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

STRIDER CONSTRUCTION CO., INC.,

Plaintiff,

vs.

IDAHO WATER RESOURCE IWRB,

Defendant.

Case No. CV01-22-10932

**REPLY 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 Reply in Support of Defendant’s Second Motion to Amend the Scheduling Order. For the reasons set forth in further detail below, and in the supporting Second Declaration of Mike Morrison and Declaration of Jennifer Reinhardt-Tessmer 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 approximately 60 days.

I. INTRODUCTION

Since the Court granted IWRB’s original motion to amend the scheduling order in part to account for a health matter of IWRB’s lead counsel and in part to allow time for a key evidence inspection, two critical developments have occurred that will necessarily impact the trial schedule. First, as discussed in IWRB’s Memorandum in Support of Defendant’s Second Motion to Amend the Scheduling Order, IWRB executed its contract with the new contractor who has taken over for Strider and that contractor has determined that implementation of its dewatering plan to facilitate inspection of the anticipated void will occur in late December or early January rather than November. Additionally, since filing the underlying motion, IWRB’s lead counsel unexpectedly passed away. *See* Declaration of Jennifer Reinhardt-Tessmer in Support of Defendant’s Second Motion to Amend Scheduling Order (“Reinhardt-Tessmer Dec.”), ¶¶ 2-4.

II. REPLY

The Inspection Continues to be Necessary.

There have been no developments in the facts or allegations in the case that would lessen the significance of the inspection or its potential impact on the resolution of this matter

since the Court's previous ruling, which modified the scheduling order to allow time for the parties to conduct the inspection. In other words, good cause exists to modify the scheduling order again, just as it did when the Court previously found good cause to amend the scheduling order. Strider's opposition to the underlying motion ignores that good cause was already found to conduct the inspection and argues that pre-litigation attempts by Strider to drill cores into the dam as part of its grout plan somehow obviate the need for Strider's expert to conduct an independent post-litigation examination of the void. Specifically, Strider asserts one of its retained consultants already attempted to use ground penetrating radar (GPR) during the pendency of Strider's work on the project and such attempts were rejected by IWRB, and therefore, IWRB should not be allowed to inspect the void now.¹ This argument is a red herring, is based on misstatements of fact and logically flawed for many reasons.

First, Strider's retention of its consultant, Mark Rohrbach of RAM GeoServices, Inc. ("RAM") and the efforts to complete on-site testing described in paragraphs 7 and 8 of Mr. Rohrbach's Declaration in response to the underlying motion occurred before the instant litigation was filed. *See* Second Declaration of Mike Morrison in Support of Defendant's Second Motion to Amend Scheduling Order ("Morrison Second Dec.") at ¶ 11. It was not as if the parties understood the instant issues at play in the case and had an equal opportunity to test in dewatered conditions, which testing was somehow neglected by IWRB. Moreover, the purpose for which Strider and Rohrbach proposed GPR during the course of the project was completely different than that being proposed now by IWRB. Strider and Rohrbach only

¹ This argument is in contrast to the argument posted by Strider's counsel during the hearing on IWRB's original Motion to Amend the Scheduling Order on July 7, 2023, in which counsel generally asserted RAM already conducted an inspection so there was no need for the parties to conduct a further inspection.

raised GPR with IWRB in the context of Strider’s proposed grout plan, which included Strider and Rohrbach’s proposal to “core” or drill holes into the dam concrete apron. *Id.* at ¶ 6. Strider and Rohrbach proposed using GPR in the grout plan, exclusively to identify rebar. *Id.* at ¶ 11. IWRB has no recollection or any documentation of any proposal by Strider, Mr. Rohrbach or anyone else from RAM to use GPR to aid in the quantification of the size of the voids below the dam, as is now being asserted. *Id.* at ¶ 5. Also, it was Dam Safety, a distinct entity from IWRB, over which IWRB has no authority, that had comments related to RAM and Strider’s grout plan, which needed to be addressed. *Id.* at ¶ 7. Those comments were unrelated to its GPR proposal to detect rebar. *Id.* at ¶ 8. It was Strider that opted to abandon the Project without addressing the comments. None of this had anything to do with the inspection of sub slab voids, which is the intended purpose of the upcoming inspection. *Id.* at ¶ 10; *see also* Declaration of Mike Morrison in Support of Defendant’s (original) Motion to Amend Scheduling Order at ¶ 3.

Further, Strider’s efforts to assume exactly how IWRB will conduct its inspection of the void and preemptively undermine the reliability of the inspection is insufficient grounds for failing to conduct a key inspection. IWRB would be greatly prejudiced if it were not allowed to conduct the inspection, as explained at length in its previous briefing. The time for raising criticism of any inspection is once Plaintiff has a chance to determine what can be found, rather than guessing about it, and when Plaintiff can review Defendant’s expert’s analysis of the same.

Additionally, there has been no delay by IWRB that should deprive it of this key inspection. Strider incorrectly asserts IWRB failed to recognize “seasonal constraints” described in its prior motion to amend the scheduling order. To be clear, the proposed testing

is occurring in the same season and is based on the same drawdown of Priest Lake that it advised the Court would begin occurring in September. *See* Declaration of Mike Morrison in Support of Defendant's (original) Motion to Amend Scheduling Order at ¶ 9. IWRB did in fact begin drawing down Priest Lake to accommodate the in-water work in September. Morrison 2nd Dec. at ¶ 12. However, as explained in IWRB's Memorandum, and for legal reasons Strider should now understand, IWRB's contractor is charged with the design of the dewatering plan (made more complicated as a result of the current state of the dam) as well as the corresponding schedule. Strider has stated this isn't "credible" because IWRB is the contract owner and "has the ability to direct work as necessary to ensure the inspection occurred in November." Plaintiff's Memorandum in Opposition at 9. In so arguing, Strider implies IWRB should choose to sacrifice the division of responsibilities (i.e. risk) in the contract to retain greater control over its contractor for purposes of expediting an inspection. This is nonsensical and would be poor legal advice.

Discovery Delays

Substantial delay in this case has occurred as a result of Plaintiff's lack of cooperation in discovery, resulting in the appointment of a discovery master. Without addressing the substance of those matters, which will now await resolution by the master, the reality is the appointment of a discovery master will necessarily result in (at least) an initial delay required to locate, retain and inform an available master on pending discovery issues, which are holding up depositions. *See* I.R.C.P. 53 (initial meeting occurring within 21 days after the date of the order).

Replacement of Lead Counsel

IWRB specifically identified and retained Mr. Andersen as its lead counsel based on his extensive experience, including over 100 jury trials. Mr. Andersen was diagnosed with a serious illness in May of 2023; however, he responded well to treatment and planned to return to try this case in February of 2023. Reinhardt-Tessmer Dec., ¶¶ 2-4. Tragically, Mr. Andersen passed away of unexpected heart failure over the recent weekend. *Id.* His heart failure was not foreseeable and was a complication from the previous treatment he received for his illness. *Id.* The sole outside counsel of record is now covering cases for Mr. Andersen as are her colleagues. *Id.* at ¶ 5. IWRB will need to replace Mr. Andersen on this matter, and to have that counsel informed and ready to participate in depositions and trial. Given the impending holidays, Ms. Reinhardt-Tessmer's previous commitments, and the schedules of counsel within Mr. Andersen's office, it will take longer than February to adequately prepare for trial, particularly given the hold-up that has been posed in Strider's depositions. *Id.* at ¶ 7.

The Current Schedule

The Amended Scheduling Order signed by the Court on July 7, 2023 set trial to commence on February 26, 2024. Based on the Court's Order, the Plaintiff's expert disclosures were due 22 weeks before trial and Defendant's were due 17 weeks before trial. Given that these disclosures fell ahead of the anticipated November inspection, which would presumably impact the reports, the parties attempted to squeeze in expert witness disclosures, lay witness disclosures, and deposition and written discovery deadlines between the November inspection and the end of January. *See* Proposed Order Granting Defendant's Stipulation to Amend Scheduling Order (entered by the Court). This was difficult enough

to do when the inspection was anticipated in November. Now that the inspection is estimated for the end of December or early January, it will be impossible. To the extent opposing counsel has conflicts in late April, IWRB's counsel is certainly willing to find mutually agreeable dates that do not pose conflicts.

III. CONCLUSION

Based on the good cause established, 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 2nd day of October 2023.

KIRTON McCONKIE

/s/ Jennifer Reinhardt-Tessmer
Jennifer Reinhardt-Tessmer
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October 2023, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

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