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DEPARTMENT OF
WATER RESOURCES

**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	)	Subcase Nos. 37-296A, 37-717, 37-1216, and
	)	37-7854
	)	
Case 39576	)	INDIAN CREEK RANCH OWNERS
	)	ASSOCIATION, INC.'S RESPONSE
	)	IN OPPOSITION TO
	)	CITY OF HAILEY'S MOTION TO
	)	COMPEL INSPECTION INFORMATION
	)	
	)	
_____	)	

The Indian Creek Ranch Owners Association, Inc. ("ICROA") by and through its above-captioned counsel of record and pursuant to SRBA, Administrative Order No. 1, and Rules 26(b)(4), 26(b)(4)(B) and 34 of the Idaho Rules of Civil Procedure, hereby submits this Response in Opposition to City of Hailey's Motion to Compel Inspection Information. This Response is supported by the Affidavit of Dana L. Hofstetter Re: City's Motion to Compel filed contemporaneously herewith and other matters of record.

I. Background

Although the City of Hailey raised a number of issues in its Motion to Compel filed June 16, 2010, it appears that the Court's June 24, 2010 *Order on Motions* decided all of the other Motion to Compel issues, reserving for hearing on July 8, 2010, only the matter of the information collected by engineers working for ICROA's legal counsel during a Rule 34 inspection of the City of Hailey water system:

The City of Hailey's *Motion for Consolidation* of subcases 37-296B, 37-19740, and 37-21412 and the *Motion to Compel* information collected by the Indian Creek Homeowners Association during an inspection of the City of Hailey water system will be held July 8, 2010 at 10:00 A.M. The *Motion for Protective Order* will also be heard July 8, 2010 at 10:00 A.M.

Order on Motions, Subcase Nos. 37-296A, *et al.* (June 24, 2010) at 1-2. Therefore, this Response addresses only the inspection aspect of the City's *Motion to Compel*.¹

On page 3 of its June 16, 2010, *Motion to Compel*, the City requests that the Court, "[o]rder Indian Creek Ranchowners [*sic*] to produce any facts, data, and results of the inspection they conducted of the City's facilities pursuant to I.R.C.P. 34, by its engineers on October 29, 2009."

In its June 16, 2010, *Affidavit of Patrick D. Brown* filed in support of its *Motion to Compel*, the City again conclusively asserts "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 I.R.C.P. 34." *Affidavit of Patrick D. Brown* at 2. As its only support of this alleged failure to disclose, the City simply refers to a specific portion (page 58) of the deposition transcript of ICROA's 30(b)(6) representative, Ben Hoff:

¹ The contemporaneously filed *Affidavit of Dana L. Hofstetter Re: City's Motion to Compel* also addresses the City's other assertions in its Motion to Compel to ensure a complete record, if necessary.

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

Affidavit of Patrick D. Brown at 5.

There's no mention of any data collected during the City's inspection on page 58 of the Ben Hoff deposition transcript which is attached as Exhibit A to the *Affidavit of Patrick D.*

Brown. The entire page 58 of the deposition transcript, including the related portions beginning on page 57 and concluding on page 59, are reproduced here for the Court's reference:

Q. At one point Dr. Brockway, Brockway Engineering was mentioned. Has the Homeowners Association hired Mr. Brockway?

A. We did, back in the year 2000, I believe. Maybe it was 2002.

Q. For what purpose?

A. Well, he assisted us in doing some things that would allow us to do -- to improve on our irrigation system.

Q. So you hired him to -- not for purposes of the water rights adjudication, but for purposes of --

A. Applying water for irrigation purposes.

Q. Okay. And what did he do for you in that regard?

A. Well, he had a young fellow by the name of Jeff Rowe who came up and worked with me on installing some diversions and putting in some flood-type irrigation for -- in three or four different diversion locations. We did that for a while. That's -- that was the extent of that -- the work that he did there.

Q. Have you had anybody measure the water, or have you yourself measured the quantity of water being used by the City at any point in time, other than what you said about the weir that day?

A. By the City, no.

Q. Any information on whether or not the data that the City produced regarding water flows is accurate or not?

MS. HOFSTETTER: I'm going to object to the extent it relates to attorney work product.

(Last Question Read Back.)

THE WITNESS: I don't have an opinion about that. We didn't do any testing of the City's measuring equipment or anything of that nature. The assumption would be that the number's correct, but we don't really have any substantiation of that.

The reference to page 58 of Ben Hoff's deposition transcript is the only cited basis for the City's claim that it requested inspection information from ICROA which was allegedly refused.

However, this page does not appear to concern such a request. Further, counsel for ICROA does not recall being asked personally to provide such information to the City. *Affidavit of Dana L. Hofstetter Re: City's Motion to Compel*. Thus, at the present time, the City has not identified an actual specific instance when it requested such information from ICROA and when ICROA refused to provide such information. In any event, Rules 26(b)(4) and 26(b)(4)(B), I.R.C.P. govern the provision of expert information collected in preparation for trial and, under such Rules, the City would not be entitled to the provision of such information at the present time, as discussed further below.

II. Legal Argument

A. The City of Hailey has not identified a specific instance where it has requested from ICROA the "facts, data and results of testing and inspections."

As explained above, the sole instance that the City has identified as being denied "facts, data, results of testing and inspections [ICROA] conducted of Hailey's facilities through its engineers on October 29, 2009," does not appear to concern this information. Accordingly, at the present time the City has not identified a specific instance where it has requested such information from ICROA. Accordingly, a *Motion to Compel* under Rule 37(a), I.R.C.P. is inappropriate and without foundation.

B. Even if the City of Hailey had requested the disclosure of facts, data, results of testing and inspections ICROA conducted of Hailey's facilities through its engineers on October 29, 2009, such information would be protected from disclosure at the present time by Rules 26(b)(4) and 26(b)(4)(B), I.R.C.P.

It is well established that the facts known or opinions held by an expert, who has been retained by a party for trial preparation but who has not yet been identified as a witness to testify at trial, are not required to be disclosed under the attorney work product doctrine:

A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except as provided in Rule 35(b) [report of examining physician] or except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Rule 26(b)(4)(B), I.R.C.P. It is when an expert is designated to testify as to certain opinions, that certain information relating to those opinions becomes disclosable by deposition or interrogatory:

Discovery of facts known and opinions held by experts expected to testify, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained by interrogatory and/or deposition, including:

(A)(i) A complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions....

Rule 26(b)(4) I.R.C.P (emphases added). The City of Hailey acknowledges that the inspection was undertaken by engineers hired by Indian Creek Ranch's legal counsel and conducted pursuant to Rule 34, I.R.C.P. At the present time, ICROA's counsel has not identified the expert witnesses she intends to have testify at trial, if any, and until she does so, pursuant to applicable deadlines and the Civil Rules, ICROA is not required to disclose any facts known or opinions held by its experts who have been retained in preparation for trial. Accordingly, even if the City of Hailey had requested disclosure of information held by ICROA's experts, such information would not be properly disclosable at the present time. Further, as stated in Rule 26(b)(4), when an expert is expected to testify, such information would be properly disclosed only by interrogatory or by deposition of that expert. Yet, the City does not even claim to have propounded such an interrogatory or deposition request.

III. Conclusion

For the foregoing reasons, the City of Hailey's *Motion to Compel* ICROA's disclosure of "facts, data, results of testing and inspections it conducted of Hailey's facilities through its engineers on October 29, 2009," should be denied.

DATED this 1st day of July, 2010.

A handwritten signature in black ink, appearing to read "Dana Hofstetter", written over a horizontal line.

Dana L. Hofstetter
Attorney for ICROA

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document (including any attachments) this 1st day of July, 2010, by the pre-paid method(s) indicated below to:

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