

Thomas A. Banducci (ISB No. 2453)
Jennifer Reinhardt-Tessmer (ISB 7432)

KIRTON MCCONKIE

11th & Idaho Building
1100 W. Idaho St., Ste. 930
Telephone: (208) 370-3325
Facsimile: (208) 370-3324
tbanducci@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 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

**REPLY IN SUPPORT OF
DEFENDANT'S THIRD MOTION TO
AMEND THE 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 Third Motion to Amend Scheduling Order (“Motion”). For the reasons set forth in further detail below, and in the concurrently-filed Second Declaration of Mark Gemperline in support of the underlying Motion (“Second Gemperline Dec.”), IWRB respectfully requests the Court enter an order vacating the jury trial date, pre-trial conference dates, and all other associated upcoming case deadlines and set a scheduling conference for late January. This will allow IWRB’s new contractor the necessary time to estimate a timeline for the repair of damage Strider caused, which IWRB discovered in recent weeks is now substantially greater than originally anticipated. Only when these repairs are complete (i.e. the repair of the dam’s apron) can IWRB’s expert schedule previously planned Windsor Probe (ASTM C803) surface concrete testing (“concrete surface testing”) and understand the complete scope of IWRB’s damages – all of which is critical for expert reports and depositions.

I. INTRODUCTION

Since IWRB filed its pending motion to vacate the trial dates, the parties participated in an on-site inspection (when the dam had been significantly dewatered). This inspection enabled IWRB’s expert to obtain camera footage confirming that the void Strider caused is in fact, substantial, and will require further evaluation by IWRB’s expert to determine the impact of the void and associated damages. In light of this development, in the past week, IWRB has scrambled to take necessary steps to secure the infrastructure for public safety and determine how best to repair the void. In light of this development, it is going to take additional time to determine the extent of the damage Strider caused and the consequences to IWRB, which is necessary to complete expert reports, conduct informed depositions and

prepare the case for trial. Additionally, due to this issue, IWRB's expert was not able to complete certain concrete surface testing, which cannot be performed until a portion of concrete slab can be re-poured, which is dependent upon temperatures. Strider's motivation for its continued efforts to accelerate trial ahead of a complete assessment of IWRB's damages is clear and should not be countenanced. Should the parties be forced into depositions, expert disclosures and ultimately trial, based on an incomplete assessment of the facts and damages, IWRB would be severely prejudiced by an incomplete trial of its case.

II. ADDITIONAL FACTS SINCE FILING OF IWRB'S MOTION

As described in IWRB's Memorandum in Support of Defendant's underlying motion, IWRB previously moved for an amendment to the scheduling order to allow for an inspection of the dam when it was in a dewatered state (which was dependent on the new contractor's schedule and weather conditions). Since the filing of IWRB's underlying Motion, the inspection occurred in late December, allowing IWRB to conduct geophysics analysis of the void it asserts Strider created before abandoning the project. *See* Memorandum at p. 4 and Second Gemperline Dec., ¶ 2. Specifically, IWRB's experts conducted camera inspections, void penetration depth probe mapping and GPR surveying, analyzing spatial variations and GPR data patterns of sub-slab voids. *Id.* at ¶ 2. This multi-faceted evaluation captured measurements and camera footage establishing the void is an alarming size in terms of dam safety and overall impact to adequate drainage and the feasibility of previously planned repairs. *Id.* at ¶¶ 4-6. Specifically, the areas IWRB's expert was able to access and evaluate indicated extensive void space (depth) and poor foundation conditions underlying the majority of the new apron extension. *Id.* at ¶ 4. Further, the patterns

of the erosion channels formed in response to the development of the void spaces are consistent with Strider's multiple failed dewatering attempts. *Id.* at ¶ 7. As such, IWRB's current contractor and Dam Safety have had to focus all efforts on securing the infrastructure for public safety and repair the void before completing apron work. IWRB's expert cannot conduct necessary concrete surface testing until the apron work is complete. IWRB needs to demolish a portion of the apron as a result of defective pouring of the previous apron by Strider (which included plastic sheeting in the concrete). *Id.* at ¶ 8. As such, that section will need to be re-poured, which can only occur in certain weather conditions (~mid to upper 20s). *Id.* at ¶ 9. Only when this occurs can the apron work be finished and IWRB's expert permitted to conclude his surface strength testing. *Id.* at ¶ 10; *see also* Declaration of Mike Morrison in Support of Defendant's Third Motion to Amend Scheduling Order at ¶ 18.

III. REPLY ARGUMENT

A. Good Cause Exists to Modify the Scheduling Order

i. The Damage Strider Caused is More Extensive Than Anticipated

In IWRB's Answer and Counterclaim, it described that "Strider's failed dewatering system caused water to flow laterally under the Dam, eroding soils beneath the dam, and risking the integrity of the Dam." Defendant's Answer to Complaint and Counterclaim, pp. 23-24, 27. IWRB's past and pending efforts to amend the scheduling order are simply based on the need to conduct necessary investigations and discovery into the damage Strider caused (as described in IWRB's Answer and Counterclaim) so a fair trial can be had based on complete and accurate facts. Due to the nature of this complex construction dispute involving mandated contracting processes, and a construction site under-water, the State

could not simply immediately inspect its property, as Strider suggests (but certainly knows better).

Rather than fix the mess it created, and presumably because Strider understood the extent of damage it caused under the dam, Strider opted to cut and run, abandoning the project, forcing IWRB into a lengthy process of tendering its surety bond, waiting for that investigation to conclude, and then engaging in the state-mandated procurement process for a contractor to replace Strider and assess the precarious state of the dam left by Strider. By this point, Strider had already preemptively filed this lawsuit, at the initial scheduling conference curiously seeking a quick trial setting just months out, which was ultimately rejected. IWRB's original request for an extension of the trial date was to enable an inspection of the damage Strider caused under the dam, which could only occur in a "dewatered" state. This issue of damage under the dam, outlined in IWRB's initial Answer and Counterclaim, is key to several defective workmanship issues and payment disputes underlying claims in the Complaint and Counterclaim in this litigation. This was explained at length in IWRB's first Motion to Amend Scheduling Order. *See* Second Declaration of Jennifer Reinhardt-Tessmer in Support of Defendant's Motion to Amend Scheduling Order ("Second Reinhardt-Tessmer Dec.") at ¶¶ 7,8, *see also* Plaintiff's Responses to Defendant's First Set of Interrogatories, attached thereto as Exhibit B (responses to Interrogatories, 14, 17, 34); *see also* excerpts from the 30(b)(6) deposition of the Idaho Department of Water Resources, attached as Exhibit C to the Second Reinhardt-Tessmer Dec., which demonstrate the materiality of the issue in the case. As noted in that initial motion to amend the scheduling order, Plaintiff's counsel specifically questioned IWRB's 30(b)(6) witness if anybody had "actually see[n] a hole under the dam". *See* Second Reinhardt-Tessmer Dec., Exhibit C at

pg. 105 of transcript. As indicated by opposing counsel's line of questioning, Strider seemed to deny the existence of the void. Now, because the Court granted the proper time to conduct the necessary inspection, we were able to confirm not just the existence of a void, but a void large enough to endanger public safety. As such, all resources have been poured into stabilizing the infrastructure, which have consequently impacted IWRB's ability to have its expert conduct necessary testing.

Of course Strider wants to keep the current deadlines and hurry to trial. We all just confirmed (including Strider's experts who were on site for the inspection) that IWRB's damages will be many times larger than originally anticipated, and Strider wants the case heard before all the facts and consequences of its actions come to light. But this would be unjust. IWRB has been diligent under the circumstances to assess its damages. Now, given this discovery, it will take additional time for IWRB's expert to conduct the necessary concrete surface testing, which IWRB has already established is the appropriate testing as described in the first Declaration of Mark Gemperline in Support of the pending Motion.

Additionally, good cause exists to modify the Scheduling Order because Strider just raised a new issue in this matter. Specifically, because it cannot deny the existence of the void, Strider now asserts it "is the new contractor" that is responsible for the discovered condition. *See* Plaintiff's Memorandum in Opposition to Defendant's Third Motion to Amend Scheduling Order, 4. Strider's latest effort to assert IWRB's new contractor is responsible for the damage is clearly going to expand the scope of the case including related discovery and expert reports, which alone is good cause to afford the parties additional time.

ii. The Schedule Cannot be Reasonably Modified

The modified schedule proposed by opposing counsel seeks to rush expert reports, expedite depositions (when only one deposition in this case has taken place given that necessary inspections for understanding the facts and damages in this matter could not occur until recently). This is completely unreasonable given the complex nature of this dispute; the recently discovered facts; Strider's disclosure of its intent to blame a third party; the concrete surface testing that must still occur (but which can only occur when the apron is repaired, but which can only be repaired when temperatures warm sufficiently for concrete to be poured). Strider's proposed modified case deadlines were crafted without regard to the seriousness of the recent discovery of the extent of the void. Strider represented that IWRB did not respond to Strider's proposed modified case deadlines outlined in counsel's December 14, 2023 email attached as Exhibit A to the Korst Declaration before IWRB filed the instant Motion. This is untrue. As provided in Exhibit D to the Declaration of Jennifer Reinhardt-Tessmer in Support of Defendant's Third Motion to Amend the Scheduling Order, the very same day, IWRB's counsel responded and explained (ahead of the inspection) that its contractor discovered the void was much larger than anticipated, and as such, would need time to fully assess the impacts. As further explained in that email, given the uncertainty and extent of the damage "IWRB will be significantly prejudiced if it is not afforded an opportunity to fully evaluate the damage and cost of repair for this mess Strider created, and given this development, it's going to take time for the contractor and our expert to do so."

The recent inspection has exponentially expanded the scope of the case, and given the current uncertainties, a simple movement of the expert disclosure deadline (when we do

not know when our expert can even complete his inspections) will not adequately account for the necessary time for IWRB to adequately investigate its damages.

B. Amending the Scheduling Order Will Not Prejudice Plaintiff but Failure to Amend Will Prejudice Defendant

Plaintiff's opposition to amendment of the scheduling order does not establish any prejudice that will be caused by pushing out the trial date and associated deadlines. "Prejudice must consist of more than general concerns of the passage of time." *Gerstner v. Washington Water Power Co.*, 837 P.2d 799, 803 (Idaho 1992). As inspections and discovery has progressed, it has become clear that the State's damages will be significant, and it is necessary to afford the State sufficient time to complete its inspections and adequately assess those damages so that a fair case can be had based on the complete facts, and that ultimately, it can receive just compensation for damages owed.

IV. CONCLUSION

IWRB would be significantly prejudiced if it were forced to trial before its full damages could be assessed. The rules provide the Court with discretion to amend the Scheduling Order for good cause, which IWRB has established. IWRB respectfully requests the Court grant its Motion.

DATED this 5th day of January 2024.

KIRTON McCONKIE

/s/ Jennifer Reinhardt-Tessmer

Jennifer Reinhardt-Tessmer

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 2024, a true and correct copy of the foregoing was served by the method indicated below, and addressed to the following:

Lindsay (Taft) Watkins, *Pro Hac Vice*
Nicholas Korst, *Pro Hac Vice*
AHLERS CRESSMAN & SLEIGHT PLLC
1325 4th Ave., Suite 1850
Seattle, WA 98101
Telephone: (206) 287-9900
Attorneys for Plaintiff Strider Construction Co., Inc.

U.S. Mail
 Facsimile:
 Hand Delivery
 Overnight Delivery
 iCourt E-File/Serve:
lindsay.watkins@acslawyers.com
nicholas.korst@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