

JAN 24 2020

WATER RESOURCES  
WESTERN REGION

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Attorneys for Kathleen Legg, the Legg Family Trust  
and Randy and Kathryn Noah

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

**IN THE MATTER FOR APPLICATION  
FOR PERMIT NO. 67-15261 IN THE  
NAME OF THE DONALD F. DRISCOLL  
FAMILY TRUST**

KATHLEEN LEGG, THE LEGG FAMILY  
TRUST AND RANDY AND KATHRYN  
NOAH'S RESPONSE IN OPPOSITION TO  
THE APPLICANT'S MOTION FOR  
SUBPOENA FOR ROB WHITNEY

Kathleen Legg, the Legg Family Trust (collectively "Legg"), and Randy and Kathryn Noah (collectively "Noah"), by and through their counsel of record, Hawley Troxell Ennis & Hawley LLP ("HTEH"), and, in accordance with the requirements of Rule 524 of the Idaho Department of Water Resources ("IDWR") Rules of Procedure (IDAPA 37.01.01.524) and Rule 37(c)(1) of the Idaho Rules of Civil hereby oppose the Applicant's Motion for Subpoenas with respect to Rob Whitney. Rob Whitney was not identified as a potential witness or as a person with relevant knowledge in any of the Applicant's discovery responses. A pertinent excerpt of the Applicant's last and most complete discovery responses, Third Supplemental and Amended Responses to Kathleen Legg, the Legg Family Trust and Randy and Kathryn Noah's First Set of

Discovery Requests that were served on the discovery deadline of December 20, 2019, are attached hereto as Exhibit A. As indicated in Exhibit A hereto, the Applicant's Responses to Interrogatories Nos. 1, 2 and 4 regarding the identification of witnesses, persons with knowledge and expert witnesses, did not include Rob Whitney. Because, the Applicant did not timely identify Mr. Whitney as a possible witness in this matter, Rule 37(c)(1) of the Idaho Rules of Civil Procedure, precludes the Applicant from calling him as a witness at hearing:

If a party fails to supplement discovery responses when required ... the party is not allowed to use that information or witness to supply evidence ... at a hearing or at a trial, unless the failure was substantially justified or is harmless.

The Applicant's failure to disclose Mr. Whitney as a possible witness during discovery is not justified as it does not appear that any reason for having Mr. Whitney testify arose only after the conclusion of discovery. Thus, he should have been identified as a possible witness during discovery. Further, since Mr. Whitney was not disclosed during the discovery period, the other parties have no information about his expected testimony nor will they have the opportunity to depose him prior to hearing. Thus, under these circumstances, it would not be harmless if Mr. Whitney were to testify at hearing.

For the foregoing reasons, a hearing subpoena for Mr. Whitney to testify at hearing should not issue.

Dated: January 23, 2020

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Dana L. Hofstetter, ISB No. 3867

Attorneys for Kathleen Legg, the Legg Family Trust and Randy and Kathryn Noah

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of January 2020, I caused to be served a true copy of the foregoing document and Exhibit A by the method (s) indicated below, and addressed to each of the following:

Nick Miller (original)  
Manager, Western Region  
IDAHO DEPARTMENT OF WATER RESOURCES  
2735 Airport Way  
Boise, Idaho 83705  
Email: [nick.miller@idwr.idaho.gov](mailto:nick.miller@idwr.idaho.gov)

☒ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ E-mail  
☒ Facsimile 208-334-2348  
☐ iCourt

James Cefalo  
Hearing Officer  
IDAHO DEPARTMENT OF WATER RESOURCES  
900 N. Skyline Drive  
Idaho Falls, Idaho 83402-1718  
Email: [james.cefalo@idwr.idaho.gov](mailto:james.cefalo@idwr.idaho.gov)

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Michael P. Lawrence  
Charlie S. Baser  
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Dana L. Hofstetter, ISB No. 3867

## INTERROGATORIES

**INTERROGATORY 1:** Please state the names, addresses, and telephone numbers of all persons you intend to call as fact witnesses at the hearing of this matter, and for each such person, please state the substance of the facts to which he or she is expected to testify.

**RESPONSE TO INTERROGATORY 1:** Objection: premature. Driscoll will disclose the identity of witnesses expected to be called at the hearing in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and Scheduling Order*. Without waiving any objection(s), at this time Driscoll has identified the following persons who may testify as fact witnesses at the hearing:

(a) Donald F. Driscoll may testify concerning facts related to Application for Permit No. 67-15261 ("Application"), the property associated with the Application, and the water rights currently held in the name of the Trust.

(b) James Fronk may testify concerning facts related to the Conservation Easement and other Payette Land Trust matters, the landscape, habitat, and water features present on Driscoll's property since 2009, design and construction of pond on Driscoll's property, and matters concerning the Application.

(c) Brandi Horton Bonner may testify concerning facts related to her duties as Basin 67 watermaster, including knowledge of the area, hydrology, and administration of water rights.

**INTERROGATORY 2:** Please state the name, address, and telephone number of each and every person that is known to you or your attorneys who has any knowledge of, or who purports to have any knowledge of, any of the facts of this case or your Application and, for each, state the relevant facts which you understand to be within the knowledge of such person. By this Interrogatory, Legg and Noah seek the names, addresses and telephone numbers of all witnesses

who have any knowledge of any fact pertinent to this proceeding and the relevant facts which you understand to be within the knowledge of each such person.

**RESPONSE TO INTERROGATORY 2:** Objection: premature; requests attorney-client privileged information or attorney work product. Without waiving any objection(s), at this time Driscoll has identified the following persons who may have knowledge of facts pertinent to this proceeding:

Donald F. Driscoll  
PO Box 1669  
McCall, Idaho 83638  
208-473-4828

Donald F. Driscoll has knowledge of facts related to the Application, the property associated with the Application, and the water rights currently held in the name of the Trust.

James Fronk  
PO Box 576  
McCall, Idaho 83638  
208-634-8093

James Fronk has knowledge of facts related to the Conservation Easement and other Payette Land Trust matters, the landscape, habitat, and water features present on Driscoll's property since 2009, design and construction of pond on Driscoll's property, and matters concerning the Application.

Rick Fereday  
309 E. Lake Street  
McCall, Idaho 83638  
(208) 634-4999

Rick Fereday has knowledge of facts related to the Conservation Easement and other Payette Land Trust matters, and general knowledge about Driscoll's property and water use associated with the Application.

Brandi Horton Bonner  
2297 Snapp Lane  
Midvale, Idaho 83645

Facts: any knowledge based on position as Basin 67 watermaster; knowledge of the area, hydrology, and administration of water rights.

Terry Scanlan  
SPF Water Engineering, Inc.  
300 East Mallard Drive, Suite 350  
Boise, ID 83706

208-383-4140

Terry Scanlan has knowledge of facts related to the hydrology of ground and surface water located on, under, and near Driscoll's property, and general knowledge of matters related to the Application.

Scott King

SPF Water Engineering, Inc.

300 East Mallard Drive, Suite 350

Boise, ID 83706

208-383-4140

Scott King has knowledge of facts related to the filing and processing of Application.

Lori Graves

SPF Water Engineering, Inc.

300 East Mallard Drive, Suite 350

Boise, ID 83706

208-383-4140

Lori Graves has knowledge of facts related to the preparation, filing, and processing of Application for Permit No. 67-15261.

**SUPPLEMENTAL AND AMENDED RESPONSE TO INTERROGATORY 2:**

Objection: premature; requests attorney-client privileged information or attorney work product.

Without waiving any objection(s), at this time, in addition to those persons listed in Driscoll's response to Interrogatory 2, Driscoll has identified the following persons who may have knowledge of facts pertinent to this proceeding:

Craig C. Utter

Payette Land Trust

309 E. Lake Street

McCall, Idaho 83638

Craig Utter has knowledge of facts related to the Conservation Easement and other Payette Land Trust matters, and general knowledge about Driscoll's property

**INTERROGATORY 3:** Please identify each person who has assisted in, participated in, prepared any information for, supplied any information for, or was relied upon in preparing the answers/responses to these Interrogatories and Requests for Production of Documents.

**RESPONSE TO INTERROGATORY 3:**

1. Donald F. Driscoll
2. James Fronk
3. Terry Scanlan
4. Scott King
5. Michael P. Lawrence, counsel of record
6. Charlie S. Baser, counsel of record

**SUPPLEMENTAL AND AMENDED RESPONSE TO INTERROGATORY 2:** In

addition to those persons listed in Driscoll's response to Interrogatory 3, Driscoll responds as follows:

7. Craig C. Utter
8. Rick Fereday

**INTERROGATORY 4:** With respect to each person that you may call to testify as an expert witness at the hearing of this matter, please separately state the following:

- (a) His or her identity;
- (b) His or her background and qualifications, including academic degrees and professional and employment affiliations (a current and complete resume or CV attached to your answer will be a sufficient response);
- (c) A complete statement of all opinions to be expressed and the basis and reasons therefor;
- (d) The data or other information considered by the witness in forming his or her opinions;
- (e) Any exhibits to be used as a summary of or support for the opinions;

(f) A list of all publications authored by the witness within the preceding ten (10) years;

(g) The compensation to be paid for the testimony; and

(h) A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

**RESPONSE TO INTERROGATORY 4:** Objection: premature; requests attorney-client privileged information or attorney work product. Driscoll will disclose the identity of expert witnesses expected to be called at the hearing in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and Scheduling Order*. Without waiving any objection(s), at this time Driscoll responds to each subpart of the Interrogatory as follows:

(a) James Fronk, Terry Scanlan, and Scott King each may be called to testify as expert witnesses at the hearing.

(b) Objection: premature. Driscoll will supplement this response with the information requested for each potential expert witness at the time each potential witness discloses his expert report, if any, by December 9, 2020, in accordance with the parties' stipulation at the November 15, 2019 status conference.

(c) Objection: premature. Each potential expert witness will disclose this information in his expert report, if any, by December 9, 2020, in accordance with the parties' stipulation at the November 15, 2019 status conference, or in his rebuttal expert report, if any, by December 16, 2019, in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and Scheduling Order*.

(d) Objection: premature. Each potential expert witness will disclose this information in his expert report, if any, by December 9, 2020, in accordance with the parties' stipulation at the



November 15, 2019 status conference, or in his rebuttal expert report, if any, by December 16, 2019, in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and Scheduling Order*.

(e) Objection: premature. Driscoll will supplement this response and serve copies of exhibits to be offered at the hearing in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and Scheduling Order*.

(f) Objection: premature. Each potential witness will disclose this information in his expert report, if any, by December 9, 2020, in accordance with the parties' stipulation at the November 15, 2019 status conference, or in his rebuttal expert report, if any, by December 16, 2019, in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and Scheduling Order*.

(g) Objection: premature; irrelevant. Driscoll will supplement this response with the information requested for each potential expert witness at the time each potential witness discloses his expert report, if any, by December 9, 2020, in accordance with the parties' stipulation at the November 15, 2019 status conference.

(h) Objection: premature. Driscoll will supplement this response with the information requested for each potential expert witness at the time each potential witness discloses his expert report, if any, by December 9, 2020, in accordance with the parties' stipulation at the November 15, 2019 status conference.

#### **SUPPLEMENTAL AND AMENDED RESPONSE TO INTERROGATORY 4:**

Objection: premature; requests attorney-client privileged information or attorney work product. Driscoll will disclose the identity of expert witnesses expected to be called at the hearing in accordance with the September 27, 2019 *Order Authorizing Discovery and Disclosure and*

Scheduling Order. Without waiving any objection(s), at this time Driscoll responds to each subpart of the Interrogatory as follows: see *The Donald F. Driscoll Family Trust's Disclosure of Expert Witnesses and Reports* dated December 9, 2019.

**INTERROGATORY 5:** If any person identified in your response to Interrogatory No. 4 above, or his or her employer or business, has worked for, consulted with, or otherwise been hired in any manner by Legg or Noah, or any of them, (the "Work"), please state, describe and identify the following:

- (a) The date the Work was performed;
- (b) All persons that performed, or were associated with, the Work;
- (c) The scope, nature, and stated goals of the Work performed;
- (d) Any engagement letters or contracts involving the Work;
- (e) The amount of compensation paid for the Work;
- (f) Any documents relating to, or produced as a result of, the Work;
- (g) The specific dates and duration of time the Work was performed;
- (h) The location where each individual person identified in response to Interrogatory No. 5(b) currently works or, resides;

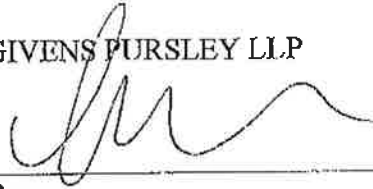
(i) For the persons identified in Response to Interrogatory No. 4 above who are currently or have ever been employed by the same employer as the persons identified in your response to Interrogatory No. 5(b) and the periods of time such persons worked for such employers:

- i. Each and every communication or statement (oral, written, email, or otherwise) made relating to, or pertaining in any way to, this case or the

potentially responsive to this request can be obtained from IDWR's publicly available files or have already been provided to Legg and Noah as part of settlement negotiations.

DATED this 20th day of December, 2019.

GIVENS PURSLEY LLP



By:

Charlie S. Baser

*Attorneys for The Donald F. Driscoll Family  
Trust*