

6-23-2011

Bettwieser v. New York Irrigation Dist. Augmentation Record Dckt. 37396

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In the Supreme Court of the State of Idaho

LAW CLERK

MARTIN BETTWIESER,)

Plaintiff-Appellant,)

v.)

NEW YORK IRRIGATION DISTRICT and)
Directors RICHARD MURGOITIO, BRIAN)
MC DEVITT, PAUL WARRICK and VELTA)
HARWOOD,)

Defendants-Respondents.)

ORDER AUGMENTING RECORD

Supreme Court Docket No. 37396-2010

Ada County Docket No. 2007-11060

The MEMORANDUM DECISION AND ORDER RE: PLAINTIFF'S MOTION TO RECONSIDER was filed May 17, 2011 in District Court and with this Court May 17, 2011; therefore, good cause appearing,

IT HEREBY IS ORDERED that the MEMORANDUM DECISION AND ORDER RE: PLAINTIFF'S MOTION TO RECONSIDER shall be AUGMENTED into the Clerk's Record in this appeal.

DATED this 23rd of June 2011

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk

AUGMENTATION RECORD

ORDER AUGMENTING RECORD – Docket No. 37396-2010

In the Supreme Court of the State of Idaho

MARTIN BETTWIESER,)
)
 Plaintiff-Appellant,) ORDER
)
 v.) Supreme Court Docket No. 37396-2010
) Ada County District Court No.
) 2007-11060
 NEW YORK IRRIGATION DISTRICT and)
 Directors RICHARD MURGOITIO, BRIAN)
 MC DEVITT, PAUL WARRICK and VELTA) Ref. No. 12-184
 HARWOOD,)
)
 Defendants-Respondents.)

A MOTION TO AUGMENT with supporting statement was filed by Appellant Martin Bettwieser on February 23, 2012. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant Martin Bettwieser's MOTION TO AUGMENT with supporting statement be, and hereby is, GRANTED and the appeal record shall include the documents listed below, a file stamped copy of which accompanied the Motion:

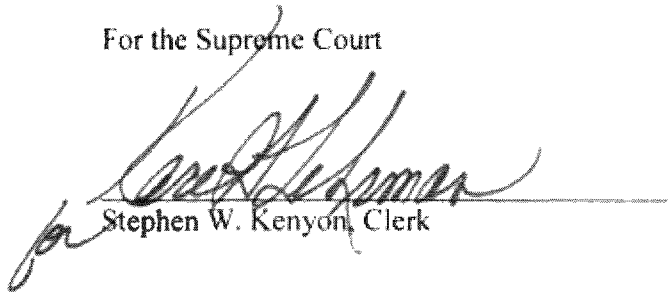
1. Rebuttal Reply to Defendant's Closing Argument, October 24, 2008;
2. Objection to Defendant's Reply to Bettwieser's Closing Argument and Objection to Defendant's Reply to Bettwieser's "Rebuttal Reply" with Affidavit, Memorandum, November 7, 2008;
3. Affidavit and Memorandum of Costs and Disbursements, dated January 13, 2009;
4. Motion to Fix Costs and Amend Judgment, dated January 27, 2009;
5. Objection to "Affidavit and Memorandum of Costs and Disbursements, file date January 27, 2009;
6. Opposition to Defendant's Motion to Fix Costs and Amend Judgment, file date February 10, 2009;
7. Affidavit of Service, file date March 2, 2009;
8. Objection/Motion to Reconsider, file date March 17, 2009;
9. Motion to Extend Time to File Brief/Motion to Compel/Motion for Contempt, file date March 31, 2009;
10. Notice of Intent to Rule on Pending Motions Which Have Not Been Noticed for Hearing, file date July 1, 2009;
11. Reply to Defendant's Non-Response to Plaintiff's Various Outstanding Motions and Affidavit, file date July 16, 2009;
12. Motion to Amend and Reconsider with Memorandum and Affidavit in Support, file date September 28, 2009; and
13. Supplemental Authority to September 28, 2009 Motion to Amend and Reconsider with Memorandum and Affidavit in Support, file date October 19, 2009.

IT FURTHER IS ORDERED that the remaining items requested in Appellant Martin Bettwieser's MOTION TO AUGMENT, as listed below be, and hereby are, DENIED:

1. A third volume of transcript;
2. Exhibits from an appeal record settlement proceeding;
3. Documents in sealed envelope in the District Court filed addressed in #9 of the CORRECTED RULING ON PLAINTIFF'S OBJECTIONS TO CLERK'S RECORD AND TRANSCRIPT;
4. The filings that this court, Idaho Supreme Court, has as a record of this appeal since, as it's file, which include the filing of the 2nd Amended Notice of Appeal until present;
5. Records from the District Court which included an ROA and all the filings from the District Court from October 18, 2010, to January 12, 2012, which were just file stamped by this court and placed in the exhibits envelope and file stamp dated as January 13, 2012;
6. E-mail correspondence in the Idaho Supreme Court file between this court's clerk and the court reporter; and
7. Order to supplement the transcript with the portion of the trail that was included in the 2nd Amended Notice of Appeal which requested, etc.

DATED this 23th day of April, 2012.

For the Supreme Court


Stephen W. Kenyon, Clerk

cc: Martin Bettwieser, *pro se*
Counsel of Record

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Patrick H. Owen/Angela Hunt
District Judge/ Clerk

Page 1 of 1

MOTION HEARING

MARTIN BETTWIESER,

Plaintiff,

vs.

NEW YORK IRRIGATION DISTRICT,
et al,

Defendants.

EXHIBIT LIST

Case No. CV OC 07 11060

Plaintiff's Attorney: Martin Bettwieser appearing pro se
Defendant's Attorney: Chas McDevitt/McDevitt & Miller

BY	NO.	DESCRIPTION	STATUS	DATE
Pltf	<u>1</u>	Copy of Supreme Court Record	ADMIT	01/25/11
	2	Copy of Notc w/ handwritten notes	ADMIT	01/25/11
	<u>3a</u>	Copy of Appeal Transcript Vol I	ADMIT	01/25/11
	<u>3b</u>	Copy of Appeal Trnscrpt. Vol II	ADMIT	01/25/11
	3c	copy of pgs 94-97 mini-transcript	ADMIT	01/25/11
	4	copy of Motn & Memo 07/06/10	ADMIT	01/25/11
	5	Copy of Motn & Memo 08/12/10	ADMIT	01/25/11

STATE OF IDAHO } ss
COUNTY OF ADA }
CHRISTOPHER D. RICH, Clerk of the District Court of
the Fourth Judicial District, State of Idaho, in and for
said county, do hereby certify that foregoing is a
true and correct copy of the original filed in
my office on _____
February 12, 2012
Brenda [Signature]

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	REBUTTAL REPLY TO
	)	DEFENDANT'S CLOSING
NEW YORK IRRIGATION DISTRICT	)	ARGUMENT
et.al;)	
Defendant's)	
_____)	

The Defendant's closing argument responds to or defends only two(2) items from Bettwieser's complaint, paragraph VII and item # 2 in the prayer for relief. The only defenses the Defendant's give in their answer to the complaint and affirmative defenses is that; 1) that no others are in the position of this Plaintiff who would constitute a class," (of which they recognize as an issue of the complaint); 2) in short "failed to file the documents requesting exclusion as provided to him by the District and as required by Idaho Code,....". The Defendant's in their closing argument only address Paragraph II of their affirmative defenses

Bettwieser claims that absent any credible defense or addressing the remainder of the issues presented in his complaint, would constitute a waiver and or admittance of the

allegations, with the relief sought by Bettwieser. Even though the Defendant's have only addressed one issue from their affirmative defenses Bettwieser will address both issues addressed in their closing argument.

BACK GROUND

All the witnesses from the Defendant's witness list were called by Bettwieser to testify at the trial of September 29,30, 2008. Bettwieser also testified in his own behalf. Bettwieser presented many exhibits, as Plaintiffs exhibits, at the proceedings as well as many of the Defendant's exhibits. The Defense didn't call any witnesses and only entered one exhibit.

REBUTTAL REPLY

In the Defendant's first claim for relief they cite some incorrect facts to the proceedings. First it fails to state that Bettwieser was at the board meeting and that Brian McDevitt testified that an agreement was negotiated and reached, and that Kendall McDevitt testified he was to provide the opinion in 10 days not 9 as they state. Next they wish to focus your attention to (Defendant's Exhibit B) even though this exhibit was never offered or admitted at the trial Bettwieser has no objection to admitting or using it herein. Even so the minutes can not be held as a certified transcript of all the happenings and discussions and events that took place that day, especially when you combine the other exhibits and testimony to the events of that day.

The Defendant's next address Kendall Mcdevitt's opinion (Exhibit E) as the only applicable statute to Title 43 chapter 11. This opinion is not all encompassing as the opinion only encompasses a few sections of that chapter.

Their argument in their FIRST CLAIM FOR RELIEF is basically that Bettwieser did

not comply specifically as the statute states in filing a petition. and in doing so the petition was to be returned and nothing was to be done. This has no basis since they never returned the petition that was given to them nor was the opinion of Kendall McDevitts given to Bettwieser nor does the petition that they claim that is required for exclusion encompass all of the items listed in Title 43 Chapter 11 for a properly informed exclusion such as sec. 43-1107. Also it is the non-benefit of the of water that warrants exclusion and not the contents of the petition *Lodge v. Miller 91 Idaho 662* Through all the evidences presented it is apparent that the Board had years of history of Bettwieser, it had all his legal history and descriptions etc. They even knew he didn't get the water nor did his neighbors for years. Bettwieser testified about his neighbors. Bettwieser didn't have the water in 1983 when he moved in and the other neighbors didn't either.

We can see from the evidence that Bettwieser's petition was never returned to him and that only another petition was sent to be filled out. (Exhibit F) We see that Richard Murgiotio was the only one that testified that Bettwieser didn't file a petition for exclusion. (Plaintiff's Exhibit 7) Joanne Scripture and Kendall McDevitt would not have known about the exhibit 7 filing. There was never a reason given why they didn't give the opinion to Bettwieser as negotiated and agreed to. After review of (exhibit 10), the minutes of June 5, 2007 board meeting, Kendall McDevitt's opinion was never even discussed.

The Defendant's then state from the June 5, 2007 meeting that only the District's required form was sent to Bettwieser to be filled out. Again the District never returned the petition Bettwieser filed. The Districts alleged addressing the issue of exclusion only

from their alleged required form is in conflict with I.C. 43-1110 which allows the board to address the issue of exclusion that is presented to it by resolution.

Page 4 of the Defendant's closing argument addresses more of the substance to the defendant's argument. They cite I.C. 43-1101 that if certain things did not accompany the petition then the petition would be returned. As stated earlier that the petition that Bettwieser filed with the District was not returned.

Again they state that In I.C. 43-1103 if proof of ownership is not accompanied with the petition it is to be returned. The petition was not returned neither did the District require that proof ownership from any other petitioner for exclusion. (Exhibits 12 and 13) Further more I.C. 43-1110 does not require a petition to be filed but the lands can be excluded by the board of directors by resolution. Bettwieser has substantially complied even when not necessary. The board can exclude without a petition, as cited earlier with authority, it is the non-benefit of the water that excludes and not the contents of the petition. The chapter allows the investigation of the particulars by the directors without a petition.

Next, the Defendants address I.C. 43-1107 This section addresses costs that are set out in all of chapter 11 Title 43 that should not have to be borne by the petitioner when;

- 1) the lands excluded are found to be to high or not susceptible of irrigation from the water system of the district without pumping by the land owner, OR
- 2) the exclusion is requested under subsection (a)3 or (a)4 of section 43-1102, Idaho Code and for (5) irrigation seasons preceding the filing of the petition (a) there has been no pipe, ditch or other delivery system between the land the assigned delivery point on the district's irrigation system, and (b) the petitioner or previous owners of the land have paid the

assessments of the district against the land. 43-1101 addresses the 2 types of exclusion costs from exclusion proceedings, one from the filing fees and exclusion fees and the others are from section 43-1105 and no others and refers the present 43-1105 which covers survey costs and not previous. Also any arrears in assessments need not be paid in full for exclusion, 43-1115 only if waiver of exclusion fees are requested. 43-1107(2)

Even though, Kendall Mcdevitt states that filing fees and exclusion fees are refundable he errors that it is only done after a hearing since no hearing is required, Sec. 43-1104. This section states that 1) the Board grant the petition for exclusion as stated and hold no hearing, 2) if allegations are not accepted to hold and order a hearing in 90 days, 3) if no hearing is held with in the 90 days the land is excluded. If any one of those things talks place the Board is to issue an order. The evidence shows the there was a petition filed, it was not returned no hearing was held and no order was given the land must be excluded then.

43-1104 allows the board to do it's own investigation and except the facts as alleged. Brian Mcdevitt testified that all that is required for exclusion is that you don't receive the water and he reiterated that no other factors are considered. It is apparent that the Board need not accept the opinions that are given them, which is in sink with 43-1110 Exclusion Procedure, that the board of directors by resolution, (not petitioned unless over 50 % of petitioned) to exclude all lots or parcels of residential land in the district if they have not received water for over 5 years. Bettwieser testified he hadn't had the water longer than that.

The Defendant's argue the Plaintiff's exhibit 7, his petition for exclusion does not comport to the statutes. As argued earlier then it was the responsibility for them to

return them to Bettwieser and notify him of their decision on how they were going to proceed. the Defendant's claim Bettwieser's testimony of owing past assessments has some bearing on this issue, as Bettwieser stated earlier in this brief, that payment of the past assessments is only required to receive a waiver of exclusion fees not for exclusion from the district. We can see from the testimony and (exhibits 5 and 6) that Bettwieser's past due assessments were not all justified and that he, and he claims others, have been wrongly assessed a considerable amount also. That the district is charging 12% interest when under 43-712 when only 8% is allowed and as much as 50% was charged as penalty when only 2% was allowed.

Finally they address Mr Murgiotios testimony as to Bettwieser not paying the fees and filing the district forms as was told by him. This could not have happened before the suit was filed since the Board had taken the waiving of exclusion fees under advisement and that the board had sought a legal opinion from Mr Kendall Mcdevitt before any instruction could have been given by Mr. Murgiotio.

PRAYER FOR RELIEF CLAIM

The Defendant's wish to address the prayer for relief claim #2 as a declaratory judgment issue. It should be noted that Bettwieser's use of the word "parties" had the intent that this case was to be tried as a class action. Idaho Code. 10-1211

The Defendant's only argument is that there can not be a declaratory judgment because there is no real controversy between the parties. This claim has no merit. At a minimum the Defendant's say they can't waive exclusion fees for filing a petition or just for excluding from the district , Bettwieser says they can, they say they don't have to refund the exclusion fees if certain criteria under 43-1107 are met. Bettwieser says they

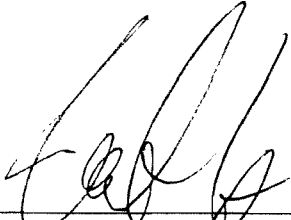
do, they say that a petition for exclusion has to be filed for exclusion, Bettwieser says that it does not, they say that only their form can be used to file for exclusion from the district, Bettwieser states it does not, they state that charging 12% interest on past due assessments is O.K. when 43-712 only allows 8%, I say it does not, they say they are the legal directors of the District, I say not, Bettwieser state a petition for exclusion should include statements and provisions to inform that exclusion will be borne by the District under the criteria of I.C. 43-1107, they say not.

There is no legal authority to give direction to these controversies and this case will set precedence although the Idaho Supreme court has stated in *Lodge v. Miller 91 Idaho 662, 665* that the court "will grant all proper relief consistent with this case made and embraced with the issues tried, whether prayed for or not."

CONCLUSION

All though the Defendant's could have settled an \$81.92 claim and costs and admitted it's fault long ago it has chosen to go to trial which has opened a can of worms of other issues of which council has no second thoughts, as he and his family and profited greatly from the controversy.

Dated this 24th day of October, 2008

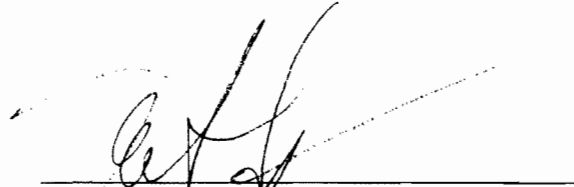


Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the REBUTTAL REPLY TO DEFENDANT'S CLOSING ARGUMENT to be served by prepaid first class mail on the 24th day of October, 2008 to the following;

The office of Chas McDevitt
P.O. Box 2564
Boise, Idaho 83702



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	OBJECTION TO DEFENDANT'S
	)	REPLY TO BETTWIESER'S CLOSING
NEW YORK IRRIGATION DISTRICT	)	ARGUMENT AND OBJECTION TO
et,al;	)	DEFENDANT'S REPLY TO
Defendant's	)	BETTWIESER'S "REBUTTAL REPLY"
_____	)	WITH AFFIDAVIT, MEMORANDUM

COMES NOW the Plaintiff, Martin Bettwieser and does object to the Defendant's REPLY TO BETTWIESER'S "REBUTTAL REPLY to the fact that court never allowed a reply to a rebuttal reply and to the Defendant's REPLY TO BETTWIESER'S CLOSING ARGUMENTS as untimely. Objections are based on fact and law including, and not limited to I.R.C.P. 6(b) and the supporting affidavit. Bettwieser requests the Court deny the Defendant's filings of October 31, 2008 and find that Bettwieser did timely serve and the Defendant's did receive his closing arguments.

1.

ARGUMENT

1) Closing Argument:

The court gave instruction that October 24, 2008 at 4:00 was the deadline for reply to the closing arguments. The Defendant's stated they never were served a closing argument and so it should be allowed to comment when it had in hand.

For argument lets state that they were not served, this still would not preclude a reply by the Defendant's by October 24, 2008 or to seek application for an extension. The Defendant's didn't reply because they new that one was served and that they just refused it. They also could have checked the filing with the court to see that it was filed, They could have replied on the 24th that Bettwieser never submitted a closing argument and so then could have continued to argue that the court must give authority to their closing argument absent any by Bettwieser.

Even if they failed reply or wanted to give a late rely they must still seek court approval for an extension, before or after the deadline for filing, by motion before doing so. I.R.C.P. 6(b)

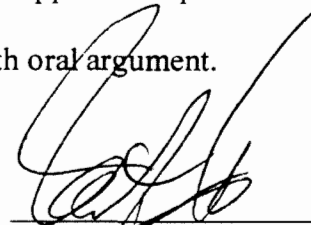
We can see from Bettwieser's affidavit and the deceitful language of the Defendant's replies and no copy of the envelope appended and no seal affixed to the affidavit of Heather Hoyle and no motions for extensions or for additional argument and the history of non-crebility of the people, that the filings of October 31 2008 should be denied and or stricken . The court must conclude that the Defendant's were timely served Bettwieser's closing arguments.

2) Rebuttal Reply.

Secondly, the Defendant's gave reply to Bettwieser's Rebuttal Reply to Defendant's closing arguments. Bettwieser never gave response to Defendant's Rebuttal reply nor did the court allow a reply to the rebuttal response. When would it end. There would continually be replies to Rebuttal replies, if allowed. In this case it was not. Additionally the reply's were to be simultaneously done. By the Defendant's refusing delivery of the closing argument it allowed itself unauthorized to respond to both the closing arguments and rebuttal reply without simultaneous filings.

As set forth the court should deny and or strike the Dendnant's filings of October 31, 2008. The court should order the defendant's to appear and produce the envelope it was sent in and should set this matter for hearing with oral argument.

Dated this 7th day of November, 2008



Martin Bettwieser

STATE OF IDAHO)
)ss
County of Ada)

**AFFIDAVIT OF MARTIN BETTWIESER IN SUPPORT OF HIS OBJECTION TO
DEFENDANT'S REPLY AND REBUTTAL REBUTTAL REPLY TO
BETTWIESER'S CLOSING ARGUMENTS.**

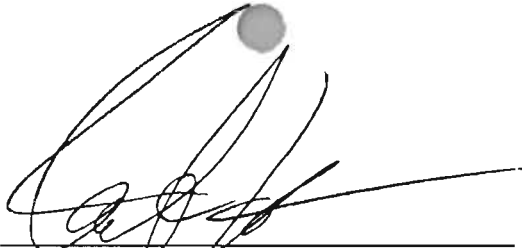
Martin Bettwieser being duly sworn upon oath deposes and states the following:

1. That I am the Plaintiff in this case and am over the age of 18 and have full knowledge of all facts, events etc pertaining to this case.
2. That on September 30, 2008 in the court room of Judge Patrick Owen, the Judge gave instructions for the closing arguments which consisted of simultaneous filings of the closing arguments on October 17, 2008 by 4:00pm and with

simultaneous replies to the closing arguments a week later. No reply to the reply was given or allowed.

3. That the Defendants mailed their closing argument to Bettwieser on October 17, 2008 and Bettwieser did the same and tendered \$1.01 postage to the large envelope according the postal meter.
4. That the next week I received back in the mail the large envelope with a postal sticker stating that Miller and McDevitt had refused delivery. It was posted as an additional 33 cents needed post postage.
5. The next day I affixed another stamp to the large envelope, pulled the refused sticker and crossed out the postage due and re-mailed it and I have not received it back since.
6. That I am and have been a carrier for the United States Postal Service for many years and know the procedures for postage due envelopes and large envelopes.
7. That when the postage that was used to mail an article is short a minimal amount on postage the Postal Service will give it to the carrier to deliver to the people it was addressed to and the carrier will deliver it and include an envelope stating that the carrier has paid the additional postage to allow for speeding delivery and without delay of the mail and that the party should put the 33 cents in the envelope to reimburse the carrier. Sometimes the people forget or just don't pay and the carrier doesn't care because more times than not the carrier is overcompensated by the appreciative party. I have never had a customer refuse a postage due of such a minimal amount, of which I had pre-paid, nor have I known any carrier that it had happened to in my many years of service
8. That in order for Miller and McDevitt to refuse the envelope it would have had to had the envelope in its possession before refusing it and or would have had to known who it was from before refusing the envelope.
9. That the copy of the Affidavit of Heather Hoyle I was served with does not contain the seal of the Notary.
10. That Ms. Hoyle on a previous occasion, September 10, 2008, gave certification that she personally hand delivered documents to me at my residence. After I objected to that certification Mr. Chas McDevitt gave affidavit that it was he that hand delivered those documents to my residence and not to me and no by Ms. Hoyle.

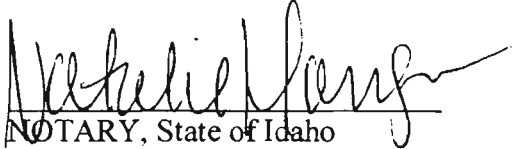
Dated this 7th day of November, 2008



Martin Bettwieser

SUBSCRIBED AND SWORN BEFORE ME this 7 day of November, 2008






NOTARY, State of Idaho
Residing at Boise
My commission expire

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the OBJECTION with SUPPORTIN AFFIDAVIT to be served by prepaid first class mail on the 7th day of November, 2008 to the following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701



Martin Bettwieser

Karel Lehrman

From: Kasey Redlich <kaseyred@gmail.com>
Sent: Monday, October 24, 2011 4:27 PM
To: Karel Lehrman
Subject: Re: #37396 (dc #cvoc 0711060)

Hi, Karel,
Here is what I can tell you regarding these transcripts:

No record of a hearing on Aug. 7, 2008,
although at that time, Judge Owen did not do telephone hearings on the record.

~~August 19, 2008~~ was already prepared for the original appeal. (See lodgement) → ~~1/27~~

February 17, 2009 - hearing took place. (I will prepare for appeal.)

January 19, 2011 - hearing took place. (I will prepare for appeal.)

January 27, 2001 - is actually 2011. - (I will prepare for appeal.)

I have not submitted an estimate to him yet. It looks like he will need to
submit payment for \$147.75 to cover the additional transcripts.

I will mail him an estimate tomorrow.

Thanks,

Kasey Redlich

On Thu, Oct 20, 2011 at 2:42 PM, Karel Lehrman <klehrman@idcourts.net> wrote:

Kasey – here are the hearings that we talked about.

Telephone hearing of August 7, 2008

Nothing on the District Court ROA

August 19, 2008

February 17, 2009

January 19, 2011

January 27, 2001
2001).

(may be 2010 or 2011 because case was not open 1-27-

Thanks so much for your help on this. karel

Chas. F. McDevitt (ISB No. 835)
McDevitt & Miller LLP
420 West Bannock Street
P.O. Box 2564—Boise 83701
Boise, Idaho 83702
T: 208.343.7500
F: 208.336.6912
chas@mcdevitt-miller.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA,

MARTIN BETTWIESER

Plaintiff,

vs.

NEW YORK IRRIGATION DISTRICT AND
DIRECTORS
RICHARD MURGOITIO, B. MCDEVITT,
PAUL WARRICK AND VELTA HARWOOD

Defendants

No. CV-OC-0711060

**AFFIDAVIT AND MEMORANDUM OF
COSTS AND DISBURSEMENTS**

STATE OF IDAHO)

: ss

County of Ada)

Chas F. McDevitt, being first duly sworn on oath deposes and states as follows:

1. That he is a member of the firm of McDevitt & Miller LLP, attorneys of record for the Defendants herein who have been retained by Defendants for the purposes of defending this action on behalf of the Defendants; that said attorney has diligently defended this action on Defendants behalf.

2. That Schedule A appended hereto and made a part hereof as if set forth at length herein, contains a full, true, and correct statement of Defendants' costs and disbursements expended in this action, each item having been actually and necessarily incurred, and your affiant alleges on information and belief that said costs and disbursements claimed are in compliance with Rule 54, I.R.C.P.; Total costs of Schedule A: \$4,553.02.

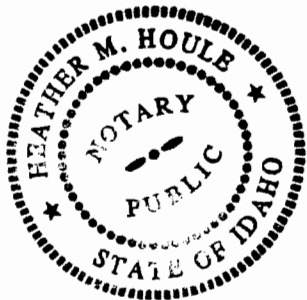
3. That this Affidavit and Memorandum has been timely filed.

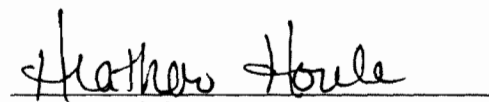
Further your Affiant sayeth not.

Dated this 13th day of January, 2009.


Chas F. McDevitt

SUBSCRIBED AND SWORN to before me this 13th day of January, 2009.




Notary Public for IDAHO
Residing at Boise
Commission Exp.: 6/20/12

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2009, I caused to be served, via email and telecopy, a true and correct copy of the foregoing document, upon:

Martin Bettwieser
3862 Yorktown Way
Boise, ID 83706

Hand Delivered	<input checked="" type="checkbox"/>
U.S. Mail	<input checked="" type="checkbox"/>
Fax	<input checked="" type="checkbox"/>
Fed. Express	<input checked="" type="checkbox"/>
Email	<input checked="" type="checkbox"/>

McDEVITT & MILLER LLP

BY Heather Houle, Legal Asst.

SCHEDULE A

I.R.C.P. Rule 54(d)(1) Costs as a Matter of Right:

7/18/07	Ada County Court	Filing Fees	\$58.00
10/08/07	Custom Recordings	Tapes of Hearing	\$27.35
10/30/07	Tucker & Associates	Depositions	\$424.80
8/27/08	Tucker & Associates	Depositions	\$508.52
8/29/08	Ada County Clerk	Certified Copies	\$32.60
9/18/08	Burnham Habel & Assoc.	Depositions	\$894.65
		TOTAL:	\$1,945.92

Discretionary Costs:

2/7/08	Kinko's	Copies of Exhibits	\$2,204.00
7/14/08	Kasey Ridlich, CSR	Transcript of Hearing	\$207.50
	Copies		\$195.60
(Copies of documents to provide Plaintiff copies of Requested Production Discovery)			
		TOTAL:	\$2,607.10

The foregoing was necessary to meet Plaintiff's claims as to what Court had ordered and to make copies of oversized certified court records of initial court approval of creation of the New York Irrigation District to meet Plaintiff's claim of improper creation of District.

GRAND TOTAL: \$4,553.02

Chas. F. McDevitt (ISB No. 835)
McDevitt & Miller LLP
420 West Bannock Street
P.O. Box 2564—Boise 83701
Boise, Idaho 83702
T: 208.343.7500
F: 208.336.6912
chas@mcdevitt-miller.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER

Plaintiff,

vs.

NEW YORK IRRIGATION DISTRICT
AND DIRECTORS
RICHARD MURGOITIO, B. MCDEVITT,
PAUL WARRICK AND VELTA
HARWOOD

Defendants

No. CV-OC-0711060

**MOTION TO FIX COSTS AND AMEND
JUDGMENT**

Comes now the Defendants, New York Irrigation District, Richard Murgoitio, Brian McDevitt, Paul Warrick and Velta Harwood, by and through their attorneys of record McDevitt & Miller, LLP, appearing through Chas F. McDevitt, and move this honorable Court as follows:

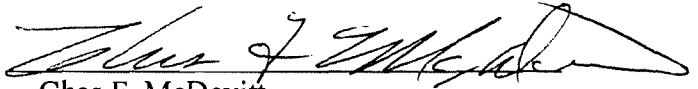
Defendants having filed their Memorandum of Costs herein, ask the Court to fix the costs pursuant to said Memorandum and the Idaho Rules of Civil Procedure.

Defendants further pray that the Court will amend the Judgment entered herein by affixing therein the costs allowed by this Court.

Further these Defendants sayeth not.

Dated this 27th day of January, 2009.

McDevitt & Miller LLP

By: 
Chas F. McDevitt
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of January, 2009, I caused to be served, via email and telecopy, a true and correct copy of the foregoing document, upon:

Martin Bettwieser
3862 Yorktown Way
Boise, ID 83706

Hand Delivered	☑
U.S. Mail	☑
Fax	☑
Fed. Express	☑
Email	☑

McDEVITT & MILLER LLP

BY Heather Houli, Legal Sec.

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	OBJECTION TO "AFFIDAVIT
	)	AND MEMORANDUM OF COSTS
NEW YORK IRRIGATION DISTRICT	)	AND DISBURSEMENTS
et,al;)	
Defendant's)	
_____)	

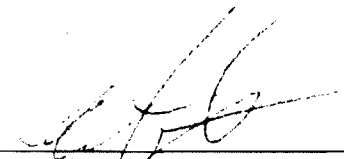
COMES NOW the Plaintiff Martin Bettwieser and does object to the Defendant's AFFIDAVIT AND MEMORANDUM OF COSTS AND DISBURSEMENT'S as follows.

In order to receive consideration of costs a party must file a memorandum of cost pursuant to IRCP 54 (d)(5) . No where is there a memorandum drafted in that pleading. The Defendant' filed an affidavit not a memorandum of costs. An affidavit is not a memorandum just because the title may assert the word MEMORANDUM in it's heading Even so the affidavit is vague with ambiguous language and is absent any justifiable statutory authority, or otherwise, to validate the affidavit, absent a memorandum so as to be able to adequately address it. It only cites "Rule 54 I.R.C.P."

in the affidavit. There is no Rule 54 I.R.C.P. Therefore the memorandum is insufficient and lacks authority which disables it and makes it as untimely filed .

Further more the defendant`s have not prevailed in this action nor did they incur the costs cited nor were they correct, necessary, reasonable, actual or just. Bettwieser is entitled to his costs pursuant to I.R.C.P. 37(c) and his pre-trial motions and issues at trial.

Dated this 27th day of January, 2009

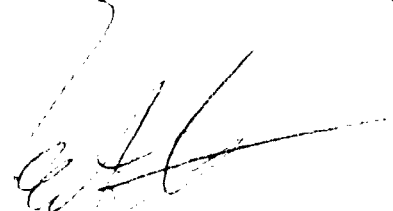


Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the OBJECTION .to be served by pre-paid first class mail on the 27th day of January, 2009 to the following;

The office of Chas McDevitt
P.O. Box 2564
Boise, Idaho 83701



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	OPPOSITION TO DEFENDANT'S
	)	MOTION TO FIX COST'S AND
NEW YORK IRRIGATION DISTRICT	)	AMEND JUDGEMENT
et,al;)	
Defendant's)	
_____)	

COMES NOW the Plaintiff Martin Bettwieser and does oppose and or object the amending of the Judgement that was entered in this action on January 7, 2009 as set forth herein and pray that it be denied with prejudice.

HISTORY

The court issued a finding of fact and conclusion of law on December 2, 2008 after pre-trial proceedings and a trial on the merits. The parties filed closing arguments before the findings were made. In the Defendant's closing arguments an awarding of costs were not requested. The courts findings of fact and conclusion of law never awarded costs to either party. The court directed the Defendant's to supply a Judgment consistent with the findings. The court received a proposed Judgment on December 12, 2008 which

included an “awarding of costs to the Defendant’s.” On January 7, 2008 the court struck that language from the proposed Judgment of awarding costs to defendant’s and signed it. On January 13, an affidavit of costs and disbursements was filed by the Defendant’s. On January 27 2009 Bettwieser filed an objection to the affidavit of costs and disbursements of which should be disallowed. On January 27, 2009 the Defendant’s filed a Motion to Amend the Judgment of the court which was to amend that judgment by fixing and awarding the costs that were denied on January 7, 2008. The Defendant’s now want the court to amend the Judgment by fixing and award costs.

ARGUMENT

The Defendant’s motion to amend the judgement is vague and ambiguous and absent as to any legal authority it relies on to support it’s motion to amend the judgement. It cites no statute or rule of which to base a full opposition although a motion to amend a judgment is grounded under *I.R.C.P.. 59(e)* which allows a motion to filed 14 days after entry of the judgment. *IRCP 6(b)* does not allow an enlargement of time to file a motion under *IRCP 59(e)*. The judgment was entered on January 7, 2009 and the motion to amend was filed January 27, 2009, past the 14 day limit given in those rules. The Idaho Supreme Court has consistently held that timeliness is essential to a motion to amend.

Even if can be construed that the affidavit of costs filed by the defendant’s was properly and timely brought, the affidavit that was filed was not accompanied by the requisite motion to amend the judgement. Neither is it established that the defendant’s are entitled to any costs as matter of right or the law or to have them fixed. An affidavit is not a timely motion to amend the judgment. The Defendant’s pleading have not been


specific as to the grounds that it is entitled to nor did the court in its finding establish entitlement or that they prevailed.

Idaho Code 12-117 would be the appropriate statutory basis to claim costs as a prevailing authority. Absent a showing that Bettwieser acted without reasonable basis in fact or law, an award would be declined. *Ada County v. Fuhrman* 140 Idaho 230
Cox v. Department of Ins. 121 Idaho 143

Furthermore, Bettwieser objects to the Defendants serving a Notice of Hearing on my behalf on issues that I present to the court without my knowledge, availability or consent and schedules a hearing before the objection is scheduled or heard and before the time for objection has past.

BETTWIESER GIVES NOTICE to the Court and the Defendant's that he is not available for the February 17, 2009 hearing, in fact, due to work issues I am not available for any hearing until after March 14, 2009 and would not have scheduled a hearing until after that date. . With the Defendant's not requesting oral argument and based on the arguments subscribed herein and as not properly brought and with no entitlement, justice can be served and the court would be well in its bounds of justice to deny said motion without hearing.

Dated this 9th Day February, 2009



Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the OPPOSITION TO AMEND JUDGEMENT .to be served By hand delivery on the 10 day of February, 2009 to the following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701



Martin Bettwieser

MAR 12 2009

DAVID FARNSWORTH, Clerk
BY J. HENDALL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)
Plaintiff,)
V.)
NEW YORK IRRIGATION DISTRICT)
et.al.)
Defendant's)

CASE NO. CV-OC- 0711060

AFFIDAVIT OF SERVICE

I, Rudy Bybee, who being duly sworn, depose and say that on Feb 25, 2009

I personally served Heather Hoyle a Subpoena Duce Tecum a her place of business at
420 W. Bannock St. Boise Idaho

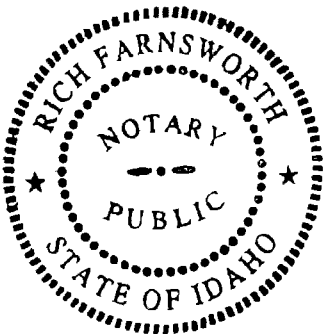
I am over the age of 18 and not a party to this action.

Dated this 02/27/09 Day of ~~July~~, 2008

Rudy Bybee
Rudy Bybee

SUBSCRIBED AND SWORN BEFORE ME this 27 Day of ~~July~~-2008

February 2009



Rich Farnsworth
NOTARY PUBLIC, State of Idaho
Residing at Boise, my commission expires:

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plainiff,	)	CASE NO. CV-OC-0711060
)	
v.	)	SUBPOENA
	)	DUCE TECUM
NEW YORK IRRIGATION DISTRICT,	)	HEATHER HOYLE
Et; al,)	
Defendants,)	

THE STATE OF IDAHO SENDS GREETINGS TO: HEATHER HOYLE

Boise, Idaho

WE COMMAND, that all singular business and excuses be laid aside, and that you are to produce for inspection and or copying the following documents or materials and appear at hearing concerning those documents and materials, including electronically stored information, that will be noticed up at a later time. You have 30 day from receipt of this subpoena to produce those documents. If they can be produced for inspection prior to the end of the 30 days you are to let the Plaintiff know when he can inspect them. Inspection will be pursuant to IRCP 45(b)

You are commanded to produce for coping and or inspection:

- 1) A receipt with showing and evidence of method of payment for filing fees in the case.

- 2) Receipts, with showing and evidence of method of payment, for payments of services from custom recordings for 10/08/07
- 3) Receipts, with showing and evidence of method of payment, for payment of depositions of Tucker & Associates of 10/30/07, and inspection only of the depositions.
- 4) Receipts, with showing and evidence of method of payment, for payment of depositions of Tucker & Associates of 8/27/08, and inspection only of the depositions.
- 5) Receipt, with showing and evidence of method of payment, for certified copies from Ada County Clerk on 8/29/08 and inspection of what the certified copies were.
- 6) Receipt, with showing and evidence of method of payment for depositions of Burnum Habel & Assoc. of 9/18/08, and for only inspection of those depositions.
- 7) Receipt, with showing and evidence of method of payment of "Schedule A" Discretionary Costs of 2/7/08, Kinkos, Copies of Exhibits. Be specific and provide all items copied on 2/7/08 for inspection.
- 8) Receipt, with showing and evidence of method of payment for Kasey Ridlick, CSR Transcript of hearing, 7/14/08, with inspection of the transcript only.
- 9) That any and all information this recorded and or stored electronically will be made available for inspection and or copying.

You are also commanded to appear in the court room of the District Judge Patrick Own at 200 Front St. Boise, Idaho. at a date and time later specified.

Failure to attend at the place and time specified or to produce or permit copying or inspection that you may be held in contempt of court and the aggrieved party will recover the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena,

Dated this 15 day of February, 2008

By order of the court:

J. DAVID NAVARRO, CLERK


DEPUTY CLERK

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

~~FILED~~
MAR 17 2009
J. DAN...
BY KATHY J. STEIN
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

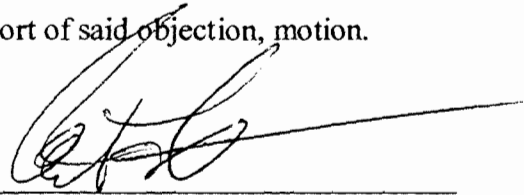
MARTIN BETTWIESER)
Plaintiff,)
vs.)
NEW YORK IRRIGATION DISTRICT)
et,al;)
Defendant's)

CASE NO. CV-OC-0711060
OBJECTION/ MOTION TO
RECONSIDER

The court having entered an AMENDED JUDGEMENT on March 3, 2009, the Plaintiff Martin Bettwieser does object to that amended Judgment and moves to reconsider to disallow the amended judgment pursuant to IRCP. 7(b)(3), 59(e), 52 (a) and (b) 54(d)(6 and 7), 59(e) and Idaho Code 12-117 and the supporting brief.

Bettwieser will file a timely brief or otherwise in support of said objection, motion.

Dated this 3rd day of March, 2009

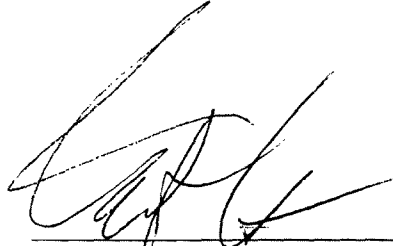


Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the OBJECTION/MOTION TO RECONSIDER.to be served by prepaid first class mail on the 3rd day of March, 2009 to the following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701

A handwritten signature in black ink, appearing to read 'Martin Bettwieser', written over a horizontal line.

Martin Bettwieser

MAR 31 2009

J. DAVID ...
...
...

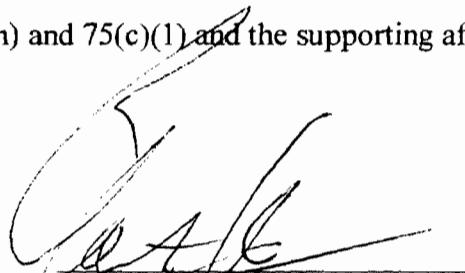
Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	MOTION TO EXTEND TIME TO
	)	FILE BRIEF/ MOTION TO COMPELL/
NEW YORK IRRIGATION DISTRICT	)	MOTION FOR CONTEMPT
et,al;)	
Defendant's)	
_____)	

COMES NOW the Plaintiff, Martin Bettwieser and does move the court for an order to extend the time to file a brief pursuant to the IRCP. 6(b) and the supporting affidavit. For an order to compel Heather Hoyle to comply with a subpoena pursuant to IRCP. 45(b) and the supporting affidavit and for the court to initiate a contempt proceeding against Heather Hoyle pursuant to IRCP 45(h) and 75(c)(1) and the supporting affidavit.

Dated this 30 Day of March 2009



Martin Bettwieser

STATE OF IDAHO)
)ss
County of Ada)

AFFIDAVIT OF MARTIN BETTWIESER IN SUPPORT OF MOTION TO EXTEND
TIME TO FILE A BRIEF/ MOTION TO COMPEL/MOTION FOR CONTEMPT

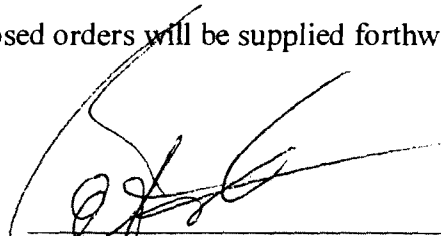
Martin Bettwieser being duly sworn upon oath deposes and states the following:

1. That I am over the age of 18 and am a party to this action have full and personal knowledge of all the happenings and events of this action and affidavit.
2. That Heather Hoyle is the legal assistant for Chas. McDevitt who represents the Defendant's in this action.
3. That she was personally served a Subpoena Duce Tecum on February 25, 2009 at approx. 3:30 p.m. at the office of McDevitt and Miller at 420 W. Bannock in Boise and that I was there when she was served and said Subpoena and Affidavit of Service is file with this court.
4. That the subpoena has not been opposed or been attempt to have quashed.
5. That documents and materials were requested for review and or copying and inspection 30 days from date of service or if sooner were to notify me.
6. That March 27, 2007 was the date for inspection of the documents and that I went to the office of Mcdevitt and Miller to review and inspect at approx. 3:50 p.m. and the office was locked up.
7. That I was relying on those documents to submit my brief in support of the motion to reconsider that was filed on March 17, 2009 and that the brief was due to be filed by March 31, 2009.
8. That in order for me to file a proper and adequate brief I need to review the items requested in the subpoena and so request the court to issue an order to compel the inspection and or copying of the materials requested and a reasonable time of 14 days to file his brief after inspection and or copying.
9. That Ms. Hoyle nor any one at the office has tried to contact me by phone or mail or in person to notify me that there was not to be compliance with the subpoena nor that they would not be available at that date or time. I was previously told by Ms. Hoyle that the office is open until 5:00 p.m. on Fridays and I had no idea that she would not be in compliance with the subpoena.
10. That it would be appropriate for the court to initiate a contempt proceeding against Ms Hoyle for obstructing justice as this is not the first time that she has obstructed

justice and prolonged the proceedings in this action by also filing a false certification of service of various documents by her by hand delivery of September 10, 2008. Those documents with objections by me are made part of the record

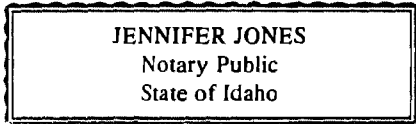
Therefore it would be appropriate for the court to extend the time for the filing of my brief and to compel to have the documents produced for copying and or inspection and initiate a contempt proceeding for not obeying a lawful subpoena and for obstructing justice as outlined in the affidavit. The proposed orders will be supplied forthwith.

Dated this 31st day of March, 2009



Martin Bettwieser

SUBSCRIBED AND SWORN BEFORE me this 31 day of March, 2009



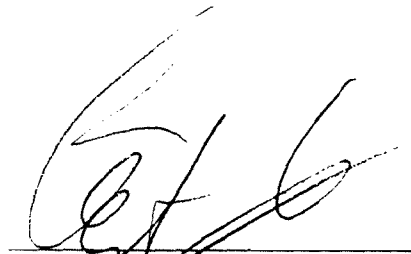


Notary Public, State of Idaho
Residing at Boise, my commission expires: 10/30/2012

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the MOTION TO EXTEND/COMPEL/CONTEMPT with supporting affidavit to be served by prepaid first class mail on the 31st day of March, 2009 to the following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701



Martin Bettwieser

JUL 8 2009

J. DAVID NAVARRO, Clerk
By *[Signature]*
DEPUTY

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER,

Plaintiff,

vs.

NEW YORK IRRIGATION DISTRICT
AND DIRECTORS RICHARD
MURGOITIO, BRIAN MCDEVITT, PAUL
WARRICK AND VELTA HARWOOD,

Defendants.

Case No. CV-OC-0711060

NOTICE OF INTENT TO RULE ON
PENDING MOTIONS WHICH HAVE
NOT BEEN NOTICED FOR HEARING

This matter was tried to the Court on September 29 and 30, 2008. Thereafter the parties submitted written closing arguments. On December 2, 2008, the Court entered its Findings of Fact and Conclusions of Law, which decided the case in favor of defendants. Thereafter, on January 7, 2009, the Court entered a Judgment in favor of defendants.¹

On January 13, 2009, counsel for defendants filed an Affidavit and Memorandum of Costs and Disbursements seeking an award of costs pursuant to I.R.C.P. 54. On January 27, 2009, defendants filed a motion to fix costs and to amend the judgment to reflect an award of costs to defendants. On January 27, 2009, Plaintiff Martin Bettwieser (Bettwieser) filed an objection to defendants' request for an award of costs. In the objection, Bettwieser asserted that: (1) the Affidavit and Memorandum of Costs and Disbursements was an affidavit and not a proper

¹ On January 20, 2009, Bettwieser filed a motion to reconsider the Court's Findings of Fact and Conclusions of Law. However, on February 3, 2009, Bettwieser withdrew his motion to reconsider.

h

1 memorandum as specified in I.R.C.P. 54(d)(5); (2) the affidavit was vague and ambiguous; and (3)
2 the affidavit and memorandum refers to Rule 54 I.R.C.P. and Bettwieser argues “[t]here is no Rule
3 54 I.R.C.P.” Lastly, Bettwieser argued that even if defendants prevailed, they did not incur the
4 costs claimed, and the costs were not justified.

5 On January 30, 2009, defendants filed a Notice of Hearing indicating that on February 17,
6 2009 at 3:00 p.m. the defendants would bring on for hearing Defendants’ Motion to Fix Costs and
7 Amend Judgment to include an award of costs.² The Certificate of Service shows that Bettwieser
8 was served by mail at his record address.

9 On February 10, 2009, Bettwieser filed a further opposition to defendants’ motion for
10 costs. In this pleading, Bettwieser argued that defendants’ memorandum of costs was filed
11 untimely. Bettwieser also argued that defendants did not prevail and should not be awarded costs.
12 Bettwieser also asserted he had to work and was unavailable for hearing on February 17, 2009 and
13 would be unavailable until after March 14, 2009. Bettwieser took no other action to reschedule or
14 request that the hearing be rescheduled to some other date and time.
15

16 The Court conducted a hearing on defendants’ motion for costs at 3:00 p.m. on February
17 17, 2009. Bettwieser did not appear. The Court found that defendants were the prevailing party,
18 made inquiry as to each item of cost requested, made certain findings and directed counsel for
19 defendants to submit an appropriate form of order. The Court entered an Amended Judgment
20 consistent with its rulings on the costs requests on March 3, 2009.
21

22 On March 17, 2009, Bettwieser filed an “Objection/Motion to Reconsider” the Amended
23 Judgment. The objection was not supported by a memorandum as required by Fourth District
24

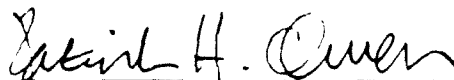
25 ² As noted above, Bettwieser withdrew the motion to reconsider on February 3, 2009. See note 1 above.

1 Court Local Rule 8.1. Instead, the objection stated that a brief would be filed later. On March 31,
2 2009, Bettwieser filed a motion for: (1) an order to extend the time to file a brief; (2) an order to
3 compel Heather Hoyle to comply with a subpoena; and (3) the Court to initiate a contempt
4 proceeding against Heather Hoyle. In an affidavit filed with this motion, Bettwieser asserts that,
5 on February 25, 2009 he served a subpoena duces tecum on Ms. Hoyle, an employee of
6 defendants' counsel, Charles F. McDevitt. Bettwieser asserts that Ms. Hoyle failed to comply
7 with the subpoena and should be held in contempt of court. Bettwieser asserts that the items he
8 attempted to subpoena were needed for his brief in support of his motion to reconsider. Bettwieser
9 has not taken any steps to notice or request a hearing upon either the Objection/Motion to
10 Reconsider the Amended Judgment, or the Motion to Extend Time to File Brief/Motion to
11 Compel/Motion for Contempt.
12

13 Based upon its review of the file, the Court gives this notice that it intends to rule on the
14 remaining outstanding matters in this case. The Court has concluded that oral argument is not
15 needed. If defendants wish to submit any response or objection to any pending matters, the Court
16 directs defendants to make such written submissions within seven (7) days of the entry of this
17 order. Bettwieser shall have three (3) days to file any written reply. Thereafter, the Court intends
18 to rule on all outstanding matters.
19

20 IT IS SO ORDERED.

21 Dated this 1 day of ^{July}~~June~~ 2009.

22 

23 Patrick H. Owen
24 District Judge

1 I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by
2 United States Mail, one copy of the NOTICE OF INTENT TO RULE ON PENDING MOTIONS
3 WHICH HAVE NOT BEEN NOTICED FOR HEARING as notice pursuant to Rule 77(d)
4 I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

5 MARTIN BETTWIESER
6 3862 YORKTOWN WAY
7 BOISE IDAHO 83706

8 CHAS. F. MCDEVITT
9 MCDEVITT & MILLER LLP
10 420 WEST BANNOCK STREET
11 BOISE IDAHO 83702
12
13
14
15
16
17
18
19
20
21

22 J. DAVID NAVARRO
23 Clerk of the District Court
24 Ada County, Idaho

Date: 7/1/09

By *Martha Lyke*
Deputy Clerk

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

NO. _____ FILED _____
M. _____ P.M. _____

JUL 16 2009

J. DAVID NAVARRO, Clerk
By J. RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	REPLY TO DEFENDANT'S
	)	NON-RESPONSE TO PLAINTIFF'S
NEW YORK IRRIGATION DISTRICT	)	VARIOUS OUTSTANDING MOTIONS
et,al;	)	AND AFFIDAVIT
Defendant's)	
_____)	

The court having given notice of it's intent to rule on the outstanding motions brought before this court by the Plaintiff, ample time having expired for response or objection from the Defendant's and the court giving the defendant's further opportunity to respond or object to those matters, and giving Bettwieser time to reply in it's notice of intent to rule dated July 1, 2009 and Bettwieser receiving no timely response or objection to the outstanding motions or requests for orders, Bettwieser replies as follows:

BACKGROUND

The court entered Judgement on the issues after trial and a findings of fact and conclusion of law and an Errata of findings of fact and Conclusion of Law on January 7, 1.

2009. On January 13, 2009 the Defendant's filed an Affidavit and Memorandum of Costs and Disbursements. Bettwieser filed a Motion to Reconsider and for Additional Finds of Fact and Conclusions of Law on January 20, 2009. On January 27 2009 both the Plaintiff and the Defendant's filed Motions. Bettwieser filed Objections to " Affidavit and Memorandum of Costs and Disbursements and the Defendant's filed a Motion to Fix Costs and Amend the Judgment. On January 30, 2009 the Defendant's noticed up a hearing on it's motions and Bettwieser's also. On February 10, 2009 Bettwieser objected to the Defendant's Motion of January 27, 2009 and objected to the Defendant's overstepping it's bounds by noticing up a hearing on Bettwieser motion. The objection also was giving notice to the court and parties that Bettwieser was not available on February 17, for a hearing. Bettwieser further objected to the Defendant's motion as stated therein. It should be noted that Bettwieser motion of January 20, 2009 was withdrawn on February 3, 2009.

The court held hearing on February 17, 2009 with no evidence taken or produced nor testimony. There were various additional findings made and the court ask Mr. Mcdevitt if he wanted an Order or Amended Judgment of which he stated he wanted an Amended Judgment and was directed to draft it. On February 25, 2009 Mr. McDevitt's personal legal and office person was subpoenaed to produce various documents for inspection and or copying that dealt with the cost and disbursements of the Defendant's and was given 30 days to respond or produce. (See Exhibits 1,2, and court file) Affidavit of Service was filed on March 2, 2009 with the original subpoena. On March 3, 2009 the court entered an Amended Judgment.

On March 17, 2009 Bettwieser filed an Objection / Motion to Reconsider of the Amended Judgement of March 3, 2009 and stated that he would "file a timely brief or otherwise in support of said objection ,motion." On March 31, 2009 Bettwieser filed a Motion to Extend time to File Brief / Motion to Compel / Motion For Contempt with Supporting Affidavit due to the fact that the Defendant's did not object or try to quash the subpoena and just locks the doors to keep Bettwieser out of the office. On April 9, 2009 Bettwieser submitted to the court a proposed order with a letter of instruction for the court to set the matters for hearing so that appropriate service could be made (See Attached Exhibits #3 and 4) On July 1, 2009 the court served a Notice of Intent to Rule on Pending Motion which have not been Noticed for hearing.

REPLY

The defendants were given notice that they had 7 days to respond or object on July 1, 2009, if they wished. Given the fact that 3 days would be added to the response, I.R.C.P.. 6(e)(1), and excluding the week end, the response should have been filed and served by July 13, 2009. Bettwieser would have until July 20 to reply. No response or objections have been filed or served on Bettwieser as of the date of this filing.

After a motion has been filed the moving party has the option of filing a memorandum, or not, with the motion. Under *I.R.C.P. 7(b)(3)(C)* the rule allows 14 days to file a memorandum after filing a motion. Bettwieser stated he intended to file a timely brief or otherwise in support of that motion. The Defendant's then would have 7 days to respond before the hearing. This is a catch 22 situation. No memorandum could be submitted so a hearing could be scheduled, no opposition could be conducted until hearing was set, *I.R.C.P. 7(b)(3)(B)*.

The court has and can set a motion hearing on it's own initiative, *I.R.C.P. 6(e)(2)*. A hearing is defined as " a proceeding wherein evidence is taken for the purpose of determining an issue of fact and reaching a decision on the basis of that evidence, *426 P. 2d 942, 951: Barrons Law Dictionary Third Edition*: The Defendant's have ignored the subpoena so that a memorandum could not be filed nor a hearing set. Although a hearing was still had on the defendant's motion to fix costs and amend judgement, even after notice was given that Bettwieser could not be present for that hearing. A hearing has not been set or had on Bettwieser's objection to the motion to fix costs and amend judgement nor has there been a hearing on Bettwieser's objection of the Amended Judgment.

To satisfy due process Bettwieser has to be given the opportunity to present his objection fully to the court. *First Sec. Bank v. Schuffer, 112 Idaho 133, 730 P.2d 1053 (Ct. App. 1986)* *Hooper v. State, 127 Idaho 945, 908 P.2d 1252 (Ct. App. 1995)*

The defendant's do not wish for Bettwieser's to be allowed to verify costs and to fully present his objection with all the relevant information.

Some motions take some time to present to the court, even as long as a year, before they were or can be presented to the court for decision, as in . *Marcher v. Butler 112 Idaho 113, 730 P.2d 1053 (Ct. App. 1986)* In this case the court never took jurisdiction of the matter until the moving party supplied a brief or memorandum after the motion was filed. There fore a memorandum in support of his motion is essential and must be allowed and extended before decision on the main matters

The Defendant's have not objected to Bettwieser's motions nor tried to quash the subpoena pursuant to *I.R.C.P. 45(d)*. A Subpoena Duce Tecum should be obeyed

particularly where Defendant and witnesses failed to obey and failed to take advantage of motion to quash. *Allen Bradley Co. v. Local Union #3 29 F Supp. 759, 761*

Persons are not a liberty to dispense with the command of a subpoena Duce Tecum. *Haney v. Woodward & Lothrop, Inc. 330 F. 2d. 940*

The better rule is that a person should not be permitted to disregard a subpoena that he or she has not challenged and if they fail to timely file an objection / motion to quash, the person may be found in contempt without need for any further court order. *Matter of Certain Complaints C.A. 11th 1986 783 F. 2d 1488-1495* The defendant's in this instance had 30 days to quash the subpoena but choose rather to just lock the office up during business hours and not comply with the subpoena.

Complying with a subpoena or objecting is essential even if it is believed that a subpoena was not properly served there is no excuse to just ignore it. *Benden v. Delvalle 2007 WL 1686322 *2 S.D.N.Y 2007*

Even the Idaho Supreme Court has recognized that if a subpoena was served a person must immediately activate safeguards, or objections if any or waive any excuses *R.E.W. Const. Co. v. District Court of the Third Judicial District. 88 Idaho 426 (1965)*

Generally failure to respond or oppose a motion is also grounds for waiver of any objections and the motion should be granted. This court is no stranger in having to issue orders to compel the defendant's or in denying their motions to quash.

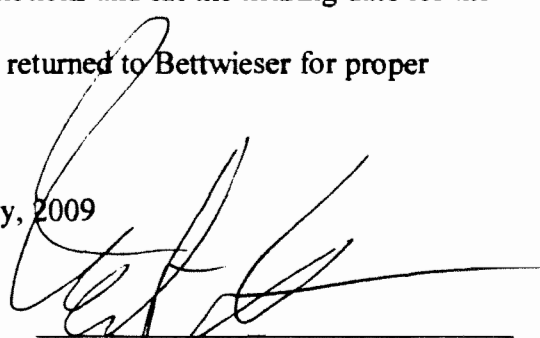
CONCLUSION

Motion have been timely filed in this case and a subpoena has been served so as Bettwieser can properly present and dispose of his motions and objections. The Defendant's have failed to timely respond or object to the motions or subpoena or

respond or object at all even after the court has given additional notice. Failure to do so waives any and all objections from the persons and parties.

Therefore, the court must grant Bettwieser's motions and fix the hearing date for the contempt proceeding with the order supplied and returned to Bettwieser for proper service.

Respectfully submitted this 16th day of July, 2009



Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the REPLY TO DEFENDANT'S NON-RESPONSE TO PLAINTIFF'S VARIOUS MOTIONS AND AFFIDAVIT. to be served by prepaid first class mail on the 16th day of July, 2009 to the following;

The office of Chas McDevitt
420 W. Bannock St.
P.O. BOX 2564
Boise, Idaho 83701



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
v.	)	SUBPOENA
	)	DUCE TECUM
NEW YORK IRRIGATION DISTRICT,	)	HEATHER HOYLE
Et; al,)	
Defendants,)	
_____)	

THE STATE OF IDAHO SENDS GREETINGS TO: HEATHER HOYLE

Boise, Idaho

WE COMMAND, that all singular business and excuses be laid aside, and that you are to produce for inspection and or copying the following documents or materials and appear at hearing concerning those documents and materials, including electronically stored information, that will be noticed up at a later time. You have 30 day from receipt of this subpoena to produce those documents. If they can be produced for inspection prior to the end of the 30 days you are to let the Plaintiff know when he can inspect them. Inspection will be pursuant to IRCP 45(b)

You are commanded to produce for coping and or inspection:

- 1) A receipt with showing and evidence of method of payment for filing fees in the case.

Exhibit 1

A

- 2) Receipts, with showing and evidence of method of payment, for payments of services from custom recordings for 10/08/07
- 3) Receipts, with showing and evidence of method of payment, for payment of depositions of Tucker & Associates of 10/30/07, and inspection only of the depositions.
- 4) Receipts, with showing and evidence of method of payment, for payment of depositions of Tucker & Associates of 8/27/08, and inspection only of the depositions.
- 5) Receipt, with showing and evidence of method of payment, for certified copies from Ada County Clerk on 8/29/08 and inspection of what the certified copies were.
- 6) Receipt, with showing and evidence of method of payment for depositions of Burnum Habel & Assoc. of 9/18/08, and for only inspection of those depositions.
- 7) Receipt, with showing and evidence of method of payment of "Schedule A" Discretionary Costs of 2/7/08, Kinkos, Copies of Exhibits. Be specific and provide all items copied on 2/7/08 for inspection.
- 8) Receipt, with showing and evidence of method of payment for Kasey Ridlick, CSR Transcript of hearing, 7/14/08, with inspection of the transcript only.
- 9) That any and all information this recorded and or stored electronically will be made available for inspection and or copying.

You are also commanded to appear in the court room of the District Judge Patrick Own at 200 Front St. Boise, Idaho. at a date and time later specified.

Failure to attend at the place and time specified or to produce or permit copying or inspection that you may be held in contempt of court and the aggrieved party will recover the sum of \$100 and all damages which the party may sustain by your failure to comply with this subpoena,

Dated this 25 day of FEBRUARY, 2008 2007

By order of the court:

J. DAVID NAVARRO, CLERK


DEPUTY CLERK

Exhibit 1

MAR 02 2009

J. DAVID NAVARRO, Clerk
By J. RANDALL

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)
Plaintiff,)
)
V.)
)
NEW YORK IRRIGATION DISTRICT)
et,al.)
Defendant's)
_____)

CASE NO. CV-OC- 0711060

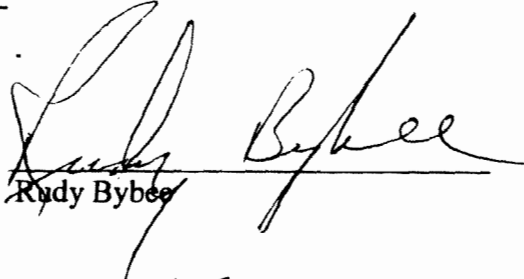
AFFIDAVIT OF SERVICE

I, Rudy Bybee, who being duly sworn, depose and say that on Feb 25, 2009

I personally served Heather Hoyle a Subpoena Duce Tecum a her place of business at
420 W. Bannock St. Boise Idaho

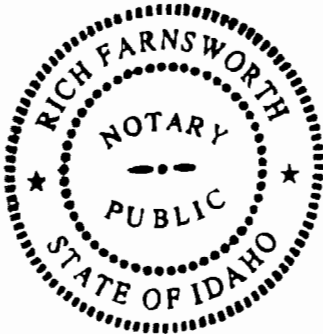
I am over the age of 18 and not a party to this action.

Dated this 02/27/09 Day of ~~July~~, 2008


Rudy Bybee

SUBSCRIBED AND SWORN BEFORE ME this 27 Day of ~~July~~ 2008

February 2009



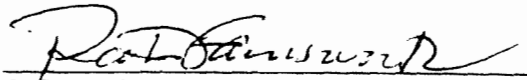

NOTARY PUBLIC, State of Idaho
Residing at Boise, my commission expires:

Exhibit 2

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706

To: Patrick Owen
District Judge
200 Front St.
Boise, Idaho 83702

RECEIVED

APR 09 2009

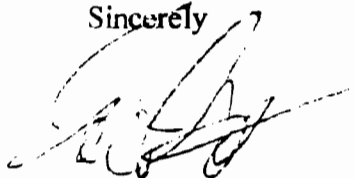
ADA COUNTY

Dear Sir:

Enclosed are the Orders prepared for signing and scheduling as per the motion that was filed on March 31, 2009 with self addressed stamped envelopes for your clerk to serve.

If there are any questions please don't hesitate to reach me as captioned above.

Sincerely



Martin Bettwieser

cc. Miller & McDevitt

Exhibit 3

violation of the Subpoena Duce Tecum that has been served on February 25, 2009 and
the file record and affidavit of Martin Bettwieser of March 31, 2009.

DATED this _____ day of April, 2009

Patrick Owen
District Judge

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the ORDER
to be served by prepaid first class mail on the _____ day of April, 2009 to the
following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701

Deputy Clerk

Exhibit 4

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

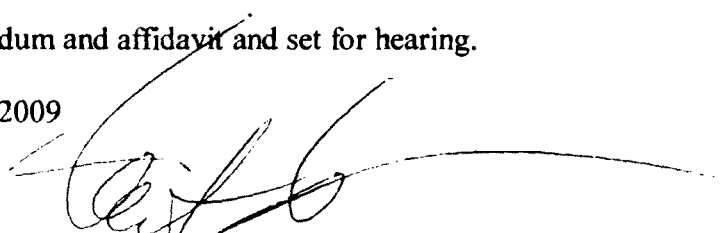
NO. _____ FILED
SEP 23 2009

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	MOTION TO AMEND AND
	)	RECONSIDER WITH MEMORANDUM
NEW YORK IRRIGATION DISTRICT	)	AND AFFIDAVIT IN SUPPORT
et,al;)	
Defendant's)	
_____)	

COMES NOW the Plaintiff, Martin Bettwieser and does move the court to alter, amend and or reconsider it's order dated September 14, 2009 with it's Amended Judgement of March 3, 2009 pursuant to IRCP 59(e), 52(a), 54(d)(5-7), Idaho Code 12-117 with partial supporting memorandum and affidavit and set for hearing.

Dated this 28th Day of September 2009



Martin Bettwieser

STATE OF IDAHO)
)ss
County of Ada)

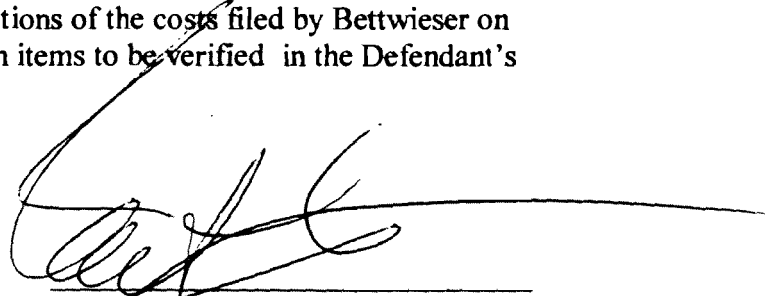
AFFIDAVIT OF MARTIN BETTWIESER IN SUPPORT OF MOTION TO AMEND AND RECONSIDER WITH MEMORANDUM AND AFFIDAVIT

Martin Bettwieser, being duly sworn upon oath deposes and states the following:

1. That I am the plaintiff in this action and am over the age of 18 and have full knowledge and belief of all the events, filings, happenings and or otherwise in this case and action including the defendant's filings and events.
1. That the defendant's through their attorney of record, Chas McDevitt have served on me an "Affidavit and Memorandum of Costs and Disbursements with appended "Schedule A", dated January 13, 2009 and that I received on or about January 17, 2009 and which I objected to January, 27, 2009.
1. That Affidavit and Memorandum with "Schedule A" does not include a true and correct statement of the costs in this action nor that there have been disbursements as alleged, nor have they been actually and necessarily incurred as alleged nor specifics on how the costs were accumulated nor given..
1. That the affidavit and memorandum is not in compliance with IRCP 54 and that the affidavit was not made on "knowledge and belief." nor was it given at hearing or any evidence given at hearing.
1. Specifically and partially "Schedule A" states filing fees for an amount of an action that is over \$10,000.
1. Bettwieser ordered the deposition talking by audio means for October 2007 and August 2008 and costs on the schedule can not be accurate or necessary for those items for a non-ordering deponent.
1. That there was never a deposition noticed up by any party nor any person deposed or under oath for the 8/27/08 charge on the schedule.
1. That the costs as matter of right and discretionary costs are vague and not specific as to what copies were needed to be made to support that exorbitant amount nor the amounts used to figure those sums. The Defendant's list them as "copies of exhibits" which is meant to include Defendant's Exhibits H-1 and H -2 that were never used or introduced at trial and which Bettwieser objected to using as immaterial and irrelevant, and was alleged to the court in the record that the defendant's were intentionally trying to up the costs in the action. Plaintiff's "Exhibit 11" is what Bettwieser was requesting from the Defendant's.

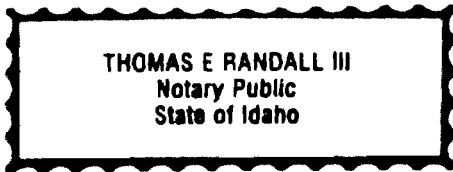
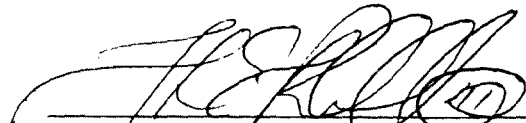
1. That I have tried to get the defendant's through their attorney and employees to produce the items with receipts to verify the items and costs, informally and formally and through subpoena, of which they have refused.
1. That this is only a partial affidavit as to the specific objections as to the alleged costs in the defendant's affidavit and Memorandum, which should be sufficient for the court to compel compliance by order with the subpoena even with being in contempt and to reconsider and amend the order and judgement.
1. That the questions in the Subpoena Duce Tecum of Heather Hoyle shows that the items request were material to the objections of the costs filed by Bettwieser on January 27, 2009 as they only dealt with items to be verified in the Defendant's Affidavit and Memorandum.

Dated this 28th day of September, 2009



Martin Bettwieser

SUBSCRIBED AND SWORN before me this 28th Day of September, 2009

NOTARY PUBLIC State of Idaho
residing at Boise, my commission exp. 07/20/15

STATE OF IDAHO
COUNTY OF ADA

MEMORANDUM

BACKGROUND

This court entered a Judgment on January 7, 2009 of which subsequently was amended on March 3, 2009 to include additional findings and added costs for the defendant's. Before the Amended Judgment was entered Bettwieser withdrew a motion that he had filed to amend and opposed the Defendant's Affidavit and Memorandum or Costs and its later motion to Amend the Judgment. Bettwieser also Subpoenaed Ms Heather Hoyle for records concerning the Defendant's costs and disbursements which gave her up to 30 days to comply. Affidavit of Service with the original court subpoena of that subpoena was filed on March 2, 2009. The Amended Judgment was filed by the next day.

After the judgment was entered Bettwieser filed and served a timely Motion to Reconsider on March 17, 2009 and was going to file a brief or memorandum within 14 days. On March 31, 2009 Bettwieser filed a motion to extend time to file brief, a motion to compel, and a motion for contempt with supporting affidavit and gave the court a proposed order with instructions to set the hearing so that Bettwieser could properly serve on the motion for contempt. There has been no response by the Defendant's in those matters. The court gave its notice of intent to rule to the parties and Bettwieser gave a reply as to the defendant's non-response of the issues. The court entered an order on the outstanding orders on September, 14, 2009 Bettwieser seeks the court to clarify and reconsider and amend as addressed herein.

ARGUMENT

Introduction:

Motions to alter or amend are meant for the court to correct errors in fact or law and thus circumvent the appellate processes. *Lowe v. Lyn 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982)*

Bettwieser seeks to correct errors and misunderstanding that have occurred in the pleadings after judgment and have the court clarify its order as to the issues ruled on and then Bettwieser will address the issue to reconsider and or alter, amend.

First off Bettwieser's reply brief was never meant to be the memorandum he requested to be extended in his motion of March 31, 2009. Bettwieser's filing of July 16, 2009 was only a reply, not a response, to the defendant's none-reply of the issues. Bettwieser takes note that the court never addressed nor ruled on Bettwieser's motion to extend time to file a brief. Also it should be noted that Bettwieser erred in citation on page 4 of that reply that should read *Marcher v. Butler 113 Idaho 867, 749 P.2d 486 (1988)*.

Also it was the intent of Bettwieser to have the court set the hearing date for the contempt proceeding so that the person may be served, not for the court to initiate a contempt proceeding as Bettwieser has already done that by motion and affidavit.

ISSUES:

1. Timeliness

The court entered Judgment in this action on January 7, 2009. Bettwieser further timely filed a motion to reconsider on January 20, 2009 which tolled the time and allowed for further proceedings and filings from the judgment. Bettwieser then withdrew that motion on February 3, 2009. The defendant's filed a motion to amend the judgement on January 27, 2009. Hearing was held on defendant's motion and additional findings

were made that the defendant's were the prevailing party and entitled to certain costs. This motion would have been timely if Bettwieser had not withdrawn his motion. When he did time was not tolled anymore and reverted back to January 7, 2009 for computation of the defendant's motion to amend. *Christensen v. Ransom*, 123 Idaho 99,104 844 P.2d 1349 (Ct. App. 1992)

Although the defendant's filed a timely affidavit and memorandum they did not timely serve the motion to amend within 14 days as required by I.R.C.P. 59(e) *Ross v. State* P.3d 761 (Ct. App.2005). Although the defendant's now state, after drafting up the Amended Judgment and not citing any authority in it motion to amend ,that it brought the motion under IRCP 54(e)(7), this rule only allows for an order, which is appealable by itself, and not an amended judgment and only after a hearing on an objection. The record shows that there was no order given and Bettwieser had not noticed up his objection for hearing. Further more the Affidavit of Chas. McDevitt does not full fill the requirement of IRCP 54(d)(5) that the memorandum must be made "to the best of the parties knowledge and belief." *Thessen v. Riggs* 5 Idaho 487, 488 (1897)

Hearing must be made on a controverting affidavit and the burden of proof rests on the defendant's. *Griffeth v. Montandon* 4 Idaho 75, 81,82 (1894)

Therefore the Amended Judgement must be vacated and the Judgment of January 7, 2009 must be reinstated, therefore Bettwieser is reluctant to address additional issues to reconsider and or alter amend dealing with the amended judgment as they would be moot but reserves the right to amend this motion with affidavit and memorandum as they can only be considered partial in argument.

2. Prevailing Party.

This issue can be addressed as it pertains to the original judgment as well as the amended judgment and subsequent order.

Bettwieser argues this by simply stating that the findings of fact or conclusion do not address or give findings to all the issues that were addressed in the complaint and in Bettwieser's closing argument, including the defenses. *Wood v. Broderson*, 12 Idaho 190, 85 P. 490 (1906)

Further more Bettwieser claims and the file record shows that most of the motions that have been filed by Bettwieser were not given proper written decision or given proper process of law nor were made part of the record that could be referenced and used for further proceedings, trial or appeal and therefore need additional written findings of fact and conclusion of law and proper hearings allowed on the issues presented.

Orders should be reduced to writing as so as possible. *Jamason v. State* 455 So. 2d 38 or 380 Fla. 1984

Can not execute on an oral order, *McAteer v. Stewart* 696 P.2d 72 Wyo. 1985

Trial courts speak only through written orders. *Frederickburg Const. Co. Inc. v. J.W. Wyne* 260 Va. 137, 530 S.E. 2d 148 VA. 2000

A court speaks through it's written orders not it's verbal decisions, *Hosner v. Brown* 40 Mich. App. 515 199 N.W. 2d 295 Mich. App 1972.

Docket entry not sufficient, *Well v. State* 474 A.2d. 846 (Me. 1984)

Nor take the place of a written order, *Texas-Ohio Gas Inc. v. Mecom* 28 S.W. 3d 129 (Tex.App. Texarcana 2000)

3. Non attendance at Hearing.

The order seems to sanction Bettwieser because he did not attend the hearing of

February 17, 2009. Bettwieser states that the court and the parties were notified that Bettwieser could not attend the hearing because of work issues and because the Defendant's had set a hearing date for him on the motion he filed. The defendant's should not be allowed to set a hearing for another party. Bettwieser was not ready for a hearing at that time. When he was ready he would have set the hearing. History from this case shows that hearings have been uneventfully rescheduled by the court when Bettwieser gave notice of not being able to attend and should be precedence to this issue.. As the record shows Bettwieser needed to secure items material to the issues at hand before scheduling.

Therefore the court needs to vacate and set the matters for hearing when Bettwieser so requests with all materials ready to be presented.

4. Motion to Compel.

The court declined to move on issues Bettwieser had presented concerning the motion to Compel and Contempt based on the fact that he didn't explain what was material about what was requested.

Bettwieser supplied an Affidavit and the court had the subpoena which showed the materials that were requested which involved the outstanding motion and objection which stated the material nature of the materials requested and now adds additionally.

Therefore an order to compel would be appropriate.

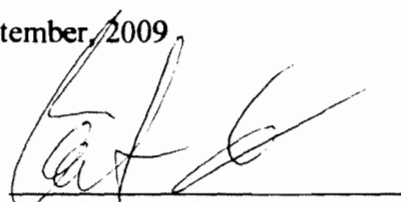
5. Contempt proceedings.

The court has declined to initiate contempt proceedings. Bettwieser gives notice and has already clarified that Bettwieser has already initiated those proceedings and only asks the court to set the hearing date so that Bettwieser may give service according to law.

CONCLUSION

Therefore the Order of September 14, 200 and Amended Judgment of March 3, 2009 must be vacated in the interest of Justice and the matters set for further proceedings as outlined herein.

Respectfully submitted this 28th day of September, 2009



Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the MOTION TO AMEND AND RECONSIDER WITH MEMORANDUM AND AFFIDAVIT to be served by prepaid first class mail on the 19th day of September, 2009 to the following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)	
Plaintiff,	)	CASE NO. CV-OC-0711060
)	
vs.	)	SUPPLEMENTAL AUTHORITY
	)	TO SEPTEMBER 28, 2009 MOTION
NEW YORK IRRIGATION DISTRICT	)	TO AMEND AND RECONSIDER
et.al;	)	WITH MEMORANDUM AND
Defendant's	)	AFFIDAVIT IN SUPPORT.
_____)	

Bettwieser submits this supplement of authority to further aid the court on the issues before it.

Bettwieser has argued that Mr. McDevitt gave affidavit on "information and belief" and not "to the best of the parties knowledge and belief" as required by I.R.C.P. 54(d)(5). *Camp v. East Fork Ditch Co. Ltd 137 Idaho 850,855.*

Affidavits on information and belief are not given on personal knowledge and are not given the weight as required in Idaho under the "to the best of the parties knowledge and belief. *In re Sullivan, 185 Misc. 2d 39,710 N.Y.S. 2d. 853 (Sup.2000)*

Additionally, Affidavits on information and belief without giving the source of the information or the grounds for belief are mere hearsay and incompetent as evidence,

In Re. Kuser's Estate, 132 N.J. Eq. 260, 264 2d 688 (Prerog.Ct 1942)

and reinforced that the source of the information must be proved, *In re Sullivan*, 185 Misc. 2d 39, 710 N.Y.S. 2d. 853 (Sup.2000)

In absence of those words entries were inadmissible. *Jones v. DeMuth* 137 Wis. 120, 118 N.W. 542 Wis. 1908

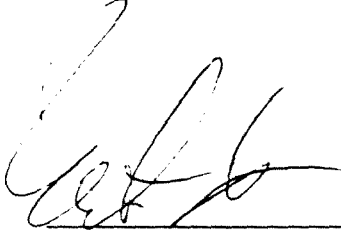
Also, generally an attorney verifying pleadings on behalf of client should allege source of knowledge underlying affidavit. *In re Montano*, 192 B.R. 843

The information requested and the source of the information requested or subpoenaed by Bettwieser is material to the issues and no admissible evidence was presented, nor at the hearing of February 17, 2009, after reviewing the proceeding. Further noting that it was not clear whether all the items and issues were fully addressed at the proceeding.

Further more the court must take note that the Defendant's Motion to Amend of January 27, 2009 can not be considered nor was meant to be a motion under Rule 54(d)(7) and was meant to be under Rule 59(e) of the I.R.C.P. The rule fully contemplates hearings to be held first on objections before any motion is filed to settle costs by order and only allows for motions to be filed after the hearing on the objection or the time for objections have past. Their motion was not filed after a hearing on the objection nor after the time for objection had past and so was not meant to be a Rule 54 (d)(7) motion. Therefore the defendant's motion of January 27, 2009 motion can only be

considered a motion under I.R.C.P. 59(e) since the motion was titled and addressed to amend the judgement and that additional finding were made at the hearing and therefore was made untimely.

Dated this 17th day of October, 2009




Martin Bettwieser

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the SUPPLEMENTAL AUTHORITY TO SEPTEMBER 28, 2009 MOTION to be served by prepaid first class mail on the 18th day of October, 2009 to the following;

The office of Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701



Martin Bettwieser

Martin Bettwieser
3862 Yorktown way
Boise, Idaho 83706
(208) 336-8804

2011 JUN 15 A 10:12

NO. _____
A.M. _____ FILED P.M. 355

JUN 15 2011

CHRISTOPHER D. RICH, Clerk
By JAMIE RANDALL
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER)
Plaintiff, Appellant)
vs.)
NEW YORK IRRIGATION DISTRICT)
et,al;)
Defendant's, Respondent's)

CASE NO. CV-OC-0711060

2nd (SECOND) AMENDED
NOTICE OF APPEAL

Supreme Court No. 37396

TO: THE ABOVE NAMED RESPONDENT'S AND THE PARTIES ATTORNEY OF
RECORD AND THE CLERK OF THE ABOVE ENTITLED COURT AND THE
COURT REPORTER:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, Martin Bettwieser appeals against the named respondent's to the Idaho Supreme Court from the final order entered on December 29, 2009 and all other post and pre-trial decisions and non-decisions and orders from the courtroom of the Honorable Patrick H. Owen presiding, including but not limited to February 17 2009, March 3, 2009, September, 14, 2009, May 17, 2011
2. The Appellant has a right to appeal to the Idaho Supreme Court pursuant to I.A.R.

1.

FILED - ORIGINAL
JUN 16 2011
Supreme Court _____ Court of Appeals _____
Entered on ATS by JE

11(a)(1,7) and 17(e)(1)(A)(B)(C).

3. The issues on appeal will be addressed and amended, due to the increased decisions of the District court in this appeal, to the errors in fact and in law from issues and proceedings in the District Court as addressed herein.

4. No order has been issued sealing any portion of the record.

5. That partial transcripts are requested as follows for motion hearings;

a) May 8, 2008 starting at the ruling approx. 15:00:00 to close.

b) June 26, 2008 starting a 11:26:00 to close.

c) Telephone hearing of August 7, 2008 entire proceeding.

d) August 14, 2008 the entire proceeding.

e) August 19, 2008 the entire proceeding.

f) February 17, 2009 the entire proceeding.

g) January 19, 2011 the entire proceeding.

h) January 27, 2001 the entire proceeding

From Trial:

A) September 29, 2008 testimony of Velta Harwood, Joanne Scripture and Kendall McDevitt.

B) September 30, 2008 Start at the beginning of the day until testimony begins. Include the testimony of Kendall McDevitt, Paul Warrick, Brian McDevitt, Martin Bettwieser.

After the testimony, include instructions by Bettwieser to the Court on which rules and statutes to consider.

Appellant requests the transcript with comb binding , 10 character to the inch ,courier or equivalent style typing. Transcript is estimated to be just over 500 pages. Estimated

transcript fee has been previously paid and not returned and the balance to be paid upon delivery of completed transcript.

6. The appellant requests a new clerks record to include the standard record pursuant to I.A.R. 28 (b)(1) except for item (L) of the record. In addition I request:

- a) a record of actions:
- b) Any and all orders issued by the court in this case.
- c) All closing arguments by both parties and replies and or rebuttals by both parties, to the closing arguments.
- d) All filed "Amended" documents and all documents filed as "Errata" or "Erratum"
- e) All filed Objections.
- f) Letter from District Court file, date August 28, 2008
- g) Notice of Hearing dated August 26, 2008

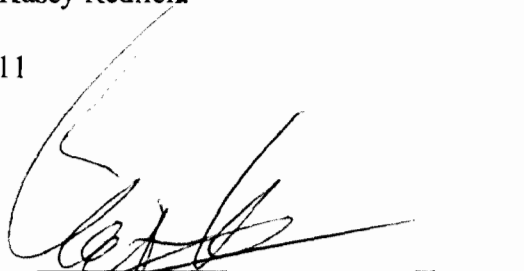
The estimated clerks record fee has been paid.

7. The lodging of exhibits that have not already been lodged with the Supreme Court pursuant to I.A.R. 31 and a Certificate pursuant to I.A.R. 31(c).

8. Service has been made to all parties through there representative of record according to rule 20 and to the court reporter Kasey Redlich.

Dated this 15th day of June, 2011

COUNTY OF ADA } ss
CHRISTOPHER D. RICH, Clerk of the District Court of
the Fourth Judicial District of the State of Idaho, in and for
the County of Ada, do hereby certify that the foregoing is a
true and correct copy of the original on file in this office. In
witness whereof, I have hereunto set my hand and affixed
my official seal this 15th day
of June, 2011
CHRISTOPHER D. RICH, CLERK
By: Bradley Deputy


Martin Bettwieser

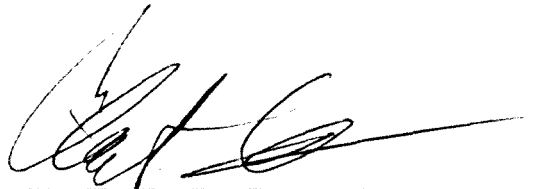
CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the 2nd AMENDED NOTICE OF APPEAL to be served by prepaid first class mail on the 15th day of June 2011 to the following;

Chas McDevitt
420 W. Bannock St.
Boise, Idaho 83701

~~Hand delivery to Ada County Court for.~~ *MB*

Kasey Redlich
Court Reporter
200 Front St.
Boise, Idaho 83702



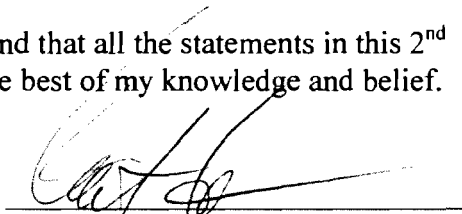
Martin Bettwieser

STATE OF IDAHO)
)ss
County Ada)

AFFIDAVIT OF MARTIN BETTWIESER

I Martin Bettwieser being duly sworn, deposes and states the following:

That I am the appellant in the above titled appeal and that all the statements in this 2nd amended notice of appeal are true and correct to the best of my knowledge and belief.

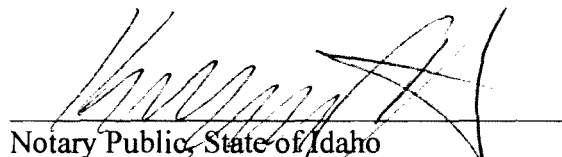


Martin Bettwieser

SUBSCRIBED AND SWORN before me this 15th Day of June, 2011

**KIMBERLY CLUGSTON
NOTARY PUBLIC
STATE OF IDAHO**

My Commission Expires 07-07-2014



Notary Public, State of Idaho
Residing at Boise, my commission expires: 7-7-14
4.

FILED - ORIGINAL
MAY 17 2011
District Court of the Fourth Judicial District of the State of Idaho

8:57 FILED P.M.

MAY 17 2011

CHRISTOPHER D. RICH, Clerk
By MARTHA LYKE
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MARTIN BETTWIESER,

Plaintiff,

vs.

NEW YORK IRRIGATION DISTRICT
AND DIRECTORS RICHARD
MURGOITIO, BRIAN MCDEVITT, PAUL
WARRICK ANDVELTA HARWOOD,

Defendants.

Supreme Court Docket No. 2011 MAY 17 AM 11:00
37396-2010

Ada County District Court No. 17 AM 11:00
CV-OC-2007-11060

MEMORANDUM DECISION
AND ORDER RE: PLAINTIFF'S
MOTION TO RECONSIDER

This matter is before the Court to determine the plaintiff Martin Bettwieser's

("Bettwieser") Motion to Reconsider Corrected Ruling on Plaintiff's Objection to Clerk's
Record and Transcript on Appeal. As explained below, the Court will deny the motion.

Background

On March 8, 2011, the Court issued its Corrected Ruling on Plaintiff's Objection to
Clerk's Record and Transcript on Appeal.¹ On March 22, 2011, Bettwieser filed this motion
to reconsider in light of: a) Bettwieser's February 1, 2011 Motion to Admit Exhibits and
Finish Presenting Testimony Evidence – he asserts this motion has not yet been addressed;

¹ The Corrected Ruling simply corrected the title of the March 3, 2011 Ruling on *Defendant's* Objection to
Record and Transcript on Appeal.

**MEMORANDUM DECISION AND ORDER RE: PLAINTIFF'S MOTION TO
RECONSIDER – PAGE 1**

ML

1 and b) Bettwieser's contention that he has not been given access to the entire court file – he
2 states that some 20 to 30 pages have been pulled from the file and not allowed for his review.

3 As explained in more detail in the Corrected Ruling, hearings on Bettwieser's
4 objections to the record and transcript on appeal took place on January 19 and January 27,
5 2011. At the January 27 hearing, Bettwieser sought to elicit testimony from Charles F.
6 McDevitt, counsel for the defendants, Kasey Redlich, the court reporter who was making a
7 stenographic record of the proceedings, and who was present in the court reporting the
8 proceedings, and Angela Hunt, the Deputy Court Clerk who was the Court's in-court clerk for
9 the hearing as well as for most of the earlier trial court proceedings. The Court denied those
10 requests. Bettwieser also sought to review defense exhibits that had been marked but not
11 admitted into evidence during the trial that occurred on December 2, 2008. The Court
12 explained to Bettwieser that these documents are not part of the court file. Bettwieser also
13 testified at the hearing that he had seen things in the file at one point that were no longer there.
14
15 The Court made it clear that Bettwieser could review the entirety of the court file, including
16 the contents of an envelope that contained, among other things, minutes from communications
17 between Angela Hunt and Bettwieser. The Court opened the envelope during the hearing and
18 listed for Bettwieser everything it contained. Bettwieser requested some additional time so as
19 to review the contents of the envelope and if necessary to supplement his objections. The
20 Court allowed one additional week for Bettwieser to do so. Bettwieser did review the file, but
21 maintains that he has not been able to review the entire file.
22
23
24
25

Standard of Review

1
2 Idaho Rule of Civil Procedure 11(a)(2)(B) permits a party to move the Court to
3 reconsider "any order of the trial court made after entry of final judgment . . . within fourteen
4 (14) days of such order. . . ." I.R.C.P. 11(a)(2)(B). The Idaho Supreme Court has recognized
5 that "[a] rehearing or reconsideration in the trial court usually involves new or additional
6 facts, and a more comprehensive presentation of both law and fact." *Coeur d'Alene Mining*
7 *Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990) (quoting
8 *J.I. Case Co. v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). However, a
9 party requesting reconsideration is not required to submit new or additional evidence.
10 *Johnson v. Lambros*, 143 Idaho 468, 472, 147 P.3d 100, 104 (Ct. App. 2006)

11
12 The burden is on the moving party to bring the trial court's attention to the new facts.
13 The trial court is not required to search the record to determine if there is any new information
14 that might change the specification of facts deemed to be established. *Id.* The district court
15 should consider any new facts presented by the moving party that would bear on the
16 correctness of the order. *See, e.g., Spur Products Corp. v. Stoel Rives LLP*, 143 Idaho 812,
17 817, 153 P.3d 1158, 1163 (2007) (citing *Coeur d'Alene Mining Co.*, 118 Idaho at 823).
18 Additionally, the trial court may reconsider its orders for legal errors. *See Johnson*, 143 Idaho
19 at 472. The decision to grant or deny a request for reconsideration rests in the sound discretion
20 of the trial court. *Spur Products Corp.*, 143 Idaho at 815. As such the inquiry on appeal would
21 be three-part: (1) whether the trial court perceived the issue as one of discretion; (2) whether
22 the trial court acted within the boundaries of such discretion; and (3) whether the trial court
23 reached its decision by an exercise of reason. *Id.*

Discussion

1 Bettwieser is correct that the Court, in its Corrected Ruling, did not refer to his
2 February 1, 2011 Motion to Admit Exhibits and Finish Presenting Testimony Evidence.

3
4 However, during the January 27, 2011 hearing, the Court denied Bettwieser's request to elicit
5 testimony from Mr. McDevitt, Ms. Redlich and Ms. Hunt. To the extent Bettwieser seeks
6 reconsideration of those rulings, his motion will be denied. As to Bettwieser's motion for
7 reconsideration in light of his earlier request to have certain unspecified exhibits admitted, it
8 is not entirely clear what he is referring to. If he is referring to the defendant's marked but
9 never admitted exhibits from trial, the Court has already explained that those exhibits are not
10 part of the file. Additionally, the Court heard the relevant evidence at the two hearings and at
11 the conclusion of each issue, asked Bettwieser if he had any more evidence to present. The
12 Court is satisfied that it was presented with sufficient information to rule upon Bettwieser's
13 objections to the record and transcript on appeal. Accordingly, Bettwieser's motion to
14 reconsider so that he can present more evidence will be denied.

15
16 Regarding Bettwieser's contention that there are missing pages from the court file, the
17 Court addressed this at the January 27, 2011 hearing. Bettwieser testified that there were
18 missing pages but was unable, when asked by the Court, to state with any specificity what
19 pages he thought were missing. Likewise, in his motion for reconsideration, Bettwieser does
20 not state with any specificity what pages he believes are missing. He only states that he
21 believes some 20 to 30 pages, including the proceedings from the January 19 and January 27,
22 2011 hearings, are missing. It does not appear that the file is missing pages. Bettwieser has
23
24

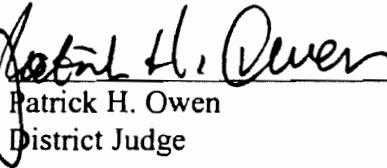
1 been given the opportunity to review the file. His motion for reconsideration in light of
2 allegedly missing court file pages will be denied.

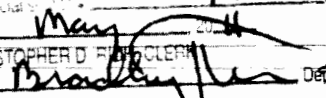
3 **Conclusion**

4 As explained above, Bettwieser's motion to reconsider will be denied.

5 IT IS SO ORDERED.

6 Dated this 17 day of May 2011.

7
8 
9 Patrick H. Owen
10 District Judge

11 STATE OF IDAHO } ss
12 COUNTY OF ADA }
13 I, CHRISTOPHER D. RICH, Clerk of the District Court of
14 the Fourth Judicial District in the State of Idaho, in and for
15 the County of Ada, do hereby certify that the foregoing is a
16 true and correct copy of the original as the same is filed in
17 my office on this 17th day
18 of May, 2011.
19 By  Deputy
20
21
22
23
24
25
26

CERTIFICATE OF MAILING

1
2 I, Christopher D. Rich, the undersigned authority, do hereby certify that I have mailed,
3 by United States Mail, a true and correct copy of the within instrument as notice pursuant to
4 Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as
5 follows:

6 MARTIN BETTWIESER
7 3862 YORKTOWN WAY
8 BOISE, IDAHO 83706

9 CHAS. F. MCDEVITT
10 MCDEVITT & MILLER, LLP
11 420 W BANNOCK STREET
12 PO BOX 2564—BOISE 83701
13 BOISE, IDAHO 83702

14
15
16
17
18
19
20
21 CHRISTOPHER D. RICH
22 Clerk of the District Court
23 Ada County, Idaho

24 Date: May 17, 2011

25 By Shirley Byke
26 Deputy Clerk

MEMORANDUM DECISION AND ORDER RE: PLAINTIFF'S MOTION TO
RECONSIDER - PAGE 6