

**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)	ORDER DENYING ATTORNEY FEES
)	AND GRANTING MOTION TO
)	DISALLOW ATTORNEY FEES
)	
Case No. 39576)	SUBCASE NO. 65-03702
_____)	

I. PROCEDURAL BACKGROUND

The claimant of this water right was Elmer J. Nisula whose successor-in-interest is Kenneth R. Purdom II. A *Director's Report* was filed for this water right, and an Objection was filed April 14, 2000 by the United States Department of Interior, Bureau of Reclamation. The United States moved to withdraw its Objection on June 12, 2001. A ***Special Master's Report and Recommendation*** was issued June 14, 2001.

An ***Order of Partial Decree*** was issued by the SRBA District Court August 8, 2001. Subsequently, Mr. Purdom filed a *Memorandum of Costs Claimed against the United States of America Acting Through the Department of Interior Bureau of Reclamation* asking for attorney fees in the amount of \$2,840 pursuant to I.R.C.P. 54(d)(1). Purdom filed an *Affidavit in re: Attorney Fees of Kenneth R. Purdom Pursuant to Rule 54(e)(5) Claimed Against the United States of America Acting Through the Department of Interior Bureau of Reclamation* (hereafter "*Affidavit in re: Attorney Fees*") asserting that he is the prevailing party. The United States filed a *Motion to Disallow Costs*, asserting its sovereign immunity from attorney fees under the McCarran Amendment, 43 U.S.C. § 666. The United States also asserts that Mr. Purdom did not make an adequate showing under I.R.C.P. 54(e)(1) and I.C. § 12-121.

II. STANDARD OF REVIEW

A prevailing party may recover reasonable attorney fees where the criteria established by I.R.C.P. 54(e)(1) are met. Idaho Rule of Civil Procedure 54(e)(1) provides, in pertinent part:

Rule 54(e)(1). Attorney Fees. - - In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation. . . .

Rule 54(d)(1) requires a court to consider “the final judgment or result of the action in relation to the relief sought by the respective parties, whether there were multiple claims, multiple issues, . . . or other multiple or cross issues between the parties, and the extent to which each party prevailed upon each of such issue or claims.” I.R.C.P. 54(d)(1).

I.R.C.P. 54(e)(2) provides that when a court awards attorney fees under I.C. § 12-121, it shall make written findings as to the basis and reasons for awarding such attorney fees. The amount of attorney fees granted by the court shall be considered pursuant to the factors set forth in I.R.C.P. 54(e)(3). In reviewing the request by Purdom for attorney fees, the following factors were considered: (a) whether Purdom was the prevailing party; (b) whether attorney fees are provided for by statute; (c) whether the United States brought, pursued or defended its Objection frivolously, unreasonably, or without foundation; and (d) the factors set forth in I.R.C.P. 54(e)(3).

III. ANALYSIS

A. Prevailing Party

Purdom claims to be the prevailing party in this matter because the Objection filed by the United States was ultimately withdrawn. However, the United States filed its Objection to the place of use element because the place of use included both federal and private land. The United States objected for the purpose of clarifying to which land this water right is appurtenant. The United States’ property included in the legal description is land to which Mr. Purdom is not an authorized user. After providing that information to IDWR, it corrected its “shape file” or map showing the place of use. The resolution of this subcase is similar to numerous other subcases involving the United States Bureau of Land Management that were resolved with an explanation that the place of use did not include federal land. No attorney fees were sought or awarded in those similar cases. This Special Master has considered the factors set forth in I.R.C.P. 54(d)(1)

and cannot say that Mr. Purdom is the prevailing party where the United States successfully clarified the place of use element.

B. Attorney Fees are Provided by I.C. § 12-121.

Idaho Code section 12-121 provides for attorney fees in certain limited circumstances. I.C. § 12-121 allows for an award of reasonable attorney's fees to the prevailing party, so long as the provisions of I.R.C.P. 54(e)(1) are met. There is a statutory provision for attorney fees, therefore, only if the court finds that the United States filed its Objection frivolously, unreasonably, or without foundation.

C. The Objection was Reasonable

Idaho Code § 12-121 allows a court to award attorney fees to a prevailing party in limited circumstances. An award of attorney fees is not a matter of right, and a court should award fees under I.C. § 12-121 only where the court is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation. *Owner-Operator Independent Drivers Ass'n Inc. v. Idaho Public Utilities Commission*, 125 Idaho 401, 408 (1994). An action is not deemed frivolous by a court merely because it ultimately fails. *Automobile Club Insurance Co. v. Jackson*, 124 Idaho 874, 879 (1993) “[I]n deciding whether an award of attorney's fees is proper, ‘the sole question is whether the losing party's position is plainly fallacious as to be deemed frivolous, unreasonable, or without foundation.’” *Id.* Also, I.C. § 12-123(b) defines “frivolous conduct” as conduct that obviously serves merely to harass or maliciously injure or is not supported in fact or warranted under existing law or a good faith argument for modifying the existing law.

In this subcase, it is undisputed that the place of use claimed and recommended in the *Director's Report* included both private land and land of the United States. The reason is that the legal description by quarter-quarter description includes both federal and private land within the same 40-acre tract. In order to clarify place of use and ownership issues, the United States Bureau of Reclamation routinely objects to SRBA *Director's Reports* where the place of use involves both federal and private property within the same 40 acres tracts. The United States files such objections in order to clarify to which lands the private water right is appurtenant. *Affidavit of Dala S. Walton*.

Prior to filing the Objection in this subcase, the Bureau of Reclamation reviewed its

records for agreements with the claimant, land records including condemnations, acquisitions, plat books, master title plats, and records from the county assessor's office. *Id.*

After filing the Objection in this subcase, the United States and Mr. Purdom attempted to resolve the Objection. The United States contacted IDWR and confirmed that the GIS "shape file" map showing the place of use incorrectly included land of the United States. *Affidavit of Dala S. Walton.* IDWR corrected the GIS "shape file" map, excluding federal land from the place of use. Based on the revised "shape file" map, the United States withdrew its Objection. *Affidavit of Dala S. Walton.*

The United States filed its Objection after inquiring into the facts regarding place of use. The United States pursued settlement in a reasonable manner resulting in the correction of IDWR's maps. The United States promptly withdrew its objection once the map was corrected. Although Idaho Code section 42-1411(2)(h) anticipates that legal descriptions need only be as detailed as quarter-quarter sections, nothing in the code prevents a party from further describing the place of use. In fact, the SRBA Court has issued ***Partial Decrees*** that provide further descriptions in several instances. For example, the SRBA has described places of use stating that no federal land is included within certain quarter-quarter tracts. In other subcases, the SRBA court has further described points of diversion, where multiple points of diversion occur within the same quarter-quarter. Therefore, I.C. § 42-1411(2)(h) does not prohibit legal descriptions from being more precise than quarter-quarter descriptions.¹

This Special Master is left with the abiding belief that the United States adequately investigated the place of use element for this water right prior to filing its Objection. The filing of the Objection was not frivolous, unreasonable, or without foundation where the United States was seeking to describe this water right with a place of use that did not include federal land. Merely because the United States ultimately withdrew its objection after IDWR corrected its "shape file" map does not result in a finding that the objection was frivolous, unreasonable, or without foundation.

¹ I.C. § 42-1411 anticipates legal descriptions with more detail than quarter-quarter sections because it requires the identification of the number of irrigated acres within each 40-acre tract. "[I]f one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision [shall be described]."

D. Amount of Attorney Fees

Where a court grants attorney fees to a party in a civil action, the court considers the factors set out in I.R.C.P. 54(e)(3). Those factors include the time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law. The prevailing charges for like work, whether the fee is fixed or contingent, the time limitations imposed by the client, the amount involved and the results obtained, and undesirability of the case, the nature and length of the professional relationship with the client, awards in similar cases, and other factors which the court deems appropriate in the particular case.

Mr. Purdom claimed attorney fees in the amount of \$2,840.00. This Special Master has reviewed the *Memorandum of Costs* and Affidavit in support and is familiar with the record and issues involved in the matter. This Special Master finds the Objection filed by the United States was not filed frivolously, unreasonably, or without foundation. No attorney fees are assessed against the United States. Therefore, the amount of attorney fees has not been analyzed.

III. MCCARRAN AMENDMENT IMMUNITY

The Special Master finds that attorney fees are not warranted against the United States pursuant to I.C. § 12-121, and I.R.C.P. 54(e). Therefore, this Special Master need not reach the issue of attorney fees pursuant to the McCarran Amendment.

IV. CONCLUSION

This Special Master concludes that the United States adequately investigated the place of use element for this water right prior to filing its Objection. The Objection was not filed frivolously, unreasonably or without foundation where the United States was seeking to describe this water right with a place of use that did not include federal land. Although I.C. § 42-1411(2)(h) anticipates that most legal descriptions to be as specific as quarter-quarter sections, that code section does not prohibit more detailed descriptions.

The Idaho Legislature could have provided for attorney fees in the SRBA under a separate statute. The Idaho Legislature, however, chose not to do so. Therefore, assessments of attorney fees in the SRBA must generally comply with the requirements of I.C. § 12-121. Although the U.S. objection asked for more specificity than I.C. § 42-1411(2)(h) minimally requires, that does not rise to the standard of unreasonableness under Idaho Code § 12-121.

Therefore, IT IS RECOMMENDED that the request for attorney fees be **denied**.
Accordingly the *United States' Motion to Disallow Costs* is **granted**.

DATED September 23, 2002.

THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING ATTORNEY FEES AND GRANTING MOTIOIN TO DISALLOW ATTORNEY FEES was mailed on September 23, 2002, with sufficient first-class postage to the following:

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