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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

Subcase Nos. 61-248 and 61-10419

**MOUNTAIN HOME IRRIGATION
DISTRICT'S OBJECTION TO
RESPONDENT'S MEMORANDUMS
OF ATTORNEY FEES**

COMES NOW the Mountain Home Irrigation District ("MHID") by and through its counsel of record, McHugh Bromley, PLLC, and pursuant to IRCP 54(e)(6) files this *Objection to Respondent's Memorandums of Attorney's Fees and Costs*, supported by the records of this Court and previously filed pleadings and declarations in this matter.

I. INTRODUCTION

Respondent's attorney of record, Laura A. Schroeder, as well as Vernon K. Smith, who claims to be Respondent's attorney, each filed their own separate Memorandum of Fees, despite Mr. Smith never having entered his appearance in these proceedings. Likewise, despite claiming some relationship with Respondent's actual attorney of record, Ms. Schroeder, Mr. Smith has not filed a Notice of Association of Counsel.

More importantly, Respondent has not prevailed in this declaratory judgment action. It has prevailed in a portion of this case, which is now being appealed pursuant to an IRCP 54(b) certified judgment. Idaho's declaratory judgment statute, I.C. § 10-1210, only allows an award of costs to a prevailing party. A prevailing party must therefore find other statutory authority to serve as a basis for an award of fees. However, Respondent fails to cite to any applicable statute which would provide for an interim award of attorney's fees. Likewise, Respondent has not supported its arguments seeking fees under the litany of statutes it does cite. Consequently, Respondent's fee petition should be denied.

II. ARGUMENT

A. There Is No Statutory Authority For Respondent To Seek Its Fees At This Interim Stage In The Litigation

Idaho continues to adhere to the American Rule where each party to litigation bears its own attorney's fees:

This Court has consistently held that the power to award attorney fees is governed by statute. *E.g., Hellar v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984) ("We continue to adhere to the so-called 'American rule' to the effect that attorney fees are to be awarded only where they are authorized by statute or contract.").

In re SRBA Case No. 39576, 128 Idaho 246, 256 (1995).

Awards of attorney's fees in declaratory judgment actions must be grounded in a separate statute providing for their award.

Furthermore, the mere fact an action is brought as a declaratory judgment action does not preclude the application of I.C. § 12-120(3) to a case where the gravamen is a commercial transaction. *See Continental Cas. Co.*, 127 Idaho at 835-36, 907 P.2d at 812-13 (fees awarded in a declaratory action regarding duties under insurance contract); *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 73, 878 P.2d 762, 772 (1994) (fees awarded in a declaratory action regarding status of security interest).

Finally, although J-U-B tries to argue that I.C. § 10-1210 is the controlling statute in regard to attorneys fees in declaratory judgment actions, the statute, by its plain

terms, clearly only applies to “costs” in declaratory actions. The general rule is that costs do not include attorney fees unless attorney fees are expressly included in the definition of the term costs. *Noble v. Ada County Elections Bd.*, 135 Idaho 495, 504, 20 P.3d 679, 688 (2000); *See* 20 AM.JUR.2D *Costs* § 1 (1995)....Therefore, we find that I.C. § 10–1210 does not provide the exclusive method for apportionment of costs and attorney fees in a declaratory action.

Freiburger v. J-U-B Engineers, Inc., 141 Idaho 415, 424 (2005).

Respondent cites six (6) statutory provisions which it contends serve as a basis for this Court to make an award of attorney’s fees: I.C. §§ 12-117, 12-121, 12-123, and §12-120(1), (2), and (3). Idaho Code §§ 12-117, 12-121 and 12-123 provide for awards of attorney’s fees in civil cases where a party engaged in frivolous conduct, i.e. without any basis in fact or law. These statutes are simply not applicable to provide for an interim award of attorney’s fees, based on the partial judgment issued in the declaratory judgment aspect of the case at hand.

Respondent’s only allegations supporting its contention that MHID engaged in frivolous conduct focuses on the holding in *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007), as it relates to the issue of Weitz’s beneficial interest in Water Right 61-248. However, in its opening Memorandum in support of its own Motion for Summary Judgment, Weitz affirmatively recognized: “MHID is technically correct – 61-248 is no longer a right of use independently recognized by the State.” *Memorandum* at 4 (emphasis added). Weitz also acknowledged 61-248 appears nowhere in the records of the Court: “61-248 is found neither in the list of Disallowed Water Rights Claims nor the list of Unclaimed Water Rights Decreed Disallowed attached to the *Final Unified Decree*.” *Weitz Memorandum in Support of Motion for Summary Judgment* at 6.

Therefore, MHID did have a good faith basis fact to seek a declaratory ruling. More importantly, MHID had a good faith basis in law in initiating and pursuing this case due to the language in the *Final Unified Decree*: “All other water rights with a priority before November

19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed.”

This preclusive effect is further reinforced in Idaho Code. “The decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system” I.C. § 42-1420.

The record reflects the fact MHID acted cautiously in seeking a declaratory ruling regarding the status of Water Right 61-248. The Idaho Supreme Court has commented on the efficiencies achieved by a party first invoking the declaratory judgment act, before taking adverse action or embarking on full blown litigation:

[J]udicial resources also are conserved by the availability of a declaratory judgment mechanism; the prompt and efficient use of that mechanism enables courts to clarify the legal relationships of parties before they have been disturbed thereby tending towards avoidance of full-blown litigation. It would frustrate this latter policy were parties required to bring, as part of a declaratory judgment action, all conceivable claims and counterclaims on pain of preclusion. The Second Restatement has weighed these competing policy rationales and concluded—sensibly, in our view—that, on balance, public policy is furthered rather than retarded by the ready availability of a no-strings-attached declaratory remedy that is simpler, faster, and less nuclear than a suit for coercive relief. *Andrew Robinson Int’l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 58 (1st Cir. 2008).

Stilwyn, Inc. v. Rokan Corp., 158 Idaho 833, 844 (2015).

Respondent also seeks its fees pursuant to I.C. § 12-120(1) (for actions seeking damages under \$35,000) and I.C. § 12-120(2), which applies I.C. § 12-120(1) to counterclaims. Neither of these fee shifting statutes are applicable to the claims which are subject to the Court’s *54(b) Partial Judgment*, which Respondent characterizes as a vindication of its constitutional rights. *Schroeder Memorandum* at 6. The Supreme Court has made it clear that a party cannot shoehorn a constitutional claim or declaratory judgment action related thereto, which may have some indirect hypothetical monetary value, into a claim directly seeking monetary relief – to which I.C. § 12-120(1) would apply:

Section 12-120(1) applies to claims for monetary relief in which the amount pleaded is under \$35,000, and entitles the prevailing party to an award of reasonable attorney fees. Here, Nye's claim was for a declaratory judgment effectuating the Senate's award of fees. Although this is a claim for money, the gravamen of the action is a dispute concerning the legal authority of the Senate to impose attorney fees in January of 2017 under the then-existing statutory scheme. As such, this case does not arise under the circumstances contemplated by section 12-120(1). Rather, it is, at its core, a constitutional issue.

Nye v. Katsilometes, 165 Idaho 455, 464 (2019) (emphasis added).

Next, Respondent, through Mr. Smith – but not its actual counsel of record, Ms. Schroeder – asserts I.C. § 12-120(3) provides independent statutory authority to make an award of its fees on an interim basis. However, I.C. § 12-120(3) governs fee awards in commercial transactions. Respondent does not provide any basis to support its argument that MHID's declaratory judgment action dealt with a commercial transaction. Furthermore, a review of the Bennett Contract (Exhibit 2 to the *Verified Petition for Declaratory Judgment*) reveals there is no fee shifting language; moreover, Respondent specifically moved the Court to exclude the Bennett Contract from this action, with the Court granting the same. *Order on Motion to Dismiss or in the Alternative to Change Venue* (Jan. 22, 2021). The only claims adjudicated to date simply focused on an interpretation of Water Right 61-10419 and the Final Unified Decree as it related to Water Right 61-248, which Respondent acknowledges does not exist.

Most importantly in this case, there has been no prevailing party in the action. Respondent's Counterclaim I and MHID Count II remain with this Court, pending MHID's appeal of the partial judgment certified pursuant to IRCP 54(b). The Idaho Supreme Court recently held that interim awards of attorney's fees are not appropriate following the issuance of an IRCP 54(b) certificate:

Ovanes and Socorro request attorney fees on appeal pursuant to Idaho Code section 12-121. However, this appeal arises from an I.R.C.P. 54(b) certified judgment which resolved some, but not all, of the parties' claims. Since each claim in an

action must be resolved before a court may determine the prevailing party, the identity of the prevailing party in this case will not be known until proceedings at the trial level are complete. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 154 Idaho 259, 269, 297 P.3d 222, 232 (2012) (citing I.R.C.P. 54(d)(1); *Bagley v. Thomason*, 149 Idaho 799, 804-05, 241 P.3d 972, 977-78 (2010)).

Accordingly, it would be premature to award any attorney fees at this juncture. Upon the district court's entry of a final judgment deciding each claim below, the court is to determine which party has prevailed and whether that party is entitled to attorney fees related to this appeal.

Berian v. Berberian, 483 P.3d 937, 953-954 (Idaho 2020).

Respondent has several claims, including tort claims it values at \$3,000,000, addressing an alleged curtailment of its water by MHID during the waning days of the 2020 irrigation season and other alleged interference with a development contract for Respondent's real property. There has been no judgment rendered on these counterclaims and MHID affirmatively denies it prematurely curtailed Respondent's diversion. *See Answer to Counterclaim*.

Mr. Smith, Respondent's "counsel," admits that the bulk of the time reflected on the Affidavit in support of the fee petition was incurred: 1) during prelitigation matters; 2) in support of Respondent's counterclaims which have not been adjudicated; and 3) in educating himself in the area of water law, despite Respondent retaining water counsel. Even had Respondent prevailed in this action, which it has not, none of the time incurred by Mr. Smith in these extraneous matters would be compensable in a fee petition.

The following timeline provides examples of Mr. Smith's excessive and unrelated billings:

1. On 10/5/2020, MHID files Petition for Declaratory Relief in SRBA.
2. Smith's total time moved for is 149.6 hours @ \$275/hr = \$41,140.
3. Smith's first time entry is 1/6/2020 when he drafts a 4-hour letter to MHID. All of Smith's time entered prior to 10/5/2020 had nothing to do with the actual lawsuit MHID filed in the SRBA.

4. Smith's total time entered from 1/6/2020 – 10/5/2020 is 69 hours @ \$275/hr = \$18,975 in fees.

5. Subtracting \$18,975 from \$41,140 = \$22,165 in possible fees having to do with filing of MHID's Declaratory Judgment action.

6. 10/28/2020 –Smith sends a 4-hour letter to Schroeder regarding Idaho Tort Claims Act. However, there has been no judgment rendered on this Tort Claim. Total time 4 hours = \$1,100.

7. 11/12/2020 and 11/13/2020 time entries totaling 9 hours regarding Tort Claim. However, there has been no judgment rendered on this Tort Claim. Total time 9 hours = \$2,475. Total fees claimed directly related to Respondent's pending Tort Claim = \$3,575.

8. 12/14/2020 Schroeder enters her Notice of Appearance herein and files motions in her name. Smith has no role in court. However, the total time entered from this point forward is 26.9 hours = \$7,397.50.

9. The total non-tort claim related fees allegedly incurred for Smith's "representation" of Respondent between 10/5/20 and 12/14/2020 is \$10,917.50.

10. Smith has entered his time in block billing, generally in several hour increments. One such increment on 3/20/2020 (nearly 6 months prior to the filing of this case), is for 12 hours in a single day. Smith has serious credibility issues as reflected in a long line of adverse Idaho Supreme Court decisions wherein he was a party. *See Smith v. Smith* (In re Estate of Smith), 164 Idaho 457 (2018); *Smith v. Smith*, 164 Idaho 46, 48, 423 P.3d 998, 1000, (2018); *Peasley Transfer & Storage Co. v. Smith*, 132 Idaho 732, 735, 979 P.2d 605, 608, (1999). The instant fee petition reveals the redundant arguments and overall inefficiencies in Smith's billing practices. This Court should view this block billing, and frankly this entire fee petition from an attorney who was not counsel of record, has entered no appearance, and has not associated with Schroeder, with a high decree of skepticism.

Ms. Schroeder's fee petition time entries and other assertions present the following areas of concern:

1. On page 3 ¶ D Ms. Schroeder states that the fees charged are consistent with those charged by other attorneys handling water law related matters within Idaho. I am not aware of anyone who regularly practices water law in Idaho and charges \$440/hr. For example, my hourly rate for MHID is \$245. I have practiced since 2001 and particularly in water law since 2003. I am aware that Norman Semanko's stated hourly rate (in 2020 in a Fifth Judicial District matter) was \$385. Ms. Schroeder's associate, Jim Browitt, whose bar registration says he lives in Lewiston, has practiced since 2013, p. 3 ¶ C, and is billing at

\$260, Aff. Schroeder p. 4 table of rates. While no offense is meant to Mr. Browitt, I have 10 more years of experience with an office in Boise, which is generally known to be a higher cost area.

2. Ms. Schroeder states on page 4 ¶ J that the SRBA Court does not hesitate to award fees in water law disputes. Based on my 18 years of practicing almost exclusively in water law, the Court has not often awarded fees.

3. Ms. Schroeder states on page 5 ¶ L: “Weitz has made a substantial investment in this effort, and is equitably entitled to recover some if not all of that expense.” That is not the basis for an award under any of the 6 fee shifting statutes cited in either her or Mr. Smiths’ fee memos. Indeed, at page 8 of her Memo, Ms. Schroeder cites *Eighteen Mile Ranch, LLC v. Nord Excavating & Paving, Inc.*, 141 Idaho 716, 720, 117 P.3d 130, 134, (2005) (The court may not use the award or denial of attorney fees to vindicate his sense of justice beyond the judgment rendered on the underlying dispute between the parties.)

4. The last paragraph of page 6 Ms. Schroeder states a “claim” was filed for 61-248. This is inaccurate. There was a claim filed for 61-10419. Moreover, there was no SRBA partial decree issued for 61-248, which required the Court to discern what happened with the SRBA partial decree for 61-10419 and whether 61-248 was part and parcel of that right. Additionally, much of Respondent’s arguments center on its alleged beneficial use conferring rights protected under Idaho Const. Art. XV, § 4 of Idaho’s Constitution. It remains to be determined, following appeal, whether Respondent’s predecessors in interest “consented” to the deprivation of their use by entering into certain contracts – the terms of which placed certain burdens upon those predecessors in interest which do not appear to have been fulfilled.

5. The total amount of fees sought by Weitz’s entire team of attorneys is \$124,234.08. By way of comparison, MHID’s fees, beginning with the drafting of the Complaint, total approximately \$28,000.

B. Respondent Is Likewise Not Entitled To An Interim Award Of Costs.

Awards of costs in declaratory judgment actions are discretionary and are governed by I.C. § 10–1210. However, at this point no costs have been claimed and there has been no prevailing party in this action. Any discussion of an award of Respondent’s costs at this juncture would be premature.

III. CONCLUSION

Respondent is improperly seeking an interim award of fees in a declaratory judgment action, for which fees are not typically awarded, absent a separate statutory authorization. Here,

no separate statutory provision allows for an award of fees, much less an interim award. As a result, no fees should be awarded to Respondent at this stage in this litigation.

DATED this 8th day of June, 2021.


CHRIS M. BROMLEY
Attorneys for Mountain Home Irr. Dist.

CERTIFICATE OF SERVICE

I certify that on this 8th day of June, 2021, I caused to be served a true and correct copy of the foregoing was served as follows:

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