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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 BOARD,

Defendant.

Case No. CV01-22-10932

**MEMORANDUM IN SUPPORT OF  
DEFENDANT'S THIRD 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 Third Motion to Amend Scheduling Order. For the reasons set forth in further detail below, and in the supporting Declarations of Mike Morrison (“Morrison Dec.”), Mark Gemperline (“Gemperline Dec.”) and Jennifer Reinhardt-Tessmer (“Reinhardt-Tessmer Dec.”), filed concurrently herewith, IWRB respectfully requests the Court enter an order vacating the jury trial date, pre-trial conference dates, and all other associated upcoming case deadlines to allow for necessary testing to support IWRB’s defenses and counterclaim. Specifically, IWRB requests the Court vacate the trial dates and associated deadlines and set a scheduling conference for late January when there will be additional information regarding when IWRB’s expert inspection may occur.

## **I. INTRODUCTION**

This is a complex construction dispute in which the parties are contending whether Strider Construction Co. (“Strider”) breached the subject construction contract for the performance of improvements to the Priest Lake Outlet Dam by providing deficient work before abandoning the project, which left the dam in dangerous disrepair. Complicating matters is that, during the pending lawsuit, IWRB had to retain a replacement contractor who is currently working to assess the damage and stabilize critical infrastructure while legal experts are trying to access the scene to conduct inspections. The new contractor, Northbank Civil and Marine, Inc. (“Northbank”), was only able to begin its work on the dam in September. Since then, Northbank has been following a critical path construction calendar, and like Strider was under the original contract, is charged with designing and implementing a dewatering plan. When the parties were last before the Court, IWRB requested an extension of trial dates to allow

for inspections necessary to its defenses and counterclaim, which can only occur when Northbank “dewater” the dam during its construction.<sup>1</sup> While that dewatering timeline is still on track, significant new facts have developed since Northbank began exhuming the construction site. Specifically, Northbank discovered a suspected void (i.e. hole) under the dam (left in the wake of Strider’s deficient work and subsequent abandonment of the Project) is much larger than expected. The extent of the void has raised serious concerns in the past two weeks regarding the stability of the dam, which must be prioritized ahead of accommodating requests for IWRB’s expert’s inspection. Northbank is currently in the process of assessing the extent of the void and will then create a repair plan in January, which will provide a timeline for completion of repairs that will allow for the inspection to proceed. As such, IWRB is seeking to vacate the trial date and all related deadlines, and requesting a scheduling conference for late January when there will be further clarity regarding the potential timeline for future inspections.

## II. STATEMENT OF RELEVANT FACTS

A key component of the parties’ construction contract was Strider’s installation of a new concrete and armor rock scour apron extension as well as repairing existing concrete. *See* Defendant’s Answer to Complaint and Counterclaim, Ex. 1. As outlined in IWRB’s Counterclaim, Strider’s failed dewatering system caused cold water to inundate freshly poured concrete on the apron, resulting in non-conforming work. Answer and Counterclaim, p. 27. When the temperature of concrete changes rapidly during the early stages of curing, cracks can form (known as thermal cracking), compromising the strength of the concrete.

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<sup>1</sup> IWRB’s previous motions to amend the scheduling order were also based on the illness and subsequent passing of IWRB’s lead counsel.

*See* Gemperline Dec., ¶ 2.

Shortly before and after Strider's failed dewatering system resulted in the flooding of the concrete, Strata Engineering tested the compressive strength of the concrete using Schmidt Hammer (ASTM C805) and Windsor Probe (ASTM C803). Morrison Dec., ¶¶ 3-4. The results indicated the compressive strength of the concrete apron was substantially below the 5,000-psi minimum value specified by the contract documents. *Id.* After additional time passed, allowing for the potential of further curing, the parties planned to conduct additional surface Windsor Probe (ASTM C803) testing; however, when efforts were made to do this in 2021 and 2022, Strider would not make the site available for testing. *Id.* at ¶ 5.

When Strider abandoned the contract without repairing its deficient work, IWRB was left to find a new contractor to assess the state of the dam's disrepair, caused in large part by Strider's multiple failed dewatering systems, including a suspected void under the dam and compromised concrete on the apron. IWRB's new contractor, Northbank began work in September on the dewatering plan and was immediately told that IWRB and Strider's experts wished to conduct inspections when the dam was dewatered. *See* Morrison Dec., ¶¶ 9, 12. The dewatering of the subject area is on schedule, allowing the geophysics (GPR) aspect of the inspection to proceed, as well as Strider's requested "coring" testing of the concrete. *Id.* at ¶ 18. Despite this, IWRB cannot proceed with what it strongly asserts is the appropriate concrete strength test until late February at the earliest. *Id.* at ¶ 19. This is because in December 2023, when Northbank exhumed the subject area, it discovered the void it believes Strider caused beneath the dam was far larger than anticipated, with a maximum dimension exceeding 20 feet. *Id.* at ¶¶ 14-15.

Such a large void could cause the dam to crack or even collapse in this area. It is now known that the void is in a location that would allow water to flow through it if the dewatering system were modified in a way to enable IWRB's expert, Mark Gemperline's, testing plan. *Id.* at ¶ 17; Gemperline Dec. at ¶ 6. The additional flow of water would increase the dimensions of the cavity, increase the risk of dam collapse and crack, and make repairing the void extremely difficult. Morrison Dec. at ¶ 17. As such, while geophysics testing by Mr. Gemperline can proceed, Mr. Gemperline's proposed surface Windsor Probe (ASTM C803) testing of the concrete cannot be conducted until the void is repaired and the apron work is complete. This requires Northbank to fully assess the extent of the void (which it is in the process of doing now) and to create a repair plan, which it will complete by the third week in January. *Id.* at ¶ 19. While it is estimated repairs may be complete in February, further clarity will be provided upon completion of Northbank's repair plan. *Id.*

### 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. Good Cause Exists to Modify the Scheduling Order Again.

When Strider was in the middle of its work on the Project, after experiencing multiple failures of its dewatering system, it became evident Strider had also caused a void under the

dam.<sup>2</sup> Rather than remedy the damage it caused, Strider chose to abandon the Project and immediately file a preemptive lawsuit against IWRB, seeking a trial date as soon as possible. IWRB was then forced to halt any further repairs or construction on the Project until it could tender its bond to the surety; allow the surety to investigate; go through the state procurement process for a new contractor; and only now is the new contractor able to fully assess the state of the site left by Strider. In so doing, it has become clear why Strider has been seeking a quick trial date from the inception of the lawsuit. Northbank's latest discovery upon exhuming the site is that the suspected void caused by Strider is so large it is posing a risk to the integrity of the dam. As such, Northbank must prioritize stabilizing the dam, including repairs to the void, before IWRB's expert can conduct testing related to concrete surface strength.

i. IWRB has been diligent.

IWRB's expert plans to opine on the damage done to the dam concrete apron (and resulting strength), which was inundated by water as a result of Strider's non-conforming work on the Project. *See* Gemperline Dec. at ¶ 9. Additionally, IWRB's damages expert must understand the extent of the damage caused by Strider, including the extent of the void, necessary repairs, and impacts to concrete strength. These expert opinions will necessarily weigh on IWRB's ability to establish its defenses and prove its complete counterclaim against Strider for breach of contract, as well as the full damages it is owed. IWRB and its expert have been diligent in communicating requests to Northbank for counsel to conduct the necessary inspections in December when the site is dewatered. *See id.* at ¶¶ 5-6; *see also*

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<sup>2</sup> For a timeline supporting IWRB's position that Strider caused the void, see Morrison's Declaration, ¶¶ 6-8, 16.

Morrison Dec. at ¶¶ 12-13. However, Northbank's recent discovery of the full extent of the void under the dam that IWRB asserts was created by Strider, indicates it may cause the dam to crack or even collapse in this area. Morrison Dec. at ¶ 17; Gemperline Dec. at ¶¶ 2-3. It is now known that the void is in a location that would allow water to flow through it if the dewatering system were modified in a way to enable Mr. Gemperline's testing plan for the proposed Windsor Probe (ASTM C803) testing. Morrison Dec. at ¶ 17. The additional flow of water would increase the dimensions of the cavity, increase the risk of dam collapse and crack, and make repairing the void extremely difficult. *Id.* Thus, while IWRB has been diligent and its experts are otherwise on track for disclosures according to the current schedule, this unforeseen circumstance will prevent its experts from completing analysis of the concrete strength and related damages until Northbank can repair. Work on the site requires extensive planning and adherence to a critical path, with the stability of critical infrastructure being of utmost importance for public safety. Morrison Dec. at ¶ 20.

While Northbank will create a repair schedule during the third week in January, it is roughly estimated the repairs will be performed by the end of February. *See* Morrison Dec. at ¶ 19. The anticipated delay is not the result of a lack of diligence on the part of IWRB but in fact, is at the hands of Strider – who created significant damage, abandoned the project, and now seeks a trial before the extent of the harm it caused can be fully assessed.

- ii. IWRB will be prejudiced if it cannot conduct the Windsor Probe (ASTM C803) surface testing.

IWRB has communicated to Strider the current conditions at the dam, which prevent IWRB's experts from conducting the Windsor Probe (ASTM C803) surface strength condition. *See* Reinhardt-Tessmer Dec. at ¶¶ 2-5. Strider's counsel, who intends to conduct

“coring” testing of the concrete strength, was provided the option to conduct its testing in February with IWRB or to proceed in December. *Id.* IWRB’s counsel reiterated IWRB’s position that concrete testing by Windsor Probe (ASTM C803) surface strength testing was the appropriate and reliable test in this circumstance. *Id.*; *see also* Gemperline Dec. at ¶¶ 3-4. Knowing that IWRB cannot proceed with its testing, Strider has opted to proceed with its coring testing in December while opposing a stipulation to modify the trial date. Reinhardt-Tessmer Dec. at ¶¶ 6-7. Should IWRB be prevented from conducting its tests in this circumstance, while Strider is afforded an opportunity to conduct its own testing (which testing IWRB contends is not accurate given the anticipated damage), IWRB would be highly prejudiced. Specifically, IWRB would be prevented – from circumstances beyond its control and at the hands of the Plaintiff/Counter-Defendant – from collecting necessary evidence for its experts’ analysis, critical to its defense and counterclaim.

### C. CONCLUSION

Based on the new facts impacting the timing of the Windsor Probe (ASTM C803) surface testing, IWRB respectfully requests that the Court grant IWRB’s Third Motion to Amend the Scheduling Order by vacating the jury trial date and all other associated deadlines and setting a scheduling conference for late January, when the parties will have further clarity as to when the subject inspection can take place.

DATED this 15th day of December 2023.

**KIRTON MCCONKIE**

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



## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 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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