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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY - 4 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) Subcase No: 37-21112
Case No. 39576)
ORDER DENYING REQUEST FOR
ATTORNEY'S FEES AND COSTS
_____)

I.

FACTS AND PROCEDURAL BACKGROUND

1. On February 21, 2007, the Director of the Idaho Department of Water Resources filed his *Director's Report, Irrigation & Other Uses, IDWR Basin 37 Part 3*. Included in the *Director's Report* was a recommendation for the above-captioned water right claim, recommending the claim to Marathon Partners, LLC ("Marathon") with the following elements:

Source: Big Wood River Tributary: Malad River
Quantity: 1.419 CFS
Priority Date: 03-24-1883
Diversion Point: T03N R18E S20 SWNW within Blaine County
Purpose and Period of Use: Purpose of Use Period of Use Quantity
 Irrigation 04-15 to 11-15 1.419 CFS

Place of Use: Irrigation within Blaine County
 T02N R18E S09 NENE 2
 S10 NWNW 34
 SWNW 11
 SENW 7
 54 Acres Total

Other Provisions Necessary for Definition / Administration of this Water Right:

Explanatory Material: Basis of Claim – Decreed

Right 37-12818A is a split from former right 37-577.
This right is a split from former right 37-12818A.

2. On November 14, 2007, an *Objection* to the recommendation was filed by the Big Wood Canal Company, Tom O’Gara, John F. Stevenson, Bill Molyneux, Pete Van Der Meulen, Grace Eakin, Rocky Sherbine, Gerald Bashaw and Pepin Corso-Harris (collectively, Objectors). The *Objection* asserted that (1) the diversion rate was excessive for the place of use; (2) the period of use should be cut off at October 31 instead of November 15; and (3) that the water right should not exist as it had been forfeited for non-use or abandonment.

3. On January 17, 2012, the parties filed a *Standard Form 5* (“SF5”) resolving the *Objection*. The SF5 differed from the recommendation only with respect to the place of use element and the explanatory material section. With respect to the place of use element, the parties agreed to alterations to certain of the legal descriptions to accurately reflect to the proper place of use, and diminished the total irrigated acreage from 54 to 53 acres.¹ With respect to the explanatory material section, the parties agreed to add the following remark: “A portion of this water right is used for conveyance.” The parties did not address the issue of attorney’s fees or costs in the SF5 or otherwise.

4. The Special Master subsequently issued a *Special Master’s Report and Recommendation; Findings of Fact and Conclusions of Law*, recommending that water right no. 37-21112 be partially decree consistent with the SF5. No challenges were filed to the *Special Master’s Report and Recommendation*, and on March 2, 2012, the Court issued a *Partial Decree* for the above-captioned water right consistent with the SF5.

5. On March 14, 2012, Marathon filed its *Memorandum of Attorney’s Fees and Costs*, along with a supporting brief and affidavit, seeking an award of \$13,267.82 in discretionary costs and \$27,729.50 in attorney’s fees, for a total award of \$40,997.32. The Objectors timely filed a *Motion to Disallow Costs* along with a supporting brief and affidavit. Marathon filed a second affidavit in support of its *Memorandum* on April 12, 2012, and the Objectors subsequently filed a *Reply Brief* in support of their *Motion*.

¹ The Court notes that no objection was raised by the Objectors to the place of use element, and that these alterations were primarily the result of Marathon catching certain errors in the claimed and recommended legal descriptions.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument was heard on April 19, 2012. 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 April 20, 2012.

III.

DISCUSSION

A. Attorney's fees.

Marathon seeks an award of attorney's fees in the amount of \$27,729.50 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). In this case then, the Court must decide whether Marathon is a prevailing party and whether the *Objection* filed by the Objectors was brought, pursued or defended frivolously, unreasonably, or without foundation.

i. Prevailing party.

The first issue before the Court is whether Marathon is a prevailing party. In determining whether a party to an action is a prevailing party, Idaho Rule of Civil Procedure 54(d)(1)(B) directs that the trial court "consider the final judgment or result of the action in relation to the relief sought by the respective parties." The determination of who is a prevailing party is committed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Bream v. Benscoter*, 139 Idaho 364, 368, 79 P.3d 723, 727 (2003). Furthermore, a trial court need not find a prevailing party in every action; rather, it has the discretion to determine that there is no overall prevailing party. *Costa v. Borges*, 145 Idaho 353, 359, 179 P.3d 316, 322 (2008).

In this case, the Court in an exercise of its discretion finds that there is no overall prevailing party. A review of the case in its entirety reveals that Marathon prevailed in part and that the Objectors prevailed in part. The *SF5* and resulting *Partial Decree* reflect that Marathon prevailed in its position that no forfeiture or abandonment of its water right occurred in full or in part. The *SF5* and *Partial Decree* further reflect that Marathon prevailed on its position that the period of use of its water right should extend until November 15, instead of October 31 as asserted by the Objectors. However with respect to the quantity issue the Objectors prevailed in getting the following remark placed under the explanatory material section of the *SF5*, against the wishes of Marathon who refused the inclusion of such a remark for over a year: “A portion of this water right is used for conveyance” (hereinafter, “Explanatory Material Remark” or “Remark”).

Marathon argues that the inclusion of Explanatory Material Remark in the *SF5* is not a significant concession on its part because remarks found under the explanatory material section of a *SF5* do not get placed into the *Partial Decree*. So in essence Marathon received in the *Partial Decree* everything recommended in the *Director’s Report*. Further, Marathon argues the substance of the Remark is also insignificant because it merely states the obvious, namely, that part of the quantity of the right includes is conveyance, which is a necessary component of all water rights. For the reasons discussed below, the Court finds Marathon’s arguments unavailing.

a) The Remark has significance despite not appearing in the *Partial Decree*.

Marathon is correct in its assertion that explanatory material section remarks are not included in a *Partial Decree*. However, such remarks nonetheless may have significance. In the early stages of the SRBA, in an effort to facilitate a preference for standardizing and simplifying the form and content of a *Partial Decree*, the determination was made to not include in the face of the *Partial Decree* every legal principle or factual detail that might be relevant to future administration of the water right unless it was determined to be absolutely necessary. In furtherance of that objective, the Department included an “explanatory material” section in its water right recommendations. The explanatory material section includes information determined by the Department to be useful and/or important with respect to future administration of the right even though determined to not be absolutely essential for administration of the right. Although

the explanatory material does not appear in the face of the *Partial Decree* it is included in the Department's back file for the water right.

Despite not appearing in the *Partial Decree*, and ultimately lacking the same binding or claim preclusive effect as the information included in the *Partial Decree*, explanatory material still provides clarification, guidance and relevant information to the Department when examining the water right for purposes in conjunction with a future administrative proceeding. In a transfer proceeding pursuant to Idaho Code § 42-222, the Department is required to "examine all evidence and available information" when approving a change. I.C. § 42-222. The information contained in the explanatory material section therefore assists the Department in complying with the statutory directive. Such explanatory material may also assist the Department by providing background information in conjunction with an administrative enforcement proceeding.

In addition, remarks included in the explanatory material also have significance independent of the *Partial Decree* where the remarks appear in an *SF5* as part of a settlement agreement. The Remark in this case is the result of an agreement between the parties and is memorialized in the *SF5*. Although the Remark may not be binding on third parties by failing to appear in the *Partial Decree*, it nonetheless has independent legal significance as between the signatories to the *SF5*, including Marathon, the Objectors and the Department, as well as their successors. Similarly, in the SRBA, it is common for parties to enter into agreements regarding the administration of a particular right. While the agreements may include details that are not absolutely necessary for the administration of the water right, the details nonetheless are important to the parties and may result in the avoidance of future controversy. Such agreements are typically not included in the face of the *Partial Decree* but are nonetheless on file with the Department and are enforceable as between the signatories to the agreement.² A remark appearing in the explanatory material as the result of an agreement is no different.

Accordingly, even though the Remark does not appear in the *Partial Decree*, the Remark nonetheless has significance and the Objectors were successful in obtaining their desired objective of making clear that a portion of the decreed quantity associated with this water right is attributable to conveyance loss.

² It is also common for a remark initially sought by an objector to be included in the face of a *Partial Decree* to ultimately be included in the explanatory material as a result of a compromise and in the interest of settlement.

b) The substance of the Remark is also significant.

Marathon next argues that even if remarks in the explanatory material are enforceable, the concession it made by agreeing to the inclusion of the Remark was still insignificant because substantively the Remark merely states the obvious. Specifically, that part of the quantity of the right is conveyance loss, which is characteristic of all water rights conveyed through an open ditch. This Court disagrees.

The Objectors contested the recommended quantity element for the water right asserting the diversion rate was excessive for the number of irrigated acres. Idaho Code § 42-220 provides as a general rule that when water is used for irrigation, no “decree of the Court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of . . . the court in making such decree, that a greater amount is necessary.” The Department in its recommendation recommended more than one second foot of water per acre for the above-captioned water right, but did not specify the reason why the greater amount was necessary.

The inclusion of the Explanatory Material Remark explains that a portion of the quantity recommended by the Department relates to the occurrence of conveyance loss in the delivery system used by Marathon, and is not actually applied on the land. This may prove significant in future administrative proceedings before the Department. Any ambiguity as to whether the decreed quantity of water associated with this water right includes water attributed to conveyance loss is resolved by the inclusion of the Remark, and may not need to be litigated in future proceedings, recognizing however, that the Remark does not quantify conveyance loss. This is especially pertinent in the context of administrative transfer proceedings, where the party requesting to transfer the water right will be put on notice that he or she may not be entitled to transfer the full decreed quantity due to the fact that a portion of it is used for conveyance loss associated with the particular delivery system. As discussed below, this is particularly relevant in the instant case.

As a general matter, *Partial Decrees* issued in the SRBA typically do not address conveyance loss unless it is central to an issue raised in the case. However, absent historical disputes, addressing conveyance loss in a *Partial Decree* is usually unnecessary. The general rule on conveyance loss is that the decreed quantity is measured at the point of diversion from the natural stream and not at the take-out point at the field head gate where water enters the place

of use. *Glenn Dale Ranches, Inc. v. Schaub*, 94 Idaho 585, 588, 494 P.2d 1029 (1972); *Hidden Springs Trout Ranch v. Hagerman Water Right Users, Inc.*, 101 Idaho 677, 681, 619 P.2d 1130 (1980). Thus, under the general rule, conveyance loss from the point of diversion to the take-out point at the place of use is implicitly recognized in the quantity element.

However, application of the general rule becomes easier stated than applied when multiple water rights are conveyed through a common system. The general rule does not mean that the decreed quantity for every right includes sufficient conveyance loss to deliver each right independently of the other rights in the conveyance system. Rather, conveyance loss as between users can be interrelated and apportioned according to different methods or historical practices. These different methods and historical practices for apportioning conveyance loss as between users leaves substantial room for controversy. *See e.g. See Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 684, 249 P.2d 868, 877 (2011) (acknowledging general rule that a water user does not have the right to have his water “ride” on the water of another water user but also noting historical place of delivery from point of diversion may affect entitlement to carriage water); *Special Master’s Report and Recommendation on Motions to File Late Notice of Claim*, Subcase nos. 72-16778 *et. al.* (Jan.13, 2010) (dispute over additional claims for conveyance loss); *Amended Findings of Fact and Conclusions of Law*, Subcase Nos. 36-00110C and 36-00111C (May 19, 1998) (dispute over conveyance loss conveyed through Sands ditch); *Findings of Fact and Conclusions of Law*, Subcase Nos. 36-00039D (Aug. 30, 1991) (dispute over allocation of conveyance loss out of Buckeye ditch). Therefore, despite any inferences that can be drawn from application of the general rule, there is no shortage of litigation on the issue of conveyance loss. However, because conveyance loss is typically not addressed in the SRBA unless the issue is specifically raised, the issue is left for another day in the event of an administrative transfer proceeding.³

In this case, Marathon’s water right is diverted and conveyed 4.6 miles through the Hiawatha Canal to Marathon’s take-out point at a field head gate located at the end of the canal. Numerous other water rights held by others are also conveyed through the same canal. *Barker Aff.* Exhibits P-T. At least some of the *Partial Decrees* issued for these water rights include remarks quantifying the amount of water that can be delivered through the field head gate at the

³ Typically, in the event of a transfer, conveyance water must be left in the conveyance system to avoid injury to other users on the canal.

take-out point and/or specifically quantifying conveyance loss. *See Second Speck Aff.* Exhibits 1-5. Additionally, some of the water rights delivered through the canal do not have any conveyance loss remarks. *Objector's Reply Brief*, p. 3. But for the agreement in this case, Marathon's water right would also fall under this category.

Consequently, with some *Partial Decrees* addressing conveyance loss others being silent on the matter, it does not strain credibility to assume that in a subsequent administrative transfer proceeding, the argument could be made that those water rights which are silent on conveyance loss were not intended to include conveyance loss due to some particular circumstance, such as in this case where Marathon's take-out point is located at the end of the canal. Indeed, the argument could be made that flows in excess of the decreed water right have historically reached the take-out point as a result of the tail water of others on the canal, resulting for no conveyance loss for the right.

At a status conference held in this subcase on June 22, 2011, before the Special Master, counsel explained Marathon's reasoning for rejecting the Remark:

MR. SPECK: Yes. I believe what Mr. Spencer said is correct, that the need for a remark on the conveyance loss appears to be the only remaining issue. My client's not willing to agree to one, being the last user on the ditch, and given the amount of the water right in question versus the number of acres.

Partial Transcript from June 22, 2011, status conference before Special Master Brigitte Bilyeu ("Tr."), p. 5 (attached as Exhibit A to this opinion). At the same status conference, counsel for the Department, Nick Spencer, explained that the quantity in excess of the inch per acre was reasonable due to the significant conveyance loss attributable to the 4.6 mile length of the ditch. Specifically, in response to a question from the Special Master regarding the need for an I.R.E. 706 Report describing the methodology used for determining the 1.34 inches per acre, Mr. Spencer stated that a report was unnecessary and explained the basis for the Department recommending in excess of an inch per acre:

Mr. Spencer: Well I haven't really thought about that Special Master. I mean in terms of a 706 report describing the methodology that the department used, basically what we have got here in terms of quantity is a recommendation, if I remember correctly of 1.3 inches per acre. And the right, if I remember correctly, as Mr. Speck says, is at the end of the ditch, if I remember correctly is several miles long.

So Mr. Barker is correct, the department did not do a calculation, because the agent, Mr. Clelland, who is very seasoned regarding these types of things, is very comfortable that the 1.3 inches to the acre is a reasonable quantity under the circumstance, because the conveyance loss clearly would be fairly significant going down a ditch of such a great length.

So the 706 report in terms of describing the basis of the department's recommendation, would be that Idaho Code 42-220 specifies the duty of water of an inch to the acre. Any more than that must satisfy the director and the court, as necessary.

And considering the facts on the ground in this case, the agent of the director is satisfied that the quantity is reasonable, even though its more than an inch per acre.

Tr., pp. 7-8.

Despite the stated basis for the Department's recommendation, Marathon continued to reject the inclusion of any remark identifying a portion of the right as conveyance loss and also took the position that the entire decreed quantity could be beneficially applied to the field:

Our position is that the amount delivered at the Hiawatha [Head Gate], which is to be memorialized in the partial decree, can be justified by either the amount required on the field for flood irrigation or by conveyance losses or both. My client agrees there are conveyance losses in the canal. However, an acknowledgement of that in the SF5 is completely unnecessary and he will not agree to include one.

...

My client will not agree to this or any other remark regarding conveyance loss. As I have said before, the property was entirely flood irrigated at the time the SRBA commenced. My client has installed a pivot but continues to flood irrigate the corners. *I am confident an excess flow analysis for flood irrigating the 53 acres will result in an on-field requirement of at least the 1.34 in/acre that my client is entitled to have delivered into the Canal.* The switch to sprinkler irrigation after the commencement of the SRBA does not affect the parameters of the water right to be decreed.

Barker Aff. Exhibit N (emphasis added). Likewise, a study prepared for Marathon by Idaho Water Engineering concludes "based on the irrigation needs of the historic gravity flow irrigation system, the recommendation of 1.419 cfs for water right no. 37-21112 can be supported even without a canal loss component." *Speck Aff., Exhibit 22 (Computation of Flow Requirement for Water Right No. 37-21112 Under a Totally Gravity Flow System)*, p. 5.

Based on the foregoing, a couple of things are apparent to the Court for purposes of this *Motion*. First, that the basis for the Department's recommendation of a quantity in excess of an inch per acre was attributable to conveyance loss. Second, that Marathon's motivation for resisting the Remark perhaps had less to do with the alleged insignificance of the Remark and more to do with a reluctance to have a binding acknowledgement that a portion of the quantity for the right included conveyance loss so as to leave that issue for another day.

For the reasons just explained, the failure to recognize that a portion of the right includes conveyance loss would leave the issue for another day, which is precisely the situation the Objectors sought to avoid by seeking the inclusion of the Remark.⁴ The Court therefore disagrees with Marathon's characterization of the significance of the Remark. Accordingly, the Court finds the substance of the Remark to be significant for its intended purpose and therefore Marathon made a significant concession in agreeing to its inclusion.

Since, for the reasons discussed, Marathon prevailed in part and that the Objectors prevailed in part, the Court in its discretion finds that there is no overall prevailing party to this action. *See Lower Payette Ditch Co. v. Harvey*, 152 Idaho 291, 271 P.3d 689 (2012). As a result, there are no grounds for an award of attorney's fees to Marathon under Idaho Code § 12-121.

ii. Whether the *Objections* were brought, pursued, or defended frivolously, unreasonably, or without foundation.

Even if Marathon were considered the prevailing party, attorney fees would not be warranted under Idaho Code § 12-121 as the Objectors did not bring, pursue or defend their *Objection* frivolously, unreasonably, or without foundation. The Idaho Supreme Court has 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

⁴ Both counsel for Objector's stated property to which Marathon's water right is appurtenant is slated for development in the foreseeable future. The reason for the inclusion of the Remark was to avoid having to litigate the existence of conveyance loss in conjunction with a transfer proceeding.

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).

With respect to the issue of quantity, the Court has already discussed the directive of Idaho Code § 42-220 that irrigation water not be decreed for more than one second foot of water for each fifty (50) acres of land irrigated, unless it is shown that a greater amount is necessary. In this case, the Objectors were founded in their objection to the Department's quantity recommendation of more than one second foot of water per acre for the above-captioned water right. It is undisputed that the Department recommended more than one second foot of water per acre. It is further undisputed that no explanation was given as to why the greater amount of water was recommended for this particular water right. These circumstances gave the Objectors sufficient grounds to raise an *Objection* to the recommended quantity, since no showing had been made that more than one second foot of water per acre was necessary. Indeed, the Objectors were successful in their position that the greater quantity was necessary, at least in part, due to conveyance losses associated with Marathon's delivery system, and that that fact should be noted in the explanatory material section.

Since the Court finds that the portion of the Objector's *Objection* to quantity was not frivolous, unreasonable, or made without foundation, no award of attorney's fees can be made under Idaho Code § 12-121. Further, it need not reach the issues of whether the portions of the *Objection* relating to period of use or the validity of the right (i.e., forfeiture or abandonment) were frivolous, unreasonable, or made without foundation. *See e.g., Michalk*, 148 Idaho at 234, 220 P.3d at 591 ("if there is at least one legitimate issue presented, attorney fees may not be awarded [under I.C. § 12-121] even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation).

B. Discretionary costs under Idaho Rule of Civil Procedure 54(d)(1)(D).

Marathon seeks \$13,267.82 in discretionary costs in this matter under Idaho Rule of Civil Procedure 54(d)(1)(D).⁵ These costs include photocopy charges, long distance telephone charges, postage charges, and expert fee charges paid to Idaho Water Engineering and John Gaeddert. A court may, in its discretion, award a prevailing party certain discretionary costs

⁵ Marathon does not seek any costs as a matter of right in this matter.

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 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.*

The Court has already determined that Marathon is not a prevailing party in this matter. However, even if Marathon were considered a prevailing party, the Court finds that the discretionary costs claimed in this matter are not exceptional costs. 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. 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.

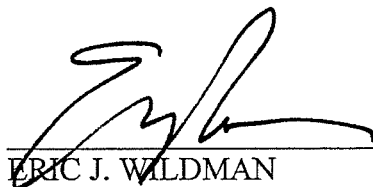
In this case, the discretionary costs claimed by Marathon are not “exceptional costs” as contemplated under Rule 54(d)(1)(D). This subcase was a typical contested proceeding in the SRBA involving one *Notice of Claim* filed by Marathon and one *Objection* to the claim filed by the *Objectors*. The *Objection* was resolved via the filing of a *Standard Form 5*, after which Marathon’s water right was partially decreed. Neither the nature nor magnitude of the above-captioned case was exceptional. Although the charges associated with photocopies, long distance telephone calls, postage, and expert fees incurred by Marathon may have been necessary and reasonable, they were not exceptional costs in a case of this nature. Rather, contested cases in the SRBA routinely involve similar costs, especially the retention of water engineers as experts, such that these costs are generally considered ordinary rather than exceptional. It follows that Marathon’s request for discretionary costs in this matter does not fall within the scope of Rule 54(d)(1)(D).⁶

IV.

ORDER

For the reasons set forth above, Marathon’s request for attorney’s fees and costs is **HEREBY DENIED.**

Dated May 4, 2012



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

⁶ Because this Court denies Marathon’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”).

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)

Subcase No. 37-21112)

PARTIAL TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS

BEFORE: BRIGETTE BILYEU, Special Master

DATE: Wednesday, June 22, 2011

TIME: 9:30 a.m.

PLACE: Snake River Basin Adjudication Building
253 Third Avenue North
Twin Falls, Idaho 83301

HEARING: Status Conference

APPEARANCES:

Mr. James P. Speck of Speck & Aanestad, Post Office Box 987, Ketchum, Idaho, 83340, appearing by telephone on behalf of Marathon Partners, LLC.

Mr. Albert P. Barker of Barker, Rosholt & Simpson, LLP, Post Office Box 2139, Boise, Idaho, 83701, appearing by telephone on behalf of Bill Molyneux, Gerald Bashaw, Grace Eakin, John Stevenson, Pepin Corso-Harris, Pete Van Der Meulen, Rocky Sherbine, and Tom O'Gara.

Mr. Craig Hobdey of Hobdey & Hobdey, Post Office Box 176, Gooding, Idaho, 83330, appearing by telephone on behalf of Big Wood Canal Company.

Mr. Nicholas J. Spencer of the Idaho Attorney General's Office, Natural Resources Division, Post Office Box 83720, Boise, Idaho, 83720, appearing by telephone for the Idaho Department of Water Resources.

1 concern.

2 If we could just find a way to acknowledge on
3 the water right that there is a portion of this right that
4 is -- is dedicated to conveyance loss, and that an inch
5 per acre is appropriate for use on the ground itself,
6 then -- then we'd be happy.

7 THE COURT: All right. Well, that helps me
8 understand kind of where you see the issue.

9 Mr. Hobdey, anything that you need to add to
10 that, to Mr. Barker's explanation of how you guys see the
11 issue at this point?

12 MR. HOBDEY: No. Al covered it well. Thank you.

13 THE COURT: All right.

14 Mr. Spencer, I'm just wondering, just kind of --
15 Now that I understand the issue in the way some of the
16 parties are characterizing it a little bit better, what
17 would the department normally do in that sort of
18 situation? Have you typically done a 706 report
19 explaining the additional quantity? Or what --

20 Is there any role for the department here? What
21 do you think the next step is?

22 MR. SPENCER: Well, I haven't really thought about
23 that, Special Master. I mean in terms of a 706 report
24 describing the methodology that the department used,
25 basically what we have got here in terms of quantity is a

7

1 additional information past that.

2 But would it be possible for the department to
3 perhaps just provide to the parties just what you did on
4 the record here, and that's just a very short explanation
5 for your understanding of how you made that recommendation
6 consistent with 42-220?

7 MR. SPENCER: Well, Special Master, I think
8 essentially that's what I did, was to describe the
9 methodology. Simply, an experienced agent, through his
10 experience, understanding that a right that has to be
11 conveyed down a very lengthy ditch is going to lose some
12 of that water in conveyance; and that this ditch is of
13 such length that 1.3 inches per acre was deemed by the
14 agent to be reasonable.

15 THE COURT: Do we know the length of the ditch, by
16 any chance?

17 MR. SPENCER: Yes, we do, Special Master. Let me
18 see if I can find it in the file here.

19 MR. BARKER: This is the Hiawatha, isn't it?

20 MR. SPECK: Yes, it is (unintelligible).

21 MR. SPENCER: All right, the information that I
22 have: It is about 4.6 miles from the point of diversion
23 into the Hiawatha Canal down to this claimant's take-out,
24 and that the actual per-acre diversion rate the department
25 has recognized as reasonable is 1.34 inches per acre.

9

1 recommendation, if I remember correctly, of 1.3 inches per
2 acre. And the right, if I remember correctly, as
3 Mr. Speck says, is at the end of the ditch. And the
4 ditch, if I remember correctly, is several miles long.

5 So Mr. Barker is correct, the department did not
6 do a calculation, because the agent, Mr. Clelland, who is
7 very seasoned regarding these types of things, is very
8 comfortable that 1.3 inches to the acre is a reasonable
9 quantity under the circumstance, because the conveyance
10 loss clearly would be fairly significant going down a
11 ditch of such a great length.

12 So the 706 report, in terms of describing the
13 basis of the department's recommendation, would be that
14 Idaho Code 42-220 specifies the duty of water of an inch
15 to the acre. Any more than that must satisfy the director
16 and the court, as necessary.

17 And considering the facts on the ground in this
18 case, the agent of the director is satisfied that the
19 quantity is reasonable, even though it is more than an
20 inch to the acre.

21 So I'm not sure that a 706 report prepared by
22 the department would in this particular case inform the
23 court's decision or provide any information that would be
24 particularly useful to the parties.

25 THE COURT: Yeah, I see what you're saying, any

8

1 THE COURT: Okay, I'm just trying to get that all,
2 Mr. Spencer, so let me make sure I've got it right.

3 So the department's information is that the
4 length of the ditch is about 4.6 miles from the point of
5 diversion going into the Hiawatha Canal, and then coming
6 out at the claimant's -- what did you call it?

7 MR. SPENCER: It would be the take-out.

8 THE COURT: Take-out.

9 MR. SPENCER: The field headgate would probably be
10 the appropriate term.

11 THE COURT: Okay, all right.

12

13 (End of partial transcript of digitally
14 recorded proceedings.)

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4 THE COURT: Good morning. We are on the record.
5 This is the court of the fifth judicial district in and
6 for the state of Idaho. The court is sitting in
7 Twin Falls in the SRBA Courthouse. The date is Wednesday,
8 June the 22nd; and the time is just after 9:30 in the
9 morning.

10 First up this morning, we have a scheduling
11 conference in subcase 37-21112. The claimant is Marathon
12 Partners, LLC, represented by Jim Speck, who is
13 participating by phone. We have got the Big Wood Canal
14 Company with Craig Hobdey. And then Al Barker's clients,
15 Bill Molyneux, Gerald Bashaw, Grace Eakin, John Stevenson,
16 Pepin Corso-Harris, Pete Van Der Meulen, Rocky Sherbine,
17 and Tom O'Gara.

18 In addition to the parties, we have the Idaho
19 Department of Water Resources with Nick Spencer.

20 And that's everybody, I believe.

21 At the last hearing, the department had
22 explained that this subcase was part of a split with a
23 long and rather complicated history. And at the last
24 hearing, the parties had also reported that they had, if
25 my notes are correct, had resolved the forfeiture issue,

1 everything else is taken care of, though I certainly would
2 stand to be contradicted by one of the parties' attorneys
3 if in fact I am wrong in that regard.

4 So that's the status, as I understand it,
5 Your Honor.

6 THE COURT: All right, very good. Mr. Spencer, I
7 appreciate that information and that update.

8 Mr. Speck, do you have any more updated
9 information on the status of those negotiations that you
10 can maybe give us at this point?

11 MR. SPECK: Yes. I believe what Mr. Spencer just
12 said is correct, that the need for a remark on the
13 conveyance loss appears to be the only remaining issue.
14 My client's not willing to agree to one, being the last
15 user on the ditch, and given the amount of the water right
16 in question versus the number of acres.

17 I explained that to Mr. Barker and Mr. Hobdey a
18 couple of months ago, or at least a month ago; and I have
19 not had a response. So that's where it stands.

20 THE COURT: All right, that's helpful.

21 And so we know where everybody is, Mr. Barker or
22 Mr. Hobdey, can one of you give us an update on perhaps
23 your clients' position at this point?

24 MR. BARKER: Your Honor, Al Barker. I think
25 Mr. Spencer described it accurately.

1 with the result being that the forfeiture issue had been
2 dropped. However, there was still a dispute about the
3 acreage and the duty of water.

4 So that's the information I have at this point,
5 and we're available to schedule additional items,
6 including a trial, if we need to; but I thought we'd get
7 an update, first.

8 So Mr. Spencer, I don't know if you have got
9 additional information, if you could start us out?

10 MR. SPENCER: Special Master, I'm not entirely clear
11 regarding what you said concerning the duty of water and
12 the number of acres.

13 Basically, I believe the number of acres has
14 been resolved; and the duty of water issue actually is
15 cast in terms of the portion of the quantity that is used
16 for conveyance loss and what kind of a remark might be
17 appropriate to address the fact that a portion of the
18 quantity is for conveyance loss.

19 That right there is the big issue; and that, to
20 my understanding, the parties can neither agree on the
21 need for a remark; or even assuming that there is a need
22 for such a remark, what the appropriate language for it
23 should be.

24 And I believe that right there is what is
25 holding up resolution of the subcase. I believe

1 And I guess in listening and thinking about
2 this, I wonder if that the issue, that last issue is a
3 legal issue that can be resolved by a motion brought by
4 one side or the other; or whether we ought to just
5 schedule it for a trial and get a resolution of the 42-220
6 issue on this right.

7 Because it seems like there's — there is no —
8 You know, we have talked about this one for a year,
9 probably, without being able to find any type of language
10 that's acceptable to both sides of the dispute.

11 THE COURT: All right. And so, Mr. Barker, can you
12 help me any just in terms of thinking about what the issue
13 is? It's just a matter of whether conveyance loss has to
14 be a part of the elements of the water right? Or am I —
15 I know I'm not phrasing it the way you would, but —

16 MR. BARKER: Well, Your Honor, the recommendation is
17 for more than an inch per acre. The 42-220 says any
18 decree must have a — there's got to be a basis for that.
19 And we haven't seen any basis for it, other than
20 Mr. Speck's statement that he is at the end of the ditch.
21 And so —

22 But there's been no calculations, there's been
23 no demonstration that more than an inch per acre is
24 appropriate for this land, and no calculations that we
25 have seen of what the conveyance loss is, so that's the

1 TRANSCRIBER'S CERTIFICATE

2 STATE OF IDAHO)
3) ss
4 County of Twin Falls)

5 I, LINDA LEDBETTER, duly appointed, qualified
6 and acting official reporter of the Fifth Judicial
7 District of the State of Idaho, DO HEREBY CERTIFY that I
8 partially transcribed the digitally recorded proceedings
9 adduced in the above and foregoing cause June 22, 2011 to
10 the best of my ability to hear and understand; and that
11 the within and foregoing constitutes and is a true and
12 correct copy of the partial transcript of said requested
13 proceedings, said transcript consisting of pages 1 through
14 11, inclusive.

15 IN WITNESS WHEREOF, I have hereunto set my hand
16 this 2nd day of May 2012.

17 
18 _____

19 LINDA LEDBETTER
20 Idaho CSR Certificate No. 26
21 Twin Falls, Idaho
22
23
24
25

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 May 04, 2012, with sufficient first-class postage to the following:

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