

RECEIVED
MAR 28 2012
DEPARTMENT OF
WATER RESOURCES

Albert P. Barker, ISB #2867
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson St., Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Telephone: (208) 336-0700
Facsimile: (208) 344-6034

*Attorneys for Tom O’Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen,
Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris*

Craig Hobdey
HOBDEY & HOBDEY
P.O. Box 176
Gooding, ID 83330
Telephone: (208) 934-4420
Attorneys for Big Wood Canal Company

**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) **A. Subcase No. 37-21112**
) **MEMORANDUM IN SUPPORT OF**
) **OBJECTOR’S OBJECTION AND**
) **MOTION TO DISALLOW COSTS**
) **PURSUANT TO I.R.C.P. 54(d)(6)**
)

COMES NOW, the Objectors, Tom O’Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw, and Pepin Corso-Harris, by and through their attorneys of record, Barker Rosholt & Simpson, LLP, and Objector, Big Wood Canal Company, by and through its attorneys of record, Hobdey & Hobdey, and hereby object to the Claimant’s Memorandum of Costs and move this Court for an Order Disallowing the claimed costs and fees.

There is no basis in the law for an award of costs and attorneys' fees to Claimants. The Claimants are not the prevailing parties in this action.

PERTINENT PROCEDURAL HISTORY

In 2007, the Department recommended water right No. 37-2117 for a diversion rate of 1.419 cfs to irrigate 54 acres approximately 4.5 miles from the point of diversion in the Hiawatha Canal to the property owned by Claimant, Marathon Partners. Speck Aff. 2. In November of 2007, Objectors filed a timely objection against the recommendation. *Id.* Ex. 3. The objection raised three bases: (1) that the diversion rate was excessive for the place of use, (2) that the period of use should be cut off at October 31 instead of November 15 as recommended, and (3) that the water right should not exist as it had been forfeited for non-use or abandonment. Marathon responded to this objection asserting that the water right had not been abandoned in whole or part. *Id.* Ex. 4. Claimant also asserted that use of the water right had been resumed to avoid abandonment or forfeiture. Claimant also asserted waiver, estoppel, laches. Claimant's response did not assert any basis to support an irrigation rate of greater than one-inch per acre.

In January, 2012, the parties executed an SF5 recognizing the existence of the right, but including a remark stating, "a portion of this right is used for conveyance." This SF5 was agreed to by Marathon and filed with the Court. Speck Aff. Ex. 23. The Court subsequently issued a Report and Recommendation which incorporated the terms of the SF5. In accordance with the SF5, the District Court entered a partial decree as a result of the proceedings. Objectors prevailed in part by the inclusion of the remark in the explanatory materials and Claimant prevailed in part when Objectors voluntarily withdrew their forfeiture objection.

STANDARD OF REVIEW

Attorneys' fees and costs may not be awarded in Idaho unless specifically authorized by statute or contract. *Rahas v. Ver Melt*, 141 Idaho 412, 414, 111 P.3d 97, 99 (2005). The legislature has authorized an award of attorneys' fees in only limited circumstances. *Id.* at 414-415. Attorneys' fees can be awarded under Idaho Code § 12-121, "only if the Court determines that the action was brought or pursued frivolously, unreasonably, or without foundation." *Youngblood v Higbee*, 145 Idaho 665, 669, 182 P.3d 1199, 1203 (2008).

A case is not brought, pursued, or defended frivolously, unreasonably, or without foundation, "if there is a legitimate, triable issue of fact, or a legitimate issue of law." *Kiebert v. Goss*, 144 Idaho 224, 228-29, 159 P.3d 862, 865-66 (2007); *Thomas v. Madsen*, 142 Idaho 635, 639, 132 P.3d 392, 396 (2006).

The Court's award of attorneys' fees is reviewed under the abuse of discretion standard. *Merrill v. Gibson*, 139 Idaho 840, 843, 87 P.3d 949, 952 (2004); *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982). The Court acts within its discretion when it recognizes the decision is one committed to the court's discretion, clearly defines the outer limits of its discretion, acts within those limits and reaches its decision through an exercise of reason. *Id.*

Under Rule 54(d)(1)(d), discretionary costs sought by the Claimant may only be allowed "upon a showing that said costs were necessary and exceptional cost reasonably incurred, and should, in the interest of justice, be assessed against the adverse party." When the need for expert witnesses in a case is essential but an ordinary part of this type of litigation, expert costs are not exceptional within the meaning of this rule. *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho 307, 109 P.3d 161 (2005).

The determination of who is a prevailing party is committed to the sound discretion of the trial court. *Lower Payette Ditch Co. v. Harvey*, ___ Idaho ___, ___ P.3d ___ (January 5, 2012); *Bream v. Benscoter*, 139 Idaho 364, 368, 78 P.3d 723, 727 (2003). “A trial court also has discretion to determine that there is no overall prevailing party.” *Lower Payette Ditch Co. v. Harvey* at ___; *Costa v. Borges*, 145 Idaho 353, 359, 179 P.3d 316, 322 (2008). “The failure of a [party] to recover all of the relief requested obviously does not automatically make the [other] party the prevailing party.” *Lower Payette Ditch Co. v. Harvey* at ___.

MARATHON CLAIMS NO COSTS AS A MATTER OF RIGHT

Rule 54(d) sets forth a specific category of costs that are awarded as a matter of right to a prevailing party. None of the costs asserted by Marathon in its Memorandum of Fees and Costs are costs as a matter of right. Accordingly, Marathon is entitled to no costs as matter of right.

MARATHON IS ENTITLED TO NO DISCRETIONARY COSTS

Marathon seeks over \$13,000 in discretionary costs, the bulk of which is costs payable to a consultant, Idaho Water Engineering, cost which presumably fall within a category of expert fees. The remaining costs claimed are photocopies, long distance telephone, and postage. First of all, Marathon has made no showing that any of these costs are exceptional as required by the rule. It is Claimant’s burden to show the exceptional nature of the costs. *Hayden Lake Fire Protection District v. Alcorn*, 141 Idaho, 307 314, 109 P.3d 161, 168 (2005). In *Hayden Lake*, the court recognized that a certain type of litigation ordinarily requires the need for expert witnesses as an essential, but ordinary part of the litigation. In those circumstances, the court should determine that the use of expert witnesses in such a case is not “exceptional” within the meaning of Rule 54(d)(1). Thus, in *Hayden Lake*, the Supreme Court affirmed the determination that use of an expert witness, even in a case that involve potential damages over \$500 million,

was not exceptional because of the nature of the case. In *Lettunich v. Lettunich*, 145 Idaho 746, 753, 185 P.3d 258, 265 (2008), the Supreme Court determined that, where a witness did not testify in person that the District Court erred in granting expert witness costs as a matter of right and upheld the District Court's determination not to award any costs beyond that as exceptional.

This Court is well aware that, in SRBA proceedings, it is hardly exceptional for the parties to use water rights consultants such as Idaho Water Engineering, Brockway Engineering, ERO, SFP, and many others. Indeed, it is routine to rely upon the expertise of hydrologists, agronomists, and others to present one's case in the SRBA. There is nothing exceptional at all in using the assistance of an expert in this instance in helping to determine when land was irrigated or how much conveyance loss there was in a 4.5 mile ditch system from the point of diversion to the Claimant's place of use. Here, the Claimant has made no attempt to show that the use of its experts or any of the other discretionary costs claimed were exceptional or otherwise meet the requirements of Rule 54(d)(1)(d). See e.g., Order on Motion to Alter or Amend (City of Pocatello), Subcase No. 29-00271, pp. 15-16, April 12, 2010, Melanson, J. (Declining to any award costs and fees even though the City of Pocatello's motion for reconsideration merely raised issues decided and explained in a previous order and even though the City of Pocatello did not prevail at all on its Motion.)

**THE COURT SHOULD EXERCISE ITS DISCRETION TO DETERMINE
THAT NO PARTY PREVAILED IN THIS ACTION**

This action involved objections to a water right delivered at the tail end of the Hiawatha Canal. The objections related to whether the right had been forfeited, whether the right had an excessive diversion rate, and whether the right had an excessive period of use. As to the forfeiture issue, there is a substantial amount of discussion in the back files of this right indicating little or no use on water on this property from the 1970s until the early 1990s. Based

upon that publicly available information, objectors raised the issue of forfeiture. The Idaho Supreme Court has recognized both complete and partial forfeiture. *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1996). It is not necessary to show that the entire right was forfeited, as a portion of every right is subject to forfeiture.

Only after Objectors provided Claimants with undisputed evidence showing that there had been no water use in 1987, the beginning of the adjudication, and only incidental water use in the early 1980s did the Claimants embark upon an investigation to attempt to show that water was put to use on the property during the 1980s. Until that investigation was done, there was no evidence to contradict the findings of the aerial photography in the possession of the Department and Objectors. When the results of that new investigation performed by Claimants was provided, Objectors immediately agreed to withdraw their objection, not because there was no chance of proving forfeiture or partial forfeiture, but because Objectors elected not to continue to pursue forfeiture, even though there appears to be substantial evidence of at least partial forfeiture in the evidence. Idaho Water Engineering made no measurements or proof of actual use of water on the property. The report only asserted that certain portions of the property were green during June and therefore must have been irrigated early in the irrigation season. Whether those green spots in late spring and early summer were the result of snow melt and runoff or from actual irrigation of the property from the Hiawatha Canal was not tested any further.

Nevertheless, at that point, Objectors asked for simple field headgate remark or a remark that would recognize the conveyance loss in the canal of 4.5 miles from the head of the canal to the place of use. For over a year, Marathon adamantly refused to even consider any such remark. Marathon hired Idaho Water Engineering to evaluate the water use, but even this expert acknowledged a substantial conveyance loss in the 4.5 mile ditch. Yet, Marathon still refused to

budge. It was only after urging by this Court that the parties resolve this subcase prior to trial that Marathon finally acceded to a remark recognizing the conveyance loss as a component of its right.

There are dozens and dozens of rights in Basin 37 with field headgate remarks and/or conveyance loss remarks. E.g., Redstone Partners on the 45 Canal (37-481B, et al. containing field headgate and volumetric limitations on the water use), Valley Club on the Hiawatha (37-494, et al. setting out field headgate requirements), and Cattle-Lack Ranch on the 45 Canal (37-114C identifying the specific amount of the flow in cfs denominated as conveyance loss). Here, the Objectors prevailed by having the same type of remark included on the right that they had suggested more than a year earlier. Notably, according to Claimant's brief, \$14,000 in costs and fees were incurred by Claimant in achieving a result through an SF5 that was offered by Objectors a year earlier and before any of those costs and fees were incurred.

It is also important to note that the SF5 is a settlement of a disputed case. The Idaho Supreme Court has held that when there is a settlement of a disputed case and where each of the parties prevailed and obtained something they wanted, or were able to fend off some of the claims that the other parties wanted, then a court is well within its discretion to determine that there was no prevailing party. *Lower Payette Ditch Co. v. Harvey*, ___ Idaho ___, ___ P.3d ___ (2012). Indeed, in Claimant's brief, not a single case is cited where a settlement was reached which included provisions requested by one party and then attorneys' fees and costs were awarded against that party for frivolously obtaining something through the settlement agreement. Under the authority of Rule 54 and *Lower Payette Ditch Company*, the Court should determine that there is no prevailing party in this matter as a whole.

**THE SUBCASE AS A WHOLE WAS NOT BROUGHT OR PURSUED
UNREASONABLY, FRIVOLOUSLY, OR WITHOUT FOUNDATION**

Recognizing that there is no basis for an award of attorneys' fees simply based on the theory that Marathon is a prevailing party (which as shown above, it is not), Marathon then reaches and asserts that the case as a whole was brought or pursued frivolously, unreasonably, and without foundation. As noted above, Marathon cites not a single wit of authority for the proposition that someone who obtains a settlement agreement including provisions it asks for, can be found to have pursued the matter frivolously, unreasonably, and without foundation. In *Belstler v. Sheler*, 151 Idaho 819, 264 P.3d 926 (2011), the Court concluded that, "where both parties presented legal theories that were ultimately successful before the district court, it was not an abuse of the court's discretion to find that the matter was not frivolously pursued or defended when it denied attorneys' fees."

Here, one of the legal theories presented by the objection was that there was excessive amount of water on the property and that the right should be limited through a remark recognizing the significant conveyance loss associated with this right. Recognizing the significant conveyance loss associated with this right is important in future administration and proceedings so that the Claimant, the Department, and any other person involved in future transfer proceedings will recognize that 100% of the right is not a consumptive right. This is important because as the back files of this right show as early as the 1990s, city water had been brought to this area and the property had been prepared to be subdivided. This is important for future administration of this water right, particularly when and if the claimant seeks to subdivide and develop this property, which is surrounded on three sides by other subdivided properties.

As the Supreme Court has stated:

“Attorneys’ fees are not appropriate under Idaho Code § 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,’ 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 Catalyst v. Turbo West Corpac, Inc., 119 Idaho 626, 630, 809 P.2d 487, 491 (1991); *Magic Valley Radiology Associates PA v. Professional Business Services*, 119 Idaho 558, 808 P.2d 1303 (1990).

Under Idaho law, it is not enough to show that one claim was frivolous or unreasonable, but that every claim must be found to be so. In *Management Catalyst* where one claim was legitimately submitted to the jury, the court held that the case as a whole could not be considered to be frivolous, even when the party did not prevail on that claim. A similar reasoning should apply to the claim that was stipulated to by the parties and submitted to the Special Master and District Court for approval in the SF5 settlement process. See *Walker v. Boozer*, 140 Idaho 451, 457, 95 P.3d 69, 76 (2004) (reversing an award of attorneys’ fees under Idaho Code § 12-121 because the entire case must be frivolous to justify an award; and that where meritorious legal arguments were raised even if not prevailing, an award is inappropriate under Idaho Code § 12-121).

First, Marathon argues that the principles of collateral estoppel make the objection on the forfeiture grounds frivolous. Marathon does not claim that collateral estoppel has any effect on the objection to the amount of water put to use on Marathon’s property. Marathon points to an internal Department memorandum concluding that the Department made no determination of forfeiture on other lands that were split from the property retained by Marathon and claims that this failure to find forfeiture on this other property somehow precludes challenge to whether or not there was forfeiture on the lands that were retained by Marathon. Marathon cites no

authority for this novel position. Indeed, there is no license or permit in the name of Marathon Partners.

Marathon relies upon a February 1995 memorandum from Mr. Saxton dealing with four applications for permit and transfer No. 4205 proposing mitigation for these four groundwater permits which specifically required the surface water to be left in the river. Mr. Saxton's memo states that the information does not clearly show the mitigation right has been forfeited through non-use. Speck Affidavit, Ex. 12. This memo states nothing about the Marathon right. Indeed, Transfer No. 4205 does not deal with the un-transferred Marathon right. Yet, a contemporaneous Department memorandum, dated February 22, 1995, from the same back file, which is not included among the exhibits to Mr. Speck's affidavit states:

“There has been much review and discussion regarding the validity of the transferred right and the SRBA is recommending disallowal because the right was forfeited or abandoned. The transfer is being processed pending the conclusion of the adjudication is subject to final disposition of the right.”

Skaggs Memo Ex. A to Barker Aff. (note that this memo was signed off on by Don Shaff on the same date).

Transfer No. 4205, referred to in the Saxton memorandum, contains the following provision, “approval of this transfer does not preclude the opportunity for review of the validity of the water rights in the ongoing Snake River Basin Adjudication.” Transfer No. 4205 conditions No. 7, *Id.* Ex. B. Even Dave Tuthill, Marathon's current expert, recognized in 2006 that the validity of this right would be reviewed in the SRBA. *Id.* Ex. C. Thus, it was clearly in the contemplation of the Department when this transfer was approved that the determination of forfeiture would be made in the course of the adjudication even for the rights subject to the transfer. Mr. Saxton's memo draws no conclusions about use of water or the remaining Marathon property. Clearly it is not frivolous to raise this issue, particularly when the

Department itself was so concerned about forfeiture of this right that the Department attempted to reserve the right to raise forfeiture of these rights in the SRBA.

Next, Marathon argues falsely that objectors had no evidence of forfeiture whatsoever. This claim is absurd. At the time the objection, or subcase, was brought, the evidence that Marathon now relies upon in this motion did not exist and had not been compiled. It was only compiled after Claimants provided Marathon with aerial photography showing that in 1987 and in 1984 there was no evidence of systematic irrigation of this property. See aerial photography, *Id.* Exs. D and E.

The existing information presented a strong case for forfeiture. In 1993, the Department's review of the files concluded as follows: "The claim has been completely reviewed by SRBA staff according to the standards set for review of claims. A Claim Verification Report (CVR) has been completed and the claim has been recommended for disallowal based upon a finding of five years non-use." *Id.* Ex F. The 1988 aerial photographs and findings by the Department determined that the delivery ditches to this property as of 1988 showed no evidence of carrying any water. *Id.* Exs. G and H. A 1993 review by Steve Clellan, Comparison of Evidence and Review, concluded that in 1974, irrigation was not shown in the aerial photographs. *Id.* Ex. I. The 1984 Landsat photography does not support irrigation uses. *Id.* In 1987 through 1993, field exams and maps showed no irrigation of the property. *Id.* As of 1990, there was no system for irrigation. *Id.* The Department reviewed affidavits prepared by the Claimant's counsel. The Department carefully reviewed the evidence that was submitted and found that the actual on-the-ground evidence did not support the Affiant's claims of use. *Id.* In reviewing the affidavits concerning use in the 1980s, the Department concluded that there was

only some possible irrigation in 1983 and 1984. This evidence gives rise to the likelihood of a partial forfeiture at best for Claimant.

The Department examined the history of the use of the Hiawatha Canal and concluded in 1974 the downstream rights on the Hiawatha were abandoned and this area became the last place of use on the ditch. *Id.* Because of the low flow at that time, the economical use of this land and water became impracticable. *Id.* As of 1980, plats were filed to subdivide the property. The Department further concluded, “all the evidence during this time confirms the non-use of water for irrigation on this property.” *Id.* The Department further concluded that merely paying assessments is not enough to prove that the Claimant actually put water to beneficial use, and therefore discounted the argument that paying assessments was sufficient to preserve the right. *Id.* The IDWR concluded in 1993 that “nothing has been found to support the use of this claim as a valid water right.” Ex. K. In a contemporaneous analysis by the Department on this claim, the Department concluded that the ditch is “heavy on conveyance losses.” Without the flows in the canal, this amount of water would not have been sufficient to get through the ditch to the property to maintain an economical crop, which “led to the non-use of the land and water as found.” Ex. J. The Department also found that use of the right in the lands for irrigation was not supported by the evidence. Ex. J.

What happened here was that Marathon Partners bought the land in 1992 from Pacesetter. Ex. L. At that time, water had not been used on the land for many years. In other words, Marathon took this property on a flyer, hoping to re-establish water rights. That this was its goal is clearly shown in the attempt by Marathon at that time to use the resumption of use doctrine to avoid forfeiture.

This effort is revealed in an exchange of communications between counsel for the Department and counsel for Marathon Partners in 1994. Ex M. The only issue at that time was whether or not Marathon could avoid forfeiture by the resumption of use of the water, which resumption apparently began in about 1993. This exchange of views preceded the Supreme Court's decision in *Sagewillow v. Idaho Department of Water Resources*, 138 Idaho 831, 170 P.3d 669 (2003). In *Sagewillow*, the Supreme Court made clear that resumption of use would not be an appropriate defense to forfeiture in an over-appropriated system because resumption of use would injure junior water users in those circumstances. Here, of course, the upper Big Wood River is over-appropriated and priority cuts are made every year in this system. Under the Supreme Court's decision in *Sagewillow*, it would be virtually impossible for Marathon to preserve its right under the theory of resumption of use.¹ Even so, it was apparent to Objectors that resumption of use was a potential issue in the case because that is exactly what Marathon Partners' response to the objection stated. "In the alternative, the use of this water right has been resumed." Speck Affidavit Ex. 4.

To argue based upon the information publicly available that there is no evidence of forfeiture is an affront to this Court. In fact, the only way that Marathon could counter this comprehensive evidence of non-use was to hire an expert to create a whole set of mapping showing green grass in the early spring in this mountain valley, from which the expert concluded that the ground must have irrigated. Even so, the expert had no knowledge of and offered no proof that any irrigation water was actually delivered to this property through the Hiawatha Canal or the ditches on the property.

¹ Indeed, Marathon made no effort to show resumption in the SRBA. Does that render Marathon's Response to Objection frivolous?

Even if this expert “conclusion” could be read to show that the original objection was frivolous or without foundation (and it does not as explained above), when the objection was raised this new expert conclusion was not available to Claimants, Objectors, or the Department. When this new information was presented to Objectors, Objectors, exercising the better part of valor, chose to withdraw their objections on the grounds of forfeiture and seek only to obtain recognition of the reason that excess water was proposed to be decreed to this property over and above the amount authorized by Idaho § 42-220 (one-inch per acre).

Marathon complains that Objectors should have spoken with certain of Marathon’s affiants. Yet, the Department’s review of the affidavits filed by these affiants concluded that their statements were not credible and not borne out by the on-the-ground evidence. Barker Aff. Ex. I. In those circumstances, it is hardly frivolous to raise an objection.

Finally, Marathon argues that the claim that there was an excessive amount of water decreed for this property was also frivolous. Marathon bases this claim on two rather bizarre notions. One, Marathon argues that the Department was willing to approve this water right in the recommended quantity because of the significant conveyance loss in the ditch. Therefore, Marathon argues that the Objectors should have simply walked away, even though the Department acknowledged that conveyance loss was the only reason this right was recommended for more than the one-inch per acre authorized under Idaho Code § 42-220.

Second, Marathon argues that the objection was frivolous (even though Marathon ultimately agreed to the terms of the objection) because Objectors signed SF5s for two other properties on the Hiawatha Canal on very small lots with more duty of water without obtaining a field headgate or conveyance loss provision. Of course, as the Court knows, the Department allows more water than one-inch per acre on small lots because of the inefficiencies associated

with deliveries to small lots. There are numerous water rights in the Basin in which Objectors sought and obtained field headgate or conveyance loss rights, including other rights on the Hiawatha. For example, the Valley Club has field headgate conditions on its water right delivered through the Hiawatha upstream of Marathon (37-494, et al.), as does Redstone Partners (37-481B, et al.), which obtains its water off the 45 Canal, another canal with significant conveyance losses. Red Devil Mountain HOA, represented by Mr. Speck, has a field headgate requirement on its water right which is delivered by the Hiawatha upstream of Marathon. (37-28F, et al.) Another example is the rights of one of the Objectors, Pepin Corso-Harris. Her water rights are in the name of Cattle-Lack Ranch. Cattle-Lack Ranch's water right has a specific quantification of the conveyance loss (37-114C). It is hardly frivolous, when the Department required a conveyance loss condition on her water right, for an Objector to ask that similar conditions or remarks be included on other rights in the same Basin and from the same source.

Moreover, this objection cannot be considered frivolous because a conveyance loss remark was exactly what was offered to Marathon over a year before the final SF5 and long before Marathon embarked on spending \$10,000 in attorneys' fees and \$3,000 or \$4,000 in expert fees to achieve what had been offered to them in early 2011. In fact, Marathon's counsel specifically responded that this proposal for conveyance remark might be acceptable but then never followed through except to say that his client would accept no remark of any kind until the final settlement was entered into in 2012. Barker Aff. Exs. N&O.

Substantively, the Department's records include a large amount of information showing that the Hiawatha has significant conveyance losses. Some of this information was filed with the Court as Objector's trial exhibits. *Id.* Exs. P-T. Here, Marathon did not and could not show that

there were not significant conveyance losses in transmitting this water 4.5 miles from the Hiawatha headgate to Claimant's ditch.

Indeed, the report that Marathon relies upon from Idaho Water Engineering specifically acknowledges the significant conveyance loss associated with the 4.5 mile canal delivery of this right is one reason why more than one-inch per acre was appropriate for this right. In fact, the Department's own records acknowledge that this canal was "heavy on conveyance losses." Ex. J. Under these circumstances, it was appropriate to seek and obtain the requested remark on this right.

SPECIFIC OBJECTIONS

Without waiving their position that no costs and fees can be awarded under the facts of this subcase, Objectors further object because:

1. The rates charged by Marathon's counsel are significantly higher than rates charged by other counsel in SRBA proceedings,
2. The total amount incurred in this case is excessive for a case that never went to trial and which involved only minimal discovery, no depositions, and no discovery requests from Objectors.
3. Claimant is not entitled to cost and fees for its ill-advised and mostly unsuccessful motion to strike responses to requests for admission.
4. Objectors object to claimant's redaction of entries on its attorneys' fees bill and at the same time asking the Court to authorize payment for sums associated with that redaction.
5. Objectors object to Claimants' attempt to charge for seeking costs and attorneys' fees.
6. Objectors object to any and all time incurred after their offer of settlement.

7. Objectors object to lack of detail in all the cost bills. No invoices are provided, no explanation as to the basis for the billings.

CONCLUSION

Claimant's motion is filed for the purposes of harassment and to cause unnecessary delay in the final resolution of this subcase. The very basis of this Motion is the arrogant notion of "how dare" anyone challenge Marathon's resuscitation of this water right, even though that is the very purpose of the SRBA, to ensure that old water rights are properly described. Idaho Code § 42-1410. Among the requirements are remarks to define or clarify a right for administration. Idaho Code § 42-1411.

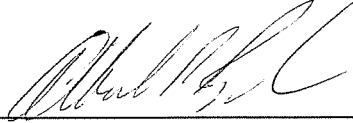
This subcase concluded with a settlement by the parties, endorsed by the Department and the Court, that a remark was necessary for definition, clarification, or administration of the right. Claimant is estopped from arguing that the agreed-upon remark was not necessary. A remark cannot be included unless it is necessary. See generally, *A&B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

Having agreed to the remark and having the Department and Court approve a remark, claimant cannot with a straight-face claim that the remark is frivolous. Having failed to cross that hurdle, Claimant is precluded from collecting costs and fees.

Nevertheless, there was a good faith basis in fact and law raised for every part of Objectors' objections. Under those circumstances, there is no basis for an award of costs and fees.

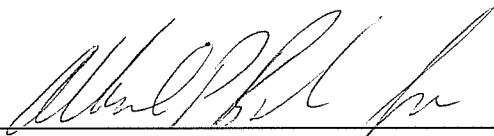
DATED this 27th day of March, 2012.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker
*Attorneys for Tom O'Gara, John F. Stevenson,
Bill Molyneux, Pete Van Der Meulen, Grace Eakin,
Rocky Sherbine, Gerald Bashaw, and Pepin
Corso-Harris*

HOBDEY & HOBDEY



Craig Hobdey
Attorneys for Big Wood Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2012, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF OBJECTORS' OBJECTION AND MOTION TO DISALLOW COSTS PURSUANT TO I.R.C.P. 54(d)(6)** by the method indicated below, and addressed to each of the following:

Original hand-delivered to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707

Copies mailed to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

James P. Speck
Speck Aanestad
120 East Avenue
P. O. Box 987
Ketchum, ID 83340



Albert P. Barker