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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

PLAINTIFF'S SUR-REPLY AND
MOTION TO STRIKE PORTIONS OF
DEFENDANT'S MEMORANDUM AND
REPLY

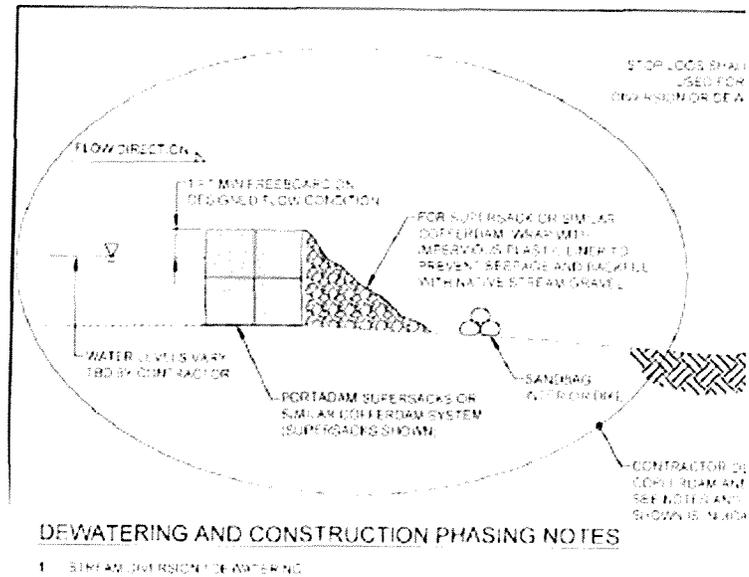
Plaintiff, Strider Construction Co., Inc. ("Strider"), by and through its counsel of record, Lindsay Watkins, Nicholas Korst, and Joe Meuleman, hereby respectfully submit this Sur-Reply and move the Court for entry of an order striking portions of Defendant Idaho Water Resource Board's ("Defendant" or "IWRB") Memorandum in Support of Defendant's Third Motion to Amend the Case Schedule ("Memo") and Defendant's Reply in Support of the same ("Reply"), which raise new "arguments" not included in their original Motion and

make allegations and representations that are wholly unsupported by the record or citation to any evidence.

As has been Defendant's consistent practice in this litigation, Defendant's Memo and Reply contain numerous spurious accusations as to the voids underneath the dam and the cause of such voids and resulting damage. Despite providing numerous affidavits in its initial filing and as part of its Reply, there is no support for Defendant's baseless allegation that Strider performed any non-conforming work that "caused" the voids. While it is clear that IWRB asserts Strider is responsible, IWRB bears the burden of demonstrating such claims at trial. Filling the public record with disparaging and false accusations supported by only counsel's conjecture and moreover including accusations Strider is somehow attempting to deceive this Court is inappropriate, belied by the Project record, and should be stricken. The continued maligning of Strider and polluting of the record goes far beyond argument and is in violation of counsel's duty of candor to this Court.

A. IWRB Designed This Project—Not Strider.

IWRB's pleadings ignore that this is a Design-Bid-Build project. In 2020, IWRB issued for public bid the Priest Lake Outlet Dam Improvement Project (the "Project"). *See*, Declaration of Kyle Gebhardt at ¶ 3. IWRB issued plans, designs, and specifications, directing and dictating to Strider what work to perform, including providing for phased construction, which required dewatering to access the work, installing new piping, and providing limitations and parameters on how that dewatering can be performed. *Id.* at ¶ 3. For example, below is an excerpt from IWRB's provided plans and specifications detailing the dewatering:



Id. at Ex. A.

This is not a design-build project. *See id.* at Ex. A. Strider did not design the Project—IWRB and its design consultants and engineers did. *Id.* In turn, Strider implemented the work as dictated by IWRB’s design and contract documents, including the dewatering as directed. *Id.* at ¶4. So there is no mistake: it is impossible to access the work area without dewatering. *Id.*

B. Strider Notified IWRB of Voids Under The Dam In 2021—Over Two Years Ago.

Partially through the Project (as work resumed in Season 2) and as a part of the dewatering provided for by IWRB’s design, however, Strider identified that water was coming underneath the Dam—a change of conditions. *See id.* at Ex. B. Contrary to IWRB’s misinformed representations, Strider was the party that informed IWRB of the migration of fines and the potential for piping or voids. *Id.* On December 3, 2021, Strider wrote to IWRB and stated that based on observations in the field the design water was flowing underneath the Dam:

This confirms the water is traveling under the Dam (either from the Phase 1 cell or Upstream) and is traveling thru open graded material (say quarry spalls, riprap **or a void**).

Id. at Ex. B.

Though IWRB represents to this Court that the erosion under the dam is “new” information in its Reply, in the Stop Work Order issued as a result of Strider raising the concerns to IWRB, IWRB Stop Work Order—issued on December 4, 2021 as a result of Strider’s concern and notification—acknowledged there was water flow entering the Phase 2 work area from an unknown source and “[t]here is concern that this flow could erode material from underneath the existing dam.” *Id.* at Ex. C.

On December 6, 2021, Strider responded to IWRB’s Stop Work Order, detailing that this was a design issue that required direction from IWRB and a design revision. *Id.* at Ex. D. Even without a Stop Work Order, the Contract provides Strider cannot proceed and modify IWRB’s design or act outside of the Contract parameters without IWRB directive and contract modifications. *Id.* Despite Strider’s notifying IWRB of this issue, IWRB took over a week to even schedule a site visit, an issued noted by Strider in its letter: “...**Strider is concerned about the apparent lack of urgency on the part of IWRB in terms of timing and the reluctance to provide the specified direction.**” *Id.*

Then again on December 14, 2021, Strider notified the Board of the continued changed condition, the identification of voids under the dam, and that failure to address this issue would only result in exacerbating the issues:

If allowed to continue this will likely hydraulically mine surrounding areas of any sediments/fine materials in the matrix, further destabilizing the streambed and perhaps compromise the structure of the Dam itself.

Id. at Ex. E.

Thus, while Strider immediately notified IWRB of the issue and spent months developing and providing IWRB with detailed and alternative solutions, and answering additional questions from IWRB in 2021 and early 2022 (two years ago), urging IWRB to act with urgency, IWRB refused to allow Strider to take any action, leaving the stop work order in place and preventing any work from occurring in the 2022 season. A copy of Strider's June 6, 2022 letter detailing Strider's efforts and IWRB's failure to provide direction is attached to the Gebhardt declaration at Ex. F. Ultimately, IWRB sat inactive, delaying any further work on the dam until the fall of 2023. *Id.* After the site investigation, Strider understands that IWRB will likely proceed with a plan to fill the voids with grout using a similar plan to the plan Strider proposed two years ago but was denied by IWRB. *Id.* at ¶ 9.

The fundamental principal that IWRB's flawed briefing ignores is that a contractor who follows the plans and specifications provided by the owner is not liable if the outcome is not as expected. The Idaho Supreme Court has adopted the *Spearin* doctrine, the long-standing construction law principle that provides "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 61, 63 L. Ed. 166 (1918); *Puget Sound Nat. Bank of Tacoma v. C. B. Lauch Const. Co.*, 73 Idaho 68, 77, 245 P.2d 800, 805 (1952) ("A contractor is required to follow the plans and specifications and when he does so, he cannot be held to guarantee that the work performed as required by his contract will be free from defects, or withstand the action of the elements, or that the completed job will accomplish

the purpose intended”). Though IWRB continues to fill its briefing with unsupported vitriol by counsel that Strider “caused” the damage and the void, not one IWRB affidavit identifies any act or inaction by Strider that would have caused the conditions that Strider notified IWRB of and IWRB was well aware of in 2021.

C. IWRB’s Allegations Are Unsupported.

IWRB’s first “argument” is titled “The Damage Strider Caused is More Extensive Than Anticipated.” IWRB then cites to its unsupported allegation in its Answer for support that “Strider’s failed dewatering system caused water to flow laterally under the Dam...” and that the Board is having to look into “the damage Strider caused (as described in IWRB’s Answer and Counterclaim”). Though IWRB has presented numerous experts and declarations, unsurprisingly **not one expert supports that Strider performed any dewatering contrary to IWRB’s design or, moreover, that such nonconformance by Strider “caused” the voids.** Nevertheless, IWRB incredulously asserts that Strider is engaging in some type of cover up. Such unprofessional attempts to malign Strider are inappropriate and are actionable. IWRB’s briefing is beyond the pale, and the Court should not condone such behavior.

D. The Condition Is Not “New” – IWRB Continues To Fail To Provide Good Cause That Warrants The Continued Financial Hardship on Strider and Preclusion of Strider’s Right to Timely Resolution of These Issues.

Consistent with its previous two attempts to delay resolution, IWRB asserts it needs more time but provides no details or specifics. The grouting work to fill the void, similar to what was proposed years prior (and which would have prevented any further erosion) could and should to a matter of days. *See*, Gebhardt Declaration at ¶ 9. Again, though counsel spends pages discussing how additional actions need to be taken, it wants to strike all trial

dates while it continues to vex and disparage Strider. Trial is six months away. Nothing in IWRB's briefing identifies any date that would be past the proposed schedule for expert designations and depositions.

IWRB also fails to properly establish what it plans to do, much less that it warrants good cause. IWRB's own expert who is purportedly performing these absolutely necessary tests calls it a "windhammer" test. *See*, Second Declaration of Mark Gemperline at p. 4. There is a Windsor Probe test and a Schmidt Hammer test. There is no "windhammer" test and the fact Mr. Gemperline signed a declaration under penalty of perjury stating a "windhammer" test is necessary and is the basis for good cause to delay trial calls into question the entire validity of Mr. Gemperline's declaration as well as his credentials and ability to opine on such subjects. It strains credulity to allow for a trial to be struck based on an expert's assertion a nonexistent test needs to be performed.

Moreover, the test that IWRB asserts cannot be performed until new work is completed to address the changed condition (i.e., what in actuality is the Windsor Probe test) is a test that is contrary to the specifications issued by IWRB. *See*, Gebhardt Decl. at Ex. A. Further, there is no reason that testing could not have been performed prior to the new contractor filling the void with grout. IWRB has asserted it wants to do a number of things—all of which are changes and new work, not contemplated under Strider's Contract with IWRB. IWRB is conflating Strider's Contract with what it should have designed and requested be performed prior to any work being started. It is not a basis to strike the trial date for a third time.

Finally, Strider did **not** assert any new claims as asserted by IWRB. IWRB acknowledged in its 2021 work order that further dewatering—which had to be performed

to finish the work and has been performed by the new contractor—would further exacerbate the erosion and void. *See id* at Ex. D. Moreover, Strider’s expert identified new erosion during the last site inspection. *See*, Declaration of Mark Rohrbach at ¶ 4. This erosion occurred between when Strider was allowed to perform work and the new contractor dewatering and performing additional work. *Id.* This is raging river. It is not a stagnant construction site. To assert that underwater soil conditions two years later and after another contractor has performed additional and different work is the same condition as two years ago is belied by common sense. Again, there is no tie, nor does IWRB provide one, to any act by Strider that did not conform with IWRB’s design. Strider performed its work in accordance with IWRB’s design and specifications, as Strider was obligated to do. IWRB’s bald, inflaming allegations are inappropriate and should be stricken and disregarded.

E. Conclusion.

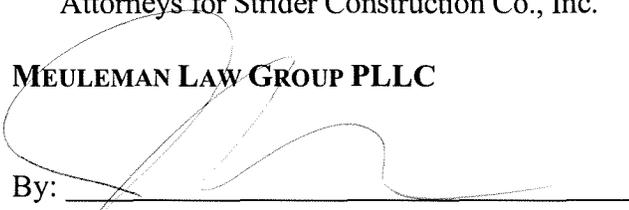
Though this is not an exhaustive identification of IWRB’s misrepresentations to this Court, even a cursory review of the tone and intent of IWRB’s briefing is inappropriate, unwarranted, and actionable. Strider continues to be irreparably damaged by such blatant disparagement and requests such harassment and vexatious behavior be admonished. Further, IWRB presents no good cause to the continued financial hardship it is imposing on Strider by withholding over \$1,500,000 in amounts due to Strider for work Strider performed while IWRB continues to delay resolution of an issue Strider identified and attempted to resolve two years ago. There is no basis for the further, unnecessary, and unlimited delay sought by IWRB. IWRB’s Motion should be denied.

DATED this 9th day of January, 2024.

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January, 2024, a true and correct copy of the foregoing document was served by the method indicated below upon the following parties:

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