

9-16-2008

Goodman Oil Co. v. Scotty's Duro-Bilt Generator Clerk's Record v. 3 Dckt. 34797

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LAW CLERK

Vol. 3 of 4

(VOLUME III)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

GOODMAN OIL COMPANY,

Plaintiff-Appellant,

-vs-

SCOTTY'S DURO-BILT GENERATOR, INC.,
an Idaho corporation; BART and ALANE
MCKNIGHT, husband and wife; and DOES
I through V,

Defendants-Respondents.

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

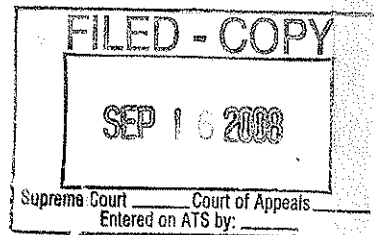
Honorable RENAE J. HOFF, District Judge

Jon M. Steele and Karl J. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Maint St, Suite 400
Boise, ID 83702

Attorneys for Appellant

Susan E. Buxton and Tammy A. Zokan
MOORE SMITH BUXTON &
TURCKE, CHARTERED
950 W. Bannock St, Suite 520
Boise, ID 83702

Attorneys for Respondents



34797

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F I L E D
A.M. 226 P.M.

MAY 14 2007

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
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Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)

Plaintiff,)

vs.)

SCOTTY'S DURO-BILT GENERATOR,)
INC., an Idaho corporation; BART and)
ALANE MCKNIGHT, husband and wife;)
and DOES I through V.)

Defendants.)

CASE NO. CV 05-9800

**GOODMAN'S SECOND MOTION
FOR RECONSIDERATION OF
ORDER GRANTING
DEFENDANT'S SECOND
MOTION FOR SUMMARY
JUDGMENT**

COMES NOW, Plaintiff Goodman Oil Company by and through its counsel of record, Runft & Steele Law Offices, PLLC, and pursuant to I.R.C.P. 11(a)(2)(B) moves this Court to reconsider its Order granting Defendant's Second Motion for Summary Judgment.

This Motion is based upon a Brief in Support of this Motion and Affidavit of Jon

M. Steele.

**GOODMAN'S SECOND MOTION FOR RECONSIDERATION OF ORDER
GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

Page 1

000299

ORIGINAL

Oral argument is requested.

DATED this 14th day of May 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: JA Steele
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of May 2007, a true and correct copy of the foregoing **GOODMAN'S SECOND MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
JON M. STEELE
Attorney for Plaintiff

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
 1020 W. Main Street, Suite 400
 Boise, Idaho 83702
 Phone: (208) 333-9495
 Fax: (208) 343-3246
 Email: jmsteele@runftlaw.com

F I L E D
 A.M. 2:25 P.M.

MAY 14 2007

CANYON COUNTY CLERK
 J HEIDEMAN, DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	CASE NO. CV 05-9800
)	
vs.	)	AFFIDAVIT OF JON M. STEELE IN
	)	SUPPORT OF GOODMAN'S
SCOTTY'S DURO-BILT GENERATOR,	)	SECOND MOTION FOR
INC., an Idaho corporation; BART and	)	RECONSIDERATION OF ORDER
ALANE McKNIGHT, husband and wife;	)	GRANTING DEFENDANT'S
and DOES I through V,	)	SECOND MOTION FOR
	)	SUMMARY JUDGMENT
Defendants.)	
)	

STATE OF IDAHO)
 :ss
 County of Ada)

COMES NOW, Jon M. Steele, being over the age of eighteen years and competent to make this Affidavit, after first being duly sworn, and upon his own personal knowledge, states as follows:

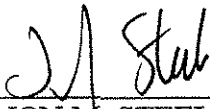
1. That I am an attorney in good standing with the Idaho State Bar and counsel for the Plaintiff herein.

2. That I make this affidavit in support of Goodman's Second Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment.
3. That attached as Exhibit A is a true and correct copy of Judge Morfitt's Order of April 26, 2007 in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007.
4. That attached as Exhibit B is a true and correct copy of the Judgment as to the Nampa Respondents, in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007.
5. That attached as Exhibit C is a true and correct copy of the Amended Preliminary Injunction Against Nampa Respondents, in the case *Goodman v. City of Nampa*, Canyon County Case No. CV 04-10007.

Further, your affiant sayeth naught.

DATED this 14th day of May 2007.

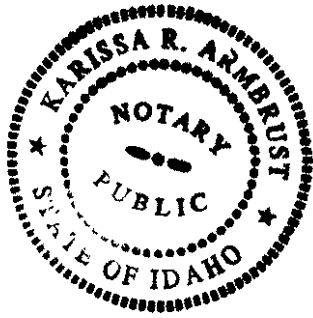
RUNFT & STEELE LAW OFFICES, PLLC

By: 

JON M. STEELE
Attorney for Plaintiff

STATE OF IDAHO)
 :SS
County of Ada)

SUBSCRIBED AND SWORN unto before me this 14th day of May 2007



Karissa R. Armbrust
Notary Public for the State of Idaho
Residing at: Nampa
My Commission Expires: 3-19-13


CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 14th day of May 2007, a true and correct copy of the **AFFIDAVIT OF JON M. STEELE IN SUPPORT OF GOODMAN'S SECOND MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith
225 N. 9th, Suite 420
Boise ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
JON M. STEELE
Attorney for Plaintiff

FILED
A.M. P.M.

APR 26 2007

CANYON COUNTY CLERK
J VASKO, DEPUTY

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
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Attorneys for Petitioner

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
Petitioner,)
)
vs.)
)
CITY OF NAMPA, a corporate body politic;)
THE CITY COUNCIL of the CITY OF)
NAMPA; MAYOR TOM DALE, in his)
capacity as Mayor of the City of Nampa;)
DIANA LAMBING, in her capacity as City)
Clerk; and SCOTTY'S DURO-BILT)
GENERATOR, INC., an Idaho corporation,)
)
Respondents.)
_____)

CASE NO. CV 04-10007

ORDER

COPY

This matter having come for hearing on April 13, 2007, and the Court having heard
Petitioner's Motion for Reconsideration and Clarification, Petitioner's Motion for
Reconsideration of Attorney Fees and Mediation, Petitioner's Motion for Entry of Proposed
Findings of Fact and Conclusions of Law; Proposed Judgment as to Nampa Respondents and

ORDER, P. 1

000306

APR 30 2007
EXHIBIT A

Proposed Preliminary Injunction as to Nampa, and Respondent City of Nampa's Motion for Reconsideration Regarding Attorney Fees, and the Petitioner being represented by its counsel of record, Jon M. Steele, and the Nampa Respondents being represented by their counsel of record, Christopher D. Gabbert, and the Court being fully advised,

DOES HEREBY ORDER the following:

1. Nampa's Motion for Reconsideration of Attorney Fees Award on the Judicial Review portion of the case is DENIED.
2. Goodman's Motion for Reconsideration of this Court's remand is DENIED.
3. Goodman's Motion for Clarification of Remand Order is GRANTED with these clarifications and directions:
 - a. The remand is limited solely to the issue of whether Ordinance No. 3374, when passed by the Nampa City Council and approved by the Mayor in September of 2004, was expedient for the public good.
 - b. The issue of expedience for the public good and the vacation of First Avenue South are not to be treated as new issues or a new application for the vacation of First Avenue South.
 - c. Consent of all adjoining property owners to the vacation of First Avenue South was given prior to passage of Ordinance No. 3374 in the Property Owners Vacation Agreement, an original of which is found in the Nampa Planning Department's file on this vacation.
 - d. Consent of the adjoining property owners to the vacation of First Avenue South is not an issue to be considered or addressed in determining expedience of the public good.

- e. Rights-of-way, easements and franchise rights of adjoining property owners and utility easements, including the existing water line, are not issues to be considered in determining expedience of the public good as they are protected by the statutory reservations in Idaho Code § 50-311, ~~and by the cross easements set forth in the Property Owner's Vacation Agreement.~~ *for*
- f. The City's inability to consider or require any ~~access or~~ easement beyond those provided by Idaho Code § 50-311 is not a factor to be considered in determining expedience of the public good. *for*
- g. There will be no public hearing held in determining expedience of the public good. ~~The fact finding process is closed.~~ *for*
 The determination shall be made at an open, public meeting. Input from Nampa city staff is permissible.
- h. The lack of reservation of a fire apparatus access in Ordinance No. 3374 is not a factor to be considered in determining expedience of the public good.
- i. Whether a fire apparatus access will be addressed in the development process is a factor which the City may consider.
- j. The Preliminary Injunction issued by this Court on February 2, 2007, will remain in effect until the expedience of the public good is considered by the Nampa City Council.

DATED this 25 day of April 2007.

James C. Morfitt

JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26 day of April 2007, a true and correct copy of the foregoing ORDER was served upon opposing counsel as follows:

Chris D. Gabbert
White Peterson, P.A.
5700 East Franklin Road, Ste 200
Nampa, ID 83687-7901

US Mail
 Personal Delivery
 Facsimile

Jon Steele
Runft & Steele Law Offices, PLLC
1020 Main Street, Suite 400
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

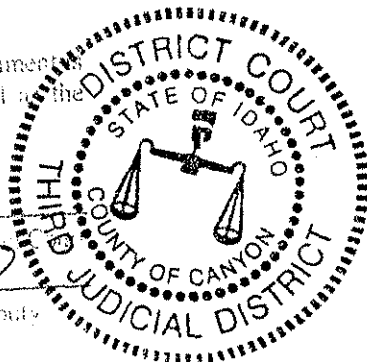
Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

By: J. Vascko
Clerk of Court

State of Idaho } ss
County of Canyon }
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears in my office.
DATE: 4/26/07

By: J. Vascko
Deputy



FILED
A.M. 11:30 P.M.

APR 27 2007

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,

Petitioner,

-vs-

CITY OF NAMPA, a corporate body
Politic; THE CITY COUNCIL of the
CITY OF NAMPA; MAYOR TOM
DALE, in his capacity as Mayor of
The City of Nampa; DIANA
LAMBING, in her capacity as City
Clerk,

Respondents.

CASE NO. CV 2004-0010007*C

JUDGMENT FOR COSTS AND
ATTORNEY FEES

The above-entitled case came on regularly for hearing on Petitioner's motion for an award of attorney fees and costs on January 18, 2007. The Court, having heard and considered the arguments and briefing of the parties together with the file and record in this case, held:

- 1) Petitioner was entitled to its cost in this action;

JUDGMENT FOR COSTS
AND ATTORNEY FEES

000310

APR 30 2007

EXHIBIT B

2) Petitioner was entitled to an award of attorney fees in the sum of \$40,000.00 pursuant to I.C. § 12-117 arising from the judicial review portion of these proceedings; and,

3) Petitioner was not entitled to an award of attorney fees arising from the Mandamus portion of these proceedings.

The Court's findings of fact and conclusions of law were made orally upon the record and are adopted herein. Either party may request a transcript of the Court's findings of fact and conclusions of law should they so desire.

Thereafter, each party requested that the Court reconsider its rulings as to attorney fees. Both motions to reconsider came on regularly for hearing on April 13, 2007. Following hearing, the Court denied each parties motion for reconsideration as to the award of attorney fees.

Therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

Petitioner, GOODMAN OIL COMPANY, is awarded its costs as a matter of right in this action in the sum of \$2,966.29 together with attorney fees relating to the Judicial Review portion of these proceedings pursuant to I.C. § 12-117 in the amount of \$40,000.00.

DATED: APR 27 2007

James C. Morfitt
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing order was forwarded to the following persons on this 27 of April, 2007.

Tammy Zokan
Moore Smith Buston & turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

Chris D. Gabbert
White Peterson, P. A.
5700 East Franklin Road, Ste 200
Nampa, ID 83687-7901

Jon M. Steele
Runft & Steele Law Offices, PLLC
1020 W. Main St., Suite 400
Boise, ID 83702

DeViner
Deputy Clerk of the Court

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
 1020 W. Main Street, Suite 400
 Boise, Idaho 83702
 Phone: (208) 333-9495
 Fax: (208) 343-3246
 Email: jmsteele@runftlaw.com

FILED
 APR 1 2007

SALMON COUNTY CLERK
 D. BUTLER, DEPUTY

Attorneys for Petitioner

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
 Petitioner,)
)
 vs.)
)
 CITY OF NAMPA, a corporate body politic;)
 THE CITY COUNCIL of the CITY OF)
 NAMPA; MAYOR TOM DALE, in his)
 capacity as Mayor of the City of Nampa;)
 DIANA LAMBING, in her capacity as City)
 Clerk; and SCOTTY'S DURO-BILT)
 GENERATOR, INC., an Idaho corporation,)
)
 Respondents.)
)

CASE NO. CV 04-10007
AMENDED
**PRELIMINARY INJUNCTION
 AGAINST NAMPA RESPONDENTS**

COPY

This Court, on February 2, 2007, having heard the Petitioner's Motion for Preliminary Injunction and Petitioner Goodman being represented by Jon M. Steele and the Nampa Respondents being represented by Chris Gabbert and the Court having heard and considered oral argument of counsel and good cause appearing for the issuance of a Preliminary Injunction against

EXHIBIT C

the Nampa Respondents, the Court finds as follows:

The Nampa Respondents have solicited consents to vacation from adjoining property owners of First Avenue South and have scheduled and noticed a public hearing concerning the vacation of First Avenue South;

Such action is inconsistent with and done in violation of Petitioner's rights respecting the subject of this litigation, which is the vacation of First Avenue South, and would render this Court's judgment ineffectual (*see*, I.R.C.P. 65(e)3) as valid consents to the vacation of First Avenue South have previously been obtained from adjoining property owners and the vacation of First Avenue South is completed and is final.

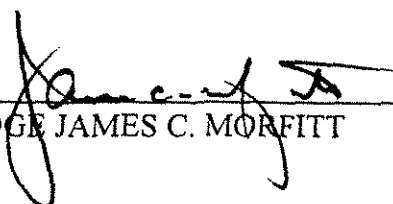
Now therefore it is ORDERED, ADJUDGED AND DECREED that ~~a~~^{an Amended} preliminary injunction is issued enjoining and restraining the Nampa Respondents, its offices, agents, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise during the pending of this action from obtaining any consents, proceeding or scheduling any public hearing, or proceeding in any other manner which is inconsistent with ~~previously obtained consents to vacation and~~ ^{this Court's Memorandum Decision on Judicial Review and Order filed Nov. 7, 2006 as clarified in the Order filed April 26, 2007} completed vacation of First Avenue South between 2nd and 3rd Streets South in the City of Nampa.

Petitioner ~~shall post~~ ^{has posted} a \$500 check payable to the Clerk of this Court as security pursuant to I.R.C.P. 65(c).

IT IS SO ORDERED

APR 27 2007

DATED this _____ day of February 2007.



JUDGE JAMES C. MORFITT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27 day of ~~February~~ ^{April} 2007, a true and correct copy of the foregoing PRELIMINARY INJUNCTION was served upon opposing counsel as follows:

Chris D. Gabbert
White Peterson, P.A.
5700 East Franklin Road, Ste 200
Nampa, ID 83687-7901

US Mail
 Personal Delivery
 Facsimile

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

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Jon Steele
Runft & Steele Law Offices, PLLC
1020 Main Street, Suite 400
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

Clerk of the District Court

~~DEUTER~~

By: _____
JON M. STEELE Deputy
Attorney for Petitioner

FILED
A.M. 225 P.M.

MAY 14 2007

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
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Phone: (208) 333-9495
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Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	CASE NO. CV 05-9800
)	
vs.	)	BRIEF IN SUPPORT OF
	)	GOODMAN'S SECOND MOTION
SCOTTY'S DURO-BILT	)	FOR RECONSIDERATION OF
GENERATOR, INC., an Idaho	)	ORDER GRANTING
corporation; BART and ALANE	)	DEFENDANT'S SECOND MOTION
MCKNIGHT, husband and wife; and	)	FOR SUMMARY JUDGMENT
DOES I through V.)	
)	
Defendants.)	
)	

Goodman respectfully requests this Court to reconsider its Order granting Defendant's Second Motion for Summary Judgment.

As a result of Judge Morfitt's recent rulings concerning the issue of consent, Goodman brings this Second Motion for Reconsideration. The Court has not had the

benefit of these rulings until now. Judge Morfitt's rulings make it clear that consent in the vacation of First Avenue South is not an issue.

In granting Defendant's Second Motion for Summary Judgment, this Court announced that the vacation of First Avenue South had not been completed, and that Duro-Bilt's time for performance under the contract was not ripe. This conclusion is in conflict with Judge Morfitt's ruling in the companion case.

This Court has reviewed Judge Morfitt's November 7, 2006 decision in the companion case of *Goodman v. the City of Nampa*, Case No. CV 04-10007. On February 8, 2007, Judge Morfitt awarded Goodman \$40,000 in attorney's fees as a result of the Judicial Review portion of its case and entered a Preliminary Injunction against Nampa prohibiting it from proceeding with obtaining consents, proceeding or scheduling any public hearing or proceeding in any other manner which is consistent with previously obtained consents to vacation and completed vacation of First Avenue South between Second and Third Streets South in the City of Nampa. See, Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Defendants Motion for Summary Judgment filed February 23, 2007.

The Court has been led astray by Defendants. The time for performance under the Vacation Agreement was August of 2004. Defendants' were asked to meet their contractual obligations by cooperating and consenting to the vacation of First Avenue South. Instead, they refused to cooperate, instigated an illegal veto of Ordinance No. 3374 and have held the development of this downtown Nampa parcel hostage.

The exhibits to the Affidavit of Jon M. Steele in Support of Goodman's Second Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment consist of two Orders and Judgment from the companion case before Judge Morfitt: Order filed April 26, 2007 Judgment for costs and Attorney fees filed April 27, 2007; and Amended Preliminary Injunction Against Nampa Respondents filled April 27, 2007.

This Court's ruling that Defendant's time for performance under the Vacation Agreement is not ripe is wholly erroneous and not supported by the record.

Judge Morfitt's Order of April 26, 2007 contains the following:

Consent of all adjoining property owners to the vacation of First Avenue South was given prior to passage of Ordinance No. 3374 in the Property Owners Vacation Agreement, an original of which is found in the Nampa Planning Department's file on this vacation.

Consent of the adjoining property owners to the vacation of First Avenue South is not an issue to be considered or addressed in determining expedience of the public good.

(emphasis added)

This litigation is the result of Defendant Duro-Bilt's breach of the contract in which it consented to the vacation of First Avenue South. That is the starting point. Duro-Bilt's breach of the Property Owner's Vacation Agreement led to Duro-Bilt's and McKnight's interference with the Goodman/Wylie Purchase and Sale Agreement.

This entire dispute would never have occurred if Duro-Bilt had abided by the contractual terms it agreed to in the Property Owner Street Vacation Agreement. But for the breach of that Agreement and McKnight's interdiction of Ordinance No. 3374 the Goodman/Wylie Purchase and Sale Agreement would have closed.


Duro-Bilt, although contractually bound to cooperate and having already consented to the street vacation, broke its promises. This conduct was not only a breach of the Property Owner's Vacation Agreement, but led to interference with the Goodman/Wylie Purchase and Sale Agreement. McKnight's undisputed role as instigator of Duro-Bilt's refusal to cooperate, the withdrawal of consent and of an illegal veto by the Nampa Mayor are more than sufficient to withstand Defendant's Motion for Summary Judgment.

Goodman respectfully requests the Court to reconsider its Order.

DATED this 14th day of May, 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____


JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE


The undersigned hereby certifies that on this 14th day of May 2007, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF GOODMAN'S SECOND MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____


JON M. STEELE
Attorney for Plaintiff

ORIGINAL

SUSAN E. BUXTON, ISB # 4041
TAMMY A. ZOKAN, ISB # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
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FILED
9:00 A.M. P.M.
JUN 01 2007
CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANTS' MOTION TO STRIKE
SCOTTY'S DURO-BILT GENERATOR,	)	PLAINTIFF'S SECOND MOTION FOR
INC., and Idaho corporation; and DOES I	)	RECONSIDERATION
through V.)	
)	
Defendants.)	
)	


COME NOW, Defendants Bart and Alane McKnight and Scotty's Duro-Bilt Generator, Inc. ("Defendants"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and hereby move this Court to strike Plaintiff's Second Motion for Reconsideration of Order Granting Defendants' Second Motion for Summary Judgment, dated May 14, 2007, in accordance with Idaho Rules of Civil Procedure 12(f), 11(a)(2)(B) and 54(a). Plaintiff's Motion dated May 14, 2007, should be stricken because it was filed more than fourteen (14) days after entry of the Court's Order denying Plaintiff's Motion for Reconsideration, entered April 2, 2007. Plaintiff's Second

Motion for Reconsideration is untimely and should be stricken from the record. This Motion is supported by Defendants' Memorandum in Support of Motion to Strike and in Objection to Plaintiff's Second Motion for Reconsideration filed herewith, and the pleadings and affidavits on file and any argument presented before decision hereon. Defendants request attorney fees and costs pursuant to Idaho Code §§ 12-120 and 12-121 and any other reimbursement and relief deemed appropriate by the Court.

Defendants request oral argument.

DATED this 1st day of June, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2007, I caused a true and correct copy of the foregoing MOTION TO STRIKE by the method indicated below, and addressed to the following:

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Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
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Boise, Idaho 83702
Facsimile (208) 343-3246
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 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

ORIGINAL

SUSAN E. BUXTON, ISB # 4041
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FILED
9:10 A.M. P.M.
JUN 01 2007

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANTS' MEMORANDUM IN
SCOTTY'S DURO-BILT GENERATOR,	)	SUPPORT OF THEIR MOTION TO
INC., and Idaho corporation; and DOES I	)	STRIKE AND RESPONSE IN
through V.	)	OBJECTION TO PLAINTIFF'S MAY
	)	14, 2007, SECOND MOTION FOR
Defendant.	)	RECONSIDERATION
)	

COME NOW, Defendants Scotty's Duro-Bilt Generator, Inc. ("Duro-Bilt" or "Defendants"), by and through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submit their Memorandum in Support of their Motion to Strike and Response in Objection to Plaintiff's Second Motion for Reconsideration of this Court's February 9, 2007, Order. Defendants' Motion and Objection is supported by this Memorandum and the pleadings and supporting documents filed by Defendants in this matter.

The Court entered its Order granting Defendants' Second Motion for Summary Judgment on February 9, 2007. Plaintiff served its Motion for Reconsideration of that Order on February 23, 2007. Defendants objected to Plaintiff's Motion for Reconsideration and Plaintiff's Motion was denied by this Court's Order entered on April 2, 2007. Plaintiffs filed a Second Motion for Reconsideration on May 14, 2007.

Plaintiff's Second Motion for Reconsideration, filed more than fourteen (14) days after entry of the Court's April 2, 2007 Order, is untimely and should be stricken from the record. If this Court entertains Plaintiff's Second Motion for Reconsideration, Plaintiff's Second Motion should be denied because it does not assert newly discovered facts or change in the law warranting this Court's reconsideration of its April 2, 2007 Order dismissing Plaintiff's contract count.

II. LEGAL STANDARDS

A. Motion for Reconsideration

A motion for reconsideration must be filed within fourteen (14) days of the entry of final judgment, unless the court enters an order after final judgment, then a motion for reconsideration must be filed within 14 days of said order. I.R.C.P. 11(a)(2)(B).

“Judgment” as used in these rules includes a decree and any order from which an appeal lies.” I.R.C.P. 54(a).

Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title. Thus if the instrument “ends the suit,” “adjudicate[s] the subject matter of the controversy,” and represents a “final determination of the rights of the parties,” the instrument constitutes a final judgment regardless of its title.

Idah-Best, Inc. v. First Security Bank of Idaho, 99 Idaho 517, 519, 584 P.2d 1242 (1978) (internal citations omitted); see also *Equal Water Rights Assn. v. City of Coeur d'Alene*, 110 Idaho 247, 249, 715 P.2d 917 (1985), *aff'd* (1986); *Camp v. East Fork Ditch Co.*, 137 Idaho 850, 55 P.3d 304 (2002).

An instrument is a final judgment that “ends the suit,” even if the issue of attorney fees and costs is not yet determined. *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho at 519.

The Ninth Circuit’s treatment of motions for reconsideration is instructive: “A motion for reconsideration ... should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or where there is an intervening change in the law.” *McDowell v. Caleron*, 197 F.3d 1253 (9th Cir. 1999) (citations omitted). (In federal court there is no specific rule motions for reconsideration and such motions may be evaluated under Fed. R.Civ. Pro. 59(e) motion to alter or amend, or 60(b) motion for relief from judgment.) See also *Coeur D’Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812, 821, 800 P.2d 1026 (1990); *Jensen v. State*, 139 Idaho 57, 64, 72 P.3d 897 (2003).

B. Motion to Strike

On a party’s motion or initiative of the court, “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” I.R.C.P. 12(f).

III. ARGUMENT

A. Plaintiff’s Second Motion For Reconsideration Is Untimely And Should Be Denied.

All Plaintiff’s claims against Defendants were dismissed with prejudice on or before April 2, 2007, therefore a motion for reconsideration was due 14 days thereafter. I.R.C.P. 11(a)(2)(B).

Plaintiff's Second Motion for Reconsideration, filed more than a month later on May 14, 2007, is untimely.

Duro-Bilt first successfully challenged the issue of all of Plaintiff's tort claims and prevailed on its Motion for Summary Judgment by Order filed on November 7, 2006, and Counts II-IV of Plaintiff's Complaint were dismissed with prejudice. Duro-Bilt then successfully challenged Plaintiff's contract claims and prevailed on its Second Motion for Summary Judgment by Order entered on February 9, 2007. Plaintiff filed a Motion to Reconsider the February 9, 2007, Order, which was denied by Order entered on April 2, 2007.

The Court's April 2, 2007, Order adjudicated all the remaining issues in controversy "and represented a final determination of the rights of the parties. It ended the suit." *Equal Water Rights Assn. v. City of Coeur d'Alene*, 110 Idaho at 249. As of April 2, 2007, the only issue left for the Court's determination was the amount of defense fees and costs awarded to Defendants. (The April 2, 2007, Order also awarded Defendants costs and fees but required Defendants to amend its requests in accordance with the Order.) Therefore, any motion for reconsideration was due within fourteen days of the April 2, 2007, Order. Plaintiff's May 14, 2007, Second Motion for Reconsideration, filed more than month late, is untimely and should be denied.

- B. Even If The Court Considers The Merits Of Plaintiff's Untimely Motion, Plaintiff's Second Motion Does Not Provide A Basis To Revisit The Court's Decision And Should Be Denied.

There are no highly unusual circumstances warranting reconsideration of the Order entered in this case. *McDowell v. Caleron*, 197 F.3d 1253 (9th Cir. 1999); *Coeur D'Alene Mining Co. v. First National Bank of North Idaho*, 118 Idaho 812, 821, 800 P.2d 1026 (1990); *Jensen v. State*, 139

Idaho 57, 64, 72 P.3d 897 (2003). The Affidavit of Jon M. Steele in Support of Goodman's Second Motion for Reconsideration does not present facts relevant to this case. Mr. Steele's Affidavit submits Judge Morfitt's Order in its litigation against the City of Nampa. Judge Morfitt's Order is not relevant to the Court's Order entered in this case and there is no basis to reconsider the Court's Order dismissing Plaintiff's contract claim.

First, Judge Morfitt's Order does not address the 1995 Vacation Agreement, nor could it since all the parties to the 1995 Vacation Agreement are not parties to the litigation before Judge Morfitt. No matter the ruling in the other litigation, the parties' agreement regarding access to and from their properties was not adjudicated or otherwise limited by Judge Morfitt's Order. The Order is not relevant to this case and should be ignored.

Judge Morfitt's Order does not change the fact that the 1995 Vacation Agreement expressly provides for each of the parties to the 1995 Agreement to have perpetual access to their individual properties from Second and Third Streets via the vacated property. Complaint, Ex. A at ¶ 3 (1995 Vacation Agreement). Plaintiff admits the 1995 Agreement protects each party's need for access. Yorgason Aff., Ex. B (Conley Tr.), p. 72 ll. 1-4. The 1995 Agreement contains no mention of or any reference to any limitation on the width of each party's access easement or the parties' consent to any such limitation. *Id.* at p. 75 ll. 24-25, p. 76 ll. 1-2; Complaint Ex. A. Indeed, the express contractual provision provides that the parties will have

a perpetual easement upon vacated First Avenue South for the purpose of access to and from their property from both Second and Third Street located in Nampa. The actual location of the easement shall be at the discretion of the legal owner of the vacated property upon the City's vacation of First Avenue South as described herein.

Id.

Plaintiff's contract claim alleges Defendants breached the 1995 Agreement by failing to consent to the limited twenty-foot (20') access proposed in 2004. Plf's Brf. in Objection to Def's Motion for Summary Judgment and in Support of Plf's Motion for Summary Judgment at p. 23 (August 22, 2006). The only thing Defendant failed to consent to in 2004 was, (1) a brand new agreement limiting the access easement to 20'; and, (2) the vacation of the property with only a 20' access easement. Duro-Bilt's refusal was not aimed at a condition of the 1995 Agreement. The condition and agreement allegedly breached in 2004, conflicts with the express terms of the 1995 Agreement. Duro-Bilt refused to enter into the *entirely new agreement, which was outside the scope of the 1995 Agreement*, proposed nine (9) years after the 1995 Agreement.

Likewise, Judge Morfitt's Order does not change the fact that Duro-Bilt's and other owners' rights cannot be impaired by the vacation of First Avenue South. Idaho Code § 50-311; Steele Aff., Ex. A, Order at ¶ 3(e) at p. 3. Indeed, Judge Morfitt's Order specifically recognizes that Idaho law protects "the right-of-way, easements and franchise rights of any lot owner or public utility [which] shall not be impaired" by the vacation of a street. Idaho Code § 50-311; Steele Aff., Ex. A, Order at ¶ 3(e) at p. 3. Therefore, no matter what happens in the other case, Duro-Bilt's right to access is protected by Idaho law and the parties' 1995 Vacation Agreement, to the extent the Vacation Agreement is still in effect.

Finally, the status of the City's vacation of First Avenue South is still in a state of flux. In the latest round, the ordinance was remanded to the City Council of the City of Nampa for further findings regarding whether the ordinance approved in 2004 was "expedient for the public good." Steele Aff., Ex. A pp. 2-3. Presumably, if the City Council finds that the vacation of First Avenue

South was expedient for the public good in 2004, the vacation will be approved; if not, the vacation will not be approved. In any event, as explained above, the Morfitt Order and any subsequent decision of the City Council, will not change the fact that Duro-Bilt has a legally protected right to adequate access to and from its property.

Plaintiff's contract count also alleged Defendants breached the implied covenant of good faith and fair dealing and the other provisions of the 1995 Agreement. Complaint, Count I. Judge Morfitt's Order provides no basis for reconsideration of the Court's Order granting Defendants' Second Motion for Summary Judgment on all Plaintiff's contract claims. The scope and conditions of the vacation are currently unknown and cannot be known until the matter is finally decided by the City Council in accordance with Judge Morfitt's Order. Until then, the remaining conditions cannot be completed.

Duro-Bilt's refusal to agree to a condition outside the scope of the 1995 Agreement and enter into a new agreement in 2004 was fair and reasonable under the terms of the 1995 Agreement. The 1995 Agreement expressly provides for access to each owner's property at each owner's discretion. Defendant's refusal to relinquish access did not violate, nullify or significantly impair any benefit of the 1995 Agreement. *Idaho Power Company v. Cogeneration, Inc.*, 134 Idaho 738, 750, 9 P.3d 1204 (2000). Plaintiff's allegation that Defendant must agree to inadequate access is contrary to the terms of the parties' 1995 Agreement. *Id.* If Duro-Bilt agreed to the 20' access proposed in 2004, its rights and benefits under the 1995 Agreement would be impaired (to the extent the Agreement is valid and enforceable in 2004). Therefore, in refusing to agree to the 2004 condition, Duro-Bilt

acted fairly and in good faith under the terms of the 1995 Agreement. McKnight Tr., p. 71, l. 25, p. 72, ll. 1-9; *Jenkins v. Boise Cascade Corporation*, 141 Idaho 233, 243, 108 P.3d 380 (2005).

Duro-Bilt has not breached the remaining conditions because:

- a. Performance of subsequent conditions is not due;
- b. The vacation has been tied up in litigation and was recently remanded back to the City for reconsideration in accordance with Judge Morfitt's Order. Until the vacation is finally approved by the City Council, the matter is not ripe for grant of a perpetual easement;
- c. There is no perpetual easement in the record and the Plaintiff has not proposed such easement. Plaintiff admits that no perpetual easement has been drafted or granted and that any perpetual easement would be conditioned on agreement by all parties, *Yorgason Aff.*, Ex. B, p 64;
- d. There is no evidence that Defendant has refused to discuss or cooperate with the parties to the Agreement regarding the grant of a perpetual easement for each party to access each party's property.

The Morfitt Order offered by Plaintiff in support of its Second Motion does not present any newly discovered facts or change in the law showing breach of contractual duty ripe for performance at the time of the alleged breach nor that Duro-Bilt failed to perform. Plaintiff has once again failed to meet the basic requirements for reconsideration of a court decision and Plaintiff's Second Motion should be denied.

III. CONCLUSION

Plaintiff's untimely Second Motion for Reconsideration should be stricken from the record and denied. If this Court considers Plaintiff's Second Motion for Reconsideration, the Court should deny Plaintiff's Second Motion and affirm the Court's April 2, 2007 Order dismissing Plaintiff's contract claim. Defendants also respectfully request that they be awarded attorney fees and costs incurred in responding to Plaintiff's Motion in accordance with Code §§ 12-120 and 12-121.

DATED this 1st day of June, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2007, I caused a true and correct copy of the foregoing DEFENDANTS' MEMORANDUM by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

ORIGINAL

FILED
7/10 A.M. P.M.

JUN 01 2007

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

SUSAN E. BUXTON, ISB # 4041
TAMMY A. ZOKAN, ISB # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
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Email: taz@msbtlaw.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	NOTICE OF HEARING ON
SCOTTY'S DURO-BILT GENERATOR,	)	DEFENDANTS' MOTION TO STRIKE
INC., and Idaho corporation; and DOES I)	
through V.)	
)	
Defendants.)	
_____)	

YOU WILL PLEASE TAKE NOTICE that Defendants' Motion to Strike filed on June 1, 2007, will be heard by the Honorable Renae J. Hoff on July 26, 2007, at the hour of 9:00 a.m., or as soon thereafter as counsel can be heard at the Canyon County Courthouse, located at 1115 Albany St. Caldwell, Idaho 83605.

DATED this 1st day of June, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

Tammy A. Zokan
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2007, I caused a true and correct copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
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Tammy A. Zokan

ORIGINAL

FILED
A.M. P.M.
JUN 01 2007

SUSAN E. BUXTON, ISB # 4041
TAMMY A. ZOKAN, ISB # 5450
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CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,

Plaintiff,

v.

SCOTTY'S DURO-BILT GENERATOR,
INC., and Idaho corporation; and DOES I
through V.

Defendants.

)
)
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) Case No. CV 05-9800
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**DEFENDANTS' MOTION FOR
ENTRY OF JUDGMENT**

COME NOW, Defendants Bart and Alane McKnight and Scotty's Duro-Bilt Generator, Inc. ("Defendants"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and hereby move this Court to enter Judgment on Defendants' Memorandums of Costs and Attorney Fees, as amended in accordance with the Court's April 2, 2007, Order, filed by Defendants on April 6, 2007.

Because Plaintiff has not objected to the amount of costs and attorney fees presented by


Defendants in the McKnights' Second Amended Memorandum of Costs and Attorney Fees and Duro-Bilt's Amended Memorandum of Costs and Attorney Fees, filed on April 6, 2007, judgment should be entered in the amounts presented in the April 6, 2007, Memorandums.

This Motion is supported by the Court's Order awarding costs and attorney fees to Defendants, entered on April 2, 2007, and the Affidavit of Tammy A. Zokan filed herewith, and the pleadings and affidavits on file and any argument presented before decision hereon.

Defendant requests oral argument.

DATED this 1st day of June, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By 

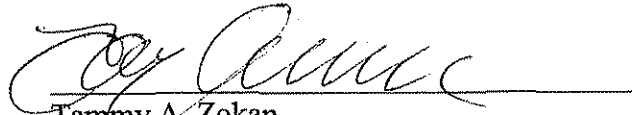
Tammy A. Zokan
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2007, I caused a true and correct copy of the foregoing MOTION FOR ENTRY OF JUDGMENT by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

ORIGINAL

FILED
7:10 A.M. P.M.
JUN 01 2007

SUSAN E. BUXTON, ISB #4041
TAMMY A. ZOKAN, ISB # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: taz@msbtlaw.com

CANYON COUNTY CLERK
C. DOCKINS DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)

Plaintiff,)

v.)

SCOTTY'S DURO-BILT GENERATOR,)
INC., and Idaho corporation; BART and)
ALANE MCKNIGHT, husband and wife; and)
DOES I through V.)

Defendants.)

Case No. CV 05-9800

**AFFIDAVIT OF TAMMY A. ZOKAN
IN SUPPORT OF DEFENDANTS'
MOTION FOR ENTRY OF
JUDGMENT**

STATE OF IDAHO)

)ss.

County of Ada)

TAMMY A. ZOKAN, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for Defendants in the above-entitled matter and make this affidavit upon my own personal knowledge.

2. The Court entered its Order awarding Defendants costs and attorney fees on April 2, 2007. The Order awarded Defendants costs and attorney fees, with some exceptions, and ordered

000339

Defendants to revise the amounts requested in accordance with the Order.

3. In accordance with the April 2, 2007, Order, on April 6, 2007, I completed and filed documents revising and updating Defendants' requests as follows:


- a. Second Amended Memorandum of the McKnights updating requests for costs and fees and resubmitting request for costs to exclude all discretionary costs except for photocopy costs;
- b. My Affidavit in Support of the McKnights' Second Amended Memorandum;
- c. Duro-Bilt's Amended Memorandum of Duro-Bilt's updating requests for costs and fees, and resubmitting request for costs to exclude (i) all discretionary costs except for photocopy costs, and (ii) attorney fees incurred in preparing Duro-Bilt's Second Motion for Summary Judgment;
- d. My Affidavit in Support of Duro-Bilt's Amended Memorandum.

4. The April 2, 2007, Order allowed Plaintiff fourteen (14) days to object to Defendants' amended memorandums filed in accordance with the Order. I received a copy of Plaintiff's "Renewed Objection" to Defendants' amended memorandums on April 18, 2007.

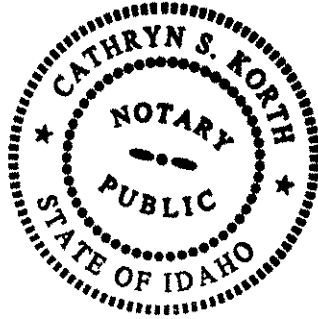
5. Plaintiff does not object to the amount of the costs and attorney fees presented in Defendants' Amended Memorandums filed on April 6, 2007. Plaintiff's Renewed Objection simply restates Plaintiff's objections to the underlying award of fees and costs, which requests have already been granted by the April 2, 2007, Order.

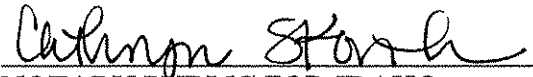
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FURTHER YOUR AFFIANT SAYETH NAUGHT.

By 
Tammy A. Zokan, Of the Firm
Attorneys for Defendants

SUBSCRIBED AND SWORN TO before me this 5th day of June, 2007.




NOTARY PUBLIC FOR IDAHO
Residing at: Nampa, ID
My Commission Expires: 3-6-2012

000341

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2007, I caused a true and correct copy of the foregoing **AFFIDAVIT OF TAMMY A. ZOKAN** by the method indicated below, and addressed to the following:

John M. Steele
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

000342

ORIGINAL

SUSAN E. BUXTON, ISB # 4041
TAMMY A. ZOKAN, ISB # 5450
MOORE SMITH BUXTON & TURCKE, CHARTERED
Attorneys at Law
950 W. Bannock Street, Suite 520
Boise, Idaho 83702
Telephone: (208) 331-1800
Facsimile: (208) 331-1202
Email: taz@msbtlaw.com

FILED
9:10 A.M. P.M.

JUN 01 2007

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Attorneys for Defendants

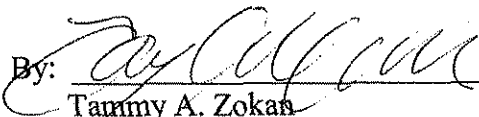
IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	NOTICE OF HEARING ON
SCOTTY'S DURO-BILT GENERATOR,	)	DEFENDANTS' MOTION FOR
INC., and Idaho corporation; and DOES I	)	ENTRY OF JUDGMENT
through V.)	
)	
Defendants.)	
)	

YOU WILL PLEASE TAKE NOTICE that Defendants' Motion for Entry of Judgment filed on June 1, 2007, will be heard by the Honorable Renae J. Hoff on July 26, 2007, at the hour of 9:00 a.m., or as soon thereafter as counsel can be heard at the Canyon County Courthouse, located at 1115 Albany St. Caldwell, Idaho 83605.

DATED this 1st day of June, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 


Tammy A. Zokan
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2007, I caused a true and correct copy of the foregoing NOTICE OF HEARING by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

____ U.S. Mail
 Hand Delivery
____ Overnight Mail
____ Facsimile



Tammy A. Zokan

H 7/2

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-9495
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

FILED
A.M. / P.M.
JUL 03 2007
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
Plaintiff,)
)
vs.)
)
SCOTTY'S DURO-BILT GENERATOR,)
INC., an Idaho corporation; BART and)
ALANE MCKNIGHT, husband and wife;)
and DOES I through V.)
)
Defendants.)

CASE NO. CV 05-9800
**PLAINTIFF'S NOTICE OF
WITHDRAWAL OF SECOND
MOTION FOR RECONSIDERATION**

COME NOW Plaintiff by and through their counsel of record, and give notice of Plaintiff's withdrawal of their Goodman's Second Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment filed with the Court on May 14, 2007 and set for hearing on July 26, 2007 at 9:00 a.m.

DATED this 2 day of July 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____



JON M. STEELE
Attorney for Petitioner

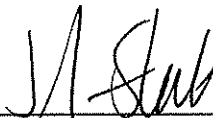
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2 day of July 2007, a true and correct copy of the foregoing **PLAINTIFF'S NOTICE OF WITHDRAWAL OF SECOND MOTION FOR RECONSIDERATION** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
JON M. STEELE
Attorney for Petitioner

SUSAN E. BUXTON # 4041
 TAMMY A. ZOKAN # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 W. Bannock Street, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

FILED
 8:55 A.M. P.M.

AUG 07 2007

CANYON COUNTY CLERK
 T. CRAWFORD, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	ORDER FOR ATTORNEY FEES AND
SCOTTY'S DURO-BILT GENERATOR,	)	COSTS
INC.; and DOES I through V.)	
)	
Defendants.)	
_____)	

Before the Court are:

1. Defendant McKnights' Second Amended Memorandum of Costs and Attorney Fees, filed on April 6, 2007;
2. Defendant Duro-Bilt's Amended Memorandum of Costs and Attorney Fees, filed on April 6, 2007;
3. Plaintiff's Renewed Objection, dated April 17, 2007, to the McKnights' and Duro-

Bilt's Memorandums of Costs and Fees.

4. Defendant Duro-Bilt's Memorandum for Costs and Attorney Fees, filed on July 6, 2007;

and, the Court having reviewed the relevant pleadings, briefs and memoranda, and having considered oral argument, and good cause appearing therefore:

It is hereby ORDERED as follows:

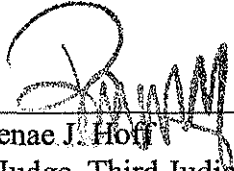
1. Defendant McKnights' Second Amended Memorandum of Costs and Attorney Fees is granted in the amounts requested on April 6, 2007:
 - a. \$10,585.00 Attorney Fees
 - b. \$ 26.00 Costs as Matter of Right
 - c. \$ 375.65 Discretionary Costs (Photocopies);
2. Defendant Duro-Bilt's Amended Memorandum of Costs and Attorney Fees is granted in the amounts requested on April 6, 2007:
 - a. \$10,565.00 Attorney Fees
 - b. \$ 26.00 Costs as Matter of Right
 - c. \$ 495.26 Discretionary Costs (Photocopies);
3. Defendant Duro-Bilt's Memorandum of Costs and Attorney Fees for costs and attorney fees incurred in defending against Plaintiff's Second Motion for Reconsideration filed on May 14, 2007 and withdrawn on July 2, 2007, is granted as follows:
 - a. \$1,530.00 Attorney Fees
 - b. \$ 71.23 Discretionary Costs (Photocopies)

4. Plaintiff Goodman Oil Company is required to pay Defendants McKnights and Duro-Bilt attorney fees and costs in the total amount of \$23,674.14.

The Court's findings and conclusions were made on the record. A written transcript of the findings and conclusions is available at the request of either party.

DATED this day of **AUG 26** 2007, 2007.

By: _____


Judge Renae J. Hoff
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

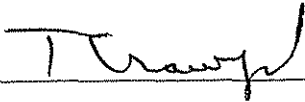
I HEREBY CERTIFY that on this 7 day of aug, 2007, I caused a true and correct copy of the foregoing ORDER FOR ATTORNEY FEES AND COSTS by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

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Tammy A. Zokan
MOORE SMITH BUXTON & TURCKE
950 W. Bannock, Suite 520
Boise, Idaho 83702
Facsimile (208) 331-1202
Email: taz@msbtlaw.com

U.S. Mail
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 Facsimile



F I L E D
A.M. 1 43 P.M.

OCT 16 2007

**CANYON COUNTY CLERK
J DRAKE, DEPUTY**

**JON M. STEELE (ISB # 1911)
KARL J. F. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICE, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-8506
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com**

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	CASE NO. CV 05-9800
)	
vs.	)	MOTION FOR ENTRY OF JUDGMENT
)	
SCOTTY'S DURO-BILT GENERATOR,)	
INC., an Idaho corporation; BART and)	
ALANE MCKNIGHT, husband and wife; and)	
DOES I through V.)	
)	
Defendants.)	
)	

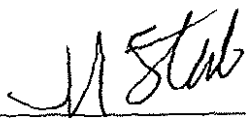
COMES NOW, the Plaintiff by and through their counsel of record, Jon M. Steele, and moves this Court for Entry of Judgment.

This Motion is based upon the Court's Orders previously filed, the Affidavit of Jon M. Steele in Support of Motion for Entry Judgment, and Brief in Support of Plaintiff's Motion For Entry of Judgment filed herewith.

Oral argument is requested.

DATED this 16th day of October 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: 
Jon M. Steele
Attorney for Plaintiff

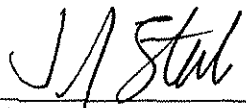
CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 16th day of October 2007, a true and correct copy of the **MOTION FOR ENTRY OF JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

U.S. Mail
 Personal Delivery
 Via Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 
Jon M. Steele
Attorney for the Plaintiff

F I L E D
A.M. 1 43 P.M.

OCT 16 2007

CANYON COUNTY CLERK
J DRAKE, DEPUTY

JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-9496
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
 Plaintiff,)
)
 vs.)
)
 SCOTTY'S DURO-BILT GENERATOR,)
 INC., an Idaho corporation; BART and)
 ALANE MCKNIGHT, husband and wife;)
 and DOES I through V.)
)
 Defendants.)
)

CASE NO. CV 05-9800

**BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR ENTRY
OF JUDGMENT**

INTRODUCTION

Plaintiff moves this Court for Entry of Final Judgment. Defendant's contention is that this Court's Order of July 27, 2007, is the final judgment and that the time to file an appeal has expired.

ARGUMENT

Idaho Appellate Rule 14(a) sets forth the time for taking an appeal from the District Court and provides in pertinent part as follows:

Any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment, order or decree of the district court appealable as a matter of right in any civil ... action.

Idaho Rule of Civil Procedure 58(a) provides for entry of judgment, and states that:

Subject to the provisions of Rule 54(b)

(2) upon a decision by the court granting other relief ..., the court shall approve the form and sign the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document.

In determining the meaning of a rule or statute, this Court has long held that its fundamental object is to determine the intent of the lawmaking authority or legislature. *Idaho Mut. Co-op Ins. Co. v. Meyer*, 10 Idaho 294, 7 P. 628 (1904); Local 1494, *Int'l Assoc. of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978). When a rule or statute is amended it must be presumed that the drafter intended a change from previous law. *Stale v. Long*, 91 Idaho 436, 441, 423 P.3d 858 (1967); *see also, Intermountain Health Care, Inc. v. Board of County Commissioners*, 109 Idaho 685, 687, 710 P.2d 595, 597 (1985).

Where Idaho procedural rules are based upon essentially identical federal rules, the United States Supreme Court's interpretation of such rules must be persuasive.

Freiberger v. American Triticale, Inc., 120 Idaho 239, 241, 815 P.2d 437, 439 (1991);
David Steed & Associates v. Young, 115 Idaho 247, 249, 766 P.2d 717, 719 (1988).

Idaho Rule of Civil Procedure 58(a) was rescinded in 1992 and the present Rule 58(a) was adopted in its place. The Reporter for the Supreme Court Rules Committee explained the reasons for the amendment as follows:

4. Rule 58(a) – This is a substantial amendment to this rule dealing with the method of an entry of judgment. The impetus for this rule arose in the Appellate Rules Committee which found that in recent years there have been a number of situations in which the Supreme Court has ruled that a memorandum decision of a trial court was in fact a “final judgment” from which the time to appeal commenced to run. Quite a number of attorneys have been caught off base with this as they did not file the notice of appeal within 42 days of the memorandum decision ... For all of these reasons, the Appellate Rules Committee felt that the rule should be amended so that there must be a separate judgment document so that all parties will know that the time to appeal has commenced to run. The Appellate Rules Committee therefore suggested that this rule be amended, and the Civil Rules Committee concurred, so as to amend the rule to adopt language out of the corresponding federal rule that “Every judgment shall be set forth on a separate document.” If a memorandum decision grants a motion for summary judgment, that *[sic]* this must be followed by a judgment which has to be set forth on a separate document.

L. Davis, *Highlights of 1992 Rules Changes*, The Idaho State Bar Advocate, Vol. 35, No. 6, (June 1992), pullout section at 5.

As noted in the *Advocate* article, Federal Rule of Civil Procedure 58 contains the identical requirement of Idaho Rule 58(a) that “[e]very judgment shall be set forth on a separate document.” In reversing a lower court decision holding an appeal untimely under Federal Rule of Appellate Procedure 4(a), the United States Supreme Court discussed the purpose behind the inclusion of the separate judgment requirement in Federal Rule 58, stating as follows:

Prior to 1963, there was considerable uncertainty over what actions of the district court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty. (Citations omitted.) To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter, Rule 58 was amended to require that a judgment was to be effective only when set forth on a separate document.

The separate document provision ... “was needed to make certain when a judgment becomes effective which has a most important bearing, inter alia, on the time for appeal ...” (Citation omitted.)

United States v. Indrehmas, 411 U.S. 216, 220 (1973); citing 6A J. Moore Federal Practice 58.04 (4. – 2) at 158-161 (1972); see also *Allah v. Superior Court*, 871 F.2d 887 (9th Cir. 1988) where the Ninth Circuit held that “[a] judgment or order is not entered within the meaning of Rule 4(a) ... unless it is entered in compliance with Rule 58 and 79(a) of the Federal Rules of Civil Procedure” and “[a]bsent compliance with these requirements, ‘a party will not ordinarily be found to have exceeded any of the time periods set forth in Fed. R. App. P. 4(a).’” *Id.* at 889. (citations omitted.)

The Idaho Supreme Court addressed this same issue in *Hunting v. Clark County School Dist.*, 129 Idaho 634, 931 P.2d 628 (1997).

I.R.C.P. 58(a) states:

Subject to the provisions of Rule 54(b): (1) ... upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court shall sign the judgment and the clerk shall enter it ... *Every judgment shall be set forth on a separate document.* The placing of the clerk’s filing stamp on the judgment constitutes the entry of the judgment; and the judgment is not effective before such entry...

The 1992 Amendments to Idaho Rule of Civil Procedure 58(a), as well as judicial interpretations of essentially identical federal law, leave no doubt that the time for an

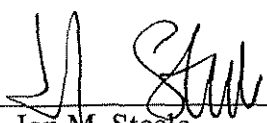
appeal runs from the entry of a separate judgment, not from a District Court's Order or Memorandum of Opinion.

CONCLUSION

Defendant's would have this Court resurrect case law, now buried for over 15 years, which will either constitute a trap for the unwary or cause a cautious practitioner to file a notice of appeal based on the entry of an adverse ruling on a *dispositive motion*, even though a separate document entitled "Judgment" has not yet been entered. This Court should decline Defendant's invitation to reinject into Idaho appellate practice the very uncertainty which caused the 1992 Amendment to Rule 58(a). Instead, this Court should enter a separate document entitled "Judgment" and the period for filing an appeal runs from that date, not earlier.

DATED this 16^A day of October, 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: 
Jon M. Steele
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 11th day of October, 2007, a true and correct copy of the **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____



JON M. STEELE
Attorney for Plaintiff

#

F I L E D
A.M. 1:43 P.M.

JON M. STEELE (ISB # 1911)
KARL J. F. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-8506
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

OCT 16 2007

CANYON COUNTY CLERK
J DRAKE, DEPUTY

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	CASE NO. CV 05-9800
)	
vs.	)	AFFIDAVIT OF JON M. STEELE
	)	IN SUPPORT OF MOTION FOR
SCOTTY'S DURO-BILT GENERATOR,	)	ENTRY OF JUDGMENT
INC., an Idaho corporation; BART and)	
ALANE MCKNIGHT, husband and wife; and)	
DOES I through V.)	
)	
Defendants.)	
)	

STATE OF IDAHO)
 :ss
County of Ada)

COMES NOW, Jon M. Steele, being over the age of eighteen years and competent to make this Affidavit, after first being duly sworn, and upon his own personal knowledge, states as follows:

1. That I am an attorney in good standing with the Idaho State Bar and counsel for the Plaintiff herein.

ORIGINAL

2. That I make this Affidavit in support of Plaintiff's Motion for Entry of Judgment.
3. That on June 1, 2007, Defendant filed Defendant's Motion for Entry of Judgment which has not been heard.
4. That on August 7, 2007, this Court entered its Order for Attorney Fees and Costs.
5. That final Judgment in accordance with I.R.C.P. 58(a) has not been entered in this case.
6. That Plaintiff's attorney has on several occasions contacted this Court's chambers and made inquiry concerning the entry of Judgment.
7. That Plaintiff's attorney was advised by this Court's chambers that Judge Hoff had injured her knee and was not able to address this issue until her return.
8. In late September, this past month, Plaintiff's attorney contacted defense attorney Zokan and inquired about the entry of Judgment.
9. That on October 2, 2007, Defendant's attorney Zokan emailed Plaintiff's attorney that the previous Order entered by this Court is the Judgment. *See*, Exhibit "A" attached.
10. That on October 2, 2007, the Plaintiff's attorney sent attorney Zokan a letter advising that I.R.C.P. 58(a) requires that a Judgment be set forth in a separate document. *See*, Exhibit "B" attached.
11. That Plaintiff's attorney then advised Defendant's attorney Zokan that Plaintiff would ask the Court to enter Judgment. *See*, Exhibit "C" attached.

Further Affiant sayeth naught.

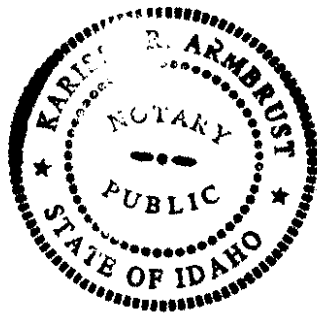
DATED this 10th day of October, 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: *JM Steele*
JON M. STEELE

STATE OF IDAHO)
 :SS
County of Ada)

SUBSCRIBED and SWORN unto before me this 16th day of October 2007.



Karin R. Armbrust
Notary Public for the State of Idaho
Residing at: *Nampa*
My Commission Expires: *3-19-13*

CERTIFICATE OF SERVICE

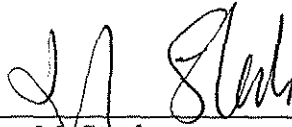
The undersigned hereby certified that on this 11th day of October 2007, a true and correct copy of the **AFFIDAVIT OF JON M. STEELE IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

U.S. Mail
 Personal Delivery
 Via Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____



Jon M. Steele
Attorney for the Plaintiff

Fax: (208) 343-3246
jmsteele@runftlaw.com
www.runftlaw.com

From: Tammy A. Zokan [mailto:TAZ@msbtlaw.com]
Sent: Tuesday, October 02, 2007 1:11 PM
To: Jon M. Steele
Subject: Goodman v. Duro-Bilt

In response to your voicemail, as I have already indicated, I don't read IRCP 58(a) or IAR 14(a) require that a final appealable order be called a "judgment." And I think IRCP 54(a) and IAR 14(a) make it clear that something called a "judgment" is not required. I have submitted final appealable orders for your review, then to the Judge and the Judge has signed and entered the orders. If you are going to file something in an attempt to reopen time period for appeal, we will object.

Tammy A. Zokan
Moore Smith Buxton & Turcke, Chtd.
950 West Bannock, Suite 520
Boise, Idaho 83702
Direct: (208) 331-1804
Fax: (208) 331-1202
taz@msbtlaw.com

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10/2/2007

000365

EXHIBIT A



RUNFT & STEELE LAW OFFICES, PLLC



John L. Runft, ISB # 1059
Phone: (208) 333-8506
jrunft@runftlaw.com

Jon M. Steele, ISB # 1911
Phone: (208) 333-9495
jmsteele@runftlaw.com

Karl J. F. Runft, ISB # 6640
Phone: (208) 333-1403
kjrunft@runftlaw.com

October 2, 2007

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, Idaho 83702

RE: Goodman v. Duro-Bilt

Dear Tammy:

I got your telephone message concerning Entry of Final Judgment. Idaho Rule of Civil Procedure 58(a) requires that a judgment shall be set forth on a separate document. Please submit the final judgment to Judge Hoff for her signature. Thank you.

Very Truly Yours,

Jon M. Steele
Runft & Steele Law Offices, PLLC.

:mch

Jon M. Steele

From: Jon M. Steele
Sent: Tuesday, October 02, 2007 1:58 PM
To: 'Tammy A. Zokan'
Subject: RE: Goodman v. Duro-Bilt

Tammy,
I will ask the Ct to enter a judgment..

Jon M. Steele
Runft & Steele Law Offices, PLLC
1020 W. Main Street, Suite 400
Boise, ID 83702
(208) 333-9495
Fax: (208) 343-3246
jmsteele@runftlaw.com
www.runftlaw.com

From: Tammy A. Zokan [mailto:TAZ@msbtlaw.com]
Sent: Tuesday, October 02, 2007 1:11 PM
To: Jon M. Steele
Subject: Goodman v. Duro-Bilt

In response to your voicemail, as I have already indicated, I don't read IRCP 58(a) or IAR 14(a) require that a final appealable order be called a "judgment." And I think IRCP 54(a) and IAR 14(a) make it clear that something called a "judgment" is not required. I have submitted final appealable orders for your review, then to the Judge and the Judge has signed and entered the orders. If you are going to file something in an attempt to reopen time period for appeal, we will object.

Tammy A. Zokan
Moore Smith Buxton & Turcke, Chtd.
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Fax: (208) 331-1202
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000367

EXHIBIT C

SUSAN E. BUXTON, ISB # 4041
 TAMMY A. ZOKAN, ISB # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 West Bannock, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

FILED
 A.M. 12:20 P.M.
OCT 24 2007
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,
 Plaintiff,

v.

SCOTTY'S DURO-BILT GENERATOR,
 INC., and Idaho corporation; and DOES I
 through V.
 Defendant.

)
)
)
) Case No. CV 05-9800
)
)
) **DEFENDANTS' MEMORANDUM IN**
) **SUPPORT OF THEIR MOTION TO**
) **STRIKE AND RESPONSE IN**
) **OBJECTION TO PLAINTIFF'S**
) **MOTION FOR ENTRY OF**
) **JUDGMENT**
)

COME NOW, Defendants Scotty's Duro-Bilt Generator, Inc. and Bart and Alane McKnight ("Duro-Bilt" or "Defendants"), by and through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submit their Memorandum in Support of their Motion to Strike and Response in Objection to Plaintiff's Motion for Entry of Judgment dated October 16, 2007, and received by Defendants on October 19, 2007. Defendants' Motion and Objection is supported by this

Memorandum, the Affidavit of Tammy A. Zokan filed herewith, and the pleadings and supporting documents filed by Defendants in this matter.

I. SUMMARY OF PROCEDURAL HISTORY

The McKnights successfully challenged all of Plaintiff's claims against them and all claims against the McKnights were dismissed with prejudice by Order entered on September 20, 2006. The Court denied Plaintiff's Motion for Reconsideration of the September 20, 2006, Order by Order entered on November 7, 2006.

Duro-Bilt first successfully challenged the issue of all of Plaintiff's tort claims and prevailed on its Motion for Summary Judgment by Order filed on November 7, 2006, and Counts II-IV of Plaintiff's Complaint were dismissed with prejudice. Duro-Bilt then successfully challenged Plaintiff's contract claims and prevailed on its Second Motion for Summary Judgment by Order entered on February 9, 2007.

Plaintiff served its Motion for Reconsideration of that Order on February 23, 2007. Defendants objected to Plaintiff's Motion for Reconsideration and Plaintiff's Motion was denied by this Court's Order entered on April 2, 2007. This Order finally adjudicated the matter before the Court; all that was left was for the Court to finally resolve the issue of attorney fees and costs.

Plaintiffs filed a Second Motion for Reconsideration on May 14, 2007. Plaintiff's Second Motion for Reconsideration, filed more than fourteen (14) days after entry of the Court's April 2, 2007 Order, was untimely and Defendants' filed a Motion to Strike and Objection thereto on June 1, 2007. Plaintiff subsequently withdrew his Second Motion for Reconsideration on July 2, 2007.

The Court subsequently entered its Order on attorney fees and costs on August 7, 2007.¹

For all the proceedings recited above, the Court entered its Findings of Fact and Conclusions of Law on the record and then issued a separate written instrument titled "Order" stating the relief granted and denied.

II. LEGAL STANDARDS

A. Final Appealable Order

(i) Idaho Code § 13-201

"An appeal may be taken to the Supreme Court from a district court in any civil action by such parties from such orders and judgments, and within such times and in such manner as prescribe by Rule of the Supreme Court." Idaho Code § 13-201 (underlining added).

(ii) Idaho Appellate Rule 11

An appeal as a matter of right may be taken to the Supreme Court from the following judgments and orders:

(a) Civil Actions. From the following judgments and orders of a district court in a civil action:

(1) Judgments, orders and decrees which are final....

* * *

(7) Any order made after final judgment....

I.A.R. 11(a) (underlining added).

(iv) Idaho Appellate Rule 14(a)

"Any appeal as a matter of right from the district court may only be made by filing a notice of appeal with the clerk of the district court within forty-two days of the district court's final order."

Baker v. Idaho, 142 Idaho 411, 418, 128 P.3d 948, 955 (Ct. App. 2005) (underlining added). "The

¹ My correspondence with Plaintiffs' counsel addressed the final orders entered in this case. See *Aff. of Jon M. Steele Ex. A and Ex. C*. This correspondence does not refer to only one order or reference a July

failure to timely file a notice of appeal is jurisdictional and cause automatic dismissal of an appeal.”

Id. at 418, 955 (citing *Walton, Inc. v. Jensen*, 132 Idaho 716, 719, 979 P.2d 118, 121 (Ct. App. 1999).

Idaho Appellate Rule 14 requires that an appeal from the district court must be made by physically filing a notice of appeal with the clerk of the "district court within 42 days" of any judgment, order or decree. The time for an appeal will be extended by the filing of "a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action." I.A.R. 14(a). However, the filing of a motion for costs or attorney fees, or an objection to such a motion, does not extend the time to appeal a judgment. I.A.R. 14(a);(fn2) *State ex rel. Moore v. Lawson*, 105 Idaho 164, 165, 667 P.2d 267, 268 (Ct.App.1983). The failure to file an appeal within the 42-day time period is jurisdictional and will result in immediate dismissal of the case. I.A.R. 21.

Walton, Inc. v. Jensen, 132 Idaho at 719 (underlining added).

Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title. As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document ... that on its face states the relief granted or denied.

Camp v. East Fork Ditch Co., Ltd., 137 Idaho 850, 867, 55 P.3d 304, 321 (2002) (underlining added) (citing *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 519, 584 P.2d 1242 (1978), *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999), *Hunting v. Clark County School Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997), I.R.C.P. 58(a).

(v) Idaho Rule of Civil Procedure 54 (a) and 58(a)

“Judgment’ as used in these rules includes a decree and any order from which an appeal lies.”

I.R.C.P. 54(a) (underlining added). “[T]he Court shall approve the form and sign the judgment, and judgment shall be entered...” I.R.C.P. 58(a). “The entry of judgment shall not be delayed for the taxing of costs.” *Id.* An instrument is a final judgment that “ends the suit,” even if the issue of

27, 2007, date as contended by Plaintiff. Steele Aff. at ¶ 9, Pltf’s Brief at p. 1.

DEFENDANTS’ MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE AND RESPONSE IN OBJECTION TO PLAINTIFF’S MOTION FOR ENTRY OF JUDGMENT – Page 4

000371

attorney fees and costs is not yet determined. *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho at 519.

Although the district court did not expressly dismiss or otherwise rule on Peacock's counterclaim, the summary judgment entered is still final and appealable because there are no claims left to be resolved with respect to the counterclaim. The general rule is that if an order or judgment ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties, the instrument constitutes a final judgment.

Davis v. Peacock, 133 Idaho at 641 (underlining added) (according to the Court's recitation of the proceedings below, the district court issued an order entering judgment against Peacock, *id.* at 640.).

A final "order" followed by a final "judgment" does not modify the effect of the earlier order. "A trial court cannot unilaterally extend the time to file an appeal by simply attaching the term 'final judgment' to a document." *Walton, Inc. v. Jensen*, 132 Idaho at 720; see also *Equal Water Rights Assn. v. City of Coeur d'Alene*, 110 Idaho at 249 (the court's earlier order, which included a comprehensive adjudication and represented a final determination of the parties' rights was the final judgment in the case; the subsequent document entitled "final judgment" was not).

A partial order is not a final order. I.R.C.P. 54(b). In *Camp v. East Fork Ditch Co. Ltd.*, the Court determined the Orders entered in that case were partial judgments and thus not final appealable orders. *Camp v. East Fork Ditch Co. Ltd.*, 137 Idaho at 868-869. "Although the partial judgments previously entered by the district court resolved counts one, two, four, and five of the second amended complaint and the counterclaims, there was no final judgment until a judgment was entered resolving court three of the second amended complaint." *Id.* at 868. Additionally, the Court noted

that the district court specifically requested legal counsel to prepare both an order and a judgment.
Id. at 868 fn. 12.

Plaintiff cites *Hunting v. Clark County School District 161*, 129 Idaho 634, 931 P.2d 628 (1996) (*reh'g den.* 1997), in support of its position however *Hunting* did not rule that a document must be called a judgment to be appealable. Instead, *Hunting* concluded that a separate document finally adjudicating the matter was required. *Hunting v. Clark County School District 161*, 129 Idaho at 637. Indeed, as explained by the Idaho Supreme Court in *Camp v. East Fork Ditch Co. Ltd.*, whether an order is appealable has two parts: (1) whether the instrument ends the lawsuit (citing *Davis v. Peacock*, 133 Idaho 637); and (2) whether that instrument is a separate document (citing *Hunting*, 129 Idaho 634). *Camp v. East Fork Ditch Co. Ltd.*, 137 Idaho at 867.

Clearly, that is the only appropriate reading of *Hunting* given that *Hunting* did not overrule case law, Idaho Appellate Rules or Idaho Rules of Civil Procedure, and cases before and after it have consistently applied Idaho law as follows:

The general rule is that if an order or judgment ends the suit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties, the instrument constitutes a final judgment.

Davis v. Peacock, 133 Idaho at 641 (underlining added); see also *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho at 867; *Baker v. Idaho*, 142 Idaho at 418, 128 P.3d at 955 (Ct. App.); *Walton, Inc. v. Jensen*, 132 Idaho at 719 (Ct. App.).

B. Motion to Strike

On a party's motion or initiative of the court, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." I.R.C.P. 12(f).

III. ARGUMENT

A. Plaintiff's Motion For Entry Of Judgment Is An Untimely Attempt To Extend The Time Period For Filing Its Appeal And Should Be Denied.

(i) Final Order on the Merits.

All Plaintiff's claims against Defendants were dismissed with prejudice on or before April 2, 2007, therefore a timely appeal must have been filed 42 days thereafter. I.A.R. 14(a). As of April 2, 2007, the only issue left for the Court's determination was the amount of defense fees and costs awarded to Defendants. (The April 2, 2007, Order also awarded Defendants costs and fees but required Defendants to amend its requests in accordance with the Order.) The time for filing an appeal could only be extended if Plaintiff timely filed a motion affecting the substantive decision and order of the Court. *Walton, Inc. v. Jensen*, 132 Idaho at 719. While Plaintiff did file a Second Motion for Reconsideration, Plaintiff's Second Motion was untimely because it was filed more than 14 days thereafter. I.R.C.P. 11(a)(2)(B). Additionally, Plaintiff withdrew its Second Motion for Reconsideration on July 2, 2007. Just as in *Walton, Inc. v. Jensen*, then, "[a]s of that date, no further motions were pending that could affect the" the Court's order, therefore the time to appeal began to run no later than July 2, 2007 (and arguably on April 2, 2007, since no timely motion for reconsideration was filed). *Walton, Inc. v. Jensen*, 132 Idaho at 719.

The Court's April 2, 2007, Order was a final, separate order that adjudicated all the remaining issues in controversy "and represented a final determination of the rights of the parties. It ended the suit." *Equal Water Rights Assn. v. City of Coeur d'Alene*, 110 Idaho at 249; *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 at 519.

(ii) Final Order on Attorney Fees.

For the same reasons detailed above, the time to appeal this Court's Order on Attorney Fees and Cost began to run on August 7, 2007, when the Court entered its separate, final order awarding attorney fees and costs to Defendants. *Walton, Inc. v. Jensen*, 132 Idaho at 719. First, the Court's final Order disposing of all issues in this litigation was entered on April 2, 2007 (or, for the sake of argument, on July 2, 2007, when Plaintiff withdrew its untimely Second Motion for Reconsideration). Such final Orders are not delayed for the subsequent taxing of fees and costs. I.R.C.P. 58(a).

Second, the Court's separate, final Order awarding Defendants' attorney fees and costs was entered on August 7, 2007. No separate certification was required for the August 7, 2007, Order to become final. *Wilsey v. Fielding*, 115 Idaho 437, 438, 767 P.2d 280 (Ct. App. 1989); I.A.R. 11(a)(7). After that date, no motions were filed affecting this Court's August 7, 2007, Order and the time for appealing the August 7, 2007, Order expired on September 17, 2007.

B. There Is No Basis For Plaintiff's Request For The Court To Attach The Term Final Judgment To Its Already Entered Final Orders And Plaintiff's Motion Should Be Stricken.

Plaintiff's attempt to extend the time for appeal is not supported by Idaho case law, Idaho Rules of Civil Procedure or Idaho Appellate Rules and any such attempt, if arguably allowed, is untimely. A final appealable order, like the Orders entered in this case is a judgment under the Idaho Rules of Civil Procedure. I.R.C.P. 54(a).

A trial court cannot unilaterally extend the time to file an appeal by simply attaching the term "final judgment" to a document. The Idaho Rules of Civil Procedure and the Idaho Appellate Rules do not provide a mechanism for interim judgments.

Walton, Inc. v. Jensen, 132 Idaho at 720; see also *Equal Water Rights Assn. v. City of Coeur d'Alene*, 110 Idaho at 249 (the court's earlier order, which included a comprehensive adjudication and represented a final determination of the parties' rights was the final judgment in the case; the subsequent document entitled "final judgment" was not).

The Idaho Supreme Court and Appellate Court have applied the standard for what constitutes a final and appealable order and that the standard does not require that a final order be titled "judgment" to be appealable. See *Davis v. Peacock*, 133 Idaho at 641; *Walton, Inc. v. Jensen*, 132 Idaho at 719; *Baker v. Idaho*, 142 Idaho at 418, 128 P.3d at 955; I.A.R. 11(a), 14(a); I.R.C.P. 54(a); Idaho Code § 13-201. Likewise, *Hunting v. Clark County School District 161*, 129 Idaho at 637, concluded only that a final order or judgment be a separate document, it did not require that the separate document be called a judgment. Similarly, the commentary cited by Plaintiff is distinguishable because it concerns "memorandum decisions" and says that a "memorandum decision" must be followed by a judgment. Pltf's Brf. at p. 3. In this case, the Court entered separate, final Orders, not memorandum decisions. Even if the commentary were controlling, it mandates only the entry of a separate document, not a separate document titled "judgment."

In this case, the separate document requirement has been met: the Court entered its Findings of Fact and Conclusions of Law on the record and then issued a separate written instrument titled "Order" stating the relief granted and denied. There is no basis for entry of a redundant final order as requested by Plaintiff and Plaintiff's request should be stricken as redundant, immaterial and impertinent. I.R.C.P. 12(f).


IV. CONCLUSION

Plaintiff's Motion for Entry of Judgment should be stricken from the record and denied. Defendants also respectfully request that they be awarded attorney fees and costs incurred in responding to Plaintiff's Motion in accordance with Code §§ 12-120 and 12-121.

DATED this 24 day of October, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: _____

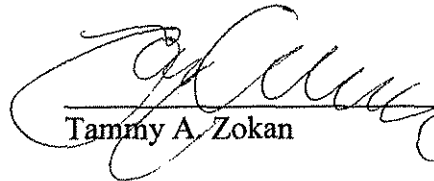

Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of October, 2007, I caused a true and correct copy of the foregoing DEFENDANTS' MEMORANDUM by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

SUSAN E. BUXTON, ISB #4041
TAMMY A. ZOKAN, ISB # 5450
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Email: taz@msbtlaw.com

FILED
A.M. 10:20 P.M.
OCT 24 2007
CANYON COUNTY CLERK
P. SALAS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)

Plaintiff,)

v.)

SCOTTY'S DURO-BILT GENERATOR,)
INC., and Idaho corporation; BART and)
ALANE MCKNIGHT, husband and wife; and)
DOES I through V.)

Defendants.)

Case No. CV 05-9800

AFFIDAVIT OF TAMMY A. ZOKAN

STATE OF IDAHO)
)ss.
County of Ada)

TAMMY A. ZOKAN, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for Defendants in the above-entitled matter and make this affidavit upon my own personal knowledge.

2. In my experience as an attorney in the State of Idaho, an instrument that finally resolves litigation is treated as a final appealable order, no matter what the instrument is titled.

Recent examples of my experience in this regard are attached to this Affidavit and by this reference

000379

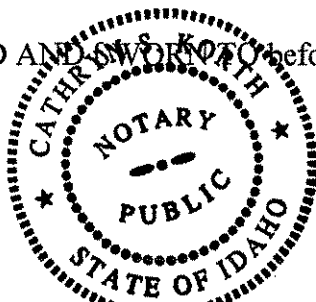
are incorporated herein:

- a. Attached hereto as Exhibit "A-1" is an Order Conditionally Dismissing Appeal" in Supreme Court Case No. 32055 (July 7, 2005), for the reason that the Notice of Appeal was not filed within 42 days of the Memorandum Decision and Order entered by District Judge Sticklen in and for the Fourth Judicial District, Boise County. Attached hereto as Exhibit "A-2" is the cover page of the referenced Memorandum Decision and Order confirming the Supreme Court's reference to the appealable instrument. Attached hereto as Exhibit "A-3" is the Supreme Court's Order of Appeal (appellant did not file a response to the Conditional Dismissal).
- b. Attached hereto as Exhibit "B-1" is a timely Notice of Appeal filed in Supreme Court Case No. 33707 appealing District Judge Culet's October 18, 2006, Order of Dismissal and subsequent November 28, 2006, Order Denying Plaintiffs' Motion to Alter or Amend/Reconsider (Third Judicial District, Canyon County Case No. CV0609056), which Orders are attached hereto as Exhibits "B-2" and "B-3" respectively. The Notice of Appeal was timely filed since it was filed within 42 days of the instrument finally adjudicating the matter.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By *Tammy A. Zokan*
 Tammy A. Zokan, Of the Firm
 Attorneys for Defendants

SUBSCRIBED AND SWORN TO before me this 22nd day of October, 2007.



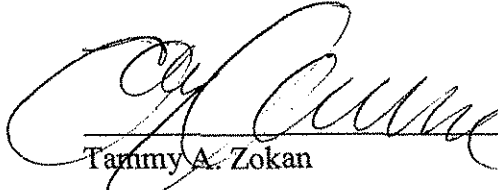
Cathryn Storch
 NOTARY PUBLIC FOR IDAHO
 Residing at: Nampa, Idaho
 My Commission Expires: 3-6-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of October, 2007, I caused a true and correct copy of the foregoing AFFIDAVIT OF TAMMY A. ZOKAN by the method indicated below, and addressed to the following:

John M. Steele
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

EXHIBIT "A-1"

000382

In the Supreme Court of the State of Idaho

ANN MARIE HELTSLEY,

Petitioner-Appellant,

v.

BOISE BASIN LIBRARY DISTRICT,

Respondent.

)
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ORDER CONDITIONALLY
DISMISSING APPEAL

Supreme Court No. 32055

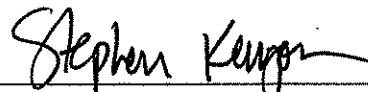
The NOTICE OF APPEAL filed June 30, 2005, is from the MEMORANDUM DECISION AND ORDER entered by the Honorable Kathryn A. Sticklen, District Judge, on May 17, 2005. Appellate Rule 14 requires that an appeal be filed within forty-two (42) days from the date of entry of the final judgment. It appears that the NOTICE OF APPEAL was not filed within forty-two (42) days from the date of entry of the final Order entered May 17, 2005; therefore, good cause appearing,

IT HEREBY IS ORDERED that this appeal be, and hereby is, CONDITIONALLY DISMISSED for the reason the appeal may not be timely filed; however, the Appellant may file a RESPONSE to this Order, with regard to the issue of timeliness, within twenty-one (21) days from the date of this Order which shall show good cause, if any exists, why this appeal should not be dismissed.

IT FURTHER IS ORDERED that proceedings in this appeal shall be SUSPENDED pending an appropriate Order from the Court.

DATED this 7th day of July 2005.

By Order of the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Court Judge
District Court Reporter

000383

EXHIBIT "A-2"

000384

RECEIVED
MAY 19 2005
MSB & T, CTD.

DISTRICT COURT BOISE COUNTY, IDAHO
Recorded in Book _____ Page _____
Filed **MAY 17 2005** No. _____
By *[Signature]* ROBA A. CANODY, Clerk
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOISE

ANN MARIE HELTSLEY, Pro Se,

Petitioner,

vs.

THE BOISE BASIN LIBRARY DISTRICT,
an Idaho library district, acting through the
Boise Basin Library District Board,

Respondent.

Case No. CV-2005-43

MEMORANDUM DECISION
AND ORDER

This case is before the Court on Respondent Boise Basin Library District's (the District's) motions to dismiss Petitioner Ann M. Heltsley's (Heltsley's) "Notice of Election Contest" pursuant to Idaho Code § 34-2001. For the reasons that follow, the motions will be granted.

FACTS AND PROCEDURAL HISTORY

On February 1, 2005 the District held a bond election pursuant to a resolution adopted by the District's board of trustees. Notice of the election was published in the Idaho World, a weekly newspaper of general circulation in Boise County, Idaho, the county in which the District is located. The first notice was published on January 12, 2005. The notice (which is not in the current record) apparently identified only one polling place, located at the District office in Idaho City. The bond measure passed by the required super-majority.

000385

EXHIBIT "A-3"

000386

In the Supreme Court of the State of Idaho

ANN MARIE HELTSLEY,

Petitioner-Appellant,

v.

BOISE BASIN LIBRARY DISTRICT,

Respondent.

ORDER

NO. 32055

Ref. No. 05S-217

An ORDER CONDITIONALLY DISMISSING APPEAL was issued July 7, 2005. RESPONDENT'S MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT OF MOTION TO DISMISS with supporting AFFIDAVIT with attachments was filed July 12, 2005. A response to this Court's Order Conditionally Dismissing Appeal has not been filed. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that RESPONDENT'S MOTION TO DISMISS APPEAL be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that this Court's ORDER CONDITIONALLY DISMISSING APPEAL be, and hereby is, AFFIRMED and this appeal is DISMISSED.

DATED this 16th day of August 2005.

By Order of the Supreme Court



Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Reporter Leslie Anderson

000387

EXHIBIT "B-1"

000388

FILED
A.M. P.M.
NOV 29 2006
CANYON COUNTY CLERK
J VASKO, DEPUTY

RICHARD L. HARRIS
Attorney at Law
P.O. Box 1328
Caldwell, Id. 83606-1438
Telephone (208) 459-1588
Facsimile (208) 459-1300
ISB # 1387

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GLENN KOCH, JOYCE CHASE,)
CARL CHASE, KATHY ALDER,)
PAUL ALLDREGE, ATWELL PARRY,)
GINA LUJAK, DELORIS CRAM,)
DIC K WINDER and BOB CARPENTER,)

Plaintiffs,)

vs.)

CANYON COUNTY, a political)
Subdivision of the state of Idaho; and)
The IDAHO ASOCIATION OF)
OF COUNTIES CAPITAL FINANCE)
CORPORATION, a 501(c)(3) Non-Profit)
Corporation;)

Defendants.)

CASE NO. CV-06-9056

NOTICE OF APPEAL

1. The title of the Court from which appeal is taken: The District Court
Division of the District Court of the Third Judicial District of the State of Idaho, in and
for the County of Canyon.

2. The title of the Court to which appeal is taken: The Supreme Court of
the State of Idaho.

3. The date and heading of the Judgment or decision from which the appeal is taken: Under the heading above appeal is taken from the decision of the District Court's Order of Dismissal of Plaintiff's Complaint granted in favor of the Defendant Canyon County and the Defendant Idaho Association of Counties Capital Finance Corporation dated October 18, 2006 and from the District Court's Order denying Plaintiff's Motion to Alter or Amend or alternatively Reconsider the Order of October 18, dated November 28, 2006.

4. This Appeal is taken as to both matters of fact and law.

5. Statement of Issues on Appeal:

(a) Whether the dismissal of Plaintiff's Complaint with prejudice and subsequent denial of Plaintiff's Motion to Alter or Amend or Alternatively Reconsider was appropriate.

(b) Whether Plaintiffs as citizens, residents, property owners and taxpayers by virtue of owners of real property of Canyon County have standing to maintain a Declaratory Judgment Action against Canyon County under the circumstances of this case, and particularly:

(1) Whether each Plaintiff is an "interested person or an affected person" as defined by Idaho Code Sec. 10-1202.

(2) Whether the expenditure contemplated by the lease between Canyon County and the Arthur and Grace Jerome Trust dated March 27, 2006 which provided for the lease of certain real property to Canyon County so that the County could "construct buildings thereon to house adult inmates, Canyon County Sheriffs dispatch services, and other county facilities during the lease term, to replace and/or expand

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lessee's existing facilities in order to meet applicable State, Federal and other requirements, the expenditure for which the lessee deems to be ordinary and necessary expenses under Article VIII, Section 3 Idaho Constitution" is an "ordinary and necessary" expense.

(3) Whether a county commission may deem an expenditure for a long term lease arrangement to construct buildings on the leased real property to be an "ordinary and necessary expense" as compliance with the provisions of Article VIII, Section 3 Idaho Constitution.

(4) Whether a transfer of \$500,000.00 of County funds to the Idaho Association of Counties Capital Finance Corporation so that the Idaho Association of Counties Capital Finance Corporation could then enter into an "Exclusive Option to Purchase Agreement" also dated March 27, 2006, to buy the same real property Canyon County leased from the Jerome Trust under lease of March 27, 2006, constitutes an "ordinary and necessary expense" in compliance with Article VIII, Section 3 Idaho Constitution.

(5) Whether the lease agreement entered into between Canyon County and the Jerome Trust and the option to purchase agreement entered into between the Capital Finance Corporation and the Jerome trust using money for the option supplied by Canyon County was a scheme to circumvent the provisions of Article VIII, Section 3 Idaho Constitution.

(6) Whether each Plaintiff as a real property owner and taxpayer of Canyon County by virtue of that ownership suffered a distinct and palpable injury by the

000391

county using property tax revenues to fund an apparent illegal and unconstitutional scheme to purchase real property to construct county facilities thereon.

(7) Whether confidentiality clauses in the agreements referred to herein violate open meeting laws of the State of Idaho.

(8) Whether an actual controversy has arisen between the Plaintiff taxpayers and the Defendants regarding their respective rights and duties under the agreements referred to above.

(c) Whether a Declaratory Judgment action is an appropriate proceeding and is an appropriate remedy for Plaintiffs to challenge illegal and unconstitutional conduct of a county commission.

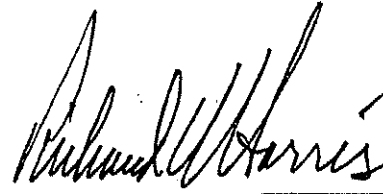
6. Is additional reporter's transcript requested? Yes. A transcript of all proceedings before the District Court is requested including arguments made by counsel and the Court's findings of fact and conclusions of law which were announced orally on the record but were not reduced to writing. It is requested that the Clerk's record contain all pleadings and documents filed in this action.

7. The undersigned certifies as follows:

- (a) A copy of this Notice of Appeal has been served on the reporter.
- (b) That the estimated cost of the reporter's transcript will be paid immediately upon receipt from the reporter of that estimated cost.
- (c) That service of this Notice of Appeal has been made upon all parties required to be served by Rule 20.

000392

Dated this 29th day of November, 2006.

A handwritten signature in cursive script, appearing to read "Richard L. Harris".

Richard L. Harris
Attorney for Plaintiff

000393

EXHIBIT "B-2"

000394

F I L E D
A.M. 4:00 P.M.
OCT 18 2006
 CANYON COUNTY CLERK
 DEPUTY
B. [Signature]

MICHAEL C. MOORE, ISB #1188
 TAMMY A. ZOKAN, ISB #5450
 Moore Smith Buxton & Turcke, Chartered
 Attorneys at Law
 950 West Bannock Street, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

Attorneys for Defendant, the Idaho Association of Counties,
 Capital Finance Corporation

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GLENN KOCH, JOYCE CHASE,)
 CARL CHASE, KATHY ALDER,)
 PAUL ALLDREDGE, ATWELL PERRY,)
 GINA LUJAK, DELORIS CRAM,)
 DICK WINDER, and BOB CARPENTER)

CASE NO. CV 0609056
ORDER OF DISMISSAL

Plaintiffs,)
)
)

vs.)
)

CANYON COUNTY, A POLITICAL)
 SUBDIVISION OF THE STATE OF IDAHO,)
 AND THE IDAHO ASSOCIATION OF)
 COUNTIES, CAPITAL FINANCE)
 CORPORATION, a 501 (c) (3), NON-PROFIT)
 CORPORATION,)

Defendants.)
)
)

Before the Court is Defendant Canyon County, Idaho's Motion to Dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6), and having reviewed the relevant pleadings, and having considered oral argument, and good cause appearing therefore;

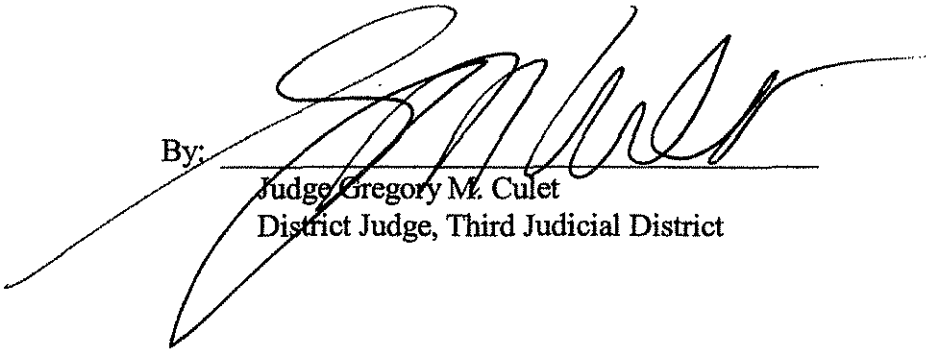
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It is hereby ORDERED that Plaintiffs have not shown that they have standing to maintain their Complaint for a Declaration of Rights; and, therefore Plaintiffs have not stated a claim upon which relief can be granted against Defendants Canyon County, Idaho and the Idaho Association of Counties, Capital Finance Corporation; and

It is further ORDERED that Plaintiffs' Complaint for a Declaration of Rights against Defendants Canyon County, Idaho and the Idaho Association of Counties, Capital Finance Corporation, is hereby dismissed with prejudice, with costs and attorneys fees to be addressed separately.

DATED this 17 day of October, 2006.

By: _____


Judge Gregory M. Culet
District Judge, Third Judicial District

000396

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of October, 2006, I served a true and correct copy of the foregoing **Order of Dismissal** to the following person by the following method:

Richard L. Harris
Attorney at Law
P.O. Box 1438
Caldwell, Idaho 83605
Fax: (208) 459-1300
Attorney for Plaintiffs

U.S. Mail
 Facsimile
 Overnight Delivery
 Hand Delivery
 Certified Mail

David L. Young
Charles L. Saari
Canyon County Prosecuting Attorney
Canyon County Courthouse
1115 Albany
Caldwell, Idaho 83605
Fax: (208) 455-5955
Attorneys for Defendant Canyon County

U.S. Mail
 Facsimile
 Overnight Delivery
 Hand Delivery
 Certified Mail

Tammy A. Zokan
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock, Suite 520
Boise, Idaho 83702
Fax: (208) 331-1202
Attorney for Defendant IAC Capital Finance Corp.

U.S. Mail
 Facsimile
 Overnight Delivery
 Hand Delivery
 Certified Mail

Brian J. Moore

000397

EXHIBIT "B-3"

000398



DAVID L. YOUNG, ISB #3679
CHARLES L. SAARI, ISB #2121
 Canyon County Prosecuting Attorney
 Canyon County Courthouse
 1115 Albany
 Caldwell, Idaho 83605
 Telephone: (208) 454-7391

RECEIVED

NOV 30 2006

MSB & T, CTD.

F I L E D

A.M. 2:10 P.M.

NOV 28 2006

CANYON COUNTY CLERK
 J HEIDEMAN, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

)
GLENN KOCH, JOYCE CHASE,)
CARL CHASE, KATHY ALDER,)
PAUL ALLDREDGE, ATWELL PERRY))
GINA LUJAK, DELORIS CRAM)
DICK WINDER, and)
BOB CARPENTER,)

Plaintiffs,)

vs.)

CANYON COUNTY, A POLITICAL)
SUBDIVISION OF THE STATE OF)
IDAHO AND THE IDAHO ASSOC.)
OF COUNTIES, CAPITAL FINANCE)
CORPORATION A 501 (c) (3))
Non Profit Corporation,)

Defendants.)

CASE NO. CV0609056

**ORDER DENYING PLAINTIFFS'
 MOTION TO ALTER OR AMEND OR
 ALTERNATIVELY RECONSIDER
 DECISION AND DISALLOWING
 DEFENDANT CANYON COUNTY'S
 AND DEFENDANT IDAHO
 ASSOCIATION OF COUNTIES,
 CAPITAL FINANCE CORPORATION'S
 REQUESTS FOR ATTORNEY FEES
 AND COSTS**

Before the Court is Plaintiffs' Motion to Alter or Amend or Alternatively Reconsider
 Decision and Defendant Canyon County's Memorandum of Defendant Canyon County in
 Support of Attorney Fees and Defendant Idaho Association of Counties, Capital Finance

ORDER DENYING PLAINTIFFS' MOTION
 TO ALTER OR AMEND OR
 ALTERNATIVELY RECONSIDER DECISION
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Corporation's Memorandum of Costs and Attorney Fees, and having reviewed the relevant filed documents, and having considered oral argument on November 20, 2006, and good cause appearing therefore, as shown by the Court's findings on the record, to confirm the Court's October 18, 2006 Order of Dismissal, and the November 3, 2006 Order of Dismissal Re: Canyon County, and to disallow Defendants' requests for attorney fees and costs.

It is hereby **ORDERED** that Plaintiffs' Motion to Alter or Amend or Alternatively Reconsider Decision is hereby denied; and

It is hereby **ORDERED** that Defendant Canyon County's Memorandum of Canyon County in Support of Attorney Fees is hereby disallowed and denied; and

It is hereby **ORDERED** that Defendant Idaho Association of Counties, Capital Finance Corporation's Memorandum of Costs and Attorney Fees is hereby disallowed and denied.

Dated this 28 day of November, 2006

By: GREGORY M. CULET
Judge Gregory M. Culet
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 day of November, 2006, a true and correct copy of the foregoing **ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND OR ALTERNATIVELY RECONSIDER DECISION** was served to the following in the manner indicated:

Richard L. Harris
Attorney at Law
P.O. Box 1438
Caldwell, Idaho 83606

U.S. Mail
 Facsimile
 Overnight Delivery
 Hand Delivery

David L. Young
Charles L. Saari
Canyon County Prosecuting Attny.
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605

U.S. Mail
 Facsimile
 Overnight Delivery
 Hand Delivery

Tammy A. Zokan
Moore, Smith Buxton & Turcke
950 West Bannock, Suite 520
Boise, Idaho 83702

U.S. Mail
 Facsimile
 Overnight Delivery
 Hand Delivery

BY: J HEIDEMAN
Clerk

SUSAN E. BUXTON, ISB # 4041
 TAMMY A. ZOKAN, ISB # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 W. Bannock Street, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

F I L E D
 A.M. / 10:20 P.M.
OCT 24 2007
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANTS' MOTION TO STRIKE
SCOTTY'S DURO-BILT GENERATOR, INC., and Idaho corporation; and DOES I through V.	)	PLAINTIFF'S MOTION FOR ENTRY
	)	OF JUDGMENT
)	
Defendants.)	
)	

COME NOW, Defendants Bart and Alane McKnight and Scotty's Duro-Bilt Generator, Inc. ("Defendants"), by an through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and hereby move this Court to strike Plaintiff's Motion for Entry of Judgment, dated October 16, 2007, in accordance with Idaho Code § 13-201, Idaho Rules of Civil Procedure 12(f), 54(a), 58(a); and, Idaho Appellate Rules 11(a), 14(a). Plaintiff's Motion should be stricken because it is untimely, redundant, impertinent and immaterial. This Motion is supported by Defendants' Memorandum in Support of Motion to Strike and in Objection to Plaintiff's Motion for Entry of Judgment filed

herewith, the Affidavit of Tammy A. Zokan filed herewith, and the pleadings and affidavits on file and any argument presented before decision hereon. Defendants request attorney fees and costs pursuant to Idaho Code §§ 12-120 and 12-121 and any other reimbursement and relief deemed appropriate by the Court.

Defendants request oral argument.

DATED this 24th day of October, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

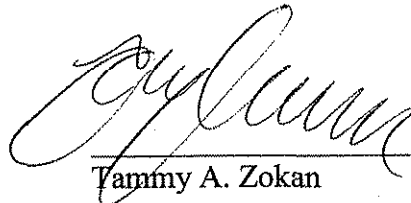
Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

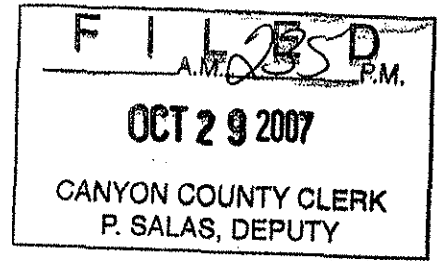
I HEREBY CERTIFY that on this 24 day of October, 2007, I caused a true and correct copy of the foregoing MOTION TO STRIKE by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan



JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-9495
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com

Attorneys for Plaintiff

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	CASE NO. CV 05-9800
)	
vs.	)	PLAINTIFF'S RESPONSE TO
	)	DEFENDANTS' MEMORANDUM IN
SCOTTY'S DURO-BILT GENERATOR,	)	SUPPORT OF THEIR MOTION TO
INC., an Idaho corporation; BART and	)	STRIKE AND REPLY TO
ALANE MCKNIGHT, husband and wife;	)	DEFENDANTS' RESPONSE IN
and DOES I through V.	)	OBJECTION TO PLAINTIFF'S
	)	MOTION FOR ENTRY OF
Defendants.	)	JUDGMENT
)	

The arguments advanced and position taken by Defendants in their Motion to Strike and Response in Objection to Plaintiff's Motion for Entry of Judgment are contra to Defendants' Motion for Entry of Judgment dated June 1, 2007. In that Motion, Defendants asked this Court to enter Judgment on Defendants' Memorandum of Costs and Attorneys Fees as Amended in accordance with the Court's April 2, 2007 Order.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO STRIKE AND REPLY TO DEFENDANTS' RESPONSE IN OBJECTION TO
PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT, P. 1**

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ORIGINAL

The Defendants' Motion of June 1st contemplates, requests and moves this Court to enter a Judgment in accordance with the Court's prior Order.


When Defendants' filed their Motion for Entry of Judgment, they were of the opinion that a Judgment entered by the Court was necessary to bring this case to a conclusion at the District Court level. Goodman agrees.

In their most recent filing, Defendants' take the exact opposite position, that no Judgment is necessary. A simple reading of Idaho Rule of Civil Procedure 58 requires the District Court to enter Judgment in order to avoid the uncertainty and traps set for the appealing party in situations exactly as proposed by Defendants.

Plaintiff requests final Judgment be entered in this case.

DATED this 29th day of October 2007.

RUNFT & STEELE LAW OFFICES, PLLC

By: 

JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of October 2007, a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE AND REPLY TO DEFENDANTS' RESPONSE IN OBJECTION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: JM Steele
JON M. STEELE
Attorney for Plaintiff

PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE AND REPLY TO DEFENDANTS' RESPONSE IN OBJECTION TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT, P. 3

000407

Cvt 11-5-07 Hoff
FILED
 10:52 A.M. P.M.
OCT 30 2007
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

SUSAN E. BUXTON, ISB # 4041
 TAMMY A. ZOKAN, ISB # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 West Bannock, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	DEFENDANTS' REPLY TO
SCOTTY'S DURO-BILT GENERATOR,	)	PLAINTIFF'S RESPONSE/REPLY
INC., and Idaho corporation; and DOES I	)	FILED OCTOBER 29, 2007
through V.)	
)	
Defendant.)	
)	

COME NOW, Defendants Scotty's Duro-Bilt Generator, Inc. and Bart and Alane McKnight ("Duro-Bilt" or "Defendants"), by and through their attorneys of record, Moore, Smith, Buxton & Turcke, Chartered, and submit their Reply to Plaintiff's Response To Defendants' Memorandum In Support Of Their Motion To Strike And Reply To Defendants Response In Objection To Plaintiff's Motion For Entry Of Judgment, received by Defendants on October 29, 2007. Defendants' Reply is supported by this Memorandum, the Affidavit of Tammy A. Zokan, filed on October 24, 2007, and

the Second Affidavit of Tammy A. Zokan filed herewith, and the pleadings and supporting documents filed by Defendants in this matter.

Plaintiff wrongly alleges that Defendants have taken the position that a document entitled a “judgment” is required to dispose of this matter. Pltf’s Response at pp. 1-2. Defendants have never takes such a position. Second Aff. of Tammy A. Zokan ¶ 6. Defendants’ June 1, 2007, styled “Motion for Entry Judgment” sought a final order awarding Defendants attorney fees and costs because Plaintiff filed no objection to Defendants’ amended Memorandums of Costs and Fees in accordance with this Court’s April 2, 2007, Order. *Id.* at ¶ 2. The Court entered such order on August 7, 2007. It did not and does not matter what the instrument is called so long as it adjudicates the matter before the court. Idaho Rule of Civil Procedure 54 (a) and 58(a); Idaho Code § 13-201; Idaho Appellate Rule 11(a); Idaho Appellate Rule 14(a); *Baker v. Idaho*, 142 Idaho 411, 418, 128 P.3d 948, 955 (Ct. App. 2005) (citing *Walton, Inc. v. Jensen*, 132 Idaho 716, 719, 979 P.2d 118, 121 (Ct. App. 1999)).

Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title. As a general rule, a final judgment is an order or judgment that ends the lawsuit, adjudicates the subject matter of the controversy, and represents a final determination of the rights of the parties. It must be a separate document ... that on its face states the relief granted or denied.

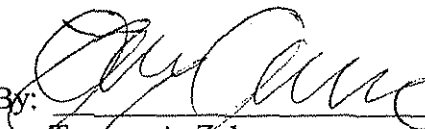
Camp v. East Fork Ditch Co., Ltd., 137 Idaho 850, 867, 55 P.3d 304, 321 (2002) (underlining added) (citing *Idah-Best, Inc. v. First Security Bank of Idaho*, 99 Idaho 517, 519, 584 P.2d 1242 (1978), *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999), *Hunting v. Clark County School Dist. No. 161*, 129 Idaho 634, 931 P.2d 628 (1997), I.R.C.P. 58(a).

Plaintiff’s attempt to mischaracterize the record in this case should be ignored and stricken from the record. Defendants also respectfully request that they be awarded attorney fees and costs

incurred in responding to Plaintiff's Motion and Reply in accordance with Code §§ 12-120 and 12-121.

DATED this 30th day of October, 2007.

MOORE SMITH BUXTON & TURCKE, CHTD.

By: 

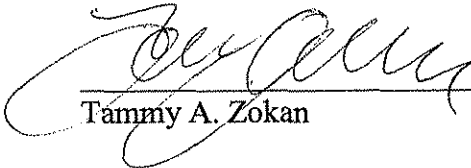
Tammy A. Zokan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2007, I caused a true and correct copy of the foregoing DEFENDANTS' REPLY by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

07/15-07 Hoff
FILED
 1058 A.M. P.M.
OCT 30 2007
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

SUSAN E. BUXTON, ISB #4041
 TAMMY A. ZOKAN, ISB # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 W. Bannock Street, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.	)	SECOND AFFIDAVIT OF TAMMY A.
	)	ZOKAN IN SUPPORT OF
SCOTTY'S DURO-BILT GENERATOR,	)	DEFENDANTS' MOTION TO STRIKE
INC., and Idaho corporation; BART and	)	AND OBJECTION TO PLAINTIFFS'
ALANE MCKNIGHT, husband and wife; and	)	MOTION FOR ENTRY OF
DOES I through V.	)	JUDGMENT
)	
Defendants.)	
)	

STATE OF IDAHO)
)ss.
 County of Ada)

TAMMY A. ZOKAN, being first duly sworn upon oath, deposes and says:

1. I am one of the attorneys of record for Defendants in the above-entitled matter and make this affidavit upon my own personal knowledge.
2. Defendants' Motion for Entry of Judgment sought a final order on Defendants' requests for attorney fees and costs because Plaintiff filed no objection to the costs and fees

contained in Defendants' amended memorandums of cost and fees within fourteen (14) days as required by this Court's April 2, 2007, Order.

3. As explained in my June 1, 2007, Affidavit:


- a. The Court entered its Order awarding Defendants costs and attorney fees on April 2, 2007. The Order awarded Defendants costs and attorney fees, with some exceptions, and ordered Defendants to revise the amounts requested in accordance with the Order.
- b. The April 2, 2007, Order allowed Plaintiff fourteen (14) days to object to Defendants' amended memorandums filed in accordance with the Order. I received a copy of Plaintiff's "Renewed Objection" to Defendants' amended memorandums on April 18, 2007.
- c. Plaintiff does not object to the amount of the costs and attorney fees presented in Defendants' Amended Memorandums filed on April 6, 2007. Plaintiff's Renewed Objection simply restates Plaintiff's objections to the underlying award of fees and costs, which requests have already been granted by the April 2, 2007, Order.

4. Defendants Motion simply sought a final appealable order, which the Court entered on August 7, 2007.

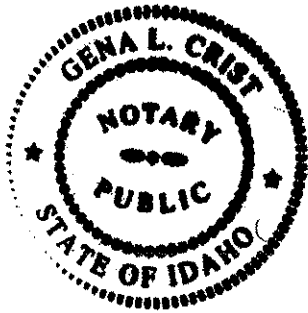
5. It was and is of no significance whether the final order is titled "judgment", "order", "decree" or "decision". See I.R.C.P. 58(a) and Defendants' briefing.

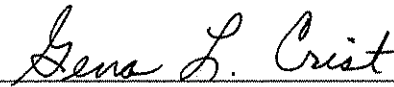
6. Contrary to Plaintiff's representations to the Court, I have never taken the position that a final appealable order must be titled "judgment."

FURTHER YOUR AFFIANT SAYETH NAUGHT.

By 
Tammy A. Zokan, Of the Firm
Attorneys for Defendants

SUBSCRIBED AND SWORN TO before me this 30th day of October, 2007.



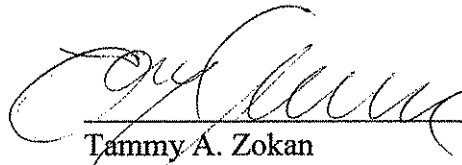

NOTARY PUBLIC FOR IDAHO
Residing at: Boise, Id.
My Commission Expires: 11-14-09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2007, I caused a true and correct copy of the foregoing **SECOND AFFIDAVIT OF TAMMY A. ZOKAN** by the method indicated below, and addressed to the following:

John M. Steele
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



Tammy A. Zokan

SUSAN E. BUXTON # 4041
 TAMMY A. ZOKAN # 5450
 MOORE SMITH BUXTON & TURCKE, CHARTERED
 Attorneys at Law
 950 W. Bannock Street, Suite 520
 Boise, Idaho 83702
 Telephone: (208) 331-1800
 Facsimile: (208) 331-1202
 Email: taz@msbtlaw.com

F I L E D
A.M. / ~~10~~ P.M.
NOV 15 2007
 CANYON COUNTY CLERK
 P. SALAS, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff,	)	Case No. CV 05-9800
)	
v.)	
	)	ORDER
SCOTTY'S DURO-BILT GENERATOR, INC.; and DOES I through V.)	
)	
Defendants.)	
)	

Before the Court is Plaintiff's Motion for Entry of Judgment, filed by Plaintiff on October 16, 2007; and, the Court having reviewed the relevant pleadings, briefs and memoranda, and having considered oral argument, and good cause appearing therefore:

It is hereby ORDERED that based on Idaho case law decided before and after the 1992 amendment to Idaho Rule of Civil Procedure 58(a), which authority is included in the record of the November 5, 2007, hearing, the final Orders entered by the Court in this case were appealable orders under the Idaho Appellate Rules and the time for filing an appeal under the Idaho Appellate Rules

has expired;

It is further ORDERED that Plaintiff has not shown that the Court must enter an instrument entitled a "judgment"; and, therefore Plaintiff's Motion for Entry of Judgment is denied.

The Court's findings and conclusions were made on the record. A written transcript of the findings and conclusions is available at the request of either party.

DATED this ___ day of November, 2007.

NOV 14 2007



By: _____

Judge Renae J. Hoff
District Judge, Third Judicial District

CERTIFICATE OF SERVICE

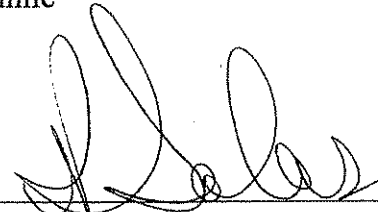
I HEREBY CERTIFY that on this 15 day of November, 2007, I caused a true and correct copy of the foregoing ORDER by the method indicated below, and addressed to the following:

Jon M. Steele
Karl J. F. Runft
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Facsimile (208) 343-3246
Email: jmsteele@runftlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile

Tammy A. Zokan
MOORE SMITH BUXTON & TURCKE
950 W. Bannock, Suite 520
Boise, Idaho 83702
Facsimile (208) 331-1202
Email: taz@msbtlaw.com

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



A handwritten signature in black ink, appearing to read 'Jon M. Steele', is written over a horizontal line.

F I L E D
A.M. 4:32 P.M.

NOV 23 2007

**CANYON COUNTY CLERK
J DRAKE, DEPUTY**

**JON M. STEELE (ISB # 1911)
KARL J. RUNFT (ISB # 6640)
RUNFT & STEELE LAW OFFICES, PLLC
1020 W. Main Street, Suite 400
Boise, Idaho 83702
Phone: (208) 333-9495
Fax: (208) 343-3246
Email: jmsteele@runftlaw.com**

Attorneys for Plaintiff/Appellant

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

GOODMAN OIL COMPANY,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 SCOTTY'S DURO-BILT GENERATOR,)
 INC., an Idaho corporation; BART and)
 ALANE MCKNIGHT, husband and wife;)
 and DOES I through V.)
)
 Defendants/Respondent.)
)

CASE NO. CV 05-9800

NOTICE OF APPEAL

TO: The above named Respondents, and their attorney of record, and the Clerk of the
above entitled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant Goodman Oil Company appeals against the
above named Respondent Scotty's Duro-Bilt Generator, Inc. and Bart &

Alane McKnight to the Idaho Supreme Court from the District Court's Order in the above action on November 15, 2007, Honorable Judge Renae Hoff presiding.

2. The Appellant has the right to appeal to the Supreme Court, and the Order described in paragraph 1 above is appealable pursuant to Rule 11(a)(1) I.A.R.
3. Appellants' preliminary statement of issues is as follows:
 - a) Did the District Court err by granting Summary Judgment to Defendant Bart and Alane McKnight?
 - b) Did the District Court err by granting Summary Judgment to Defendant Duro-Bilt?
 - c) Did the District Court err by failing to grant Goodman's Motion for Partial Summary Judgment on liability?
 - d) Did the District Court err by awarding attorney's fees to Defendants?
 - e) Did the District Court err by failing to grant Defendant's Motion for Entry of Judgment filed June 1, 2007?
 - f) Did the District Court err by failing to grant Plaintiff's Motion for Entry of Judgment filed on October 16, 2007?
4. A reporter's transcript of the following hearings is requested:
 - a) Defendant's Motion for Summary Judgment and Motion to Dismiss heard on September 5, 2006;
 - b) Plaintiff's Motion for Summary Judgment on Issues of Liability heard on October 2, 2006;

- c) Plaintiff's Second Motion for Summary Judgment heard on January 25, 2007; and,
 - d) Plaintiff's Motion for Entry of Judgment heard on November 5, 2007.
5. The Appellant requests the clerk's record be prepared to include in addition to those documents automatically included under Rule 28 I.A.R. the briefs and affidavits of the parties relating to the Motion for Entry of Judgment and Motion for Reconsideration, specifically the following:
- a) Complaint & Demand for Jury Trial, filed 09/19/05;
 - b) Answer, filed 10/12/05;
 - c) Memorandum in Support of Defendants' Motion for Summary Judgment and Motion to Dismiss, filed 06/16/06;
 - d) Defendant's Motion for Summary Judgment and Motion to Dismiss, filed 07/03/06;
 - e) Plaintiff's Motion for Summary Judgment on Issues of Liability, filed 08/22/06;
 - f) Plaintiff's Brief in Response to Defendant's Motion for Summary Judgment and Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment on Issues of Liability; filed 08/22/06;
 - g) Affidavit of Jon M. Steele in Support of Motion for Summary Judgment on Issues of Liability, filed 08/22/06;
 - h) Order of Dismissal of Bart and Alane McKnight, filed 09/22/06;

- i) Brief in Response to Defendants' Motion for Summary Judgment and Motion to Dismiss and in Support of Plaintiff's Motion for Summary Judgment on Issues of Liability, filed 09/22/06;
- j) Goodman's Motion for Reconsideration of Order Dismissing McKnight Individually, filed 10/04/06;
- k) Brief in Support of Goodman's Motion for Reconsideration of Order Dismissing McKnight Individually, filed 10/04/06;
- l) Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Order Dismissing McKnight Individually, filed 10/04/06;
- m) Second Affidavit of Tammy A. Zokan, filed 10/10/06;
- n) Defendant's Response in Objection to Plaintiff's Motion for Summary Judgment, filed 10/10/06;
- o) Defendants' Response in Objection to Plaintiff's Motion for Reconsideration, filed 10/16/06;
- p) Goodman's Reply Brief, filed 10/16/06;
- q) Order, filed 11/07/06;
- r) Memorandum in Support of Defendant's Second Motion for Summary Judgment, filed 12/27/06;
- s) Affidavit of Tammy Zokan in Support of Defendant's Second Motion for Summary Judgment, filed 12/27/06;
- t) Plaintiff's Brief in Response to Defendant's Second Motion for Summary Judgment, filed 01/11/07;

- u) Defendant's Reply Brief in Support of Defendant's Second Motion for Summary Judgment, filed 01/18/07;
- v) Order, filed 02/09/07;
- w) Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, filed 02/23/07;
- x) Plaintiff's Brief in Support of Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, filed 02/23/07;
- y) Affidavit of Jon M. Steele in Support of Goodman's Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, filed 02/23/07;
- z) Defendants' Response in Objection to Plaintiff's February Motion for Reconsideration, filed 03/02/07;
- aa) Objection to Motion to Strike and Reply Memorandum to Defendant's Response Memorandum in Support of Memorandum of Attorney Fees and Costs and Replies to Defendant's Response in Objection to Plaintiff's Feb 23, 2007 Motion for Reconsideration, filed 03/12/07;
- bb) Affidavit of Jon M. Steele in Support of Objection to Motion to Strike and Reply Memorandum to Defendant's Response Memorandum in Support of Memorandum of Attorneys Fees and Costs and Replies to Defendant's Response in Objection to Plaintiff's Feb. 23, 2007 Motion for Reconsideration, filed 03/12/07;
- cc) Order, filed 03/28/07;

- dd) Brief in Support of Goodman's Second Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, filed 05/14/07;
- ee) Goodman's Second Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, filed 05/14/07;
- ff) Affidavit of Jon M. Steele in Support of Goodman's Second Motion for Reconsideration of Order Granting Defendant's Second Motion for Summary Judgment, filed 05/14/07;
- gg) Order, filed 05/16/07;
- hh) Defendants' Motion for Entry of Judgment, filed 06/01/07;
- ii) Affidavit of Tammy A. Zokan, filed 06/01/07;
- jj) Notice of Hearing, filed 06/01/07;
- kk) Motion to Strike, filed 06/01/07;
- ll) Defendants' Memorandum in Support of Their Motion to Strike and Response in Objection to Plaintiff's Second Motion for Reconsideration, filed 06/01/07;
- mm) Plaintiff's Notice of Withdrawal of Second Motion for Reconsideration, filed 07/06/07;
- nn) Order for Attorney Fees and Costs, filed 07/27/07;
- oo) Plaintiff's Motion for Entry of Judgment, filed 10/16/07;
- pp) Plaintiff's Brief in Support of Plaintiff's Motion for Entry of Judgment, filed 10/16/07;

- qq) Affidavit of Jon M. Steele in Support of Motion for Entry of Judgment, filed 10/16/07;
- rr) Defendants' Memorandum in Support of Their Motion to Strike and Response in Objection to Plaintiff's Motion for Entry of Judgment, filed 10/24/07;
- ss) Defendants' Motion to Strike Plaintiff's Motion for Entry of Judgment, filed 10/24/07;
- tt) Affidavit of Tammy Zokan, filed 10/24/07;
- uu) Plaintiff's Rep to Defendant's Memo in Support & Reply to Defendant's Rep in Objection to Plaintiff's Motion for Entry of Judgment, filed 10/29/07;
- vv) Defendants' Reply to Plaintiff's Response/Reply Filed October 29, 2007, filed 10/30/07;
- ww) 2nd Affidavit of Zokan in Support of Defendants' Motion to Strike and Objection to Plaintiffs' Motion for Entry of Judgment, filed 10/30/07;
- xx) Order, filed 11/15/07.


6. I certify that:

- a) That a copy of this Notice of Appeal has been served on the reporter;
- b) That the Clerk of the District Court has been paid the filing fee;
- c) That the Clerk of the District Court has been paid the estimated fee for preparation of the clerk's record;
- d) That the Appellate filing fee has been paid; and

e) That Service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 19th day of November 2007.

RUNFT & STEELE LAW OFFICE, PLLC

By: 

JON M. STEELE
Attorney for the Plaintiff/Appellant

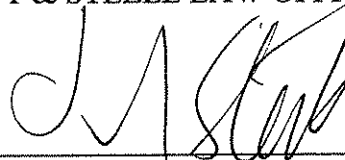
CERTIFICATE OF SERVICE

The undersigned hereby certified that on this 12th day of November 2007, a true and correct copy of the **NOTICE OF APPEAL** was served upon opposing counsel as follows:

Tammy Zokan
Moore Smith Buxton & Turke, Chtd.
950 W. Bannock, Suite 520
Boise, ID 83702

US Mail
 Personal Delivery
 Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: 

JON M. STEELE
Attorney for Appellant

In the Supreme Court of the State of Idaho ¹⁶³⁰ ~~of Idaho~~ ^D P.M.

FEB 12 2008

GOODMAN OIL COMPANY,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 SCOTTY'S DURO-BILT GENERATOR, INC.,)
 an Idaho corporation; BART and ALANE MC)
 KNIGHT, husband and wife; and DOES I)
 through V,)
)
 Defendants-Respondents.)

CANYON COUNTY CLERK
 T RANDALL, DEPUTY
 ORDER DENYING MOTION
 TO CONSOLIDATE
 Supreme Court Docket No. 34797
 Canyon County Case No. 05-9800
 Ref. No. 07S-330

A MOTION TO CONSOLIDATE and AFFIDAVIT IN SUPPORT OF MOTION TO CONSOLIDATE were filed by counsel for Appellant December 18, 2007. Thereafter, a BRIEF IN OBJECTION TO APPELLANT'S MOTION TO CONSOLIDATE with attachments was filed by counsel for Respondents December 31, 2007. Subsequently, a REPLY TO OBJECTION TO MOTION TO CONSOLIDATE was filed by counsel for Appellant January 14, 2008. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Appellant's MOTION TO CONSOLIDATE be, and hereby is, DENIED as moot.

DATED this 7th day of February 2008.

By Order of the Supreme Court

Stephen W. Kenyon
 Stephen W. Kenyon, Clerk

cc: Counsel of Record

000428

In the Supreme Court of the State of Idaho E D
1130 A.M. P.M.

FEB 12 2008

GOODMAN OIL COMPANY,)
)
Plaintiff-Appellant,)
)
v.)
)
SCOTTY'S DURO-BILT GENERATOR, INC., an)
Idaho corporation; BART and ALANE MC)
KNIGHT, husband and wife; and DOES I through)
V,)
)
Defendants-Respondents.)

CANYON COUNTY CLERK
T. RANDALL, DEPUTY
ORDER GRANTING MOTION
TO DISMISS APPEAL

Supreme Court Docket No. 34797
Canyon County Case No. 05-9800
Ref. No. 07S-330

A MOTION TO SUSPEND AND MOTION TO DISMISS OF RESPONDENTS BART AND ALANE MCKNIGHT AND SCOTTY'S DURO-BILT GENERATOR, INC. and BRIEF IN SUPPORT OF MOTION TO SUSPEND AND MOTION TO DISMISS OF RESPONDENTS BART AND ALANE MCKNIGHT AND SCOTTY'S DURO-BILT GENERATOR, INC. with attachments were filed by counsel for Respondents December 5, 2007. Thereafter, a RESPONSE TO MOTION TO SUSPEND AND MOTION TO DISMISS OF RESPONDENTS BART AND ALANE MCKNIGHT AND SCOTTY'S DURO-BILT GENERATOR, INC. was filed by counsel for Appellant December 18, 2007. The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that the MOTION TO DISMISS OF RESPONDENTS BART AND ALANE MCKNIGHT AND SCOTTY'S DURO-BILT GENERATOR, INC. be, and hereby is, GRANTED and this appeal is DISMISSED.

IT FURTHER IS ORDERED that the MOTION TO SUSPEND OF RESPONDENTS BART AND ALANE MCKNIGHT AND SCOTTY'S DURO-BILT GENERATOR, INC. be, and hereby is, DENIED as moot.

DATED this 7th day of February 2008.

By Order of the Supreme Court

Stephen W. Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Carole Bull
District Judge Renae J. Hoff

000429

In the Supreme Court of the State of Idaho

FILED
115 A.M. P.M.

APR 22 2008

GOODMAN OIL COMPANY,)
)
 Plaintiff-Appellant,)
)
 v.)
)
 SCOTTY'S DURO-BILT GENERATOR, INC.,)
 an Idaho corporation; BART and ALANE MC)
 KNIGHT, husband and wife; and DOES I)
 through V,)
)
 Defendants-Respondents.)

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

ORDER

Supreme Court Docket No. 34797
 Canyon County Case No. 05-9800
 Ref. No. 07S-330

A MEMORANDUM OF COSTS AND ATTORNEY FEES, AFFIDAVIT OF TAMMY A. ZOKAN IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEY FEES with attachment, and BRIEF IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEY FEES were filed by counsel for Respondents on February 19, 2008. A MOTION FOR RECONSIDERATION and BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION were filed by counsel for Appellant on February 20, 2008. Thereafter, an OBJECTION TO APPELLANT'S MOTION FOR RECONSIDERATION was filed by counsel for Respondents on February 29, 2008. Subsequently, an OBJECTION TO RESPONDENT'S MEMORANDUM FOR FEES AND COSTS was filed by counsel for Appellant on March 4, 2008.

The Court is fully advised; therefore, good cause appearing,

IT IS ORDERED that Appellant's MOTION FOR RECONSIDERATION is GRANTED AND THE APPEAL SHALL PROCEED.

IT IS FURTHER ORDERED that Respondent's MEMORANDUM OF COSTS AND ATTORNEY FEES is DENIED AND THE DISTRICT COURT SHALL PREPARE AND FILE THE CLERK'S RECORD AND REPORTER'S TRANSCRIPTS WITH THE SUPREME COURT WITHIN SIXTY-FIVE (65) DAYS FROM THE DATE OF THIS ORDER.

IT IS FURTHER ORDERED that BRIEFING WILL BE SET WHEN THE CLERK'S RECORD AND REPORTER'S TRANSCRIPTS ARE FILED WITH THIS COURT, AND THE FIRST ISSUE TO BE ADDRESSED BY THE PARTIES IS WHETHER THE NOTICE OF APPEAL WAS TIMELY FILED.

000430

DATED this 17th day of April, 2008.

By Order of the Supreme Court

Stephen W. Kenyon
Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
Court Reporter Carole A. Bull

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff-Appellant,	)	Case No. CV-05-09800*C
)	
-vs-	)	CERTIFICATE OF EXHIBITS
)	
SCOTTY'S DURO-BILT GENERATOR,)	
INC., etal.,)	
)	
Defendants-Respondents.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the following is being sent as an exhibit because of it's volume:

Affidavit of Jon M. Steele in Support of Motion for Summary Judgment on Issues of Liabiltiy, Filed 8-22-06

The following is also being sent as an exhibit as requested in the Notice of Appeal:

Memorandum in Support of Defendants' Motion for Summary Judgment and Motion to Dismiss, Lodged 6-16-06

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15 day of August, 2008.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By:  Deputy

CERTIFICATE OF EXHIBITS

000432

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)	
)	
Plaintiff-Appellant,	)	Case No. CV-05-09800*C
)	
-vs-	)	CERTIFICATE OF CLERK
)	
SCOTTY'S DURO-BILT GENERATOR, INC.,)	
etal,)	
)	
Defendants-Respondents.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including specific documents as requested in the Notice of Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15 day of August, 2008.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *Heideman* Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GOODMAN OIL COMPANY,)
)
Plaintiff-Appellant,) Supreme Court No. 34797
)
-vs-) CERTIFICATE OF SERVICE
)
SCOTTY'S DURO-BILT GENERATOR, INC.,)
etal.,)
)
Defendants-Respondents.)

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

Jon M. Steele and Karl J. Runft, RUNFT & STEELE LAW OFFICES, PLLC,
1020 W. Main St, Suite 400, Boise, ID 83702

Susan E. Buxton and Tammy A. Zokan, MOORE SMITH BUXTON & TURCKE,
CHARTERED, 950 W. Bannock St, Suite 520, Boise, ID 83702

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 15 day of August, 2008.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *J. Heidemman* Deputy

CERTIFICATE OF SERVICE

000434