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**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 RESPONSE AND
 OBJECTION TO RESPONDENT'S
 MOTION FOR ENTRY OF FEES
 AND COSTS WITHOUT
 EVIDENTIARY HEARING AND
 TRANSFER OF REMAINING
 CLAIMS TO ELMORE COUNTY**

COMES NOW the Mountain Home Irrigation District ("MHID") by and through its counsel of record, McHugh Bromley, PLLC, Respondent Weitz having filed its *Motion for Entry of Fees and Costs without Evidentiary Hearing and Transfer of Remaining Claims to Elmore County*, and files this *Response and Objection* thereto. This Response is supported by the records of this Court and previously filed pleadings and declarations in this matter.

I. INTRODUCTION AND PROCEDURAL HISTORY

This Case was originally filed by MHID as a narrowly tailored request for a declaratory judgment to determine the legal status and/or ownership of water right 61-248 and its relationship,

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if any, to water right 61-10419. In response, Weitz sought to expand the case by alleging tortious acts by MHID as well as a Counterclaim seeking the opposite declaration as to the existence of 61-248 and its relationship, if any, to water right 61-10419.

The Court elected to bifurcate the case, sending Count II of MHID's case (related to a matter of contractual interpretation) as well as Weitz's tort-based counterclaim (Counterclaim Count I) for determination to the District Court in Elmore County. However, this Court retained jurisdiction over Count I of Weitz's counterclaim as well as MHID's Count II, pending a resolution of MHID's request for declaratory judgment as to the ownership of 61-248.

On April 22, 2021 this Court entered its *Order on Cross-Motions for Summary Judgment*, determining that, while 61-248 no longer exists, Weitz retained a beneficial interest in that right as a portion of right 61-10419, which is owned by MHID. This decision denied Count I of MHID's case and granted Weitz's Counterclaim, Count II, "to the extent it asserts Weitz owns a beneficial interest in water right 61-10419." *Order on Cross-Motions for Summary Judgment* at 11. Thereafter, on May 20, 2021, the Court entered an IRCP 54(b) *Partial Judgment* ("Judgment"), certifying these adjudicated claims as ripe for an interlocutory appeal. MHID timely appealed the matters decided and certified under IRCP 54(b) on June 30, 2021.

Weitz's attorney of record, Laura A. Schroeder, as well as Vernon K. Smith, who claimed to be Weitz's attorney, each timely filed their own separate Memorandum of Fees, despite Mr. Smith never having entered his appearance in these proceedings at the time he submitted his fee memorandum. Likewise, despite claiming some relationship with Weitz's actual attorney of record, Ms. Schroeder, Mr. Smith had not filed a Notice of Association of Counsel at the time he submitted his fee memorandum. However, on September 2, 2021, Mr. Smith entered his

appearance on behalf of Weitz by filing a notice of substitution of counsel. This filing also ended Ms. Schroeder's and her firm's representation of Weitz in this case.

MHID timely filed its *Objection to Respondent's Memorandums of Attorney's Fees* ("Objection") which listed a litany of reasons why Weitz was not entitled to an award of his fees or costs incurred in this action. For example, 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. No such basis exists in this case.

A hearing on MHID's *Objection* was originally scheduled for September 2, 2021 at 1:30 p.m. However, on August 30, 2021, in the hopes of reaching a settlement in this matter, the parties submitted a *Stipulation to Vacate Hearing on Attorneys' Fees*.

One argument advanced by MHID addressed the line of cases which prohibited an award of fees due to the interim nature of an IRCP 54(b) judgment. MHID has since dismissed its appeal in the hope that the aforementioned settlement discussions would be fruitful, thus rendering this portion of its original *Objection*, moot. Unfortunately, a settlement was not reached and MHID now relies on the other arguments advanced in its *Objection*.

Instead of simply utilizing the status conference set for January 18, 2021 or another mutually agreeable time to hear MHID's *Objection*, Weitz has now filed a *Motion for Entry of Fees and Costs without Evidentiary Hearing and Transfer of Remaining Claims to Elmore County* ("Motion"). The *Motion* seeks to undermine MHID's *Objection*, the procedures outlined in IRCP 54(d) and (e), and to deny this Court the ability to hear the arguments presented in opposition to *Respondent's Memorandums of Fees and Costs*.

MHID agrees with Respondent that MHID's *Objection* is now ripe for resolution. However, MHID believes a hearing would be appropriate so that the Court and parties can discuss

the *Objection* as well as the mechanisms for transferring the previously stayed causes of action to District Court in Elmore County. Thus, MHID has set its *Objection* for hearing at the status conference previously scheduled for January 18, 2022. However, as will be discussed below, there is no basis for Weitz to seek additional fees and costs which were not previously submitted in the 14 days following the Court's entry of Judgment on May 20, 2021.

II. LEGAL ARGUMENT

Idaho Rule of Civil Procedure 54(d)(4) states:

Memorandum of Costs. At any time after the verdict of a jury or a decision of the court, but not later than 14 days after entry of judgment, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense. The memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule. Failure to timely file a memorandum of costs is a waiver of the right to costs. A memorandum of costs prematurely filed is considered as timely.

Emphasis added.

Idaho Rule of Civil Procedure 54(e)(5) states:

Attorney Fees as Costs. Attorney fees, when allowable by statute or contract, are costs in an action and processed in the same manner as other costs and included in the memorandum of costs. A claim for attorney's fees as costs must be supported by an affidavit of the attorney stating the basis and method of computation.

Emphasis added.

Weitz has improperly augmented the record in this case with untimely filings in violation of the Idaho Rules of Civil Procedure. These untimely filings should be struck from the record and/or disregarded.

Additionally, while Weitz vaguely contends some of the billings from his former counsel were received after the date he submitted his original fee memorandums, Weitz never sought relief

from the timelines contained in IRCP 54, though Idaho Supreme Court precedent would have allowed them to do so:

We initially address the assertion of the highway district that the trial court erred in allowing such amendment of the Acarrequis' costs bill to include attorneys' fees after the ten-day period allowed by I.R.C.P. 54(d)(5) had expired. The allowance of amendment to pleadings is a matter within the trial court's discretion and will not be disturbed absent a showing of clear error. *Wheeler v. McIntyre*, 100 Idaho 286, 596 P.2d 798 (1979); *Cougar Bay Co. v. Bristol*, 100 Idaho 380, 597 P.2d 1070 (1979). A court may, in its discretion, allow such amendment, unless to do so would deprive the complaining party of some substantial right. *Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426 (1942); *Pennsylvania-Coeur d'Alene Mining Co. v. Gallagher*, 19 Idaho 101, 112 P. 1044 (1910). We have previously ruled that the time periods allowed under Rule 54 may be enlarged at the discretion of the trial court. *Wheeler v. McIntyre*, *supra*. The record discloses no harm or prejudice resulting to the highway district from the court's allowing amendment of the Acarrequis' memorandum of costs. We find no abuse of discretion and no error.

Ada County Highway Dist. v. Acarrequi, 105 Idaho 873, 875, 673 P.2d 1067, 1069 (1983).

Likewise, while Weitz's new counsel, Mr. Smith, contends these billings were received after the submission of the original fee memorandums, this assertion is simply inadmissible hearsay which should be viewed with a high degree of skepticism. *See* IRE 801(c) and IRE 802. The proper method of making such an assertion would be for Weitz's prior counsel, Ms. Schroeder, to explain that her billings were yet to be completed at the time she submitted her original fee memorandum, combined with a request for relief from the timelines. That procedure was not followed. Thus, there is no admissible evidence supporting Weitz's untimely recitation of his version of the events giving rise to his tardy submission.

Likewise, if Weitz had actually incurred fees in relation to the appeal filed by MHID, which was subsequently dismissed based on the premise that the parties were acting in good faith in an effort to reach settlement, the proper procedure would have been to seek those fees in a petition to the Idaho Supreme Court. The procedure for this process is outlined in Idaho Appellate Rules 40

and 41. Yet Weitz did not avail himself of his right to seek the fees and costs he allegedly incurred. He has therefore waived this right and cannot resurrect it by untimely augmenting the record in violation of the timelines specified in IRCP 54(d)(4) and (e)(5).

III. CONCLUSION

This Court should therefore deny Weitz's *Motion for Entry of Fees and Costs without Evidentiary Hearing and Transfer of Remaining Claims to Elmore County* and disregard the Affidavit of Vernon K. Smith in support thereof.

DATED this ____ day of January, 2022.



CHRIS M. BROMLEY

Attorneys for Mountain Home Irr. Dist.

CERTIFICATE OF SERVICE

I certify that on this ____ day of January, 2022, I caused to be served a true and correct copy of the foregoing was served as follows:

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