

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

IN THE MATTER OF APPLICATION FOR)	
TRANSFER NOS. 79357, 79380 & 79384)	
IN THE NAME OF LENO AND NO. 79466)	ORDER ADDRESSING
<u>IN THE NAME OF FOUR SISTERS DAIRY)</u>	DISCOVERY DISPUTE

On December 5, 2014, the Idaho Department of Water Resource (“Department”) issued a Notice of Hearings and Order Authorizing Discovery for the above referenced contested cases. The Order Authorizing Discovery did not specifically authorize deposition of experts, but did not prohibit the taking of such depositions.

On February 25, 2015, the Department received a letter from protestant Edward Smith raising a question about who should pay for expert witness fees for the time spent in deposition. The letter asked the hearing officer to require the applicants to pay for the protestants’ expert witness fees during deposition because the applicant is the one requesting and conducting the depositions.

On February 26, 2015, the applicants filed a *Response in Opposition to Protestants’ Request for Payment of Expert Fees for Attending Depositions* (“Response”). The Response argued that the hearing officer appointed by the Department does not have the legal authority to force the applicants to pay the experts’ fees. The applicants also assert that it would constitute “manifest injustice” to require the applicants to pay for the experts’ fees during depositions.

Generally, the Idaho Rules of Civil Procedure do not apply to contested cases before the Department. Rule 52, IDAPA 37.01.01. However, there are a few exceptions to this rule. One of the exceptions is in the area of discovery. “Unless otherwise provided by statute, rule, order or notice, the scope of discovery, other than statutory inspection, examination, investigation, etc., is governed by the Idaho Rules of Civil Procedure.” Rule 520, IDAPA 37.01.01. Specifically, depositions are to be taken in accordance with the Idaho Rules of Civil Procedure. Rule 523, IDAPA 37.01.01.

The Idaho Rules of Civil Procedure include a number of rules describing the process of scheduling and taking depositions. One rule specifically addresses payment of expert fees for time spent in depositions. Rule 26(b)(4)(C) states:

Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and, **in the event discovery is obtained by deposition under (b)(4)(A)(i) of this rule, the party seeking discovery shall pay the expert a reasonable fee for time spent testifying at said deposition;** and (ii) with respect to discovery obtained under

subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. (emphasis added)

This rule is not ambiguous. It clearly states that the party seeking discovery through a deposition shall pay the deposed expert a reasonable fee for the time spent testifying in the deposition.

In his Response, Travis Thompson, attorney for the applicants, notes that in other contested cases before the Department, the parties usually pay for their own experts during depositions. This is likely the result of informal agreement between the parties. In many contested cases, each party identifies an expert and chooses to depose the opposing party's expert prior to hearing. In such cases, each party volunteering to pay for their own expert during depositions simplifies the process. It eliminates the need to send bills back and forth between opposing parties.

In this case, it appears that none of the protestants have requested to depose the applicants' expert. Therefore, there is not offsetting benefits which would support an informal agreement for each party to pay for their own expert. In the absence of an informal agreement to the contrary, Rule 26(b)(4)(C) governs.

Mr. Thompson argues that the Department does not have the statutory authority to force the applicants to pay for the protestants' expert fees. Even if this argument is correct, it does not affect the outcome of this order. If the applicants wish to depose any of the protestants' experts, they will comply with the Rule 26(b)(4)(C). If the applicants are not willing to comply with Rule 26, then the depositions don't need to be conducted. There is no evidence of "manifest injustice" in this case if Rule 26(b)(4)(C) is followed.

ORDER

IT IS HEREBY ORDERED that depositions conducted in the above referenced contested cases are governed by the Idaho Rules of Civil Procedure, including Rule 26(b)(4)(C). Unless the parties come to an informal agreement regarding payment of expert fees, the party seeking discovery through deposition shall pay the deposed expert a reasonable fee for time spent testifying at said deposition.

Dated this 27th day of February, 2015.


James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February 2015, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, postage prepaid and properly addressed, to the following:

Document Served: Order Addressing Discovery Dispute

Jimmie L. Conder
3623 N 2000 E
Filer ID 83328

Jeanie Mc Creary
2217 E 3300 N
Twin Falls ID 83301

Michael & Jana Humphries
2382 E 3300 North
Twin Falls ID 83301

Barbara & Lynn Stephens
PO Box 2118
Twin Falls ID 83303-2118

William D. Hamby
2399 E 3300 N
Twin Falls ID 83301

Margaret Winsryg & Leroy Elliott
David Coleman
PO Box 525
Twin Falls ID 83303-0525

Eric Parrott
2152 E 3300 N
Twin Falls ID 83301

Elizabeth Slifer
3779 N 2250 E
Filer ID 83328

Lois M. Rice
PO Box 200
Filer ID 83328-0200

Martin F. Hackard
3289 N 2300 E
Twin Falls ID 83301

Leslie Ellsworth
PO Box 5023
Twin Falls ID 83303-5023

Richard Parrott
1389 E 4400 N
Buhl ID 83316

Pam Ritter
3283 N 2300 E
Twin Falls ID 83301

Delea C. Miller
2239 E 3300 N
Twin Falls ID 83301

Ed Smith
PO Box 6015
Twin Falls ID 83303-6015

Victoria B. Henson
3295 N 2300 E
Twin Falls ID 83301-0455

Shadow & Bonnie Seaman
1940 E 3700 N
Filer ID 83328

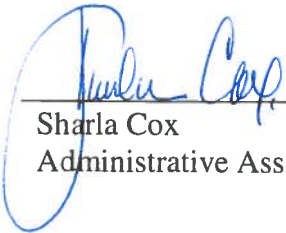
Scott Houtz
2231 E 3300 N
Twin Falls ID 83301

Thomas and Dorothy Leno
4236 N 1900 E
Buhl ID 83316

Four Sister Dairy LLC
PO Box 105
Twin Falls ID 83303-0105

Greg Sullivan
Brockway Engineering PLLC
2016 N. Washington St., Ste 4
Twin Falls ID 83301

Barker Rosholt & Simpson
Travis L Thompson
195 River Vista Place, Ste 204
Twin Falls ID 83301-3027



Sharla Cox
Administrative Assistant