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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAR 12 2012	
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	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART MOTION TO
Case No. 39576	)	ALTER OR AMEND SPECIAL MASTER'S
	)	DECISION AND ORDER ON COSTS AND
	)	ATTORNEY FEES
	)	
	)	
_____	)	SUBCASE NO.: 31-11845

I. FACTS & PROCEDURAL HISTORY

This decision involves a dispute about whether discretionary costs sought by the State of Idaho during litigation of subcase 31-11845 were properly denied. Additionally, this decision corrects an arithmetic error made in the *Memorandum Decision* and Order Re: Costs and Attorney Fees.

A *Memorandum Decision and Order Re: Costs and Attorney Fees* (Dec. 31, 2008) was issued for subcase 31-11845. That *Memorandum Decision* held that the State of Idaho was entitled to costs under I.R.C.P. 68; the State of Idaho was not entitled to attorney fees under I.C. § 12-121 and I.R.C.P. 54(e), and the State was not entitled to attorney fees as a sanction under I.C. § 12-123.

The State filed a *Motion to Alter or Amend*, arguing that the case was “extraordinary” under Rule 54 and, therefore, discretionary costs should have been awarded. In addition, the *Motion to Alter or Amend* pointed out an arithmetic error in determining costs of right.

The claimant and objector, Ben Jernberg and Idaho Properties LLC, (hereafter Objectors) argued against the *Motion to Alter or Amend*. The Objectors argue that the *Memorandum Decision* correctly decided that discretionary fees should not be awarded. Objectors assert the case was not “exceptional” within the meaning of I.R.C.P. 54. The Objectors do not concur with the assessment of \$442.50 for Dr. Stukenholtz’s deposition, but they do not object to correcting the clerical error.

II. THE STATE’S ARGUMENT

The State of Idaho argues that I.R.C.P. 54(d)(1)(D) authorizes the district court to award “[a]dditional items of cost . . . upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party.” The State asserts that the case was “exceptional.” Specifically, the State of Idaho requests that the court reconsider its determination that the costs in this matter were not exceptional and asks for an award to the State for its out-of-pocket expert witness fee expenses in the amount of \$99,848.43.

III. THE CLAIMANT’S ARGUMENT

The Objectors argue that subcase 31-11845 was not “exceptional” within the meaning of I.R.C.P. 54. Objectors assert that the irrigation methods used, the type of soil and land covered and the ditch system was not enough to convert this in to an “exceptional” case. Objectors focused on the need to do soil testing. The State asked for soil testing, explaining it had conducted such tests in Federal Reserve Claims. The State asked for the tests because they believed the key issues were whether there was beneficial use of water. However, Objectors noted at the time of the asking for soil tests that the Soil Conservation Service had already classified most of the place of use as having soil which was not irrigable.

IV. DISCUSSION

The procedural background in this subcase and the litigation preparation by the parties was extensive. *Motions* for testing were filed. *Motions for Summary Judgment* were filed. Multiple depositions of fact witnesses and expert witnesses were taken. Offers of Judgment were exchanged. Field examinations were conducted, and photographs were taken of the place of use. The Idaho Department of Water Resources filed a *Director’s Report* and later a *Supplemental Director’s Report* regarding Subcase No. 31-11845. The Department reported

that its field inspection had led it to believe “that much of the pasture land is at a little higher elevation than the ditches and thus, cannot be watered with the distribution system in place.” *Supplemental Director’s Report* at 13. The Claimants supplied an *Affidavit of Joe Llamas in Support of Motion for Summary Judgment* which stated that Mr. Llamas had irrigated all the lands on Mr. Jernberg’s Mud Lake property and had pumped the full capacity of the two wells onto all of the pasture and dry graze property owned by Mr. Jernberg. IDWR then conducted an additional field inspection to prepare a topographic map of the place of use. The State of Idaho understood that IDWR’s topographic map contained good information, but was concerned that it appeared to be missing data along some elevations.

The State of Idaho obtained the Soil Conservation Service reports on the place of use. The State of Idaho acknowledged that the reports concluded that most of the Objector’s place of use was classified as not irrigable. This information was available without the additional soil testing which the State conducted.

Subsequently, the State of Idaho conducted an additional field examination and took its own soil samples. The State explained that it conducted similar tests on the Duck Valley Reservation to determine aspects of a Federal Reserved Water Right. Generally Federal Reserved Rights may be measured by the practicably irrigable acre standard. The State wanted to conduct soil testing here to litigate the issue of beneficial use.

The State argues this subcase was “extraordinary” within the meaning of IRCP 54(d)(1)(D) and therefore it is entitled to discretionary costs. The State’s argument in favor of finding this case to be “exceptional” and “extraordinary” are based on the economic, soil, and topography issues raised.

The State points out that a critical factual determination in analyzing whether a cost is exceptional is whether this class of cases “generally involves” the type of costs claimed. The State cites *Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 307, 314, 109 P.3d 161, 168 (2005). The *Hayden Lake* case involved a class action against the State Insurance Fund. In the *Hayde Lake* case, the trial court found the expert witnesses in a class action suit were necessary, and found that their fees were reasonable. However, the court found that the case and witnesses were not exceptional. *Id.* The Supreme Court upheld the finding that the case was not exceptional.

The State argues this case is extraordinary because state-law cases have not usually required a determination of the nature of the soil. That conclusion, however, may be overstating the situation. It is true that the court has not previously had discovery disputes over soil testing. However, soil evaluation is frequently used in SRBA cases. When IDWR makes recommendations for irrigation rights, it has determined that the soil is irrigable. The court has not had an opportunity to inquire whether IDWR conducts soil sampling of each irrigation right, or examines ASCS results for irrigation rights, or whether IDWR relies on field examinations of the place of use in combination with previous licenses, decrees, and other evidence to infer that the soil is irrigable. The court concludes that questions about soil conditions are routinely examined.

The State asks, perhaps rhetorically, how many trials have involved a claim that the delivery system would require water to run uphill? The court would note that other subcases have raised that question in one way or another during the litigation process. As with this subcase, most of those issues were resolved prior to trial. However, the court cannot conclude that topography of place of use is unique.

The State argued that this case was exceptional and extraordinary within the meaning of Rule 54(d)(1)(D) because it was critical to overall litigation in the SRBA relating to the State's water management. Surface water users alleged in other cases that the State had mismanaged the Eastern Snake Plain Aquifer by allowing too many junior groundwater users to pump from the aquifer. Thus the State was obligated to litigate this subcase in order to avoid charges of mismanagement by surface water users.

The State also argued that the irrigation methods utilized by the Objectors such as wild flooding with sporadic dikes presented novel issues which should be considered "extraordinary." This argument is that the State conducted economic analysis of whether the type of irrigation practices asserted by Objectors constituted a beneficial use. This analysis raised the issue of whether the additional forage produced by those irrigation methods cost more to produce than it was worth.

The Special Master was impressed with the professional, meticulous, and organized manner in which the State litigated throughout this subcase. Its arguments and presentation of evidence were among the best this court has seen in the SRBA. Nevertheless, the court does

not view the issues in this subcase as “exceptional” within the meaning of IRCP 54. The State’s litigation strategy was undoubtedly influenced by its management role with regard to the Eastern Snake Plain Aquifer. That management responsibility included oversight of a large number of water users who pump from the aquifer. Nevertheless, a connection to the aquifer is not enough to convert a subcase into an “exceptional” subcase under Rule 54.

Similarly, issues of whether the place of use had the type of soil and topography to enable irrigation may be vital to determining the elements of an irrigation right. However, they do not appear to be “exceptional.” The irrigation methods used, the type of soil and land covered, the topography and slope of the ground, and the primitive nature of the ditch system were facts which weighed in favor of the results sought by the State. However, the court cannot conclude that these issues or factors were so novel as to be “exceptional” under Rule 54. Thus, the court declines to find the additional costs were “necessary and exceptional costs reasonably incurred” which should be assessed in the interest of justice. Accordingly, the court **declines** to grant the *Motion to Alter or Amend* with the exception of correcting the total amount of the award of \$442.50 for expert witness fees plus the amount of \$2,012.10 for the deposition costs of Joe Llamas, Omar Llamas, Paul Stukenholtz and Dr. Dale Stukenholtz which correctly totals \$2,454.60.

DATED: March 12, 2012.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND SPECIAL MASTERS DECISION AND ORDER ON COSTS was mailed on March 12, 2012, with sufficient first-class postage to the following:

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