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	)	**Consolidated Subcase 67-13701**
	)	**(United States and Nez Perce Tribe**
Case No. 39576	)	**Springs or Fountains Claims)**
	)	
	)	**I.R.C.P. 7(b)(3) NOTICE**
	)	**and**
	)	**ORDER DENYING HARRISES'**
	)	**MOTION FOR SUMMARY JUDGMENT,**
	)	**MOTION FOR ENTRY OF JUDGMENT**
	)	**AND MOTION FOR AN AWARD**
	)	**OF ATTORNEY FEES, SANCTIONS**
	)	**AND COSTS**
	)	**and**
	)	**ORDER GRANTING UNITED STATES'**
	)	**AND NEZ PERCE TRIBE'S MOTION TO**
	)	**DISALLOW ALL ATTORNEY FEES**
	)	**AND COSTS**

PROCEDURAL BACKGROUND[1]

I. HARRISES' MOTION TO PARTICIPATE

On July 30, 2002, Dr. Scott and Connie Harris ("the Harrises") filed a *Motion to Participate* in consolidated subcase 67-13701 seeking to participate as objectors to the United States' and Nez Perce Tribe's springs or fountains claims.[2] The Harrises wrote that they own and operate Idaho's second-oldest resort, Burgdorf Hot Springs – a 160 acre private parcel in

[1] For convenience sake, the procedural background is arranged by issue rather than strictly by date.

[2] The United States and the Nez Perce Tribe filed approximately 1,886 springs or fountains claims, since consolidated in subcase 67-13701. Of that total, 1,243 claims are located on private or state-owned lands. Currently, 12 of those claims are "test cases" soon to be scheduled for trial. Neither of the Harrises' claims is a test case.

Idaho County, originally homesteaded in the 1860s. The resort's large outdoor swimming pool is supplied with natural hot water (113° F) from the nearby Burgdorf Hot Spring. From the pool, the water flows into Lake Creek, then into the Secesh River and finally into the South Fork of the Salmon River.

The Harrises filed claims in the SRBA for the full amount of the geothermal spring (77-04218) plus cold water from Jeanette Creek which flows through their property (77-04217).[3] In their *Motion*, the Harrises alleged that the Nez Nerce Tribe's reserved water right claims to springs or fountains based on the 1863 Treaty[4] directly affect the Harrises' water rights at the Burgdorf Hot Springs resort.

The Harrises wrote in their *Motion to Participate* that their intervention "will not unduly delay or prejudice the adjudication of the rights of the original parties . . . [and] will not require any change in the current scheduling order for this case." Harrises' *Memorandum in Support of Motion to Participate*, at 5. When none of the parties opposed the Harrises' *Motion*, on August 8, 2002, the Special Master entered an ***Order Granting Harris Motion to Participate***.

II. HARRISES' MOTION FOR SUMMARY JUDGMENT

On August 12, 2002, the Harrises filed their *Motion for Summary Judgment* in consolidated subcase 67-13701 arguing that the reserved water right claims filed by the United States and the Nez Perce Tribe that directly affect the Harrises' water rights at the Burgdorf Hot Springs resort should be resolved now by summary judgment. They wrote:

> [T]here is no material factual dispute regarding the claims. None of the tribal claims for springs on the Harris property satisfy the necessary conditions to be reserved under the 1863 Treaty. Therefore, as a matter of law, the Harrises request this Court to grant their motions for summary judgment and dismiss all tribal claims affecting their property.

Harrises' *Memorandum in Support of Motion for Summary Judgment*, at 1-2.

---

[3] On July 20, 1988, Scott, Connie and Gretchen Harris filed both claims with IDWR. They filed claim 77-04218 for .334 cfs from Burgdorf Hot Spring for year-'round commercial, domestic and recreation uses in Idaho County with a priority date of June 1, 1875. They filed claim 77-04217 for 3.06 cfs from Jeanette Creek and a spring for year-'round stockwater, commercial and domestic uses and for irrigation of 40 acres from April 1 to November 1 with the same priority date. Both claims are based on beneficial use. The Harrises filed a third claim (77-10011) for a *de minimis* year-'round instream stockwater right in Lake Creek with a priority date of June 1, 1875, based on beneficial use. That claim was recommended as claimed and reported to the Court in the *Director's Reports for Domestic and Stockwater, Reporting Area 24, IDWR Basin 77* on March 9, 1999.

[4] Treaty with the Nez Perce, 14 Stat. 647, 2 Kappler 843 (June 9, 1863).

Nez Perce Tribe's and United States' Joint Response

On September 3, 2002, the Nez Perce Tribe and the United States filed their *Joint Response to Dr. Scott and Connie Harris' Motion for Summary Judgment*. They first pointed out that the *Motion for Summary Judgment* is premature (the Harrises' claims to the same springs have not been reported by IDWR)[5] and untimely (neither the Harrises' claims nor the United States' and Nez Perce Tribe's claims have been designated test cases). The United States and the Nez Perce Tribe then wrote: "Although these springs clearly continue to have special cultural, spiritual, and religious significance to the Nez Perce people, the Burgdorf claims[6] will be withdrawn." Nez Perce Tribe's and United States' *Joint Response*, at 3.

III. NEZ PERCE TRIBE'S AND UNITED STATES' JOINT NOTICE OF WITHDRAWAL OF BURGDORF CLAIMS

On September 13, 2002, the Nez Perce Tribe and the United States filed their *Joint Notice of Withdrawal of Six Claims in Basin 77* stating that:

> [T]hey are withdrawing six claims for springs in the Burgdorf area for which water right claims also have been filed by the Harris Family. The Harris Family claims have not yet been reported to the SRBA Court by the Idaho Department of Water Resources. However, as we have previously notified the Court that these claims would be withdrawn, and in a[n] effort to resolve this matter as expeditiously as possible, the United States and the Tribe hereby withdraw Bureau of Indian Affairs Claim Numbers 77-13439, 77-13440, and 77-13441 and Nez Perce Tribe Claim Numbers 77-13724, 77-13725, and 77-13726 [footnote omitted].

Nez Perce Tribe's and United States' *Joint Notice*, at 1-2.

IV. HARRISES' MOTION FOR ENTRY OF JUDGMENT

On October 31, 2002, the Harrises filed a *Motion for Entry of Judgment*. They first pointed out that the United States' and the Nez Perce Tribe's *Joint Notice of Withdrawal* (a voluntary notice of dismissal) filed *after* the Harrises filed their *Motion for Summary Judgment* requires a stipulation of dismissal signed by all parties who have appeared in the action. I.R.C.P. 41(a)(1)(ii). The Harrises assert that even though the United States and the Nez Perce Tribe

[5] The Harrises' two claims (77-04217 and 77-04218) will likely be reported in the "irrigation and other" director's report for Basin 77 tentatively scheduled to be filed with the SRBA Court in the late summer or fall, 2005.

[6] The United States (Bureau of Indian Affairs, BIA) and Nez Perce Tribe (NPT) Burgdorf claims are: BIA claim numbers 77-13439, 77-13440 and 77-13441 and NPT claim numbers 77-13724, 77-13725 and 77-13726.

failed to comply with the rule, the Court should treat the *Joint Notice of Withdrawal* as a stipulation to withdrawal, "to which the Harrises, the only party to have appeared regarding these claims, acquiesce." Harrises' *Motion*, at 2. The Harrises then asked for judgment that the 6 United States and Nez Perce Tribe Burgdorf claims be withdrawn and dismissed with prejudice.

Responses to Harrises' Motion for Entry of Judgment

Nez Perce Tribe

On January 28, 2003, the Nez Perce Tribe filed its *Response and Objections to the Harrises' Motion for Entry of Judgment*. It argued that "because the [United States' and the Nez Perce Tribe's Burgdorf] claims as to which the Harrises seek a judgment have been withdrawn without a decision from this Court on the merits of those claims, and because the Harrises' claims to the same springs have not been reported to the Court, the Harrises' Motion for Entry of Judgment must be denied." Nez Perce Tribe's *Response*, at 1-2.

United States

The United States filed its *Response to the Harrises' "Motion for Entry of Judgment"* on January 29, 2003, urging the Court to deny the Harrises' *Motion* because entry of judgment is unnecessary; the stipulated withdrawal of the Burgdorf claims is legally sufficient; and further court action is not required.

Harrises' Reply

The Harrises filed their *Reply to the United States' Response to the Harrises' Motion for Entry of Judgment* on February 20, 2003. The Harrises agreed with the United States and Nez Perce Tribe suggestion that the SRBA Court could decline to enter judgment dismissing the 6 United States and Nez Perce Tribe Burgdorf claims, provided the Court hears the Harrises' *Motion for an Award of Attorney Fees, Sanctions and Costs* as scheduled (see below). The Harrises maintained that entry of a judgment is not required *before* a hearing on fees, sanctions and costs.

The Harrises then argued:

> Claimants' [the United States' and the Nez Perce Tribe's] claims against the Harrises were rightfully and actually resolved independent of the remainder of the claims in the subcase. Further, the Harrises' own claims in the SRBA are completely irrelevant to the proceedings in this subcase. Thus, there is no just reason to force the Harrises to await finality for their motion seeking fees until after resolution of unrelated claims.

Harrises' *Reply*, at 2-3.

V. HARRISES' MOTION FOR ATTORNEY FEES, SANCTIONS AND COSTS

On December 24, 2002, the Harrises filed a *Motion for an Award of Attorney Fees, Sanctions and Costs* seeking $24,992.59 in attorney fees and $648.39 costs. They alleged three grounds for relief: "The Harrises are the prevailing party in this matter; the United States and the Nez Perce Tribe ("Claimants") brought and pursued this case frivolously, unreasonably, and without foundation; and Claimants engaged in frivolous conduct causing the Harrises to suffer adverse affects." Harrises' *Motion*, at 1. They cited I.C. §§ 12-121 and 12-123 as the bases for an award of attorney fees, I.R.C.P. 11(a)(1) for sanctions and I.R.C.P. 54 for costs.

The core of the Harrises' *Motion* was the allegation that the United States and the Nez Perce Tribe "failed to conduct a proper investigation upon reasonable inquiry into the facts of this case prior to filing their claims to springs on the Harrises' property." Harrises' *Motion*, at 1. The Harrises argued that none of the United States' and the Nez Perce Tribe's Burgdorf claims conform with the 1863 Treaty:[7]

> The plain language of this treaty provision confirms the reservation to the Nez Perce Tribe was limited to springs that meet, at least, the following criteria: (1) not adjacent to, or near, streams; (2) not directly connected with streams; and (3) located within land reserved from private settlement. The failure of a claim to satisfy any one of these factors mandates the failure of that claim under the 1863 Treaty.

Harrises' *Memorandum in Support of Motion for Attorney's Fees, Sanctions and Costs*, at 9.

[7] Article 8 of the 1863 Treaty, cited by the Harrises in their *Memorandum in Support of Motion for Attorney's Fees, Sanctions and Costs*, at 9, states:

> The United States also agree to reserve all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished, and to keep back from settlement or entry so much of the surrounding land as may be necessary to prevent the said springs or fountains being enclosed; and further, to preserve a perpetual right of way to and from the same, as watering places, for the use in common of both whites and Indians [emphasis added by the Harrises].

The Harrises concluded that if the United States and the Nez Perce Tribe had done a simple on-site investigation *before* they filed the claims, they would have realized:

> (1) There are only two springs on the Harris property;
> (2) These two springs are directly connected by surface flow to Lake Creek;
> (3) Both are adjacent to Lake Creek; and
> (4) Both are located on private property that was acquired by homestead, not land reserved from settlement, sale or entry.[8]

Harrises' *Memorandum*, at 24.

Objections to Harrises' Motion for Attorney Fees, Sanctions and Costs

Nez Perce Tribe

On January 31, 2003, the Nez Perce Tribe filed its *Objections to the Harrises' Motion for Attorney's Fees, Sanctions and Costs and Motion to Disallow Same*. The Tribe argued:

> First, the Tribe . . . is immune from such an award on the basis of the McCarran Amendment's [43 U.S.C. § 666] express prohibition of cost awards and on the basis of the Tribe's own sovereign immunity. As to the merits of the Harrises' Motion, there is absolutely no basis to award either sanctions or attorney fees and costs against the Tribe. Further . . . it would be premature for this Court to rule on the Harrises' Motion as there are multiple claims and defenses that have yet to be decided. In addition, and alternatively, the requested attorney fees and costs are unreasonably excessive and were not reasonably incurred.

Nez Perce Tribe's Objections, at 2.

United States

The same date, the United States filed its *Objection to the Harrises' "Motion for Attorney Fees, Sanctions and Costs" and Motion to Disallow All Attorney Fees and Costs*. It argued:

> First and foremost, the Harrises seek relief which is beyond the Court's jurisdiction to award, given the Court's limited jurisdiction under the waiver of sovereign immunity known as the McCarran Amendment, 43 U.S.C. § 666. That statute preserves the United States' sovereign immunity from unconsented monetary exactions such as the claims for attorney fees, sanctions and costs made here.
>
> . . .

---

[8] The Harrises wrote that "the resort's namesake, Fred Burgdorf, first became involved with the property around 1865 . . . [and] took over the property and began residing there around 1870. The United States granted Mr. Burgdorf a patent for the property on February 12, 1902, upon perfection of his Homestead Act application." Harrises' *Memorandum in Support of Motion for Attorney's Fees, Sanctions and Costs*, at 2-3.

> Neither the United States nor the Tribe brought or pursued the claims frivolously, unreasonably or without foundation nor did they file the claims for any improper purpose.
>
> . . .
>
> The United States' conduct is not sanctionable nor are the Harrises "prevailing parties" otherwise entitled to attorney fees under applicable United States Supreme Court precedent, since there has been no court ruling on the merits.
>
> . . .
>
> Counsel for the Harrises persist in "jumping the gun" and now have filed the instant Motion for Attorney Fees, Sanctions and Costs in contravention of the Court's directions during the hearing on the Harrises' Motion to Participate that such motions should await a ruling on the merits of the pending summary judgment motions as to the test cases[9]. . . . Such fees could have simply been avoided altogether had the Harrises complied with the Court's orders and awaited the outcome of the test-case litigation before commencing to litigate the instant, non-test, claims.

United States' *Objection*, at 2-3.

State of Idaho's Reply to United States and Nez Perce Tribe Objections

On February 19, 2003, the State lodged its *Reply to Briefs of United States and Nez Perce Tribe Re: Applicability of Sanctions Relating to the "Harris" Claims*, because: "The responsive briefs of the United States and the Nez Perce Tribe . . . raise assertions that, if left unanswered, may prejudice the State's ability to seek sanctions related to the United States' withdrawal of a number of springs and fountains claims." State's *Reply*, at 1.

The State argued that: 1) I.R.C.P. 11 requires a reasonable pre-filing investigation to support each claim asserted; 2) the United States cannot assert sovereign immunity from the State's "adjective law;" 3) Rule 11 sanctions are not costs; 4) besides, such sanctions are usually assessed against the attorney rather than the client; and 5) "Burgdorf Hot Spring lies within one-quarter mile of the perennial stream Jeanette Creek, a fact that could have been easily determined during the most perfunctory of pre-filing investigations." State's *Reply*, at 9.

[9] On February 18, 2003, the Special Master entered ***Orders on Motions for Summary Judgment*** denying motions for summary judgment filed by the United States, the Nez Perce Tribe, the State of Idaho and the Pioneer Irrigation District, *et al.*, in the 12 test cases. A related ***Order Denying Motion for Clarification and Motion for Reconsideration*** was entered on June 18, 2003.

Harrises' Response

The Harrises filed their *Response to United States' and Nez Perce Tribe's Objections to Harrises' Motion for Attorney Fees, Sanctions and Costs* on February 20, 2003. They argued that: 1) sanctions against the United States and the Nez Perce Tribe are proper under I.R.C.P. 11(a)(1) and I.C. § 12-123 for their litigative misconduct; 2) attorney fees are warranted under I.C. § 12-121 because the United States and the Nez Perce Tribe brought and pursued the Burgdorf claims frivolously, unreasonably and without foundation; 3) the Harrises are entitled to recover their costs under I.R.C.P. 54(d)(1) as the prevailing party; 4) the timing of when the Harrises filed their *Motion for Summary Judgment* has no bearing on the United States' and the Nez Perce Tribe's duty to properly investigate and seriously pursue their claims; and 5) the Harrises' claimed attorney fees and costs are reasonable.

VI. UNITED STATES' AND NEZ PERCE TRIBE'S MOTION TO STRIKE

On February 26, 2003, the United States filed its *Motion to Strike State of Idaho's "Reply" to Briefs of United States and Nez Perce Tribe Re: Applicability of Sanctions Relating to the Harrises' Claims*. The United States wrote:

> Idaho's Reply is not a "reply" at all but rather an opening argument for a Rule 11 Motion against the United States by the State of Idaho. Indeed, Idaho's Reply raises new arguments not previously presented by the Harrises and suggests new claims, including that sanctions should be imposed against the federal attorneys in their personal capacity, a claim which the Harrises themselves did not make.
>
> . . .
>
> Second, Idaho's Reply is untimely because it is filed outside the January 10, 2003 Scheduling Order as well as prematurely filed prior to a Court decision on the test cases.

United States' *Motion to Strike*, at 1-3.

The same date, the Nez Perce Tribe filed its *pro forma Joinder in the United States' Motion to Strike State of Idaho's "Reply" to Briefs of United States and Nez Perce Tribe Re: Applicability of Sanctions Relating to the Harrises' Claims*.

State of Idaho's Response

The State of Idaho filed its *Response to Motion to Strike* on February 27, 2003, because:

> [T]he State is concerned that the superficial inquiry that occurred prior to the filing of the amended springs and fountains claims may have violated the requirements of Rule 11.
>
> . . .
>
> Given that the United States urged the Court to expand its inquiry and rule upon the United States' "total conduct" in the investigation of the Consolidated Subcase, the State had little choice but to preserve its legal arguments on this matter. In essence, the briefs of the United States and the Tribe were the opening briefs in defense of pending motions for Rule 11 sanctions in the larger, Consolidated Subcase.

State's *Response*, at 1-3.

United States' Brief in Response

The United States lodged its *Brief in Response to State of Idaho's Reply to Briefs of United States and Nez Perce Tribe Re: Applicability of Sanctions Relating to the "Harris" Claims* on April 7, 2003 (after the hearing[10]). The United States argued that its pre-filing investigation, before it filed approximately 1,200 amended springs or fountains claims on private lands in 1998, was reasonable because the United States relied on maps and the private landowners' own claims. The United States wrote that it then deferred field investigations until the SRBA Court could rule on the novel terms of the 1863 Treaty and the issue of access to private property through discovery:

> These pre-filing decisions were reasonable for several reasons: the 1863 Treaty presents legal issues of first impression; the Treaty terms, such as adjacency and connectivity, have proven to be quite complicated when applied to the facts; and the United States had limited access to private land in 1998 to conduct field investigations prior to filing its claim amendment.

United States' *Brief in Response*, at 3.

Next, the United States argued:

> In short, the United States is subject to both substantive and procedural ("adjective") law of a state in a McCarran Amendment proceeding. However, that waiver of sovereign immunity does not extend to monetary exactions regardless of whether they appear on the substantive or procedural side of a state's law.[11]

---

[10] The United States and the Nez Perce Tribe were allowed to further brief the issue of Rule 11 sanctions after the February 28, 2003 hearing because the State filed its *Response to Motion to Strike* the day before the hearing.

[11] The United States noted that it, like Idaho, can choose to submit itself to Idaho adjective law while still maintaining its sovereign immunity:

> No judgment for costs or award of attorneys fees against the state of Idaho, any state agency, or any officer or employee of the state of Idaho shall be allowed in any water rights adjudication

. . .

> We do not dispute that the United States could, in an appropriate case, be subject to certain non-monetary sanctions under I.R.C.P. 11 via the McCarran Amendment.

United State's *Brief in Response*, at 29-31.

The United States closed its arguments on the applicability of sanctions relating to the United States' and Nez Perce Tribe's Burgdorf claims by stating:

> The Court's inquiry focuses on the legitimate need for a court to control or regulate the conduct of lawyers who appear before it, including government attorneys. We acknowledge that courts need such authority. This authority, however, is reconcilable with a bar on monetary exactions from the United States without a clear waiver of sovereign immunity. Reading the principle of sovereign immunity and the need for court authority to discipline attorneys together, a logical conclusion is that the state court has jurisdiction to award non-monetary procedural sanctions against the United States under I.R.C.P. 11 or Idaho Code § 12-121 to the same extent that it has jurisdiction to apply such procedural rules to Idaho and its attorneys.[12]

United States' *Brief in Response*, at 38.

Nez Perce Tribe's Response

The Nez Perce Tribe lodged its *Response to the State of Idaho's "Reply" to Briefs of United States and Nez Perce Tribe Re: Applicability of Sanctions Relating to the Harrises' Claims* the same date the United States lodged its *Brief in Response*. The Tribe summarized what the Court has been asked to decide: "What is at issue here is whether there has been any violation of Rule 11 in this subcase, and if so, whether this Court has jurisdiction to impose attorney fees as a sanction against the United States, or the Tribe, or the attorneys for either." Nez Perce Tribe's *Response*, at 2. It then suggested that "it would clearly be premature to determine whether the pre-filing investigation of a particular spring was adequate until it has been determined which springs can even be claimed." Nez Perce Tribe's *Response*, at 11.

> pursuant to this chapter. The state of Idaho expressly refuses to waive its sovereign immunity to the imposition of any judgment for costs or award of attorney fees.

I.C. § 42-1423.

[12] Non-monetary sanctions might include: "striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; [and] referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc." United States' *Brief in Response*, at 18-19, fn 9.

On the jurisdiction issue, the Nez Perce Tribe reasoned that the McCarran Amendment's waiver of sovereign immunity is the same for the Tribe as it is for the United States; and since the McCarran Amendment does not expressly waive the United States' immunity from an award of attorney fees (and none can be implied), both it and the United States are immune from an award of attorney fees. But the Tribe agreed it and the United States are "generally" subject to Rule 11. Nez Perce Tribe's *Response*, at 22.

VII. HEARING ON HARRISES' MOTION FOR ATTORNEY FEES, SANCTIONS AND COSTS and UNITED STATES' AND NEZ PERCE TRIBE'S MOTION TO STRIKE

A hearing on the Harrises' *Motion for Attorney Fees, Sanctions and Costs* and the United States' *Motion to Strike* was held on February 28, 2003, at the SRBA Courthouse in Twin Falls, Idaho. Peter C. Monson, Vanessa Boyd Willard and Frank Wilson appeared for the United States; K. Heidi Gudgell and Steven C. Moore appeared for the Nez Perce Tribe; Steve W. Strack and John R. Kormanik appeared for the State of Idaho; and Jeffrey C. Fereday appeared for Dr. Scott and Connie Harris.

VIII. SUMMARY OF MATTERS RELATED TO UNITED STATES' AND NEZ PERCE TRIBE'S BURGDORF CLAIMS – STATUS

1. The Harrises' *Motion to Participate* – **granted**, August 8, 2002.
2. The Harrises' *Motion for Summary Judgment* – **pending**.
3. The Nez Perce Tribe's and United States' *Joint Notice of Withdrawal of Six Claims in Basin 77* (Burgdorf claims) – **pending**.
4. The Harrises' *Motion for Entry of Judgment* – **pending**.
5. The Harrises' *Motion for an Award of Attorney Fees, Sanctions and Costs* – **pending**.
6. The United States' and Nez Perce Tribe's *Motions to Disallow All Attorney Fees and Costs* – **pending**.
7. The United States' and Nez Perce Tribe's *Motion to Strike State of Idaho's "Reply" to Briefs of United States and Nez Perce Tribe Re: Applicability of Sanctions Relating to the Harrises' Claims* – **denied** in open court February 28, 2003; State's *Reply to Briefs of United States and Nez Perce Tribe* deemed to be an *amicus curiae* brief.

IX. RULE 7(b)(3) NOTICE

The parties have extensively briefed and argued the issues raised in the above pending matters and it is important that these proceedings continue in an orderly manner. Therefore, the Special Master will rule on all pending motions without further oral argument pursuant to I.R.C.P. 7(b)(3).

DISCUSSION

Rule 11(a)(1)

The beginning point in these voluminous filings concerning the United States' and Nez Perce Tribe's Burgdorf claims and the Harrises' claim for attorney fees, sanctions and costs is I.R.C.P. 11(a)(1), which reads in relevant part:

> The signature of an attorney . . . constitutes a certificate that the attorney . . . has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief after reasonable inquiry, it is well founded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee [emphasis added].

The Harrises also invoked I.C. § 12-123 because of alleged "frivolous conduct" (conduct "not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law"), plus I.C § 12-121 and I.R.C.P. 54(d)(1) and 54(e)(1) as the alleged prevailing party.

Standards of Review

The Idaho courts have developed guidelines to determine whether there was an abuse of discretion in awarding attorney fees and costs:

> (1) [W]hether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and

> consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

Sun Valley Shopping Ctr. v. Idaho Power, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991); and *Burns v. Baldwin*, 138 Idaho 480, ___, 65 P.3d 502, 508-509 (2003).

> [While Rule 11(a)(1) authorizes sanctions, including attorney fees, it] is not a broad compensatory law. It is a court management tool. The power to impose sanctions under this rule is exercised narrowly, focusing on discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit.

Kent v. Pence, 116 Idaho 22, 23, 773 P.2d 290, 291 (Ct.App.1989).

> [Rule 11] does not exist to duplicate I.C. § 12-121, which has long been construed to authorize an attorney fee award in any civil case brought frivolously, unreasonably, or without foundation [citation omitted]. Rather, the rule serves a separate, cognizable purpose, focusing upon discrete pleading abuses or other types of litigative misconduct within the overall course of a lawsuit.

State of Alaska, ex rel. Sweat v. Hansen, 116 Idaho 927, 929, 782 P.2d 50, 52 (Ct.App.1989).

> An attorney is required to perform a prefiling inquiry into both the facts and the law involved to satisfy the affirmative duty imposed by Rule 11. Reasonableness under the circumstances, and a duty to make reasonable inquiry prior to filing a pleading or other paper, is the appropriate standard to apply when evaluating an attorney's conduct. Whether a pleading, motion or other signed document is sanctionable must be based on an assessment of the knowledge of the relevant facts and law that reasonably should have been acquired at the time the document was submitted to the court [citations omitted].

Landvik by Landvik v. Herbert, 130 Idaho 54, 61, 936 P.2d 697, 704 (Ct.App.1997).

> This Court has held that an award of attorney fees under I.C. § 12-121 is not a matter of right, and is appropriate only when the Court, in its discretion, is left with the abiding belief that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation [citation omitted]. When deciding whether the case was brought or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account. Thus, if there is a legitimate, triable issue of fact, attorney fees may not be awarded under I.C. § 12-121 even though the losing party has asserted factual or legal claims that are frivolous, unreasonable, or without foundation.

NMID v. Washington Federal Sav., 135 Idaho 518, 524-525, 20 P.3d 702, 708-709 (2001).

Attorney Appearance on Motion in SRBA

On January 18, 1996, former-Presiding Judge Daniel C. Hurlbutt, Jr., entered an ***Order Granting in Part United States' Motion for Permission to Appear***, case no. 39576. Department of Justice attorneys, who are not members of the Idaho State Bar, are allowed to appear on motion (without local counsel) if they meet certain criteria and the United States certifies that:

> . . .
> 5. The attorney is familiar with and will follow the rules of practice in Idaho including the Idaho Rules of Civil Procedure, the Idaho Rules of Evidence, the Idaho Appellate Rules, the applicable Idaho Rules of Professional Conduct; and,
> 6. The attorney subjects themselves to the jurisdiction of this court respecting their practice and ethics in the Snake River Basin Adjudication.

Gravamen of the Pending Motions

The Nez Perce Tribe suggested that there are two questions before the Court: 1) whether there have been violations of Rule 11 in this consolidated subcase and if so, 2) whether this Court has jurisdiction to impose attorney fees as a sanction against the United States, the Tribe or their attorneys. Judge Hurlbutt's ***Order Granting in Part United States' Motion for Permission to Appear*** answers at least part of the second question – the SRBA Court has jurisdiction over Department of Justice attorneys who appear before the Court on motion, as well as those who are members of the Idaho State Bar. But that begs the question of whether the SRBA Court has jurisdiction to award *monetary sanctions* against the United States and the Nez Perce Tribe and/or their attorneys for alleged Rule 11 violations.

The United States agreed that the SRBA Court has jurisdiction to award *non-monetary procedural sanctions* against the United States under I.R.C.P. 11 or I.C. § 12-121 to the same extent that it has jurisdiction to apply such procedural rules to Idaho and its attorneys.[13] And the Nez Perce Tribe agreed it is "generally" subject to Rule 11, but argued it is immune from an award of attorney fees.

In the Special Master's view, neither question needs to be answered because the Harrises' 1) *Motion for Summary Judgment,* 2) *Motion for Entry of Judgment* and 3) *Motion for an Award of Attorney Fees, Sanctions and Costs* are premature and must be denied. By analogy to a horse

[13] Of course, that concession implicates I.C. § 42-1423 and the Idaho Legislature's effort to immunize the State, its agencies and its officers and employees from any judgment for costs or award of attorney fees in any water rights adjudication.

race, the horses are at the starting gate, but the Harrises' entry is half way around the track and heading for home before the gun has sounded. And the race course has yet to be defined.

First of all, it can be argued that the SRBA Court lacks jurisdiction to act in the matter because the Harrises' claims have not been reported and recommended to the Court by the Director of IDWR. Without those claims before it, the Court is left to weigh only the United States' and Nez Perce Tribe's Burgdorf claims and the Court is being asked for an advisory ruling. For all practical purposes, an examination of the Harrises' claims by the Director ("an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported," I.C. § 42-1401B) has been circumvented and an essential piece of the puzzle is missing. For instance, it would be superfluous for the Court to address the Harrises' *Motions* if the Harrises' claims to the same springs are deficient or if there are missing party-claimants. The Court simply does not have before it all the information it needs to enter a viable, informed decision.

Second, the United States and the Nez Perce Tribe have not been provided the opportunity to discover the Harrises' claims as has been done with the 12 test cases now proceeding to trial. As the Nez Perce Tribe pointed out during oral argument, the Harrises first appeared in the consolidated subcase when they filed their *Motion to Participate* in July, 2002. They did not object when the United States and the Nez Perce Tribe filed the springs or fountains claims in 1993, nor when the claims were amended in 1998. And the Harrises chose not to join in the pre-consolidation hearings and later proceedings to select test cases.

The Nez Perce Tribe said it did not oppose the Harrises' *Motion to Participate* because the Harrises' claims were not yet reported out by IDWR and the Harrises wrote that their intervention "will not unduly delay or prejudice the adjudication of the rights of the original parties . . . [and] will not require any change in the current scheduling order for this case." In other words, the Harrises agreed to take the consolidated subcase as they found it, including the test-case procedure.

Clearly, the Harrises have not limited their participation as understood by the other parties and the Special Master. They chose to file their *Motions* before the test case procedure was able to define the scope of the United States' and the Nez Perce Tribe's entitlement to springs or fountains reserved in the 1863 Treaty.

Perhaps the most important reason to deny the Harrises' *Motions* is that they presume that Article 8 of the 1863 Treaty is clear and needs no further interpretation. In fact, the Harrises wrote that the "plain language" of the Treaty reserved *only* those springs 1) not adjacent to, or near, streams, 2) not directly connected with streams, and 3) located within land reserved from private settlement. They maintained that if a claim fails to meet *any one* of those criteria, the claim fails.

The Special Master has already denied motions for summary judgment after exhaustive briefing and argument on the meaning of the phrase: "all springs or fountains not adjacent to, or directly connected with, the streams or rivers within the lands hereby relinquished." The reason given was that there are genuine issues of material fact as to the intent of the parties and meaning when the United States and the Nez Perce Tribe used that phrase in the 1863 Treaty.

One example of a genuine issue is the meaning of the phrase, "not adjacent to, or directly connected with." The Harrises presumed that a ¼ mile standard has been established, but that was merely an early suggestion by the United States and the Nez Perce Tribe. The State suggested a standard up to 2 miles, depending on terrain. In any event, a trial is necessary to determine what standard, if any, will adequately identify which springs or fountains the parties to the 1863 Treaty intended to reserve.

The Harrises suggested that a spring or fountain claim must fail if it is located on land opened to homesteaders after the 1863 Treaty was signed. It will be recalled that the Harrises' predecessor, Fred Burgdorf, first became "involved" with the Burgdorf Hot Springs resort property around 1865, and received a patent for the property in 1902. That would mean Mr. Burgdorf's first involvement with the property was 2 years after the Treaty and his patent was granted 37 years after the Treaty.

As the Special Master wrote in the February 18, 2003 ***Orders on Motions for Summary Judgment and Motions to Strike***, at 11,

> [A]rguments about whether the United States should have kept back from settlement the land surrounding the springs or preserved perpetual rights of way raised issues of *relinquishment* of treaty rights rather than *establishment* of such rights, *viz*, post-treaty considerations. While post-treaty events may shed light on the parties' intent at the time the 1863 Treaty was signed, at this point (pre-trial proceedings) the court is more focused on the specific language of the Treaty.

Another point is worth noting. The Harrises argued that the United States and the Nez Perce Tribe brought and pursued the Burgdorf claims frivolously, unreasonably and without foundation, primarily because of their alleged failure to reasonably investigate the claims before filing. The Harrises argued that anyone could easily see the Burgdorf Hot Spring is tributary to Lake Creek which flows into the Secesh River and then into the South Fork of the Salmon River. Hence, the Harrises believe the spring is "directly connected with" a stream or river and therefore not reserved by the 1863 Treaty "for the use in common of both whites and Indians."

However, despite lack of discovery by the United States and the Nez Perce Tribe, there was some evidence of substantial alterations made to the spring by Mr. Burgdorf *after* the 1863 Treaty. The mere fact that he constructed a large outdoor swimming pool, together with the associated plumbing from the spring to the pool, suggests that the natural condition of the spring has been altered. In other words, there is no conclusive evidence that the parties to the 1863 Treaty intended to exclude Burgdorf Hot Spring, because in 1863, the spring may not have been "adjacent to, or directly connected with" a stream or river. In fact, evidence that the springs "clearly continue to have special cultural, spiritual, and religious significance to the Nez Perce people" suggests that the parties to the 1863 Treaty may have intended to reserve that particular spring.

One final point deserves mention. The United States and the Nez Perce Tribe filed their *Joint Notice of Withdrawal of Six Claims in Basin 77* on September 13, 2002, withdrawing the 6 BIA and NPT Burgdorf claims. They did so "in a[n] effort to resolve this matter as expeditiously as possible" as an accommodation to the Harris family. The *Joint Notice* recalled a similar development earlier in this consolidated subcase.

In January, 2002, the United States and the Nez Perce Tribe filed a *Motion to Withdraw* seeking to dismiss 38 of their springs or fountains claims. On April 2, 2002, the Special Master denied that *Motion* because of the unique circumstances of this consolidated subcase and in the interests of orderly case management. The Special Master reasoned that if he were to grant the *Motion to Withdraw*, it would have to be in the context of a report and recommendation to the Presiding Judge who has exclusive authority to dismiss claims. That would only complicate and prolong the process of adjudicating the springs or fountains claims. See ***Order on Pending***

Motions, dated April 2, 2002.[14] For that same reason, the Special Master does not intend to act on the United States' and Nez Perce Tribe's *Joint Notice of Withdraw of Six Claims in Basin 77*. The legal effect of the *Joint Notice* (whether binding or not) will be left to some later proceeding.

ORDERS

THEREFORE, IT IS ORDERED that:

1. The Harrises' *Motion for Summary Judgment* is **denied**;
2. The Harrises' *Motion for Entry of Judgment* is **denied**;
3. The Harrises' *Motion for an Award of Attorney Fees, Sanctions and Costs* is **denied**; and
4. The United States' and Nez Perce Tribe's *Motions to Disallow All Attorney Fees and Costs* are **granted**.

DATED August 1, 2003.

_____
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

[14] The April 2, 2002 ***Order on Pending Motions*** was entered over 3 months before the Harrises first appeared in the consolidated subcase by filing their *Motion to Participate*.