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Department of Water Resources
Eastern Region

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Attorneys for Applicant City of Pocatello

**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

**APPLICANT'S MOTION TO
COMPEL DISCOVERY
RESPONSES OF PROTESTANT
PORTNEUF WATERSHED USERS'
ASSOCIATION, INC.**

COMES NOW Applicant City of Pocatello ("City"), by and through its attorneys of record, Givens Pursley LLP, and respectfully moves the Idaho Department of Water Resources, pursuant to Idaho Rule of Civil Procedure 37(a) and IDAPA 37.01.01.521, for an Order compelling Protestant Portneuf Watershed Users Association ("PWUA") to fully respond to the City's Interrogatories and Requests for Production served on PWUA on February 18, 2011, ("Discovery Requests") and to withdraw their unfounded objections alleging subparts.

INTRODUCTION

The City's grounds for this Motion are that PWUA's responses to the City's Discovery Requests ("Responses") are evasive, non-responsive and/or incomplete, contain unfounded objections, and do not otherwise conform to the Idaho Rules of Civil Procedure as required by

IDAPA 37.01.01.527. The Responses fail to furnish the facts the City sought in the Discovery Requests, and such facts are necessary for the City to properly prepare for the hearing in this matter. Further, PWUA's consistent objection that every interrogatory propounded by the City exceeds the Department's Order Authorizing Discovery ("Order") because of alleged "subparts" is without merit. PWUA's Responses are deficient, must be deemed a failure to answer under Idaho Rule of Civil Procedure 37(a)(3), and should be supplemented.

This Motion is supported by the Affidavit of Michael C. Creamer ("Creamer Affidavit") filed contemporaneously herewith. A copy of PWUA's Responses is attached as Exhibit A to the Creamer Affidavit.

STANDARD OF REVIEW

The scope of discovery is expansive. Idaho Rule of Civil Procedure 26(b)(1) governs the scope of discovery and provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Idaho R. Civ. P. 26(b)(1).

"I.R.C.P. 26(b)(1) permits broad discovery of any matter that is not privileged, even if it is inadmissible, so long as it is 'reasonably calculated to lead to the discovery of admissible evidence.'" *Kirk v. Ford Motor Company*, 141 Idaho 697, 703-04, 116 P.3d 27, 33-34 (2005).

Furthermore, "[t]he discovery rules require a defendant's answer to be responsive, full, complete, and unequivocal." *Lester v. Salvino*, 141 Idaho 937, 941, 120 P.3d 755, 759 (Idaho Ct. App.

2005). “Relevant” evidence is also broadly defined. According to Idaho Rule of Evidence 401, relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Idaho R. Evid. 401. Thus, the City is entitled to obtain any discovery, not legally objectionable, which is relevant to the action at hand and is reasonably calculated to lead to the discovery of admissible evidence.

The whole point of discovery is for opposing parties to learn each others’ facts. *Edmunds v. Kraner*, 142 Idaho 867, 136 P.3d 338 (2006) (“The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering.”).

A motion to compel is governed by Idaho Rule of Civil Procedure 37(a), which states in pertinent part:

- (2) Motion. If 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...or fails to permit inspection...the discovering party may move for an order compelling an answer...or an order compelling inspection...in accordance with the request.
- (3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

Idaho R. Civ. P. 37(a).

In conjunction with this rule, IDAPA 37.01.01.521 allows a party to “apply for an order compelling discovery in a manner consistent with the provisions of Rule 37(a) of the Idaho Rules of Civil Procedure.” IDAPA 37.01.01.521. Further, the disposition of motions to compel necessitates consideration of sanctions. Idaho Rule of Civil Procedure 37(a)(4) provides in pertinent part:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees.

Idaho R. Civ. P. 37(a)(4).

ARGUMENT

A. The City Is Entitled To Complete and Unevasive Answers To The Discovery Requests.

To facilitate the discovery process, any party may serve upon any other party written interrogatories pursuant to Idaho Rule of Civil Procedure 33. The purpose of interrogatories “is to afford parties information in the possession of the other party regarding the issues in suit to enable the propounding party to prepare for trial and to reduce the possibility of surprise in the trial.” *Lester v. Salvino*, 141 Idaho 937, 940, 120 P.3d 755, 758 (Idaho Ct. App. 2005) (citing *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 383, 364 P.2d 146, 151 (1961)).

Consequently, the rationale for limiting interrogatories “is not to prevent discovery but to prevent potentially excessive use of this particular discovery device.” *Estate of Manship v. United States*, 232 F.R.D. 552, 554 (M.D. La. 2005) (citing *Power & Telephone Supply Co., Inc. v. Suntrust Banks, Inc.*, 2004 WL 784533, 1 (W.D. Tenn. 2004)). The City's interrogatories to PWUA aim solely to gain relevant information regarding the issues at hand in this case.

PWUA's Responses hamper the discovery process because they refuse to provide the requested facts and information.

PWUA's Responses are contained in Exhibit A to the Creamer Affidavit. Several Responses are blatantly evasive and incomplete and warrant further emphasis. For example, in Interrogatory No. 6, the City asked whether PWUA contends that suitable measuring devices have not been installed on the Portneuf River, and if so to “describe the basis for this contention

and identify each fact, and each document, that supports, contradicts, or in any material way pertains to it.” Creamer Affidavit, Ex. A, p. 6 (emphasis added).¹ In response, PWUA merely made its subpart objection and stated “[s]uitable measuring devices do not exist.” Creamer Affidavit, Ex. A, p. 6. From this response, one gleans only that PWUA contends that suitable measuring devices do not exist. But its cursory response offers no facts to support the contention, or basis to understand it. On the ground that asking for the facts supporting the contention violates the Department’s “non-subpart” requirement, PWUA evades producing facts necessary for the City to prepare for hearing on this issue.

PWUA’s Response to Interrogatory No. 8 is similarly unhelpful. The City specifically asked whether PWUA contends that the delivery of the Transfer Water Rights to Pocatello would injure PWUA’s members’ water rights or negatively affect their water supplies, and if so to describe the basis for such contention and the related facts. Creamer Affidavit, Ex. A, p. 7. In response, PWUA objects and states “[s]ee answers to Interrogatory Nos. 1 through 7.” Creamer Affidavit, Ex. A, p. 7. Inasmuch none of PWUA’s answers to of the City’s interrogatories provide facts, its Response to the City’s Interrogatory No. 8 is unresponsive.

By way of further example, in Interrogatory No. 10 the City asked PWUA to provide relevant facts to the extent PWUA contends that any changes in Portneuf River gains or losses downstream of Chesterfield Reservoir have been due to irrigation well development. Creamer Affidavit, Ex. A, p. 8. PWUA’s response simply was that “[a]pplicant has developed numerous wells which have negatively impacted the aquifer tributary to the Portneuf River,” and further

¹ The City’s Discovery Requests also include, in the introductory section, a definition of “describe” to be applied in responding: “‘Describe’ means to explain with particularity and in detail, setting forth all facts material to such explanation.”

that the City should also see the “documents provided in response to the City’s Requests for Production.” Creamer Affidavit, Ex. A, p. 8.

However, PWUA’s Responses to the City’s Discovery Requests show that no documents have been either specifically identified or “provided.” Rather, PWUA’s response to each of the City’s production requests states “[t]he requested documents will be made available for review and copying at the offices of Protestant’s counsel at a mutually agreeable time.” Creamer Affidavit, Ex. A. There is neither identification of responsive documents nor of the nature of facts, if any, contained within the documents.²

B. PWUA’s Objection Alleging Improper Subparts is Unfounded Because the City’s Interrogatories Do Not Contain Improper Subparts.

The Federal Rules of Civil Procedure allow 25 interrogatories and include “all discrete subparts” in the limit. Fed. R. Civ. P. 33(a)(1). The Idaho Rules of Civil Procedure, which are modeled in large part on the Federal Rules, allow 40 interrogatories and include subparts in the limit. Idaho R. Civ. P. 33(a)(3). In comparison, the Department’s Order allows only 15 interrogatories and states that dividing a single interrogatory into “sub-questions” is not allowed. The Department’s Order does not define “sub-questions,” however, and a “subpart” is not defined in either the Federal or Idaho Rules of Civil Procedure, although the issues of calculating the number of interrogatories, and when and whether a subpart is considered an additional interrogatory, has been discussed throughout the courts, with most courts concluding that a

² Additionally, PWUA’s response to the City’s Interrogatory No. 4 consisted of, aside from the objections, exactly one word. The City essentially asked whether PWUA contends there has been a forfeiture of any Transfer Water Rights or PMVCC Water Rights, and if so to please describe the basis for the contention and the related facts. Creamer Affidavit, Ex. A., p. 5. PWUA made several objections and then simply stated “[n]one.” Creamer Affidavit, Ex. A, p. 5. The meaning of this response is difficult to discern, although, the City deems it a complete answer only if it means PWUA does not contend that forfeiture of the Transfer Water Rights is not at issue.

“subpart” constitutes a separate interrogatory only if it departs from the common theme of the main interrogatory to which it refers and raises a separate and distinct question.

The Federal Advisory Committee addressed the issue of subparts in its comments to the Federal Rules of Civil Procedure (when amending the rules) and explained parties cannot avoid the 25-interrogatory limit “through the joining as ‘subparts’ questions that seek information about [a] discrete separate subject,” but that “a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present and contents be stated separately for each such communication.”

Advisory Committee Note, 146 F.R.D. 401, 675-676 (Fed. 1993) (emphasis added). Thus, additional portions or “subparts” in interrogatories should not be counted as separate unless they actually ask a new distinct question (as opposed to providing the desired scope of, or requesting specific details regarding, the main question or theme in the interrogatory).

Case law further confirms this approach of allowing interrogatories to include additional inquiries and clarification related to the main question: “the issue...[in deciding upon a motion to compel in the face of objections to the number of interrogatories] is whether the interrogatory subparts are ‘logically or factually subsumed within and necessarily related to the primary [interrogatory] question.’”³

In *Theobles v. Industrial Maintenance Co.*, 247 F.R.D. 483 (D.V.I. 2006), the court gave several examples of when subparts are to be considered a single interrogatory for purposes of the

³ *Estate of Manship v. United States*, 232 F.R.D. 552, 554 (M.D. La. 2005) (citing *Dang v. Cross*, 2002 WL 432197 (C.D.Cal. 2002); *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684 (D. Nev. 1997)); See also *Mezu v. Morgan State University*, 269 F.R.D. 565, 261 Ed. Law Rep. 360 (D. Md. 2010) (An interrogatory containing subparts directed at eliciting details concerning the common theme should be considered a single question for purposes of limits on the number of interrogatories), *Swackhammer v. Spring Corporation PCS*, 225 F.R.D. 658, 60 Fed. R. Serv.3d 945 (D. Kan. 2004) (Subparts of interrogatory which related to a common theme would not count as separate interrogatories for purposes of scheduling order’s numerical limit).

rule limiting the number of interrogatories a party may propound, including an interrogatory asking “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,” as these subparts are all related to the same question and “designed to describe any warning or reprimand.” *Id.* at 485 (citing *Kendall v. GES Exposition Services Inc.*, 174 F.R.D. 684, 686 (D.Nev. 1997)). Similarly, an interrogatory asking the opposing party “to state whether a particular product was tested,” and also asking “when the tests occurred, who performed them, how and whether they were conducted and the result,” all relate to the same topic and “constitute a single interrogatory.” *Id.* at 485 (citing *Banks v. Office of the Senate Sergeant-At-Arms*, 222 F.R.D. 7, 10 (D.D.C. 2004)).

The City’s interrogatories do not contain subparts that create distinct separate questions. Rather, they contain additional language to specify the scope and level of detail of the information and relate directly to one common theme and question for each interrogatory. For example, most interrogatories simply ask PWUA to “describe the basis” for a certain contention and, in doing so, to “identify each fact, and each document, that supports, contradicts, or in any material way pertains to it.” In other words, the City seeks to learn of all the facts and documents already known to PWUA that would bear on its protest. The language that PWUA objects to as “excessive” merely clarifies the information sought related to the question or common theme in the interrogatory and does not constitute a separate subpart for numbering purposes.

Here, the City's interrogatories should be deemed permissible, as any additional inquiries presented clarify and relate to the main theme of each interrogatory. PWUA should be required to supplement its discovery responses.⁴

CONCLUSION

In summary, the rules of discovery authorize the City to discover all facts known to PWUA, and all documents in their possession or control, relevant to the protest, not just those facts and documents PWUA selectively decides to provide as supporting evidence for its position at the hearing. In accordance with the rules set forth above, the City requests that PWUA be compelled to supplement its Responses to include all relevant facts, information, and documents requested in the Discovery Requests.

Further, pursuant to IDAPA 37.01.01.531, the City requests that if PWUA fails to obey any order compelling discovery, the Department issue an order precluding PWUA from presenting as evidence in this proceeding, either as a party or as a witness for another party, any information not produced to the City in response to the Discovery Requests.

⁴ PWUA's objections are particularly curious in light of the fact that several of the interrogatories it propounded to the City, after objecting to the City's discovery, mirror the City's interrogatories exactly. For example, the City's Interrogatory No. 14 states:

Please state the name and address of each person you intend to call as a lay witness at the trial of this matter, and for each such person describe the substance of the facts and opinions to which he or she is expected to testify and identify the underlying facts and data upon which the opinion testimony is based.

Creamer Affidavit, Ex. A, p. 10. PWUA objected to this interrogatory (as it did to all of the City's interrogatories) by stating "[t]his interrogatory exceeds the parameters of the Department's Order because it contains subparts," and indicated it would respond to the first portion only. Yet, PWUA's Interrogatory No. 13 contains precisely the same inquiry to the City. An excerpt of PWUA's Interrogatories is attached as Exhibit B to the Creamer Affidavit. Additionally, a comparison of the City's Interrogatory No. 15 (Creamer Affidavit, Ex. A, p. 12) to PWUA's Interrogatory No. 14 to the City (Creamer Affidavit, Ex. B) reveals that although PWUA objected to the City's interrogatory it included the very same language in its own inquiry to the City.

REQUEST FOR EXPEDITED HEARING

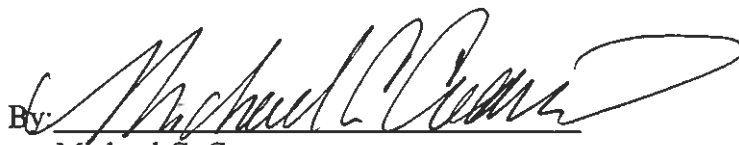
The City hereby requests that this Motion to Compel be heard before the Department at the status conference currently set in this matter for April 1, 2011.

CERTIFICATION

Michael. C. Creamer, counsel for the Applicant hereby certifies that, pursuant to Idaho Rule of Civil Procedure 37(a)(2), I have in good faith conferred with PWUA's counsel in an effort to secure the requested disclosures without action from the Department.

DATED this 22nd day of March, 2011.

GIVENS PURSLEY LLP

By: 
Michael C. Creamer
Attorneys for Applicant City of Pocatello

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of March, 2011, a true and correct copy of the foregoing was served upon the following individual(s) by U.S. Mail, postage prepaid.

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March 22, 2011

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Re: *In the Matter of Application for Transfer No. 76779 in the Name of
the City of Pocatello*

Dear Mr. Cefalo:

Enclosed are **originals** and one set of copies of *Applicant's Motion to Compel Discovery Responses to Protestant Portneuf Watershed Users' Association, Inc.* and *Affidavit of Michael C. Creamer in Support of Applicant's Motion to Compel Discovery Responses* for filing in the above-referenced transfer number. Please returned the conformed copies to our office in the postage-paid envelope provided for your use.

Your assistance is appreciated.

Sincerely,

Caralea Hopingardner
Legal Assistant to Michael C. Creamer

Enclosures
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