

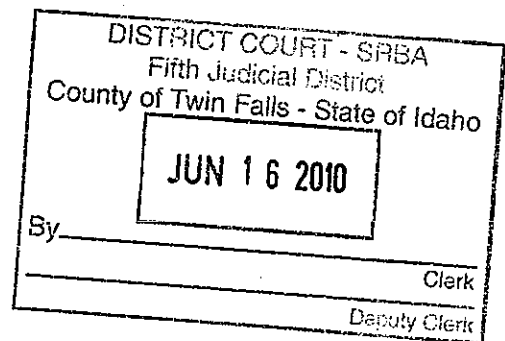
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DEPARTMENT OF
WATER RESOURCES

Patrick D. Brown, ISB #4413
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Attorneys for **Claimant City of Hailey**



IN THE DISTRICT COURT OF THE 5th JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase Nos. 37-00296A, 37-00717,
	)	37-01216 and 37-07854
Case No. 39576	)	
	)	AFFIDAVIT OF PATRICK D. BROWN
	)	
_____	)	

STATE OF IDAHO)
 (ss.
County of Twin Falls)

PATRICK D. BROWN, being first duly sworn on oath, deposes and states the following:

1. I am counsel for Claimant City of Hailey in this matter.
2. I make the following and foregoing statements in this affidavit based on my personal knowledge. To the extent I state my personal beliefs, they are based on personal knowledge and experience. I am otherwise competent to give the testimony set forth in this affidavit.

3. All of the information herein is true and correct to the best of my knowledge, information and belief; where based on information and belief, I believe the same to be true and correct.

4. This affidavit is filed in support of motions that address 5 topics, as outlined below:

A. The 30(b)(6) deposition of Indian Creek Ranch Owners Association, which this court instructed the parties to conduct on the scheduled date of 3/17/10. Issues regarding that deposition include the following:

- Indian Creek's failure to produce documents;
- Counsel for Indian Creek impeding, delaying, and frustrating the fair examination of the deponent, contrary to IRCP 30(d);
- Counsel for Indian Creek asserting unfounded claims to privilege under the attorney/client communication doctrine and laws, and under the work product doctrine and laws, and improperly objecting because the "question calls for a legal conclusion."
- Indian Creek's failure to designate and produce witnesses with knowledge about the listed topics;
- Indian Creek's failure to disclose facts, data, results of testing and inspections it conducted of Hailey's facilities through its engineers on October 29, 2009, pursuant to IRCP 34.

B. The refusal of counsel to communicate about or schedule the

depositions of Dana Hofstetter and Victor Hofstetter, objectors to the City of Hailey's rights.

C. The motions to compel filed by Indian Creek regarding requests for production under water right 37-07854, which counsel will not agree to have heard on a date when I am available.

D. The rescheduling of ICROA's deposition of the City, and;

E. The City of Hailey's motions to join and consolidate the Indian Creek Ranch Owners Association subcases numbered 37-00296B, 37- 19740, and 37-21412, with the instant cases, as they are interrelated rights to the same water.

I. The 3/17/10 deposition duces tecum, under Rule 30 (b)(6), of Indian Creek Ranch Owners.

5. Attached hereto and marked as Exhibit "A" is a true and correct copy of the transcript of the 3-17-10 30(b)(6) DEPOSITION OF INDIAN CREEK RANCH OWNERS' ASSOCIATION VIDEOTAPED TESTIMONY OF EINAR BENJAMIN HOFF.

6. A brief history about this deposition is that it was originally scheduled for February 12, 2010. I rescheduled it for March 17, 2010 to avoid issues asserted by Ms. Hofstetter about not having enough time to prepare for the deposition. Ms. Hofstetter waited until March 11, 2010 to file and serve her "Renewed Notice of Intent Not to Appear, or in the Alternative Renewed Motion for Protective Order."

7. On Friday, March 12, the Special Master held a phone conference and

directed that the deposition go forward on March 17, 2010.

8. After that phone conference, Ms. Hofstetter began sending me faxes and e-mails, to which I responded. True and correct copies are attached and incorporated hereto as Exhibit B. In short, they show that Ms. Hofstetter attempted to shift the burden of production and attendance from her client to me. They also show that I never agreed to such conditions.

9. As the deposition demonstrates at pages 23-24, no documents were produced, and this was because Indian Creek's counsel did not seek to obtain any documents until Friday, March 12, pages 27-29, about 6 days before the deposition despite about 2 months notice of what was sought for production at the deposition.

10. Regarding the issue of delaying, impeding, and frustrating the fair examination of the opponent, I am submitting the entire deposition for the court's review, because one can only appreciate the excessive speaking objections, wrongful assertion of privileges and objections, and directing the witness how and when to answer by considering the deposition as a whole.

11. Numerous unfounded speaking objections and claims to privilege were made during the deposition. Examples include:

-when asked about the history of an agreement, the witness is not allowed to answer because counsel asserts work product and attorney-client privilege: page 12-13; page 16-17. -when asked about whether measurements were

accurate, attorney work product is claimed, page 58. -when asked whether someone contests the calculated capacity of the pipeline, attorney work product is asserted, page 61. -when asked what documents exist, privileges are claimed because the documents were "put into a file" of their former attorney, Mr. Speck, page 21-22.

12. Regarding the designation of people who have knowledge on behalf of the organization, it is clear such designations were not made. For example, one of the topics was the history of negotiations of the 1983 agreement between the parties, and the deponent did not know about the negotiations. Page 17.

13. Regarding the failure of Indian Creek to disclose facts, data and results of testing and inspections it did on October 29, 2009 pursuant to IRCP 34, counsel again improperly claimed privilege about whether or not the data the City produced was accurate. Page 58.

II. The depositions of Dana Hofstetter and Victor Hofstetter.

14. Attached as Exhibit B are true and accurate copies of correspondence I had my assistant send to Ms. Hofstetter attempting to reschedule the depositions which had already been timely noticed. For months Ms. Hofstetter has never responded or provided any available dates, except to tell me that she would not allow the depositions and instead would withdraw her and her husband's objection to the City's claims. I continue to believe that

both Ms. Hofstetter and her husband have factual information about the use of water and the rights relating thereto and should be compelled to submit to depositions of each of them. I understand and believe that the Hofstetter's own property adjacent to Indian Creek and are members of the Indian Creek Ranch Owners Association. I further understand that the Hofstetters have personally diverted water from the Creek under the Indian Creek Ranch Owners Association rights. See deposition at page 135 and attached hereto and marked as Exhibit "C" a true and correct copy of Connie Bell's 3-2-10 letter to Dana Hofstetter, together with the transmission verification report, to which no written response has been received for several months.

III. The motions to compel filed by Indian Creek regarding its request for production under water right 37-07854.

15. Since the March 17, 2010 deposition of Indian Creek Ranch Owners, I have in good faith attempted to obtain production of the documents that were not produced during that deposition duces tecum. My efforts have been fruitless as Ms. Hofstetter has taken the position that I "waived" the right to the documents by proceeding with the deposition on that date. Also, as stated above, Ms. Hofstetter will not provide dates for the deposition of she and her husband. Consequently I take the position that I should not be required to respond to her requests for production unless and until she and her clients respond to long outstanding discovery requests I have made. While I am aware

the rules say that one party's discovery is not dependent upon another's, the rules also give the court to ability to weigh the equities in deciding upon what remedies to fashion regarding discovery disputes. At this stage of discovery, the City of Hailey has received no documents. I have attempted to accommodate and have accommodated the scheduling of the depositions in which the documents should have been produced on several occasions. Therefore, I believe a protective order is warranted.

IV. The motion to join and consolidate subcases involving Indian Creek water rights claimed by the City of Hailey and the Indian Creek Ranch Owners Association.

16. As the files in each of the individual subcases demonstrate, the most senior water rights on Indian Creek are claimed by the City and the Association (37-296A and 37-296B). How this "parent" right is split and allocated among the 2 parties involves intricately related common questions of law and fact. (See Judge Wood's decision on the Hagerman 36-03 "children rights.") While the City has not to date objected to the Association's claims, including that 37-296 B right, the Association has since amended its claims. This court then ordered that Amended Directors Reports be filed on those amendments by March 25, 2010. IDWR has yet to file those reports, which the City is awaiting in order to file objections. I fully intend to object as soon as those reports are filed because the Ranch Owners Association had increased the amount of water it claims under

the 37-296B right and other rights, while at the same time continuing to pursue objections to the City's claims of the same water.

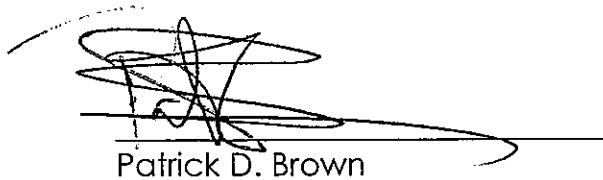
17. Additionally in the City's cases, The Ranch Owners are asserting a certain agreement between the party's limits and or extinguishes the City's rights, and increases the Ranch Owner's. This court cannot "decree water God did not make," nor unilaterally apply an agreement which by its own language is mutual. The agreement states: (which is asserted by and attached to the Ranch Owner's Objections)

18. No Contest. The parties agree that they will not contest the beneficial uses of water of the other, and acknowledge that said present beneficial uses are perfected.

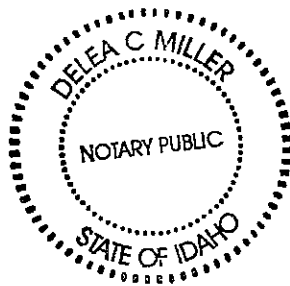
19. Consolidating the cases will, in my opinion, not only lead to a consistent, comprehensive resolution of the rights including as stated above, which cannot be had in separate proceedings without duplication and inefficiency, but will also obviate discovery disputes in the present cases about the scope of discovery the City may conduct concerning the Ranch Owner's rights, claims, and uses.

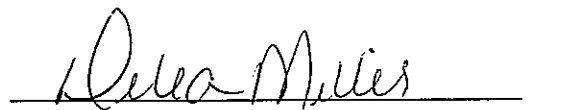
20. Therefore, the best way to proceed in my experience trying cases for years, is to consolidate, reschedule deadlines to accommodate the time when IDWR will file amended Director's reports in the ICROA cases, and compel both parties and their counsel to comply with discovery rules. I also believe that Ms.

Hoffstetter's conduct regarding the scheduling and taking of her clients 30(b)(6) deposition and her conduct during the deposition should be met with sanctions and there is no basis in law or fact justifying it.


Patrick D. Brown

SUBSCRIBED and SWORN to before me this 16th day of June, 2010.




NOTARY PUBLIC
Residence: Idaho, ID
My Commission Expires: 03-15-12

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of June, 2010, (s)he served a true and correct copy of the within and foregoing document upon the following by depositing a copy thereof in the United States mail, postage prepaid, addressed to:

Dana Hofstetter & Michael Schwarzkopf
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608 W. Franklin St.

Boise ID 83702 424-7800; fax 424-8774; dana@idahowaterlaw.com
(for Indian Creek Ranch Owners Assoc. "ICROA")

Craig Hobdey
HOBDEY LAW OFFICE
125 5th Ave. W.

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(for Big Wood Canal Co.)

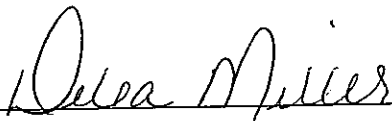
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A handwritten signature in cursive script, reading "Debra Miller", is written over a horizontal line.