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DEPARTMENT OF
WATER RESOURCES

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Department of Water Resources
Eastern Region

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 76779 IN THE NAME OF
THE CITY OF POCATELLO

RESPONSE TO APPLICANT'S MOTION TO
COMPEL DISCOVERY RESPONSES OF
PROTESTANT PORTNEUF WATERSHED
USERS ASSOCIATION

I.
INTRODUCTION

On November 2, 2010, the City of Pocatello ("City") filed an Application for Transfer No. 76779 with the Department of Water Resources ("Department"). On November 26, 2010, Portneuf Water Users Association, Inc. ("PWUA") filed a Notice of Protest. Thereafter, on January 4, 2011, City moved for an order authorizing discovery pursuant to Department Rule of Procedure 521. On February 8, 2011, after a pre-hearing conference, the

Department issued an Order Authorizing Discovery. The Order provided, among other things, that written discovery was to be completed by May 15, 2011. The Order also provided that “[d]ivision of a single interrogatory into multiple sub-questions is not permissible.” On February 17, 2011, City propounded its first set of discovery requests on PWUA, to which PWUA responded on March 3, 2011. On or about March 9, 2011, counsel for City contacted counsel for PWUA to state that City deemed the responses of PWUA non-responsive. *See* McGee Aff., Ex. A. PWUA noted that it did not wish to engage in needless discovery disputes and that the forthcoming availability of documents for inspection may alleviate City’s concerns. *See id.* PWUA also noted that it intended to supplement interrogatories regarding lay and expert witnesses, including the disclosure of general facts and areas of knowledge, which would serve to allow City to determine which witnesses it may need to depose. *See id.* Finally, PWUA requested that if City intended to continue challenging the responses of PWUA, City should provide it with a specific inventory of concerns in order to allow PWUA to better respond and potentially provide clarification. *See id.*

On or about March 18, 2011, City provided to PWUA a copy of its proposed motion to compel. *See* McGee Aff., Ex. B. On March 21, 2011, PWUA responded to each of City’s concerns, providing clarification where necessary and noting that further document production and review, as well as the expert disclosure, would continue to refine responses to City’s discovery requests. *See id.* Of particular note:

(1) PWUA addressed its allegedly deficient response to Interrogatory No. 6, which was a purely factual contention interrogatory about whether suitable measuring devices existed on the Portneuf River, by again stating the fact that no measuring device exists upstream of the Chesterfield Reservoir;

(2) PWUA addressed its allegedly deficient response to Interrogatory No. 8 by again identifying other answers that were responsive; and

(3) PWUA addressed its allegedly deficient response to Interrogatory No. 10 by specifically identifying three reports made available to the City. *See id.*

Moreover, PWUA continued to reiterate that it remains early in the discovery process and that additional document review, as well as forthcoming expert disclosures, will likely resolve any further concerns about the basis of PWUA's contentions. *See id.* On March 22, 2011, City filed the motion to compel.

II. ARGUMENT

Motions to compel discovery are governed by Idaho Rule of Civil

Procedure 37(a). The Rule provides in pertinent part:

If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

I.R.C.P. 37(a)(2).

The Department, like a court, has "broad discretion . . . in determining whether or not to grant a motion to compel." *Kirk v. Ford Motor Co.*, 141 Idaho 697, 700-01 (2005) (citing I.R.C.P. 37(a)(2)).

A. City's Contention Interrogatories

As an introductory matter, the interrogatories that serve as the primary point of contention in this manufactured discovery dispute are what are referred to as “contention interrogatories.” Contention interrogatories “ask another party to indicate what it contends, to state all the facts on which it bases its contentions, to state all the evidence on which it bases its contention, or to explain how the law applies to the facts.” *In re Grand Casinos, Inc., Sec. Litig.*, 181 F.R.D. 615, 618 (D. Minn. 1998). For reasons that will become apparent, the Department must recognize that such interrogatories are distinct from interrogatories that seek identification of witnesses or documents that bear on the allegations. *See McCarthy v. Paine Webber Group, Inc.*, 168 F.R.D. 448, 450 (D. Conn. 1996).

1. City's Motion Regarding Its Premature Contention Interrogatories Is Not Justified

Importantly, “[a] party filing contention interrogatories early in the pretrial period, *before substantial documentary or testimonial discovery has been completed, has the burden of justification.*” *Fischer & Porter Co. v. Tolson*, 143 F.R.D. 93, 96 (E.D. Pa. 1992) (emphasis added). The propounding party should be able to present “specific, plausible grounds for believing that securing early answers to its contention questions will materially advance the goals of the [civil rules].” *In re Convergent Technologies Sec. Litig.*, 108 F.R.D. 328, 340-41 (N.D. Cal. 1985). In other words, the propounding party must have reason to believe that answers to the interrogatories “will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a [summary judgment motion.]” *Id.* at 339.

Of course, PWUA does not contend that in light of the expedited nature of discovery in this matter, the contention interrogatories are improper or not “justified” at all.

Therefore, PWUA does not raise the particular concerns associated with premature contention interrogatories as a means to avoid answering the interrogatories, or as a means to excuse its answers. The contention interrogatories have been answered fully and in compliance with the civil rules, as set forth in the analysis below. However, these recognized concerns illustrate the unreasonableness of City's aggressiveness in filing the instant motion in the middle of this rather short discovery period. Contention interrogatories will only clarify the issues or narrow the scope of the dispute in this case once adequate discovery, including expert disclosure, is complete. Yet currently, discovery is incomplete and being conducted in an expedited fashion. PWUA does not have the benefit of its expert opinion or the facts on which such opinion is based, which as the Department and City know, is a critical component in a protest such as this. Moreover, PWUA is collecting and producing *all* pertinent documents and information that contain discoverable facts as expeditiously as possible.

In short, PWUA's answers and references to documents it has or will soon produce adequately provide the basis, factual and/or legal, for its contentions in compliance with the civil rules; but as the Department considers the City's motion, it should also consider the nature of these proceedings and City's "justification" for so quickly seeking Department intervention related to premature contention interrogatories. City will almost certainly find that the documents and information that have been produced, and continue to be produced, provide "each fact, and each document, that supports, contradicts, or in any material way pertains to" the contentions at issue. A motion such as this serves only to add to the already inefficient and burdensome nature of discovery in these proceedings. There is no "justification" for City's aggressive and premature motion practice related to the contention interrogatories at issue, and the City's motion should be denied.

2. City's Authority And Analysis Of Subparts Under The Federal Rules Does Not Apply

In response to City's briefing regarding subparts, it again bears noting that City's issues refer to their "contention interrogatories." Such interrogatories are distinct from interrogatories that seek identification of witnesses or documents that bear on the allegations. *See McCarthy v. Paine Webber Group, Inc.*, 168 F.R.D. 448, 450 (D. Conn. 1996). Yet City cites cases interpreting the latter traditional interrogatory types, where subparts were not held to be separate and distinct interrogatories. None of the cited examples involve contention interrogatories. In *Theobald*, for example, a federal district court held as a single interrogatory an interrogatory that asked "whether an employee was given any warning or reprimand during her employment, to identify the warning or reprimand by date, with a brief description of the incident and the name, gender position and address of the person who administered the warning or reprimand," because such subparts were all related to the same question and "designed to describe any warning or reprimand." *See* Motion at 7-8. In short, the interrogatory at issue sought various facets of a single factual inquiry. The interrogatory did not, however, also seek the responding party's explanation of the legal effect of the described "warning or reprimand." Such a request for explanation of a legal theory of the case would certainly have constituted a separate inquiry (and would also not likely have been appropriately propounded at the outset of discovery).

In this case, City generally seeks a description of the legal basis for a given contention. Then, in the same interrogatory, City seeks identification of facts related to the legal contention. City certainly does not intend to argue that a legal theory and a fact are not discrete subjects requiring discrete inquiries. Clearly, the circumstances presented in the cases cited within City's briefing are drastically different than in this case. Contention interrogatories "ask

another party to indicate what it contends, to state all the facts on which it bases its contentions, to state all the evidence on which it bases its contention, or to explain how the law applies to the facts.” *In re Grand Casinos, Inc., Sec. Litig.*, 181 F.R.D. 615, 618 (D. Minn. 1998) (emphasis added). City appears to contend that a single interrogatory can accomplish all of those objectives at once, but City can provide no support for such a contention. Instead, City’s argument relies on authority interpreting, for example, an interrogatory requesting the factual matter of whether, when, and how certain tests were conducted. *See* Motion at 8. It can provide no authority, however, for the proposition that a separate request about the **legal impact** of whether, when, and how certain tests were conducted should be considered the same interrogatory. City’s authority is inapplicable to this dispute.

To illustrate, City’s Interrogatory No. 1 states: “If you contend that the transfer will violate Idaho Code § 42-105, please describe the basis for this contention and identify each fact, and each document that supports, contradicts, or in any material way pertains to it.” *See* Creamer Aff., Ex. A at 3. Thus, in the course of one interrogatory, City asks PWUA not only to adopt or reject the contention, but also to (1) describe its legal theory, and (2) identify facts and documents that contradict, support, or are material to its legal theory. These are two discrete issues, requiring discrete inquiries and answers.

Another example, Interrogatory No. 6, presents a slightly different situation. In that interrogatory, City states a contention interrogatory that has no legal component. It is merely a factual contention. *See* Creamer Aff., Ex. A at 6. In turn, PWUA’s response is factual, making the remaining request for identification of facts entirely duplicative and unnecessary. *See id.* It is entirely unclear what type of response would satisfy City in this case, but it is clear that if the question is not compound, PWUA has provided a satisfactory factual answer.

PWUA's objections to improper subparts are not "unfounded," and City's attempts to analogize to federal precedent covering traditional factual interrogatories rather than contention interrogatories fail upon comparison to the interrogatories at issue in this case. City's interrogatories request both a description of a legal theory and identification of facts and documents, not merely various facets of a single factual inquiry. Accordingly, PWUA's objection based on subparts was not unfounded, and was indeed proper and supported by the rules of discovery and the Department's Order governing the discovery process.

B. PWUA's Answers And Responses Comply With Discovery Rules

City suggests that PWUA's answers to interrogatories are evasive and non-responsive. Even a cursory examination of the responses refutes such an allegation, and notwithstanding the objections raised, City received adequate responses to its compound interrogatories. First, to demonstrate evasion, City specifically cites the response to Interrogatory No. 6. *See* Motion at 4-5. That interrogatory requests the basis for a contention that "suitable measuring devices have not been installed on the Portneuf River both above and below the Reservoir that allow determination of the amount of inflows to be passed through the Reservoir when it is not storing water in priority." If measuring devices existed that, for some reason, did not "allow determination of the amount of inflows to be passed through the reservoir when it is not storing water in priority," perhaps a more exhaustive factual response would be in order. However, that is not the case. The factual basis for the contention is that no such measuring devices exist. An answer is not "evasive" just because it is not complex or long-winded. This is not an argument about semantics or obstruction. It appears that City simply does not care for the fact set forth in response to the interrogatory. Moreover, City's assertion that the response is not sufficient to allow it to prepare for a hearing on the issue is completely

disingenuous. As counsel for PWUA made very clear to counsel for City, PWUA intends to supplement its responses regarding the facts and substance of testimony from lay and expert witnesses (as City presumably intends to do) in a timely fashion. *See McGee Aff., Ex. A.*

Second, addressing the allegation that PWUA's response to Interrogatory No. 8 is non-responsive, PWUA notes that nothing in the civil rules precludes answering by reference to previous interrogatory responses. City can provide no authority for that proposition, and the assertion that none of the referenced answers provide facts is plainly false upon even a cursory examination of the referenced interrogatories, as well as the documentation provided to date in response to such interrogatories (which documentation adequately serves as a response pursuant to Idaho Rule of Civil Procedure 33(c)). Moreover, as both the responses and discussion with counsel in advance of this unwarranted motion revealed, PWUA continues to locate responsive documents and supplement its document production, and will provide its expert's findings and report within the timeframe ordered by the Department. As City and the Department are well aware, PWUA's support for allegations of injury associated with the proposed transfer in this case will depend significantly upon the findings and report of PWUA's expert. PWUA concisely stated the legal and/or factual basis of the contention interrogatories prematurely propounded by City and referenced documents that are currently available, or will be available shortly. PWUA did not "evade" the interrogatories.

City's concern that it will not receive from PWUA all facts and documentation is unwarranted. As has been repeatedly conveyed to City, it will receive all responsive documents, regardless of such documents' status as supportive, contradictory, or material. But PWUA does not have an obligation to do City's work for it and identify the effective nature of such documents on the protest. City has engaged legal counsel to do that work, and that its counsel

attempts to shift such burden to PWUA via manufactured discovery disputes only serves to make the process more expensive and inefficient.

Finally, City appears to take issue with the reference within the interrogatories to documents PWUA has made available to City for inspection. PWUA concedes that City is entitled to all facts and information related to the protest, and City will receive as much. City is not, however, entitled to dictate the form and format in which it receives such facts and information. Rule 33(c), Idaho Rule of Civil Procedure, provides that:

Where the answer to an interrogatory may be derived or ascertained from the business or other records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business or other records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, ***it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.***

IDAHO R. CIV. P. 33(c) (emphasis added).

PWUA has appropriately described and identified the basis of its contentions, and continues to produce responsive documents for City's inspection as they become available. Importantly, ascertaining whether a given document or fact supports, contradicts, or is material to the basis of PWUA's contentions should be accomplished by City, at least insofar as it pertains to City's case in support of the transfer application. As PWUA has stated in its attempts to confer with City and avoid time-consuming, expensive and unnecessary litigation over discovery, the underpinnings of PWUA's protest will be fleshed out in greater detail based upon

(1) the expert findings of Christian Petrich, and (2) the location, review and production of a varied volume of documents. As City is aware, neither is entirely complete yet.

City appears to suggest PWUA may not avail itself of Rule 33(c)—that PWUA must spell out in exacting terms each and every individual document that may bear upon the protest and how it relates to the protest rather than simply identifying the pertinent documents and facts. To the extent an explanation of facts and evidence is not set forth in PWUA's expert disclosures or the promised supplementation of lay and expert witness interrogatories in response to Interrogatory Nos. 5, 14 and 15, City's demand appears to request the mental impressions of counsel, which impressions are protected by the attorney work product privilege.

In sum, City's motion is premature. Additional supplementation and document production will continue to refine the answers to City's discovery, and will allow City to adequately prepare for a hearing on the matter. Even in the event the Department finds the objection based on subparts to be without merit (which it should not), PWUA has met its burden to answer the contention interrogatories of City in this case. The Department should deny City's motion. It is inefficient and wasteful of the parties' financial resources.

C. City Ignores PWUA's Cooperation And Responsiveness

Finally, as the Department considers the context and substance of City's motion, it should consider the Idaho Supreme Court's decision in *Kirkman v. Stoker*, 134 Idaho 541 (2000). In *Kirkman*, the Idaho Supreme Court held that the trial court did not abuse its discretion when it declined to impose discovery sanctions based on plaintiff's numerous motions to compel where defendants' counsel: (1) indicated a willingness to supply the requested documentation; (2) gave reasons why some requested documents had not been produced; (3) invited plaintiff to

review the files; and (4) supplied most of the documents before the discovery deadline. *Id.* at 134 Idaho at 546.

At no point has PWUA refused to provide facts and responsive documents or otherwise indicated that it intended to withhold any information pertinent to this protest from City. To the contrary, PWUA has been entirely forthcoming and cooperative in this expedited discovery, working diligently to produce voluminous documents and records in a timely fashion.¹ PWUA has made documents available to City as soon as possible, and with the discovery deadline still six (6) weeks away, City has not experienced prejudice, or even inconvenience.

Moreover, in response to City's threats about bringing the instant motion, PWUA individually responded to City's concerns about particular interrogatories, and made every effort to avoid City bringing this matter before the Department. To wit, time spent engaging in this discovery dispute is time that might more effectively be spent reviewing documents for privilege in advance of supplementation or otherwise completing the discovery process. City's motion appears to be an effort to harass and annoy, and serves only to make these expedited discovery proceedings more expensive and burdensome than necessary. The Department should deny the City's motion, and should award PWUA the attorney fees it incurred responding to the motion. *See* IDAHO R. CIV. P. 37(a)(4) ("If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.").

¹ At this juncture, in excess of 7,000 pages of documents have been exchanged between the PWUA and the City.

III. CONCLUSION

Because PWUA's objections to subparts were not unfounded, and because regardless of the objections, PWUA's answers nonetheless met the requirements of an answering party under the Idaho Rules of Civil Procedure, the Department should deny City's motion and award PWUA its reasonable attorney fees incurred to respond to this premature motion to compel.

DATED this 5th day of April, 2011.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Scott L. Campbell
Scott L. Campbell – Of the Firm
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of April, 2011, I caused a true and correct copy of the foregoing **RESPONSE TO APPLICANT'S MOTION TO COMPEL DISCOVERY RESPONSES OF PROTESTANT PORTNEUF WATERSHED USERS ASSOCIATION** to be served by the method indicated below, and addressed to the following:

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