

Roger D. Ling, ISB #1018
Attorney at Law
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Ste. 303
P.O. Box 485
Boise, ID 83303
Telephone: (208) 733-0485
Facsimile: (208) 735-2444

Attorneys for Petitioner:
A&B IRRIGATION DISTRICT

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

| | | |
|-------------------------------|---|-------------------------------------|
| IN THE MATTER OF THE PETITION |) | DOCKET NO. 37-03-11-1 |
| FOR DELIVERY CALL OF A & B |) | |
| IRRIGATION DISTRICT FOR THE |) | MOTION FOR PROTECTIVE ORDER; |
| DELIVERY OF GROUND WATER AND |) | POINTS AND AUTHORITIES IN |
| FOR THE CREATION OF A GROUND |) | SUPPORT THEREOF |
| WATER MANAGEMENT AREA |) | |
| _____ |) | |

COMES NOW, A&B Irrigation District, by and through their attorneys of record, Barker Rosholt & Simpson, LLP, in the above captioned case, and hereby submits this **MOTION FOR A PROTECTIVE ORDER; POINTS AND AUTHORITIES IN SUPPORT THEREOF.**

Pursuant to IDAPA 37.01.01 Rule 532 and Rule 26(c) of the Idaho Rules of Civil Procedure (“IRCP”), movant is seeking from the Hearing Officer a protective order that discovery not be had on information and documents identified in IGWA’s *Second Set of Interrogatories and Third Request for Production*; and *Notice of Taking of Deposition Duces Tecum* for the following lay

witnesses: Virgil Temple, Tim Eames, Ken Kostka, Timm Adams, and Harold Mohlman. *See* Exhibits 3, 4, 5, 6 and 7 attached to the Affidavit of Travis L. Thompson (“Thompson Aff.”) submitted herewith.

I. PROCEDURAL AND FACTUAL HISTORY

On July 26, 1994 A&B Irrigation District filed its *Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area*. A&B later filed its *Motion to Proceed* on March 16, 2007. The delivery call concerns A&B’s senior priority ground water right #36-2080.

On January 22, 2008, IGWA propounded *IGWA’s First Set of Interrogatories & Second Requests for Production*. A&B executed and served responses on February 22, 2008, which were verified by A&B’s manager Dan Temple.

On March 20, 2008, the parties entered into a *Stipulation and Joint Motion to Set Pre-Hearing Schedule*. *See* Thompson Aff., Exhibit 1. Pursuant to the stipulated schedule, the Deposition Deadline and Discovery Completed Deadline is October 17, 2008, and the hearing is calendared for December 3 – 17, 2008. *See id.*

On August 26, 2008, the parties entered into the *Stipulation to Extend Deadline for Lay Witness Disclosure and Joint Motion*. Pursuant to the stipulated extension, A&B served a *Disclosure of Lay Witnesses and Exhibits and Request for Public Witness Testimony* on September 12, 2008. The parties then proceeded to coordinate and arrange dates for lay witness depositions. A&B contacted its lay witnesses and secured available deposition dates for October 27 – 29, 2008.

On October 1, 2008, IGWA propounded IGWA’s *Second Set of Interrogatories and Third Request for Production* upon A&B. *See* Thompson Aff., Exhibit 2 filed herewith.

Pursuant to the instructions of the latest discovery, IGWA is requesting that the answers to the discovery come from lay witnesses—not A&B, the party to this proceeding. The instructions state:

Each of the following Interrogatories and Requests for Production should be separately responded to for each of the following A&B lay witnesses: Ken Kostka, Tim Eames, Timm Adams, and Harold Mohlman. Request for Production No. 13 should be responded to by A&B Irrigation District.

See IGWA's Second Discovery Requests at 2. Ex. 2 to Thompson Aff.

On October 3, 2008, IGWA then served A&B Irrigation District, not the witnesses, with separate Notices of Taking Deposition Duces Tecum of: Virgil Temple, Tim Eames, Ken Kostka, and Timm Adams, which are currently calendared for October 27 – 29, 2008. *See Thompson Aff. Exhibits 3, 4, 5, 6, and 7.* Each notice of deposition also had a request to produce documents and records.

II. REQUEST FOR EXPEDITED HEARING

In order to avoid confusion in the depositions and responses to discovery, A&B Irrigation District requests the Hearing Officer's expedited consideration, hearing and ruling on this motion at the Hearing Officer's earliest convenience. As outlined herein, the responses to discovery are due 11/03/2008, and the depositions are currently calendared for 10/27/2008 - 10/29/2008.

III. THE USE OF WRITTEN INTERROGATORIES FOR DISCOVERY PURPOSES IS LIMITED TO PARTIES OF THE ACTION.

IDAPA 37.01.01 rule 520(01) states that unless otherwise provided by statute, rule, order or notice, the scope of discovery is governed by the Idaho Rules of Civil Procedure (see Idaho Rules of Civil Procedure 26(b)). Pursuant to IRCP Rule 26(a), parties may obtain discovery through depositions upon oral examination or written questions, written interrogatories, production of documents or things, etc.

IRCP Rule 33(a), titled, “Interrogatories to parties-Availability-Procedures for use.” specifically deals with the use of interrogatories as a discovery tool in Idaho. IRCP Rule 33(a)(1) provides that any party may serve upon any other party written interrogatories to be answered by the party served. Once Interrogatories are propounded upon a party, the party has 30 days to respond. *See* IRCP Rule 33(a)(2). There are not any provisions involving rules concerning general interrogatories propounded to non-party witnesses as it is an incorrect method of discovery to use toward non-party witnesses. *See e.g., Crown v. State Department of Agriculture*, 127 Idaho 175, 182 (1995) (Court recognizing that it has held that it is improper to serve interrogatories upon an individual non-party who is employed by a corporation that is a non-party). In *Crown*, the Court extended the holding to “governmental agencies” in denying a motion to compel responses to interrogatories propounded to a non-party in the case. The same reasoning applies in this case where IGWA is seeking answers to interrogatories from A&B’s lay-witnesses, non-parties to the action.

More importantly, A&B does not have any of the information requested of its witnesses, other than water delivery records, which have already been made available to IGWA for inspection and copying. Since the witnesses are not “parties”, IGWA has no right to propound discovery upon A&B to answer questions on their behalf.

The principal 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, 120 P.3d 755 (Idaho App. 2005) citing *Smith v. Big Lost river Irrigation Dist.*, 83 Idaho 374, 383, 364 P.2d 146, 151 (1961). Any party may serve upon any adverse party, who has been served with

process or who has appeared, written interrogatories to be answered by the party served. *Sanders v. Ayrhart*, 89 Idaho 302, 404 P.2d 589 (1965).

IGWA's *Second Set of Interrogatories and Third Request for Production*, served upon A&B Irrigation District, request responses to written interrogatories from third person non-parties, specifically: Virgil Temple, Ken Kostka, Tim Eames, Timm Adams, and Harold Mohlman. A&B is the party in the instant case and cannot be responsible for procuring the responses of specific written interrogatories of third person non-parties. As explained above, written interrogatories are not allowed upon non-party witnesses.

The Idaho Rules of Civil Procedure have afforded parties other avenues for obtaining discovery and information from non-parties through the use of oral depositions in conjunction with a request for production of documents. However, as explained below, IGWA's production requests should be denied since they are overly burdensome and oppressive in this instance.

III. IGWA MAY USE (AND HAVE USED) ALTERNATIVE DISCOVERY METHODS TO OBTAIN INFORMATION FROM THIRD PERSON NON-PARTIES, WHICH MAKE THE PREVIOUS REQUEST FOR WRITTEN INTERROGATORIES AND REQUEST FOR DOCUMENTS MOOT.

A party may properly interrogate or take the deposition upon oral examination of a non-party witness pursuant to IRCP Rule 30(a) *et seq.* by reasonably noticing the taking of said deposition.

In conjunction with a proper notice of taking oral examination, a party may serve a request for production of documents and things at the taking of a deposition. *IRCP* Rule 30(b)(5). IGWA will have the opportunity to properly inquire via oral examination the requested answers to their written interrogatories, and be able to obtain any appropriate and relevant documents at the deposition. Furthermore, pursuant to the IRCP, even if this were an appropriate procedural step, the responses to written interrogatories would not have to be answered until

after the time of the depositions, which will make the responses redundant and interrogatories moot. In this case, the parties have stipulated that discovery would be completed by October 17, 2008. Although provision has been made for deposition of lay witnesses, IGWA's present discovery requests do not apply.

IV. THE HEARING OFFICER HAS THE AUTHORITY TO MAKE APPROPRIATE ORDERS TO LIMIT THE DISCOVERY REQUEST AND ORDER THAT THE WRITTEN INTERROGATORIES NOT BE HAD AND THAT UNREASONABLE AND IRRELEVANT PRODUCTION REQUESTS NOT BE HAD.

Under IDAPA 37.01.01 Rule 532, as authorized by statute or rule, the agency may issue protective orders limiting access to information generated during discovery. Additionally, IDAPA 37.01.01 rule 520(01) states that unless otherwise provided by statute, rule, order or notice, the scope of discovery is governed by the Idaho Rules of Civil Procedure (see Idaho Rules of Civil Procedure 26(b)).

In conjunction with the IRCP governing discovery, IRCP 26(c) provides that upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including: that discovery not be had; that it may be limited on specified terms and conditions; and that the scope of discovery be limited. *IRCP* Rule 26(c); *Bailey v. Sanford* 139 Idaho 744, 86 P.3d 458 (2004). The Idaho Supreme Court has recognized that “[w]hen use of such discovery procedures becomes unreasonably oppressive and onerous it becomes the duty of the court and counsel immediately to activate safeguards to avoid unjust results” *See R.E.W Construction Co. v. District Court of Third Jud. Dist.*, 88 Idaho 426, 443 (1965).

Here, A&B is requesting an order from the Hearing Officer that the written interrogatories and request for production of documents not be had since it will cause

unnecessary oppression and undue burden or expense. The scope of discovery is limited to issues that are relevant to the subject matter involved in the pending action or is reasonably calculated to lead to admissible evidence. IRCP Rule 26(b)(1). Notably, A&B has already produced its water delivery records to IDWR and IGWA in this matter. IGWA has no basis for its redundant and repetitive requests now.

IGWA's request for documents is overly burdensome and largely irrelevant for the issues before the Hearing Officer. For example, IGWA is requesting: board agendas and minutes spanning over 30 years, as well as newsletters and any correspondence from A&B to its landowners. Although A&B already produced board minutes to IGWA in the *SWC Case* and has provided IGWA with an opportunity to inspect any documents in this case, IGWA continues with its repetitive and unduly burdensome request. With respect to newsletters and correspondence to its landowners, A&B has already produced or made that information available as well.

Next, IGWA is requesting 20 years of documents from the lay witnesses concerning "all farming activities" and data submitted to the "Farm Services Agency, the Federal Crop Insurance Corporation or other entity" as well as "reports, records, or receipts that indicated yield or production given by purchasers or warehouses". See *Second Discovery Request, Request for Production No. 9, 12.*; Ex. 2 to Thompson Aff. IGWA also seeks various documents from the past 20 years in its notices of deposition. See *Notice of Taking Depositions*, Request (1) – (9); Exs. 3-7 to Thompson Aff. A&B seeks a protective order because the information and documents sought to be discovered are neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to any of the issues before the Hearing Officer in

this proceeding. The case concerns the Director's January 29, 2008 Order and his improper denial of A&B's water delivery call to its senior ground water right #36-2080.

IGWA unreasonably request virtually any information associated with A&B's witnesses' farming operations, regardless of the relationship to water delivery from A&B. As such, these requests are clearly overly broad and unduly burdensome. Pursuant to the rules of procedure, the Hearing Officer should protect A&B's witnesses from the "annoyance", "oppression", and "undue burden or expense" associated with IGWA's requests. *See* Rule 26(c) Notably, the request for similar documents has previously been denied in other water delivery call proceedings before the Department. *See* September 11, 2007 Order *Re: Discovery (Spring Users Case)* (wherein IGWA propounded unreasonable and overly burdensome discovery requests seeking pre-decree information that was not relevant to the proceeding).

V. IGWA'S REQUESTS FOR PRODUCTION ARE UNREASONABLE AND UNDULY BURDENSOME GIVEN THE TIMING OF THE REQUESTS.

Finally, the timing of IGWA's requests are unreasonable and unduly burdensome given the circumstances of this case. While discovery has been open in this matter since January, 2008 IGWA has yet again waited until the eleventh hour to seek information from A&B and its lay witnesses. Given the members it represents IGWA presumably knows the schedule of farming operations. Presently, the majority of A&B's witnesses are in the middle of beet and potato harvest. It is unreasonable to request the production of voluminous and clearly irrelevant records at a time when these witnesses are in the middle of harvest, obviously some of the busiest weeks of a farmer's annual operations. While these witnesses are literally working around the clock it is impractical to ask them to stop their operations and attempt to gather 20 years' worth of records in a short amount of time. Not only is it impractical, it is unnecessary as explained above.

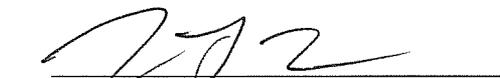
The requests are particularly troubling since IGWA has had over 9 months to seek information and make reasonable requests upon A&B or its witnesses. While the witnesses are available and have been scheduled for depositions later this month, at which IGWA can discover the relevant information each witness has, there is no basis for their present requests, particularly given the timing and the “oppressive” and “undue burden” it will cause to A&B’s witnesses in the middle of harvest.

VI. CONCLUSION

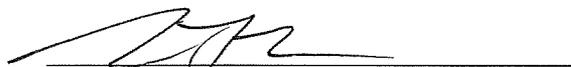
Based upon the aforementioned, A&B Irrigation District is requesting that the Hearing Officer order that IGWA’s *Second Set of Interrogatories and Third Request for Production* not be had, as it is improper discovery, and would be redundant, burdensome and oppressive—given the fact that the third person non-party witnesses will have their depositions taken later this month. Additionally, based upon the volume and burdensome document request that is outside the scope of the current issues before the Hearing Officer, A&B requests that the parameters for IGWA be reasonably tailored back to the documents that would be appropriate for the instant case.

DATED this 10th day of October 2008.

BARKER ROSHOLT & SIMPSON LLP



Roger D. Ling



John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District