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Department of Water Resources
Eastern Region

**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 Thomas & Dorothy Leno);
79466 (in the name of Four Sisters Dairy,
LLC)

**APPLICANTS' RESPONSE IN
OPPOSITION TO PROTESTANTS'
REQUEST FOR PAYMENT OF EXPERT
FEES FOR ATTENDING DEPOSITIONS**

COME NOW, the Applicants in the above-referenced matter, THOMAS LENO & FOUR SISTERS DAIRY LLC, and the proposed intervenor CEDAR RIDGE DAIRY LLC¹ (hereinafter collectively referred to as "Applicants"), by and through counsel of record and pursuant to the Department's Rules of Procedure (Rule 270.02), and hereby oppose the Protestants' request² to have the Applicants pay for the Protestants' expert witnesses to attend depositions requested by the Applicants. The reasons for this response are set forth below.

¹ Cedar Ridge Dairy LLC filed a motion to intervene in these proceedings dated January 16, 2015. No other party has opposed the motion and the Hearing Officer has yet to issue an order on the motion.

² The Applicants consider the Protestants' February 25, 2015 letter to constitute a "motion" and are responding to the same. See IDAPA 37.01.01.260.

RESPONSE

By hand delivery on February 25, 2015, Protestant Ed Smith presented a copy of a letter that he intended to mail to the Hearing Officer. In the letter, Mr. Smith requests that the Applicants pay for the time that the Protestants' experts would have to spend to testify at a deposition.³ The Applicants are in the process of attempting to set up depositions of the Protestants' expert witnesses. Idaho Rule of Civil Procedure 26(b)(4)(C) requires a "court" to order the "party seeking discovery pay the expert a reasonable fee for the time spent testifying at said deposition" unless "manifest injustice would result." As described below, the rule does not apply to administrative proceedings before the Idaho Department Water Resources (IDWR). Further, given common practice before IDWR in contested cases, it would be "manifestly unjust" for IDWR to require the Applicants to pay the Protestants' expert fees for testifying at a deposition in this matter.

First, the plain language of the rule references a "court." IDWR is an executive state agency, not a court within Idaho's judiciary. Further, the authorities of IDWR, its Director, and any hearing officers are limited by statute. *See* I.C. § 42-1701; *Henderson v. Eclipse Traffic Control and Flagging, Inc.*, 147 Idaho 628, 632 (2009). While the Director has authority to commence and pursue certain enforcement actions and seek civil penalties for violations, nothing in Title 42, Idaho Code, authorizes the Director or a hearing officer to order a party to pay certain expert witness fees through discovery in an administrative contested case. *See* I.C. § 42-1701B. Further, nothing in the Idaho Administrative Procedures Act provides for such authority either. *See* I.C. § 67-5201 et seq. Consequently, IDWR, its Director, and any designated hearing officers cannot order parties to pay for these types of costs incurred in administrative contested

³ Mr. Smith does not represent the other protestants in this matter. To the best of the Applicants' knowledge no other protestant has made a similar request.

cases. Such an order would exceed the limited statutory authority granted by the Idaho Legislature in these matters and would not be enforceable. For this reason alone the request should be denied.

Next, IDWR's Rules of Procedure provide that unless "otherwise provided by these rules, the Idaho Civil Rules of Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings before the agency." IDAPA 37.01.01.52 (emphasis added). Accordingly, any request for an order of expert fees must be examined against Rule 52, which plainly states such rules do not apply. There is no statute or other rule of procedure that would change this analysis in regard to a request for the payment of a party's expert fees.⁴ As such, any request made for payment of expert fees under I.R.C.P. 26(b)(4)(C) should be denied.

Further, the Department's procedural rules only apply the Idaho Rules of Civil Procedure in reference to the "scope of discovery." See IDAPA 37.01.01.520.02. The "scope of discovery" does not address a requirement to pay an expert's fee associated with testifying at a deposition. Although the rules recognize that depositions may be taken in accordance with Idaho's civil rules "for any purpose allowed by statute, the Idaho Rules of Civil Procedure, or rule or order of the agency," that authorization does not expand IDWR's authority to order a party to pay for any expert fees incurred for the same. See IDAPA 37.01.01.523. Stated another way, although the rules of civil procedure apply to the "scope" of discovery in IDWR contested cases, they are not wholesale adopted for any purpose, including creating a new authority for IDWR to order payment of expert fees in connection with testifying at depositions.

⁴ IDWR cannot adopt a rule of procedure that would conflict with its statutory authorities set forth in Title 42, Idaho Code, or the Idaho APA, Chapter 52, Title 67, Idaho Code. Accordingly, any attempt to interpret IDWR's procedural rules as granting authority to order the payment of such costs must be rejected. See *Roeder Holdings, LLC v. Board of Equalization of Ada County*, 136 Idaho 809, 813 (2001); *Hillcrest Haven Convalescent Ctr. v. Idaho Dept. of Health and Welfare*, 142 Idaho 123, 125 (2005) ("This Court will not enforce a regulation that is, in effect, a rewriting of the statute"). Only the legislature can grant administrative agencies like IDWR the power and authority to impose costs on parties under Idaho's civil rules like a court.

Next, it is common administrative practice before IDWR to have Applicants and Protestants pay for their own expert witnesses in contested cases. In nearly 15 years of practice before IDWR counsel for the Applicants is unaware of any instance where a Director or hearing officer has ever attempted to require a party to pay for another party's expert in regards to testifying at a deposition. In this regard the common practice is fair in that each party pays for its own witnesses that have been retained in a particular matter. There is no reason to change what is already an accepted practice before the agency. Moreover, the Applicants are not seeking expert fees from the Protestants for any matter, including depositions if taken. Further, there is no reason to order a party to pay for another party's expert in an effort to discover information which would aid in the presentation at hearing and streamline and make the proceedings as efficient as possible.

Finally, and alternatively, if it is the Hearing Officer's position that I.R.C.P. 26(b)(4)(C) applies and that IDWR can order the payment of such costs, the Applicants submit that it would result in "manifest injustice." The Protestants filed a *Submission of Expert Reports to Applicants* on February 13, 2015 identifying three reports submitted on behalf of 18 separate Protestants. Presumably the costs of the Protestants' experts are being shared in some fashion. For example, even assuming the Protestants' experts charge \$175/hr, if a deposition took 3 hours, the expert fee would be \$525. If this fee were split by all the Protestants, it would only amount to about \$30 per person. However, forcing Cedar Ridge Dairy LLC (the party in interest seeking the approval of the transfer applications) to pay for the Protestants' experts' time at a deposition would be unreasonable and unjust under the circumstances since it would require the payment from a single entity, in an amount approximately 17 times greater than what each Protestant might be expected to pay. Further, Cedar Ridge already has to incur the costs of its own experts,

counsel, and the court reporter for any depositions resulting from this contested case. Having each party for its own experts is fair and consistent with common administrative practice before IDWR.

In sum, the rule does not apply, and if it did it would be manifestly unjust to require payment of such fees in this instance. Therefore, the Applicants respectfully request the Hearing Officer to deny the Protestants' request.

DATED this 26th day of February, 2015.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

*Attorneys for Thomas Leno, Four Sisters Dairy,
LLC, and Cedar Ridge Dairy, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2015, I served a true and correct copy of the foregoing *Response in Opposition to Protestants' Request*, by depositing same in the United States mail, postage prepaid, addressed to the following:

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