

“A portion of this right is used for conveyance.” This remark was included in the explanatory materials associated with the water right and is kept in the Department of Water Resources files for this water right. Objectors also showed that the point of diversion was 4.5 miles away from the place of use and that, by all accounts, including the report by Claimant’s own consultant, there is significant conveyance loss associated with this right. Objectors also showed, through the publicly available records, there is significant information suggesting that there had been forfeiture of this water right, at least in part, by non-use during the 1970s and 1980s, even prior to the initiation of the adjudication and filing of the water right claim for water right 37-21112.

Objectors also provided the Court with case law showing that, when the parties reach a settlement approved by the Court, it is inappropriate to award attorneys’ fees to either party under either a prevailing party theory or under a showing that the claim was brought or defended frivolously, unreasonably, and without foundation under Idaho Code § 12-121. In response, Claimant filed an affidavit by its counsel and nothing more.¹ Claimant has provided no authority for the proposition that it is urging before this Court. By failing to provide any supporting authority in response to Objector’s motion, Claimant has waived the right to raise issues, arguments, and cite authority not contained in its initial request for costs and fees.

The issue before the Court is whether the entire subcase and every component piece of the subcase was brought frivolously, unreasonably, and without foundation under Idaho Code § 12-121. This principle has been acknowledged in SRBA proceedings. See *e.g.*, Subcase No. 63-27475 (*Janicek Properties LLC*), Amended Special Master’s Report and Recommendation re Janicek’s Request for Attorney Fees. See also Order Dismissing Motion for Attorney Fees and Closing Subcase (7/10/2009). In Subcase No. 45-10507, this Court denied a request for

¹ Objectors formally object to exhibits 6 and 7 to counsel’s second affidavit on the grounds of multiple lawyers of heresay contained in those exhibits and on the grounds that this information was not contained in the expert reports.

attorneys' fees when there was a reasonable and colorable argument that Bedkes had a stock water right, even though the Bedkes claim was ultimately dismissed with prejudice. In other words, Bedkes did not act without some basis in law or fact in asserting its claim. There, Bedkes received nothing, certainly less than objectors obtained here, and were not subject to an award of attorney fees again them. Here, Objectors did obtain a remark recognizing the substantial conveyance loss associated with the 4.5 miles of canal loss from the point of diversion to the place of use.

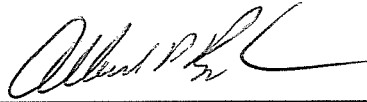
Claimant hints at, but does not directly address, the contention that because the Objectors agreed to drop claims on some other small lots the Objectors should have been bound to drop claims against Marathon without a remark. Subcase 63-27475 *Janicek Properties* addresses this contention in the following language: "Settlement in some other subcase cannot be considered for any reason regarding this subcase." (*See* p. 10)

Finally, Objectors draw the Court's attention to the decisions in *Idaho Properties LLC*, Subcase No. 31-11845. In an Order dated December 31, 2008, the Special Master denied the State's request for attorney fees under Idaho Code § 12-121. Subsequently, the State filed a motion to alter or amend arguing that the case involved extraordinary expert witness costs under Rule 54. The Special Master denied the State's request on the grounds that the type of expert witness information sought was not so novel as to be exceptional under Rule 54. The Court declined to award any discretionary costs and awarded only mandatory costs. Here, of course, Marathon has claimed and can claim no mandatory costs. As with its claim for attorneys' fees, Claimant has failed to supply any authority for any evidence that its expert costs are exceptional. Claimant makes no argument that its costs are exceptional and has thereby waived any claim to costs on those grounds.

Objectors' Motion to Disallow should be granted in its entirety.

DATED this 17th day of April, 2012.

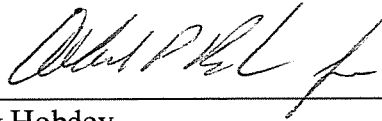
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 17th day of April, 2012, I caused to be served a true and correct copy of the foregoing **OBJECTORS' REPLY IN SUPPORT OF MOTION TO DISALLOW COSTS** by the method indicated below, and addressed to each of the following:

Original faxed to:

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

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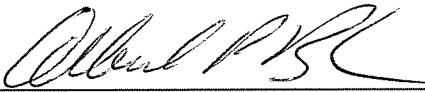
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