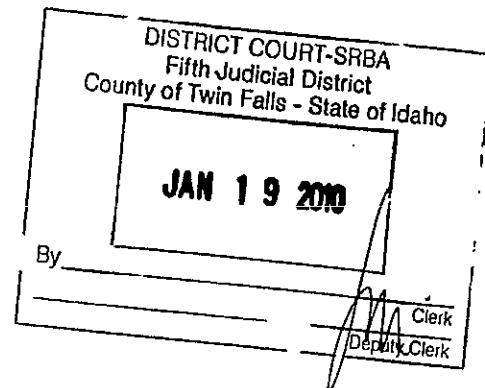


Dana L. Hofstetter, ISB #3867
HOFSTETTER LAW OFFICE, LLC
 608 West Franklin Street
 Boise, Idaho 83702
 Telephone (208) 424-7800
 Facsimile: (208) 424-8774
 Email: Dana@IdahoWaterLaw.com

Michael B. Schwarzkopf, ISB #2861
ATTORNEY AT LAW
 1809 Graham Street
 Yakima, Washington 98902
 Telephone: (208) 841-8227
 Email: mbschwarzkopf@yahoo.com

Attorneys for
 Indian Creek Ranch Owners Association, Inc.



**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case 39576

Subcase Nos. 37-296A, 37-717, 37-1216
 and 37-7854

**AFFIDAVIT OF MICHAEL B.
 SCHWARZKOPF**

STATE OF WASHINGTON

COUNTY OF YAKIMA

) ss.

Michael B. Schwarzkopf, being first being duly sworn upon oath, deposes and

says:

AFFIDAVIT OF MICHAEL B. SCHWARZKOPF -- 1

(1) I am Michael B. Schwarzkopf, counsel of record in this matter for Indian Creek Ranch Owners Association, Inc. ("ICROA");

(2) I have personal knowledge of the facts set forth herein;

(3) I have attached, as Exhibit "A" hereto, a record of all of the communication I have had with counsel for City of Hailey in a good faith effort to identify the deficiencies in his client's discovery answers and responses and to meet and confer with him about the deficiencies in his client's answers and responses to ICROA's Discovery Requests since our last hearing in this matter on January 13, 2010. I certify that I made my part of these communications in an attempt to identify discovery deficiencies, to resolve the discovery disputes and to avoid the need for additional court action;

(4) The seven (7) deficiencies that I noted for Mr. Brown, contained in my emails that make up a part of Exhibit "A" hereto, accurately reflect the results of my review thus far of ICROA's Discovery Requests and City of Hailey's discovery Answers and Responses thereto;

(5) These deficiencies include failures to provide critical flow data from the collection/diversion works and from Indian Creek itself, failure to provide any construction or facilities drawings of the collection/diversion works, failure to provide information about the measuring devices used by claimant to measure flow, and incomplete minutes of city meetings about the collection/diversion works;

(6) I have attached, as Exhibit "B" hereto, a copy of relevant pages 11 through 14 of Claimant's 1st Answers and Responses to Objector's 1st Set of Interrogatories and

Requests for Production, in subcase 37-00296A. ICROA's other subcase Discovery Requests have analogous subject matter, and Claimant's other subcase Answers and Responses are analogous to its Answers and Responses in subcase 37-00296A as to this subject matter.

FURTHER YOUR AFFLIANT SAYETH NOT.

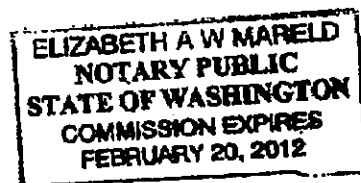
DATED this 19th day of January, 2010.



Michael B. Schwarzkopf

SUBSCRIBED AND SWORN to before me this 19th day of January, 2010.

Elizabeth A W Mareld
Notary Public in and for the State of Washington
Residing at: Yakima
My Commission Expires: Feb. 20, 2012



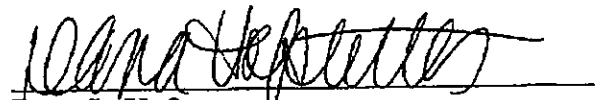
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document (including any attachments) this 19th day of January, 2010, by the pre-paid method(s) indicated below to:

IDWR
Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098
☐ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax

Craig Hobdey
P.O. Box 176
Gooding, Idaho 83330
☐ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax

Patrick D. Brown
Hutchinson & Brown
104 Lincoln Street
P.O. Box 207
Twin Falls, Idaho 83303
☐ U.S. Mail ☐ Fed Ex ☐ Hand ☒ Fax


Dana L. Hofstetter

RE: Indian Creek Ranch Owners' Discovery

Monday, January 18, 2010 6:40 PM

From:

To:

Cc:

"Hille, Spencer" <hille.spencer@johnc.com>

Full name: Spencer Hille

"John Brown" <john.brown@johnbrown.com>

Full name: John Brown

Date: 1/18/2010 10:40 AM

Mr. Brown:

Because you don't indicate in the email below (dated January 18 2010, 11:52 a.m.) whether you also received the first of my two emails of last Friday, let me say again that while your answers and responses to our interrogatories and requests for production did provide some of the Indian Creek Spring and Creek flow data we requested, you did not provide any indication of the location(s) in the collection/diversion works at which the flow data you provided was taken. We assume that the limited data you provided pertained to flow data documents you provided in because you referenced the flow data documents you provided in your response to our Request for Production No. 13 and our Interrogatory No. 16, both of which had a municipal water supply, not a creek, orientation. If we're misreading the limited data you provided in this regard, please let us know. We think this information is requested in Request for Production No. 15, Interrogatory No. 16 and Request for Production No. 11 as well.

As an aside, please be aware that, for purposes of this email, the numbered Interrogatories and Requests for Production to which I refer are those contained in the discovery we propounded in subcase 296A. We would note that the three other sets of interrogatories and requests for production that we propounded for the three other subcases could have analogous requests with different numbers as to the omissions listed both above and below.

To continue, then, you have told us that, historically, there have been at least two locations where measurement could take place once the spring water enters the municipal collection/diversion works. We would like all the flow data from each measuring point, and an indication of which data applies to which point, and the time periods involved.

As for the discovery answers and responses deficiencies referenced in the second of my two emails of last Friday, I did point out to you explicitly that you have not provided us any

construction or facilities drawings as requested in Request for Production No. 10.

Your failure to provide us any Indian Creek flow measurement records, even though the City has been contractually required since 1983-ish to maintain measurement at two points on the creek, is implicated by Request for Production No. 15.

Your failure to provide us any documents that would describe your past or present measuring equipment, even though we saw that such equipment recently existed at two points in your collection and conveyance system, is implicated by Interrogatory No. 16 and Request for Production No. 11.

Your failure to provide the underlying measurement data (turbine flow SCADA data at 15-minute intervals) utilized to analyze system demands in the Municipal Water System Demand and Supply Analysis (Page 4, Paragraph 2), referenced in the SPF study, is implicated by Interrogatory No. 16 and Request for Production No. 13. We think this information is requested in Request for Production No. 15, Interrogatory No. 16 and Request for Production No. 11 as well.

Our indication that we received a number of duplicate documents in response to our Requests for Production (and our question whether they were supposed to be something else) is based on the fact that the documents you provided, described in your index as numbers 7-28, are completely duplicated by documents numbered 36-57. Should we have been provided different documents as document numbers 36 to 57, instead of the same documents?

Further, there are apparent gaps in the relevant minutes of the Council Meetings you provided. For example, the produced minutes for February 22, 1982 reference a planned City Council meeting on March 8, 1982 on the same subject but the minutes for the March 8, 1982 meeting are not provided.

Please note that these are the omissions we have identified based on an intermediate review of the answers and responses to our Interrogatories and Requests for Production. It is not necessarily a comprehensive list of omissions. We reserve the right to identify further omissions as discovery proceeds.



which you believe triggers the need to produce information itemized below.

In the meantime, I am forwarding this e-mail to my client, so they may check again about whether some of the information requested below is information we possess. I do not, however, expect to be able to talk to my client until Tuesday morning, as today is a holiday.

I also have a message for my receptionist from Friday afternoon indicating you called demanding that I communicate to you on Friday that I personally had received e-mail from you. I would appreciate it if you would not make such demands of my staff. I was not available as I was in court on other business. And I don't need my receptionist running to the courthouse because someone on the phone demands to hear from me immediately.

I would also appreciate it if you would do what you promised to do in December: namely let me know when and where your client will be available so I can conduct the 30(b)(6) deposition. It will include the following topics:

1. The negotiation, drafting, execution, and implementation of the 1993 agreement;
2. The surface water rights, and water right usage in the last 20 years, of the Indian Creek Ranch Owners Association;
3. The surface water rights, and water right usage in the last 20 years, by each member of the Indian Creek Ranch Owners Association;
4. The Indian Creek Ranch Owners Association's knowledge about the City's use of water since 1980;
5. The Indian Creek Ranch Owners Association's knowledge about the City's water rights;
6. All information provided to any person who may testify as an expert for Indian Creek Ranch Owners Association in any of the subcases;

I will continue to be available to respond to any further communications you may undertake on these subjects. After noon on Tuesday, however, I will likely also be focused on drafting the documents I will need to file with the court to update it on the status of any continuing discovery response inadequacies. Please give me your thoughts as early as possible so the court may have the most up to date information possible.

As for your assertion that I demanded anything from your receptionist on Friday afternoon (or at any other time), much less what you claim I demanded, it is patently false. But I'm confident you know that. Moreover, when I spoke with her and left the message asking that you call me (wanting to confirm with you that you had in fact received my emails because of the difficulties you have claimed in the past), she told me affirmatively that you were on the phone in your office. There was no indication that you were in court or anywhere else.

Finally, as for your assertions that you have asked me for, and that I promised you, dates for a 30(b)6 deposition of ICROA, that is also patently false. I'm confident that you know that as well. I will be glad to speak more about the subject of scheduling the depositions we all need in the near future. As we did discuss in December, ICROA has been waiting a long time to schedule depositions due to your inability to answer and respond to its written discovery. In any event, I couldn't make out the meaning of the last few lines of your email on that subject. Perhaps you could fill in the blanks for me before we have any further discussion of that subject.

Mike Schwarzkopf

RE: Indian Creek Ranch Owners' Discovery

Monday, January 18, 2010 11:52 AM
From:

"Fourth Street" <fourthstreet@icrowa.com>
Attachments:

"Mike Schwarzkopf" <mischwarzkopf@yahoo.com>
Mr. Schwarzkopf:

I have received the below e-mail. You could significantly expedite the review process if you would identify, for each item listed, what particular request for production, or interrogatory, you're referring to

7. The sources of information relating to each of the above items.

I need to hear from you soon on this, as I anticipate I will be taking depositions of any experts may utilize, once we have completed and I just that the information likely to be forthcoming from the deposition.

Thanks. Pat

Indian Creek Ranch Owners' Discovery

Friday, January 15, 2010 1:34 PM

"Mike Schwarzkopf" <mischwarzkopf@yahoo.com>

Add Sender to Contacts

patbrown@calnet.net

connect@calnet.net

Dan@patbrownlaw.com

Mr. Brown:

Apparently, I just inadvertently sent you only a partial email dealing with what we believe are the deficiencies in your answers and responses to our Interrogatories and Requests for Production of documents. I have set forth below other of those deficiencies (although analysis is ongoing):

2. You have not provided us any construction or facilities drawings as requested in Request for Production No. 10 of the 290A Requests (repeated in the other three claims' Requests as well).
3. You have not given us any Indian Creek flow measurement records even though the City has been contractually required since 1983-ish to maintain measurement at two points on the creek.
4. You have not given us any documents that would describe your past or present measuring equipment even though we saw that such equipment recently existed at two point in your collection and conveyance system.
5. Apparently, SPF utilized turbine flow SCADA data at 15-minute intervals to analyze system demands (Municipal Water System Demand and Supply Analysis Page 4, Paragraph 2), and yet you

have provided none of their underlying measurement data.

6. We received a number of duplicate documents in response to our Request for Production. Were they supposed to be something else?

7. We note gaps in the chronology of the minutes of the Council Meetings you provided.

Please provide me a responsive email by noon Tuesday so that we can meet our meet and confer obligations under the IRCP before the continuation hearing set for next Wednesday. I will be available all weekend and on Monday and Tuesday (till noon) to respond to any responses you may make. I will continue to analyze your responses and answers so that we can get to the bottom of these information needs.

Thank you.

Mike Schwarzkopf

Indian Creek Ranch Owners' Discovery

Friday, January 15, 2010 1:02 PM

"Mike Schwarzkopf" <mischwarzkopf@yahoo.com>

Add Sender to Contacts

patbrown@calnet.net

connect@calnet.net

Dan@patbrownlaw.com

Mr. Brown:

I have initially identified what I believe are the following gaps in your discovery responses to our interrogatories and requests for production in this case:

1. While you have provided some of the Indian Creek Spring and Creek flow data we requested, you have not provided any indication of the location in the collection/diversion works at which this flow data was taken. You have told us that historically there have been at least locations where measurement could take place. We would like all the flow data from each measuring point, and an indication of which data applies to which point.

shown the well and allowed to measure it. They and their engineers were also allowed to photograph and document the measurement systems and question the City officials about the particulars of each of the measurement systems.

REQUEST FOR PRODUCTION NO. 11: Please produce all documents relating to your answer to Interrogatory No. 16.

RESPONSE NO. 11: Respondent does not possess responsive documents at this time.

INTERROGATORY NO. 17: In your Claim, you contend that your portion of the Water Right is for "Municipal Purpose". Please describe all the facts that support this contention.

ANSWER NO. 17: Claimant objects to the extent the interrogatory purports to compel the description of "all facts" as such is beyond scope of what may be required by and Interrogatory. Without waiving the objection, the respondent submits the water from Indian Creek has been used to supply the municipal needs of the City of Halley for as long as any one presently at the City can remember and such uses have been recognized since at least the time of the Frost decree.

REQUEST FOR PRODUCTION NO. 12: Please produce all documents relating to your answer to Interrogatory No. 17.

RESPONSE NO. 12: See attached documents.

CLAMANT'S 11 ANSWERS & RESPONSES TO
OBJECTION'S IN SET OF INTERROGATORIES & REQUESTS FOR PRODUCTION - 12

INTERROGATORY NO. 15: Please describe the equipment you use for diverting water under your portion of the Water Right from the source and conveying it to the place of use, including in your response, without limitation, descriptions of all pumps, pipelines, tanks, conduits and other facilities employed in such diversion and distribution systems.

ANSWER NO. 15: Please see Answer No. 13. Claimant has allowed the proponents to inspect the collection and distribution system which is comprised of underground drain pipe collecting water at the source. The water then passes through a well into underground, which runs down to the hydropower generator and water storage reservoir at the lower end of the valley. From there the water is piped underground to the City of Halley where it is distributed to its users.

REQUEST FOR PRODUCTION NO. 10: Please produce all documents relating to your answer to Interrogatory No. 15.

RESPONSE NO. 10: Please see the Answer No. 15.

INTERROGATORY NO. 16: Please describe any and all measurement equipment used for measuring your diversions of water under the Water Right from the source.

ANSWER NO. 16: Measurement occurs through a fixed well and through an ultrasonic measurement system at the collection point, where the water enters the reservoir, and at various points where individual users within the City have their water metered. Pursuant to the proponent's inspection of the facilities, they were

CLAMANT'S 11 ANSWERS & RESPONSES TO
OBJECTION'S IN SET OF INTERROGATORIES & REQUESTS FOR PRODUCTION - 11

EXHIBIT

B

INTERROGATORY NO. 18: In your Claim, you contend that your portion of the Water Right has a season of use of "1-1 to 12-31". Please describe all the facts that support this contention.

ANSWER NO. 18: Municipal water supply has an inherent use year-round as most people use it for culinary purposes daily, and in this case, as set forth in the above answers, the water has been used for those purposes for more than a century without any cessation.

REQUEST FOR PRODUCTION NO. 13: Please produce all documents relating to your answer to Interrogatory No. 18.

RESPONSE NO. 13: Flow records of the flows from the springs are attached.

INTERROGATORY NO. 19: In your Claim, you contend that your portion of the Water Right is for 2,620 cubic feet per second "cfs". Please describe all the facts that support this contention.

ANSWER NO. 19: Please see First Decree and IDWR's claim file.

REQUEST FOR PRODUCTION NO. 14: Please produce all documents relating to your answer to Interrogatory No. 19.

RESPONSE NO. 14: See Answer No. 19.

REQUEST FOR PRODUCTION NO. 15: Please produce all documents that contain any measurement records of Indian Creek and/or Indian Springs flows or diversion quantities.

CLAIMANT'S 1st ANSWERS & RESPONSES TO
OBJECTION'S 1st SET OF INTERROGATORIES & REQUESTS FOR PRODUCTION - 13

RESPONSE NO. 15: Please see attached flow records.

REQUEST FOR PRODUCTION NO. 16: Please produce all documents referenced in, relating to or supporting any of your answers to the Interrogatories above that are not otherwise being produced in response to another Request for Production here.

RESPONSE NO. 16: All responsive documents are being produced, except as noted above.

Dated this 28 day of December, 2009.

HUTCHINSON & BROWN, LLP
By: 
Patrick D. Brown
Attorneys for Claimant

CLAIMANT'S 1st ANSWERS & RESPONSES TO
OBJECTION'S 1st SET OF INTERROGATORIES & REQUESTS FOR PRODUCTION - 14