

Lindsay Watkins, *Pro Hac Vice*  
lindsay.watkins@acslawyers.com  
Nicholas Korst, *Pro Hac Vice*  
nicholas.korst@acslawyers.com  
**AHLERS CRESSMAN & SLEIGHT PLLC**  
1325 Fourth Avenue, Suite 1850  
Seattle, WA 98101  
Telephone: (206) 287-9900  
Facsimile: (206) 934-1139

Joe Meuleman, ISB #8029  
**MEULEMAN LAW GROUP PLLC**  
950 West Bannock Street Suite 490  
Telephone: (208) 472-0066  
Facsimile: (208) 472-0067  
jmeuleman@meulemanlaw.com

*Attorneys for Strider Construction Co., Inc.*

**IN THE DISTRICT COURT OF 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

PLAINTIFF'S MEMORANDUM  
IN OPPOSITION TO  
DEFENDANT'S SECOND  
MOTION TO AMEND  
SCHEDULING ORDER

**I. INTRODUCTION**

Plaintiff, Strider Construction Co., Inc. ("Strider"), by and through its counsel of record, Lindsay Watkins, Nicholas Korst, and Joe Meuleman, hereby submits this Memorandum opposing Defendant's Second Motion to Amend Scheduling Order.

Defendant Idaho Water Resource Board ("IWRB") asks this Court to postpone the trial date 60 days, from February 26, 2024 to April 26, 2024 and similarly continue all other deadlines. Defendant's Motion at p. 2. This is IWRB's second motion to amend the scheduling order. *Id.*

IWRB's motion is littered with excuses as to why IWRB has failed to perform an inspection of the dam. IWRB has had nearly two years since it issued the Stop Work Order to facilitate an inspection of the dam. It is unreasonable and prejudicial to continue to delay Strider's ability to reach final resolution in this matter.

IWRB – as Owner of the project – claims a reason for the delay is because the construction schedule is completely out of its control and IWRB is simply at the mercy of the contractor. This is not true and is contradicted by the contract documents. IWRB is the owner of the dam, controls the contractor's schedule, and was fully capable of facilitating an inspection by November 2023.

IWRB also attempts to blame Strider for delays allegedly caused by discovery disputes (scheduling of depositions and inspection of the J-Seal). IWRB's baseless allegations that Strider has acted improperly to delay this litigation are offensive and nothing more than an attempt to deflect from its own failures. The scheduling of depositions and inspection of the J-Seal have had no impact on the overall case schedule. The current deadline to complete lay witness depositions is January 15, 2024 and discovery cutoff for written discovery is January 22, 2024.

This Court should deny IWRB's Motion because IWRB fails to provide good cause justifying a two-month continuance and because the proposed continuance will prejudice to Strider, as Strider will be forced to wait even longer to receive payment for work it performed – even amounts not in dispute.

## **II. STATEMENT OF RELEVANT FACTS**

In June 2020, the Board put out a request for bids on the Priest Lake Outlet Dam Improvement Project (the "Project"). Declaration of Jim Gebhardt ("Gebhardt Decl."), ¶3. Strider submitted the lowest bid and was awarded the fixed-price contract for the Project. *Id.* On August 20, 2020, a fixed-price Contract in the amount of \$1,542,334 (the "Contract") was fully executed

between the Board as the “Owner” and Strider as the “Contractor.” *Id.* at ¶4. On December 4, 2021, the Board issued a Stop Work Order on the Project. *Id.* at ¶5. On or about July 27, 2022, Strider properly terminated the contract with IWRB. *Id.* at ¶6. Strider filed this lawsuit on July 29, 2022, seeking over \$1,500,000 in damages.

#### IWRB’s Proposed Testing of the Dam

After the Stop Work Order was issued, Mark Rohrbach of RAM GeoServices, Inc. (“RAM”), who was working for Strider on the Project, investigated the conditions of the dam. Declaration of Mark Rohrbach (“Rohrbach Decl.”), ¶3. RAM ultimately worked with representatives of Project Owner, IWRB, including Mike Morrison; the Project Engineer of Record, Mott MacDonald (“Mott”); and the Project Geotechnical Engineer of Record, GeoEngineers, Inc. (“GEI”). *Id.* at ¶4. RAM’s work included efforts to develop an approach which would prevent the flow of water below the dam. *Id.* at ¶6. As part of RAM’s investigation and work, RAM performed on-site testing and requested various non-destructive tests (including ground penetrating radar, GPR). *Id.* GPR is a non-destructive test which potentially could have identified existing steel reinforcement in the dam and aid in quantification of the size of the alleged voids below the dam. *Id.* However, IWRB did not allow the testing to be completed, citing concerns for the dam’s stability. *Id.* at ¶8. This is the same testing IWRB is now proposing as part of the dam site inspection. *See* Declaration of Mike Morrison dated June 25, 2023.

Importantly, an investigation, years later and after the new contractor has installed another dewatering system, will likely not result in obtaining relevant evidence because the conditions will not be the same as those at the time of IWRB’s Stop Work Order. Rohrbach Decl. at ¶12-13. This is because any dewatering system will require time to develop, or purge fines from the system, and will almost certainly result in the movement of soil particles and thereby change the soil conditions

making the new conditions not the same as those which existed before installation of the new contractor's dewatering system. *Id.* at ¶12. In other words, conditions observed during the inspection will not be evidence of conditions present during Strider's work on the Project.

#### IWRB's Delay in Scheduling the Testing

IWRB provided a Declaration of Mike Morrison as part of its supplemental briefing to its First Motion to Amend the Scheduling Order. In it, Mr. Morrison explained that heavy snowfall in the winter months would make access to the dam challenging. Declaration of Mike Morrison dated June 25, 2023 at ¶5. He further explained that rainfall and snowmelt in the spring months would create too high of water levels for the testing to take place. *See Id.* at ¶6. He continued to explain that dewatering in the summer months would require additional permits, significant costs, and months of planning. *Id.* at ¶8. Mr. Morrison stated that the Idaho Department of Water Resources planned to draw down Priest Lake in September so that inspection could occur in November. *Id.* at ¶9. Thus, by IWRB's own admission, the weather and river conditions make fall the only season that IWRB could reasonably inspect the dam. With full knowledge of this, IWRB failed to ensure the new contractor started its work in time to allow for the inspection to take place in November.

In Mr. Morrison's subsequent declaration, dated September 20, 2023, he alleges the ability to schedule the dam inspection is controlled by the new contractor's dewatering plan and schedule, not the seasonal weather and river conditions. Declaration of Mike Morrison ("Morrison Decl.") at ¶8. IWRB claims that it had no control over the timing of this process. Defendant's Motion at p. 7-8. Not only is this position not credible given IWRB is the project owner, but it is contradicted by the contract documents. *See* Declaration of Lindsay Watkins ("Watkins Decl."), Exhibit A at

p. 33.<sup>1</sup> As discussed in detail below, the contract provides numerous avenues for IWRB to direct the work and the contractor's schedule of work. Moreover, though Strider has repeatedly requested an update on the schedule and the basis for the delay from IWRB, IWRB has refused to provide such schedule or any substantive detail by which Strider can assess when or even if this inspection can occur. *Id.*, Exhibit B.

### Discovery Issues

Strider has complied with its discovery obligations and has acted in good faith to resolve discovery disputes. IWRB presents zero evidence to the contrary. IWRB first issued discovery in November of 2022, to which Strider responded in January of 2023. Watkins Decl. at ¶4. Strider has produced six different productions of documents in response to IWRB discovery requests. *Id.* at ¶5. The two pending issues before this Court – the inspection of the J-Seals and the location of depositions – are not evidence of Strider acting evasively or attempting to delay the litigation. Strider agreed to the dates proposed by IWRB for the depositions (only the location was in dispute) and made the J-Seal available at any time (again, only the location was in dispute). *Id.*, Exhibit B. Not only that, but these two issues will be resolved over three months prior to the discovery deadlines in the case scheduling order. The J-Seal is available for inspection and Strider's witnesses are available for deposition and will continue to be once the Court rules. It is against Strider's interest to delay this litigation as it is the party that is owed money and has been for years.

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<sup>1</sup> The entire document is voluminous and is not attached to Watkins Decl. The entire document is a public record and can be found here: <https://idwr.idaho.gov/about-idwr/solicitations/>

### III. ARGUMENT AND AUTHORITY

The trial date and other case schedule deadlines “must not be modified except by leave of the court **on a showing of good cause.**” I.R.C.P. 16(a)(3) (emphasis added). Here, there is no showing of good cause and Strider will be prejudiced by another continuance.

#### **A. IWRB’s Inability to Conduct an Inspection in November 2023 is Due to its Own Failures.**

The Idaho and Federal Rules Civil Procedure require good cause for a scheduling order to be amended. Fed.R.Civ.P 16(b)(4); I.R.C.P. 16(a)(3). Federal case law may provide persuasive authority to interpret Idaho Rules of Civil Procedure when the Idaho rules and Federal Rules of Civil Procedure are substantially similar. *Black v. Ameritel Inns, Inc.*, 139 Idaho 511, 515, 81 P.3d 416 (2003).

Courts have held a finding of “good cause” under the Federal Rules depends on the diligence of the moving party. *Grochowski v. Phoenix Const.*, 318 F.3d 80, 86 (2d Cir. 2003). The “good cause” standard is “an exacting one, and requires a demonstration that the Scheduling Order ‘cannot reasonably be met despite the diligence of the party seeking the extension.’” *E.E.O.C. v. Hibbing Taconite Co.*, 266 F.R.D. 260, 265 (D. Minn. 2009)(quoting *North Star Mutual Ins. Co. v. Zurich Ins. Co.*, 269 F.Supp.2d 1140, 1144 (D. Minn. 2003)). When courts examine whether the “good cause” necessary to amend a scheduling exists, the “focus of the inquiry is upon the moving party’s reasons for seeking modification.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). However, if the moving party is not diligent, there is no “good cause” to justify amending the schedule. *Johnson*, 975 F.2d at 609.

To determine whether a party has been diligent, and therefore has good cause to amend the schedule, courts “consider what information the party knew, or should have known, in advance of

the deadline sought to be extended.” *Smith v. Bradt*, 329 F.R.D. 337, 505 (W.D.N.Y. 2019)(quoting *Lopez v. Ramos*, 2013 WL 6912692, \*3 (S.D.N.Y. 2013)).

Here, IWRB has not acted with due diligence to facilitate an inspection within a reasonable amount of time. IWRB identified their need to inspect the subterranean conditions beneath the dam apron using ground penetrating radar (“GPR”) in February 2023.<sup>2</sup> Morrison Decl. at ¶6. This was seven months prior to IWRB filing their Second Motion to Amend the Scheduling Order to accommodate this inspection. Moreover, IWRB knew the inspection needed to occur in the fall time, as the other seasons presented significant challenges. Declaration of Mike Morrison dated June 25, 2023 at ¶4, 5, 8. These seasonal restraints were known from the time IWRB first desired to perform a GPR inspection, and, presumably, throughout the duration of the Project.

IWRB relied upon these seasonal constraints to support its First Motion to Amend the Scheduling Order. Defendant’s Motion at p. 5. This Court granted IWRB’s motion for additional time in the trial schedule to allow IWRB to perform the GPR testing in November 2023. *See* Scheduling Order dated July 7, 2023. Notwithstanding IWRB’s stated importance of this inspection, and IWRB recognition of the seasonal constraints, IWRB inexcusably failed to ensure the inspection was timely performed. IWRB attempts to shift the blame for three reasons, each of which fails.

1. No Evidence that Idaho’s Procurement Laws Delayed IWRB.

IWRB’s alleges the timing of the dam inspection was impacted by is out of its control due to Idaho’s procurement laws. Morrison Decl. at ¶4-5. However, IWRB presents no evidence as to how Idaho’s procurement laws, which assuredly were in effect the first time IWRB sought a continuance of the trial date, impacted IWRB’s ability to award the contract to the new contractor.

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<sup>2</sup> Strider’s consultant actually recommended the use of GPR prior to February 2023. *See* Rohrbach Decl. at ¶6.

Notably, the contract with the new contractor was executed on August 30, 2023 with a construction start date of November 1, 2023. Morrison Decl. at ¶4, 7. Based on IWRB's motion, it appears the new contractor will not start on November 1 as set forth in the contract, but sometime in December, which logically could not have been the result of Idaho's procurement laws, considering this delay occurred after the contract was executed.

2. The Owner – Not the Contractor – Controls the Construction Schedule.

IWRB repeatedly represents that the construction schedule, including dewatering, is determined by the contractor. IWRB claims to be at the mercy of the schedule developed by the replacement contractor and that IWRB has no influence or control over this schedule. Morrison Decl. at ¶8, Defendant's Motion at p. 4. However, the construction contract included in the request for qualifications gives IWRB options to have necessary dewatering completed to accommodate GPR testing.

First, IWRB's contractor must provide a construction schedule acceptable to the IWRB and subject to IWRB's approval. Watkins Decl. Exhibit A at p. 30, para. 10.11. This construction schedule must conform to date restrictions *provided by IWRB. Id.* at p. 17, para. 1.04. For example, no work is allowed prior to September 15, 2023, work below the ordinary high-water mark must start on or about November 1, 2023, and work in water must be completed by March 15<sup>th</sup>, 2024. *Id.* at p. 17, para. 1.05.

Next, if specific dates in the project schedule are not met or are not on track to be met, IWRB has the contractual right to "require the Contractor to work such additional time over regular hours, including Saturdays, Sundays, and holidays, without additional cost to the [IWRB] to bring the Work on schedule." *Id.* at p. 31, para. 10.14.



Further, “changes in the Work may be accomplished after execution of the contract, and without invalidating the Contract, by Change Order, construction Change Directive or order for a minor change in the Work.” *Id.* at p. 37, para. 16.1.1. IWRB has the right to direct the contractor, even without the contractor’s agreement, to perform dewatering by a certain date by issuing a Construction Change Directive. *Id.* at p. 38, para. 16.3.1.

In short, IWRB had and has the ability to direct work as necessary to ensure the inspection occurred in November. The contract shows that IWRB: (1) can set specific dates for key milestones (like dewatering) through the base contract or change directive; (2) can require the contractor provide and execute a schedule that meets those dates; and (3) can require the contractor to use additional manpower if the key dates are not being met. The contractor hired by IWRB may be responsible to “design, construct, and operate a temporary combined bypass, cofferdam, and dewatering system,” but IWRB, as the project owner, has significant control over the project schedule and could have required dewatering to be complete at a date that allowed the GPR inspection to occur as originally planned. *Id.* at pg. 9. That IWRB failed to take steps to ensure dewatering could be complete and/or is not willing to set that in process shows a lack of diligence and therefore the “good cause” necessary to modify the scheduling order does not exist.

Finally, despite repeated request, IWRB refused to provide Strider with the schedule from the Contractor or any detail as to what was impacting the Contractor’s schedule. Watkins Decl., Exhibit B. In fact, despite asserting the Contractor’s schedule is somehow holding up the inspection, such schedule has not been provided to Strider nor any specific detail provided to demonstrate and substantiate IWRB’s claims. *Id.* IWRB has not demonstrated good cause.

3. The Two Discovery Disputes Do Not Necessitate a Change in Trial Date.

Unfortunately, nearly every litigation involves some level of disagreement as to discovery, often requiring court intervention. However, the simple fact that motion practice was required related to discovery does not provide good cause to continue a trial date. As discussed above, IWRB alleges that two discovery disputes of IWRB's creation – scheduling of depositions and inspection of the J-Seal – IWRB alleges caused delays. These two disputes are subject to pending motions before this Court on the very day the underlying Motion is to be heard, which means these disputes will be resolved over three months prior to the relevant case deadlines for discovery. IWRB presents zero evidence that these discovery issues have actually impacted the overall case schedule or require a later trial date.

**B. A January 2024 Inspection Would Not Necessitate a Change in Trial Date.**

Even if an inspection were to take place in January of 2024, it does not necessitate a change in the trial date. Strider notified IWRB that it would consider modifying the deadlines to allow for necessary expert discovery pertaining to expert reports and depositions extension, to accommodate the later inspection date. Watkins Decl., Ex. B. IWRB did not respond but instead filed its Motion. Strider presented IWRB a fair and reasonable compromise that would allow IWRB to perform the inspection, provide necessary time for experts to complete their respective reports and be made available for depositions (if requested), and still proceed with the current trial date of February 26, 2024. IWRB's unwillingness to agree to such an arrangement is telling and indicates this is less about the inspection and more about IWRB's desire to delay final resolution of this matter.

**C. Strider Will Be Prejudiced if the Second Motion to Amend the Scheduling Order is Granted**

The focus of the inquiry into whether “good cause” exists to amend a scheduling order is on the moving party's reasons, however, a degree of prejudice to the party opposing the

modification can supply an additional reason to deny the motion. *Johnson*, 975 F.2d at 604. In Idaho, courts also must “strive to treat both sides fairly” and take prejudice from delay into account. *Krepcik v. Tipett*, 109 Idaho 696, 698, 710 P.2d 606 (Ct. App. 1985).

Strider initiated the instant suit by filing its Complaint on July 29, 2022. The basis for the suit was IWRB’s failure to pay Strider at least \$1,500,000 work performed under the Parties’ contract. The case was set for trial in November 2023. Then, the scheduling order was amended to February 2024 to accommodate IWRB’s counsel’s unforeseen medical condition and to allow for the GPR inspection. Now, IWRB seeks to further delay trial until April 26, 2024, nearly two years after Strider filed the lawsuit.

I.R.C.P. 16(a)(3) not only requires IWRB show “good cause” before a scheduling order can be modified, but I.R.C.P. 1(a) requires that the Idaho Rules of Civil Procedure be “administered to secure the just, speedy and inexpensive determination of every action and proceeding.” I.R.C.P. 1(b). Forcing Strider to nearly two years after filing suit before beginning trial does not further the just, speedy and inexpensive resolution of this suit.

Finally, Strider’s trial attorneys have significant conflicts with IWRB’s proposed date of April 26, 2024. Lead counsel for Strider, Lindsay Watkins, will be out from April 1 through April 10, 2024. Watkins Decl. at ¶6. Counsel Nicholas Korst will be in Arbitration from April 22-26, 2024. Declaration of Nicholas Korst (“Korst Decl.”) at ¶2. If IWRB’s motion is granted, trial could not start until later in May of 2024 at the earliest, considering Strider’s counsel would need to properly prepare for trial.



**CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of September, 2023, a true and correct copy of the within and foregoing instrument was served upon:

Garrick L. Baxter, ISB #6301  
[Garrick.baxter@idwr.idaho.gov](mailto:Garrick.baxter@idwr.idaho.gov)  
Meghan M. Carter, ISB #8863  
[Meghan.carter@idwr.idaho.gov](mailto:Meghan.carter@idwr.idaho.gov)

Steven B. Andersen, 2618  
[sandersen@kmclaw.com](mailto:sandersen@kmclaw.com)  
Jennifer Reinhardt-Tessmer, #7432  
[jtessmer@kmclaw.com](mailto:jtessmer@kmclaw.com)

*Attorney for Defendant Idaho Water  
Resource Board*

*Attorney for Defendant Idaho Water  
Resource Board*

- Via U.S. Mail
- Via Legal Messenger
- Via Federal Express
- Via Facsimile
- Via iCourt E-File and Serve**

- Via U.S. Mail
- Via Legal Messenger
- Via Federal Express
- Via Facsimile
- Via iCourt E-File and Serve**

DATED: This 27<sup>th</sup> day of September, 2023.

: \_\_\_\_\_ /s/ Joe Meuleman