STATE OF IDAHO)
County of BONNER) ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, COUNTY OF BONNER

ROBERT C. READ and ALEXIS M. READ, husband and wife,	) Case No.: CV-99-00830
Plaintiffs,	) MEMORANDUM DECSION AND ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION AND MOTION TO AMEND INTERIM JUDGMENT AND PLAINTIFFS' MOTION FOR ORDER AWARDING FEES AND COSTS
vs.	
JENNIFER HARVEY, an unmarried woman,	
Defendant.	

I. BACKGROUND.

A bench trial was held August 21-23, 2006. On September 1, 2006, this court entered its Memorandum Decision, Findings of Fact and Conclusions of Law. Pertinent to the present motion for attorney's fees this court found that since Defendant Harvey knew of the original landowner's intent as to the property lines, and therefore had no legal or factual basis to oppose the relief sought by the Plaintiffs Reads, Harvey's defense of the lawsuit and prosecution of her counterclaim was frivolous. The Court held Reads were the prevailing party for purposes of I.R.C.P. 54(d). Reads filed their motion for attorney fees and costs they incurred in prosecuting the case and defending Harvey's counterclaim, arguing Harvey knew all along that the centerline

of the current channel of Little Gold Creek was the location of her common boundary with the Reads.

At the September 25, 2006, oral argument on Reads' Motion for Costs and Attorney Fees and Harvey's Motion for Reconsideration and Motion to Amend Interim Judgment, Reads argued Harvey purposefully deceived the Supreme Court and the Court of Appeals. Reads argued that since Harvey knew there was no factual dispute as to the common boundary of their properties, her defense and counterclaim was frivolous and the Reads should be awarded their costs and attorney fees. Harvey argued she should not have to pay costs and attorney fees, especially those associated with the appeal process because both appellate courts found there was a genuine issue of material fact that precluded summary judgment and therefore her claim was not frivolous.

After hearing on the motions, the Court ordered the parties to submit a copy of the record on appeal so the Court would know what information was before the appellate courts and ordered supplemental briefing so the Court could determine if Harvey had a factual basis for pursuing her claim when she appealed this Court's summary judgment dismissal. That material was received and reviewed by the Court. All motions are now at issue.

II. MOTION TO RECONSIDER.

A. Timliness.

Reads argue Harvey's Motion to Reconsider is untimely. The Memorandum Decision, Findings of Fact and Conclusions of Law was filed September 1, 2006. Harvey's Motion for Reconsideration was filed September 13, 2006, and was made pursuant to I.R.C.P. 11 (a)(2)(B). Said rule requires a motion for reconsideration to be made not later than fourteen days after the

entry of the final judgment. Even if the Memorandum Decision, Findings of Fact and Conclusions of Law were a judgment (which it is not), Harvey's Motion for Reconsideration is timely.

B. From a Factual Standpoint, Harvey's Motion to Reconsider Must be Denied.

Harvey asks this Court to reconsider and amend "that part of its Memorandum Decision, Findings of Fact, and Conclusions of Law ('Memorandum Decision') finding that 'after no later than February 7, 2002, the date Jerry VanOoyen's affidavit was filed, Harvey's defense of this lawsuit and prosecution of her counterclaim has been frivolous, because as of that date Harvey has know [sic] of the original landowner's (Andersons') [sic] intent as stated by Andersons' agent Jerry VanOoyen, and Harvey has never obtained any evidence to the contrary of the original landowner's (Andersons') [sic] intent. Memorandum decision, p. 15." Defendant's Motion for Reconsideration, pp. 1-2.

From a factual standpoint, the Motion for Reconsideration must be denied. As soon as Harvey was involved in this lawsuit, she injected her own ambiguity into the deed. That ambiguity did not truly exist. Harvey first defended this lawsuit claiming, "There is a dispute between READ and HARVEY regarding the natural and historical location of 'the main tributary of Little Gold Creek' and, hence, READ and HARVEY have a dispute relating to the common boundary line of the HARVEY PROPERTY and the real property owned by READ." Answer and Counterclaim, p. 4. Reads filed a Motion for Summary Judgment on February 7, 2002, and supported that motion with an Affidavit of Jerry VanOoyen filed that same date. VanOoyen's affidavit detailed how he was retained by Dick D. Andersen and Nancy L. Andersen, the owners of all this land, to subdivide and market the Andersens' property, and how he used "the centerline of the main channel of Little Gold Creek which traversed the property as a boundary."

Affidavit of Jerry VanOoyen, pp. 1-2, ¶2-4. VanOoyen also stated unequivocally that the main channel of Little Gold Creek is in the same location in 1998 as it was in 1972 when he subdivided the Andersens' property. *Id..,* p. 2, ¶ 6. VanOoyen stated that the main channel of Little Gold Creek was intended to be the boundary between what are now the Read and Harvey properties and is depicted as channel "A" on the Tucker Engineering Survey, and that he is "positive that Little Gold Creek did not flow through the ditch labeled as 'B' on the Tucker Engineering survey at any time relevant to this proceeding." *Id.,* p. 2, ¶ 7. Harvey filed an affidavit on February 28, 2002, and while she stated that she has "had an ongoing doubt that Channel 'B' is the actual property line separating the Harvey and Read properties due to the fact that it is a small gully that does not resemble any type of natural creek" (Affidavit of Jennifer Harvey, p. 2, ¶ 4), nowhere in that affidavit does she identify any evidence to contradict VanOoyen's testimony of the grantors' intent back in 1972. "Ongoing doubt" is not enough to defend this lawsuit or support her counterclaim when confronted with the uncontradicted testimony of Jerry VanOoyen, the person who subdivided the property as the agent of the original grantors, the Andersens. Harvey also filed the affidavit of soil scientist Pierre Bordenave, who opined that the "historic centerline of 'Little Gold Creek' is well to the east of all the excavated channels'" (Affidavit of Bordenave, p. 4, ¶14), but Bordenave rendered no opinion as to where Little Gold Creek flowed in 1972. Again, Bordenave provides no evidence contrary to the testimony of the person who subdivided the property as the agent of the original grantors, the Andersens. Harvey argued at summary judgment that since Little Gold Creek seemed to flow present day in a "drainage ditch" and since the deeds do not mention a boundary line being delineated as a drainage ditch, then "Presumably, the term 'creek' as used in the deeds refers to a natural drainage and not a man made drainage." Brief in Opposition to the Plaintiff's

Motion for Summary Judgment, p. 3, citing I.C. § 42-1502(e). Harvey, through creative lawyering, and not through facts, injected ambiguity into a situation where ambiguity did not exist. Harvey's argument is a statue indicates a "creek" has to be a "natural drainage", and since she had evidence that the creek flowed in an area that may be a drainage ditch, her boundary should be the historical streambed. Injecting that ambiguity has been Harvey's only defense. That injected ambiguity fails for several reasons. First, that statute is part of the "Minimum Stream Flow" legislation passed in 1978. That legislation was passed in an attempt to keep other states from taking Idaho's water. The statute does not have a thing to do with boundary disputes. Second, that statute itself does not say what Harvey wants it to say. Idaho Code § 42-1502(3) reads: "'Stream' means any lake, spring, creek, stream, river or other natural body of standing or moving water which is subject to appropriation under the laws of the State of Idaho." A clear reading of that subsection of that statute is: "stream means creek". A clear reading of that statute is NOT as Harvey would have us all believe: "creek means natural body of moving water." Third, even if that statute said what Harvey wants it to say, her argument would elevate form over substance, since the ONLY proof in this case as to what the original grantors, the Andersens, intended, was through VanOoyen, the person who subdivided the property. While VanOoyen may have not known of any legal distinction between a creek and a drainage ditch, he was certain that the only body of moving water in the area, which he took to in fact be Little Gold Creek, had never changed course since 1972, and was the common boundary between Reads' land and Harvey's land. In other words, Harvey manufactured her defense of this lawsuit through a strained interpretation of I.C. § 42-1502(e), asking the Court to have that strained interpretation trump the uncontroverted testimony of the man who subdivided the property. This Court was unwilling to do so, and granted summary judgment in favor of the Reads. Harvey

appealed. The Court of Appeals affirmed the decision of this Court. A petition for review was then filed. In Harvey's Brief in Support of Petition for Review, Harvey abandoned her argument under I.C. § 42-1502(e), and substituted Merriam Webster's Collegiate Dictionary, 10th ed. (1995) where "creek" is defined as "a natural stream of water…" Brief in Support of Petition for Review, p. 8. The Idaho Supreme Court then reversed the district court and the Court of Appeals, finding there was a material issue of fact, writing:

> The intentions of the parties to the conveyance instruments in question are consequently unclear and must be determined as questions of fact with reference to the surrounding facts and circumstances.

Read v. Harvey, 141 Idaho 497, 500, 112 P.3d 785, 788 (2005). The Supreme Court then noted the parties disagree as to what "the drafters of the original deeds intended to invoke" when referring to "the creek" in the deeds, either "channel A, a drainage ditch which has consistently during the times in question carried water, or the comparatively dry historical natural creek channel is a question of fact that precludes summary judgment." *Id.* The Supreme Court made reference to VanOoyen's affidavit. 141 Idaho at 498-99, 112 P.3d at 786-87. Since that affidavit stated exactly what "the drafters of the original deeds intended to invoke", this Court can only assume that the Idaho Supreme Court simply failed to keep in mind the uncontroverted evidence of VanOoyen, the **only** evidence of the drafters' intent.

The Idaho Supreme Court in the first instance apparently did not discern that Harvey used Merriam Webster to inject ambiguity to this deed. In the second instance the Idaho Supreme Court, in analyzing this deed made ambiguous only by Merriam Webster, did not appear to appreciate that the only and uncontradicted intent of the grantor, was through VanOoyen. The trial court (and appellate courts) should consider "extrinsic evidence of the circumstances and intentions of the original parties" to the instrument. *Latham v. Garner,* 105 Idaho 854, 858, 673

P.2d 1048, 1052 (1983); *Nelson v. Johnson*, 106 Idaho 385, 387, 679 P.2d 662, 664 (1984). The **only** evidence of the grantors' intent was through the grantors' agent Jerry VanOoyen.

> This Court has previously set forth its analysis in the interpretation of the pertinent deeds:
>
> 3. This Court must interpret the deeds granting the Reads their parcels, and granting Harvey her parcel. The Idaho Supreme Court has previously noted, on an earlier appeal of this matter, that if deeds are ambiguous, their interpretation is a question of fact. *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785 (2005). The Idaho Supreme Court has also found that the Read and Harvey deeds are ambiguous. *Id.*
> 4. When interpreting deeds, courts seek to ascertain the drafter's intent. *Id.* In this case, the task of the Court is to determine what the Andersens meant when they used the term "the centerline of the creek."
> 5. In making that determination, the Court must consider the deeds as a whole, and not select certain parts of the deeds. Moreover, the deeds should be construed so that all terms in the deed are given effect. *Thompson on Real Property*, David A. Thomas, Editor-in-Chief (2nd Thomas Ed. 1999), § 82.13(b)(2), p. 668 (footnotes omitted).
> 6. This Court is not persuaded by Harvey's arguments regarding Andersens' distinctions between "creek" and "drainage" ditch, as it asks the Court to engage in wholesale assumption as to Andersens' knowledge of the ground in question, and asks the Court to ignore the uncontroverted testimony of Jerry VanOoyen as to Andersens' intent, and would result in Andersens having subdivided their land based upon a meandering line to a dry creek bed, not clearly visible on the ground at the time, leaving several parcels bisected by the actual flowing creek and leaving several parcels without access to the water in the actual flowing creek.
> 7. The Andersens, who in 1972, created the legal descriptions at issue in this case, intended the common boundary at issue to be the centerline of the channel in which water presently flows between Reads' property and Harvey's property. That was the same channel in which water flowed in 1972.

Memorandum Decision, Findings of Fact and Conclusions of Law, pp. 14-15. Nothing in that analysis changes on reconsideration. The Court has reviewed the briefing to the Idaho Court of Appeals and the Idaho Supreme Court. While this Court finds no purposeful deception by Harvey to the Court of Appeals and Supreme Court, Harvey certainly continued her baseless argument that the Andersens must have meant to subdivide these parcels along a historically dry riverbed. Harvey's argument is baseless in light of VanOoyen's affidavit. The Idaho Court of Appeals did not buy into this baseless argument. For some reason the Idaho Supreme Court was

apparently confused by the argument. The question then is: "Can the Idaho Supreme Court decision cause there to be no frivolous defense of this lawsuit as a matter of law?"

C. From a Legal Standpoint, Harvey's Motion to Reconsider Must be Granted.

The district court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. *Bailey v. Sanford,* 139 Idaho 744, 753, 86 P.3d 458, 467 (2004). Idaho Code §12-121 permits a trial court to award reasonable attorneys' fees to the prevailing party in any civil litigation. Idaho Rule of Civil Procedure 54(e)(1) limits the trial court's authority to cases in which the Court finds "from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation." The decision to award fees when any of those factors are present is committed to the sound discretion of the trial court and subject to review on an abuse of discretion standard. *Soria v. Sierra Pacific Airli*nes, 111 Idaho 594, 615, 726 P.2d 706, 723 (1986).

The frivolity and unreasonableness of a defense is not to be examined only in the context of trial proceedings. The entire course of the litigation should be taken into account. *Turner v. Willis*, 116 Idaho 682, 685, 778 P.2d 804 (1989). Under I.R.C.P. 54(e)(1) the Court has discretion to award attorney fees when it finds, from the facts presented to it, that the case was brought, pursued or defended frivolously. However, the ***total*** defense of a party's proceedings must be unreasonable or frivolous. *Magic Valley Radiology Associates v. Professional Business Services, Inc*., 119 Idaho 558, 808 P.2d 1303 (1991) (emphasis added). The prevailing party is not entitled to attorney fees where the Court finds there is a legitimate, triable issue, and where the "total defense" of the case is not unreasonable or frivolous. *Turner v. Willis*, 119 Idaho 1023, 1025, 812 P.2d 737 (1991).

In *Turner*, the Supreme Court held the Defendant was not liable for the Plaintiffs' attorney fees even though it did not drop a groundless defense until the beginning of trial. The Court held that attorney fees were not proper because, although the trial proceedings involved only the issue of damages, that issue was a legitimate, triable issue. *Id* at 1025. The Court stated that the entire course of the litigation should be taken into account and therefore attorney fees were not warranted because the "total defense of [the] case was not unreasonable or frivolous." *Id*.

Reads claim they are entitled to attorneys' fees under the rules stated above because Harvey's claims and prosecution of her counterclaim went beyond frivolous to the point of being malicious. Reads argue Harvey "concocted arguments, manipulated and misrepresented the opinions of her experts, and advocated a position she had to know was thoroughly illogical at best and directly contradicted" by witness testimony. Supplemental Memo, p. 2. Reads argue Harvey's appeal was also frivolous because, as was discovered at trial, Harvey knew the arguments presented to the Idaho Supreme Court misrepresented the information found within the affidavits.

Harvey argues she had reasonable grounds for believing she might prevail at trial and on appeal, and therefore her claims were not frivolous. Harvey points to the fact that the Supreme Court found there was a genuine issue of material fact when it remanded the case to the lower courts, which provided her with legal support for her position. Harvey asserts that this Court cannot apply a "retrospective lens to determine what Ms. Harvey knew during the appellate proceedings in this case." Defendant's Final Brief, p. 2. Harvey claims that because discovery had not occurred until after the conclusion of the appellate proceedings, the information she

acquired through discovery was not available to her prior to her appeal, making Reads' claims of frivolity unsupported accusations.

Neither the Reads nor this Court can deny that Harvey convinced the Idaho Supreme Court to overturn this Court's decision on summary judgment. While the Reads and this Court may not understand that decision given VanOoyen's uncontradicted affidavit, by operation of law the Idaho Supreme Court's decision causes Harvey's defense to not be frivolous. Under *Wing v. Amalgamated Sugar,* 105 Idaho 905, 684 P.2d 307 (Ct.App. 1984) and *Turner v. Willis,*116 Idaho 682, 778 P.2d 804 (1989), attorney fees under Idaho Code § 12-121 would be improper through and including the remititur of this action back to the district court.

Conclusion of Law 11 reads:

> 11. The plaintiffs are deemed to be the prevailing parties for purposes of IRCP 54(d). Furthermore, after no later than February 7, 2002, the date Jerry VanOoyen's affidavit was filed, Harvey's defense of this lawsuit and prosecution of her counterclaim has been frivolous, because as of that date Harvey has known of the original landowner's (Andersens') intent as stated by Andersens' agent Jerry VanOoyen, and Harvey has never obtained any evidence to the contrary of the original landowner's (Andersens') intent.

As a matter of law, Harvey's Motion to Reconsider is granted. As a matter of law, that Conclusion of Law is now modified to read:

> 11. The plaintiffs are deemed to be the prevailing parties for purposes of IRCP 54(d). Furthermore, after no later than February 7, 2002, the date Jerry VanOoyen's affidavit was filed, Harvey's defense of this lawsuit and prosecution of her counterclaim has been frivolous, because as of that date Harvey has known of the original landowner's (Andersens') intent as stated by Andersens' agent Jerry VanOoyen, and Harvey has never obtained any evidence to the contrary of the original landowner's (Andersens') intent. The Idaho Supreme Court has held there is an issue of fact, (*Read v. Harvey,* 141 Idaho 497, 500, 112 P.3d 785, 788 (2005)) and the Idaho Supreme Court has read the Affidavit of Jerry Van Ooyen (141 Idaho at 498-99, 112 P.3d at 786-87). By operation of *Wing v. Amalgamated Sugar,* 105 Idaho 905, 684 P.2d 307 (Ct.App. 1984) and *Turner v. Willis,*116 Idaho 682, 778 P.2d 804 (1989), attorney fees under Idaho Code § 12-121 would be improper through and including the remittitur of this action back to the district court. The remittitur was filed June 21, 2005.

III. MOTION TO AMEND INTERIM JUDGMENT.

As a result of this Court's decision granting Harvey's Motion to Reconsider, the motion to Amend Interim Judgment is Granted. The portion of the Interim Judgment which reads: "[f]urther, the Court concludes that both the defense of defendant, Jennifer Harvey, and the prosecution of her counterclaim were frivolous from March 7, 2002" is stricken.

IV. ATTORNEY FEES.

Based on the above, Reads are not entitled to attorney fees pursuant to I.C § 12-121 from the inception of this lawsuit through the time of remittitur. This covers Harvey's present objections as to attorney fees during the appeal and for other work done in 2003 (matters pending before the Idaho Supreme Court Department of Water Resources). Defendants Response and Objection to Motion to Fix Costs and Fees, pp. 11-12.

Reads have requested attorney fees pursuant to I.R.C.P. 37(c). That rule mandates a trial court award attorneys' fees when a party fails to admit a fact in response to a Rule 36 request to admit, that his or her opponent is then forced to prove at trial. One exception to that mandatory award of attorney fees is if Harvey had a "reasonable ground that she might prevail on the matter" at trial. If that belief is unreasonable, an award of fees under rule 37(c) is required. *Contreras v. Rubley,* 142 Idaho 573, 577, 130 P.3d 1111, 1115 (2006).

Reads argue that along with the Court's holding that the lawsuit was frivolous, Harvey wrongfully and without sufficient cause denied several facts in her response to "Read's Request for Admissions," which forced the Reads to prove those facts at trial. Reads assert Harvey was present at several of the depositions taken where she heard the testimony of several witnesses as to what the Andersens intended to be the common boundary of the property, yet still pursued this

cause of action even though she had no "reasonable belief she would prevail on any of the matters." Plaintiffs' Memorandum in Support of Motion for Order Awarding Fees and Costs, p.8.

Reads claim they are entitled to attorneys' fees under the rules stated above because Harvey's claims and prosecution of her counterclaim went "beyond frivolous to the point of being malicious." *Id.* Reads argue Harvey in no way could have had a reasonable belief that she would prevail on any of her claims she denied in discovery, she falsely communicated information to the expert witnesses to overcome the testimony of the Reads' witnesses, and she deceived Mr. VanOoyen into signing an affidavit that falsely stated the water was flowing in another location. Reads further contend Harvey manipulated the testimony of her experts by deceiving them when she failed to reveal what she knew about the excavation work Reads had performed. Reads assert Harvey failed to show her experts photographs of the work the Reads had done and that she withheld critical information from them. *Id.* p. 4. Reads argue Harvey's denial of "literally every request" made in Reads' Request for Admissions, without any reason for doing so except to deceive the parties, is grounds for an award of costs and attorneys' fees. *Id.*, p. 8. Reads argue Harvey forced the Reads to incur thousands of dollars of legal expense knowing she had nothing to support her claims, but still pursued this matter beyond summary judgment. Reads assert Harvey's actions therefore entitle them to legal expenses from the date summary judgment was entered. *Id.* p. 9.

Harvey claims the Reads are attempting to supplement the established record by providing copies of depositions and discovery which were not before the Court at trial, and therefore should be disregarded and stricken. Defendant's Response and Objection to Motion to

Fix Costs and Fees, pp. 3-4. However, Harvey cites no rule basis or case law for that claim. Accordingly, her objection is overruled.

Harvey argues her denials of the requests made by the Reads were reasonable and supported by evidence presented at trial, and therefore the Reads should not be awarded costs and fees. Harvey claims the Reads falsely accused her of misleading her expert witnesses by withholding important information, but there is nothing in the record to indicate their opinions would have changed had they been aware of the information Harvey allegedly failed to supply.

Harvey's Responses to Plaintiffs' First Set of Requests for Admissions were dated October 3, 2005. Exhibit G to Plaintiffs' Memorandum in Support of Motion for Order Awarding Fees and Costs. A review of those responses, in addition to the above analysis and the Court's prior Memorandum Decision, Findings of Fact and Conclusions of Law, shows that from October 3, 2005, through trial, Harvey had no "reasonable ground that she might prevail on the matter" at trial.

Attorney fees relating to requests for admission submitted under I.R.C.P. 36(a) are governed by I.R.C.P. 37(c). Rule 37(c) mandates that a trial court award attorneys' fees when a party fails to admit a fact in response to a Rule 36 request that his or her opponent is then forced to prove at trial. However, Rule 37(c) authorizes sanctions only in favor of a party who, after a request for admission is denied, later proves the truth of the matter. *Payne v. Wallace*, 136 Idaho 303, 32 P.3d 695 (Ct. App. 2001). The rule is mandatory, subject only to the four exceptions set forth in the rule itself:

> (1) that the request was held objectionable pursuant to Rule 36(a);
> (2) that the admission sought was not "of substantial importance";
> (3) that failure to admit was based upon a reasonable belief in prevailing on the issue; or
> (4) other good reason.

I.R.C.P. 37(c); *Ruge v. Posey,* 114 Idaho 890, 892, 761 P.2d 1242, (Ct.App.1988). Whether any of the exceptions apply is committed to the sound discretion of the district court. *Ruge* at 892. Just as in *Ruge,* the first two exceptions are simply not applicable. *Id.* Harvey filed boilerplate general objections to the Reads' Requests for Admissions, (Exhibit G to Plaintiffs' Memorandum in Support of Motion for Order Awarding Fees and Costs, pp. 1-3), but then proceeded to answer most of the Requests for Admissions, while posing some specific objections. The bottom line is Harvey never requested to have the Court rule on those objections, and I.R.C.P. 37(c) requires for that exception to apply, Harvey must have had the request to admit "held objectionable". What is telling about Harvey's objections is that they are based upon her lack of investigation, to wit: "Harvey has not completed her own investigations and/or discovery" (*Id.,* p. 1); "Harvey is without sufficient knowledge or information to respond to this request for information [asking her to admit that channel "A" is where water has always flowed and that the water has flowed no other place than channel "A"], and therefore denies the same" (*Id.* p. 6); "Harvey is without sufficient knowledge or information to respond to this request for information [asking her to admit that Andersens intended the centerline between the two properties to be where the water flowed], and therefore denies the same". *Id.* p. 7. Keep in mind that Harvey's answers to these Requests to Admit were made **six years and one month after she answered the complaint and filed her counterclaim!** More than six years into the litigation, and after she has been to the Idaho Court of Appeals and Idaho Supreme Court, and gone through two different attorneys, Harvey still "has not completed her own investigations and/or discovery", and is "without sufficient knowledge or information to respond" to these requests to admit **that go to the very heart of her defense and counterclaim.**

As to the second exception under I.R.C.P. 37(c), the above excerpts from the Requests to Admit and Harvey's response show why every single one of the thirty-three Requests to Admit went to the central issues to this litigation.

The third exception that Harvey had a "reasonable belief in prevailing on the issue", is not available for several reasons. The first is that as of October 3, 2005, six years and one month into this litigation, Harvey admittedly had not done any work to even try to see if she had any evidence to support her defense or her counterclaim. Over the next year, up until the time of the trial in August 2006, Harvey either made no more effort to try to find such evidence, or if she did make effort, her efforts were fruitless. At trial, the Court wondered how Harvey was going to defend this lawsuit. Was she going to be able to find the Andersens to come in and contradict VanOoyen? Were her attorneys going to be able to cross-examine VanOoyen so effectively as to render him not credible? Were there other witnesses who were going to testify that in 1972 the creek ran somewhere else? While Harvey's counsel hinted such might occur (on the first day of trial he argued in response to Reads' Motion to Exclude Expert Testimony that VanOoyen was not the grantor, the Andersens were the grantor and the deed creates ambiguity). None of these scenarios occurred. Harvey provided no contrary proof of Andersens' intent. She had no proof that VanOoyen was not Andersens' agent. Harvey had no reasonable belief in prevailing on her defense or her counterclaim. Harvey claims in Defendant's Response and Objection to Motion to Fix Costs and Fees, pages 14-15, that "Ms. Harvey had reasonable grounds for believing that she **might** prevail at trial on her position that the boundary between her property and the Reads' was the natural channel of Little Gold Creek, not the manmade channel A." *Id.* p. 14. (emphasis added). Harvey's choice of words are telling. Idaho Rule of Civil Procedure 37(c) does not read "that failure to admit was based upon a reasonable belief that one **might** prevail on the issue", it

reads "that failure to admit was based upon a reasonable belief **in prevailing** on the issue." Harvey's arguments conveniently ignore the "issue" requested to be admitted. The "issue" as framed by most all of the Requests for Admission, are that the water flowed in Channel "A" at all times pertinent to this litigation (since 1972 and ever since that time), and that in 1972 when the property was subdivided by Andersens it was their intent that the boundaries run to this Channel A where the creek was running. Harvey argues she was reasonable in her denial because "the Supreme Court clearly found that there was a genuine issue of material fact as to whether the boundary should be the now-relatively dry natural stream channel, or Channel A." *Id.* p. 14. Harvey completely ignores that whether the Supreme Court found there to be an issue of material fact regarding some historical dry stream channel has nothing to do with what she was being asked to admit, ie., that in 1972 water flowed in Channel "A", only in Channel "A" and that Channel "A" is what the Andersens intended to be the boundary when they subdivided in 1972. Harvey's remaining reasons why her denials were based upon "a reasonable belief in prevailing upon the issue" likewise ignore the "issue" sought to be admitted. Harvey claims she had evidence of Reads' dredging in the 1990's, that Reads altered the flow of the channel and that some of the other deeds referenced "drainage ditch" and "creek". None of those has a thing to do with what Harvey was being asked to admit, and that was the fact that in 1972 water flowed in Channel "A", only in Channel "A" and that Channel "A" is what the Andersens intended to be the boundary when they subdivided in 1972.

For all the reasons set forth above, the fourth exception, some "other good reason", is not available to Harvey.

Reads are awarded their attorney fees against Harvey from October 3, 2005, (the date of Harvey's Responses to Plaintiffs' First Set of Requests for Admissions) to the present under

I.R.C.P. 37. This Court finds none of Harvey's "objections" were "held objectionable pursuant to Rule 36(a)", the admissions sought were "of substantial importance", Harvey's failure to admit was not based upon a "reasonable belief in prevailing on the issues", and there was no other "good reason" for Harvey's failure to admit said Requests for Admissions. Counsel for Reads is instructed to submit the amount of those fees in a proposed final judgment.

This Court has reviewed the Affidavit of Charles R. Dean in Support of Attorney Fees and Costs. While Mr. Dean does not set forth the criteria of I.R.C.P. 54(e)(3)(A)-(L) in that order, he provides sufficient information for the Court to analyze his claim for attorney fees on behalf of the Reads. Regarding (A), this Court finds the time and labor required since October 3, 2005, to be reasonable and a neutral factor in this analysis. Criteria (B) is a neutral factor as the questions involved in this lawsuit were neither novel or difficult. Criteria (C), the skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law, is a neutral factor. Criteria (D), the prevailing charges for like work has the effect of causing an increase in the amount of fees requested. Mr. Dean kept his rates at $150 per hour because he "felt sorry for the Reads and the outrageous amount of time I was forced to spend in a case where the ultimate result was so clear", but in 2006 raised those rates to $175 for the Reads. Affidavit of Charles R. Dean, Jr. in Support of Attorney Fees and Costs, pp. 1-2. This Court finds that the prevailing rate in this area for an attorney with 28 years of experience in real estate matters (*Id.*., p. 1) to be in excess of $200 per hour. Accordingly, this Court will grant a 10% increase in the amount charged to Reads by Mr. Dean. Criteria (E) is neutral as this fee of Mr. Dean's was neither fixed nor contingent. Regarding criteria (F), the Court has been made aware of no time limitations imposed by the client, but finds the "circumstances of the case" justify all hours charged by Mr. Dean. This Court agrees with Mr. Dean that the hours spent on

the case were the direct result of Ms. Harvey's failure to admit the Requests to Admit, and this Court finds Harvey's continued defense and counterclaim was based on nothing more than the strained statutory interpretation set forth in Part II above. Criteria (G) is neutral regarding the amount involved and the results obtained. Certainly if someone is trying to take your land and your access to a creek, one would expect them to aggressively defend. Reads were successful in that defense. Criteria (H), the undesirability of the case, is a factor which should cause an upward departure of fees from that requested. The case was undesirable because Harvey was being unreasonable and frivolous in her defense. While an attorney appreciates the work on an hourly basis, in order to fulfill his or her ethical obligations and to foster future business, he or she would also like to achieve the desired result with a minimum expense to the client. This Court factors in this upward departure from amounts claimed with the 10% increase set forth above. Criteria (I) is neutral, as to the nature and length of the professional relationship with the client. Since the work performed was on an hourly basis, criteria (J) is neutral as "awards in similar cases" is essentially covered by the analysis in criteria (A), the "time and labor required", since the Court has determined the hours spent after October 3, 2005, were reasonable. Criteria (K) is not a factor as no request for computer-assisted legal research was made. This Court finds no criteria (L) factors ("any other factors") apply.

The Court has totaled the hours and hourly rate charged to Reads by Mr. Dean from October 3, 2005, to September 6, 2006, as shown on Exhibit 1 and Exhibit 2 to the Affidavit of Charles R. Dean, Jr. in Support of Motion for Attorney Fees and Costs. Those amounts total $24,158.50. Because of the relatively low hourly rate given Mr. Dean's experience and the undesirable nature of the case, I.R.C.P. 54(e)(3)(D) and (H), an increase of ten percent

($2,415.00) is added, bringing the total attorney fee award to $26,573.50. Counsel for Reads is instructed to include that fee amount allowed in a proposed final judgment.

V. COSTS.

Reads have requested costs in the amount of $3,883.17. This Court's review of the charges that make up that total show they are costs as a matter of right under I.R.C.P. 54(d)(1)(C). Harvey argues that "many of these costs…claimed by the Reads pertain to the appeal before the Idaho Court of Appeals and the Idaho Supreme Court" (but not specifying which costs) and that some (but again without specifying which) costs are discretionary. Defendant's Response and Objection to Motion to Fix Costs and Fees, p. 2. First of all, the Idaho Supreme Court awarded costs to Harvey in its decision and in the remittitur and as subsequently ordered by this Court on December 2, 2005. It is unknown if the Idaho Court of Appeals awarded costs against Harvey that are duplicated in Reads' present request. Second, this Court finds no discretionary costs have been presently claimed by Reads. All costs requested by Reads at present are costs as a matter of right and are proper unless they have previously been ordered by the Idaho Court of Appeals and previously paid by Harvey. To the extent any of these costs claimed have already been awarded by the Idaho Court of Appeals and have been paid by Harvey, no duplication of awarded costs will be allowed.

Counsel for Reads is instructed to include these costs allowed in a proposed final judgment.

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VI. ORDER.

IT IS HEREBY ORDERED Harvey's Motion for Reconsideration and Motion to Amend Interim Judgment are GRANTED to the extent set forth above;

IT IS FURTHER ORDERED Reads' Motion to Fix Costs and Fees is GRANTED to the extent all costs sought (unless previously awarded by the Idaho Court of Appeals and previously paid by Harvey) are awarded as requested in Reads' Memorandum of Costs and Fees and to the extent attorney's fees are sought from October 3, 2005, to the present. Unless there is duplication, those approved costs as a matter of right total $3,883.17. Attorney fees are awarded in the amount of $26,573.50. Counsel for Reads shall prepare a final judgment including that amount of attorney fees and the appropriate amount of costs (subtracting any duplication from any award of costs by the Idaho Court of Appeals and prior payment of those costs by Harvey).

IT IS FURTHER ORDERED that the September 1, 2006 Memorandum Decision, Findings of Fact and Conclusions of Law is AMENDED to add Conclusion of Law 12, which reads:

> 12. Reads are awarded their attorney fees against Harvey from October 3, 2005, (the date of Harvey's Responses to Plaintiffs' First Set of Requests for Admissions) to the present under I.R.C.P. 37. This Court finds: 1) Harvey's objections were not "held objectionable" by this Court; 2) the admissions sought were "of substantial importance"; 3) Harvey's failure to admit was not based upon a reasonable belief in prevailing on the issues, and 4) there was no other good reason for Harvey's failure to admit said Requests for Admissions. Accordingly, attorney fees from October 3, 2005, to the present are mandatory under I.R.C.P. 37. The amount of such fees under an I.R.C.P. 54(e)(3) analysis is $26,573.50. Reads are awarded costs as a matter of right under I.R.C.P. 54(d)(1)(C) in the amount of $3,883.17 (unless any of that amount is included in costs awarded by the Idaho Court and previously paid by Harvey). Reads' counsel shall include such attorney fees and costs in a proposed final judgment.
>
> DATED this 19th day of December, 2006.

John T. Mitchell, District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of December, 2006, I caused a true and correct copy of the foregoing **MEMORANDUM DECSION AND ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION AND MOTION TO AMEND INTERIM JUDGMENT AND PLAINTIFFS' MOTION FOR ORDER AWARDING FEES AND COSTS** to be served by facsimile to the following:

Charles R. Dean, Jr.
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Scott L. Campbell
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_____
Clerk