THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ADA COUNTY HIGHWAY DISTRICT, a body politic corporate of the State of Idaho,

Plaintiff,

vs.

BROOKE VIEW, INC. *et. al.*

Defendants.

Case No. CV-OC-2012-12275

ORDER GRANTING ATTORNEY FEES AND COSTS TO BROOKE VIEW

The parties tried this case before a jury from April 6, 2015 through April 23, 2015, to determine the amount, if any, of just compensation due to Brooke View as a result of ACHD's taking of a portion of Brooke View's property for a South Curtis Road improvement project. After fourteen days of trial, the jury awarded Brooke View $146,291.68, as just compensation for damages caused by the taking and by "construction of the improvement in the manner proposed by" ACHD.

Both parties claimed to be the prevailing party and both asked the Court to award them attorney fees and costs. Brooke View also moved for sanctions pursuant to the Idaho Rules of Civil Procedure, 11, 16, 37 and 54. Because the Court finds Brooke View is the prevailing party and awards it attorney fees and costs, the Court does not reach this issue. The Court heard argument on July 30, 2015, and took the matter under advisement on August 3, 2015. Based on the following analysis, as announced orally at the conclusion of oral argument, the Court finds Brooke View is the prevailing party and awards it costs as a matter of right in the amount of **$44,051.46**.

In addition, the Court, in an exercise of discretion, also awards **$365,703.63** in discretionary costs, not including attorney fees, finding that these costs were "necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party."

In an exercise of discretion, after carefully considering the facts of this case and applying the I.R.C.P. 54 factors, the Court awards Brooke View all of its requested attorney fees of **$744,243.56**.

The Court credits ACHD for the previously imposed sanctions it paid in the amount of $2,298.66, consisting of $2,250.41 (attorney fees) and $48.25 (copy costs).

Therefore, the Court awards Brooke View a total of **$1,151,699.99**, taking into account the credit.

RELEVANT BACKGROUND

Defendant Brooke View, Inc. d/b/a The Senator ("Brooke View"), an Idaho corporation, owns an undivided interest in Parcel 25 Condemned Property and Parcel 25 Temporary Easement Property ("Brooke View Property"). The Ada County Highway District ("ACHD") decided to improve South Curtis Road in Boise, Idaho ("Curtis Road Project"). ACHD owns the public right of way known as South Curtis Road in Boise, Idaho, which is adjacent to the Brooke View Property and its entrance.

The ACHD Board of Commissioners entered an Order of Condemnation on June 20, 2012, and filed suit to condemn a portion of the Brooke View Property (1,425 square feet) and temporary easements. Brooke View answered and requested a jury trial to determine the amount of just compensation. An appraiser determined the value of the condemned property as $7,738.47. The parties stipulated to possession on August 7, 2012, and the Court entered an Order for Possession of Real Property on August 23, 2012.

ACHD's taking increased to 1,566.07 square feet because ACHD built part of its sidewalk outside the right of way and failed to include land owned by Brooke View within the Ridenbaugh canal. Construction was planned to be within 2-6 feet of Brooke View structures. The jury returned a verdict in the amount of $146,291.68 as just compensation.

a. Brooke View.

As a young woman in her early twenties, Diane Miller purchased and developed the area (Parcel 25) off South Curtis Road in Boise, Idaho. Miller is the principle shareholder in Brooke View, an Idaho corporation, created to manage and own the Brooke View Property. Miller is now seventy (70) years old. The Brooke View Property is bordered by the Ridenbaugh Canal.

Initially, Miller developed and managed the Brooke View Property as a mobile home park and called it "The Senator." Over time, Miller changed the character of "The Senator" into a manufactured home development for people over fifty-five (55) years of age. Recently, she again initiated changes to the area and began turning her project into a more permanent residential development for people over fifty-five. Central to the condemnation jury trial, as part of the amenities for Brooke View, Miller built an intricate and unique serpentine concrete block entrance wall, covered in stucco on one side and in specially ordered and arranged brick on the other. This wall spanned both sides of the entry way to Brooke View with a remote controlled gate, to create a "gated community." Testimony at trial established these entry walls are integral to the overall character of this community.

The evidence at trial showed that Miller carefully documents everything in her project, including taking photographs of everything done in the Brooke View community whether it be repairs or new construction. It is not an overstatement to observe that this is her life's work. She even lives there.

After ACHD announced the project, Miller met with ACHD and advised ACHD in 2012 that she believed that the proposed sidewalk and storm drain placement would damage[1] the structural integrity of the entranceway walls, an important feature to her development. She also told them her primary concern was not money. This was before any condemnation or construction began.

ACHD never inspected Brooke View's walls or took Ms. Miller's concerns seriously. Miller consulted experts and began documenting the construction project by taking photographs, like she had done throughout the time she owned the development. ACHD, through its contractor, failed to even have a daily on-site project manager or inspector, did not record the equipment used, and, unlike most construction projects, did not keep construction logs or other records of what they did. In most instances, the only records that existed are Miller's daily photographs.

At trial, Miller presented an impressive array of experts who proved to the jury that the Curtis Road Project, constructed as planned, structurally damaged the entryway walls, decreasing the value of the Brooke View Property or the amount a willing buyer would pay for the property.

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[1] Construction plans indicated construction would be within 2-6 feet of Brooke View structures.

b. Miller's testimony regarding settlement efforts.

Miller testified that initially, rather that hire experts, she was willing to settle with ACHD in exchange for a warranty against further damage.

> Rather than go to the expense of trying to hire experts to prove ACHD caused the damage I was willing to settle for a warranty against additional future damage. I knew this would mean taking a loss on the cost of repair but it would prevent me having to pay for experts to prove the damage was caused by ACHD. However, ACHD refused to agree even to a warranty against further damage.

Affidavit of Diane Miller in Support of Defendant's Motion for Attorney Fees and Costs, dated June 10, 2015, page 2.

The parties attempted to mediate in September 2013. According to Miller, she was willing to settle the case for $75,000 at the mediation. Her costs at that time were around $45,000 because the Court's scheduling order required her to disclose opinions and reply to ACHD's initial opinions. Miller testified she remained willing to accept $75,000 until August of 2014. Miller testified that in that summer, it became clear that ACHD would not settle the case for $75,000. However, as the October 6, 2014 deadline drew closer, she needed to authorize her attorneys to pay her experts to develop their expert opinions. She testified that while she realized the costs were high and that a trial had its own risks, she believed that her

> only alternative was to let ACHD make me give up my right to just compensation simply by outspending me and making sure I could never get the case to a jury. I realize that many property owners have no option to fight in such a situation, but I was determined to find the funds vs. let ACHD get away with the damage they had done just because they have the resources to hire more experts or to continue to fight. If ACHD could do this to me they could do it to anyone and few can afford to fight back. I didn't feel it was fair to let the government take advantage of me, just because they could. I knew they had infinite amount of money, and my resources were limited, but I was willing to borrow money, deplete my IRA or whatever it took to not let them roll-over a single senior female that owned a "trailer park". I knew they had damaged the walls and didn't want to accept responsibility, because I have seen those walls every day from the time they were built and I know exactly when the damage to them took place — during ACHD's construction project.

Affidavit of Diane Miller in Support of Defendant's Motion for Attorney Fees and Costs, dated June 10, 2015, pages 3-4.

According to Miller, only after she fully disclosed her expert opinions, deposed ACHD's experts, disclosed rebuttal experts, responded to ACHD's fourth motion for summary judgment, and

incurred all associated costs and fees, ACHD then made its first offer above $45,000. ACHD offered her $204,600.00 on January 6, 2015, just 90 days before trial on April 6, 2015. This offer would not cover the costs Brooke View had incurred. As Miller testified, "taking the offer would yield [Brooke View] nothing." *Id.* at 3.

Miller testified she decided she could not afford to accept the offers made shortly before trial of $257,000 and $275,000 because by the time ACHD made those offers, she "already had such substantial costs and so much time had been spent in the case it would result in no recovery, and it would cost less to go to trial vs. the costs already incurred at that point, the bulk of the costs were incurred and paid." *Id.*

However, Miller testified she still wanted to resolve the case, avoid further costs, and "get on with [her] development and [her] life." *Id.* Therefore, she offered to take $100,000 if ACHD would pay interest, costs and fees to date, and both sides could avoid another four months of expert costs and the cost and risk of trial. She also offered to take $200,000, no interest, and just submit costs and fees to the Court and take whatever the Court felt was fair for costs and fees. Miller further testified:

> I did not go to trial because I wanted to. I went to trial because I had no choice but to let ACHD get away with the damage they did and refused to take any responsibility for, or take my chances with the jury system. I chose to put my faith in the jury system and to believe a jury would see that ACHD caused structural damage to the walls — which they did.
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> My attorneys never pressured me not to settle, and in fact made clear to me the risks of not settling. I knew that this was a big risk to them as well; I saw first hand the kinds of hours they put in and the work they did on this case. In my opinion it would be unjust for them not to be paid a fair hourly fee for the time they put in representing Brooke View. They risked their time and I risked my money, not because of the possibility of a huge verdict, but because it was take the risk or simply forgo any kind of justice.

Id. at 5 (emphasis in original). ACHD rejected her offers and the parties went to trial.

On January 6, 2015, just 90 days before trial, for the first time ACHD offered more than the $45,000 mediation offer. At that point, Brooke View had already incurred approximately $524,978.99[2] in fees and costs. If Brooke View had accepted ACHD's highest offer of $275,000, it

[2] Brooke View's January 23, 2015, reply to ACHD's offer stated the fees and costs as of that point were $546,916.79.

would not have even yielded the $45,000 offered by ACHD at mediation and Brooke View would have lost a lot of money.

c. The litigation.

Prior to bringing this litigation, ACHD initially offered Brooke View $7,738.47 as just compensation on March 1, 2012, and then increased that offer to $8,512.32 on May 22, 2012. Brooke View rejected those offers because it contended that its entryway walls had been or would be structurally damaged by ACHD's construction of the Curtis Road Project as planned.

Therefore, ACHD brought this lawsuit on July 11, 2012. Central to the entire lawsuit was Brooke View's consistent position that ACHD's Curtis Road Project damaged the entryway walls and any amount for just compensation should reflect the decline in Brooke View's value caused by that damage. ACHD argued damages from construction of the project are not an element of severance damages[3] and must be sought in a separate tort claim.[4] Furthermore, it contended its

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[3] ACHD steadfastly ignored the fact that the measure of damages in Idaho are calculated very simply.

> Severance damages are determined by calculating the difference between the remainder's fair market value before the taking and the remainder's fair market value after the taking. *State ex rel. Rich v. Dunclick, Inc.*, 77 Idaho 45, 56, 286 P.2d 1112, 1118 (1955). Fair market value is the amount a willing buyer and a willing seller would agree on. *Ada Cnty. Highway Dist. v. Magwire*, 104 Idaho 656, 659, 662 P.2d 237, 240 (1983). To determine fair market value, courts should consider all elements that an owner or a prospective purchaser could reasonably find affect the land's fair market price. *State ex rel. Rich v. Halverson*, 86 Idaho 242, 248, 384 P.2d 480, 483 (1963).

State, Dept. of Transp. v. Grathol, 158 Idaho 38, __, 343 P.3d 480, 489 (2015). It has long been Idaho case law that compensation for property condemned includes all damages and the property owner is to be made whole. *Crane v. City of Harrison*, 40 Idaho 229, 232 P. 578 (1925). In other words, compensation is calculated by comparing the value of the property before and after – what a willing buyer would now pay for it and what that buyer would consider in determining what to pay. A willing buyer would clearly consider damaged entry walls in deciding what to pay Brooke View. It is not complicated. In addition, the Idaho statute is clear and unambiguous; it reads as follows:

> 2. If the property sought to be condemned constitutes only a part of a larger parcel: (a) the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, **and the construction of the improvement in the manner proposed by the plaintiff**[.]

I.C. § 7-711 (emphasis added). The cases cited by ACHD involved jurisdictions with different statutory schemes that do not allow for damages caused by the construction of the improvement. According to the Court's own research, only seven (7) other states have similar language in their eminent domain statutes, Arizona, Utah, California, Hawaii, Alaska, Indiana and North Dakota. Few courts have considered the language – albeit because the language is clear and unambiguous. However, in those that have, they have upheld awards to property owners that include consideration of the effects of damages caused by the construction. *See e.g., Rayburn v. State ex rel. Willey*, 378 P.2d 496, 498 (Ariz. 1963); *People ex rel. Dept. of Public Works v. Simon Newman Co.*, 112 Cal.Rptr. 298 (1974), *San Marino City School Dist. of Los Angeles County v. Morgenthaler*, 281 P. 75, 75-76 (Cal. App. 2 Dist. 1929); *City of*

construction did not cause the damage to Brooke View's property. The parties were unable to agree on damages and just compensation. The case proceeded to trial based solely on these two competing theories. At the end of the trial, a jury determined ACHD had damaged the entryway walls and just compensation should consider the impact such damage had on post-taking valuation.

To say that the litigation was hotly contested is an understatement. In fact, in fifteen years on the bench and nearly forty-three years of practice, this is the first and only time the Court had a jury send a note out to ask the Court to admonish trial counsel to stop being uncivil -- something the Court had repeatedly done *outside* the presence of the jury. Even during the oral argument on these attorney fees and costs, when Brooke View's counsel was arguing, the Court observed the general counsel for ACHD stomp out of the courtroom several times and pace just outside the courtroom.

In all, ACHD filed twenty-five motions and Brooke View filed seventeen. In August 2013, ACHD disclosed thirty-eight witnesses and then disclosed another five in November of 2014. In ACHD's November 2014 disclosures, twelve experts were engineers, three were geotechnical engineers and two were structural engineers. ACHD took thirty-two depositions, for a total of sixty-six hours of deposition time and Brooke View took twenty-three depositions for a total of fifty-nine hours of deposition time. (The Court's own court files number at twenty-one (21) as of the date of this decision.)

At the outset, ACHD asked the Court to bifurcate the issues and hold two trials, a court trial on certain legal issues and the jury trial. The Court denied that motion. ACHD filed its first partial summary judgment on June 27, 2013, arguing among other things that Brooke View could not be compensated for damage to its entryway walls as severance damages but only in a separate

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Hammond v. Marina Entertainment Complex, Inc., 733 N.E.2d 958, 964-66 (Ind. App. 2000); *State v. Heslar,* 274 N.E.2d 261 (Ind. 1971).*Schwartz v. State*, 900 P.2d 939, 941-43 (Nev. 1995); *State, Dep't of Transp. v. Las Vegas Build. Materials, Inc.*, 761 P.2d 843, 847 (Nev. 1988); *Sloat v. Turner,* 563 P.2d 86, 89 (Nev. 1977); *Utah Dept. of Transp. v. Admiral Beverage Corp.*, 275 P.3d 208, 217-18 (Utah 2011); *State v. Harvey Real Estate*, 57 P.3d 1088, 1091 (Utah 2002); *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990); *Utah Department of Transportation v. D'Ambrosio*, 743 P.2d 1220, 1222 (Utah 1987).

[4] ACHD urged that a property owner must separately pursue a tort claim. Of course, in this case because the improvement involves highway construction, any Brooke View claim would arguably be barred by statutory immunity; thus, denying a landowner any compensation or recourse for that damage. *See* I.C. § 6-904(7).

cause of action. In its second partial summary judgment filed on August 8, 2013, it continued to argue that any damage to the entryway walls and the effect on Brooke View's post-taking value could not be considered in arriving at just compensation. The Court denied both motions on September 30, 2013. Contrary to ACHD's argument, Brooke View did not "re-start" the litigation in 2014 by changing the character of the litigation. As early as summer 2013, David O'Day testified in his deposition on July 25, 2013, that vibrations from construction possibly caused the damage to the walls.

ACHD renewed many of its same arguments in its third partial summary judgment and Motion for Reconsideration both filed on October 3, 2013. The Court again denied those same arguments on December 2, 2013. The next day, ACHD filed an interlocutory appeal of the Court's October 3, 2013 decision and denial of reconsideration dated December 2, 2013, finding that just compensation could consider the effect damage caused by the construction of the project had on post-taking valuation. The Idaho Supreme Court declined to hear ACHD's interlocutory appeal.

Brooke View moved for a protective Order. ACHD filed its fourth motion for partial summary judgment arguing that Brooke View could not prove what mechanism caused the cracks – continuing to cast the damage to the entryway walls as a tort. This motion required Brooke View to depose numerous experts and file affidavits of various experts. At oral argument, the Court orally granted Brooke View's motion in part and denied it in part. The Court denied ACHD's fourth motion at the same time. In every oral argument, ACHD continued to raise the same or similar arguments.

Both sides filed numerous motions in limine and the Court heard nearly all of those motions on January 15, 2015.

After the Court decided ACHD's fourth summary judgment motion and ACHD again moved for reconsideration with new affidavits from experts, Brooke View finally asked the Court to impose its costs and fees on ACHD. At the hearing on sanctions, the Court observed there was no reason ACHD could not have earlier supported its summary judgment with those affidavits. Their testimony and opinions were in ACHD's possession well before its fourth summary judgment motion. In fact, ACHD could identify no reason it could not have obtained the affidavits by the deadline for response, January 2, 2015. Based on its pattern of behavior, the Court granted Brooke

View's motion and required ACHD to reimburse Brooke View its costs in responding to the unnecessary motion practice.

ACHD's conduct continued through trial. ACHD had trouble accepting the Court's rulings, tried to re-argue issues, or simply disregarded the Court's orders. Several ACHD employee-witnesses introduced evidence that had previously been ruled inadmissible, even after being admonished, creating potential mistrial concerns.[5] In the end, even though in discovery, Brooke View timely requested copies of any photographs taken by ACHD or its contractors to show the walls prior to the construction project, it was not until the very end of the trial that ACHD "located" pictures of the walls visibly showing that the walls were undamaged just prior to when the construction began.

At trial other than a jury instruction using its original offer of $8,512.32, ACHD produced no evidence regarding value.

ANALYSIS

In eminent domain cases, a request for an award of attorney fees is a clear exception to the American Rule that generally "parties pay their own attorney's fees." *Rohr v. Rohr*, 128 Idaho 137, 911 P.2d 133 (1996); *Owner-Operator Independent Drivers v. Idaho Public Utilities Com'n*, 125 Idaho 401, 871 P.2d 818 (1994); *Matter of Estate of Keeven*, 126 Idaho 290, 882 P.2d 457 (Ct. App. 1994) (also called the "American Rule"). Idaho case law considering awards of costs and fees is grounded in the rule of eminent domain that a property owner must be justly compensated and made whole, and in the historical roots of eminent domain and individual property ownership. *See* Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho,* 38 Idaho L.Rev. 1, 7 (2001) Thus, any analysis unmistakably relies on the historical background underpinning property ownership under our constitutions, both State and United States.

Given this background, the Court's analysis is rooted in the Constitution and this country's long tradition of jealously protecting individual property rights. John Adams wrote,

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[5] It is not lost on the Court that had a mistrial been declared, Brooke View likely could not have sustained beginning anew.

"Property must be secured, or liberty cannot exist"[6] and "Property is surely a right of mankind as real as liberty."[7] George Washington stated, "Private property and freedom are inseparable."

Property ownership is not first vested in the government where government then "allows" individuals temporary "use" of that property. Individuals do not owe their fellow citizens an obligation to affirmatively[8] use their property for the good of the whole. In fact, without a firm understanding of what individual property rights are, a person cannot understand the Constitution. Individual property ownership is at the core of this Constitution. Our Founders understood that.

This ability to own and control one's own property, personal or real, free from forced government usurpation, is fundamental to our form of government and the success of our civil society. There are no rights without property rights. The recognition that individuals own that which they earned or purchased is a founding concept. When government loses sight of this proposition, freedom is at risk. When a governmental agency takes the position that a property owner must accept less than the difference between the value of his or her property before the condemnation and the value of that property after that taking, for the good of the "people,"[9] our liberties are diminished.

The Founders of our county understood the importance and power of private property ownership in "securing the blessings of liberty." They understood that the right to private property ownership is fundamental to preserving a free society. These individuals were greatly influenced by various English philosophers and essayists. Most scholars recognize that English philosopher John Locke's earlier writings on private property ownership, government and freedom directly inspired our Founders. For example, Jefferson's audacious declaration in the Declaration of

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[6] John Adams, A BALANCED GOVERNMENT (1790) in DISCOURSES ON DAVILA (1805), reprinted in 6 Works of John Adams (1851 ed.).

[7] John Adams, DISSERTATION ON THE CANON AND THE FEUDAL LAW, 1765.

[8] The Court is not suggesting property owners cannot be restrained from using their property to the detriment of their fellow citizens. Government clearly can place limitations, within reason, on the use of an individual's property. But even that has its limitations.

[9] At oral argument, ACHD's counsel argued that the Court should consider that the "taxpayer" would pay these fees after complaining he could not introduce the fact the taxpayer would have to pay at trial. This demonstrates a fundamental misunderstanding of the Court's role. Who ultimately foots the bill is irrelevant to the Court's decision as to what is fair and reasonable. Likewise, at oral argument, ACHD's counsel argued that the Court should consider that the property owner was a corporation. Again, who the property owner is, has nothing to do with whether the owner has a right to just compensation.

Independence that citizens enjoy inalienable rights to "life, liberty, and the pursuit of happiness" as being self-evident, originated with Locke's *Two Treatises of Government*. In that treatise, Locke explained that men (and women) joined together to form a government to ensure the "mutual preservation of their lives, liberties and estates, . . ." which he broadly identified "by the general name, property." In other words, the main reason for forming a government related to preserving property.

Like John Locke, Sir William Blackstone, greatly influenced the Founders. Blackstone was an English jurist and professor who produced the historical treatise on the common law which became the foundation of our common law tradition. As Justice Thomas observed in his scholarly dissent in *Kelo*

> Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great ... is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. . . . Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.*

Kelo v. City of New London, Conn., 125 S.Ct. 2655, 2680, 545 U.S. 469, 510 (2005). Finally, Madison wrote:

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

See James Madison, Property, in PRIVATE PROPERTY AND POLITICAL CONTROL 30 (The Foundation for Economic Education 1992) (1792).

Private property is the cornerstone of our constitutional republic. Likewise, Idaho has long recognized that a property owner whose property is taken for a public use should be made whole. In fact, in response to *Kelo* the legislature acted quickly to limit its application in Idaho. *See* I.C. § 7-701A.[10]

As this litigation progressed, and as made clear during oral argument on attorney fees, ACHD's attitude fulfills Jefferson's prediction that government over time would usurp private

[10] The legislature in 2015 again strengthened this statute to further limit *Kelo*'s effects.

property rights when he wrote, "[t]he natural progress of things is for liberty to yield, [sic] and government to gain ground." *See* Letter from Thomas Jefferson to Edward Carrington, (Paris, May 27, 1788)[11].

A. Brooke View is the prevailing party.

Brooke View prevailed at trial and proved to a jury that ACHD damaged its entryway walls in the construction of its project. Brooke View further proved that the damage reduced its after-taking value. That jury awarded Brooke View $146,291.68, as just compensation. Thus, Brooke View asks the Court award it costs and fees as the prevailing party.

In an eminent domain action Idaho code allows the Court, in an exercise of discretion, to "award reasonable attorney's fees to the prevailing party or parties." *See* I.C. § 12-121; I.C. § 7-718. However, the condemnee, Brooke View, is not required to prove that the "action was brought and pursued frivolously, unreasonably, or without foundation." *State, Dep't of Transp. v. Grathol,* 158 Idaho 38, __, 343 P.3d 480, 492 (2015). Section 7-718 only applies to costs. *Id.* at 495.

Before considering an award of attorney fees, the Court first determines which party prevailed. In making that determination, the Court applies I.R.C.P. 54(d)(1)(B) to determine the prevailing party. *Grathol,* 158 Idaho at __, 343 P.3d at 492 (citing *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 829, 820 P.2d 695, 699 (1991)). According to *Grathol*, Rule 54(d)(1)(B)'s provisions only apply to the extent that they are not in conflict with the *Acarrequi*[12] factors. *Id.* (citing *State ex rel. Smith v. Jardine*, 130 Idaho 318, 321, 940 P.2d 1137, 1140 (1997)). The *Acarrequi* factors include the following:

> (1) whether a condemnor reasonably made a timely offer of settlement of at least 90 percent of the ultimate jury verdict;
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> (2) whether the offer was timely and not made "on the courthouse steps an hour prior to trial";

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[11] Founders Online, National Archives (http://founders.archives.gov/documents/Jefferson/01-13-02-0120 [last update: 2015-06-29]). Source: The Papers of Thomas Jefferson, vol. 13, March–7 October 1788, ed. Julian P. Boyd. Princeton: Princeton University Press, 1956, pp. 208–210.

[12] *Ada Cty. Highway Dist. v. Acarrequi*, 105 Idaho 873, 877, 673 P.2d 1067, 1071 (1983) (overruled on other grounds by *Grathol*, 158 Idaho 38, 343 P.3d 480).

(3) whether the offer was made within a reasonable period after the action was instituted;

(4) whether the condemnee contested the allegations of public use and necessity;

(5) the outcome of any hearing on such a challenge;

(6) whether the condemnor made any modifications in the project's plan or designs resulting from the landowner's challenge; and

(7) whether the condemnee voluntarily granted possession of the property pending resolution of the just compensation issue.

Grathol, 158 Idaho at __, 343 P.3d at 486, fn. 1 (citing *State ex rel. Smith v. Jardine,* 130 Idaho 318, 320, 940 P.2d 1137, 1139 (1997)).

However, these factors "are matters for consideration and not rigid guidelines within which a trial court is required to operate." *Id.*, 158 Idaho at__, 343 P.3d at 492.

> In *Acarrequi,* this Court delineated factors to guide courts in determining whether to award attorney fees. *Id.* at 877–78, 673 P.2d at 1071–72. The Court noted that these factors "are matters for consideration and not rigid guidelines within which a trial court is required to operate." *Id.* at 877, 673 P.2d at 1071. In addition to considering the *Acarrequi* factors, the trial court must apply I.R.C.P. 54(d)(1)(B) to determine the prevailing party. *State ex rel. Ohman v. Ivan H. Talbot Family Trust,* 120 Idaho 825, 829, 820 P.2d 695, 699 (1991).

Id.

ACHD relies heavily on the fact they offered an amount greater than the jury verdict just ninety days prior to the trial. However, the ninety-day period is not a rigid rule that is required to be applied to each action. The Court must examine the totality of the litigation and offers should be within a "reasonable" time, not at a time that the property owner has spent more than the offer and if the offer is accepted, the property owner is not made even close to whole.

Like the trial court in *Grathol*, having considered the ninety-day offer, the Court finds the offer was not timely because it was not made within a reasonable period after the filing of the condemnation action and it was made after Brooke View had spent a lot more than the offer. The *Jardine* court, cited with approval in *Grathol,* made it clear that each case should be decided based on its own unique factors and not by applying a set of rigid factors. *State ex rel. Smith v. Jardine*, 130 Idaho 318, 322, 940 P.2d 1137, 1141 (1997).

As argued by Brooke View, by January 2015, two and one-half (2½) years after ACHD brought the action, ACHD's own actions forced Brooke View to expend numerous attorney

hours, paralegal hours and expert fees. Furthermore, pre-trial orders required all discovery be disclosed 180 days prior to trial, meaning the condemnee, Brooke View, had already incurred substantial expense well before any ninety-day settlement offer. As of the January 6, 2015 offer, Brooke View had incurred approximately $524,978.99 in fees and costs. If Brooke View had accepted ACHD's highest offer of $275,000, it would not have even yielded the $45,000 offered by ACHD at mediation. The highest offer by ACHD prior to January 6, 2015, was $45,000, clearly not 90% of the jury verdict. The Supreme Court adopted the *Acarrequi* factors to encourage the condemnor (ACHD) to make a reasonable offer within a reasonable time of filing the action to relieve the condemnee (Brooke View) of expense, time and inconvenience. This clearly did not occur – quite the opposite.

Due to ACHD's failure to make a reasonable offer early in the litigation, Brooke View had no choice but to hire expensive experts to prove the construction of the improvement damaged the entryway walls. Brooke View hired numerous impressive experts with Ph.D.s and other graduate degrees who went to great lengths to prepare demonstrative exhibits to make complex scientific principles easy for the jury. Causation in this case was not straightforward; it plainly required the physicists, structural engineers, valuation experts and many more experts, Brooke View hired. It could not have been established without the extensive array of experts Brooke View hired and presented. It was a complicated case on many levels, made more complicated by ACHD's positions.

In this case, Brooke View had "done nothing to bring the action upon himself except to have the bad (or good) fortune of owning property which the governmental entity has chosen to expropriate." *Acarrequi*, 105 Idaho at 877, 673 P.2d at 1071. It should not be punished. The Court finds, in an exercise of discretion, having considered all the *Acarrequi* factors, as well as I.R.C.P. 54(d)(1)(B), that Brooke View, as previously announced in court, was the prevailing party.

B. The amount of attorney fees requested by Brooke View is reasonable and awards Brooke View $744,243.56.

Brooke View requests the Court award it attorney fees in the amount of $744,243.56. Unlike other civil litigation where the American Rule applies, awards of attorney fees to prevailing parties in eminent domain actions are intended

> To relieve the condemnee of the expense of defending against the condemnation where the condemnee is determined to be the prevailing party. *Id.* at 878, 673 P.2d at 1072. Otherwise, a condemnee who is determined by the trial court to be a prevailing party will be deprived of part of the just compensation to which the condemnee is entitled. Idaho Const. art. I, § 14; I.C. § 7-711.

Jardine, 130 Idaho at 322, 940 P.2d at 1141. Just compensation is constitutionally required to make the prevailing condemnee whole and, thus, analyzing attorney fee requests applies an entirely separate set of standards.

In *Acarrequi*, the Supreme Court concluded that "an award of reasonable attorneys' fees to [a] condemnee in an eminent domain proceeding is a matter for the trial court's guided discretion." *Acarrequi,* at 877, 673 P.2d at 1071. Rule 54(e)(3) guides the Court in determining the amount of attorney fees that should be awarded. *Id.*

1. In determining a reasonable attorney fee award, the Court is not constrained by the form of the attorney-fee agreement.

ACHD argues that because Brooke View's attorney-fee agreement was a contingent fee[13] agreement, the Court should only award attorney fees on a contingent fee basis. However, according to Idaho case law, in eminent domain, "the court should not automatically adopt any contingent fee or contractual arrangement, but rather the fee awarded may be more or less than that provided in the lawyer-client contract." *Acarrequi*, 105 Idaho at 878, 673 P.2d at 1072 (emphasis added). Thus, the Court is not bound by the contractual relationship between Brooke View and its lawyers.

The *Acarrequi* court applied the criteria found in I.R.C.P. 54 in determining a proper award of attorney fees in an eminent domain action. These factors include:

(A) The time and labor required.

(B) The novelty and difficulty of the questions.

(C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.

(D) The prevailing charges for like work.

(E) Whether the fee is fixed or contingent.

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[13] According to Brooke View, most eminent domain cases are taken on a contingency fee basis, because generally a property owner is unable to pay hourly attorney fees and expert costs up front.

(F) The time limitations imposed by the client or the circumstances of the case.

(G) The amount involved and the results obtained.

(H) The undesirability of the case.

(I) The nature and length of the professional relationship with the client.

(J) Awards in similar cases.

(K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.

(L) Any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3). The Court applies those factors in determining the proper fee award.

2. The requested time and labor of 3,344.46 hours is reasonable.

The primary focus of most eminent domain cases is valuation. However, in addition to valuation, the principal dispute throughout this litigation, was the effect ACHD's construction project had on Brooke View's entryway walls and how the damage, if any, impacted Brooke View's property value after construction. This directly and necessarily increased the attorneys' time and labor.

As Brooke View observed, this meant that in addition to traditional witnesses and experts consisting of valuation experts like appraisers, land use planners, brokers, real estate agents or developers, this case required the employment and preparation of an extensive and, as previously observed, impressive variety of experts. It required Brooke View to hire, and the attorneys intelligibly present testimony from structural engineers, geotechnical engineers, masons, heavy equipment operators, and geophysicists and to have their own knowledge of obscure concepts like lidar and photogrammetry. This meant that the attorneys were required to become conversant in what are very complex scientific matters. These concepts had to be translated to the jury so that they became understandable. In fact, they succeeded.

After carefully reviewing the time records, the Court finds the time and labor actually expended of 3,344.46 hours, were necessary to demonstrate ACHD had damaged the entranceway walls and how that impacted Brooke View's after-taking valuation. Additionally, this case also had an unusually high number of pre-trial motions, especially for an eminent domain case, including numerous motions to reconsider. ACHD litigated this case very aggressively with

numerous substantive motions, motions to clarify or reconsider which increased the time and labor required by Brooke View's attorneys. ACHD's consistent denial of responsibility for damage done to the wall and its refusal to offer any reasonable amount that would recognize the impact such damage had on valuation, forced the property owner to either go to trial to prove ACHD's offers were inadequate or forfeit a constitutional right to just compensation.

Based on the abnormally high number of motions filed, experts disclosed and depositions taken, Brooke View's attorney hours of 3,344.46 are appropriate for this case.

Contrary to ACHD's allegation, there is NO EVIDENCE Brooke View's attorneys engaged in "churning" the file. This Court carefully reviewed all of the hours being claimed and finds them to have been necessary – often in direct response to ACHD's actions.

3. The questions presented were novel and difficult.

Eminent domain is a specialized area of law and few practitioners tackle it. As demonstrated by the history of this case and the previous discussion, the Court finds this eminent domain case was atypical. In addition, the questions that arose in this case increased litigation costs to Brooke View. ACHD argued a number of novel issues that required Brooke View to respond with additional research or expert opinions. For example,

> (1) ACHD argued that Brooke View's after-taking valuation should not be influenced by the damage to the entryway walls even though just compensation is always determined by calculating the difference between the remainder's fair market value before the taking and the remainder's fair market value after the taking and fair market value is the amount a willing buyer and a willing seller would agree on. Instead it argued that Brooke View had to file a separate tort action to receive any compensation influenced by damages caused by construction even though, arguably Brooke View may have found that claim barred by statutory immunity;
>
> (2) ACHD argued work done by Owhyee Construction (United Water) required by and included in its project documents was not part of ACHD's project;
>
> (3) ACHD's argued part of the entryway wall was located within the Ridenbaugh Canal easement making the wall valueless even though the case law makes clear that the landowner can use and even occupy irrigation canal easements;
>
> (4) ACHD's attempted to use terrestrial lidar technology to disprove Brooke View's damage even though no peer review studies existed supporting ACHD's claim; and
>
> (5) ACHD's attempted to use photogrammetry to disprove Brooke View's damage even though no peer review studies existed supporting ACHD's claim.

The Court finds this case involved numerous novel and difficult concepts, legal, factual and scientific.

4. The attorneys demonstrated a high degree of skill.

Counsel for Brooke View testified that few attorneys practice in the area of eminent domain, but Davison, Copple, Copple and Copple has represented numerous condemnees over the last century. Due to the aggressive manner this case was pursued by ACHD, the novelty of the legal and factual issues, the numerous motions filed and experts retained, this case required extensive knowledge and skill to effectively represent Brooke View. Counsel for Brooke View were able to extract the extensive amount of information produced by witnesses and effectively explain extremely difficult concepts to the jury in such a way the jury could understand it.

5. The charges requested represent the prevailing charges for similar work.

Counsel for Brooke View testified that it is the general and accepted practice to accept eminent domain cases on a contingency fee basis. Such contingency fee is usually one-third of the amount recovered over ACHD's last written offer before the attorney is retained. Condemnees are normally not in a position to pay hourly fees throughout litigation and would be unable to defend themselves without a contingency arrangement.

According to the numerous affidavits, Brooke View's counsel and paralegal hourly rates are comparable to other attorneys offering similar services. The work done by Brooke View's counsel was necessary and the time expended was reasonable.

ACHD argues Mr. Copple's and Ms. Cunningham's rates are 30% over the rates charged by ACHD. However, according to a certified copy of Mary V. York's affidavit offered in the case *ITD v. Grathol*, as a condemnation attorney, she testified that her hourly rate of $325 and Steve Bowman's hourly rate of $335 were commensurate with prevailing rates for attorneys with equivalent experience.

Based on the skill and professionalism demonstrated in this case, as well as, the experience, the Court finds the hourly rates are commensurate with prevailing rates for attorneys with equivalent experience.

6. The time limitations imposed by the client or circumstances of the case.

The time limitations in this case were set by the case itself. There is no evidence that Brooke View *or its* attorneys prolonged this litigation.

7. The amount involved and results obtained justify the award requested.

ACHD's initial just compensation offer was only $7,738.47 and then it rose to $8,512.32. During trial, ACHD did not offer any value evidence. Instead it advocated $8,512.32 as just compensation. Brooke View's value witnesses testified just compensation was between $210,000 and $272,371. The jury awarded Brooke View $146,291.68. Throughout the litigation, ACHD continually argued the construction of the project did not damage the wall, something Brooke View successfully disputed, although it required long hours and significant testimony to accomplish. The jury determined the walls had been damaged and that damage had impacted the value of the property, a desirable result for Brooke View.

8. The undesirability of the case justifies the award requested.

Any attorney who accepts a condemnation case on a contingency fee basis works on the case with no payment, while incurring great costs. Most condemnation cases require expert witnesses, thereby creating high costs for either the condemnee or counsel. In the current action, it took almost three years to come to any conclusion. The case required numerous engineers, and land use planning and valuation experts. Brooke View's counsel testified this case was the most technically complicated condemnation case their firm had litigated. The Court agrees. The difficult concepts involved required more time to understand and more risk that the jury would become confused or bored.

As with any case, there is a risk that any fees and costs would not be rewarded. Furthermore, ACHD chose to aggressively litigate this action, increasing costs and the risk that any return would be insufficient for the time and cost expended. The case justifies an award as requested.

9. The nature and length of the professional relationship with the client justify the award requested.

Brooke View and more specifically Diane Miller, the primary owner of Brooke View, has had a relationship with the firm Davison, Copple, Copple and Copple for over thirty years.

10. There are no similar cases but the award is consistent with other eminent domain attorney fees awards.

There are no similar cases. Unlike the cases cited by the parties, this action was unusual in two ways. First, none of the cited cases involves comparing the before and after values where the after-value has been affected by damage caused by the project's construction. Second, none involves

evidence that the government aggressively increased litigation costs by its own actions like happened here. Even though the amount in dispute is significantly smaller than the requested fees and costs, ACHD's choices and actions constitute a substantial reason for that disparity. However, the Court notes that the court in *Jardine* awarded almost all of the property owner's costs and fees, even though the sum awarded by the jury was less than requested by the property owner. The amount requested here is appropriate.

11. The automated legal research is reasonable.

The main issue in this case did not have Idaho precedent to guide the parties. Brooke View's counsel credibly testified these issues required online research to find informative cases in other states and jurisdictions. In fact, this Court resorted to extensive automated legal research throughout this litigation. The Court finds the amounts and their necessity reasonable.

12. Other factors.

As detailed in previous sections, the Court considered other factors in determining attorney fees. Brooke View was the prevailing party after almost three years of acrimonious[14] litigation. ACHD increased those litigation costs by its actions with its unending and often repetitive arguments. ACHD was on notice prior to and throughout the project's construction that Ms. Miller was concerned about her entranceway walls. Instead, it made no effort to modify its construction plan or project to meet those concerns and essentially brushed her concerns aside. Once the project was complete, this indifference continued and it failed to make any settlement offer that included damage to the wall for almost three years.

In an exercise of discretion, after carefully considering the facts of this case, the Court awards Brooke View all of its requested attorney fees per an hourly basis, **$744,243.56**.

C. The Court awards Brooke View $44,051.46 in non-discretionary costs as a matter of right.

Idaho Rule of Civil Procedure 54(d)(1)(A) provides: "Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court." Having determined that Brooke View prevailed against ACHD,

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[14] Even after a verdict was rendered, the parties continued to bicker back and forth over every minor detail. This Court has not addressed every argument brought forth by each party and did not consider the testimony found in the parties affidavits that did not comply with the Rules of Civil Procedure and Rules of Evidence.

the Court turns to the issue of costs. As the prevailing party, Brooke View is entitled to certain costs as a matter of right. I.R.C.P. 54(d)(1)(A). Brooke View claims $46,061.46 in costs as a matter of right pursuant to I.R.C.P. 54(d)(1)(C).

1. The Court awards $66.00 in court filing fees. (I.R.C.P. 54(d)(1)(C)(1))

The Court awards Brooke View **$66.00** for court filing fees as matter of right.

2. The Court awards $114.80 actual fees for service. (I.R.C.P. 54(d)(1)(C)(2))

The Court awards Brooke View **$114.80** for service of two subpoenas as matter of right.

3. The Court awards $40.00 in witness fees. (I.R.C.P. 54(d)(1)(C)(3)

The Court awards Brooke View **$40.00**[15] for witness fees as matter of right.

4. The Court awards $276.00 in travel expenses of witnesses. (I.R.C.P. 54(d)(1)(C)(4)

The Court awards Brooke View **$276.00**[16] for witness travel expenses as matter of right.

5. The Court awards $500.00 for costs of exhibits admitted into evidence. (I.R.C.P. 54(d)(1)(C)(6)

The Court awards Brooke View **$500.00** for the reasonable costs of trial exhibits as matter of right.

6. The Court awards $26,542.50 expert witness fees (I.R.C.P. 54(d)(1)(c)(8)

Brooke View requests an award of $28,542.50 in expert fees as a matter of right as follows:

- Patrick Dobie $2,000 Deposed and testified at trial
- Roger Dunlap $2,000 Deposed and testified at trial
- Mark Butler $2,000 Deposed and testified at trial
- Mark Richey $2,000 Deposed and testified at trial
- Richard Evans $2,000 Deposed and testified at trial
- David O'Day $2,000 Deposed and testified at trial

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[15] In Brooke View's Memorandum of Costs and Disbursements, Brooke View incorrectly requested $25.00 for witness fees. Brooke View did include $5.00 for the mileage of the two witnesses, but does not affirm this is the correct amount for any mileage actually traveled by these witnesses. Therefore, the Court does not include the $5.00 for mileage as requested by Brooke View.

[16] In Brooke View's Memorandum of Costs and Disbursements, Brooke View incorrectly requested $736.00 for travel expenses on page 36.

- Paul Michaels $2,000 Deposed and testified at trial
- Brian Smith $2,000 Deposed and testified at trial
- David Roylance $2,000 Testified at trial
- Rodney Boone $1,092.50 Deposed and testified at trial
- Jon Pullman $2,000 Deposed and testified at trial
- Ron McConnell $1,375 Deposed and testified at trial
- Roger Wood $2,000 Deposed, but did not testify at trial
- William Vander Pol $75.00 Deposed, but did not testify at trial
- John Roters $2,000 Deposed and testified at trial
- Joseph Canning $2,000 Deposed and testified at trial

However, ACHD objects to the following expert witness fees being awarded:

- Roger Dunlap as duplicative.[17]
- Mark Butler as duplicative[18]
- Richard Evans as duplicative.[19]
- Brian and Roger Smith[20] as unnecessary.[21]
- Pat Dobie as unnecessary.[22]

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[17] Mr. Dunlap is an MAI appraiser, certified by the State of Idaho. The Court finds he was not duplicative. He opined as to just compensation and appraised the property in the before and after conditions. Mr. Dunlap testified at two depositions, assisted in creating exhibits and testified at trial.

[18] The Court finds his testimony was not duplicative. Mr. Butler is a land use planner who owns and operates Land Consultants in Eagle and was the Planning and Zoning Administrator for the City of Eagle. Mr. Butler determined highest and best use both before and after and did extensive historical research regarding the property. Brooke View argued Mr. Butler's opinions were considered or relied on by all of the value witnesses, at least in part. Mr. Butler rebutted Ms. McKay's testimony and others regarding City policies, City codes and the comprehensive plan.

[19] The Court finds his testimony was not duplicative. Mr. Evans is a developer, construction manager and general contractor. Mr. Evans determined a cost estimate for replacement of the entryway walls and the value of the property before and after. Mr. Evans tracked the progression of the cracks, photographed the cracks and assisted Mr. Smith with crack mapping. Mr. Evans also assisted in creating exhibits.

[20] Roger Smith is not included in Brooke View's Memorandum of Costs and Disbursements.

[21] Brian Smith was Brooke View's only structural engineer; he was absolutely essential. He mapped the cracks and ruled out damage from wind and earthquakes and assisted in creating exhibits. ACHD made him necessary.

[22] Mr. Dobie is a licensed professional engineer. Mr. Dobie rebutted testimony from Mr. Aleksander and examined the samples and photos taken by Mr. Aleksander. Mr. Dobie assisted in creating exhibits for trial. He was absolutely essential.

- David Roylance as unnecessary and unqualified as an expert witness.[23]
- Joseph Canning did not testify as an expert engineer at trial.[24]
- John Roters as unqualified as an expert landscaper.[25]

A condemnee must prove just compensation and must support their request with expert testimony. An expert is someone with scientific, technical or other specialized knowledge, acquired through knowledge, skill, experience, training or education. I.R.E. 702. In the present action, Brooke View was required to retain engineers, land use planners, real estate experts, appraisers, masons and landscapers. Costs as a matter of right are allowed to Brooke View for reasonable expert witness fees for an expert who testifies at trial or deposition. After carefully considering Brooke View's experts' qualifications and testimony at trial and during depositions, the Court, in an exercise of discretion, overrules ACHD's objections to Brooke View's experts, except for Canning. While he is clearly an expert, Brooke View has not demonstrated that it offered Mr. Canning as an "expert" at trial for purposes of awarding costs as a matter of right.

Therefore, the Court grants Brooke View expert costs as a matter of right in the amount of **$26,542.50**.

7. The Court awards $16,512.16 for charges for reporting, copying and transcribing of a deposition (I.R.C.P. 54(d)(1)(c)(9) and (10)

"Rule 54(d)(1)(C)(9) allows a prevailing party to recover '[c]harges for reporting and transcribing of a deposition taken in preparation for trial action, whether or not read into evidence in the trial of an action.' " *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 240, 159 P.3d 870, 877 (2007). Brooke View claims charges for the reporting, transcribing and

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[23] Mr. Roylance is a long time real estate developer and retired surveyor and engineer. Mr. Roylance did not testify as to just compensation at trial, but did testify regarding landscape and typical subdivisions and entryways. Mr. Roylance assisted with survey issues related to the Nampa Meridian easement, examined other entranceways in the Treasure Valley and formed opinions of value and economic feasibility. He was absolutely essential.

[24] Mr. Canning was contacted as soon as ACHD notified Brooke View there would be a taking and did preliminary work determining the taking and what the project was. Mr. Canning evaluated the capacity and design of the storm drain and was retained to testify regarding his concerns about the structural integrity of the walls. Mr. Canning is a licensed engineer and required payment at a reasonable rate. He is clearly an expert. However, during the trial, he testified as a fact witness. Therefore, the Court denies the request for expert witness fee as a non-discretionary cost.

[25] Mr. Roters is an expert. To be an expert it is not necessary to have a particular educational background. He has expertise as a CADD draftsman and with exhibit design. Mr. Roters evaluated the landscape elements before and after and put together a vast number of the exhibits at the direction of other experts. He provided expert opinion on the landscape as a landscape expert based on his experience.

copying of depositions taken by ACHD as a matter of right in the amount of $6,114.82. Brooke View also claims charges for the reporting, transcribing and copying of depositions taken by Brooke View as a matter of right in the amount of $10,397.34. The Court awards 100% of that amount, or **$16,512.16**.

D. The Court awards Brooke View $365,703.63 in discretionary costs.

Brooke View requests the Court award it discretionary costs. Discretionary costs are not automatically awarded, and this Court has awarded them in very few cases. Idaho Rule of Civil Procedure 54(d)(1)(D) allows a court to award discretionary costs. That rule provides:

> Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed.

I.R.C.P. 54(d)(1)(D). A trial court has discretion to "award a prevailing party certain costs where there has been 'a showing that the costs are necessary and exceptional, reasonably incurred, and should in the interests of justice be assessed against the adverse party.' " *Hayden Lake Fire Prot. Dist. v. Alcorn,* 141 Idaho 307, 314, 109 P.3d 161, 168 (2005); *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 203, 321 P.3d 739, 753 (2014).

In exercising its discretion, the Court must make express findings explaining its decision. *Id.* Moreover, the award is appropriate only in those cases where the nature of the case was itself exceptional. *Grathol*, 158 Idaho 38, __, 343 P.3d 494. Over the years, the Idaho courts have construed the "exceptional" cost requirement to include those costs incurred "because the nature of the case was itself exceptional." *Id.* (citing *Hayden Lake,* 141 Idaho at 314, 109 P.3d at 168). As the Supreme Court observed in *Hoagland*,

> Over the years, this Court and the Court of Appeals have been inconsistent with handling discretionary costs. *Compare, e.g., Hayden Lake Fire Protection Dist. v. Alcorn,* 141 Idaho 307, 314, 109 P.3d 161, 168 (2005) (holding expert witness fees can be exceptional), *and In re Univ. Place/Idaho Water Ctr. Project,* 146 Idaho 527, 545, 199 P.3d 102, 121 (2008) (upholding award of discretionary costs on the district court's finding discretionary costs were equitable and just), *and Puckett v. Verska,* 144 Idaho 161, 169, 158 P.3d 937, 945 (2007) (permitting discretionary cost for expert witness in medical malpractice case based on the long course of

> litigation), *with, e.g., Nightengale v. Timmel,* 151 Idaho 347, 354, 256 P.3d 755, 762 (2011) (holding that case was not exceptional merely because an expert was necessary), *and City of McCall v. Seubert,* 142 Idaho 580, 588–89, 130 P.3d 1118, 1126–27 (2006) (holding intervenor costs were not exceptional but were "routine costs associated with modern litigation overhead"), *and Fish v. Smith,* 131 Idaho 492, 493–94, 960 P.2d 175, 176–77 (1998) (finding hiring of expert for accident reconstruction was routine). We therefore clarify that numerous complaints, depositions, and expert testimony does not render a case in and of itself exceptional.

Hoagland v. Ada County, 154 Idaho 900, 914, 303 P.3d 587, 601 (2013) reh'g denied (July 8, 2013), cert. denied sub nom. *Hoagland v. Ada Cnty., Idaho*, 134 S. Ct. 1024 (2014). In determining whether a case is exceptional, the Idaho Supreme Court gave this guidance:

> [C]ourts should assess the context and nature of a case as a whole along with multiple circumstances. *See Nightengale,* 151 Idaho at 354, 256 P.3d at 762. The mere fact numerous experts were retained or numerous amendments were filed does not standing alone render a case exceptional. Particular standards a court should consider include, but are not limited to, whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary costs that could have been easily avoided. Most importantly, however, a court should explain *why* the circumstances of a case render it exceptional.

Id..

This is one of those exceptional cases. A condemnee must prove just compensation to a jury or accept the offer from the State. However, where the government's offer is so low, as it was here, the property owner has no choice; it must hire experts and prepare for expensive litigation. The property owner, as Ms. Miller testified, must seek relief from a jury or give up their land without just compensation. However, the fact the property owner must prove its case does not, by itself, justify imposing discretionary costs.

ACHD aggressively and unreasonably litigated this case from the beginning. ACHD early on took the unwavering position that it did not damage the entryway walls and that even if it did, any negative effect on the post-taking valuation could not be used to determine just compensation. It ignored the fact that any potential buyer would take the damaged entryway walls into consideration in determining the fair market value. Once causation was proven, this should have been a relatively easy case. Therefore, unlike the typical eminent domain case, Brooke View faced fighting ACHD on two fronts. It first had to fight the legal arguments. As previously explained,

ACHD would not accept court rulings, simply preserve the record for appeal and move on. Throughout this litigation, ACHD reargued every ruling and kept trying to treat any damage as a tort, right through trial, even suggesting that Ms. Miller had an obligation to "halt" construction when she saw cracks developing. Every legal issue was argued and re-argued.

Brooke View also had to prove ACHD's construction project damaged the entryway walls causing the post-taking value to decrease.[26] Given the complexity of the issue, unlike the typical eminent domain case, it had to hire structural engineers, geophysicists, traffic engineers, and geotechnical engineers. In addition, while Brooke View also retained land use planners, real estate experts, and appraisers which arguably are not exceptional, it was ACHD who increased the costs associated with even the normally anticipated experts. It delayed, obfuscated, and unnecessarily wasted resources. It disclosed expert opinions late, causing additional costs and delays. It identified an exceptionally long list of potential witnesses which Brooke View had to depose and, then called few of those witnesses at trial. They also disclosed some witnesses as experts whose expertise was debatable.

For example, ACHD identified so-called experts like Leo Geis but disclosed no opinions. This required Brooke View to depose him and it became apparent that his so-called expertise in "determining the depth of cracks based on paint pixels," an unheard of technique, was questionable. The Court actually held a several hour *Daubert*-type hearing to evaluate Geis' unsupported "opinion" – wasting both the Court's time and raising costs for Brooke View on two levels. Brooke View had to have an expert research Geis' "expert opinion" and also use precious attorney time to attend the hearing. Brooke View had to employ its own experts to refudiate this bogus theory. At the hearing, Geis testified his "expertise" was based on reading the Adobe manual. He admitted that his "theory" was never peer reviewed, and he could identify no published studies supporting his opinion. After several hours, part way through the hearing, the Court took a break and asked ACHD counsel whether they really thought Geis was an expert and whether they had additional support. Even they could not support his classification as an expert.

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[26] While this arguably is not unreasonable, even when it became apparent that construction of ACHD's improvements actually caused the structural damage, ACHD did not make a reasonable offer. At trial, ACHD never produced any reasonable evidence that it did not cause the damage.

ACHD had the same problem with Dr. Aleksander who based his opinions on his "gut" in yet another *Daubert*-type hearing during the middle of trial. While Dr. Aleksander may be an expert in some areas, as he clearly is, he was not an expert for the purposes identified by ACHD.

Brooke View did not willingly go to trial. From the outset, after consulting experts, Ms. Miller on behalf of Brooke View alerted ACHD that constructing its improvement so close to her entry walls would damage them structurally. ACHD ignored her. During construction, its contractors failed to properly document their activities and when cracks in fact appeared, just as Ms. Miller warned, this lack of documentation directly increased the costs to Brooke View to prove its case. Luckily for Brooke View, Ms. Miller photographed as much of the construction activity that she could. Those photographs formed the basis for the majority of the evidence presented at trial. Because ACHD failed to document its project, in order to proceed, Brooke View was forced to hire experts to review those photos and recreate what happened. For example, while normally construction companies keep daily logs, showing what they did and what equipment was used, in this case ACHD produced very few logs and those it did produce had no equipment listed. The kind of equipment and what psi it generated was critical to Brooke View's view of what happened. Thus, Brooke View's experts carefully reviewed the picture evidence to identify the equipment and its placement. Again this made the litigation exceptional. Effectively, ACHD shifted costs it should have borne to Brooke View.

The unique facts of the case, plus ACHD's actions, make the discretionary costs claimed by Brooke View necessary and exceptional. Furthermore, the Court finds that in the interest of justice, most of them should be assessed against ACHD. *See*, *Hoagland, supra.* Against these findings, the Court reviews the individual costs.

1. <u>The Court awards Brooke View $35,592.38 for exhibit supplies, trial preparation and mediation.</u>

Brooke View requests discretionary costs for trial exhibits, preparation of exhibits and items related to certain exhibit supplies, including trial exhibits prepared by John Roters, a

Bonneville blueprint, a clothes line, USB cable,[27] jury books,[28] magnets, slinky, modeling clay, sponges and a golf ball exhibit, in an amount of $33,255.74. ACHD argues these exhibits can be reused and are not appropriate for an award. ACHD also argues that any exhibits depicting the property are unnecessary because the jury was allowed to view the property, ignoring the fact that by rule the jury *cannot* use a jury view as evidence; they are so instructed. Moreover, pictures and other depictions of the property are evidence in the record.

As discussed above, the online research was necessary in researching areas of law outside the jurisdiction of Idaho and will be awarded to Brooke View in the amount of $736.34.

Most courts encourage mediation efforts by the parties to litigation, this case is no different. However, when the Court orders mediation, it assumes it is not a waste of time. When one party simply submits the same offer, as here, and there is no attempt to mediate, the Court will award the costs for mediation charges in the amount of $318.75.

While normally the Court would not award discretionary cost for photocopies, because they are considered overhead and not exceptional, in this case, Brooke View claims it excluded those photocopies that would be considered normal from its request. It only requested those photocopies that exceeded what it would normally incur such as oversize documents and exhibits. Given the exceptional nature of the case, the Court awards Brooke View $1,781.55. This was a very complex case and large exhibits needed to be photocopied.

Therefore, the Court awards Brooke View **$35,592.38** in discretionary costs ($500.00 was already awarded as non-discretionary trial exhibit costs) for trial exhibits, mediation costs and exceptional copy costs.

2. The Court awards Brooke View $330,111.25 for expert witness fees.

The Court finds that the experts and witnesses retained by Brooke View were necessary and reasonable in challenging ACHD's position, and made necessary by the aggressive nature of ACHD's handling of the litigation. ACHD cannot now argue against costs incurred by Brooke

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[27] While on its surface this may appear to be just a usual cost, the Court notes that like much that occurred in this case, when Brooke View was provided the Geis photographs the drive required a specific USB cable type that Brooke View's counsel did not have. Thus, the Court awards that amount.

[28] Jury books are not routinely used. In this case, given the volume of material, the Court finds they were necessary and exceptional.

View for experts, when ACHD's own actions made these costs necessary. The remaining requested amount of expert fees requested by Brooke View is $330,111.25. (Brooke View requests $356,653.75 and the Court already granted $26,542.50 in non-discretionary expert witness fees.)

ACHD argues that certain experts merely corroborated other expert's opinions and are not necessary in making the prima facie case. It challenges several.

For example, having sat through the trial, contrary to ACHD's contention, the Court finds Dr. Michaels did not duplicate Mr. O'Day's testimony. Dr. Michaels provided the evidence that linked the equipment to the damage and ruled out other non-construction related causes. As a Ph.D. geophysicist professor with extensive and impressive credentials, he computed peak particle velocity which was indispensable to prove the equipment damage to the walls. Mr. O'Day testified about geotechnical soil evidence, explaining how vibrations affect soil, calculating shrinkage and settlement. ACHD also challenges Evans versus Roylance and Richey versus Dunlap. However, while there may have been some overlap, each brought a different interpretation of the evidence and each was presented to refute some of ACHD's theories. Their testimony was not duplicative.

ACHD objects to a number of the experts as unnecessary. However, the Court finds, having presided at the trial, as follows:

> Pat Dobie was necessary and his charges are reasonable. He is a licensed professional traffic engineer and rebutted Dr. Aleksander's testimony. He assisted in creating numerous exhibits for trial.
>
> Roger Dunlap was necessary and his charges are reasonable. ACHD's actions made him necessary. He opined on just compensation and appraised the property in the before and after conditions. He testified at two depositions, assisted in creating exhibits and testified at trial.
>
> Mark Butler was necessary and his charges are reasonable. He determined highest and best use both before and after and did extensive historical research regarding the property, a primary ACHD issue. Many of his opinions were considered or relied on by all of the value witnesses. He rebutted ACHD McKay's testimony and others regarding City policies, City codes and the comprehensive plan.
>
> Mark Richey was necessary and his charges are reasonable. He is a local MAI appraiser.

Richard Evans was necessary and his charges are reasonable. Evans is a developer, construction manager and general contractor. Evans tracked the progression of the cracks, photographed the cracks and assisted Smith with crack mapping. Evans also assisted in creating exhibits.

David O'Day, a geotechnical engineer, was necessary and his charges are reasonable.

Dr. Paul Michaels was necessary and his charges are reasonable, as previously discussed.

Brian Smith was necessary and his charges are reasonable. Brian Smith was Brooke View's only structural engineer. He mapped the cracks and ruled out damage from wind and earthquakes and assisted in creating exhibits.

David Roylance was necessary and his charges are reasonable. He is a real estate developer and retired surveyor and engineer. He is an expert and testified regarding landscape and typical subdivisions and entryways. Roylance assisted with survey issues related to the Nampa Meridian easement, examined other entranceways in the Treasure Valley and formed opinions of value and economic feasibility.

Rodney Boone, William Vander Pol and Jon Pullman were necessary and exceptional and their charges are reasonable.

John Roters was an expert who was necessary to Brooke View's case and his charges are reasonable. Roters has expertise as a CADD draftsman and with exhibit design. He evaluated the landscape elements before and after and put together a vast number of the exhibits at the direction of other experts.

Joseph Canning was an expert who was necessary to Brooke View's case and his charges are reasonable, as previously discussed.

Lucas Spaete and Talbot & Associates were experts who were necessary to Brooke View's case and their charges are reasonable. ACHD's attempt to rely on Leo Geis and Dr. Aleksander forced Brooke View to seek their expertise in evaluating Leo Geis' and Dr. Aleksander's photographs. This clearly makes their costs an exceptional expense.

The Court grants the remaining requested amount of expert witness fees requested by Brooke View in the amount of **$330,111.25**.

E. "Manifest injustice would result" if Brooke View was required to pay for ACHD expert deposition time.

ACHD took the position that Brooke View must pay for its experts' deposition time. The Court incorporates its earlier discussion finding that ACHD's actions caused this case to be exceptional. Based on that discussion, the Court finds that "manifest injustice would result" if

Brooke View were required to pay these invoices. I.R.C.P. 26(b)(4)(C). Furthermore, even if the Court did require Brooke View to pay these costs, the Court, in an exercise of discretion, would then impose them on ACHD as discretionary costs based on the Court's earlier findings.

Therefore, Brooke View is not required to pay those costs of $8,106.39.

CONCLUSION

NOW, THEREFORE, IT IS ORDERED that Brooke View's Motion for Costs and Attorney Fees is hereby GRANTED and the Court awards Brooke View attorney fees in the amount of **$744,243.56**, non-discretionary costs in the amount of **$44,051.46** and discretionary costs in the amount of **$365,703.63**, finding the costs exceptional, for a total award of **$1,151,699.99**[29] taking into account the credited amount[30].

IT IS SO ORDERED.

Dated this 27th day of August 2015.

Cheri C. Copsey
District Judge

[29] Brooke View's Memorandum of Costs and Disbursements incorrectly totals its own numbers by an overage of $263.50.

[30] $2,298.66.

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of August 2015, I mailed (served) a true and correct copy of the within instrument to:

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CHRISTOPHER D. RICH
Clerk of the District Court

By: Beth Martin
Deputy Clerk