

RECEIVED

JUN 18 2010

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JUN 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 No: 63-32533

Case No. 39576

)
)
) ORDER DENYING REQUEST FOR
) ATTORNEY'S FEES AND COSTS
)
)
)

I.

FACTS AND PROCEDURAL BACKGROUND

1. On April 21, 2010, this Court issued a *Memorandum Decision and Order on Challenge* ("Memorandum Decision") in the above-captioned matter. The facts and procedural background set forth in the *Memorandum Decision* are incorporated herein by reference and will not be repeated.

2. Also on April 21, 2010, this Court issued a *Partial Decree* in the above-captioned matter, decreeing Joe Aten, Matthew Aten, Bill Aten and Maria Morales (collectively, "Claimants") 0.16 cfs of waste water from the Case Drain for irrigation and stockwater purposes with a priority date of November 4, 1933. As a result of the *Objection* filed by the Wilder Irrigation District ("District") to the Claimants' claim, the following waste water remark was also included in the *Partial Decree*: "Source of this right is waste water. The wasting of water may be discontinued at any time."

3. On May 5, 2010, the District filed its *Memorandum of Costs & Fees* and supporting *Affidavit*, wherein the District sought recovery solely of the costs and attorney's fees it incurred in relation to Claimants' *Challenge*.¹ The District's request for

¹ The amount of costs and attorney's fees sought by the District in its *Memorandum of Costs & Fees* are \$29.03 and \$2,686.50 respectively.

fees and costs was made pursuant to Idaho Code § 12-121 and Idaho Rule of Civil Procedure 54(d).

4. On May 17, 2010, Claimants filed a hand-written letter with this Court in opposition to the District's request for attorney's fees and costs. The Court treated the letter as a *Motion to Disallow Attorney's Fees and Costs* ("*Motion to Disallow*").

5. Hearing on Claimants' *Motion to Disallow* was held before this Court on June 15, 2010.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on June 15, 2010. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or June 16, 2010.

III.

DISCUSSION

A. Attorney's fees under Idaho Code § 12-121.

The District seeks an award of attorney's fees related to its defense of Claimants' *Challenge* under Idaho Code § 12-121, which provides for reasonable attorney's fees to the prevailing party "in any civil action." However, "an award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562, 82 P.3d 833, 844 (2003); *see also* I.R.C.P 54(e)(1).

The Idaho Supreme Court has further directed that when deciding whether attorney fees should be awarded under Idaho Code § 12-121, "the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Michalk v.*

Michalk, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009). Although an award of attorney fees under Idaho Code § 12-121 is discretionary, the award must be supported by findings, and those findings, in turn, must be supported by the record. *McGrew*, 139 Idaho at 562, 82 P.3d at 844; I.R.C.P. 54(e)(2) (court shall make written findings as to basis and reason for awarding such attorney fees).

In this case, the District seeks only a portion of its attorney's fees incurred in this matter; specifically, those fees incurred by it as a result of defending against and responding to Claimants' *Challenge*. All attorney's fees incurred by the District in this matter prior to the filing of Claimants' *Challenge*, including those associated with the District's objection and its responses to Claimants' positions taken before the Special Master, have not been claimed and are not at issue. While the District is entitled to seek the recovery of less than all of its attorney's fees incurred in this matter, doing so does not relieve this Court of its obligation under Idaho Code § 12-121 to take into account "the entire course of the litigation" in determining whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation.

In reviewing the entire course of the litigation, this Court cannot reach the requisite finding under Idaho Code § 12-121 that the entire litigation was pursued frivolously, unreasonably or without foundation. As an initial matter, when Claimants initiated this matter by filing their *Notice of Claim* in the SRBA they had a reasonable, founded and colorable argument that they had established a valid right to the use of water from the Case Drain under Idaho law. Indeed, the *Director's Report* for the above-captioned water right recommended that Claimants receive a waste water right for 0.13 cfs from the Case Drain for the irrigation of 6.7 acres and 0.03 cfs for stockwater use, with a priority date of November 4, 1933. Ultimately a *Partial Decree* was issued in the above-captioned matter on April 21, 2010, decreeing Claimants 0.16 cfs of water from the Case Drain for irrigation and stockwater purposes. The issuance of the *Partial Decree* establishes that Claimants' *Notice of Claim* presented a legitimate issue to this Court as to whether they had established a right to the use of the water claimed therein.

Likewise, Claimants' defense to the District's objection that the Claimants' water right was developed in trespass and therefore should not exist was also not pursued frivolously, unreasonably or without foundation. This Court is aware and acknowledges

that the District's objection in this respect was voluntarily withdrawn following the Special Master's issuance of his *Order Granting Summary Judgment*. However, up until the time of withdrawal, the issue of whether Claimants' water right claim was developed in trespass was pending before the Special Master, and Claimants' defense against the same was not frivolous, unreasonable or without foundation.²

In its briefing in support of its request for attorney's fees and costs, and at oral argument, the District refrained from making the assertion that the entire course of litigation in this matter was frivolous. Rather the District's argument was limited to the *Challenge* portion of this proceeding, and the fact that it was required to incur attorney's fees and costs in responding to Claimants' *Challenge*, which it asserts was unsupported and unfounded. The District has not, however, set forth any grounds which would authorize this Court to parse out the *Challenge* portion of this proceeding and consider it separate from the remainder of the proceeding (i.e., that portion handled by Special Master Booth) for the purposes of evaluating the District's request for attorney's fees under Idaho Code § 12-121.

Simply stated, there are no grounds on which to separate the *Challenge* portion of a contested subcase from the remainder of a subcase proceeding for the purposes of Idaho Code § 12-121. *SRBA Administrative Order 1* ("AOI") § 9.a states that "[t]he Presiding Judge may refer matters, including subcases, to a Special Master by an *Order of Reference* pursuant to I.R.C.P. 53."³ An *Order of Reference* was issued on April 11, 2006, in the SRBA appointing Theodore R Booth as the presiding special master over all contested subcases for water right claims in Basin 63, including the one at issue here. *Order of Reference Appointing Theodore R. Booth as Special Master for Irrigation and Other Claims in Reporting Area 13, Basin 63*, In Re SRBA Case No. 39576 (April 11, 2006). That portion of this subcase handled by Special Master Booth pursuant to the *Order of Reference* and the subsequent *Challenge* handled by this Court under AOI § 13

² Also, the District's withdrawal of the issue was contingent upon the outcome of the summary judgment proceeding. In other words, the District reserved the issue pending the outcome of the summary judgment proceeding.

³ Idaho Rule of Civil Procedure 53(c) states in relevant part that "[s]ubject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order."

are a part of the same subcase. This Court must determine whether the *case*, not simply the *Challenge*, was brought, pursued, or defended frivolously, unreasonably, or without foundation under Idaho Code § 12-121. Since Claimants presented legitimate issues to this Court with respect to their *Notice of Claim*, an award of attorney's fees under Idaho Code § 12-121 is improper even if an argument can be made that other issues raised by Claimants in the course of this proceeding were frivolous, unreasonable or made without foundation.

The District argues that the Idaho Supreme Court's recent decision in *Bedke v. City of Oakley*, 2010 WL 1980433 (Idaho 2010) supports its request for fees under Idaho Code § 12-121, given that the Court upheld an Idaho Code § 12-121 award of attorney's fees to the City of Oakley in that matter against a *pro se* litigant. The District's reliance on *Bedke* is misplaced. In *Bedke*, unlike here, the entire course of the litigation was found to be frivolous. The Claimants in that matter presented no legal theory or authority supporting their claim to the use of water historically diverted by the City of Oakley and delivered through its system to customers within its service area. In this case, the Court is unable to make the requisite finding that the entire course of the litigation was pursued frivolously, unreasonably or without foundation.

Last, for purposes of applying Idaho Code § 12-121 a distinction can be made between the pursuance or defense of a matter "frivolously, unreasonably, or without foundation" and the pursuance or defense of a matter without the same level of competency expected of an attorney. Indeed both situations result in the incurrence of fees and costs by the party required to respond. However, Idaho Code § 12-121 only provides for the recovery of such fees in the event of the former situation.

B. Discretionary costs under Idaho Rule of Civil Procedure 54(d).

The District seeks \$29.03 in discretionary costs under Idaho Rule of Civil Procedure 54(d) for photocopies and postage associated with Claimants' *Challenge*.⁴ A court may, in its discretion, award a prevailing party certain discretionary costs where there has been "a showing that said costs were necessary and exceptional costs, reasonably incurred, and should in the interest of justice be assessed against the adverse

⁴ The District does not seek any costs as a matter of right in this matter.

party.” I.R.C.P. 54(d)(1)(D). A trial court must make express findings as to why a party’s discretionary costs should or should not be allowed. *Id.*

In *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005), the Idaho Supreme Court construed the requirement that a cost be “exceptional” to include “those costs incurred because the nature of the case was itself exceptional.” In that case, the prevailing party in a class action suit sought the recovery of discretionary costs in the form of expert witness fees incurred above and beyond the amount statutorily allowed as recoverable as a matter of right. The Idaho Supreme Court addressed the issue of whether the trial court’s denial of the request for discretionary costs on the grounds that they were not “exceptional costs” was an abuse of discretion. A review of the Court’s analysis in addressing this issue is instructive:

The record indicates the district court considered the nature of this case as a class action and its effect on numerous Idaho businesses and **found that although expert witnesses were necessary and their fees reasonable, the costs were not exceptional for a class action suit.** The district court recognized that the decision to deny additional expert witness fees was a matter of discretion and applied the correct legal standard.

The district court’s denial was likewise a reasonable conclusion. A court’s description of the circumstances giving rise to a grant or denial of discretionary costs is sufficient to satisfy the court’s obligation to exercise reason in its decisions. In this case the district court found that the outcome could affect over one thousand local businesses and involve potential damages of over \$50,000,000.00. This description adequately portrays the magnitude of the suit and suggests that **the district court found the need for expert witnesses an essential but ordinary part of such litigation.** Complex business litigation often relies on expert witnesses to explain alternative management schemes and/ or financing. The district court’s denial of the SIF’s additional expert witness fees was not an abuse of discretion.

Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho at 314–15, 109 P.3d at 168–69 (emphasis added). Thus, given that the nature of the class action suit was not exceptional and that the need for expert witnesses in class action suits is commonplace, the Court held that the district court did not abuse its discretion in holding that the expert witness fees incurred were not “exceptional.” *Id.* at 316, 109 P.3d at 170.

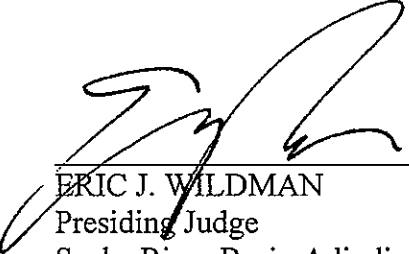
In this case, the discretionary costs claimed by the District are not “exceptional costs” as contemplated under Rule 54(d)(1)(D). This subcase was a typical contested

proceeding in the SRBA involving a notice of claim filed by Claimants and an objection to the water right claim filed by the District. The case involved four claimants and one objecting party. The District's objection was resolved on summary judgment, after which Claimants' water right was decreed. Neither the nature nor magnitude of the above-captioned case was exceptional. Although the photocopies and postage incurred by the District in relation to Claimants' *Challenge* may have been necessary and reasonable, they were not exceptional costs in a case of this nature. Rather, contested cases in the SRBA commonly involve copying and postage charges such that these costs are generally considered ordinary rather than exceptional. It follows that the District's request for discretionary costs in this matter associated with Claimants' *Challenge* does not fall within the scope of Rule 54(d)(1)(D).⁵

IV.
ORDER

For the reasons set forth above, Wilder Irrigation District's request for attorney's fees and costs associated with Claimants' *Challenge* is **HEREBY DENIED**.

Dated June 17, 2010


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

⁵ Because this Court denies the District's request for discretionary costs on the grounds that the same are not exceptional under Rule 54(d)(1)(D), it need not reach the issue of whether the costs should be assessed in the interest of justice. See e.g., *Hayden Lake Fire Protection Dist.*, 141 Idaho at 316, 109 P.3d at 170 (since the district court determined discretionary costs were not exceptional, it "was not required to rule on the issue of whether the fee should be assessed in the interests of justice").

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING REQUEST FOR ATTORNEY'S FEES AND COSTS was mailed on June 17, 2010, with sufficient first-class postage to the following:

WILDER IRRIGATION DISTRICT

Represented by:

PAUL L ARRINGTON
113 MAIN AVE W, STE 303
PO BOX 485
TWIN FALLS, ID 83303-0485
Phone: 208-733-0700

USDI BUREAU OF RECLAMATION

Represented by:

US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

BILL ATEN

21737 CASE LN
WILDER, ID 83676
Phone: 208-482-6963

JOE ATEN

MARIA L MORALES
MATTHEW ATEN
30588 PECKHAM RD
WILDER, ID 83676

