.

McKay argues that he was not bound by the Purchase and Sale Agreement. This Special Master finds this argument to be unpersuasive. In the *Summary Judgment Order*, this Special Master directly relied on two provisions of the Purchase and Sale Agreement in making a determination that the subject water right was conveyed from McKay to Sundance thereunder. First, the Purchase and Sale Agreement describes the water rights that were to be conveyed to Sundance as water rights "used on" the land. Secondly, the Purchase and Sale Agreement contained a merger clause which prevented consideration of parol evidence to contradict, vary, alter, add to, or detract from the terms of the contract. *Summary Judgment Order* pp. 10-11. McKay did not file a motion to alter or amend or in any way challenge the *Summary Judgment Order* for purposes of arguing that he was not bound thereby.

Sundance argues that McKay was a party to and bound by the Purchase and Sale Agreement, and further that this issue is *res judicata* based upon the unchallenged *Summary Judgment Order*. This Special Master agrees with both assertions. Although McKay's signature does not appear on the Purchase and Sale Agreement, he had authorized Jack Miller, through the "Action by Cotenants" to execute and deliver to the buyer an agreement and other documents to effectuate the purchase and sale of the land. As to whether it is *res judicata* that McKay is bound by the Purchase and Sale Agreement, a final judgment (partial decree) has been entered by the SRBA Presiding

Judge adjudging Sundance to be the owner of the water right. The record underlying this final judgment shows that the determination of ownership of the water right was derived from the written Purchase and Sale Agreement. Principles of *res judicata* now preclude McKay from asserting that he was not a party to, or bound by, that Agreement.

**D. Sundance's Claim for Attorney Fees under I.C. § 12-121.**

In the previous sections of this recommendation, this Special Master has determined that Sundance is entitled to recover attorneys' fees pursuant to both I.C. § 12-120(3) and pursuant to the Purchase and Sale Agreement. Both of these basis are very straightforward in their application in these subcases. Accordingly, this Special Master finds it unnecessary to engage in making the more subjective findings required under I.C. § 12-121 as to whether McKay pursued this litigation unreasonably, frivolously, or without foundation.

**IV. FINDINGS PURSUANT TO Rule 54(e)(3)**

With respect to the factors to be considered pursuant to Rule 53(e)(3), this Special Master has carefully reviewed the *Memorandum of Costs and Affidavit of Attorney Fees* submitted by Sundance. The attorney's fees and related expenses incurred by Sundance are commensurate with the requirements of the litigation and the results obtained. Furthermore, this Special Master notes that at oral argument on the matter, counsel for McKay stated in substance that McKay was not challenging the particulars of Sundance's claimed attorney fees; but rather McKay's objection to said attorney fees was based on the assertion that no attorney's fees should be awarded to Sundance.

**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 Sundance

Investments Ltd. Partnership and against L. Darwin McKay., in the amount of \$17,720.50.

Dated May 17, 2012



THEODORE R. BOOTH  
Special Master  
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER REPORT & RECOMMENDATION RE SUNDANCE INVESTMENTS LTD PARTNERSHIP REQUEST FOR ATTORNEY FEES was mailed on May 17, 2010, with sufficient first-class postage to the following:

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