

3-10

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DEPARTMENT OF  
WATER RESOURCES

*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 No. 39576

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

MOTION TO STRIKE AFFIDAVIT  
AND EXHIBITS

INDIAN CREEK RANCH OWNER'S ASSOCIATION ("Association") by and through the undersigned counsel of record, files this *Motion to Strike Affidavit and Exhibits* ("Motion to Strike") pursuant to Idaho Rules of Civil Procedure and 56(e).<sup>1</sup> This *Motion to Strike* requests that the *Affidavit Supporting Hailey's Response to Motion for Summary Judgment* ("Brown's Affidavit") and its attached exhibits and attachments be stricken entirely.

The affidavit and exhibits do not set forth proper foundation for the exhibits to establish their admissibility nor do they set forth specific facts that show that there is a genuine issue for trial as required by Rule 56(e). The City of Hailey has not filed an answering brief in response to the *Indian Creek Ranch Owner's Association's Motion for Summary Judgment* ("Motion for Summary Judgment") and *Memorandum in Support of Indian Creek Ranch Owner's*

<sup>1</sup> This motion is also filed in the alternative pursuant to LRCP 12(f) and 37(b) and (e).

*Association's Motion for Summary Judgment* ("Memorandum"). Therefore, the Association has no way of knowing what facts set forth in its *Motion for Summary Judgment* the City of Hailey claims are in dispute leaving the Association to guess what facts the affidavit exhibits and attachments are intending to dispute or put at issue.

## ARGUMENT

The Association filed its *Motion for Summary Judgment* on January 18, 2011; the motion was filed in subcase numbers are 37-296A, 37-717, and 37-1216 and sets forth a list of undisputed facts. The City of Hailey has not filed a responsive brief, but has instead filed *Brown's Affidavit* along with 15 exhibits and two voluminous attachments that consist of several volumes of deposition transcripts and exhibits.

### A. THE AFFIDAVIT, EXHIBITS AND ATTACHMENTS DO NOT COMPLY WITH THE REQUIREMENT OF IRCP 56(e) AND SHOULD BE STRUCK IN THEIR ENTIRETY

Rule 56(e) requires any opposing affidavit to "set forth such facts as would be admissible in evidence.... [and] the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." The Supreme Court has held that:

[T]he question of admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment. *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). The Court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2002). *Edmunds v. Kraner*, 142 Idaho 867, 871 (2006).

*Brown's Affidavit* simply attaches exhibits with no explanation as to what facts the exhibits purport to show, how the documents are relevant nor what genuine issue for trial exists. The Association must speculate as to the exhibits' purposes.

Exhibits 1, 2, and 9-15 are public documents. Exhibits 1 and 2 are historical documents that are part of the public records of Blaine County, exhibit 9 is a portion of the “Frost Decree,” exhibits 10-11 relate to the Association’s water right no. 37-296B<sup>2</sup> and are part of the public records of the Idaho Department of Water Resources. There is no explanation as to how these documents are relevant and what they purport to show and thus, should be stricken.

Exhibits 12-14 relate to subcase no. 37-7854 and are part of IDWR’s public record. Subcase no. 37-7854 involves a claim to a hydropower right by the City of Hailey and is not the subject of the pending motion for summary judgment. *Memorandum* at 1, fn. 1. Exhibit 15 is an adjudication recommendation for claim no. 37-28F which is not the subject of the pending motion, is not owned by either party, but is claimed by Red Devil Mountain Home Owner’s Association from the Big Wood River; a trial is set on it to begin May 11, 2011. There is no explanation offered as to why exhibits relating to these water rights that are not the subject of the pending motion for summary judgment are included nor how they may be relevant or what specific facts these documents show. Because there is no foundation showing the relevance of these documents, they should be stricken.

Exhibits 3-8 attached to *Brown’s Affidavit* are historic newspaper articles that date back to 1913. These articles make general references to the City of Hailey buying a water system from the Idaho State Life Insurance Company. *Brown’s Affidavit* offers no explanation as to why these articles are relevant. Without any explanation, there is no foundation showing that Exhibits 3-8 are admissible; further, these documents are hearsay. Therefore, exhibits 3-8 are not admissible evidence and should be excluded under Rule 56(e).

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<sup>2</sup> Water right no. 37-296B is claimed by the Association and is not at issue in the pending *Motion for Summary Judgment*.

Also attached to the affidavit are over 800 pages of documents consisting of deposition transcripts, videos, and deposition exhibits. These documents are attached to *Brown's Affidavit*, and are likewise inadmissible evidence and should be stricken as they constitute hearsay. In addition, there is no explanation as to how this information is germane, which facts contained in these hundreds of pages are important, or what facts that are material to the pending motion for summary judgment may be questioned by these documents. These documents should be excluded entirely.

Because the affidavit, exhibits and attachments do not set forth specific facts that show that there is a genuine issue for trial as required by Rule 56(e) and there is no proper foundation for the exhibits and attachments nor any explanation of what specific facts the exhibits purport to show or refute, the affidavit, exhibits and attachments should be stricken.

**B. ALTERNATIVELY, PORTIONS OF THE AFFIDAVIT AND CERTAIN EXHIBITS SHOULD BE STRUCK AS IMMATERIAL UNDER IRCP 12(f) OR AS A SANCTION FOR FAILURE TO DISCLOSE THE DOCUMENTS IN DISCOVERY**

Alternatively, this *Motion to Strike* requests that certain portions of the *Brown Affidavit* be stricken as immaterial to the issues pending on summary judgment in the above-listed subcases. Exhibits 3-8 should be excluded for the additional reason that they were not produced fairly in discovery or in compliance with this Court's orders relating to discovery.

**1. REFERENCES TO CLAIM NOS. 37-7854 and 37-28 ARE IRRELEVANT: THE MOTION FOR SUMMARY JUDGMENT IS NOT FILED IN THOSE SUBCASES**

Paragraphs 10, 11, and 12 of *Brown's Affidavit* and Exhibits 12, 13, and 14 attached thereto discuss or relate to subcase no. 37-7854. The *Motion for Summary Judgment* is not filed in that subcase and the *Memorandum* and on page 1 states that the City of Hailey's claim to

water right no. 37-7854<sup>3</sup> was not a part of the *Motion for Summary Judgment*. *Memorandum* at 1, fn. 1. Because claim no. 37-7854 is not part of the Association's *Motion for Summary Judgment*, any documents relating to or supporting that claim are not relevant in this proceeding. Hence, paragraphs 10, 11, and 12 of *Brown's Affidavit* and Exhibits 12, 13, and 14 attached thereto are immaterial and should be stricken under Rule 12(f).

In addition, paragraph 13 of *Brown's Affidavit* and Exhibit 15 referred to therein relate to a claim to water right no. 37-28F. This water right is not at issue in this case, is not owned nor claimed by either party to these subcases and its source of supply is from the Wood River, not from Indian Creek; any reference to this claim and exhibit 15 is immaterial and irrelevant and should be stricken under Rule 12(f).

## **2. EXHIBITS 3-8 WERE NOT PRODUCED IN DISCOVERY AND SHOULD BE EXCLUDED**

In addition to the above reasons that would justify their exclusion, exhibits 3-8 should be excluded because they were not timely or fairly produced in response to the Association's prior discovery requests and in violation of this Court's December 7, 2009 *Order on Motion to Compel Discovery and Setting Status Conference* wherein the Court ordered the City of Hailey to answer the Association's *First Set of Interrogatories* and *First Set of Requests for Production of Documents* by December 11, 2009.<sup>4</sup> Discovery was properly propounded upon the City of Hailey and its answers were due in the fall of 2009 originally and then ordered by the Court to be served by December 11, 2009. *See id.* Documents that would support or relate to the City of

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<sup>3</sup> The City of Hailey's claim no. 37-7854 is for a previously licensed hydropower right with a priority date later than the Association's water rights.

<sup>4</sup> There has been an assorted history between the parties regarding discovery disputes prior to the undersigned counsel becoming involved in these subcases. Current counsel is not entirely clear of the reasons why the City of Hailey did not meet the December 11, 2009 deadline.

Hailey's claims at issue in these subcases were requested by the Association in its first set of discovery, interrogatory numbers 6 and 7 and requests for production numbers 1, 2 and 5<sup>5</sup> which are set forth below:

INTERROGATORY NO.6: Please separately identify each communication which in any way relates to your Claim. For each such communication, please identify:

- a. Whether the communication was oral or written;
- b. Who were the parties to the communication;
- c. The date of the communication;
- d. The substance of the communication; and
- e. The relevance of the communication to the issues in this subcase.

INTERROGATORY NO.7: Please separately identify each document which in any way relates to your Claim, and describe its significance.

REQUEST FOR PRODUCTION NO. 1: Please produce a copy of each and every written communication identified in your answer to Interrogatory No.6.

REQUEST FOR PRODUCTION NO. 2: Please produce copies of each and every document identified in your answer to Interrogatory No.7.

REQUEST FOR PRODUCTION NO. 5: Please produce all documents that you assert support or may support your Claim.

Attached as Exhibits A – C to the *Affidavit of Candice M. McHugh* is a copy of the *Claimant's 1<sup>st</sup> Answers & Responses to Objector's 1<sup>st</sup> Set of Interrogatories & Requests for Production* that were served December 23, 2009 for subcase nos. 37-296A, 37-717 and 37-1216 which contain both the Association's interrogatories and requests for production and the City of Hailey's answers and responses. See *Discovery Notice of Claimant's 1<sup>st</sup> Answers & Responses to Objector's 1<sup>st</sup> Set of Interrogatories & Requests for Production* on file herein.

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<sup>5</sup> The Association's discovery was served in each of the individual subcases but all interrogatories and requests are substantially similar in each of the subcases. These direct quotes are taken from those interrogatories and requests served in subcase no. 37-296A. The City of Hailey's objections and answers were served in each individual subcase and the answers were also substantially similar in each subcase; the answers quoted below contained are taken from the answers served in subcase no. 37-296A.

In the City of Hailey's answers and responses to the discovery requests, the City of Hailey objected and simply relied on or pointed to public records as being documents supporting its claims.<sup>6</sup>

ANSWER NO.6: Claimant objects to this interrogatory to the extent it seeks privileged work product and statements prepared in anticipation of litigation for which Objector has made no showing of hardship under I.R.C.P. 26(b). Claimant also objects that the interrogatory is overbroad, unduly burdensome, and vague in that it purports to require Claimant to determine what "relates to the claim" and whether or not some communication within that vague concept has occurred. Without waiving the objection, proponent is referred to the Court records and IDWR's claim's file which reflect communications about the claim.

RESPONSE NO.1: *See Answer No. 6* - such documents are public records equally available to proponent without imposing the costs of production on respondent.

ANSWER NO.7: Claimant objects to this interrogatory as being overbroad, unduly burdensome and vague in that it purports to require the respondent to determine what relates to the claim and, without waiving the objection, refers the proponent to Response No. 1, above. The public documents identify themselves.

RESPONSE NO.2: *See Answer No.7.*

RESPONSE NO.5: Claimant objects to this request on the grounds that it is overly broad, too general, unduly burdensome in that the respondent is unable to determine what the proponent may consider supporting a claim. A request for production must identify documents or other things sought with reasonable particularity. Seeking anything that might support a claim does not identify what is being sought with reasonable particularity, and certainly not with the particularity needed for the respondent to identify and produce what is being sought.

The undersigned counsel for Indian Creek, has examined the documents produced in discovery by the City of Hailey and cannot find reference to Exhibits 3 through 8 nor are they contained in any of the production documents. See McHugh Affidavit filed herewith. Furthermore, counsel cannot find Exhibits 3 through 8 in the deposition exhibits that were produced or discussed during the depositions taken in this matter. The deadline for discovery to be completed was

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<sup>6</sup> See fn. 5 *supra*.

December 17, 2010. *Order Resetting Dates and Deadlines* dated July 27, 2010 at 2, on file herein.

The purpose of discovery is to provide parties the opportunity to discover relevant documents that are not privileged. IRCP 26(b)(1). The answering party is under a duty to fairly disclose information that it knows is relevant and responsive to the question posed by the discovery request. The City of Hailey failed to produce the documents now identified as Exhibits 3-8 and attached to *Brown's Affidavit*. Striking references to and use of documents not fairly disclosed is an appropriate sanction for failing to comply with discovery deadlines and lies within the discretion of the Court. The City of Hailey had ample opportunity to fairly answer discovery and produce the documents in a timely fashion in response to the Association's discovery requests; it was ordered to do so by this Court. It failed to comply with this Court's order and instead provided evasive and incomplete answers and responses. The City of Hailey should be precluded from using undisclosed documents in an attempt to defeat the Association's *Motion for Summary Judgment*. Exhibits 3-8 should be stricken and not allowed to be used in the summary judgment proceeding or at any trial in this matter.

### CONCLUSION

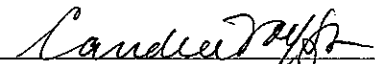
In conclusion, *Brown's Affidavit* and its attached exhibits and attachments should be stricken entirely because the statements and exhibits do not set forth admissible evidence that explain specific facts to show that there is a genuine issue for trial as required by Rule 56(e).

Alternatively, paragraphs 10, 11, 12, and 13, along with Exhibits 13, 14 and 15 should be stricken as immaterial to the matter pending on summary judgment as the paragraphs and exhibits relate to claims to water rights not at issue in the pending motion. Exhibits 3-8 should

also be stricken because they were improperly withheld by the City of Hailey in violation of this Court's discovery orders.

DATED this 9th day of March, 2011.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By:   
RANDALL C. BUDGE  
CANDICE M. McHUGH  
Attorney for Indian Creek Ranch  
Homeowners Association

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of March, 2011, I mailed a true and complete copy of the foregoing document, postage prepaid, to each of the following:

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