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6 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF**
7 **THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

8 Subcase No. 61-248 and 61-10419

9 In Re: SRBA

10 Case No. 39576,

MEMORANDUM
OF ATTORNEY'S FEES SUBMITTED
BY VERNON K. SMITH ON BEHALF OF
WEITZ & CO, INC.

12 COMES NOW, the Respondent, Daniel Weitz, by and through his attorney, Vernon K.
13 Smith, of the Law Offices of Vernon K. Smith, PC, associate counsel to the Schroeder Law
14 Offices, and, pursuant to IRCP 54(e), including IRCP 54(e)(2), I.C. §12-117, §12-120(3) §12-
15 121 and §12-123, does request this court to enter an award of attorney fees in accordance with
16 the following attorney services provided to Weitz & Co. Inc.

17 The below tabled services and rates of services performed, are the reasonable attorney's
18 fees that were incurred on behalf of Weitz & Co, Inc, regarding the intense controversy over the
19 conflicting issue of ownership/right to the beneficial use and application of the water right 61-
20 248, and the Flora Bennett Delivery Agreement (FBDA) that has been in existence since
21 October, 1923, all of which pertained to the parent claim and Water Right No. 61-248
22 adjudicated by the Elmore County District Court in 1912 and decreed to the beneficial use of
23 the Bennett/Van Berkem/ Weitz & Co. Inc property in 1914, thereby declaring the place of its
24 beneficial use within ascribed data elements of the decreed right of appropriation and beneficial
25 use of the water.
26

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
MAY 28 2021	
By _____	Clerk
	Deputy Clerk

1 This controversy began to develop into the issues and claims through the response to the
2 Mountain Home Irrigation District (MHID) assertions that began the extensive research that
3 progressed throughout this ordeal that went to a scheduled mediation and then into the litigation
4 initiated by MHID in October, 2020.

5 Before the litigation commenced, substantial involvement took place, and a brief
6 reference to that history—preceding the litigation—would assist in appreciation of the ordeal
7 experienced by Weitz & Co. Inc in the spring of 2020.

8 Mountain Home Irrigation District (MHID), has been administering numerous decreed
9 water rights of the district water users for many decades. They had filed a Claim with the
10 Department of Water Resources (IDWR) on December 7, 1989, the effect of which appears to
11 have been undertaken to over-ride what was of record that indicated a prior Claim filed
12 November 22, 1989 (whom we believed had been filed by John Van Berkem), as MHID sought
13 to procure a combination of six established water rights—of which Water Right No. 61-248 was
14 among the six—all of which were being administered by MHID.

15 MHID was administering the diversion and delivery of this disputed Water Right, No.
16 61-248—along with many other rights—that began, with respect to 61-248, back on October 15,
17 1923. For reasons yet that have not been clarified, we confirmed that those six established water
18 rights were combined into MHID's Claim No. 61-10419, and after MHID's combined claim
19 was approved, MHID continued the administration of the same diversion and same delivery of
20 the water annually, pursuant to their statutory responsibilities—as well as the 500-acre feet of
21 stored water, in compliance with the contractual obligation established under the Flora Bennett
22 Delivery Agreement of 1923 (FBDA), and MHID never asserted any superior claim or right to
23 the water, or a right to terminate delivery, or a right to appropriate it elsewhere.

24 In the spring of 2020, however, MHID chose to express a position inconsistent with their
25 decades of performance, announcing—for the first time—they “owned” water right 61-248, as a
26

1 result of the SRBA combining process, and MHID threatened to halt delivery of any water to
2 the Bennett property.

3 Weitz & Co, Inc., the owner of the Bennett property since 2006, contacted his attorney
4 and an extensive review of the IDWR records was commenced, and being informed by Timothy
5 Healy, the long-term operator of the farming operations, expressed his sincere belief that John
6 Van Berkem, the owner of the property in 1989, was the one that filed the November 22, 1989,
7 Claim –undertaken to prove up on his decreed Water Right No. 61-248. Mr. Weitz challenged
8 MHID’s threat to withhold any delivery, regardless any claim or reasoning they could withhold
9 delivery, as the IDWR records confirmed the approved claim of Water Right N0, 61-10419 was
10 still based upon the beneficial use of the water being applied to that property—which was
11 entirely within the district, despite the uncertainty as to what transpired within IDWR since the
12 November 22, 1989 claim, and our efforts to track the events further went cold and somewhat
13 un-explained.

14 The records with IDWR never revealed any disallowance or rejection of the November
15 22, 1989 claim, but the “paper-trail” within the IDWR records basically reflected a “combining”
16 process of a series of water rights, and they were bundled into MHID’s Claim No. 61-10419—
17 where they were always before “administered” by MHID, and water delivered each year.

18 Much lingering uncertainty remained—as identified in letters we sent to the attorney
19 representing the Van Berkem Trust back in 2006, but irrespective of what IDWR did or chose
20 not to do, MHID was the statutory administrator of those water rights—as a statutory water
21 District—and with respect to 61-248, they had a “trust relationship” between a water district
22 and water appropriators—the actual land owners—to which there was even a further obligation
23 – regarding the Bennett Property—under the contractual obligation because of the delivery
24 agreement (FBDA)—created in 1923—having created a contractual obligation that later
25 confirmed was a priority delivery by confirmation of the decision from the District Court in
26 1934-35—and those factors (statutory and contractual) remained superior regardless of any

1 claim to the water asserted by MHID, which could never abrogate their fiduciary-trust
2 obligation to deliver water as an administrator to the property designated to be the location of
3 the actual use, when the water was appropriated under the elements within the decree, nor could
4 MHID disturb their contractual obligation under FBDA. MHID challenged that position, and that
5 summarizes the development of the dispute we encountered, and was presented for mediation.

6 What remained clear from our review of the records on file with IDWR was that the
7 claim (water right) of MHID—61-10419—it was based upon the exact same “proof data” (the
8 diversion point, the quantity, the period of appropriation, the priority date, *the place of*
9 *beneficial use*, etc.), as it was taken directly from the originally decreed water rights—meaning
10 IDWR decreed to MHID a claim based solely upon the original “appropriation and beneficial
11 use” data from the actual appropriators, and without that proof of “appropriation and beneficial
12 use”, MHID could never prove up on any claim, and it would be otherwise disallowed.

13 IDWR could not approve any claim without proof data of “appropriation and beneficial
14 use”—and MHID was not an appropriator to ever establish any “beneficial use”, as MHID was
15 only a delivery entity, so upon what basis could MHID establish a “beneficial use” as an
16 appropriator of a beneficial use of water when they were a delivery provider only?

17 Either MHID thought they could “steal” the water, or they were seeking to use the water
18 delivery as “hostage” to assess more annual water assessments, and either way, the water had to
19 be delivered—and the water had to be applied to the same beneficial use—just as the “proof
20 data” identified. The mediation later suggested that MHID was trying to extort more
21 assessments, as that seemed to be the direction of the “potential” compromise being addressed.

22 In our attempt to reach some sensible resolution, we participated in a mediation session
23 with MHID, and being unsuccessful, Mr. Weitz expressed his intent to continue his good-faith
24 efforts in addressing this controversy created by MHID, and indicated he would seek to
25 continue to explore the records from both IDWR and from the Van Berkem Family Trust, to the
26 extent anything remained available, to ascertain the rationale for the combining and bundling

1 the six water rights, and to assist Timothy Healy in his efforts to secure further documents that
2 might shed light on the reasoning behind this combining process, as he thought records may be
3 available through David Van Berkem, the surviving son of the decedent, John Van Berkem.

4 With that discussion, MHID said they would continue the Canal flows for the 2020
5 irrigation season, but they wanted the matter resolved before the 2021 season—thus the filing of
6 the Petition by MHID in October, 2020.

7 David Van Berkem was unable to assist in locating documents, leaving Weitz & Co, Inc
8 to argue the case authority and statutes mandating MHID had to deliver the water to the same
9 location(s) as the “proof data” required, and if they had any “interest in the water right”, it was
10 held in trust for the “beneficial users”, being the property owners—the actual appropriators of
11 the water, and MHID merely “administers” and “delivers” that water to the “beneficial users”,
12 and we maintained that position, as we perceived the law to be.

13 The controversy escalated, as the MHID’s Board directed the water master shut off
14 water to the Bennett Property on August 1, 2020, causing loss of the fourth cutting of hay.

15 That termination was the exact situation that led to the litigation back in 1934-35—when
16 the Co-op (before it became a District) curtailed delivery and held liable for the damages caused
17 to the Bennett property, as the delivery was a contractual obligation under the Flora Bennett
18 Delivery Agreement (FBDA).

19 It was shortly after the water curtailment that MHID filed their Petition with the SRBA
20 Court in Twin Falls to adjudicate ownership of 61-248 and their effort to terminate the
21 obligation to deliver the 500-acre feet of storage water under the FBDA.

22 The SRBA Court has issued its decision , confirming the beneficial use of the water IS
23 held in trust by MHID, for the benefit of the appropriators that own the property, as embraced
24 by the facts in *Pioneer Irrigation* and *Black Canyon* Decisions from the Idaho Supreme Court,
25 as the water must be delivered consistent with the “proof data” (dates, quantities, priorities,
26 locations) as relied upon in the original decrees, as that was the sole proof to support their Claim

1 to those six formerly decreed Water Rights now embraced within Claim No. 61-10419—held in
2 trust for the beneficial use by the property owners, and with respect to the historic Water Right
3 No. 61-248, that water must be delivered to the Bennett property, owned by Weitz & Co, Inc.

4 Because of the unsuccessful mediation with MHID, followed by the decision of the
5 MHID Board members to terminate the water delivery on August 1, 2020, and followed with
6 filing the Petition in the SRBA Court, it became prudent for Weitz & Co, Inc to secure the
7 service of the water specialist law firm located in Portland, Oregon, and through their
8 assistance, Weitz presented their defense and counter-claims.

9 As part of Weitz' efforts to preserve its right to recover damages for hay loss and
10 preservation of the Flora Bennett Delivery Agreement (FBDA) created in 1923, a Notice of Tort
11 Claim was presented to MHID, under the Idaho Tort Claims Act (ITCA), addressing their
12 termination of water delivery on August 1, 2020. Though that notification may not be a
13 requirement—as the actions of MHID were intentional—not an act of negligence—deliberately
14 terminating water delivery—being also a deliberate contractual breach of the delivery
15 agreement, none-the-less, the Notice was given as a precautionary step—in anticipation MHID
16 would exercise the wisdom to re-evaluate their motives, and give serious consideration to the
17 consequence of their actions, as withholding delivery of water had financial consequences to a
18 farm operation—and this repeat behavior of withholding delivery of a contractual obligation
19 would give rise to an award for damages. That Notification is attached to this Memorandum

20 Through the SRBA litigation process, that position maintained by Weitz & Co, Inc has
21 been confirmed to be the law, and it appears a partial certified judgment will be entered by the
22 SRBA Court under IRCP 54(b), and with that entry, the right to request attorney fees and costs
23 becomes applicable pursuant to IRCP 54(e). Under IRCP 54(e)(4)(A) it was not necessary for
24 any party in a civil action to assert a claim for attorney fees in any pleading.

25 These attorney fees are identified as follows:

26 **REASONABLE AND NECESSARY ATTORNEY'S FEES INCURRED**

DATE	STAFF	NARRATIVE	HRS	RATE	TOTAL
01/06/2020	VKS	Drafting and research of letter to MHID regarding water right 61-248, and delivery thereof, etc. 7 Pg. Letter.	4	275.00 / HR	1100.00
01/08/2020	VKS	Call from D. Weitz, re: Mountain Home Irrigation District; Water right 61-248 litigation discussions.	1	275.00 / HR	275.00
03/12/2020	VKS	E-mail correspondence from D. Weitz. Re: Dan's meeting with John Westra back in 2006, regarding the surety of the water right and its claim perfection.	1	275.00 / HR	275.00
03/13/2020	VKS	Drafting and research of 8 pg. Mediation Statement.	6	275.00 / HR	1650.00
03/18/2020	VKS	E-mail correspondence and telephone calls with Linda Werner, IDWR, field examiner who conducted initial field examination of water right 61-248 during the SRBA process.	4	275.00 / HR	1100.00
03/19/2020	VKS	Telephone conversation with Linda Werner, who informs she left IDWR for a period of ten years, and recently returned, described the field adjudication process as she recalled at the time.	1	275.00 / HR	275.00
03/20/2020	VKS	Drafting of Response to MHID mediation statement pertaining to contractual delivery agreement, and SRBA water rights process. 14-page letter requiring much computer-assisted legal research of the background and basis in law of this water right, and the matters and historical events pertaining thereto. SRBA website research of water rights, IDWR website research, and outside research and review with Idaho State Historical Archives, and IDWR's Historical Archives, where the 61-248 water rights material boxes were "missing from the vault" according to the curator.	12	275.00 / HR	3300.00
03/24/2020	VKS	Call to Mr. John Westra, Fmr. W. Dist. Manager with IDWR., and discussion of water right 61-248. (Memory lapse)	1	275.00 / HR	275.00
03/25/2020	VKS	Preparation, Research, coordination with D. Weitz, and Mediation with MHID on 61-248 water right and Weitz beneficial and contractual usage of water.	6	275.00 / HR	1650.00
03/26/2020	VKS	Drafting, review, and e-mail correspondence with D. Weitz and M. Snowball, drafting After Mediation Follow-up Statement. Further revisions by VKS and D. Weitz.	4	275.00 / HR	1100.00

1	03/27/2020	VKS	Further drafting and correspondence with D. Weitz and M. Snowball, drafting of After Mediation Follow-up Statement. Further revisions by VKS and D. Weitz.	4	275.00 / HR	1100.00
2	04/01/2020	VKS	Telephone conversation with Jake Ake, Calvin Ireland, re: Bennett water rights, historical presence of MHID in relation to Bennett water rights. Research and analysis of priority water rights in the area and during the same time period.	1	275.00 / HR	275.00
3	04/06/2020	VKS	Review of IDWR documentation for basin 61, and watermaster delivery reports for each historical year dating back to 1993, research of Clayton Colthorpe, Ditch Rider, or water master, historically delivering water to Bennett property.	4	275.00 / HR	1100.00
4	04/06/2020	VKS	Research of Title 42, Idaho Code, SRBA Court process, case review of recent and relevant precedent. Review of federal reserved water rights claims.	6	275.00 / HR	1650.00
5	04/08/2020	VKS	Download and review of IDWR claims adjudication file, review of file documents for 61-248 water rights. Review of historical presence dating back to Bennett homestead, and further research of railroad easement relating to 1925 land grant from Congress.	6	275.00 / HR	1650.00
6	04/23/2020	VKS	Drafting, research, and review of Reply letter to C. Bromley, Re: pertaining to water delivery, Weitz & Co., and contractual right of delivery of water thereof.	4	275.00 / HR	1100.00
7	05/10/2020	VKS	Review of water studies conducted by the Bureau of Reclamation, showing that the aquifer has been steadily decreasing since the 1960's. Review of recent water permits pulled by Elmore County, and further research for land patents that may have been granted and could have potentially conveyed a use of water. Searches for any other Deeds that could have conveyed a water right with respect to the "Bennett" property.	4	275.00 / HR	1100.00
8	10/14/2020	VKS	E-mail to D. Weitz regarding drafted letter to Jay Friedly, re: sale of Van Berkem property, and Bennett water rights.	1	275.00 / HR	275.00
9	10/15/2020	VKS	Drafting of letter to Jay Friedly and research relating to Bennett, 61-248 water right.	1	275.00 / HR	275.00
10	10/16/2020	VKS	Review and further drafting of letter to	2	275.00	550.00

1			Jay Friedly re: water rights 61-248, as sold to Weitz, and as successor in interest to Bennett.		/ HR	
2	10/21/2020	VKS	Letter to Jay Friedly, Attorney At Law, regarding SRBA Petition, and request for information regarding the transfer of 61-248 water rights. 9 pg. letter.	6	275.00 / HR	1650.00
3						
4	10/23/2020	VKS	Call from Dan, re: Jay Friedly Letter, and SRBA water rights issues discussion. Further discussion of the effects of other business in the loss of water right 61-248.	1	275.00 / HR	275.00
5						
6	10/27/2020	VKS	Meeting with Laura Schroeder, re: water right 61-248, and further SRBA consultation thereof.	2	275.00 / HR	550.00
7						
8	10/28/2020	VKS	Letter to L. Schroeder, etc. re: Idaho Tort Claims Act.	4	275.00 / HR	1100.00
9	10/28/2020	VKS	E-mail correspondence to L. Schroeder and staff, re: letters already sent, research already conducted, and meeting with L. Schroeder and Staff to be briefed on the issues and other discussion.	2	275.00 / HR	550.00
10						
11	10/28/2020	VKS	Review of e-mail from J. Wiley, Associate attorney with L. Schroeder, re: <i>Bliss v. Minidoka Irrigation District</i> .	1	275.00 / HR	275.00
12						
13	11/04/2020	VKS	Meeting with Dan re: the manner to proceed with SRBA water right conversion claims and review of retainer agreement with the water lawyer, L. Schroeder.	1	275.00 / HR	275.00
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15						
16	11/05/2020	VKS	E-mail received from Dan, re: L. Schroeder's comments on summary letter.	.30	275.00 / HR	137.50
17	11/11/2020	VKS	Call from Dan, re: and review of drafted document from Laura Schroeder, regarding representation of SRBA matter.	1	275.00 / HR	275.00
18	11/12/2020	VKS	Drafting of Notice of Tort Claim, and subsequent e-mail and telephone correspondence with L. Schroeder, D. Weitz, and staff.	5	275.00 / HR	1375.00
19						
20	11/13/2020	VKS	Drafting and research of Notice of Tort Claim against political subdivision of the State of Idaho, MHID.	4	275.00 / HR	1100.00
21						
22	11/16/2020	VKS	Call from Dan, and review of E-mail sent from Laura Schroeder regarding SRBA matter, and filing before Dec. 15 th deadline.	.30	275.00 / HR	137.50
23						
24	11/17/2020	VKS	E-mail received from R. Harman, re: Copies of Requests for MHID files.	.30	275.00 / HR	137.50
25	11/18/2020	VKS	Email correspondence with Dan and Laura, re: Federal Water Rights issues, as Bennett water right may have previously been described at one time as a "federally	2	275.00 / HR	550.00
26						

			reserved water right".			
1	11/18/2020	VKS	Call from D. Weitz, re: retainment of Schroeder Law Offices to represent in SRBA matter.	1	275.00 / HR	275.00
2						
3	11/19/2020	VKS	E-mail correspondence over Nov. 18, 19, 20, and 21, with L. Schroeder re: clarification of basis in law to pursue defense 61-248 water right, and if federal reserved water rights doctrine applies.	1	275.00 / HR	275.00
4						
5	11/20/2020	VKS	Meeting with Dan, re: water rights, 61-248, box of documents, deeds, and various records, delivered for review.	2	275.00 / HR	550.00
6						
7	11/24/2020	VKS	Telephone conversation with C. Bromley, MHID Atty. Regarding Bennett Delivery agreement.	1	275.00 / HR	275.00
8	11/27/2020	VKS	Long e-mail sent to L. Schroeder, D. Weitz, etc., regarding telephone conversation with C. Bromley, MHID Atty.	2	275.00 /HR	550.00
9						
10	11/28/2020	VKS	Review of e-mail sent by D. Weitz, and review of attached case <i>MHID v. Diffy</i> , 319 P.2d 965, appears to be "good law", and subsequent phone call and discussion with D. Weitz.	1	275.00 / HR	275.00
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12						
13	11/28/2020	VKS	Review of e-mail sent from D. Weitz, re: MHID history, and phone call discussion regarding MHID history of delivery of water.	1	275.00 / HR	275.00
14						
15	11/30/2020	VKS	Review of e-mail correspondence between A. Dalglish, IDWR, and D. Weitz.	.30	275.00 / HR	137.50
16						
17	11/30/2020	VKS	Review of e-mail sent by D. Weitz, review of Mountain Home news article pertaining to short season due to contractual agreement to deliver to Bennett property. Subsequent phone call and discussion with D. Weitz.	1	275.00 / HR	275.00
18						
19	12/02/2020	VKS	Call from Dan, re: letter and e-mail from Laura S.	.30	275.00 / HR	137.50
20						
21	12/02/2020	VKS	E-mail received from Dan, re: Holiday closure, and billing statement.	.30	275.00 / HR	137.50
22	12/03/2020	VKS	Email from Dan, re: Status of Petition brought by MHID. Review of 2 pg. document from L. Schroeder.	1	275.00 / HR	275.00
23						
24	12/04/2020	VKS	Review of e-mail from L. Schroeder, re: communication with C. Bromley, re: settlement negotiations.	.30	275.00 / HR	137.50
25						
26	12/04/2020	VKS	Review of e-mail correspondence between D. Weitz and IDWR resource Agent, Alex Dalglish, re: MHID Petition for Organization, and subsequent telephone call.	1	275.00 / HR	275.00

1	12/07/2020	VKS	E-mail from Dan, re: Letter to Attorney Bromley, re: Settlement Proposal.	1	275.00 / HR	275.00
2	12/07/2020	VKS	E-mail correspondence with Alex Dalgeish, Idaho Dept of Water Resources staff, and subsequent telephone call regarding archived information on Bennett water rights, 61-248.	1	275.00 / HR	275.00
3						
4	12/08/2020	VKS	Review of e-mail correspondence between D. Weitz and L. Schroeder, and C. Bromley, regarding delivery of water each year.	.30	275.00 / HR	137.50
5						
6	12/10/2020	VKS	Visit to Idaho Dept. of Water Resources, meeting with Alex Dalgeish, re: review of box of historical documents sent from Idaho State Historical Archives.	4	275.00 / HR	1100.00
7						
8	12/11/2020	VKS	Drafted e-mail to Dan, re: what Laura said in her previous e-mail and letter.	.30	275.00 / HR	137.50
9	12/12/2020	VKS	E-mail received from Dan, re: thoughts for Laura's settlement discussions. Call from D. Weitz re: settlement discussions.	2	275.00 / HR	550.00
10						
11	12/15/2020	VKS	E-mail from Dan, Copies of Notice of Appearance, Response to Petition, Counterclaims, and Motion to Dismiss/Change of Venue. E-mail thread with Laura Schroeder on <i>Black Canyon Irr. Dist. v. State of Idaho</i> .	2	275.00 / HR	550.00
12						
13						
14	12/21/2020	VKS	E-mail received from Dan, re: Court Order Setting Hearing on Motion to Dismiss/Change of Venue.	.30	275.00 / HR	137.50
15						
16	12/31/2020	VKS	Email received from Dan, MHID's Reply to Response to Verified Petition for Declaratory Judgment	1	275.00 / HR	275.00
17	12/31/2020	VKS	Review of MHID's Reply to Response to Verified Petition for Declaratory Judgment, and discussion with D. Weitz.	2	275.00 / HR	550.00
18						
19	02/12/2021	VKS	E-mail received from Dan re: SRBA Court re: Motion for Summary Judgment and Supporting Memorandum, downloaded and reviewed.	1	275.00 / HR	275.00
20	02/12/2021	VKS	Telephone call from D. Weitz and discussion of Motion for Summary Judgment.	1	275.00 / HR	275.00
21						
22	03/18/2021	VKS	Review of e-mail correspondence between L. Gage, D. Weitz, and J. Browitt. Calendaring of SRBA Hearing.	.30	275.00 / HR	137.50
23						
24	03/18/2021	VKS	Observation of Oral argument by L. Schroeder.	1	275.00 / HR	275.00
25	04/23/2021	VKS	Review of e-mail correspondence between D. Weitz and J. Browitt.	.30	275.00 / HR	137.50
26	04/29/2021	VKS	Letter to Jay Friedly, re: Bennett Property Water Rights, 8 Pg. Letter.	6	275.00 / HR	1650.00
	05/12/2021	VKS	5 Pg. Letter to L. Schroeder and J.	6	275.00	1650.00

RESPONDENT'S MEMORANDUM OF ATTORNEY'S FEES

P.11

		Browitt. Re: IRCP 54, statutes		/ HR	
1	05/21/2021	VKS	Drafting of Respondent's Memorandum of reasonable attorney's fees incurred in the defense and research of the 61-248 water right matter, and the historical challenges thereof.	6	275.00 / HR
2					1650.00
3					
4	TOTAL:	VKS	-	HRS 149.6	Rate @ 275.00 / HR
5					Total Fees \$41,140.00

METHOD OF COMPUTATION

Vernon K. Smith, is an attorney located in Boise, Idaho, practicing law in a variety of areas since 1971. He charges as his prevailing rate the fee of \$275 per hour for his professional legal expertise and services.

The foregoing attorney's fees were incurred as a result and incidental to the preparation, necessary pre-trial investigation, letter formation, mediation statements and mediation efforts to avoid the litigation that came into being with the SRBA Court in the fall of 2020; and what has then been the participation in the defense of the matter and preparation of notice of claims and efforts to secure further documentation from the former property owner heirs. These fees assessed for these services were a reasonable amount spent on the necessary elements that relate to the facts and the law relating to this appropriation and beneficial use dispute that was needlessly created by MHID, given what was believed to be the state of the law as announced in 2007 with the *Pioneer* Decision, and thereafter maintained through the subsequent analysis of the right to the beneficial use at the place of appropriation for that beneficial use by the appropriators- irrigators of the property with the beneficial use of the water as addressed in the *Black Canyon* Decision in 2018. The amount of attorney's fees is not inclusive of all the work performed, as it became rather extensive in the research conducted, and not all the time exhausted in the preparation of the documentation has been assessed in this presentation, as it became very voluminous and could be later used in other water controversies in the future as part of extensive research will be retained in counsel's library of extensive water law and literature in various segments, along with the literature relating to the Carey Act law, the Desert

1 Entry law, the McCarren Amendment, and the creation of Water Distribution Districts and their
2 responsibilities and duties to their members and the land owners to where the beneficial use of
3 the water was to be applied pursuant to State and Federal water law.

4 The extent of the services charged in this Memorandum are reasonable and were deemed
5 necessary to accomplish the task at hand and to engage in the discussions, correspondence,
6 mediation, and recommendations related to the defense of these beneficial rights of the use of
7 the appropriated water to these respective properties after the formerly decreed water rights
8 were combined into a single adjudication—61-10419—for what appeared to be undertaken for
9 the convenient administration of the water distribution from the place of appropriation to the
10 place of beneficial use as historically established since the delivery through the Co-op that later
11 became the District—MHID—that was subject to the defense of quasi-estoppel and laches—in
12 any attempt to terminate the delivery of the water by a District that exists solely to deliver water
13 to the applicators -irrigators of the land. MHID has consistently delivered the water for the past
14 97 years (from 1923 to the present—with the one season of failure—resulting in litigation in
15 1934-35 stemming from their breach and award of damages against them).

16 These fees are very reasonable in light of the services required to be performed and
17 rendered to address the interests of Weitz & Co, Inc., and there has been a reductio in the
18 allocation of time spent for the depth of research and given the experience of the professional
19 services rendered.

20 This Memorandum of Attorney's Fees, is submitted to this Court pursuant to IRCP
21 54(e)(1), 54(e)(2), and the statutes mentioned above, as there was no basis or foundation in fact
22 or law for MHID to take the position they took to attempt to extort assessments out of Weitz &
23 Co, Inc. by claiming wrongfully that MHID owned the rights to the use of the water, well
24 knowing they are a delivery entity, not a water right owner, and the principle of law announced
25 in *Pioneer* and *Black Canyon* were very illustrative of the obligation of the District to maintain
26 the water delivery to the place of beneficial use, and not attempt to mis-appropriate or "steal" it,

1 and then use it as the basis to assess further annual assessments for the continued delivery and
2 use of the water.

3 Simply stated, MHID had no factual basis, nor were they ever supported with any
4 foundation in law to withhold delivery and claim the right of their own use, let alone claim the
5 exclusive ownership and right to appropriate the water elsewhere. The case law precludes that
6 bad faith act, and we are of the belief this Court has so declared the law, as it is well-
7 established, and as the Court is authorized to award reasonable attorney's fees to the prevailing
8 party or parties, as defined in Rule 54(d)(1)(B), as allowed by statute.

9 In accordance with the provisions of IRCP 54(e)(3), the following representations are
10 made to the court.

11 A. The time and labor required has been set forth above, and is reflected in a reduced portion of
12 the actual time spent on the research as stated above.

13 B. The difficulty of the questions presented stemmed from the tenacity of the Board of
14 MHID—who wanted to steal the water right, and then refuse to deliver the water to the
15 only place it could be beneficially used under the claim date used to secure the adjudication
16 of the Claim No. 61-10419, as without use of that claim data, there could be no approval and
17 decree to MHID. The district refused to accept that fact, and during the mediation process, it
18 became apparent MHID was using the water decree, 61-10419 in their hopes to churn more
19 assessments out of Weitz, and that was deemed to be bad faith and would never serve as a
20 foundation for any compromise settlement with MHID, and the matter had to be litigated
21 and the law declared to apply as it was similarly applied in *Pioneer* and *Black Canyon*.

22 C. The skill requisite to perform the legal service properly and the experience and ability of the
23 attorney in the particular field of law has been extensive in research and accumulating the
24 factual and historical data that would be needed in the mediation process and then as may be
25 needed in the SRBA litigation and possibly thereafter in the Elmore County litigation over
26 the breach of contract, the damages, and the notification to MHID as to their conduct and

1 the exposure to damages they were causing by their unconscionable behavior. It was
2 anticipated that Weitz & Co, Inc would thereafter secure the services of the water experts to
3 associate with counsel to litigate the case in the SRBA Court, but the law was deemed to be
4 supportive of the position and rights asserted by Weitz.

5 D. The prevailing charges for like work are significantly higher in most areas of the country, as
6 reflected in the Memorandum of the Schroeder Law Firm, and that was the reason counsel
7 did this preliminary work—designed to reduce the cost of preparation and fact-finding of
8 documentation, participation in correspondence, mediation, tort claims, etc., and the
9 extensive investigation into the historical data and documentation located in the archives of
10 IDWR that would address the history of the events that took place in 1989 and the perceived
11 reason for the combining of the six water rights for the continued administration of the
12 water to the respective parcels of beneficial use.

13 E. The fee was not contingent, but it was reduced in certain aspects to conserve on the
14 available funding to be allocated instead to address the expense to be assessed by the
15 Schroeder law firm, knowing their established rates for their services are relative higher.

16 F. There were some time limitations, as there was the need to address the scheduling of the
17 mediation efforts with Theodore Booth, and there were limitations in the required
18 notifications of the claim for damages, though counsel does not believe notification under
19 the ITCA was required, but in an abundance of caution, that notification was given—serving
20 to encourage the MHID Board to reflect upon their duties as a water delivery entity, and not
21 entitled to withhold delivery of water they had delivered for 97 years, and then seeking to
22 threaten breach of the FBDA when they were assessed damages back in 1935 for the same
23 mischievous act of withholding delivery of the prioritized 500-acre feet of stored water,
24 causing the loss of the fourth cutting of hay.

25 G. The value placed upon the water is essentially invaluable; land without water is grossly
26 depreciated and the unsuccessful efforts sought through Weitz' good faith cooperation in the

1 mediation process has instead been restored by the application of the facts to the controlling
2 law through this litigation in the SRBA Court, and it was genuinely hoped that MHID would
3 hold a Board meeting and correct this misguided behavior and stop this course of action, but
4 that remains to be seen. Their conduct will result only in more attorney fees and damages,
5 and the only way those costs can be satisfied is through assessments charged against the
6 water users, and that is not fair to the landowners, as they do not support the actions of the
7 Board in conducting this type of management, and they have not held a properly noticed
8 election of the Board for years, and that will soon change because of this unprecedented
9 conduct.

10 H. It is never desirable to engage in litigation with a water district that you have to maintain a
11 close relation for the life-blood of the farming operations. It serves to develop animosity
12 among some, and especially so when Board members must be challenged and a new
13 directorship put in place to stop this kind of misconduct in the future. No one benefits from
14 a senseless feud of this nature, as the facts were clear and the applicable principle of law has
15 been established. It was made clear—and as ruled upon by the SRBA Court, that the very
16 concepts set forth in *Pioneer Irrigation Decision* in 2007, and the very same principle then
17 re-affirmed by the *Black Canyon Decision* in 2018, represent a significant application of the
18 well-established law to these facts.

19 In both *Pioneer Irrigation* and *Black Canyon*, it was apparent that the irrigation
20 districts in each instance were suing the Bureau of Reclamation on behalf of their water
21 users, seeking to protect their interest that the districts knew belonged to the applicator, not
22 the delivering entity; In this controversy, MHID not only sought to “up-end” the rights of
23 the water users, but to both steal the right, and then use it as hostage to levy more
24 assessments—not only bad faith, but what some would call a basis for an award of punitive
25 damages, as this was malicious and despicable from the start.

1 The Idaho Supreme Court saw the right existed with the landowner-water
2 appropriator—just as the districts in *Pioneer* and *Black Canyon* perceived the law to be, and
3 MHID is no exception to the application of the same principle of law as declared to be
4 correct in 2007 and re-affirmed in 2018. This Decision from the SRBA Court is not an
5 “expansion” of the law, but the direct application of the intended consequence of the law.
6 The benefit of this decision is that other districts will now condition their behavior
7 accordingly in any water decrees in which they have the “duty of administration” and
8 possibly also hold “nominal title” in another of these “combined allocations” that we have
9 witnessed in this process engaged by IDWR in this situation.

10 I. The relationship between Vernon K. Smith and Weitz & Co, Inc and Daniel P. Weitz has
11 encompassed almost four decades, commencing in early 1980’s, and continuing to the
12 present.

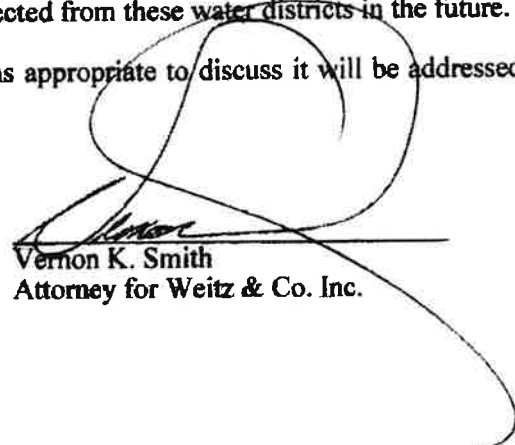
13 J. The issue of awards in similar case is left to this Court to decide what has been the practice
14 in these SRBA disputes—when the law and facts mandate what should be the resolution,
15 based upon the principle of law that is established with respect to water districts and the
16 rights of the water users to the application of the beneficial use of the Water their lands
17 were the place of beneficial application of the allocated appropriation under the criteria and
18 historical data used to support the right to an appropriation and beneficial use.

19 K. Counsel and his assistant make extensive use of Idaho’s Casemaker research tool as the
20 “automated legal research” to review the applicable case authority, and the extensive
21 research relating to the formation of water districts under the statute and case authority by
22 reviewing the extensive data relating to the extensive literature relating to the Carey Act
23 law, the Desert Entry law, the McCarren Amendment, and the creation of Water
24 Distribution Districts and their responsibilities and duties to their members and the land
25 owners to where the beneficial use of the water was to be applied pursuant to State and
26 Federal water law.

1 L. Counsel was relegated to engage in "hands-on" research of the many boxes of filed archived
2 documents located in storage with IDWR, a challenge in itself as the assistant can attest in
3 our effort to glean the rationale behind IDWR's decision to engage in a "combination" of
4 these six water rights that came to be bundled into Water Right No. 61-10419—the event
5 that has caused this controversy to become among the SRBA Decisions that has protected
6 the water users who are associated with these water districts, and make clear what is the
7 statutory duty and legal requirements to be expected from these water districts in the future.

8 If there is any other factor this court deems appropriate to discuss it will be addressed
9 upon inquiry.

10 Dated this 28th day of May, 2021.

11 
12 Vernon K. Smith
13 Attorney for Weitz & Co. Inc.
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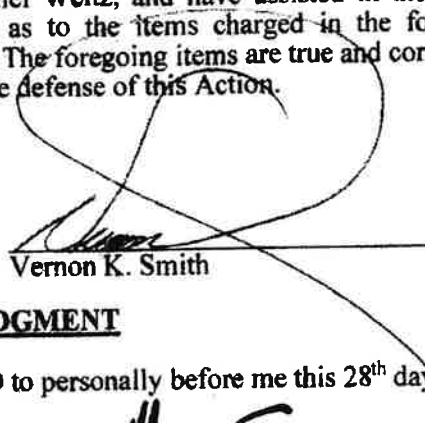
VERIFICATION

STATE OF IDAHO)
) ss.
County of Ada)

I, Vernon K. Smith, after being first duly sworn upon an oath, deposes and says:

I am an attorney for the Respondent, Daniel Weitz, and have assisted in the above-entitled Action and as such am better informed as to the items charged in the foregoing Memorandum of Attorney's Fees than Respondent. The foregoing items are true and correct and have been reasonably and necessarily incurred in the defense of this Action.

Dated this 28th day of May, 2021.

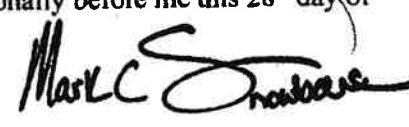

Vernon K. Smith

ACKNOWLEDGMENT

SWORN, SUBSCRIBED, and EXECUTED to personally before me this 28th day of
May, 2021.

(SEAL)




Notary Public for Idaho
Residing At: Ada Co, ID
Commission Expires: 03/20/2023

11-2-11



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 2021, pursuant to the Idaho Rules of Civil Procedure, I caused a true and correct copy of the above and foregoing Memorandum of Attorney's Fees to be delivered to the following Parties, by the means and methods as follows:

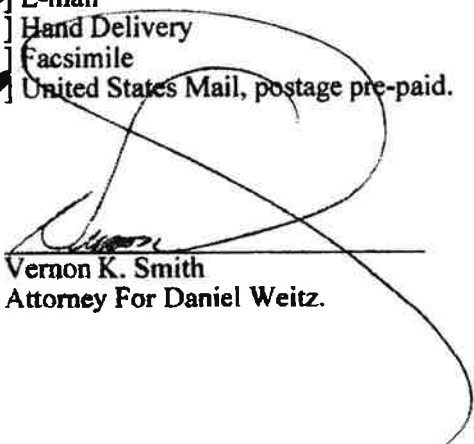
Chris M. Bromley
380 S. 4th St. STE 103
Boise, ID 83702
Tel. (208) 287-0991

☐ i-Court File and Serve
☒ E-mail
☐ Hand Delivery
☐ Facsimile
☒ United States Mail, postage pre-paid.

Laura A Schroeder
Schroeder Law Offices, PC
1915 NE Cesar E Chavez Blvd
Portland, OR 97212
Tel. (503) 281-4100

☐ i-Court File and Serve
☒ E-mail
☐ Hand Delivery
☐ Facsimile
☒ United States Mail, postage pre-paid.

Dated this 28th day of May, 2021.


Vernon K. Smith
Attorney For Daniel Weitz.

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VIA U.S. AND ELECTRONIC MAIL

The Mountain Home Irrigation District
140 S. 3rd E. St
Mountain Home, Idaho 83647
c/o Christopher Bromley, their attorney
380 S. 4th St. Ste 103
Boise, Idaho 83702

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November 13, 2020

RE: Tort Claim Notification under Title 6, Chapter 9, Idaho Code

Dear Mr. Bromley and Secretary of the Mountain Home Irrigation District:

I take this opportunity to advise Mr. Bromley, counsel for the Mountain Home Irrigation District ("MHID") that the Schroeder Law Offices, PC, located in Portland, Oregon, has been hired by Weitz & Company, Inc. to assist as litigation counsel in response to the Verified Petition for Declaratory Judgment filed by Mr. Bromley on behalf of MHID. Their response to that Petition will be timely prepared prior to the hearing currently scheduled for January 21, 2021.

My purpose in submitting this correspondence to the Secretary of MHID, and to Mr. Bromley, is to provide MHID with written notification of the existing and developing claims for damages and losses, to any extent they may be subject to recovery under the Idaho Tort Claims Act, so there is no question as to issue of the potential need for compliance under the provisions of Title 6, Chapter 9, Idaho Code.

Weitz & Company, Inc. ("Weitz") has determined there has been damages and losses as a result of the actions and conduct of MHID, and to any extent the Idaho Tort Claim Act has any application, you are herewith notified to preserve their tort and contractual claims related to MHID's deliberate withholding and failure to deliver the water supply required under the contractual obligation existing by virtue of the Flora Bennett Delivery Agreement (FBDA) created in October, 1923.

We note for the record that MHID's Water Master, Terry Siegrist, was told by MHID officials to terminate delivery of the required water supply to the Weitz farming operation on August 1, 2020, and he did so, thereby breaching their contractual obligation to deliver the water supply throughout the irrigation season, the consequence of which has resulted in claims for damages as herein expressed.

As you are aware, Weitz operates several farming operations in Elmore County, receiving water from MHID, and one such farming operation is historically referred to as the Old Bennett Ranch, currently owned by Weitz, an active Idaho corporation in good standing. Weitz has operated the Old Bennett Ranch premises pursuant to the two acquisitions, the first being in 1991, and then the remainder in 2006. MHID has consistently delivered the required water supplies under the FBDA, without interruption, throughout all the years Weitz has owned the property.

Weitz has owned the real property and beneficial rights to the delivery of the water since 2006, and Daniel P. Weitz is the President and current registered agent of Weitz, and that entity holds the rights to receive each of the three categories of water delivery from MHID, two of which are identified within the FBDA (dated October 15, 1923), including Water Right 61-248 (and/or Water Right 61-10419) and the five hundred (500) Acre-Feet of Storage Water obligated to be delivered through the delivery system, and the third category being the water shares issued relating to the 1976 annexation of a parcel into the District.

Though MHID has breached the delivery commitment identified in FBDA on August 1, 2020, MHID has continued using the delivery system belonging to Weitz, constituting the unauthorized use of the canal delivery system owned by Weitz, portions of which are located above and within Weitz property. Because of this intentional breach of the FBDA, MHID has jeopardized its authorized use the delivery system, and if this disruption is not immediately restored, MHID must cease any further use of the canal system, as identified and addressed within FBDA.

MHID remains contractually obligated to deliver water to the Weitz property, pursuant to FBDA, as well as the duty to discharge its fiduciary obligation to District share-holders. To our disappointment, MHID has behaved in a similar manner it did in 1934, seeking to avoid the commitment to abide by the terms of the FBDA, and for that reason, MHID withheld delivery of water obligated to be delivered under the FBDA, be it with reference to Water Right 61-248 and/or the combined Water Right 61-10419, and the delivery of the 500 Acre-Feet of Storage Water, now owned by Weitz, the successor in interest to those water rights.

MHID failed to discharge its contractual obligation to deliver these water allocations, commencing August 1, 2020, withholding delivery of the entire 500 Acre-Feet of Storage Water, delivering only a portion of the storage water, the effect of which caused loss of the fourth cutting of alfalfa hay.

This curtailment commenced August 1, 2020, when the MHID Water Manager, Terry Siegrist, notified Timothy Healy, the managing agent of the farming operations for Weitz, that MHID was terminating delivery of the Storage Water, on the pretense this was a short water year, despite the unqualified obligation to deliver the 500 Acre-Feet of Storage Water, as defined in the Delivery Agreement.

The consequence of that act and notification by Mr. Siegrist commenced the act of withholding the required distribution of Storage Water, and from an historical standpoint, it was that same attitude that gave rise to the issue litigated in 1934-35, requiring MHID to pay damages suffered to crop production as a result of their curtailment of water delivery during that drought season. MHID has a contractual obligation to perform this delivery to Weitz, not just a statutory duty as an Irrigation District.

The claims for damages are described below, resulting from the statements and actions that curtailed the water deliveries stemming from the intentional acts of MHID, its staff, officials, agents, and the water manager, which does include the acts and actions forthcoming from the board members of MHID, including David Ascuena, Eric Orr, Mike Landers, and David Knox.

Under Idaho Code §6-906, it is therein expressed that notice of "tort claims" must be presented to political subdivisions of the State of Idaho within 180 days from the date of a known and identifiable damage and loss, or as reasonably thereafter discovered. These losses have commenced as of August 1, 2020, stemming from the actions of MHID as a result of this contractual breach expressed by Mr. Siegrist, being not an act of negligence, but an intentional tort, and more specifically, a direct breach of the Flora Bennett Delivery Agreement, constituting a contractual breach, beyond a breach of a statutory fiduciary duty to discharge delivery of water under the administration of MHID.

In the interests of providing adequate notification of these claims for damages and losses, Weitz does submit this notification to MHID under I.C. §6-906, notifying you that Weitz has suffered and sustained damages as a result of the intentional withholding of the required water delivery, and the initial damage and losses consist of the loss of the entire fourth cutting of alfalfa hay to have been harvested during the 2020 season, a crop of alfalfa hay that typically is harvested and sold as dairy quality hay that would generate the approximate sum of \$40,000.00, depending upon the market price to be realized from the eventual sale of the 2020 hay crop to the dairy market when needed, subject to the seasonal market price.

Additionally, you are notified there will be further consequential damages and losses that will result from the inability to conduct other business-related ventures with respect to its water use rights and fulfillment of other obligations under the City of Mountain Home annexation agreement known to MHID as having taken place with the City of Mountain Home, Idaho.

These damages will come about effectively as a result of the curtailment occurring August 1, 2020, and the expressed intentions to withhold future deliveries by virtue of the Petition filed by MHID, which are reasonably anticipated as a result of the conduct and behavior of MHID.

Due to MHID's conduct, behavior, and actions, Weitz will seek damages as a result of this conduct and behavior under several aspects of misconduct, including actions for their intentional

acts, and or such other tort theories, along with their contractual violations, including (1) conversion, (2) trespass, (3) breach of the implied covenant of good faith and fair dealing, (4) slander of title, (5) intentional interference with economic relations, (6) intentional interference and breach of their contractual obligations, (7) breach of fiduciary duties, (8) negligence in a variety of manners, (9) consequential economic loss, and (10) deliberate breach of the performance required under the unqualified delivery obligation identified within the FBDA, giving rise to what may also include punitive damages.

The damages resulting from MHID's actions described above, notwithstanding any tort limitations reflected by any statute, may be premised upon the contractual claims as a result of the breach of the FBDA, and may come to exceed \$3,000,000.00, stemming, in part, from the additional expenses incurred in relation to the planned development, including increased annexation costs in addition to the damages to crop production due to the curtailment of the water delivery, deprivation, and intentional withholding of critical irrigation water announced and physically withheld as of August 1, 2020, and the commencement of what will become a series of consequential economic damages and losses, including lost business opportunities, together with current and anticipated attorney fees, and you are herewith notified of these actual, potential, and consequential damages that will be claimed in the course of this controversy as a result of the actions and conduct of MHID. You are herewith placed on notice of such tort claims and contractual claims, and I trust this provides you with sufficient information from which to commence your investigation into these matters, and you shall judge your actions accordingly. Should you have any questions or concerns, so indicate, and until then, I remain

Yours very truly,

Vernon K. Smith