

Steven B. Andersen (ISB #2618)
Jennifer Reinhardt-Tessmer (ISB #7432)

KIRTON MCCONKIE
11th & Idaho Building
1100 W. Idaho St., Ste. 930
Telephone: (208) 370-3325
Facsimile: (208) 370-3324
sandersen@kmclaw.com
jtessmer@kmclaw.com

RAÚL R. LABRADOR
ATTORNEY GENERAL

SCOTT L. CAMPBELL
Chief of Energy and Natural Resources Division

GARRICK L. BAXTER, ISB No. 6301
MEGHAN M. CARTER, ISB No. 8863
Deputy Attorneys General
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Facsimile: (208) 287-6700
garrick.baxter@idwr.idaho.gov
meghan.carter@idwr.idaho.gov

Attorneys for Defendant

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

STRIDER CONSTRUCTION CO., INC.,

Plaintiff,

vs.

IDAHO WATER RESOURCE BOARD,

Defendant.

Case No. CV01-22-10932

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S SECOND MOTION TO
AMEND SCHEDULING ORDER**

Idaho Water Resource Board (“IWRB”), by and through its counsel of record, Kirton McConkie, hereby submits this Memorandum in support of Defendant’s Second Motion to Amend

Scheduling Order. For the reasons set forth in further detail below, and in the supporting Declaration of Mike Morrison filed concurrently herewith, IWRB respectfully requests the Court enter an order extending the jury trial date, pre-trial conference dates, and all other associated upcoming case deadlines by 60 days.

Dates for trial and pre-trial conferences contained in scheduling orders “must not be modified except by leave of the court on a showing of good cause.” I.R.C.P. 16(a)(3). Other deadlines described in I.R.C.P. 16(a)(2)(B) (e.g., completing discovery, disclosing expert witnesses) “must not be modified except by leave of the court on a showing of good cause or by stipulation of all the parties and approval of the court.” I.R.C.P. 16(a)(3). Moreover, “the rules are to be liberally construed, and a just result is always the ultimate goal to be accomplished.” *Sines v. Blaser*, 566 P.2d 758, 762, 98 Idaho 435, 439 (1977). Trial courts’ decisions involving application of a “good cause” standard are “discretionary decisions.” *Phillips v. Eastern Idaho Health Services, Inc.*, 166 Idaho 731, 757, 463 P.3d 365, 391(2020).

I. INTRODUCTION

The Court previously granted IWRB’s original motion to amend the scheduling order in part to account for a health matter for IWRB’s lead counsel and in part to allow time for a key evidence inspection, central to key claims and defenses at issue in the lawsuit, which cannot occur without dewatering the area of an anticipated void under the dam. (Court’s Bench Ruling, July 7, 2023). The instant Second Motion to Amend the Scheduling Order is merely an extension of IWRB’s original Motion to Amend the Scheduling Order, based only upon new information that the dewatering of the area of the anticipated void, which is necessary to facilitate the inspection, and which is being conducted by IWRB’s new contractor who has taken over for Strider, is now scheduled to occur later than estimated at the time of IWRB’s original motion.

II. STATEMENT OF RELEVANT FACTS

Grounds for IWRB's original motion to amend the Scheduling Order

As demonstrated by IWRB in conjunction with its motion to originally extend the schedule, IWRB has been unable to inspect a suspected void under the dam, which is relevant to several defective workmanship issues and payment disputes underlying claims in the Complaint and Counterclaim in this litigation. *See* Second Declaration of Jennifer Reinhardt-Tessmer in Support of Defendant's Motion to Amend Scheduling Order, ¶¶ 7-8 and Exhibits B, C attached thereto. Further, despite IWRB demonstrating diligence to retain experts and explore the issues, the inspection could not previously occur due to requirements for physical access safety and optimal data quality combined with water levels at the dam. *See* Declaration of Mike Morrison in Support of Defendant's (original) Motion to Amend Scheduling Order at ¶¶ 8-11. In order to inspect the void, dewatering must occur, which is a process requiring permits, months of planning and significant costs; and therefore, IWRB has been waiting on the retention of its new contractor who is taking over for Strider to dewater the area of the suspected void in order to complete repairs and improvements at the dam, which will enable the parties to conduct the subject inspection. *Id.*; *see also* Reply in Support of Defendant's Motion to Amend Scheduling Order pp. 4-5. At the time of IWRB's original motion, IWRB's Project Manager over the Priest Lake outlet dam Project thought the in-water work for the project, and consequently a dewatered state to accommodate counsel's inspection, would occur in November. *See* Declaration of Mike Morrison in Support of Defendant's Motion to Amend the Scheduling Order, ¶ 7.

The Court's Previous Ruling

The Court granted IWRB's original motion to amend the scheduling order, noting in its ruling the impact the inspection findings may have on the case. (Bench ruling on July 7, 2023,

followed by new Scheduling Order dated July 7, 2023). The new Scheduling Order set the trial for 12 days commencing February 26, 2024. Because the February trial date was so close to the anticipated November inspection, counsel submitted a stipulated motion to amend the scheduling order to modify the expert witness disclosures and written discovery deadline. The stipulation was granted by the Court on August 29, 2023. *See* Order Granting Stipulation to Amend Scheduling Order.

Recent Developments Impacting the Timeline

On August 30, 2023, IWRB and its new contractor entered into a contract for repair and improvement to the Priest Lake Dam. *See* Declaration of Mike Morrison in Support of Declaration in Support of Second Motion to Amend the Scheduling Order (“Morrison Dec. 2nd”) at ¶ 5. The contractor is taking over the work left unfinished and damage caused by Strider. *Id.* at ¶ 4. The new contractor is charged with creating a schedule to complete the work outlined in the contract, including when to dewater in order to complete the in-water work. *Id.* at ¶ 9. Although IWRB previously thought this in-water work would be done in November, the new contractor has recently advised that it plans to do the work in late December. *Id.* at ¶¶ 7, 9.

Additionally, apart from the developments impacting the dewatering issue, Strider’s has caused unnecessary delay by filing a meritless motion for protective order to avoid appearing in the forum location for a 30(b)(6) deposition, waiting weeks to file after receiving the notice and setting the hearing for the day prior to the scheduled deposition, making it logistically impossible for the parties to proceed without vacating and rescheduling. *See* Order Denying Motion to Shorten Time filed September 11, 2023. Also contributing to the delay in depositions is Strider’s failure to produce evidence in response to propounded discovery or otherwise appropriately objecting to the set location. *See* Motion to Compel Strider to Produce Physical Evidence in Response to

Defendant's Second Set of Requests for Production and the supporting Memorandum and Declaration of Jennifer Reinhardt-Tessmer, filed in this matter on September 13, 2023. Instead, counsel agreed to a location, failed to respond to counsel's request to arrange for the inspection for weeks and then canceled after its expert had arranged to travel to Boise for the inspection. *Id.* All of these tactics have caused substantial and unnecessary delay in the progression of the case, which time has been instead focused on discovery motion practice.

III. ARGUMENT

A. Standard

Idaho Rule of Civil Procedure 16(b)(6) provides the Court with the discretion to modify a scheduling order upon a showing of good cause. Idaho R. Civ. Pr. 16(a)(3); *see also State v. Young*, 136 Idaho 113, 116, 29 P.3d 949, 952 (2001) (considering I.C. § 19-3501(2), noting that “[b]ecause there is no fixed rule for determining what constitutes good cause, the matter is initially left to the discretion of the district court.”).

B. The Same Good Cause Exists to Modify the Scheduling Order Again

A key evidence inspection cannot be conducted until the dam is dewatered. At the time of IWRB's original motion, IWRB estimated this could occur in November. However, as a state entity, IWRB does not have the same freedom over the contracting process or speed as a private entity, because that process is governed by Idaho law. Further, according to the terms of the contract, the new contractor determines how and when it will dewater. The new contractor which was only officially retained August 30, 2023, and has been working to develop its dewatering plan (which is not yet finalized) and its schedule (which is also not finalized) now estimates that its dewatering, which will enable the inspection of the suspected void under the dam, will occur in late December or early January, despite IWRB's diligence. Morrison Dec. 2nd at ¶ 13. This is a unique matter

involving a state entity; a construction dispute over a site that is currently largely underwater; a new third-party contractor who is in charge of setting the schedule for when and how the site is dewatered; and a dam with a suspected hole under it, making the dewatering plan the new contractor is in charge of creating and the surrounding timeline much more complicated. *See Morrison Dec. 2nd*. All of these factors have resulted in the schedule being pushed from the original November timeframe to late December or early January. By way of background, when Strider abandoned the project, IWRB had to reengage in the statutorily mandated procurement process. *Id.* at ¶ 4. First, it had to assess what was unfinished or done improperly, which was all dependent on lake levels and weather conditions. *Id.* at ¶ 3. The board then used a two-step procurement process. *Id.* at ¶ 5. The request for qualifications was issued in March of 2023 and upon identifying a winning qualified contractor, a contract was signed on August 30, 2023. *Id.* The new contractor is charged with designing the dewatering system (which will facilitate the inspection) and setting the schedule for when that system will be in place. *Id.* at ¶ 8. The new dewatering system is more complicated given the anticipated void under the dam. *Id.* at ¶ 10. The Contractor has recently provided a preliminary design to IWRB of its dewatering plan and associated schedule, which reflects that the dewatering is estimated to occur in the last week of December. *Id.* at ¶ 9. Unfortunately, the exact date is not known, as the plan has not yet been finalized, and finalization of the plan requires acquisition of permits. *Id.* at ¶ 13.

IWRB has requested that the contractor accelerate the dewatering plan as much as possible; however, the dewatering plan is entirely within the contractor's discretion. *Id.* at ¶ 11. Therefore, based on current information, IWRB estimates that its experts will be able to conduct testing at the site location in late December. *Id.* at ¶ 13.

C. New Good Cause Exists to Modify the Scheduling Order

As noted above, Strider has engaged in tactics to avoid appearing for depositions and

producing evidence for inspection, which inspections are necessary for the Plaintiff to conduct prior to taking the depositions. Not only did Strider delay filing its motion for protective order until it would necessarily result in a conflict with the actual depositions, but now Strider has stated it won't produce the evidence with its local counsel in Boise until November with depositions occurring thereafter. *See* September 8, 2023 4:26 email from Lindsay Watkins, attached as Exhibit I to the Declaration of Jennifer Reinhardt-Tessmer in Support of Motion to Compel Strider to Produce Physical Evidence in Response to Defendant's Second Set of Requests for Production. There are pending motions on these issues yet to be resolved by the Court, which have caused delay to the schedule.

D. Failure to Amend Will Prejudice IWRB

As described in IWRB's Reply in Support of Defendant's Motion to Amend the Scheduling Order, if IWRB is unable to inspect evidence necessary for its defense and counterclaim, it will be prejudiced. *See* IWRB's Reply in Support of Defendant's Motion to Amend the Scheduling Order at 4 and Second Dec. of Jennifer Reinhardt-Tessmer in Support of Defendant's Motion to Amend Scheduling Order, Ex. C. at pg. 105 (excerpt from 30(b)(6) deposition of IWRB in which Plaintiff's counsel specifically questioned the witness about what evidence it had that Strider caused the "hole" under the dam and specifically asking the witness if anybody has "actually see[n] a hole under the dam").

IV. CONCLUSION

For the same reason that the Court previously granted IWRB's original motion (in order to conduct a necessary inspection) and based on the new facts impacting the timing of the inspection, IWRB respectfully requests that the Court grant IWRB's Second Motion to Amend the Scheduling Order by extending the jury trial date and all other associated deadlines by at least 60 days.

DATED this 20th day of September 2023.

KIRTON McCONKIE

/s/ Jennifer Reinhardt-Tessmer

Jennifer Reinhardt-Tessmer

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2023, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

Lindsay (Taft) Watkins
Pro Hae Vice Admission Pending
Kristina Southwell
Pro Hae Vice Admission Pending
AHLERS CRESSMAN & SLEIGHT PLLC
1325 4th Ave., Suite 1850
Seattle, WA 98101
Telephone: (206) 287-9900

- U.S. Mail
- Facsimile: (208) 388-1300
- Hand Delivery
- Overnight Delivery
- iCourt E-File/Serve:
lindsay.watkins@acslawyers.com
kristina.southwell@acslawyers.com

Joe Meuleman
MEULEMAN LAW GROUP PLLC
950 W. Bannock St., Ste. 490
Boise, ID 83702
Telephone: (208) 472-0066
Attorneys for Plaintiff Strider Construction Co., Inc.

- U.S. Mail
- Facsimile:
- Hand Delivery
- Overnight Delivery
- iCourt E-File/Serve:
jmeuleman@meulemanlaw.com

Garrick L. Baxter
Meghan M. Carter
Deputy Attorneys General
Idaho Water Resource Board
P.O. Box 83720
Boise, Idaho 83720-0098
Telephone: (208) 287-4800
Attorneys for Defendant

- U.S. Mail
- Facsimile:
- Hand Delivery
- Overnight Delivery
- iCourt E-File/Serve:
garrick.baxter@idwr.idaho.gov
meghan.carter@idwr.idaho.gov

/s/ Jennifer Reinhardt-Tessmer
Jennifer Reinhardt-Tessmer