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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE CITY OF BLACKFOOT, Petitioner/Appellant, v. GARY SPACKMAN, in his capacity as Director of the Idaho Department of Water Resources, and THE IDAHO DEPARTMENT OF WATER RESOURCES, Respondents.	Supreme Court Case No. 44207-2016 Bingham County Case No. CV-2015-1687 **MEMORANDUM IN SUPPORT OF THE CITY OF BLACKFOOT'S OBJECTION TO MEMORANDA OF COSTS AND ATTORNEY FEES**
IN THE MATTER OF APPLICATION FOR PERMIT NO. 27-12261 In the name of the City of Blackfoot.	

Appellant, the City of Blackfoot (the "City" or "Blackfoot"), by and through its attorneys of record, Garrett H. Sandow, Blackfoot's City Attorney, and Holden, Kidwell, Hahn & Crapo,

P.L.L.C., and pursuant to Idaho Appellate Rules 40 and 41, hereby submit this *Memorandum in Support of the City of Blackfoot's Objection to Memoranda of Costs and Attorney Fees* (this "*Objection*"). This Objection is filed in response to the memoranda of costs and, where submitted, the supporting affidavits filed by the Idaho Department of Water Resources and Gary Spackman (together, the "Department"), and the Surface Water Coalition[1] (the "Coalition").

The Coalition's members are divided between two law firms, both of which claimed attorney fees pursuant to the Court's award. A&B, BID, MLID, NSCC, and TFCC seek an award of attorney fees as described in *Intervenor Respondents' A&B Irrigation District et al.s' [sic] Memorandum of Costs and Attorney Fees* (the "*Thompson Memorandum*"), supported by the *Affidavit of Travis L. Thompson in Support of Memorandum of Costs and Attorney Fees* (the "*Thompson Affidavit*"). AFRD#2 and MKID seek an award of attorney fees as described in *Intervenors-Respondents Minidoka Irrigation District's and American Falls Reservoir District #2's Memorandum of Costs and Disbursements and Claim for Attorney's Fees* (the "*Fletcher Memorandum*"), supported by the *Affidavit of W. Kent Fletcher in Support of Memorandum of Costs and Attorney's Fees* (the "*Fletcher Affidavit*").

I. INTRODUCTION

This Court awarded the Coalition its attorney fees on appeal based on Idaho Code § 12-117(1) for the following stated reasons:

1. "While the City's argument that an incorporated document under the other provisions element may add a use to the purposes of use element is novel, it is not reasonably based in law."
2. "The City has asserted the same arguments on appeal as it did before the Director and the district court."

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[1] The Surface Water Coalition is composed of the A&B Irrigation District ("A&B"); Burley Irrigation District ("BID"); Milner Irrigation District ("MLID"); North Side Canal Company ("NSCC"); Twin Falls Canal Company ("TFCC"); American Falls Reservoir District #2 ("AFRD#2"); and the Minidoka Irrigation District ("MKID").

3. "[T]he City failed to appeal either the Director's decision to leave recharge off the initial transfer or the district court's partial decree, which also did not include recharge as a beneficial use.

Opinion at 11. The court cited to *Rangen, Inc. v. Idaho Dep't of Water Res.*, 159 Idaho 798, 812, 367 P.3d 193, 207 (2016), and a case the *Rangen* court relied upon, *Castrigno v. McQuade*, 141 Idaho 93, 98, 106 P.3d 419, 424 (2005), in support of its decision to award fees. *Opinion* at 11. In *Rangen* and *Castrigno*, the nonprevailing party was "clearly advised on the applicable law in an articulate and well reasoned written decision from the district court," yet continued to appeal the matter. *Rangen, Inc.*, 159 Idaho at 812, 367 P.3d at 207 (quoting *Castrigno*, 141 Idaho at 98, 106 P.3d at 424); *see also Opinion* at 11 (quoting the same).

Neither this Court, nor the district court, nor the Director quoted from the *Settlement Agreement* wherein the recitals state that "the conditions agreed to below are incorporated in the Water Right through the transfer approval" and "[t]he Parties have met and agreed upon certain conditions to be included in the Water Right after its transfer that would make the Transfer acceptable to the Parties." A.R., Hrg. Exh. List, Exhibit 4, p. at 19.[2] Here, the Court made new

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[2] Additionally, none of these decisionmakers quoted from paragraph 1 of the *Settlement Agreement* in their written decisions. Provisions of that document certainly evidenced the parties' intent even if—as this Court has now held—it was not properly documented in the water right description The relevant provisions are:

> a. After approval of the pending Transfer, the CITY shall not, temporarily or permanently, thereafter transfer the Water Right, or any portion thereof, without receiving the written consent of the COALITION.
>
> b. Without the written consent of the COALITION, the CITY agrees to hold the Water Right in perpetuity for diversion of the water from the Snake River into storage at the Pond, for irrigation and recreation purposes, and to not transfer the Water Right or change the nature of use or place of use of the Water Right.
>
> . . .
>
> e. The CITY shall not lease, sell, transfer, grant, or assign to any other person or entity any right to recover groundwater or mitigation for the diversion of groundwater as a result of diversions under the Water Right including any incidental groundwater recharge that may occur as a result of such diversions. Furthermore, the CITY shall not request or receive any such mitigation credit on behalf of any other person or

law on a basis that was never utilized or considered by the Department or the district court, that neither party briefed or argued at any level of proceeding on this matter, and that never arose at oral argument. Specifically, the Court held that "a water decree must either contain a statement of purpose of use **or** incorporate one, **but not both**." *Opinion* at 6 (citations omitted, emphasis added). It is only by the application of this case's new rule of law that the Court could dismiss the *Settlement Agreement* as a mere "private settlement agreement ... between the private parties," *Opinion* at 8, rather than as a document with conditions of the water right as the parties intended based upon the statements and provisions of the *Settlement Agreement*.

No prior tribunal nor any of the parties to this matter argued for the interpretation of Idaho Code § 42-1412(6) as this Court concluded—which is that use of the word "or" in this particular statute is disjunctive for each statement, meaning that each element of a water right may either state or incorporate the element, but not both. Even though "Idaho courts interpret water decrees using the same interpretation rules that apply to contracts," *Rangen*, 159 Idaho at 807, 367 P.3d at 202 (citation omitted), this Court's articulation of new law in this case is a departure from the current state of contractual interpretation law where "[i]n determining the intent of the parties, this Court must view [a] contract as a whole," *Pocatello Hosp., LLC v. Quail Ridge Med. Inv'r, LLC*, 156 Idaho 709, 720, 330 P.3d 1067, 1078 (2014). An alternative interpretation of § 42-1412(6)—apparently rejected by the Court without argument—builds on the principles of contract interpretation and allows each element of a water right to contain or incorporate each separate statement of the element and any other limitations associated with that element (as an element

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> entity. If the CITY proposes to utilize the Water Right for groundwater recharge or mitigation purposes associated with existing or future groundwater rights, the CITY must file the appropriate application for permit and/or transfer.

A.R., Hrg. Exh. List, Exhibit 4, pp. 19-20 (capitalization in original).

could contain multiple statements describing or limiting it). This practice is common with contracts. For example, a contract for the purchase of real estate[3] could have a legal description on the first page of the contract and a description of an associated easement described on an exhibit to the same contract. It seems reasonable and probable that a court would conclude that the full extent of the property description is contained in both places—in other words, the legal description can be contained in the main body of the contract, or in an exhibit to the contract, or a combination of both. In this instance, "or" is nonexclusive and can mean a combination of both. How "or" is interpreted—as either disjunctive or as a coordinating conjunction—is not a well-settled area of law because the interpretation depends on the circumstances surrounding the interpretation. *See, e.g.*, 82 C.J.S. Statutes § 442 (Conjunctive and disjunctive words) (describing cases where "or" has been determined to be disjunctive and where it has been determined to be conjunctive, meaning that it is interchangeable with "and" if necessary to effectuate the intent of the legislature, etc.).

Accordingly, given that under Idaho law interpretation of water rights is closely tied to contractual interpretation, then whether or not use of the word "or" in the context of water right interpretation is disjunctive or conjunctive was a fair question for the Court to rule upon and explain. That was the basis for the City's argument—water decrees are to be interpreted as a whole based on all of their contents, particularly where one part of the contract or decree is more fully explained or described elsewhere on the decree. Based on the holding of this case, we now know that water right decrees are now treated differently in relation to incorporation, and in this particular manner, are therefore not interpreted like contracts. While contracts may state various

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[3] Water rights are defined as real property, along with land, under Idaho Code § 55-101.

provisions or incorporate elements of an agreement in exhibits that are to be interpreted as a whole, water right decrees may only do one or the other when describing its elements.[4]

And while the City's logic may not have won the day, the City could not disagree with this Court more that the City's position was frivolous, unreasonable, without foundation, or describable with any other similar words. By objecting to the Coalition's attorney's fees below, the City does not concede in any way that its legal arguments or positions asserted in this matter were frivolous, unreasonable, or without foundation. No prior tribunal nor any of the parties to this matter considered this interpretation of Idaho Code § 42-1412(6), distinguishing this matter from other cases where the district court's "articulate and well reasoned written decision" explained the correct basis for a decision. *See Rangen*, 159 Idaho at 812, 367 P.3d at 207 (quoting *Castrigno*, 141 Idaho at 98, 106 P.3d at 424); *see also Opinion* at 11 (quoting the same).

II. LEGAL STANDARD

The Court awarded the Coalition its attorney fees pursuant to Idaho Code § 12-117(1). *Opinion* at 11. That statute provides, based on the Court's finding in this case, an "award [to] the prevailing party [of] **reasonable** attorney's fees, witness fees and other reasonable expenses." Idaho Code § 12-117(1) (emphasis added). This Court has explained that "the bottom line in an award of attorney's fees is reasonableness." *Johannsen v. Utterbeck*, 146 Idaho 423, 433, 196 P.3d 341, 351 (2008). Where a "district court did not consider the I.R.C.P. 54(e)(3) factors under a standard of reasonableness," this Court found the award unreasonably excessive. *Id.* (citing *Lettunich v. Lettunich*, 141 Idaho 425, 436, 111 P.3d 110, 121 (2005)). The Rule 54(e)(3) factors provide the basis for determining the reasonableness of any award of attorney fees. *Johannsen*,

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[4] Consequently, provisions of settlement agreements reached with protested transfers and applications for permit that intend to alter elements of a water right must be documented a specific way. They cannot be documented like the *Settlement Agreement* in this case.

146 Idaho at 433, 196 P.3d at 351. Therefore, "it logically follows as a corollary that the court must have sufficient information at its disposal concerning these factors. . . . it is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider factors as they specifically relate to the *prevailing* party or parties seeking fees." *Sun Valley Potato Growers, Inc. v. Texas Refinery Corporation*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004) (italics in original).

III. ARGUMENT

A. The City has no objection to the costs as a matter of right claimed by either the Department or the Coalition.

Pursuant to the Opinion, both the Department and the Coalition have sought an award of certain costs in accordance with Idaho Appellate Rules 40(a) and 40(b). The Department seeks an award of $162.00. *Memorandum of Costs*, p. 2. The Coalition seeks an award of $260.00. *Thompson Memorandum*, p. 2. The City has no objection to and does not contest these amounts.

B. The Coalition is not entitled to an award of fees for the preparation of its memoranda of costs and supporting affidavits.

Because reasonableness is the "bottom line" in an award of attorney fees, *Johannsen*, 146 Idaho at 433, 196 P.3d at 351, this Court ought to decline to award the Coalition any fees associated with the preparation of its memoranda and affidavits after the Opinion was issued. All told, the Coalition seeks $1,162.50 for work associated with its attorneys' preparation of memoranda of costs and supporting affidavits. *See Thompson Affidavit*, Ex. A, p. 1 (entries on 6/21/2017 and 6/22/2017 totaling $700.00); *see also Fletcher Affidavit*, Ex. A, p. 3 (two entries on 6/21/2017 totaling $462.50). These amounts are approximately ten percent of the total attorney fee award sought by the Coalition. Further, these fees that were incurred played no role in furthering the

Coalition's position on appeal. For these reasons, the amounts do not meet the reasonableness test and should be disallowed by this Court.

C. Neither the *Thompson Memorandum* nor the *Thompson Affidavit* address the reasonableness of the requested attorney fees, as required by Idaho Code § 12-117.

Idaho Code § 12-117(1) requires that any award of attorney fees must be "reasonable." This Court has found that a district court made an unreasonably excessive award of attorney fees when it failed to "consider the I.R.C.P. 54(e)(3) factors under a standard of reasonableness." *Johannsen*, 146 Idaho at 433, 196 P.3d at 351 (citing *Lettunich*, 141 Idaho at 436, 111 P.3d at 121). The Rule 54(e)(3) factors provide the basis for determining the reasonableness of any award of attorney fees. *Johannsen*, 146 Idaho at 433, 196 P.3d at 351. Therefore, "it logically follows as a corollary that the court must have sufficient information at its disposal concerning these factors. . . . it is incumbent upon a party seeking attorney fees to present sufficient information for the court to consider factors as they specifically relate to the *prevailing* party or parties seeking fees." *Sun Valley Potato Growers, Inc. v. Texas Refinery Corporation*, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004) (italics in original).

The *Thompson Memorandum* and the *Thompson Affidavit* do not contain sufficient information for the court to consider the Rule 54(e) factors of reasonableness, which is unlike the *Fletcher Memorandum* and *Fletcher Affidavit*. Paragraph 4 of the *Fletcher Affidavit* describes information associated with all of these Rule 54(e) factors for this Court to consider in awarding reasonable attorney fees, which is information Mr. Thompson did not provide. As stated by the Idaho Supreme Court:

> The factors of Rule 54(e)(3) include: time and labor; difficulty; skill required; prevailing charges; fixed or contingent fee; time limitations; amount and result; undesirability of the case; relationship with the client; awards in similar cases; costs of automated research; and any other factors.

Id.

Mr. Thompson only provided information related to time and labor, prevailing charges, whether the case was fixed or contingent, and amount. There is no information for the numerous remaining other necessary reasonableness factors, and no statement that the fees were reasonably incurred. Accordingly, Mr. Thompson has not provided this Court with "sufficient information for the court to consider factors as they specifically relate to the *prevailing* party or parties seeking fees." *Id.* (italics in original). As a result, the fees sought by A&B, BID, MLID, NSCC, and TFCC should be disallowed, a result that is similar to the result this Court reached in *Sun Valley Potato Growers Inc.*[5]

D. A major portion of the attorney fees described in the *Fletcher Affidavit* appear to be duplicative and should be disallowed.

From the *Thompson Affidavit*, it is clear that most of the work performed on behalf of the Coalition in this matter was performed by Paul Arrington (in drafting the Coalition's *Response Brief*) and Travis Thompson (at oral argument on behalf of the Coalition). *See Thompson Affidavit*, Ex. A, pp. 1-2. It appears that Mr. Fletcher's involvement in this appeal was in more of a support role, and it would be unreasonable to award attorney fees incurred by Mr. Fletcher for unnecessary, duplicative work performed by Mr. Arrington and Mr. Thompson.

1. ***While some coordination between differing counsel chosen by the Coalition is to be expected, the majority of the billing entries submitted in the* Fletcher Affidavit *are duplicative, and should not be allowed by this Court.***

Most entries detailed in the *Fletcher Affidavit* relates to either emailing "SWC attorneys" (presumably the attorneys at Barker Rosholt & Simpson LLP; who represent A&B, BID, MLID, NSCC, and TFCC) or reviewing various documents. The only substantive legal work that is

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5 The Court vacated the district court's award of attorney fees to Texas Refinery Corp. under Idaho Code § 12-120(3) because Texas Refinery did not provide the district court with information relative to one of the Rule 54(e) factors, which were time sheets evidencing time and labor. *Id.*

detailed in the *Fletcher Affidavit* are the efforts to revise the Coalition's response brief, which occurred over portions of the entries from October 27, 2016, through November 1, 2016. *Fletcher Affidavit*, Ex. A, p. 2 (where such entries total $629.00). However, even these efforts are duplicative, as both Mr. Thompson and Mr. Simpson also revised the same brief. *See Thompson Affidavit*, Ex. A, pp. 1-2. Accordingly, these fees should be disallowed.

As to the remaining entries documenting fees incurred prior to issuance of the Opinion and except for the entries addressed in the following section of this Objection, we trust that this Court can review the time entries and determine their reasonableness as required under Rule 54(e). Mr. Fletcher has provided sufficient Rule 54(e) information for this Court to perform such an evaluation.

2. *Mr. Fletcher provided no legal services to AFRD#2 and MKID in relation to the oral argument in this case and, for that reason, the claimed fees relating to oral argument should be disallowed.*

Only Mr. Thompson represented the Coalition at oral argument, with no time allotted to Mr. Fletcher to participate in oral argument. Nevertheless, the *Fletcher Affidavit* requests an award for time spent on May 11, 2017, to "Review Appellate Briefs" and then, on May 12, 2017, to "Attend Supreme Court Oral Argument." *Fletcher Affidavit*, Ex. A, p. 3. However, Mr. Fletcher provided no actual legal service to AFRD#2 or MKID (his clients within the Coalition) at oral argument that either necessitated preparation before oral argument or attendance at oral argument. As a result, these charges are not reasonable and should be disallowed by this Court.[6]

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6 If for any reason this Court awards Mr. Thompson his attorney fees even without the information necessary to perform a reasonableness analysis, a portion of his fees should similarly be reduced by $700.00 as these fees were incurred in the preparation of his memorandum on costs and attorney fees.

IV. CONCLUSION

While the City has no objection to the costs claimed as a matter of right by either the Department or the Coalition, the City objects to—and asks that this Court disallow—certain of the attorney fees claimed by the Coalition as set forth above. Mr. Thompson's fees should be disallowed as unreasonable because he has not submitted sufficient information for this Court to evaluate their reasonableness. Mr. Fletcher's fees should be reduced for the reasons set forth above. At a minimum, Mr. Fletcher's fees should be reduced by a total of $1,646.50 for a total award of fees in the amount of $2,756.50.

Dated this 6th day of July 2017.

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2017, I served a true and correct copy of the document listed below on the persons listed below by the method indicated.

Document Served: MEMORANDUM IN SUPPORT OF CITY OF BLACKFOOT'S OBJECTION TO MEMORANDA OF COSTS AND ATTORNEY FEES

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