11-18-2011

Duspiva v. Fillmore Clerk's Record v. 2 Dckt. 38480

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Vol 2 of 6

(VOLUME II)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT,

Plaintiff-Appellant,

-vs-

CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual,

Defendants-Respondents.

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

Honorable THOMAS J. RYAN, District Judge

Daniel V. Steenson
Jon C. Gould
RINGERT LAW CHTD.

Attorneys for Appellant

Bruce M. Smith
MOORE SMITH BUXTON & TURCKE, CHTD.

Attorney for Respondents

38480

IN THE SUPREME COURT OF THE

STATE OF IDAHO

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff-Appellant, -vs- CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants-Respondents.	)	Supreme Court No. 38480

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE THOMAS J. RYAN, Presiding

Daniel V. Steenson and Jon C. Gould, RINGERT LAW CHTD.,
P. O. Box 2773, Boise, Idaho 83701-2773

Attorneys for Appellant

Bruce M. Smith, MOORE SMITH BUXTON & TURCKE, CHTD.,
950 W. Bannock St., Ste. 520, Boise, Idaho 83702

Attorney for Respondents

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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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendant.	Case No. CV 08-10463 **SECOND AFFIDAVIT OF GARY DUSPIVA**

STATE OF IDAHO)
) ss.
County of ADA)

Gary Duspiva, being first duly sworn upon his oath, deposes and says that:

1. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.

2. IDWR did not require any additional work to complete the Enochs LTG Well or the Rohn LTG Well so no additional charges were incurred by the well owners.

3. The Riggs LTG Well did require an additional formation seal.

4. I completed the additional seal for a charge of $2,500.

5. IDWR did not require a bond for the Enochs, Rohn or Riggs wells.

6. IDWR has never required Mr. Duspiva's or one of his customers to post a bond.

7. I was unaware of the possibility of significant costs to complete a LTG well.

Further your affiant sayeth naught.

DATED this 8 day of July, 2010.

Gary Duspiva

STATE OF IDAHO)
)ss.
County of Ada)

On this 8 day of July, 2010, before me, the undersigned, a notary public in and for said state, personally appeared Gary Duspiva, known to me to be the individual that executed the foregoing affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

KORTNEY D. BROWN NOTARY PUBLIC STATE OF IDAHO

Notary Public for Boise ID
Residing at Boise ID
My Commission Expires: 2/4/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of July, 2010, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Bruce Smith
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock Street, Suite 520
Boise, Idaho 83702

( ) U.S. Mail, Postage Prepaid
(X) Hand Delivery
( ) Overnight Mail
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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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendant.	Case No. CV 08-10463 **AFFIDAVIT OF SCHUYLER ENOCHS**

STATE OF IDAHO)
) ss.
County of Canyon)

Schuyler Enochs, being first duly sworn upon oath, deposes and says:

1. My name is Schuyler Enochs. I am an adult over the age of 18 years and I am of sound mind. I make the following statements based on my own personal knowledge.

3. Prior to initiating drilling, Mr. Duspiva informed me of the price for his drilling service and the costs to complete the well.

4. Mr. Duspiva charged me $20.00 per foot to drill to a depth of 400 feet with an increase of $1.00 per foot for every 100 feet after the 400 foot depth for cased well. The cased portion of the well is from 0 to 854 feet below ground surface.

5. Mr. Duspiva charged me $12.00 per foot to drill to a depth of 400 feet with an increase of $1.00 per foot for every 100 feet after the 400 foot depth for uncased well. The uncased portion of the well is from 854 to 865 feet below ground surface.

6. Mr. Duspiva charged me for drive shoe, well cap, well permit, air development, and sealing the well.

7. Prior to drilling, Mr. Duspiva told me that he would not guarantee the quality or quantity, if any, of water resulting from his services.

8. Mr. Duspiva informed me that he did not set screens when constructing wells.

9. Mr. Duspiva informed me that for a well to be satisfactorily developed it must produce less than one pinch of sand per five gallons of water.

10. I have not had any issues with the well Mr. Duspiva provided me.

11. I use the water from this well for domestic purposes.

12. The receipt I received from Mr. Duspiva for his drilling services shows all charges, shows the total drilling depth, and the temperature of 86.2 degrees and bottom temperature of 88 degrees.

13. The total cost for the well was $21,595.00, which I paid to Gary Duspiva.

11. I use the water from this well for domestic purposes.

12. The receipt I received from Mr. Duspiva for his drilling services shows all charges, shows the total drilling depth, and the temperature of 86.2 degrees with a bottom temperature of 88 degrees.

13. The total cost for the well was $21,595.00, which I paid to Gary Duspiva.

14. Neither Gary Duspiva nor the Department of Water Resources required any additional charges, costs or bonds for this well.

DATED this 22 day of June, 2010.

Schuyler Enochs

Schuyler Enochs

SUBSCRIBED AND SWORN to before me this 22 day of June, 2010.

Notary Public for State of Idaho
Residing at Boise
My commission expires: 11/4/2010

JOINT COURT NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of July, 2010, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Bruce Smith
Moore Smith Buxton & Turcke, Chtd.
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Jon Q. Gould

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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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendant.	Case No. CV 08-10463 **AFFIDAVIT OF RON SMITH**

STATE OF IDAHO)
) ss.
County of Canyon)

Ron Smith, being first duly sworn upon oath, deposes and says:

1. My name is Ron Smith. I am an adult over the age of 18 years and I am of sound mind. I make the following statements based on my own personal knowledge.

3. I have always found Mr. Duspiva to work in a professional manner.

4. Prior to initiating drilling for me, Mr. Duspiva informed me of the services he would provide including the price for his drilling services and the costs to would be incurred.

5. Mr. Duspiva informed me that his drilling rate was based on a charge per foot drilled with the rate increasing at 400 feet with an rate increase of an additional $1.00 per foot for every 100 feet after the 400 foot depth for cased well.

6. Mr. Duspiva informed me that the charge for the cased portion of the well was different rate for the uncased portion of the well.

7. Mr. Duspiva also informed me that there I would be charged me for the drive shoe, well cap, well permit, each air development, and sealing the well for each well.

8. Prior to drilling, Mr. Duspiva told me that he would not guarantee the quality or quantity of water resulting from the wells he drilled.

9. Mr. Duspiva informed me that he did not set screens when constructing wells.

10. Mr. Duspiva informed me that for a well to be considered satisfactory for completion that the developed well must produce less than one pinch of sand per five gallons of water.

11. Mr. Duspiva never refused to discuss his drilling services or the status of his work with me.

DATED this _____ day of June, 2010.

DATED this 22 day of June, 2010.

Ron Smith

Ron Smith

SUBSCRIBED AND SWORN to before me this ___ day of June, 2010.

J. Gould

Notary Public for State of Idaho
Residing at Boise
My commission expires: 11/4/2010

JON C. GOULD NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of ~~June~~ July, 2010, a true and correct copy of the foregoing was served upon all parties listed below by:

( ) U. S. mail, postage prepaid	( ) express mail
(X) hand delivery	( ) facsimile

Bruce M. Smith
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock Street, Suite 520
Boise, Idaho 83702

J. Gould

Jon C. Gould

7-22 Ryan

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Attorney for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants.	Case No. CV08-10463 **DEFENDANTS' WITNESS LIST**

COME NOW, Defendants Clyde Fillmore and John Fillmore, by and through their attorneys of record, Moore Smith Buxton & Turcke, Chartered, and hereby submits its Witness List identifying the expected witnesses anticipated to be called at the trial in the above-entitled matter. Defendants do not anticipate calling rebuttal or impeachment witnesses at this time, but Defendants reserve the right to impeach and or provide rebuttal testimony should the trial proceedings precipitate such need.

1. John Fillmore
   23252 Homedale Road
   Wilder, ID 83676
   Phone: (208) 337-5737

2. Clyde Fillmore
   23252 Homedale Road
   Wilder, ID 83676
   Phone: (208) 337-5737

3. Tom Neace
   IDWR
   322 East Front Street
   PO Box 83720
   Boise, Idaho 83720-0098
   Phone: (208) 287-4800

4. Ed Squires
   Hydro Logic
   988 Longmont Avenue
   Boise, ID 83706
   Phone: (208) 342-8369

5. Rob Whitney
   IDWR Western Region
   2735 Airport Way
   Boise, ID 83705-5082
   Phone: (208) 334-2190

6. Tony Hackett
   Down Right Drilling
   6025 Little Freezeout Rd
   Caldwell, Idaho 83607-7420
   Phone: (208) 454-3098

7. Chris Duncan
   10020 W. Stardust Dr.
   Boise, ID 83709
   Phone: (208) 631-8160

8. Gary Duspiva

9. Any witnesses identified or called by Plaintiff.

Respectfully submitted this 15 day of July, 2010.

MOORE SMITH BUXTON & TURCKE,
CHARTERED

BRUCE M. SMITH
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of July, 2010, a true and correct copy of the foregoing **DEFENDANTS' WITNESS LIST** was served upon the following by the method indicated below:

Jon C. Gould
RINGERT LAW CHARTERED
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

Facsimile: (208) 342-4657

✓ via U.S. MAIL
____ via HAND DELIVERY
____ via OVERNIGHT MAIL
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BRUCE M. SMITH

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Attorney for Defendant

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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT

Plaintiff,

vs.

CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual,

Defendants.

Case No. CV08-10463

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE DEFENDANTS' EXPERT WITNESSES

COME NOW Defendants/Counterclaimants Clyde Fillmore and John Fillmore (Fillmores) and respond to Plaintiff's Motion to Exclude Defendants' Expert Witnesses. Plaintiff misinterprets I.R.C.P. 26(b)(4). Section (4) of I.R.C.P. 26(b) does not require the disclosure of expert opinion but rather allows the use of depositions or interrogatory to ascertain opinions. Defendants timely disclosed to Plaintiff pursuant to the Court's order those experts they intend to use at trial. Both Mr. Squires and Mr. Hackett are familiar to the Plaintiff, a Master Ground Water Contractor. Mr. Whitney is an employee of IDWR who is familiar to Plaintiff and is also

on the Plaintiff's witness list. Plaintiff has had ample time to depose these experts pursuant to I.R.C.P. 26(b)(4) and has chosen not to do so. Plaintiff's efforts to prohibit the testimony of experts is a thinly veiled effort to avoid the ramifications of Plaintiff's failure to timely identify any experts in compliance with the Court's order. Plaintiff's efforts to exclude testimony by experts is consistent with Plaintiff's other efforts to exclude as much evidence as possible.

CONCLUSION

Plaintiff has known the identity of the experts for months. The objections by Plaintiff are not well taken and constitute an effort to restrict testimony regarding agency reports and public records. The motion should be denied.

Respectfully Submitted this 30 day of July, 2010.

MOORE SMITH BUXTON & TURCKE, CHARTERED

Bruce M. Smith
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 30 day of July, 2010, a true and correct copy of the foregoing **DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO MOTION IN LIMINE TO EXCLUDE DEFENDANTS' EXPERT WITNESSES** was served upon the following by the method indicated below:

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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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendant.	Case No. CV 08-10463 **PLAINTIFF'S CLOSING ARGUMENT**

COMES NOW, the Plaintiff in this proceeding, Gary Duspiva, by and through his attorneys of record, Ringert Law Chartered, and hereby submits his Closing Argument in this matter.

I. INTRODUCTION

This is a breach of contract case with counterclaims alleging that there was no contract between the parties, Fillmores are entitled to equitable relief, and the Plaintiff, Mr. Duspiva, violated the Consumer Protection Act while providing his services for the Defendants, Clyde and John Fillmore. A three-day trial was held on August 23-25, 2010. At the trial, in addition to the parties, Rob Whitney, Tom Neace, Ed Squires, Dr. Enochs, and Ron Smith testified.

During the trial it was undisputed Mr. Duspiva was retained by the Fillmores to construct a well. Mr. Duspiva performed drilling services under the contract under the direction and authorization of Clyde and John Fillmore. The Fillmores partially performed under the contract by making two $10,000.00 payments to Mr. Duspiva on or about August 3, 2007, and September 13, 2007, respectively. The cost of Mr. Duspiva's services exceed the payments made by the Fillmores. The Fillmores owe Mr. Duspiva $30,665.00 for services he provided under the contract between June 12, 2007 and October 10, 2007. (See Plaintiff's Exh. 15).

II. THE PARTIES

Plaintiff, Mr. Duspiva, is a well driller holding Idaho driller's license no. 395. Mr. Duspiva obtained his driller's license in 1981. Since that time, Mr. Duspiva has drilled and completed 342 wells. Mr. Duspiva is also a Master Ground Water Contractor (MGWC). The MGWC designation is the highest level of certification and is reserved for those who have demonstrated exceptional knowledge in both water well construction and pump installation by passing additional rigorous testing and having a worked a minimum of five years full-time in the industry. There are only 80 MGWC's in the United States. Mr. Duspiva is the only licensed driller in Idaho to ever hold the MGWC designation. Additionally, Mr. Duspiva is the past president of the Idaho Ground Water Association and continues to be a member of its continuing education program. Mr. Duspiva has received more than 300 hours of NGWA approved continuing education credits. He is also on the legislative committee for the Idaho Water Users Association.

Defendants, Clyde and John Fillmore, are father and son, respectively. Mr. Duspiva and Clyde Fillmore have known each other for many years. Clyde had seen Mr. Duspiva drilling wells

where Clyde had worked. Clyde knew Mr. Duspiva was a cable tool driller. When Clyde needed a well for his son's new home, Clyde asked Dale Dixon for a recommendation. Mr. Dixon recommended Mr. Duspiva. Clyde then asked Mr. Duspiva to drill a well for John and Clyde.

III. PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT

Generally, the inquiry by the trier of fact into an alleged oral agreement is three-fold: first, determining whether the agreement exists; second, interpreting the terms of the agreement; and third, construing the agreement for its intended legal effect." *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 823 (2001) citing *Bischoff v. Quong-Watkins Props.*, 113 Idaho 826, 828, 748 P.2d 410, 412 (Ct. App. 1987). Clyde Fillmore made an offer to Mr. Duspiva to have Mr. Duspiva drill a well for John Fillmore. Mr. Duspiva accepted the offer. The parties do not contest, and the evidence presented at trial establishes, that an agreement existed for Mr. Duspiva to drill a well for the Fillmores.

A. Terms of the Agreement

Mr. Duspiva agreed to perform well drilling services and Clyde Fillmore agreed to pay for the drilling services. Mr. Duspiva testified that he informed both Clyde and John of the his drilling rates and provided Clyde Fillmore with a business card that listed the costs of all his drilling services to be provided on the back of the card. Mr. Duspiva's testimony explaining his costs for his drilling services to Clyde Fillmore prior to initiating drilling is consistent with the testimony of former customers Dr. Enochs and Mr. Smith regarding information Mr. Duspiva provided to them before he initiated drilling for them. (See affidavit testimony of Dr. Enochs and Ron Smith).

At trial, Clyde could not remember receiving Mr. Duspiva's business card with Duspiva's drilling costs and rates. Clyde did not remember meeting with Mr. Duspiva on June 11, 2007. Clyde did not remember if he was present when John Fillmore and Mr. Duspiva executed the start card permit. However, Clyde did recall that there were some discussions defining the terms and conditions of Mr. Duspiva's drilling services for the Fillmores. Clyde recalled that Mr. Duspiva informed him that drilling costs included a rate of $32.50 per foot and that there were incidental charges. Clyde recalled Mr. Duspiva telling him there was a charge for the permit, a charge for a drive shoe, and a charge for a well cap.

C. Performance By Duspiva

Under the agreement, Mr. Duspiva was to drill a well for the Fillmores. Mr. Duspiva initiated his drilling services on or about June 12, 2007 in accordance with the agreement and a start card drilling permit issued by the Idaho Department of Water Resources ("IDWR"). The drilling location was adjacent to and in plain view of Clyde Fillmore's driveway. While drilling, Mr. Duspiva attempted to develop every potential water bearing layer encountered in order to complete the well. At the end of each development activity, Mr. Duspiva advised Clyde of the results of the development including the drilling depth, the volume of sand per 5 gallons of water, the quality and quantity of water from the layer, and lastly, made a recommendation to Clyde on whether to complete the well or continue drilling.[1] After each meeting to discuss development results, Clyde

[1]Duspiva testified that he developed each potential water bearing layer encountered including layers at depths of 320, 360, 465, 580, 642, and 701. According to the well driller's report, (Plaintiff's Exh. 13), Duspiva also encountered water bearing layers at depths of 942 and 1,115 as well. This is consistent with John Fillmore's testimony regarding the number of meetings Duspiva had to discuss development results "eight, ten, somewhere in that neighborhood."

directed Mr. Duspiva to continue drilling until the final development occurred at the layer encountered at the depth of 1,115 feet and drilling was completed.

On or about August 8, 2007, Mr. Duspiva drilled to a depth of 836 feet. Mr. Duspiva measured a soil cuttings temperature of 92.5 degrees Fahrenheit. However, Mr. Duspiva had not encountered any water bearing layers below the depth of 701 feet. (See Plaintiff's Exh. 13). Mr. Duspiva developed the water bearing layer at a depth of 701 feet for 8.5 hours. Mr. Duspiva then measured a bottom hole temperature ("BHT") of 73 degrees Fahrenheit. Mr. Duspiva provided Clyde with the results from the development.[2] Mr. Duspiva informed Clyde that if drilling was going to continue, IDWR would need to be contacted because low temperature geothermal ("LTG") conditions had been encountered. Mr. Duspiva gave Clyde the option of perforating the casing at an upper water bearing layer (642 feet bgs), knowing that if the layer collapsed the well would be ruined or drill deeper which would require Mr. Duspiva to contact IDWR. Clyde Fillmore then instructed Mr. Duspiva to continue drilling.

On or about August 8, 2007, Mr. Duspiva contacted IDWR agent Rob Whitney to inform IDWR that LTG conditions were encountered and Mr. Duspiva wanted to continue drilling to complete the well. Rob Whitney informed Mr. Duspiva that a long form drilling permit application for a LTG well and prospectus must be submitted to continue drilling.[3] The long form permit was necessary because the well would be completed as a LTG well and the start card permit was not valid for completing a LTG well.

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[2]After 8.5 hours of development, this zone produced 1/4 cup of sand per five gallons of water. The water was blue in color and contained floating sand. The temperature of the water be discharged was 73 degrees F.

[3]Mr. Whitney testified that the start card drilling permit became invalid when LTG conditions were encountered and a new drilling permit was necessary to continue drilling.

On August 9, Mr. Duspiva relayed the information received from IDWR to Clyde Fillmore. Mr. Duspiva also provided Clyde with an itemized bill for Mr. Duspiva's services to date totaling $32,191.00. (See Plaintiff's Exh. 3). On August 16, 2007, John Fillmore reviewed and executed the long form permit application for a LTG well. Mr. Duspiva submitted the application to IDWR. IDWR received and approved the long form permit application on August 20, 2007. Rob Whitney informed Mr. Duspiva that he could continue drilling.

Mr. Duspiva then resumed drilling. Ultimately, Mr. Duspiva advanced the casing and set the drive shoe at a depth of 1,087.5 feet and successfully developed a water layer at a depth from 1115 to 1130 feet. (See Plaintiff's Exh. 13). Mr. Duspiva completed drilling on or about September 26, 2007.

Mr. Duspiva recommended test pumping the well and Clyde agreed. Clyde arranged to have Idaho Power provide a power source and hire Dale Dickson to assist with the pump test. Mr. Duspiva conducted a pump test with Dale Dickson beginning on September 30, 2007.

At this point, a satisfactory water bearing layer was established, and the drilling and development activities were completed. From June 12 until October 10, 2007, Mr. Duspiva was on the Fillmore property nearly every day either drilling or developing. At no time did Mr. Duspiva ever refuse to provide the Fillmores with information. At no time did the Fillmores ever instruct or direct Mr. Duspiva to stop working. In fact, from June 11, 2007 through the completion of the pump test in October, 2007, the Fillmores continued to cooperate with Mr. Duspiva to complete the well.

Mr. Duspiva performed his services in a workman like manner. At no time during the contractual period did the Fillmores ever question or complain of the service provided by Mr. Duspiva.

D. Performance by Fillmores

Under the agreement, Clyde Fillmore was to pay Mr. Duspiva for his drilling services. At no time did either Clyde or John Fillmore instruct or request Mr. Duspiva to stop performing under the agreement.

On August 2 or 3, 2007, Clyde Fillmore hand delivered a check for $10,000.00 to Mr. Duspiva for his drilling services under the contract. Clyde testified that the two of them probably had conversation but he doesn't remember. At some point prior to August 9, 2007, Clyde requested that Mr. Duspiva provide him with an invoice or an accounting of the cost of Duspiva's drilling services to date. On August 9, 2007, Mr. Duspiva provided Clyde Fillmore with an itemized invoice of all charges to date. (See Plaintiff's Exhibit 3). Neither Clyde nor John Fillmore questioned or disputed any of the charges. In fact Clyde testified as to each charge on the invoice, including having knowledge of the air development charges. Clyde testified that after he received the invoice he instructed Mr. Duspiva to continue drilling.

On August 16, 2007, John Fillmore and Gary Duspiva executed a long form permit application to complete a LTG well. (See Plaintiff's Exh. 6). John Fillmore reviewed the permit application. The permit application stated that the proposed maximum depth would be greater than 1,000 feet with a water temperature between 85 and 212 degrees and that Mr. Duspiva was the driller.

On or about September 13, 2007, Clyde made a second $10,000.00 payment to Mr. Duspiva for his drilling services. This payment was made after Clyde Fillmorereceived the itemized invoice from Mr. Duspiva and had knowledge that the well would be completed as a LTG well.

In late September, 2007, on Mr. Duspiva's request, Clyde Fillmore arranged for Idaho Power to supply a power source so that Mr. Duspiva could conduct a long term pump test on the well. Clyde Fillmore retained Dale Dixon to assist Mr. Duspiva with the pump test. Clyde Fillmore always instructed Mr. Duspiva to keep drilling.

E. Implied Assent and Ratification of the Terms of the Agreement

Any conflict in the evidence regarding the costs of Mr. Duspiva's services became irrelevant when Mr. Duspiva, upon Clyde Fillmores request, provided Clyde with an itemized invoice of all charges. Ratification results where the party entering into the contract intentionally accepts its benefits, remains silent, or acquiesces in it after an opportunity to avoid it, or recognizes its validity by acting upon it. *Clearwater Constr. & Eng'g v. Wickes Forest Indus.*, 108 Idaho 132, 135 (1985); see Annot., 77 A.L.R.2d 426, 428 (1961) and cases cited therein. *See also* Restatement (Second) of Contracts §§ 380, 381 (1981).

On August 9, 2007, Mr. Duspiva provided Clyde with a detailed invoice of all charges for Gary's services to date. (See Plaintiff's Exh. 3). Clyde Fillmore testified as to every charge on the invoice and the depths at which those charges were incurred. The invoice also made it clear that Clyde Fillmore was being charged for development and that the drilling rate increased with depth. Clyde never disputed the charges on the invoice. He never contested the charges or stated that he did not agree to pay the charges.

The evidence establishes that Clyde Fillmore ratified the costs and fees sought by Duspiva when he (1) received an invoice he requested without disputing or questioning the charges even though the charges differed from his alleged understanding of the agreement, (2) subsequently authorized and instructed Mr. Duspiva to continue drilling, (3) made a subsequent payment of $10,000.00 for Duspiva's drilling services, and (4) lastly, upon Mr. Duspiva's request, procured a power source for an extended pump test on the well and retained a pump man to assist Mr. Duspiva with the pump test. From August 9, 2007 until Mr. Duspiva completed work on October 10, 2007, Mr. Fillmore had full knowledge of the services for which Mr. Duspiva was charging him and the costs of those services.

Assuming that Mr. Duspiva did not provide Clyde Fillmore with the complete breakdown of cost prior to initiating performance on June 12, 2007, Clyde ratified the costs incurred up to August 9, 2007 when he accepted the invoice without question and continued to act in furtherance of the agreement by instructing Duspiva to continue drilling, making payments, and satisfying Duspiva's requests. Likewise, through his statements and course of conduct, Clyde acquiesced or assented to the cost for Mr. Duspiva's drilling services.

F. Consent to Low Temperature Geothermal Well

On or about August 8, 2007, Clyde had knowledge that, if drilling continued, the well would be a low temperture geothermal well. John Fillmore had knowledge that the well would be a LTG when he executed the drilling permit application on August 16, 2007. This knowledge was confirmed when IDWR called the Fillmores to provide them with information on the consequences

and responsibilities of owning a LTG well. Still, at no point did the Fillmores ever tell Mr. Duspiva to stop performing under the agreement.

Any possible dispute about the costs for Mr. Duspiva's services or the type of well being completed was extinguished through the Fillmores acknowledgment, acquiescence and ratification of costs which Mr. Duspiva is now seeking and instructing Mr. Duspiva to proceed on drilling a LTG well.

G. Fillmores Breached the Agreement by Not Paying Duspiva

It is undisputed that Mr. Duspiva performed under the contract with the Fillmores and the cost of his services was $50,665.00. It is also undisputed that the Fillmores never told Mr. Duspiva to stop working. The Fillmores paid Mr. Duspiva $20,000.00 leaving a balance of $30,665.00 due and owing.

IV. NO JUSTIFICATION FOR BREACH - JUST EXCUSES

At trial, the Fillmores proffered numerous excuses to relieve them from their contractual obligation to Mr. Duspiva. However, the excuses proffered do not relieve the Fillmores of their payment obligation under the agreement.

A. Excuse No. 1: Lack of Information

The Fillmores assert or imply that their supposed lack of knowledge regarding the performance of Mr. Duspiva's services relieves them from their contractual obligation. However, lack of knowledge does not excuse a breach of the contract.

The evidence shows that the Fillmores knew that the services provided by Mr. Duspiva required a permit. Additionally, the Fillmores knew that completing a LTG well required a different permit. Clyde testified that the person who recommended Mr. Duspiva to him, Dale Dixon, was on his property at the site when the LTG conditions were encountered, and that he overheard Mr. Dixon say that Mr. Duspiva should contact IDWR because of the LTG conditions.

Additionally, Rob Whitney of IDWR called the Fillmores to ensure that they understood what the implications were of this LTG encounter. Mr. Duspiva provided the Fillmores with knowledge gained from years of well drilling, interacting with IDWR and completing three LTG wells for domestic use.[4]

The Fillmores knew that LTG conditions had been encountered and that the well would be completed as a LTG well. The Fillmores knew that Mr. Duspiva, Rob Whitney and Dale Dixon, the person Clyde relied upon to select Mr. Duspiva to drill his well, had knowledge and information about LTG well. With the information received, the Fillmores choose to continue drilling. There is no evidence that the Fillmores lacked the knowledge or mental capacity to enter into a binding contract.

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[4]Of the three LTG wells Gary completed, the owners incurred no additional requirements, no bonding requirements, and two of the three wells had no additional drilling costs. The Rohn Well had an increased drilling cost of $2,500.00.

B. Bottom Hole Temperature Excuse

The point at which the bottom hole temperature exceeded 85 degrees is irrelevant to this breach of contract case. On or about August 9, 2007, Clyde Fillmore instructed Duspiva to keep drilling – after being informed that if drilling continued the well would be a LTG well (a well with a BHT of greater than 85 degrees). Furthermore, John Fillmore executed an permit application for a LTG well on August 16, 2007, which was approved by IDWR. By definition, and written on the permit application itself, which John Fillmore testified that he reviewed, a LTG well has a temperature between 85 and 212 degrees. When drilling resumed on August 21,2007, as authorized by the Fillmores, any potential issue regarding BHT became irrelevant because the Fillmores knew that the well would be a LTG well. Moreover, the evidence demonstrates that Mr. Duspiva stopped drilling prior to encountering ground water with a temperature of greater than 85 degrees.[5]

1. Bottom Hole Temperature Measured by Mr. Duspiva

The bottom hole temperature of an existing or proposed well is defined in Rule 10.09, IDAPA 37.03.09 as "[t]he temperature of the **ground water encountered in the bottom of a well.**" Emphasis added. The terms 'bottom hole temperature' and 'low temperature geothermal' are not synonymous. Low temperature geothermal is the temperature of the substrate. Low temperature geothermal conditions represent conditions where the substrate temperature is greater than 85 degrees. LTG conditions can exist when there is no bottom hole temperature, such as when the

[5]Duspiva stopped drilling on August 8, 2007. At that time, the most recent BHT measurements were 72 degrees collected from bottom hole water at 642 feet bgs and 73 degrees collected from bottom hole water collected at 701 feet bgs.

substrate does not contain water. However, there are two criteria for bottom hole temperatures; (1) there must be groundwater present and (2) the water must be from the bottom of the hole.

Mr. Duspiva measured BHT after developing the water bearing layer at the bottom of the boring. During well development, water was withdrawn from the well for an extended period of time so that when Mr. Duspiva measured the BHT he was measuring the temperature of water that was representative of water at the bottom of the well.[6]

Mr. Duspiva encountered ground water in a layer between 642 and 650 feet bgs. He developed this layer for 9 hours. At the end of development, the BHT was 72 degrees Fahrenheit. Mr. Duspiva lowered the casing, set the drive shoe at 691.5 feet bgs sealing out all previously encountered in the water bearing zones and continued drilling. Mr. Duspiva then encountered ground water between 700 and 701 feet bgs. He developed this layer for 8.5 hours. At the end of development, the BHT water was 73 degrees Fahrenheit.

Mr. Duspiva did not encounter ground water between 701 and 836 feet bgs. However, Mr. Duspiva did measure clay cuttings removed from the bottom of the boring. The cuttings had a temperature of 92.5 degrees.[7] Mr. Duspiva then conducted a temperature survey of the well to obtain additional temperature data.

2. Temperature Probe Data (not bottom hole temperature)

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[6]With cable tool drilling, the casing and drive shoe prevent water from previously encountered water bearing zones from entering the boring. As pointed out by Ed Squires, cable tool drilling often requires the driller to add water to the boring to drill.

[7]Even assuming for arguments sake that the clay cuttings is a BHT and disregarding the BHT of 73 degrees measured after development, Duspiva stopped drilling at that time and contacted IDWR in compliance with condition no. 8 of the start card.

Mr. Duspiva conducted a temperature survey of the well on August 8, 2007. At that time, the well was cased to a depth of 691.5 feet, the drive shoe was set at the bottom of the casing, and the boring depth was 836 feet bgs. Mr. Duspiva collected six temperature probe measurements at 100 foot intervals beginning at a depth of 300 feet and extending 800 feet. The data is displayed on Plaintiff's Exh. 4, August 9th Schematic on the left of the hand drawn casing. Mr. Duspiva testified that he conducted this survey, after measuring BHT at a depth of 701 feet, to obtain additional temperature data.

At the time of this temperature survey, the bottom of the hole was at a depth of 836 feet. There are three critical points for the court to recognize: (1) temperature probe measurements were not collected from the bottom of the hole, (2) the temperatures were measured on August 8, 2007, and (3) the temperatures do not represent water at the bottom of the hole. While this information is irrelevant to this case, there was much confusion about Plaintiff's Exh. 4 and the temperature probe data on the exhibit. While temperature probes can be and are used to measure BHTs, as described by Mr. Squires[8], not all temperature probe measurements are BHT measurements.

C. Compliance With Rule 30, IDAPA 37.03.09

Any alleged non-compliance with Rule 30 IDAPA 37.03.09 ("Rule 30") is irrelevant in this case because there was no finding by IDWR that Mr. Duspiva violated Rule 30. Even if he had, the non-compliance does not relieve fillmores of their contractual payment obligation. Neither Mr. Duspiva nor the Fillmores have authority to enforce agency rules. Under the Idaho Code, IDWR is

[8]When measuring bottom hole temperature, we lower our thermistor down into the bottom of either the clay or the very bottom of the hole.

tasked and authorized to enforcement its agency rules. At no time did IDWR determine that Duspiva had violated Rule 30 or any other agency rule while drilling the Fillmore Well.[9]

Rule 30 deals with construction of LTG wells and bonding. (*See* Defendants' Amended Exh. I). The pertinent portions of Rule 30 as it applies to this matter are well owner bonding (Rule 30.2)[10], casing (Rule 30.3)[11], and sealing of casing (Rule 30.4)[12]. Under Rule 30, the Director of IDWR may decrease or increase the bonds, waive the casing requirement, and waive the sealing requirement. Therefore as to the requisite criteria for bonding, casing and sealing of casing for LTG wells, Rule 30 provides the Director of IDWR with absolute discretion.

In this case, IDWR approved the LTG well drilling permit on August 20, 2007. IDWR approved the completion plan for the well. Construction of the well was never completed. Compliance with the pertinent portions of Rule 30 mention above is determined when the well is completed. In this case, because the well was not completed and no IDWR determination regarding compliance was made, compliance with Rule 30 is moot.

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[9]IDWR did issue a notice of violation against Duspiva for failing to comply with a term on the start card permit. Upon an evidentiary hearing the notice was rescinded. Even if the violation had not been rescinded, the violation had no impact or consequence on the Fillmores.

[10]**Rule 30.2.d.** The Director may decrease or increase the bonds required if it is shown to his satisfaction that well construction or other conditions merit an increase or decrease.

[11]**Rule 30.3.c.** Subsection 030.03.b. may be waived if it can be demonstrated to the Director through the lithology, electrical logs, geophysical logs, injectivity tests or other data that formations encountered below the last casing string set. will neither accept nor yield fluids at anticipated pressure to the borehole.

[12]**Rule 30.4.** Sealing of Casing. All casing must be sealed its entire length with cement or a cement grout mixture unless waived by the Director.

D. Use of Contractors to Install a Packer

The Fillmores imply that Mr. Dupiva's possible use of a contractor to assist with installing a packer excuses their breach. Mr. Duspiva proposed using contractor(s) to assist with setting a packer in order to complete the well under the approved completion plan.[13] However, the well was not completed, Mr. Duspiva did not retain the contractor and this issue is moot.

V. DEFENDANTS' CONSUMER PROTECTION ACT CLAIM

Defendants, in their counter claim, allege numerous violations of the Consumer Protection Act. There was no evidence presented at trial to support any alleged violation of the Consumer Protection Act.

A. I.C. § 48-603(9) Advertising Goods or Services with Intent Not to Sell Them as Advertised

During the trial there was no evidence that Mr. Duspiva advertised goods or services with the intent not to sell them as advertised. Mr. Duspiva did not advertise goods or services. Mr. Duspiva responded to Clyde Fillmore's solicitation to drill a well for the Fillmores and that is exactly what Mr. Duspiva did. Mr. Duspiva provided his services as a well driller to the defendants just as he has for his 342 other customers. There is no evidence of a violation under Idaho Code § 48-603(9).

B. I.C. § 48-603(12) Obtaining the Signature of the Buyer to a Contract When it Contains Blank Spaces to Be Filled in after it Has Been Signed.

The parties entered into an oral contract. At trial there was no evidence presented supporting the existence of a written contract.

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[13]Duspiva does not use a packer when completing a well. Duspiva proposed retaining a contractor with a packer that would be able to set the packer. Fillmores had every right to terminate Duspiva's services if they were opposed to Duspiva's use of a contractor.

C. I.C. § 48-603(2) Causing Likelihood of Confusion or of Misunderstanding as to the Source, Sponsorship, Approval, or Certification of Goods or Services

At trial there was no evidence presented suggesting that Mr. Duspiva caused the likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services. Mr. Duspiva provided drilling services under his drilling license. All drilling was conducted under valid drilling permits and with the authorization of IDWR.

Moreover, Mr. Duspiva took action to avoid any confusion or misunderstanding. He always received Fillmore's authorization before proceeding. He was always was responsive to requests made of him by IDWR.

D. I.C. § 48-603(16) Representing That Services, Replacements or Repairs Are Needed If They Are Not Needed, or Providing Services, Replacements or Repairs That Are Not Needed

The Fillmores sought out Mr. Duspiva to provide well drilling services. Mr. Duspiva provided those services under the direction and authorization of Clyde Fillmore. Mr. Duspiva did not represent that any unnecessary replacements or repairs where needed.

E. I.C. § 48-603(13) Failing to Deliver to the Consumer at the Time of the Consumer's Signature a Legible Copy of the Contract or of Any Other Document Which the Seller or Lender Has Required or Requested the Buyer to Sign, and Which He Has Signed, During or after the Contract Negotiation

The parties recognize that there was not a written contract between the parties. The drilling permit applications were IDWR forms that are required or requested by IDWR. Additionally, the applications are public records that are available to the public.

F. I.C. § 48-603(18) Engaging in Any Unconscionable Method, Act or Practice in the Conduct of Trade or Commerce, as Provided in Section 48-603c, Idaho Code.

Mr. Duspiva did not engage in any unconscionable method, act or practice in providing his drilling services for the Fillmores. Mr. Duspiva testified that between June 12, 2007 and October 10, 2007, he worked on the well nearly everyday. Tom Neace, (IDWR), testified that at an October 23, 2007 meeting, Mr. Duspiva offered to pay all costs to abandon the well if that is what the Fillmores wanted to do. At no cost to the Fillmores, Mr. Duspiva prepared and submitted a well completion plan that was approved by IDWR and remained committed to resolving this matter through the life of the long form permit (August 20, 2007-August 20, 2008).

Specifically, 48-603C(a) is not applicable to the Fillmores nor alleged. 48-603C(b) is not applicable because Mr. Duspiva's fees are reasonable. In fact Mr. Duspiva provided work from October 11, 2007 until November 1, 2008 without charge to the Fillmores. 48-603C(c) is not applicable because the transaction was not one-sided. Mr. Duspiva worked nearly seven (7) days a week for the Fillmores at rates that were comparable to other drilling companies (compare cost per foot of Duspiva's Fillmore well v. Downright's Fillmore well). 48-603C(d) is not applicable because this is not a sales matter. Clyde Fillmores contacted Mr. Duspiva based on his reputation and recommendation of a third party.

VI. CONCLUSION

The parties acknowledge that there was a contract between the Fillmores and Mr. Duspiva for Mr. Duspiva to drill a well for the Fillmores. The Fillmores breached the contract by failing to pay Mr. Duspiva for his services. Any dispute as to Duspiva's costs under the contract were extinguished by the Fillmores assent and ratification of the costs Duspiva is seeking. The Fillmores, after knowing the well would be a LTG well and after knowing the costs of Mr.

Duspiva's services, instructed and authorized Mr. Duspiva to continue providing his services. Mr. Duspiva is entitled to a money judgment for the value of the services he provided.

The Fillmores counterclaim that Mr. Duspiva violated the Consumer Protection Act is frivolous and not supported by the evidence presented at trial. There is no evidence of any unconscionable act or practice by Mr. Duspiva . For the reasons stated above the counterclaim must be dismissed.

DATED this 17th day of September, 2010.

RINGERT LAW CHARTERED

by: _____
Jon C. Gould

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of September, 2010, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Bruce Smith
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock Street, Suite 520
Boise, Idaho 83702

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivery
( ) Overnight Mail
( ) Facsimile

_____
Jon C. Gould

BRUCE M. SMITH, ISB #3425
MOORE SMITH BUXTON & TURCKE, CHARTERED
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Attorney for Defendants

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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants.	Case No. CV08-10463 **CLOSING ARGUMENT BRIEF OF JOHN FILLMORE AND CLYDE FILLMORE**

COME NOW, Defendants Clyde Fillmore and John Fillmore, by and through their attorneys of record, Moore Smith Buxton & Turcke, Chartered, and submit their Closing Argument Brief in this matter.

I.

PARTIES

This is a case about a well driller, Gary Duspiva, and his efforts to take advantage of his customers, John Fillmore and Clyde Fillmore. Clyde Fillmore is a retired ironworker and farmer who lives in Homedale. John Fillmore is his son and a carpenter. When the dealings with Mr.

Duspiva began, neither Clyde nor John had any experience in well drilling or any knowledge of well drilling rules, regulations, or techniques. They were simply ordinary consumers looking for a well driller to drill a domestic well for John. Clyde Fillmore's intentions and his participation were like those of many parents, he just wanted to help his son get a domestic well for his lot in Homedale.

Gary Duspiva is an experienced well driller with over 40 years of experience and holds himself out as a "Master Ground Water Contractor", the only one of his kind in the State of Idaho. Mr. Duspiva claims to have exceptional knowledge in well construction and pump installation.[1]

II.

GENERAL RESPONSE TO PLAINTIFF'S CLOSING ARGUMENT

It is difficult to conceive of a more frivolous, baseless argument than that asserted by Plaintiff in his closing argument. Applying Mr. Duspiva's theory of contract law, Bernie Madoff would still be collecting fees today for ripping off and cheating his elderly investment clients because he had an "agreement" to manage their life savings. The fact that Madoff's actions were illegal and immoral would be irrelevant. After all, there was an "agreement". The fact that Madoff's clients had no knowledge of his illegal activities and did not tell him to quit breaking the law is their fault. He would claim that they still owe him for "managing" their money. If they had paid, they were ratifying his illegal activities and the "agreement" to manage their funds. If they didn't tell him to stop, they impliedly agreed to his conduct and the "agreement". The fact the clients didn't have information about what Madoff was doing, that he hid his actions, or that

[1] Based on the representations by Mr. Duspiva, the Fillmores would suggest that Mr. Duspiva should be held to the absolute highest standards for both knowledge and performance. The Fillmores would also suggest that based on the

his actions were illegal would simply fall into Mr. Duspiva's legal list of "excuses" as argued in his closing brief.

This Court should not countenance nor condone Mr. Duspiva's aberrant behavior or accept his faulty legal reasoning. Mr. Duspiva violated Idaho Statutes and Idaho Department of Water Resources (IDWR) rules, his customers' trust, his duty to them, and any sense of good faith and fair dealing. Mr. Duspiva's actions fall squarely within the type of unconscionable behavior the Idaho Consumer Protection Act was designed to address and remedy.

III.

THE FILLMORES AND MR. DUSPIVA'S RELATIONSHIP AND THE WELL

In late spring/early summer 2007, Clyde Fillmore and Mr. Duspiva talked about Mr. Duspiva drilling a domestic well for John. Clyde and John Fillmore and Mr. Duspiva all agree, and all testified that the discussions and the agreement were for a cold water domestic well of 200 feet as shown on the Start Card Permit. Clyde and John Fillmore and Mr. Duspiva all agree that the rate to be charged was for $32.50 for a 200 foot well. Clyde Fillmore also acknowledged there would be some incidental charges for a permit, a shoe, and the permit for the domestic well. Mr. Duspiva, however, testified that he told Clyde Fillmore that the initial charge of $32.50 was only for a well up to 400 feet and that his rate increased $2.00/foot for each one hundred feet beyond 400 feet. According to Clyde Fillmore, Mr. Duspiva never said this in their initial discussions. The lack of agreement between Mr. Duspiva and the Fillmores as to the cost was to become a significant issue as the drilling of the well unfolded. It remains so today. There appears to be little way of reconciling exactly what was said between Mr. Fillmore and Mr. Duspiva at the beginning of their discussions because Mr. Duspiva does not use written

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standard Mr. Duspiva set by virtue of his testimony, he failed to meet even the most ordinary standard of care for

contracts. However, from the Fillmores' perspective the $32.50 a foot is the price agreed upon and since the agreement was for a 200 foot well, it doesn't really matter if there were increases or not.

Mr. Duspiva started drilling on June 12, 2007, using a Start Card Permit. See attached Exhibit 1 – Timeline for Fillmore Well. Well drillers are licensed by the State and are required to have an Idaho Department of Water Resources (IDWR) permit before drilling a well. For drilling a cold water domestic well, a driller can use a self-issued Start Card Permit. However, the Start Card Permit can only be used for a Single Family Domestic Well with cold water less than 85 degrees Fahrenheit. It cannot be used for a Low Temperature Geothermal well pursuant to IDWR rules. The Start Card Permit requires the driller to provide information such as the name and address of the well owner, the name of the driller, and well construction information such as the size of casing and the Proposed Maximum Depth of the well. Mr. Duspiva presented the Start Card Permit to John Fillmore to sign, telling him it was necessary for drilling to start. John Fillmore signed the permit. According to John Fillmore, the permit was not completely filled out when he was asked to sign it. However, Clyde and John Fillmore and Mr. Duspiva all acknowledged that the Start Card Permit only proposed a well with a maximum depth of 200 feet.

The IDWR Start Card Permit has thirteen standard conditions with which the well driller must comply. Condition 6 indicates the permit does not represent other approvals that may be required to construct a well. Condition 7 indicates the permit does not represent a water right that is required for use of the water. Important to this case, Condition 8 states:

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competence, the implied covenant of good faith and fair dealing, and basic tenants for honesty.

> If a bottom hole temperature of 85° F. is encountered, well construction shall cease and the well driller shall contact the Department of Water Resources immediately.

Compliance with these conditions is not discretionary, and it is the well driller's responsibility to measure Bottom Hole Temperature (BHT). IDWR Rule 50. Condition 8 is designed to protect against drilling a Low Temperature Geothermal (LTG) Well which has special rules and regulations, construction standards, and procedures which apply to LTG wells. There are also increased responsibilities, costs, and obligations for the owner of a LTG well. Under Idaho Code Section 42-233, water between 85°F. and 212°F. is designated as Low Temperature Geothermal Water. To use such water, in addition to the detailed rules applicable to well construction, a state issued water right is required. Such a water right can only be issued by the Director of the Department of Water Resources. If the LTG water is not used for its heat value, the Director must specifically grant an exemption and authorize the other use including domestic use. I.C. §42-233.

Mr. Duspiva acknowledged that he drilled past the 200 foot maximum depth of the well and kept on drilling until he drilled over 1100 feet. According to IDWR employee Tom Neace, manager of the Ground Water Protection Program which oversees the Well Driller Licensing Program and the Well Construction Standards Program, IDWR protocol requires drillers who drill beyond the limits set out in the Start Card Permit to contact the IDWR for approval before drilling deeper. Otherwise, according to Mr. Neace, the driller is violating the terms of the Start Card Permit. Mr. Neace and Mr. Rob Whitney from the IDWR Western Regional Office, both testified that Mr. Duspiva never contacted them or the Department about drilling beyond the 200 foot maximum depth. Mr. Duspiva did not contest at trial the fact that he had failed to contact

the IDWR when he drilled beyond the 200 foot maximum depth allowed by the Start Card Permit.

According to Mr. Duspiva, he talked to Clyde Fillmore and described his findings every time he found water. Clyde Fillmore testified that Mr. Duspiva did talk to him at various times, but the information was sparse and always included a recommendation to "drill deeper". However, Mr. Duspiva did not say anything to Clyde Fillmore or John Fillmore about the need to contact IDWR when Mr. Duspiva exceeded the 200 foot proposed maximum depth. Mr. Duspiva is a Master Ground Water Contractor with "exceptional knowledge" about well construction and has over "300 hours of continuing education credits". How or why he failed to contact IDWR or get IDWR approval for exceeding the Start Card Permit terms was never explained. He just did not do it.

According to Mr. Duspiva, as he drilled, he encountered several zones of water. As he drilled deeper, the well also started to get hotter. See Defendants' Exhibit M. Mr. Duspiva later provided information to IDWR indicating that he hit water at 85-100 feet, at 210 feet, at 300 feet, at 360-362 feet, at 465 feet, at 580-585 feet, and at 600 feet. The well was 81° F. at 500 feet, and hit 85°F. at 600 feet. The well continued to get hotter and hit 92.5°F. on August 8, 2007, when it had been drilled to a depth of 836 feet. Until the well was 836 feet deep, Mr. Duspiva never contacted IDWR.

According to Clyde Fillmore and John Fillmore, prior to August 9, 2007, Mr. Duspiva also never mentioned to them anything about the temperature of the well, that the water was getting hotter, that at 85°F. the well would hit the LTG statutory threshold, and that special regulatory and financial requirements and obligations would kick in under IDWR Rule 30 if the well was an LTG well. Nor did Mr. Duspiva reveal anything to the Fillmores about his failure to

contact IDWR when he had drilled beyond the 200 foot proposed maximum depth authorized by the Start Card Permit.

Not only did Mr. Duspiva not inform the Fillmores or IDWR about the increasing temperatures and well depth as he was drilling, he failed to tell the Fillmores that the area where the well was located contained LTG water at certain depths, that Mr. Duspiva had just drilled three such wells, and that the deeper he drilled the more likely he would encounter LTG conditions. These omissions set the stage for still more problems.

As Rob Whitney, the IDWR employee who later conducted an extensive investigation of Mr. Duspiva's drilling activities, stated:

> The driller should have communicated the potential to encounter LTG resources to his customer prior to starting construction (or at least after exceeding the proposed depth) since Duspiva had encountered them in the nearby well drilled for the Rohns.

Defendants' Exhibit A, pg. 3, 2nd paragraph.[2]

Mr. Duspiva never uttered one word to the Fillmores about his immediate past problems with encountering LTG conditions, his past problems with IDWR, or the increased liabilities and responsibilities John Fillmore would face as a result of the well being a LTG well. As events later unfolded, Mr. Duspiva also failed to explain to the Fillmores that the well as constructed did not comply with IDWR well construction standards or that Mr. Duspiva was incapable of bringing the well into compliance with IDWR rules.

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[2] Defendants' Exhibit A prepared by Rob Whitney is the complete IDWR report on the Fillmore well matter. It explains Mr. Duspiva's history of not complying with IDWR rules, Mr. Duspiva's actual knowledge of LTG conditions in the area, and IDWR's warnings to Mr. Duspiva about drilling into LTG conditions using the Start Card Permit. According to the report, Mr. Duspiva had just completed fixing a previous LTG well that had been improperly drilled only a few days prior to starting the Fillmore well. The well was fixed by Mr. Duspiva after he was given a "final opportunity" to comply with IDWR rules or face a formal enforcement action. See Defendants' Exhibit A, pg. 1-3. The Court is encouraged to read the entirety of the IDWR report since the entire report could not be exhaustively reviewed during trial. Rob Whitney testified that he stood behind the accuracy and content of his report.

August 9, 2007, marked a significant change in events associated with the well. Clyde Fillmore, who was in charge of communicating with Mr. Duspiva, became increasingly concerned over not being told what Mr. Duspiva was doing and what costs Mr. Duspiva was running up. This was because Mr. Duspiva had not been providing sufficient information to the Fillmores. Clyde Fillmore demanded that Mr. Duspiva provide information on costs and what was going on. In response, Mr. Duspiva presented Clyde Fillmore with a handwritten note indicating to Mr. Fillmore, for the first time according to Mr. Fillmore's testimony, that Mr. Duspiva was charging increasing rates based on depth as well as fees for "Air Development". Mr. Duspiva's handwritten note about "costs" showed a cost on August 8, 2007, of $32,191.00. Mr. Duspiva also disclosed that the well was then at 836 feet and was so hot that Mr. Duspiva had to go see the IDWR in order to continue drilling. However, on August 9, 2007, Mr. Duspiva still did not tell Clyde Fillmore any details about the costs, regulations, and liabilities associated with LTG wells. On August 9, 2007, after having drilled over 600 feet beyond the depth authorized by the Start Card Permit, Mr. Duspiva contacted IDWR about what he had done.

According to Rob Whitney, and as documented in his report (Defendants' Exhibit A, pg. 2), Mr. Duspiva called Mr. Whitney on August 9, 2007, to report the well's Bottom Hole Temperature (BHT) was 92.5° F. at 836 feet. Because the well was already drilled into the LTG aquifer, Mr. Whitney required Mr. Duspiva to submit information on how the well had been drilled and other details associated with the construction of the well. Mr. Duspiva responded with an August 9, 2007, schematic showing that not only was the 836 foot well a LTG well on August 9, 2007, but that Mr. Duspiva had actually hit LTG conditions at 585-600 feet. See Defendants' Exhibit A, Exhibit __. Further, the well was not constructed in compliance with IDWR rules.

Mr. Duspiva's August 9, 2007, submittal to Mr. Whitney didn't just provide the details of what had happened with the well. In fact, the submittal was also described as a "Request for Variance" from the rules applicable to a LTG well. This critical document clearly demonstrates that Mr. Duspiva already knew the well did not comply with IDWR well construction standards. Rather than having complied with IDWR standards and procedures for drilling a LTG well, Mr. Duspiva simply sought to avoid having to comply with the standards by having the rules waived.

The August 9, 2007, schematic also documented that Mr. Duspiva had, despite his years of experience and knowledge of IDWR rules applicable to well drillers, incorrectly measured Bottom Hole Temperature (BHT). The August 9 document showed that Mr. Duspiva, instead of measuring temperature at the bottom of the well, was incorrectly measuring the temperature "out of the top" of the well. Mr. Duspiva at trial argued at trial that this "out of the top" measurement was what he considered to be the BHT. However, he admitted on cross examination that in fact he was incorrect and the well was a LTG well at 600 feet. As the August 9 document also shows, Mr. Duspiva wanted to continue drilling deeper even though he already knew the well was a LTG well and did not comply with IDWR standards. Yet he continued to say nothing about the risks, liabilities, or costs of a LTG well to Clyde Fillmore or John Fillmore. After all, Mr. Duspiva was charging the Fillmores by the foot. Why would Mr. Duspiva say anything that might alert the Fillmores to the truth?

Between August 9, 2007, and August 29, 2007, Mr. Duspiva continued to submit requests to the IDWR to try to get the IDWR to waive the rules applicable to LTG wells. On August 15, 2007, Mr. Duspiva submitted yet another hand drawn schematic showing the well was 85°F. at 600 feet and again requested a "variance" from the rules. Mr. Duspiva followed the August 9th and August 15th requests with yet another submittal on August 29, 2007, that proposed, among

other things, sticking a wooden plug in the well in the hope that it would block the mixing of cold water and LTG water. The August 29th schematic, along with the August 9th and August 15th schematics, showed the well at 85°F. at 600 feet.

As IDWR employee Rob Whitney documented in his report, the IDWR refused to grant the variances because they were vague and open-ended. However, Mr. Duspiva, according to Mr. Whitney's report, continued drilling and later argued the IDWR had "verbally approved his requests for variances." Mr. Whitney's report indicated that Mr. Duspiva's assertions about having received a verbal variance were "without merit." Mr. Whitney's report also documented that he repeatedly discussed with Mr. Duspiva on August 9th and after the August 29th submittal that the well had to comply with IDWR Rule 30, the rule applicable to LTG wells. Yet, Mr. Duspiva never revealed nor disclosed to the Fillmores anything about these warnings or that the IDWR had disallowed his requests for a variance from the rules for the illegally constructed well.

After Mr. Duspiva's requests for a variance were denied he continued drilling still without disclosing to the Fillmores anything about the fact that the LTG well would result in additional liabilities and costs for the Fillmores, that the LTG well had special construction requirements, and that the well, as constructed by Mr. Duspiva, did not meet these regulatory requirements. Instead of explaining these details to the Fillmores, on August 16, 2007, Mr. Duspiva gave John Fillmore another permit to sign telling him it was necessary for the well and for Mr. Duspiva to continue drilling which, of course, Mr. Duspiva recommended.

Notwithstanding that Mr. Duspiva's requests for a variance from the LTG regulations had been denied, Mr. Duspiva persisted in continuing to drill without disclosing these details to the Fillmores. On August 16th, when he asked John Fillmore to sign the second permit, Mr. Duspiva knew the well was a LTG well, that it had been a LTG well since the 580 foot to 600 foot level,

that it did not meet IDWR well construction requirements, that he had been denied a variance, and the IDWR had told him specifically that he still had to comply with Rule 30 requirements. Yet Mr. Duspiva disclosed none of this to the Fillmores. Instead, he just recommended drilling deeper. After all, he was going to charge by the foot.

According to Mr. Duspiva, he completed drilling on September 26, 2007, after drilling to over 1100 feet. The temperature at the bottom of the well was now at 102°F. The 1100 foot well produced 17 gallons per minute of LTG water which was only 2 gallons per minute more than the well had produced at 465 feet. As Ed Squires testified, LTG water is poor quality for drinking, has elevated mineral content, and is not desirable for domestic use. When the well was 465 feet, it had a temperature of only 77°F. and the costly and specific construction requirements and other liabilities associated with LTG wells did not apply. Yet even upon drilling to 1100 feet, Mr. Duspiva did not tell the Fillmores about the LTG requirements, that his request for a variance from the rules had been denied, or that John Fillmore as the owner of a LTG well would have increased liabilities and costs because of Mr. Duspiva's actions. Mr. Duspiva still did not reveal that the well had not been constructed to IDWR well construction standards for LTG wells.

In fact, the Fillmores knew nothing about the IDWR's LTG requirements or regulations until October 23, 2007, when IDWR convened a special meeting to discuss the well and what needed to be done to try to bring it into compliance with the well construction standards for LTG wells. The October 23rd meeting was another pivotal date because, for the first time, the Fillmores were informed about the requirements for a LTG well, that special regulations applied, that the well Mr. Duspiva had drilled did not meet these requirements, and that John Fillmore was subject to a $20,000.00 bonding requirement. The Fillmores were stunned. Even more

incredibly, the Fillmores did not learn about these details and their obligations from Mr. Duspiva, but rather from Rob Whitney. According to Mr. Whitney's report, he correctly sensed that the Fillmores had not been told anything by Mr. Duspiva about the situation with the well.

After the October 23rd meeting, the IDWR continued to press Mr. Duspiva to bring the well into compliance with the regulations. Mr. Duspiva continued to struggle to figure out how to bring the well into compliance. He hired an attorney. He consulted with other contractors/consultants/well drillers about what to do. After rejecting Mr. Duspiva's early proposals, the IDWR eventually approved a conceptual plan to try to bring the well into compliance with the intent of IDWR Rule 30, even though the well had not been constructed according to the Rule 30 requirements. However, the proposal was not an approval or acceptance of the well. As Mr. Tom Neace testified, it was only a plan for work that had to be done to see if it would fix the well. The results were still subject to IDWR approval. In other words, Mr. Duspiva could try it, but there was still no guarantee that IDWR would approve the result.

One problem with Mr. Duspiva's "approved plan", as he referred to it at trial, was that he expected the Fillmores to pay for all the work that might allow Mr. Duspiva to bring the well into a condition that the IDWR would accept. Instead of doing the work himself, Mr. Duspiva proposed using other contractors because he was incapable of doing the work and didn't have the equipment to do it, this despite his being a "Master Ground Water Contractor" with exceptional knowledge. Remarkably, Mr. Duspiva refused to tell the Fillmores the details about the work, who was actually going to do the work, and what it would cost to complete the well. Alternatively, Mr. Duspiva demanded the Fillmores abandon the well if they did not allow Mr. Duspiva to try to fix it. Yet, just as with the completion plan, Mr. Duspiva refused to disclose

who would abandon the well, what it would cost, or how it would be done. He just wanted the Fillmores to pay to correct the mistakes he made in turning a domestic well into a LTG well.

The IDWR wanted the illegal and improperly constructed well brought into compliance or abandoned properly. Because Mr. Duspiva would not disclose the information about the identity of the contractors and the costs, Mr. Duspiva and the Fillmores could not agree on how to proceed. The IDWR, at the Fillmores' urging, hired an independent well driller, Down Right Drilling, to abandon the well. The well abandonment was successfully completed in January 2008. Although Mr. Duspiva had previously agreed to pay the costs of abandonment, he reneged on this promise and Clyde Fillmore had to pay $9,365.00 to get the illegal well properly abandoned.

The Fillmores had already paid Mr. Duspiva $20,000.00 to drill a domestic well. After the LTG well was abandoned, Mr. Duspiva told the Fillmores they owed an additional $30,665.00 for his work in drilling the illegal well. When they refused to pay, Mr. Duspiva sued Clyde Fillmore and John Fillmore.

IV.

THERE IS NO FACTUAL OR LEGAL BASIS FOR THE DUSPIVA BREACH OF CONTRACT CLAIM

A. There Was No Agreement Between the Fillmores and Mr. Duspiva as Alleged by Mr. Duspiva.

Mr. Duspiva and John and Clyde Fillmore all testified as to the scope of the agreement between John Fillmore and Mr. Duspiva. The only agreement was for a domestic well of 200 feet at a cost of $32.50 per foot plus incidental costs for the shoe, the permit, and the seal. As Clyde Fillmore testified, the cost of a 200 foot well should have been about $7,400.00.

There was no agreement between the Fillmores and Mr. Duspiva as to any other arrangement. John Fillmore testified that he did not agree to pay any amount for the well no matter the cost. Even Mr. Duspiva acknowledged that there was no agreement for a LTG well. After all, the Fillmores didn't even know what LTG meant. They just wanted a cold water domestic well.

Although, Mr. Duspiva claims that he told Clyde Fillmore at a meeting in June 2007 that he charged $32.50 per foot plus $2.00 per foot for each 100 feet over 400 feet, Clyde Fillmore testified that did not happen. If Mr. Duspiva had actually told Clyde Fillmore this in June, Clyde Fillmore would not have had to demand information as to costs on August 9, 2007, and Mr. Duspiva would not have had to provide the handwritten note regarding costs because the parties would have already agreed upon the cost, and everyone would know exactly what the costs were.

Mr. Duspiva makes the strained argument that Clyde Fillmore impliedly ratified and assented to Mr. Duspiva's August 9th explanation of his charges because Clyde Fillmore never instructed Mr. Duspiva to stop drilling and made a payment of $10,000.00 after getting the August 9th notes from Mr. Duspiva. This assertion is without merit. First, Mr. Duspiva relies upon the fact that the Fillmores never told him to stop drilling. What Clyde Fillmore and John Fillmore explained was that they followed Mr. Duspiva's recommendations because they had no reason not to accept his recommendations. That was because Mr. Duspiva never explained the details of what he was doing and never explained the ramifications of the LTG situation. They both testified that had Mr. Duspiva been truthful and told them about the LTG situation, they would have instructed him to stop. The fact that the Fillmores did not tell Mr. Duspiva to stop drilling cannot be impliedly construed to be a ratification of his efforts to change his charges or to drill an illegal well.

As to the second payment made after Mr. Duspiva gave Clyde Fillmore the August 9th handwritten note, that also does not imply a ratification or acceptance of the charges. John Fillmore testified that he did not agree to the charges but that he recognized the payment was a mistake he should have caught. More importantly, the charges included in Mr. Duspiva's hand written note totaled $32,116.00. Yet Clyde Fillmore did not pay this amount. All he paid was $10,000.00. Clyde Fillmore testified that he made no commitment to paying the remainder or that he even agreed with the charges. If there were a ratification of the August 9th charges, Clyde Fillmore would have paid the amount Mr. Duspiva put in his note. As John Fillmore explained, his dad liked to pay his bills. The fact that Mr. Duspiva took advantage of Clyde Fillmore's age, lack of knowledge, honesty, and sense of being fair does not constitute a ratification of Mr. Duspiva's charges or his actions.

It is fundamental that there must be a meeting of the minds in order to have an agreement. Here, the only meeting of the minds was for a 200 foot domestic well at $32.50 per foot plus incidental costs. There was no other agreement to which all parties agreed. The testimony at trial supports no other conclusion.

B. Even If There Was a Contract For Something Other Than a 200 Foot Domestic Well, a Contract For An Illegal Purpose is Not Enforceable.

Mr. Duspiva argues that there was a contract for drilling based on an escalating charge per foot to support his claim for $30,665.00 for breach of contract. According to Mr. Duspiva's testimony, the well cost $50,665.00.[3] Since the Fillmores had already paid $20,000.00, Mr. Duspiva theorizes he is owed an additional $30,665.00. Regardless of Mr. Duspiva's contorted

[3] The Fillmores do not agree that there was any contract beyond an agreement for a 200 foot domestic well that cost $7,080.00. Further, there was no evidence that Mr. Duspiva ever even sent a bill to the Fillmores for $50,665.00.

assertions, this theory fails for the fundamental reason that in Idaho, a contract for an illegal act is not enforceable as a matter of law.

Idaho scrupulously follows the rule that contracts for acts forbidden by law are void and unenforceable. *Kunz v. Lobo Lodge, Inc.,* 133 Idaho 608, 990 P.2d 1219 (Ct.App. 1999), (*citing Tiffany v. Boatman's Savings Inst.*, 85 U.S. (19 Wall) 375, 384, 21 L.Ed. 868, 869 (1973); *Harris v. Runnels*, 53 U.S. (12 Howard) 79, 83, 13 L.Ed. 901, 903 (1851)). Idaho law follows the trend that any contract made for the purpose of furthering any matter or thing prohibited by statute is void. *See, Porter v. Canyon County Mut. Fire Ins. Co.*, 45 Idaho 522, 525, 263 P. 632, 633 (1928). Moreover, Idaho case law does not allow Courts to evaluate between whether or not an act was *mala in se* or *mala in prohibita* when confronted with an act that violates Idaho statute. In *Kunz*, the Court noted that:

> ... so far as contracts in violation of statute are concerned, there is no distinction between acts *mala in se* and acts *mala in prohibita* .... [W]here a statute intends to prohibit an act, it must be held that its violation is illegal, *without regard for the reason of the inhibition ... or to the ignorance of the parties as to the prohibiting statute*. (Emphasis added).

Kunz at p. 611; *citing*, 17 Am. Jur. 2D Contracts §251 (1991). The *Kunz* Court left no doubt regarding the application of this rule by holding that:

> No principal of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; ... the law in short will not aid either party to an illegal contract; it leaves the parties where it finds them. The general rule is the same at law and in equity and whether the contract is executor or executed.

Kunz at p. 611; *citing*, *Hancock v. Elkington*, 67 Idaho 542, 548, 186 P.2d 494, (1947).

According to Rob Whitney's report, testimony by Mr. Whitney, by Tom Neace, and based on Mr. Duspiva's own submittals and testimony, the well was not constructed to IDWR LTG well construction standards. (See attached Exhibit 2, excerpts of Mr. Duspiva's testimony.) Further, Mr. Duspiva drilled the well in contradiction of Condition 8 of the Start Card Permit and IDWR well drilling rules, including Rule 30, and the August 16, 2007, long form permit. Mr. Duspiva violated numerous statutes and regulations, and as a matter of law, even if Mr. Duspiva thinks there was a contract allowing him to recover for these illegal actions, such a contract is not enforceable.

Idaho Code 42-238 requires all wells to be constructed to IDWR standards. The testimony at trial, plus Mr. Duspiva's actions in seeking a variance, established that the well was a LTG well that was not constructed to IDWR standards. Under IDWR Well Construction Rule 30, there are specific requirements for a one inch annular space, for special casing requirements, and a seal that keeps the LTG water from mixing with cold water. None of these requirements were met. Further, drilling a LTG well requires pre-approval from the Director of IDWR and a pre-approved prospectus before drilling. Mr. Duspiva met none of these requirements and admits it. Rule 50 of the Well Driller's Licensing Rules, IDAPA 37.03.050.01(b), also requires a well driller to complete a well in compliance with well construction standards and permit conditions. Mr. Duspiva violated this IDWR rule as well.

Idaho Code 42-235 requires a permit to drill a well. Mr. Duspiva started the well using a Start Card Permit that provided for a well with a maximum depth of 200 feet. However, he continued drilling beyond the permitted depth and never contacted IDWR as Tom Neace and Rob Whitney testified he was required to do. In fact, until August 9, 2007, Mr. Duspiva never

contacted IDWR at all. When he did, Mr. Whitney discovered the well was 836 feet deep and already at least 200 feet into the LTG aquifer. Mr. Whitney and Mr. Neace also testified that Mr. Duspiva had violated condition 8 of the Start Card Permit. Thus, any drilling done by Mr. Duspiva beyond 200 feet pursuant to the Start Card Permit was not authorized.

When Mr. Duspiva did contact Mr. Whitney on August 9, 2007, Mr. Whitney informed him that since the well was already a LTG well, Mr. Duspiva had to apply for a new permit. Instead of explaining the details about the fact that the well was at that point – and had been for some time – a LTG well with all the additional regulatory and financial requirements to the Fillmores, Mr. Duspiva simply gave John Fillmore another permit to sign telling him it was needed for the well. That permit application was dated August 16, 2007.

The August 16, 2007, Application was approved by IDWR on August 20, 2007, with the express condition that the well had to comply with the IDWR Rule 30 standards. The well, as drilled, never complied with Rule 30, as Mr. Duspiva acknowledged at trial. That is why Mr. Duspiva filed for a "variance" seeking to avoid the regulations which he, as a Master Ground Water Contractor and Licensed Well Driller, knew he had to comply with.[4]

In fact, the IDWR rules regarding LTG well construction apply not only to the requirements prior to drilling a LTG well, but also to any modifications to such a well. IDAPA 37.03.09.010.22. Before a LTG well can be drilled deeper, i.e. modified, a drilling prospectus

[4] The fact the August 16, 2007, permit had specifically written on it that the well had to comply with Rule 30 was redundant to the extent that this was already required by IDWR regulations and Idaho Code 42-238. Further, as documented by Mr. Whitney in his report, he told Mr. Duspiva on August 9, 2007, that the well would have to comply with Rule 30. Mr. Duspiva knew from the day he started drilling that the well, if it were drilled in to a LTG aquifer, would have to comply with IDWR rules, including Rule 30. After all, Mr. Duspiva, only a few days before starting the Fillmore well, had to fix another LTG well he had drilled that did not comply with the IDWR rules. See Whitney report, p.1-3, regarding the Riggs well. Further, to the extent Mr. Duspiva still argues he had verbal

must be submitted to and approved by the IDWR director *prior* to the modification. IDAPA 37.03.09.030.01(b). Mr. Duspiva never complied with these rules because he drilled the LTG well without telling the IDWR or the Fillmores. Mr. Duspiva drilled the well, then sought a "variance" so that he would not have to comply with the rules he had already violated.

Idaho Code 42-233 requires a specifically authorized water right for a LTG well. The use of LTG water must be utilized primarily for its heat value, and secondarily for its value as water. *Id.* The use of LTG resources for water, as opposed to heat, is not a statutorily authorized use of the resource *unless* the Director specifically exempts the use. *Id.* Mr. Duspiva never obtained the necessary water right to use the LTG for water and never even sought an exemption from the Director. Thus, not only was the well illegally constructed, the water in the well could not be used for the very purpose (domestic use) for which Mr. Duspiva had been hired to drill the well. This demonstrates that not only did Mr. Duspiva violate I.C. 42-233 by not obtaining a water right or seeking an exemption to allow the use of the LTG water for household use, any agreement to drill a domestic well was frustrated by the fact that there was *no authorized* construction of the well *or* use of the water. Under such circumstances, there was no consideration or valid agreement for even drilling the well.

C. Mr. Duspiva's Actions in Drilling the Fillmore Well Repeatedly Violated IDWR Rules and Idaho Statutes.

Except for using the Start Card Permit to drill 200 feet, everything that Mr. Duspiva did in drilling the well was done in violation of IDWR regulations and Idaho statutes. Mr. Duspiva, a "Master Ground Water Contractor" with 42 years experience, breached IDWR procedures by

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permission to drill, as Rob Whitney testified, verbal authorization to construct or modify a LTG well is not permitted. Mr. Duspiva actually violated both the Start Card Permit and the August 16, 2007, long form permit.

not contacting IDWR when he exceeded the maximum depth of 200 feet authorized by the Start Card. He then violated the Start Card Permit Condition 8 by continuing to drill into the LTG aquifer and not contacting IDWR. He was issued a Notice of Violation for doing so. (See Exhibit 3, excerpts of Mr. Tom Neace's testimony.) Mr. Duspiva only contacted IDWR after going over 200 feet into the LTG aquifer. He violated I.C. 42-233, 42-235. and 42-238, by not complying with IDWR well construction standards (I.C. 42-238), by not complying with permits (I.C. 42-235), and by not obtaining a water right or exemption for using the LTG water (I.C. 42-233). He violated IDWR regulations at IDAPA 37.03.09.030 that apply to the construction criteria for LTG wells with regard to annular spacing requirements, casing, and sealing. IDAPA 37.03.09.030.03(b), (d) and IDAPA 37.03.09.030.04.

One interesting aspect of Mr. Duspiva's testimony at trial was that he did not "know" the well was drilled into the LTG aquifer until after the fact. Mr. Duspiva is required to measure Bottom Hole Temperature pursuant to IDAPA 37.03.09.030.01. Yet, according to the information he provided to IDWR on August 9, 2007, he only measured the temperature of the water at the top of the casing. He claimed at trial that this was the Bottom Hole Temperature even though it was not measured at the bottom of the well. Thus, Mr. Duspiva's only defense to this violation seems to be the "I didn't know" argument. However, Mr. Duspiva clearly violated the requirement in that he measured Bottom Hole Temperature in the wrong place. This defense, if it can be characterized as such, comes from a "Master Ground Water Contractor". The assertion is simply not credible. It is, however, entirely consistent with Rob Whitney's testimony that when Mr. Duspiva had previously been admonished by IDWR for drilling into the LTG aquifer in the same vicinity as the Fillmore well and not measuring Bottom Hole Temperature, Mr. Duspiva's response was "I didn't want to know. If I did, I might have to tell you."

Mr. Duspiva's theory of a contract is that because the Fillmores did not tell him to stop drilling, there was a contract to drill to 1100 feet. This explanation defies common sense and is not credible. It is particularly incredible in that Mr. Duspiva never informed the Fillmores about the details of his activities and the fact that Mr. Duspiva had continuously violated the Start Card Permit, and IDWR rules and regulations. For Mr. Duspiva to conclude there was a contract, or ratification of a contract, based on his failure to inform his customers and their resulting actions in not specifically telling him to stop drilling is neither believable nor legally sound.

Even if such a twisted sense of logic could be construed as some kind of agreement, such a contract is void and unenforceable as a matter of law as previously explained. There is simply no legal basis by which this Court can rule in favor of Mr. Duspiva's alleged breach of contract claim. The claim should be dismissed.

D. There Was No Valid Consideration by Mr. Duspiva

As Noted, Mr. Duspiva's actions were continuously in violation of Idaho statutes and IDWR regulations. It was these illegal drilling activities that Mr. Duspiva bases his contract claim upon. However, it is well settled that consideration given in violation of the law or public policy is not consideration at all. *State v. Clark*, 102 Idaho 693, 638 P.2d 890 (1981). The State's policy on well drilling is reflected in numerous statutes and rules that Mr. Duspiva violated. Even assuming the contract Mr. Duspiva alleges existed, there was no valid consideration given by Mr. Duspiva.

V.

MR. DUPIVA'S NEGLIGENCE AND FAILURE TO DRILL IN A WORKMANLIKE MANNER

The testimony and other evidence at trial clearly established that Mr. Duspiva was both negligent and failed to drill in a workmanlike manner. First, Mr. Duspiva failed to inform his customers of the likelihood of encountering LTG resources if he drilled beyond the 200 feet allowed by the Start Card Permit. Mr. Duspiva failed to contact the IDWR about deepening the well beyond 200 feet. Since Mr. Duspiva had already encountered LTG conditions in three previous domestic wells in the area, it is inconceivable that he did not know of the high likelihood, indeed the certainty, that he would encounter LTG if he continued deepening the Fillmore well. Ed Squires confirmed this in his testimony about LTG resources in this area.

Mr. Duspiva, as a Master Ground Water Contractor and licensed well driller for 42 years, knew that, if he encountered LTG resources, he would be required to comply with IDWR rules for LTG well construction, and that the Fillmores would also have additional costs and liabilities. Yet, Mr. Duspiva drilled deeper and ignored the IDWR rules. Mr. Duspiva, despite evidence of a well that was getting hotter and hotter, did not contact IDWR until he had drilled over 200 feet into the LTG aquifer using a drilling technique and well construction method that were guaranteed to not meet IDWR LTG well construction standards. That is why Mr. Duspiva had to seek a variance from the IDWR rules – he could not meet the design standard for a LTG well – because he had already drilled it in a manner that did not allow compliance. Mr. Duspiva was clearly negligent in continuing to drill until he encountered the LTG aquifer even though he knew the well would not meet the required design standards.

Mr. Duspiva was also negligent in failing to properly monitor Bottom Hole Temperature (BHT) in order to comply with IDWR Rule 30. Mr. Duspiva indicated at trial that he did not know that the well became a LTG well at 580-600 feet until after he had drilled the well. Obviously, the reason he did not know was because he improperly measured the BHT at the top of the well instead of the bottom. As Ed Squires testified and IDWR Rule 30 requires, the BHT is to be measured at the bottom, not the top of the well.

Mr. Duspiva was negligent and failed to perform in a workmanlike manner in yet another significant way. Mr. Duspiva should have explained the use of screens to the Fillmores notwithstanding that Mr. Duspiva told the Fillmores he did not set screens. Mr. Duspiva testified he didn't set screens because he considers them a "hindrance". However, he also testified that he frequently used contractors to help him drill. Even if Mr. Duspiva refused to use screens, or was so inexperienced that he could not install a screen, he should have informed the Fillmores about screens and the opportunity to retain a qualified contractor to install a screen once he drilled beyond 200 feet and found the productive 15 gallons per minute water layer at 465 feet. It was only 77.5°F. This would have avoided all aspects of the LTG problem Mr. Duspiva created. It would have produced the very well that the Fillmores had hired Mr. Duspiva to drill.

As Ed Squires, Tom Neace, and Rob Whitney all testified, the use of screens is a standard industry practice in areas where sand is an issue in well construction. Ed Squires testified that screen installation is not a complicated or a complex technique and is frequently used in the area of the Fillmore well. Mr. Duspiva testified that he was incapable of completing the well (until he drilled to 1100 feet) solely because of sand issues. Yet he also showed that he found fifteen gallons per minute of cold water at only 465 feet when the well was still only 77.5°F. Had Mr. Duspiva properly informed the Fillmores of the LTG risks, the liabilities and costs associated

with LTG wells, the fact that Mr. Duspiva had already drilled into the LTG aquifer in three previous wells, and that by installation of a screen, even if by another contractor, the LTG problem could have been avoided, this suit would likely never have occurred. Of course, Mr. Duspiva would not have then been in a position to recommend drilling to 1100 feet, developing 102°F. water, and charging the Fillmores for drilling that was not needed.

What likely would have been the result if Mr. Duspiva had been honest with the Fillmores and workmanlike in his drilling is demonstrated by the fact that Down Right Drilling moved over only 40 feet from where Mr. Duspiva drilled, put in a 320 foot well with a screen, and completed a highly productive, cold water well for the Fillmores for only $18,000.00.

Mr. Duspiva's negligence and dishonesty in drilling the Fillmores' well started when Mr. Duspiva failed to inform the Fillmores about the LTG risks when the well went beyond 200 feet. It continued throughout the drilling process when Mr. Duspiva, knowing full well about the LTG situation, drilled without properly measuring BHT and failed to stop drilling and notify the IDWR as required by Condition 8 of the Start Card Permit. Instead of properly informing the Fillmores about the opportunity to install a screen when the well was only 465 feet and the water was cold and abundant, Mr. Duspiva breached his obligation to his customers. Mr. Duspiva's sole intent was in drilling as deep as he could because he wanted to charge by the foot.

VI.

VIOLATION OF THE CONSUMER PROTECTION ACT

The Fillmores have previously briefed the issues of Mr. Duspiva's violations of the Consumer Protection Act. The trial of this matter only reinforced and confirmed Mr. Duspiva's violations of the act. The Consumer Protection Act was designed for a case such as this where a person takes advantage of consumers unable to protect their interests due to ignorance or the

inability to understand, where the price charged grossly exceeds the price of similar services, and the violator induces the consumer to enter into a transaction excessively one-sided in favor of the violator. I.C. 48-603(2).

As exemplified in this case, the Consumer Protection Act prohibits representing services that are not needed such as drilling an excessively deep well instead of using accepted industry standards that would avoid the cost and liability of such a well, I.C. 48-603(16); engaging in misleading practices such as not telling the consumer about LTG wells and the risks and liabilities associated with them, I.C. 48-603(13); causing confusion as to services by hiding the identity and costs of proposed contractors when asked directly by the customer for such information; or engaging in unconscionable practices I.C. 48-603(18) by taking advantage of consumers who are not able to protect their interests, in part, because the driller did not disclose material, relevant information.

The Fillmores, as with most consumers, had no understanding of well drilling, or the rules and regulations relevant to wells. They, as do most consumers, rely upon the driller and trust him to be honest and forthcoming with information and to drill in a workmanlike manner. They did not expect, or authorize, Mr. Duspiva to violate the rules or to drill an illegal well for which they as the customer would ultimately be liable. Mr. Duspiva failed to properly inform the Fillmores about the situation and conditions relative to LTG wells and their obligations. Mr. Duspiva failed to inform the Fillmores or the IDWR about his having drilled into the LTG aquifer until after he had done so. Mr. Duspiva found productive layers of cold water at only 465 feet, yet continued his illegal, unpermitted drilling to 1100 feet and hitting 102°F. water. Mr. Duspiva failed to inform his customers of standard, industry-based practices of using screens for dealing with sand because Mr. Duspiva considered screens a "hindrance". Mr. Duspiva failed to

inform the Fillmores about his attempts to get variances to avoid having to comply with IDWR rules. When denied a variance, Mr. Duspiva tried to hire other contractors to fix the well at the Fillmores' expense while at the same time refusing to tell the Fillmores about who was to do the work, what the work consisted of, and what the costs would be. Mr. Duspiva just wanted to do whatever it took to fix the improperly constructed well and have the Fillmores pay for it. Mr. Duspiva drilled the illegal well, the Fillmores didn't. They didn't even know the well was drilled out of compliance until it was completed and IDWR told them about the problem.

At trial, the most Mr. Duspiva seemed to imply was that he did not intend to deceive his customers. While the Fillmores do not accept this as the truth based on Mr. Duspiva's actions, an intent to deceive is not required to find that an act is unfair or deceptive. *State ex rel. Kidwell v. Master Distributors,* 101 Idaho 447, 615 P.2d 116 (1985). Rather the CPA is remedial and intended to defer unfair and deceptive practices. It is to be construed liberally. *In re Edward Bkrtyc.* (D. Idaho 1999).

In this case, there is little need to construe the statute. Mr. Duspiva's actions and deception towards IDWR and his customers was so extreme and so outside the bounds of honesty as to be beyond any excuse he could offer.

VII.

DAMAGES

According to the testimony of Clyde Fillmore, John Fillmore and Mr. Duspiva, Mr. Duspiva agreed to drill the 200 foot domestic well for $32.50 plus certain incidental costs for a shoe ($50.00), a permit ($80.00), a well cap ($50.00), and the seal ($400.00). The total for these incidental costs is $580.00. As noted, the only agreement between the Fillmores and Mr.

Duspiva was for a 200 foot domestic well. The cost of the well would be $6,500.00 ($32.50 x 200) plus $580.00 for incidental costs ($50.00 + $50.00 + $400.00 + $80.00) for a total of $7,080.00[5]. Clyde Fillmore paid Mr. Duspiva $20,000.00. Clyde Fillmore also testified that he incurred damages of $9,500.00 to pay for abandonment of the illegal well. Therefore, based on the agreement for the 200 foot well, Mr. Duspiva would owe the Fillmores a refund of $22,420.00 as set out below:

Drilling 200 feet x $32.50/foot	$ 6,500.00
Incidental Costs	
Shoe –	$ 50.00
Cap –	$ 50.00
Seal –	$ 400.00
Permit –	$ 80.00
TOTAL	$ 7,080.00
Less Payments	($20,000.00)
Less Fillmore Abandonment Costs	($ 9,500.00)
Refund/Damages Owed to Fillmores	($22,420.00)

The Fillmores have acknowledged an agreement with Mr. Duspiva to drill a 200 foot well. Notwithstanding Mr. Duspiva's misrepresentation as to his abilities and dishonest actions toward the Fillmores, the Fillmores continued to acknowledge and honor the actual agreement they had with Mr. Duspiva until he sued them over his drilling of an illegal well. However, any drilling beyond 200 feet was/is contested because that is not what was agreed upon. There was no meeting of the minds on anything else.

[5] There was conflicting testimony about whether Mr. Duspiva informed the Fillmores about what Mr. Duspiva referred to on August 9, 2007, as Air Development costs. However, there appeared to be no Air Development costs for the 200 foot well.

If the Court concludes that there was no agreement due to Mr. Duspiva's being equitably estopped from enforcing the agreement for the 200 foot well, the failure of Mr. Duspiva to provide consideration, or that the alleged contract was unenforceable in its entirety, the Fillmores would be entitled to a refund of the $20,000.00 paid plus the $9,500.00 in damages they incurred for abandonment costs to abandon the illegal well

CONCLUSION

There was no meeting of the minds except for a 200 foot domestic well at $32.50 foot. Mr. Duspiva violated numerous statutes and rules and thus gave no valid consideration even for the agreement he alleges. Such contracts for illegal purposes are not enforceable. The Court is requested to dismiss Mr. Duspiva's claim, find that Mr. Duspiva violated the Consumer Protection Act, order Mr. Duspiva to refund the Fillmores' $20,000.00 payment and pay $9,500.00 in damages.

Respectfully submitted this 23 day of September, 2010.

MOORE SMITH BUXTON & TURCKE, CHARTERED

BRUCE M. SMITH
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of September, 2010, a true and correct copy of the foregoing **CLOSING ARGUMENT BRIEF OF JOHN FILLMORE AND CLYDE FILLMORE** was served upon the following by the method indicated below:

Jon C. Gould
RINGERT LAW CHARTERED
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

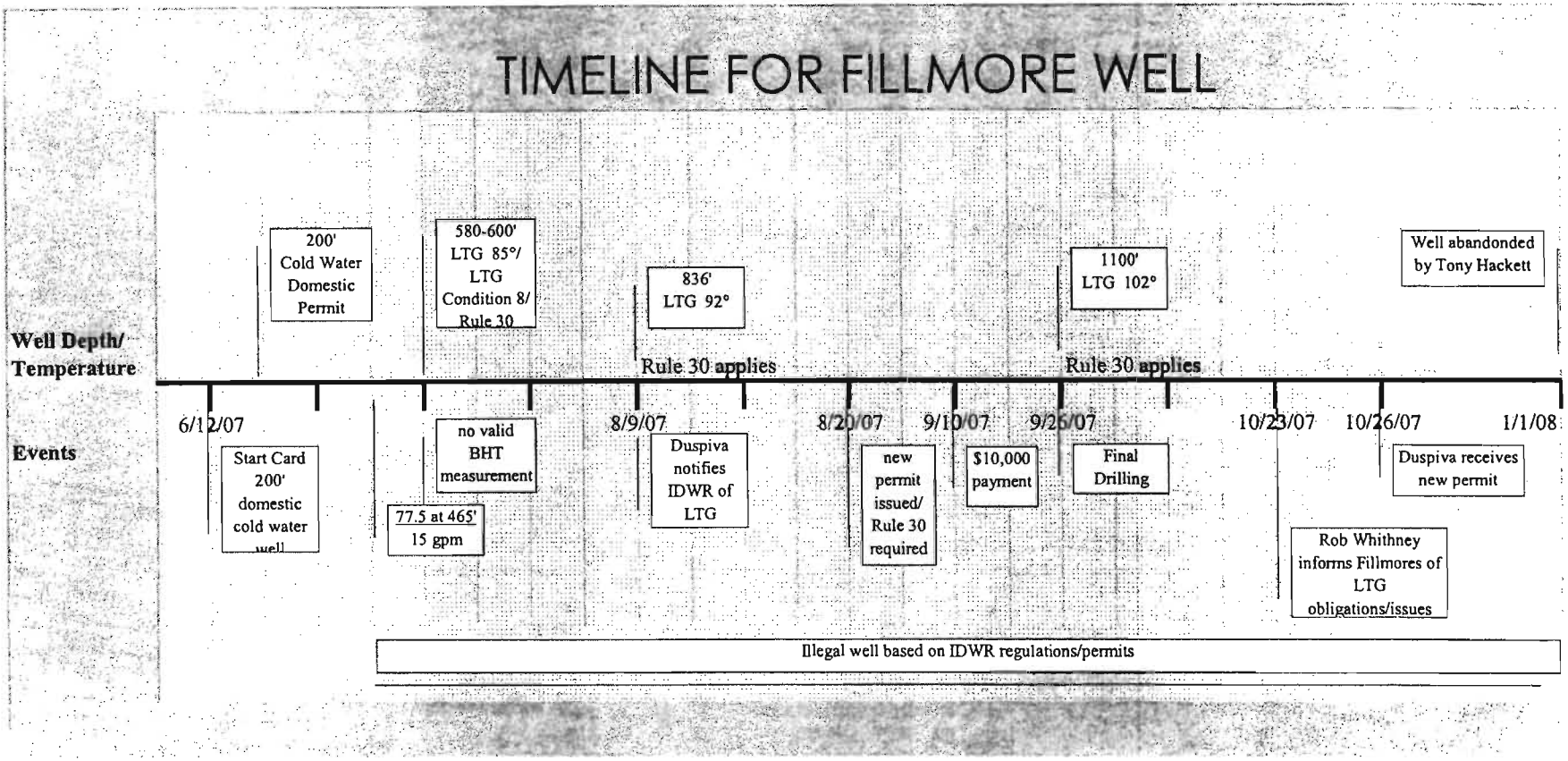
Facsimile: (208) 342-4657

_____ via U.S. MAIL
_____ via HAND DELIVERY
_____ via OVERNIGHT MAIL
_____ via FACSIMILE

BRUCE M. SMITH

EXHIBIT 1

TIMELINE FOR FILLMORE WELL



BHT = Bottom Hole Temperature (IDAPA _____) IDWR = Idaho Department of Water Resources
Start Card = Cold Water Domestic Permit Rob Whitney = IDWR employee

EXHIBIT 2

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MR. SMITH: No. This is an objected to exhibit.
THE COURT: Okay.
MR. SMITH: I am just at this point asking Mr. Duspiva if it refreshes his memory.
THE COURT: Okay. Ask him that question.
MR. SMITH: Yes.
Q. (BY MR. SMITH:) Mr. Duspiva, I have handed you page 1 of Defendant's Exhibit A. It is a November 6 memo from Mr. Whitney. Do you see that?
A. Yes, I do.
Q. If you will look down at the bottom part where I highlighted it, it makes references to, I'll tell you, about warnings you've received. If you would read that, please.
MR. GOULD: I object. He's handed my client a document the source of which hasn't been confirmed, it hasn't been authenticated, it hasn't been agreed to, and this contains some random statement.
THE COURT: Okay. Mr. Smith, I think it would be appropriate to ask this witness whether he recognizes this document or if he has ever seen it before.
MR. SMITH: Okay.
Q. (BY MR. SMITH:) Mr. Duspiva, have you ever seen the document that I just handed you?
A. Yes.

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Q. So you recognize it?
A. Yes.
Q. Do you see the information that I highlighted?
A. Yes.
Q. Do you see the reference to the Schuyler Enochs well at the bottom?
A. Yes.
Q. Does that refresh your memory as to whether you received a warning over that well?
A. Yes.
Q. Do you believe now that you did receive a warning?
A. No.
Q. Mr. Duspiva, would you refer, please -- do you have the defendant's exhibits in that round notebook -- yeah, that one.
Would you look at Exhibit C, please.
Do you recognize that as the start card for the Fillmore well?
A. Yes, I do.
Q. Mr. Duspiva, as a licensed well driller, aren't you required to follow these conditions that are listed on the bottom of that document as a condition of drilling that well?
A. Yes.

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Q. Condition No. 8 says that if you encounter a temperature of 85 degrees or greater, you shall cease construction and the well driller shall contact the department immediately. So you agree with me that you are required to follow that condition; correct?
A. Correct.
Q. Is it your testimony that you complied with that condition with regard to the start card?
A. Yes.
Q. So when you encountered a bottom hole temperature of 85 degrees, you stopped drilling?
A. It was plus 85 degrees.
Q. Plus 85 degrees. Correct me, but you said that was at 836 feet; is that correct?
A. Repeat the question.
Q. You encountered this 85 degree bottom hole temperature when you were at 836 feet; is that correct?
A. Plus 85 degrees.
Q. But it was 836 feet; correct?
A. Yes.
Q. Mr. Duspiva, didn't the Department of Water Resources issue you a notice of violation for violating condition No. 8?
A. It was rescinded.
Q. Mr. Duspiva, yes or no, did they not issue you --

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THE COURT: Can I ask you to clarify, because I am confused as to whether you are speaking about the Enochs, Roan, Riggs, or Fillmore well.
MR. SMITH: Sorry, Judge. I moved off of it.
THE COURT: Okay.
MR. SMITH: I just wanted to clarify when we were talking about those three wells, we had this reference to the fact that he had been warned about them, so I wanted to clarify that while we were talking about them. But I've moved on now to the Fillmore well.
THE COURT: To the Fillmore well, all right.
Q. (BY MR. SMITH:) So, Mr. Duspiva, with regard to condition No. 8, didn't the Department of Water Resources issue you a notice of violation for violating your condition No. 8; yes or no?
A. Yes.
Q. So you would agree with me that there is a difference between what the department did with regard to indicating that you violated condition No. 8 and your statement that you said you did not violate it; correct?
A. Repeat the question.
Q. There is a difference between what the department did in issuing you a notice of violation for violating condition No. 8. It is your testimony that you did not

violate condition No. 8. There is a difference there; correct?

A. Yes.

Q. But it remains your position that you did not violate that condition?

A. Yes.

THE COURT: Mr. Smith, if you are referring to documents that you submitted to the clerk as proposed exhibits, this witness has those.

MR. SMITH: Correct.

THE COURT: Oh, okay.

Q. (BY MR. SMITH:) Mr. Duspiva, if you will refer -- put that one back. Mr. Duspiva, just a couple of questions. You don't need the exhibit. I just thought of a couple of questions. What is that start card used for?

A. Domestic well.

Q. I mean, how do you get it? How do you obtain that permit?

A. You fill it out, and send it in.

Q. You, as a well driller, just fill it out and send it in?

A. With the customer's signature on it.

Q. That's the permit, if you will, for starting this domestic well?

A. Yes.

Q. So that's the authority under which you can go out and actually start drilling this well?

A. Yes.

Q. Your authority to use a start card has been revoked, has it not?

MR. GOULD: Objection; that's not relevant to this matter in any way.

THE COURT: I will allow you to answer it.

THE WITNESS: For one year.

Q. (BY MR. SMITH:) If you would have answered my question, the answer would have been yes?

A. Yes.

Q. Thank you. Was that revoked because of what happened here on the Fillmore well?

A. Yes.

Q. As a result of the issuance of the notice of violation; is that correct?

A. Yes.

Q. Mr. Duspiva, I would like for you to look at Defendant's Exhibit M, which is the August 9 submittal that you made to the department. Do you have that in front of you?

A. Yes, I do.

Q. At the top under where it says: Well - John Fillmore. Do you see where I am referring to?

A. Yes.

Q. The fourth line says: Request for variance for domestic well, plus 85 degrees?

A. Yes.

Q. You were requesting this variance, were you not, because this well did not comply with the Department of Construction's rules; correct? Isn't that correct?

A. Yes.

Q. And if you will look down, if you'll go with me starting at the left column where it starts off at 74 degrees at the top, goes down, and then goes to the next column. My question is, what we are looking at there is the well diagram; correct, from top to bottom?

A. A schematic diagram, yes.

Q. So the left part is the top half, and the right half is the bottom half?

A. Right.

Q. As you look at the temperatures starting off at 74 degrees, and it drops down and you have 67, 70, 77.5, 81, 85, 87, 91.5. Do you see that?

A. Yes.

Q. Doesn't that indicate that as you are drilling this well, the well is getting hotter; isn't that correct?

A. Yes.

Q. Do you see where it says on the right-hand side, right column, it says 600 and a dash - I assume that means feet; correct?

A. Yes.

Q. It says 85 degrees; correct?

A. Yes.

Q. Isn't that correct?

A. Yes.

Q. Just to the right of that, it says water black color, 8 to 10 gallons per minute; correct? Isn't that correct?

A. Yes.

Q. So, Mr. Duspiva, doesn't that say that this well is at 85 degrees at 600 feet, you have got water right there? Isn't that what it says?

A. That's the temperature probe reading.

Q. No, Mr. Duspiva. Doesn't this say 85 degrees, 600 feet, water is black color, 8 to 10 gallons per minute.

MR. GOULD: Objection. He just answered that question.

MR. SMITH: No, he didn't. I asked a yes or no question, Jon -- excuse me, Judge. I didn't mean to address Mr. Gould. I asked the correct question.

A. This is the long form?
Q. Yes.
A. Yes.
Q. Okay. I think the Court's specific question was if you received that permit within a few days of the August 20th issuance date, and then you resumed drilling. And I think you indicated yes.
A. Yes.
Q. Okay. And, in fact, didn't you start drilling before you received that permit?
A. No.
Q. Didn't you finish drilling to 1100 feet before you received that permit?
A. I believe I answered that.
Q. No. Just go ahead and answer this question.
A. I was authorized --
Q. Mr. Duspiva, let's --
A. Okay.
Q. I'm really -- we'd like to move this along. So I've gone to a lot of effort to try to get some questions to you that will move us along.
So the question is didn't you finish drilling this well to 1100 feet before you

received that permit?
A. No.
Q. You did start drilling again before you received it?
A. No.
Q. Mr. Duspiva, the question I asked you before, to which you answered yes, was didn't you start drilling before you received that permit, and you said no.
MR. GOULD: Objection, Your Honor, I don't think the question -- that was the question. If it was, I misunderstood it. Might be a double negative.
MR. SMITH: Okay. Let's move forward.
Q. (By Mr. Smith) Yesterday, you testified that you completed drilling on September 26th; isn't that correct?
A. Yes.
Q. Okay. In September 26th, when you completed drilling, was before you actually received that permit, isn't it? You didn't have that permit on September 26th, did you?
A. I had authorization to drill.
Q. Mr. Duspiva --
A. I had verbal.

Q. Mr. Duspiva, you did not have that permit on September 26th when you completed drilling, did you?
Yes or no?
A. No.
Q. Okay. So when you resumed drilling after August 9th, you didn't even know if you had a permit to authorize that drilling, did you?
A. I had verbal from Rob Whitney.
Q. Mr. Duspiva, when you resumed drilling after August 9th, you didn't even know that you had a permit, did you?
A. I knew I had a permit.
Q. How did you know you had a permit?
A. Verification from Rob Whitney.
Q. Okay. In fact, you didn't receive that permit until October 25th, did you?
A. That's correct.
Q. Okay. And when you received that permit, you remember the discussion yesterday about the blue ink on the bottom of that permit? And it said you have to comply with rule 30?
A. Yes.
Q. Okay. And you got that permit on October 25th, and you had a problem with complying

with the rule 30, didn't you?
A. Not at that point.
Q. So did that well -- when you received that permit on October 25th, did it meet all conditions required by rule 30?
A. The well was not completed at that time.
Q. Mr. Duspiva, do not explain your answers. I am asking yes and no questions. Please. I'm not looking for explanations from you.
When you received that permit, that well that you drilled did not comply with rule 30 requirements, did it?
A. No.
Q. Okay. Let's go back to this Exhibit M.
Exhibit M was submitted on August 9th, correct?
A. Yes.
Q. And that's what you were just testifying to that on August 9th, that well did not comply with rule 30 requirements, did it?
MR. GOULD: I'm going to object, Your Honor. Compliance from rule 30 doesn't occur while the drilling's going on. And so, the question cannot

be answered. It would be the same if someone were building a house and they only had the beams and the foundation up, and said does the house at that time comply with the electrical code. Well, it doesn't --

THE COURT: This is argument, but it's not an objection to the question. So I appreciate your argument, but --

MR. GOULD: Well, he's asking my client a question that can't be answered is what's happening, and demanding a yes or no answer.

THE COURT: Pose your question, and then we'll determine that.

Q. (By Mr. Smith) Mr. Duspiva, on August 9th, when you submitted this Exhibit M to the department, that well at that point in time had not been constructed in compliance with rule 30, had it?

A. As I understand the question, I'd have to say yes.

Q. So it was in compliance with the rule 30?

A. Repeat the question, 'cause I think I've got confused.

Q. Okay. The way you had constructed that

well, the condition of that well on August 9th, the question was did it comply with the rule 30?

A. No.

Q. Okay. It did not.

And that is why you requested the variance, correct?

A. Yes.

Q. Okay.

MR. GOULD: Okay. I object. He's asking my client to make legal conclusions of whether something complies or doesn't comply. And if you look at rule 30, rule 30 compliance comes in at the completion of the construction. At this point, it's a proposed well. It's not a well. August 9th, it was not a well. It was a proposed well. Rule 30 compliance occurs at the completion.

THE COURT: Objection overruled.

MR. SMITH: Thank you.

Q. (By Mr. Smith) You testified yesterday that at any time you hit a layer of water, you gave Mr. Fillmore all of the details about that situation, correct?

A. Yes.

Q. Okay. When you hit -- looking back at

Exhibit M, 580 to 585, that indicates that that well, was already above 80 degrees, correct?

Isn't that what that exhibit says?

A. No.

Q. Okay. From the right-hand column, top of the page, it says 500 feet. To the left of that it says 81 degrees, correct?

A. Yes.

Q. Okay. And at 600 feet, you hit 85 degree temperature, didn't you?

A. Those were temperature probe readings.

Q. Mr. Duspiva, please, if you need to rehabilitate your testimony because it's in error or mistaken or wrong or whatever, your counsel can take care of that. That is not my job. My job is to try to get you to answer my questions, please. So I'm going to ask you just to answer my questions.

Looking at this exhibit, it says at 600 feet it was 85 degrees, correct? That's what this exhibit says?

A. Yes.

Q. When you saw the 81 degrees at 580 to 585 feet, you did not tell Mr. Fillmore about that, did you?

A. I did not see that.

Q. Mr. Duspiva --

MR. GOULD: Objection, Your Honor --

MR. SMITH: What --

MR. GOULD: He's -- objection, Your Honor.

MR. SMITH: Sorry, go ahead.

MR. GOULD: He's asking questions that aren't -- he can't answer yes or no. He's asking a conclusory question where he said, "when you saw that temperature." Well, he didn't see the temperature when he was drilling.

THE COURT: Okay. I need to have you rephrase your question, because I think it's -- I mean, the witness is -- you stated in your question that when you saw that it was at 81 degrees, and then he answered, "no, I didn't see it at 81 degrees," so we need a clarification of that.

MR. SMITH: Okay. That's fine.

Q. (By Mr. Smith) Mr. Duspiva, let's go back a little bit, try to help clarify this.

You indicated yesterday that the information on this sheet came from your field notes, correct?

A. Yes.

Q. Specifically, that's what you told hem?

A. I told them that -- the temperature at 836.

Q. So you didn't tell them that it was 600 -- or that it was 85 degrees at 600 feet?

A. No.

Q. When you told them it was -- excuse me, what temperature did you tell them it was at 836 eet?

A. 92 and a half degrees.

Q. Did you tell them that was bottom hole emperature?

A. Clay-cutting temperature.

Q. So you didn't tell them it was bottom iole temperature?

A. No.

Q. Didn't you testify yesterday you told :hem it was a low temperature geothermal well on August 9th when you met with them?

A. I told them we had to get a permit for a low temperature geothermal well.

Q. No, no.

So you testified yesterday you told :hem it was a low temperature geothermal well on

August 9th, didn't you?

MR. GOULD: Objection, the question's been asked and answered.

MR. SMITH: Judge, quite frankly, we've got a witness here --

THE COURT: No, stop.

Answer the question, please.

THE WITNESS: Yes.

Q. (By Mr. Smith) You told them -- 'cause of the interruption, I need to clarify.

You told them that it was a low temperature geothermal well when you talked to them on August 9th?

A. Yes.

Q. And that means that it was beyond 85 degrees bottom hole temperature on August 9th?

A. Yes.

Q. When did you go back to figure out that the well was actually low temperature geothermal at 600 feet?

A. August 8th.

Q. And so, because you didn't look at it when you were at 600 feet, you didn't stop drilling, did you?

A. No.

Q. If you had seen it was 85 degrees, would you have stopped?

A. Yes.

Q. But because you didn't measure bottom hole temperature, you didn't -- you just kept drilling, correct?

MR. GOULD: Objection, he's already answered that he did measure bottom hole temperature.

MR. SMITH: Judge --

THE COURT: Pose was your question again. Objection overruled.

MR. SMITH: Could the Reporter just read the question back so I don't mischaracterize it?

(The record was read by the Reporter.)

THE WITNESS: Yes.

Q. (By Mr. Smith) And because you didn't measure bottom hole temperature when you were at 600 feet, you didn't call the department then either, did you?

A. No.

Q. I want to go back through Exhibit M a ittle bit on this water production question. Okay?

Looking at this document, at 410 feet, you say you had developed -- that well was

producing 15 gallons per minute, correct?

A. Yes.

MR. SMITH: Okay. That's at -- Your Honor, that's at the bottom left-hand --

THE COURT: I see it.

Q. (By Mr. Smith) Okay. And at 580 to 585 feet, you had 8 to 10 gallons a minute, correct?

A. Yes.

Q. And at 670 feet, you had 10 gallons per minute?

A. Yes.

Q. So the final well that you produced only produced 17 gallons per minute, correct?

A. Yes, sand-free.

Q. So you had all of this water that you've been producing from 400 to 600 feet, and you couldn't make that well produce, correct?

A. Right.

Q. Was the first time you measured temperature in this well on August 8th?

A. No.

Q. When was -- I've got to tell you, I'm confused a little bit. You're saying you knew on August 8th that it was a low temperature

eothermal well, but you didn't know at 600 feet.
o I'm trying to figure out, when did you measure
iese temperatures?
When did you measure temperatures in
iis well?
A. I measured the temperature -- let me efer to the document -- when I developed a layer t 670 and at 701 previous to August 8th.
Q. Okay. And how did you measure? What
/ere you measuring?
A. The water on the discharge at the end if the development.
Q. That's the 72 degrees out of the top?
s that what you're referring to?
A. The water out the top when I was leveloping.
Q. So you're not measuring bottom hole emperature. You're measuring the water out of he top of the casing; is that correct?
A. That's bottom hole temperature.
Q. So 72 degrees is the bottom hole emperature?
A. Yes.
Q. Okay. Look down at the -- at the very)ottom of this graph. And it shows 800 feet, 91

and a half degrees.
A. Which side, Bruce?
Q. Right-hand side.
A. Right-hand side shows 92 and a half degrees.
Q. 92 and a half, right, at the bottom. That's your bottom hole temperature?
A. Clay-cutting temperature at the bottom of the well.
Q. So is that bottom hole temperature or not?
A. No, not according to the definition.
Q. So how did you know the bottom hole temperature was 92 degrees on August 8th?
A. Temperature probe.
Q. So that was something different from what you've recorded here?
A. Well, actually, the temperature probe reading is --
Q. No, no, no.
Was it some other method than what you've recorded here?
A. Correct. I understand your question now.
The 92 and a half degrees was clay

:uttings measured with a thermometer.
Q. Is that bottom hole temperature?
A. That's clay-cutting temperature off the)ottom of the hole.
Q. No. Is that bottom hole temperature?
A. No.
Q. So how did you know bottom hole :emperature was 92 degrees?
A. The clay cuttings.
Q. So you used the clay cuttings to determine what the bottom hole temperature was?
A. Yes.
Q. So when you were back at 600 feet and /ou're measuring the temperature, you said, and t's 85 degrees, at that point, you wouldn't use :he cuttings to measure bottom hole temperature; s that your testimony?
A. Yes.
Q. But you do agree after the fact, after all this information, that this well was low :emperature geothermal at 600 feet, then?
A. Yes.
Q. When you're measuring bottom hole :emperature and you're saying, according to this :hart, that 72 degrees out the top of the casing

was bottom hole temperature -- correct?
A. Yes.
Q. Now, you hit water at 400 and 500 and 600. Where's all that water going?
Or excuse me, doesn't that water go to the bottom of the hole?
A. The measures --
Q. Doesn't that water from the upper zones go to the bottom of the hole?
A. Clarification?
Q. No. No, Mr. Duspiva, not clarification.
You hit water at all these levels. You testified to that already. And my question is, when you hit that water at a shallow zone and it's not hot, doesn't that water go to the bottom of the hole?
A. No.
Q. So when you're measuring water out of the top, all you're measuring is water from the very bottom?
A. Yes.
Q. Since you didn't tell the Fillmores about the 85 degrees at 600 feet, and you now acknowledge that it was low temperature geothermal

there, you never told them about the ramifications of low temperature geothermal when that well was at 600 feet, did you?

A. No.

Q. And you didn't give them all the details about the ramifications of low temperature geothermal when you told them on August 8th that it was low temperature geothermal, did you?

MR. GOULD: Objection, it assumes, that phrase of "all the details" -- without defining what those details are, there's no way a person can answer that.

THE COURT: Objection overruled.

THE WITNESS: Repeat the question, please.

MR. SMITH: Would the Reporter please read that question back?

(The record was read by the Reporter.)

THE WITNESS: Yes, I did.

Q. (By Mr. Smith) Did you explain to them about the requirement that there's a one-inch annular space on low temperature geothermal well?

A. No, I did not.

Q. That is correct, isn't it? Isn't that one of the requirements of a low temperature geothermal well?

A. Yes.

Q. And there are special casing requirements under rule 30 for the number of strains of casing, correct?

A. Yes.

Q. And you didn't tell them that either, did you?

A. No.

Q. And you didn't tell them about the fact that a full-length seal is required by rule 30 either, did you?

A. No.

Q. And you didn't tell them about what the ultimate liabilities that they would have for having a low temperature geothermal well would be either, did you?

A. I did.

Q. So Mr. Duspiva, according to this testimony, you drilled a low temperature geothermal well, and after it was low temperature geothermal well, you informed the Fillmores about that; is that correct?

A. Yes.

Q. So once that well was low temperature geothermal, and I think you did testify, correct

me if I'm wrong, that you did not drill it in compliance with the criteria of a low temperature geothermal well; is that correct?

A. Yes.

Q. So on August 8th, you had to figure out how to bring that well into compliance, didn't you?

A. Yes.

Q. So you called Mr. Whitney on August 9th and told him that you had drilled into a low temperature geothermal situation, and he told you to send in the schematics of what that well was constructed as, or how it was constructed, correct?

A. Yes.

Q. And that's what that August 9th submittal is, isn't it?

A. Yes.

Q. So at that point, you went back and reconstructed what you had done?

A. No.

Q. When you submit that August 9th report, isn't that the response to the request for Mr. Whitney to tell him how you constructed that well, and what it was consisting of?

A. Yes.

MR. SMITH: Judge, excuse me, at this point, I want to kind of reorganize a little bit. I've got some exhibits that I excerpted. What I intend to do with this witness is pursue this bottom hole temperature question. Okay? And I've got some exhibits that I've pulled together from the exhibits we have. There's a couple of others that we haven't really gotten to yet in the testimony because of the way we're structuring the testimony by Mr. Duspiva today. 'Cause, my original intent was to bring Mr. Duspiva up at the end of my case in chief, but -- so I've got exhibits that we haven't really even gotten to yet, but I want to ask him about that. And then I'll have to follow up with those later. Okay?

THE COURT: Okay.

MR. SMITH: Is that okay?

Q. (By Mr. Smith) Mr. Duspiva, I'm going to hand you this binder. And it's got eleven exhibits in it. And we're going to go through those. Okay?

MR. SMITH: Judge, a copy for you.

THE COURT: Well, now I don't want to get a confused record here. You're handing me a binder

Repeat your question.

MR. SMITH: I think I have the question.

Q. (By Mr. Smith) This notice of violation was issued to you for violating condition 8 of the start card, was it not?

A. Yes, and rescinded.

Q. No. Mr. Duspiva, please. We've been through this about me asking you questions and getting an answer. I would appreciate it if you'd cooperate, okay?

In condition 8 of the start card, as your counsel just read, says, "if you hit a bottom hole temperature of 85 degrees, you shall stop construction and contact the department immediately, correct?

A. Yes.

Q. So that's what they issued the violation to you for, for not doing that; isn't that correct?

A. Yes.

Q. And looking at that page, it says -- further down where I highlighted, it says, "drilling continued to an additional 200 feet or more before notification was provided to the department, correct?

A. Correct.

Q. Okay. And so, according to this document, you failed to notify the department when you hit low temperature geothermal, correct? That's what this document says?

A. Yes.

Q. And a little math. 836 feet, which is the depth of the well on August 8th, minus 600 feet is 236 feet, correct?

A. Your math is correct.

Q. Okay. So --

MR. GOULD: Objection.

Q. (By Mr. Smith) We're talking about approximately 200 feet, that's what we're talking about. Okay?

A. Yes.

MR. SMITH: Okay.

MR. GOULD: Objection, Your Honor, it's -- counsel is starting to badger the witness. The document speaks for itself.

THE COURT: Objection overruled. Go ahead and proceed.

Q. (By Mr. Smith) Okay. Would you please -- let's see.

Would you look at Exhibit Y, please?

A. Okay.

Q. Have you seen that one before?

A. It looks like a previous exhibit.

Q. But have you seen it before?

A. I'm not sure.

Q. Okay. If you would like, if you would refer back to Exhibit DD. Okay?

And let me just help you. This says the preliminary order. And Exhibit DD was the amended preliminary order, issued by the department in the matter of abandonment of the John Fillmore well.

A. Okay.

Q. Okay. And if you look at finding of fact No. 3 here, and finding of fact No. 5 here, aren't they pretty much the same findings that the department made in the amended preliminary order?

A. Yes.

Q. Okay. So they made -- they issued two separate orders, and made the same findings in both, correct?

A. I haven't read it close enough to completely understand it.

Q. That's okay.

And would you go to Exhibit A, please?

A. You said Exhibit A?

Q. Yes.

A. Thank you.

THE COURT: Do you have a question about this exhibit?

MR. SMITH: Oh, I'm sorry. I thought he was still --

Q. (By Mr. Smith) Have you seen this before?

A. Yes.

Q. What is it?

A. It's a memorandum.

Q. Where did you see it?

A. I'm not sure.

Q. When did you see it?

A. I'm not sure.

Q. Okay. Do you know what it is besides a memorandum?

MR. GOULD: Objection --

MR. SMITH: All right. Let me ask a more direct question to help counsel too.

Q. (By Mr. Smith) Mr. Duspiva, isn't this the staff memorandum prepared by Mr. Whitney where it says at the top, by Mr. Whitney, "in response to the hearing officer's order in the matter of

Mr. Duspiva has already testified that the well did not comply with rule 30.

MR. GOULD: And my objection is that it doesn't mean it was drilled improperly.

THE COURT: Can I get the Court Reporter to read back the question, please?

(The record was read by the Reporter.)

THE COURT: And I'll sustain the objection with regard to drilled improperly. Otherwise, I'd ask you to answer the question.

THE WITNESS: Yes, Your Honor. The question would be yes.

MR. SMITH: Your Honor, I think this is a good time for a break. I've got some questions for Mr. Duspiva just to let you know, about department rules and regulations that he is obligated to comply with.

THE COURT: Okay.

MR. SMITH: So would you like to take a short break and then do that, or do you want me to do it now? You asked me how long it's going to take. I was going to take the break and go through these and see where I can cut this short, but I -- like I said, it's my shot at --

THE COURT: Well, if you need a break to

kind of organize your thoughts, then we'll go ahead and take one.

MR. SMITH: Okay. Just five minutes.

(Break taken from 11:25 to 11:33.)

THE COURT: Mr. Duspiva.

THE WITNESS: Thank you.

THE COURT: Okay. Resuming with the cross-examination of Mr. Duspiva, Mr. Smith.

MR. SMITH: Your Honor, I'm going to try to get done before noon. Okay?

Q. (By Mr. Smith) Mr. Duspiva, as a licensed well driller, you are charged with understanding and complying with the well drilling rules issued by the state, correct?

A. Yes.

Q. And under rule 30, you're required to measure bottom hole temperature, are you not?

A. Yes.

Q. Idaho Code department rules require a permit to drill, do they not?

A. Yes.

Q. And Idaho Code 42-238 requires all wells to be constructed to IDWR standards, correct?

A. Correct.

Q. To drill a low temperature geothermal well, you have to have a water right for that, don't you?

A. Yes.

Q. There was no water right issued for this well that you drilled, was there?

A. No.

Q. And the well was not constructed to IDWR standards, was it?

MR. GOULD: Objection, there wasn't a well -- well was never completed. It's an impossibility.

THE COURT: Answer the question if you can.

THE WITNESS: I'm not sure.

Q. (By Mr. Smith) Okay. And under the well driller licensing rules, you're required -- rule 50 requires you to drill and complete wells in compliance with well construction standards, correct?

A. Correct.

Q. And drilling permit conditions too, correct?

A. Correct.

Q. Start cards can't be used for low temperature geothermal wells, can they?

A. No.

Q. And to drill a low temperature geothermal well, you have to have a preapproved drilling prospectus from the director of the Department of Water Resources, don't you?

A. That's stated in rule 30.

Q. So that's yes?

A. Yes.

Q. Okay. And you drilled this low temperature geothermal well without complying with any of those, correct?

A. Yes.

Q. Mr. Duspiva, you had this well that you had drilled that did not comply at that time with -- at the time you drilled it, with the rule 30 criteria, correct?

A. Correct.

Q. And you, as a driller, had this agreement with the Fillmores. You weren't personally capable of bringing that well into compliance with rule 30, were you?

A. Yes.

Q. By yourself, just you?

A. Yes.

Q. And how did -- okay. Let me ask --

MR. GOULD: I'm going to object as to relevance. I mean --

MR. SMITH: Well, let me develop it --

MR. GOULD: This has nothing to do with the agreement between the parties to drill the well.

THE COURT: Well, I think what Mr. Smith pointed out is that the agreement was evolving during the course of time. And I believe it's your client's position that the Fillmores agreed to the geothermal well. And I'm going to allow Mr. Smith to inquire. But --

MR. SMITH: Judge, just give me a minute. I've got to go back to the deposition.

Jon, look at page 72 of his deposition.

MR. GOULD: Okay.

Q. (By Mr. Smith) So Mr. Duspiva, I just asked you about complying with rule 30, and you said that you were personally capable of complying with rule 30.

A. Yes.

Q. Okay. And I asked you about this subject matter in the deposition because we had this issue about you wanting to hire these contractors from North Idaho and Oregon to come in to help complete or abandon this well, correct,

you recall that?

A. I recall that.

Q. Okay. We'll refer you to this deposition testimony. Okay? We're talking about hiring the subcontractors. Okay? "Why were you doing this?"

And your answer was?

A. "To comply with rule 30."

Q. Okay. "Why weren't you doing it?"

And what was your answer?

A. "'Cause of lack of experience setting the term packer, and the lack of equipment to do it."

Q. My question, "so you didn't have the equipment or experience to do this?"

And your answer was?

A. "Right."

Q. Start card authorized you to start drilling 200-foot well, correct?

A. Yes.

Q. The long form application that was filed and submitted on or about August 16th that you received October 25th authorized drilling after August 20th, did it not?

A. Yes.

Q. But it was only so long as you comply with rule 30, correct?

A. Correct.

Q. So, in fact, for any drilling from 200 feet in that start card until you got the second permit, you didn't have a drilling permit to be drilling at all, did you?

A. I don't know that.

Q. Well, one permit takes you to 200 feet, and the other permit issued after you're at 836 authorizes you to continue drilling.

So you tell me, what permit applied between 200 feet and when you started drilling after the permit was issued -- or excuse me, when you started redrilling after you notified the department that you were at 836. What permit applied?

A. The start card.

Q. The start card authorized you to 200 feet. That's what you already testified to.

A. Right.

Q. So what permit -- your testimony is the start card authorized you to drill beyond 200 feet?

A. Yes.

Q. Start card said 200 feet, correct? We're all in agreement on that?

MR. GOULD: Objection, what the start card says is clear. And it says, "proposed maximum depth."

THE COURT: Yeah. The document speaks for itself.

MR. SMITH: Sure.

MR. GOULD: And it's proposed.

Q. (By Mr. Smith) And so, for that long form permit that was issued on August 20th and you got in October, the drilling you did after that long form permit was issued did not -- the well didn't comply with rule 30. We've already determined that.

So you didn't comply even with the conditions that were issued on the long form permit, did you?

Yes or no?

A. No.

Q. So isn't it a fact that the only permitted drilling that you did was in association with that start card?

A. I don't know that.

Q. And that start card was the only permit

that was -- excuse me, let me rephrase this.
And that start card was for the agreement that you had with the Fillmores to drill a domestic well, correct?
A. Yes.
Q. And the Fillmores never authorized you to do any illegal drilling, did they?
A. No.
Q. And they didn't authorize you to do any drilling without a permit, did they?
A. No.
Q. And they didn't authorize you to drill without complying with the rules, did they?
A. No.
Q. And they never agreed to pay you for all these efforts to hire these other people to come in and try to fix that well and bring it into compliance, did they?
A. No.
Q. I want to turn to screens and filter packs. This is going to be the end of cross-examination.
Mr. Duspiva, I want to talk to you about screens and filter packs for a minute. Purpose of a screen and filter pack is to screen

out sand, isn't it?
A. Yes.
Q. And screens and filter packs were used frequently in this area where you've got sediment problems like you do out in this area where you drilled the Fillmore well, correct?
A. Yes.
Q. As you said in your deposition, though, you consider screens to be a hindrance, correct? Do you recall that?
A. Yes.
Q. And you had already drilled the Roen well and hit low temperature geothermal, correct?
A. Correct.
Q. And that Roen well was over a thousand feet and it was just two miles from where you drilled the Fillmore well?
A. Yes.
Q. So you had some reasonable basis for knowing that if you went deep, you'd hit geothermal, didn't you?
A. Yes.
Q. And that final well was 17 gallons a minute, correct, the 1100-foot well you drilled?
A. The Fillmore well?

Q. Yes. That's what you produced?
A. 17.6.
Q. Okay. 17.6 gallons per minute. It was 102-degree water, correct?
A. 102 and a half.
Q. 102 and a half.
Yet you reported hitting water of 10 to 15 gallons per minute back before you hit 16 -- 600 feet, correct?
A. Correct, with sand.
Q. With sand, correct.
But you couldn't fix that sand problem, could you?
A. No.
Q. And you, in fact, didn't even mention to the Fillmores the idea or the option of installing a screen and filter pack in order to develop that domestic well in a cold water zone so that you wouldn't end up in this low temperature geothermal problem, did you? You didn't tell them that?
A. I told them I didn't set screens.
Q. No, but you didn't tell them about the option and the possibility of installing a screen and filter pack, did you?

A. No.
Q. You didn't give them an option?
A. No.
Q. You recommended drilling deeper?
A. Yes.
Q. And at one point, you got down before 600 feet to, I think it said, 2 teaspoons of sand in your 5 gallon bucket, correct?
A. Correct.
Q. But you couldn't bring -- you're a master groundwater contractor?
A. Yes.
Q. You're the only one of your kind in the state, correct?
A. Correct.
Q. And you couldn't bring it to yourself to tell your clients about this option to install a filter pack and screen even if you didn't like it, even if you thought it was a hindrance, but you didn't even have the wherewithal to tell your customers about that as an option so that they could have a cold water well -- a cold water domestic well like they had asked you to drill, did you?
A. No.

Q. And, in fact, you think screens are a hindrance because you make your money by drilling deeper, don't you?
A. No.
Q. Do you make more money if you drill deeper?
A. No.
Q. If you're charging by the foot and you drill deeper, you don't make more money?
A. It takes more time.
Q. The question is not time. The question is do you make more money?
A. Yes.
Q. But you didn't give the Fillmores even the option of doing the screen and filter pack, did you?
A. No.
Q. And we're here today because the Fillmores found out what you had done, and they found out through the Department of Water Resources; isn't that correct?
MR. GOULD: Objection, it's asking Mr. Duspiva to speculate on how the Fillmores obtained information.
THE COURT: Sustained.

Q. (By Mr. Smith) Did you inform the Fillmores about the low temperature geothermal problem?
A. Yes.
Q. Okay. And you told them all the details of it and what they were going to be obligated to do?
A. All that I knew.
Q. So which ones did you not know?
MR. GOULD: Objection, what does which ones mean?
MR. SMITH: I responded to the witness' answer. "I told him all I knew." I'm asking which --
THE COURT: Hang on a second. Let me read the --
Okay. The question was, "you told them all the details of it and what they were going to be obligated to do?" The answer, "all that I knew." Mr. Smith is asking, "so which ones did you not know?"
I think I'm going to sustain the objection on that question. But if the question is what did you later find out that you did not know at the time, that would be an appropriate question.

MR. SMITH: Good question, Your Honor.
Q. (By Mr. Smith) So what did you find out later that you didn't know about that you could advise the Fillmores about?
A. More extensive requirements by the Department of Water Resources.
Q. And what requirements are you referring to?
A. Sealing process.
Q. Anything else?
A. That's all I can remember.
Q. So you didn't realize what the sealing requirements were under rule 30?
A. Understood them.
Q. But you couldn't explain them to the Fillmores or you didn't?
A. I didn't.
Q. And you learned them after -- according to the Judge, after you told them about the problem with the low temperature geothermal well?
A. Past history. It was never required.
Q. I apologize, I don't even understand the answer. Past history about what?
A. On the former wells.
Q. The other three low temperature

geothermal wells?
A. Yeah. There are two.
Q. So based on the fact that you had drilled these other three low temperature geothermal wells, you didn't understand what it took to comply with rule 30?
A. The department --
Q. No.
A. Okay.
Q. Did you not understand what rule 30 required, independently of what happened with those other three wells?
A. I understood rule 30.
Q. But there were some parts of it you didn't explain to the Fillmores, correct?
A. That is correct.
Q. Because you learned it after the fact?
A. Correct.
Q. So when you learned these things after the fact, that's when you were proposing to bring in other contractors from North Idaho, from, I think, Eastern Oregon to help you bring that well into compliance, correct?
A. Correct.
Q. And you expected the Fillmores to pay

for all of that, didn't you?

A. Yes.

Q. And when they asked you about the details of these proposals to use other people to fix the wells, you didn't want to give them all that information, did you?

A. I gave them an estimate.

Q. No, you didn't want to give them the details about all these other people you were going to hire, did you?

A. Yes.

Q. Yes, you did want to?

A. Yes, I did not give them the details.

Q. Okay. Despite them asking for it?

A. Yes.

Q. And when that information was not provided to them, they didn't agree to pay all these other people to fix that problem that you had created, did they?

A. I don't know that.

Q. They didn't agree to hire those other people to fix that well, did they?

A. The result is they didn't continue with their decision.

Q. But they didn't agree for you to go out

and hire these other people to come in and fix that well, did they?

A. I don't think I've ever seen that in documentation.

Q. I don't care if you've seen it in documents or not. They didn't agree, did they?

A. How would I know that, Bruce?

Q. Because of your point that they didn't decide to abandon or complete it because you didn't give them the information.

Isn't that correct?

A. I don't know that.

MR. SMITH: I have no further questions, Your Honor.

THE COURT: And what would be the length you expect of your redirect examination?

MR. GOULD: I think I can do it in under 30 minutes. I will try. But I would ask the Court that I could ask leading questions on direct -- or on cross under 16 -- or 611 rules of evidence. It would help speed things up dramatically. I think it's 611. Might be 612. 611(c).

THE COURT: Well, I guess we're going to have to consider that on a question-by-question basis, depending upon whether Mr. Smith objects.

MR. SMITH: Okay. That's fair.

THE COURT: But what we're going to do is we'll take a lunch recess at this time. I'm a little bit concerned that we're not on a pace to get this completed by tomorrow night. Are we -- is there a reason for that concern, or are you guys comfortable that we're on that pace?

MR. SMITH: From talking to Mr. Gould this morning, he's got very few questions to try to rehab his witness. And I don't -- unless there's some big surprise comes out of it, I don't know if I've got anymore for Mr. Duspiva, and then we'll move into probably -- well, it's his turn. He's gets to call Rob Whitney. I don't know how much questions he's got for Rob.

I'm going to -- quite frankly, just to let you know, I'm going to be moving to admit Rob's report -- Mr. Whitney's report, which is the -- my Exhibit A. And Mr. Gould's going to object to it. And so, if you would look at it an figure out if I lay an adequate foundation for Mr. Whitney to have prepared that -- he prepared it in response to a department order. So I'm going to move for admissibility. And Mr. Gould's going to object to it. So we're going to have to deal with that.

THE COURT: But is he the next witness?

MR. GOULD: Well, I think there's John Fillmore as well. But we can -- if it's -- Rob's schedule is a conflict, we can call Rob this afternoon immediately. I mean, I don't think I have a lot to ask of Rob. It depends on how much Bruce asks of him.

THE COURT: Well, you know, if he testifies, and you can lay the proper foundation, it's likely that that's going to be admitted, but I can't say until I hear from Mr. Whitney. And what we're going to do is we're going to resume at 1:30, and we'll take up the redirect examination of Mr. Duspiva, and then we'll take up Mr. Whitney.

MR. GOULD: If I could, I'll just lay out -- my primary objection is that that memorandum was prepared by order of the director or by order of the hearing officer for an administrative hearing and enforcement hearing. And that, I think, pulls it out of the exception of the public records document. I don't have any real qualms with the memorandum or the attachments. There are some opinion statements from Mr. Whitney. And that was my primary concern, but --

THE COURT: Okay. We'll take that up this

EXHIBIT 3

rescission of it -- let me rephrase this.
The fact that it was rescinded, does that mean that there was not a violation of condition 8 of the start card?
A. No, sir.
MR. GOULD: Objection --
THE COURT: It's been asked and answered.
Q. (By Mr. Smith) At the October 23rd meeting, did you have any discussions about the drilling of the Fillmore well as it related to options that would have been available at 600 feet?
A. We did discuss a variety of options to make that a viable well, one of which was to abandon the lower part of the well and just build a well in the cold water aquifer.
Q. And what aquifer are you referring to?
A. That would have been above 600 feet before the 85 degrees was hit.
Q. And, I mean, were you taking about that that could still be done at that point?
A. I believe that could still have been done.
Q. What would that have required?
A. That would have required abandoning the

entire bottom part of the hole, making sure that that entire zone was sealed off, and then perforating the casing above that zone to allow water to come into the well.
Q. Okay. So could that -- I take it that could have been done at 600 feet as well, correct?
A. That could have, yes, sir.
Q. Are you aware whether the use of screens and filter packs is a standard for the industry --
A. It is.
Q. -- well drilling industry?
It is?
A. Yes, sir.
Q. And screens and filter packs are designed to address sand problems; is that correct?
A. Correct.
Q. August 9th, Mr. Duspiva reported to Mr. Whitney that the well was low temperature geothermal, correct?
A. From what I understand, that's correct.
MR. GOULD: Objection, it's hearsay.
Q. (By Mr. Smith) Did you have a conversation with --

THE COURT: Well, it is hearsay as to this witness, but I think it's already been established in evidence, so we're going to go ahead and proceed.
MR. SMITH: Okay. Thank you.
Q. (By Mr. Smith) Did you have a subsequent conversation in the immediate days after August 9th with Mr. Duspiva?
A. I had a conversation with Mr. Duspiva. He had called to find out if -- I think it was a different time frame, though.
Q. Okay. Do you recall --
A. Okay. No. I think I know what you mean. Yes, I -- Mr. Duspiva called me to get approval to continue the casing down below where he had drilled to. And I believe the casing was at about 691 when he called me. He had drilled to about 836 feet. And he felt like, based on the sediments he'd gone through, he found some zones that he thought he could seal out the sand. And he wanted approval to go ahead and continue to drive that casing down to see if he could develop a zone and get sand-free, minimum sand water. I wasn't comfortable at the time, because I really hadn't been too much in the middle of it, so I

called Rob Whitney. He was on vacation at the time. I got him on his cell phone. We discussed it briefly. And Rob said that --
MR. GOULD: Objection, hearsay.
THE COURT: Sustained.
Q. (By Mr. Smith) Can't talk about what Mr. Whitney said, so move on with --
A. Okay.
Q. -- what you told Mr. Duspiva --
A. So I told Mr. Duspiva that he could take the casing down to 836 to see if he could find a sand-free zone there to develop as well. But I told him not to drill any further until he had talked to Rob Whitney, who was supposed to be back from vacation that next week. And I believe that was on a Friday afternoon he called me.
Q. Do you have any idea what date it was?
A. I don't.
Q. But your instructions were do not drill?
A. Correct, specifically.
Q. Do you know if he drilled after that before talking to Mr. Whitney?
A. The next I heard about it, I talked to Mr. Whitney to find out where the well was. And

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Mr. Neace didn't author that document. He didn't make the findings of facts and any information contained in this document that was related to Mr. Neace would be hearsay. A hearsay communication between the author, administrative water management division person Gary Spackman and that --

THE COURT: I'm going to deny admission of this exhibit, but I want the parties to be aware that the Court considers that it is in evidence that the Department of Water Resources was of the opinion that Mr. Duspiva failed to comply with approval No. 8 of the start card. And it's also in evidence that he was received a one-year suspension of the start card privileges.

MR. SMITH: But it's not going to be admitted?

THE COURT: This document is not going to be admitted, no.

MR. SMITH: Okay. Mr. Neace, I have no further questions for you. Thank you very much for your time.

THE WITNESS: Thank you.

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CROSS-EXAMINATION

BY MR. GOULD:

Q. Mr. Neace, the notice of violation we were just discussing, that was rescinded after an evidentiary hearing; is that correct?

A. It was rescinded after --

Q. Yes or no, please.

A. No.

Q. It was not rescinded?

A. It was rescinded after a compliance conference.

Q. Thank you.

And at that compliance conference, evidence was presented?

A. Yes.

Q. Thank you.

The rescission -- the notice of violation had no retroactive terms or conditions?

A. Restate that. I'm not sure what you mean.

Q. The document that rescinded the notice of violation, were there any retroactive terms or conditions that would be applicable to Mr. Duspiva?

A. The -- I guess he had agreed to suspend

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the start card privileges and I can't remember if that was in that document or not. I believe it was.

Q. But that would be moving forward, right?

A. Correct.

Q. And that's something he agreed to?

A. Yes, he did.

Q. And the rescission of the notice of violation had no impact or consequence on the drilling services provided by Gary back in 2007?

MR. SMITH: Objection, he's got no basis for testifying or answering that question.

THE COURT: What's the question again?

Q. (By Mr. Gould) Did the rescission of the notice of violation have any impact or consequence on the drilling services Gary performed back in 2007?

MR. SMITH: I renew my objection to that. It's an intelligible question, and it calls for speculation.

THE COURT: Go ahead and answer the question.

THE WITNESS: I guess the answer would be no, I'm not really sure what that means, but --

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MR. GOULD: Okay.

THE WITNESS: Best of my ability, no.

Q. (By Mr. Gould) And you stated that at some time, you didn't know the date, that you authorized Gary Duspiva to lower the casing?

A. Correct.

MR. GOULD: Having a hard time reading my notes. I apologize. It's one last sentence. Oh, all right. Thank you for the break.

Q. (By Mr. Gould) You testified about start cards and a requirement or that the department had authority to take action if a driller exceeded the proposed maximum depth stated on the start card?

A. Well, what I said is the driller, if he was going to exceed that maximum depth, should get approval from the regional office agent.

Q. Okay. Should get approval?

A. Right.

Q. Okay.

A. Because, otherwise, they're violating the terms of their start card.

Q. Is there a policy statement that states that?

A. Not that I'm aware of, but the terms

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

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendant.	Case No. CV 08-10463 **PLAINTIFF'S REPLY TO DEFENDANTS' CLOSING ARGUMENT**

COMES NOW, the Plaintiff in this proceeding, Gary Duspiva, by and through his attorneys of record, Ringert Law Chartered, and hereby submits his Reply to Defendants' Closing Argument in this matter.

I. INTRODUCTION

Defendants comparison of Mr. Duspiva to Bernie Madoff is ludicrous. Madoff pled guilty to eleven criminal offenses including fraud, theft and perjury. Mr. Duspiva is simply seeking payment for services he provided to the Defendants at the Defendants request. After performing under the contract, Mr. Duspiva continued to work with the Defendants and Idaho Department of

Water Resources ("IDWR") through most of 2008 at no cost to the Defendants to help them resolve this matter. In over 30 years of drilling, excepting the Defendants, Mr. Duspiva has never had a complaint about his well drilling services. In fact the majority of Mr. Duspiva's customers are repeat customers or referrals from former customers.

II. REPLY

Defendants Closing Argument contains numerous false statements, misrepresentations and conclusions based on false statements. Mr. Duspiva, upon request of IDWR, submitted two well completion plans that he called "variances". Defendants falsely stated that the "variances" were denied by IDWR. In Defendants Ex. A, it states that IDWR did not take action on the proposals because the well depth had yet to be determined. Once drilling was complete, IDWR approved the well completion plan.

Defendants' Closing Argument at p. 15 states that "John Fillmore testified that he did not agree to the charges but that he recognized the payment was a mistake he should have caught." John Fillmore never made this statement or anything close to it at trial.

In reviewing the Defendants' Closing Argument, it is a series of repetitive false or misleading statements, including Defendants' Exhibit. The majority of relevant misrepresentations are addressed in this reply. Additionally, Defendants, at trial through the questioning by their counsel and now in their closing argument, misrepresent temperature data. To eliminate misinformation and prevent confusion, Exhibit 1 (attached hereto), lists the temperature data presented at trial.

Through their closing argument Defendants argue that they are not liable for the entirety of Mr. Duspiva's drilling costs for the following reasons:

A. The contract was for the drilling of a well to a depth of 200 feet.

B. The contract was for an illegal purpose.

C. Mr. Duspiva violated IDWR rules and state laws enforced by IDWR.

D. There was no consideration by Mr. Duspiva because the drilling he provided was illegal.

E. Mr. Duspiva breached his duty to perform in a workmanlike manner.

F. Mr. Duspiva violated the Consumer Protection Act.

A. The Contract Was for the Drilling of a Well.

The contract between the parties was to drill a well. The Start Card Permit listed a proposed maximum depth of 200 feet. In response to the question "in June of 2007, did you discuss a specific depth with Gary Duspiva?" posed by this Court, Clyde Fillmore answered "no." John Fillmore testified that he met Mr. Duspiva for the first time on or about June 11, 2007 and that he doesn't recall any discussions involving the well. There is no evidence that the contract to drill a well was limited to drilling no more than 200 feet.

Assuming, for arguments sake, this Court finds that the contract was limited to a drilling depth of 200 feet, the parties agreed to modify the 200 foot limitation when Clyde Fillmore authorized Mr. Duspiva to continue drilling and Mr. Duspiva agreed. In Idaho, a contract may be modified by a subsequent oral agreement. *Scott v. Castle*, 104 Idaho 719, 662 (Ct.App. 1983). Here, Clyde Fillmore directed Mr. Duspiva to continue drilling. Clyde testified at trial that he had discussions with Mr. Duspiva "early on within in the 200 feet and he had water at 85 feet." Gary recommended continuing drilling. Clyde then authorized Mr. Duspiva to continue drilling. In fact, Clyde testified that he authorized Mr. Duspiva to continue drilling until the final depth of 1,130 was reached.

B. The Contract Was **Not** for an Illegal Purpose.

Defendants allege that the contract to drill a well was for an illegal purpose. The contract as stated by the Defendants was to drill a well. Drilling a well is not an illegal purpose or act.

Defendants argument appears to be that Mr. Duspiva violated state law in drilling the well. Assuming, for arguments sake and contrary to the evidence presented at trial, Mr. Duspiva did violate state law while drilling the well, a violation of the law by a contractor does not per se void the contract.

Also dispositive on this matter, Mr. Duspiva did not violate any state law while drilling this well for the Defendants. A determination by the parties as to whether a law was violated is irrelevant because these parties lack the authority to make that determination. The only evidence of a violation was the notice of violation of a condition of the Start Card Permit. The notice of violation was issued in 2009, over a year after all drilling was completed. There was no consequence to the Defendants from the notice. Most importantly, the notice of violation was rescinded after an evidentiary hearing was conducted. There is no evidence of a finding of any type of violation against Mr. Duspiva resulting from his drilling services for the Defendants.

C. Mr. Duspiva DID NOT Violated IDWR Rules and State Laws Enforced by IDWR.

Defendants are unable to prove that Mr. Duspiva violated a rule or law while performing services under the contract with Defendants. Under Idaho Code §§ 42-238 and 42-1701B, IDWR is authorized to enforce its agency rules and violations set out in title 42, Idaho Code. IDWR personnel testified at trial. There is no evidence that IDWR or any other body authorized to enforce the rules and laws referenced by the Defendants has held that found that Mr. Duspiva violated any rules or laws.

Defendants specifically cite the following rules and law as being violated:

1. IDAPA 37.03.09.030.01 - recording Bottom Hole Temperature.

Defendants incorrectly state that 37.03.09.030.01 required Mr. Duspiva to measure Bottom Hole Temperature ("BHT"). Defendants' Closing Argument at 20. Defendants acknowledge that he measured BHT but that it "in the wrong place." *Id.* Rob Whitney testified that IDWR does not define the methodology for measuring BHT.

Rule 37.03.09.030.01, as it pertains to BHT, states "[t]he owner or well driller is required to provide bottom hole temperature data . . ." Mr. Duspiva provided IDWR with BHT data as required.

2. IDAPA 37.03.09.030.03 and 37.03.09.030.04 Casing and Sealing of Casing.

Defendants state "[Mr. Duspiva] violated IDWR regulations at IDAPA 37.03.09.030 that apply to the construction criteria for Low Temperature Geothermal ("LTG") wells with regard to annular spacing requirements, casing, and sealing." *Id.* Defendants fail to state how Mr. Duspiva violated this rule.

Plaintiff's Closing Argument points out that IDAPA 37.03.09.030.03 and 37.03.09.030.04 allow IDWR waive the requirements contained therein as illustrated by IDWR's approval the completion plan for the Fillmore Well drilled by Mr. Duspiva. Making Defendants' argument irrelevant is the fact that, as testified by Rob Whitney, compliance with well construction is determined when the well is completed not during the construction.

3. I.C. §§ 42-233, -235, -238.

Defendants allege that Mr. Duspiva violated I.C. §§ 42-233, -235, -238. However, there is no evidence of IDWR ever issuing a violation to Mr. Duspiva as to the above referenced statutes. Defendants' belief that a law has been violated is irrelevant.

Defendants acknowledge that compliance with I.C. § 42-233 can be exempted by IDWR. IDWR exempted the use of the water for domestic use when it issued the LTG drilling permit on August 20, 2007. (See Plaintiff's Exh. 6, section 4 - Proposed Well Use - Domestic).

I.C. § 42-235 requires a drilling permit to drill a well. The evidence demonstrates that Mr. Duspiva drilled with a valid drilling permit at all times. Drilling under the Start Card Permit was initiated on June 12, 2007 and continued until August 8, 2007. The start card drilling permit was valid from June 12, 2007 through August 9, 2007.[1] Prior to issuing the LTG well permit, IDWR had knowledge of the depth drilled and conditions encountered by Mr. Duspiva under the Start Card Permit. In fact, on or about August 8, 2007, Rob Whitney (IDWR) told Mr. Duspiva that a new drilling permit would be needed if drilling was to continue. Mr. Duspiva did not drill between August 8 and August 20, 2007.

On August 20, 2007 IDWR received, approved and notified Mr. Duspiva of the approval of the LTG well drilling permit. Mr. Duspiva stopped drilling on or about September 26, 2007. The permit remained valid until August 20, 2008. Lastly, IDWR, having actual knowledge of the drilling and permits in this matter, did not issue a violation of drilling without a permit.

Defendants allege Mr. Duspiva violated I.C. § 42-238 by failing to comply with IDWR well construction standards. Defendants do not identify the well construction standards being referenced. There is no evidence of IDWR finding any of the well construction standards listed in § 42-235 were violated.

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[1]Whitney testified that the start card drilling permit became invalid when LTG conditions were encountered on August 9, 2007.

D. There was Consideration By Mr. Duspiva Because the Drilling He Provided was Legal.

Defendants allege that there was no consideration by Mr. Duspiva because the drilling was illegal. Defendants are drawing an invalid conclusion based on the false and unsubstantiated premise that Mr. Duspiva's drilling was illegal. Defendants state that Mr. Duspiva's actions were continuously in violation of Idaho statutes and IDWR regulations. As stated above, there is no evidence of any finding by IDWR or any other regulatory body that Mr. Duspiva violated statutes or regulations. In reviewing Defendants' allegations of unlawful conduct by Mr. Duspiva, the Defendants either misinterpret the underlying authority or misinterpret the evidence.

Only bodies authorized to enforce the rules and laws can make a binding determination of whether an act is unlawful. The Defendants belief that a statute or regulation was violated does not equate to a violation.

E. Mr. Duspiva Satisfied His Duty To Perform in a Workmanlike Manner.

"In a contract for drilling a water well, there is no implied undertaking that water will be obtained or that the well will be a success as to the quantity or quality of the water obtained, but only that the work shall be done in a workmanlike manner with the ordinary skill of those who undertake such work." *Durfee v. Parker*, 90 Idaho 118, 121 (1965) quoting *Knoblock v. Arenguena*, 85 Idaho 503 (1963). In *Durfee*, the trial court found and the Supreme Court affirmed that the drillers performed their work in a workmanlike manner. In that case, the owners claimed that the drillers failed to perform their work in a workmanlike manner because the casing was broken and the well shaft deviated from its vertical course. The drillers produced evidence that the size of the deviation in the well shaft was within the recognized tolerance and that throughout the drilling operation both

the drill and the bailer moved freely up and down in the casing without any indication of sticking or catching. *Id.*

In *Tentinger v. Mc Pheters*, 132 Idaho 620, 622 (Idaho Ct. App. 1999), defendant alleged that Tentinger, a painter hired by defendant to paint, failed to provide services in a workmanlike manner because at the end of the job there was (1) paint overspray underneath the redwood decking; (2) lack of paint coverage on portions of the rain gutter and downspout; and (3) water erosion caused by one of Tentinger's workers leaving a water hose turned on for an excessive period of time. The trial court held and the appellate court affirmed that although some touch-up work needed to be completed on the McPheters home, the job had been performed in a workmanlike manner.

In this case, the evidence demonstrates that Mr. Duspiva performed all drilling services in a workmanlike manner. Mr. Duspiva showed up on time, completed his work in a timely and lawful manner, provided the Defendants with frequent appraisals,[2] obtained Defendants authorization prior to proceeding, always responded to questions and requests, and was accessible to the Defendants. For instance, Clyde Fillmore requested an invoice for drilling services to date on August 8, 2007 and Mr. Duspiva provided him with the invoice on August 9, 2007.

The Defendants never raised any issue regarding work performed by Mr. Duspiva during the period of performance. Into October when all drilling was completed, Clyde Fillmore continued to work with Mr. Duspiva by procuring power and a pump man for the final pump test. Not once did either Clyde or John Fillmore voice a concern about the quality of Mr. Duspiva's work or his work practice. Defendants did not express any concern with Mr. Duspiva's work when they were

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[2]Clyde testified that he spoke frequently with Duspiva during the first 200 feet drilling and that between June 12 and August 9 Clyde and Duspiva had "on several occasions [had discussions] about his progress that he was making . . ."

contacted in August by Rob Whitney to discuss the low temperature geothermal conditions and completing the well as a low temperature geothermal well.

There is no evidence that Mr. Duspiva failed to perform in a workmanlike manner. Mr. Duspiva's duty owed to the Defendants was to perform his drilling services in a workmanlike manner. *Durfee v. Parker*, 90 Idaho 118, 121 (1965). As demonstrated by *Durfee* and *Tentinger*, the work does not have to be perfect. Mr. Duspiva satisfied his duty to the Defendants.

The Defendants are attempting to expand the scope of the duty owed to them by Mr. Duspiva without providing any authority to support this position. Defendants allege Mr Duspiva breached the duty owed to the Defendants as follows:

1. Failing to inform his customers of the likelihood of encountering LTG resources if he drilled beyond the 200 feet allowed by the Start Card Permit.

Rob Whitney testified that the Start Card Permit was valid until LTG conditions were encountered. He also testified that LTG conditions were encountered on August 8 or 9 at a depth of 836 feet. Clyde, John and Mr. Duspiva testified that they knew the well would be a LTG well if drilling continued beyond 836 feet and a LTG drilling permit would be required. Assuming, for arguments sake, Mr. Duspiva owed a duty to the Defendants to tell them that if drilling continues then it is likely that LTG conditions will be encountered then Mr. Duspiva satisfied that duty. However, Mr. Duspiva believes the duty owed his clients is to perform his drilling services in a workmanlike manner.

2. Mr. Duspiva failed to contact IDWR about deepening the well beyond 200 feet.

Mr. Duspiva owed no duty to the Defendants to contact IDWR about deepening the well beyond 200 feet.[3] Rob Whitney, whose duties include regulation of well construction, stated "since the low temperature geothermal condition had been encountered, that the start card became invalid, which is why we required the submittal of the long form application." Mr. Whitney also stated that LTG conditions were first encountered on August 8 or 9.

3. Mr. Duspiva failed to properly measure and monitor BHT.

The evidence demonstrates that Mr. Duspiva did measure Bottom Hole Temperature. Defendants allegation that Mr. Duspiva failed to measure BHT properly is absurd. IDWR does not define or identify a methodology for measuring BHT. Apparently Defendants do not understand that BHT cannot be taken continuously throughout the drilling process nor is it required to be taken continuously. Mr. Duspiva measured and monitored BHT as required by IDWR.

4. Mr Duspiva failed to explain the use of screens to the Defendants even though he told them he does not set screens.

Mr. Duspiva owed no duty to the Defendants to explain the use of screens or other drilling techniques. Use of screens is not required. Some drillers, such as Mr. Duspiva, do not use screens because screens can be a temporary solution. Once the filter pack surrounding the screen becomes clogged or the screen becomes encrusted by iron, the well is compromised. Of note, Ed Squires stated that he did not set screens in some wells in this same area.

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[3]Mr. Neace stated that the driller is required to contact IDWR when he exceeds the proposed maximum depth. Not only is this statement contrary to the testimony of Mr. Whitney, Mr. Neace, when questioned about his statement, stated "If [a driller] was going to exceed that maximum depth, [he] **should** get approval from the regional office agent." Mr. Neace then acknowledged that he is not aware of any policy statement to that effect. IDWR did not issue a violation to Duspiva for failing to contact it.

When Mr. Duspiva informed the Defendants that he did not set screens, he satisfied any duty that he possibly owed the Defendants. The Defendants were free to terminate the contract or seek additional information after being told by Mr. Duspiva that he did not set screens.

5. Mr. Duspiva failed to drill a well that would meet the design standard for a LTG well.

This is a false statement. IDWR approved the well completion plan submitted by Mr. Duspiva. Mr. Duspiva agrees that he had a duty to drill a well that would comply with all applicable rules. Had the well been completed as defined in the well completion plan prepared by Mr. Duspiva and approved by IDWR, the well would have complied with the LTG well construction standards. The well construction was never completed because from the October 23, 2007 meeting until after the drilling permit expired on August 20, 2008, the Defendants never instructed Mr. Duspiva or IDWR on how they wished to proceed.

The Defendants are attempting to expand the scope of Mr. Duspiva's duty owed to them from performing in a workmanlike manner to an unrealistic, limitless duty of liability for all decisions made by the Defendants. Mr. Duspiva does not go beyond performing in a workmanlike manner.

To be clear, in this case, prior to filing an application for permit to drill a LTG well, the Fillmores had knowledge that if drilling continued the well would be a LTG well. In addition to the information provided by Mr. Duspiva, IDWR had called the Fillmores to discuss the responsibilities and consequences of owning a LTG well (See Defendants Exh. C and testimony of Rob Whitney), and Clyde heard Dale Dixon discussing the LTG conditions. The Defendants had knowledge of the LTG. Defendants could have asked Mr. Duspiva for more information, they could asked IDWR for more information, and they could have asked Dale Dixon, the person that recommended Mr. Duspiva

to Clyde, for more information. Defendants decided to continue drilling knowing that the well would be a LTG well.

Again, with well drilling, there are no guarantees as to quality or quantity, including a dry hole. Defendants determined the depth of the drilling and Mr. Duspiva controlled the quality of the drilling. There is no evidence that Mr. Duspiva failed to perform in a workmanlike manner.

F. Mr. Duspiva Did Not Violated the Consumer Protection Act.

Defendants significantly narrowed their allegations of violations of the Consumer Protection Act to I.C. § 48-603(16), -(13), and -(18). As to I.C. § 48-603(16), *Providing Services, Replacements or Repairs That Are Not Needed*, Mr. Duspiva was hired to drill a well and that is what he did. He only provided his well drilling services as directed and authorized by Clyde Fillmore. Clyde Fillmore made all decisions on the depth of drilling. Mr. Duspiva did not represent that any unnecessary replacements or repairs where needed.

As to I.C. § 48-603(13), *Failing to Deliver to the Consumer at the Time of the Consumer's Signature a Legible Copy of the Contract or of Any Other Document Which the Seller or Lender Has Required or Requested the Buyer to Sign, and Which He Has Signed, During or after the Contract Negotiation*, there was no written contract and Mr. Duspiva did not require or request the Defendants to sign any document. The drilling permit applications were IDWR documents and those documents are available from IDWR.

Defendants, without citing to the code section, allege that the use of contractors by Mr. Duspiva violated the Consumer Protection Act. The only outside contractors used during the drilling services performed by Mr. Duspiva were Mr. Dixon and Idaho Power Co. Both contractors were retained by Clyde Fillmore. Mr. Duspiva is not seeking payment for services provided by these

contractors or any other contractors. Of note, the contract between the parties did not limit the use of contractors.

As to I.C. § 48-603(18), *Engaging in Unconscionable Practices*, Defendants allege Mr. Duspiva violated the CPA by failing to disclosed material, relevant information. Mr. Duspiva provided the Defendants with material, relevant information. Mr. Duspiva was not only available to the Defendants, he answered every question asked by the Defendants.

G. Defendants' Materially Misrepresent Authority Regarding Deceptive Act.

Defendants misrepresent *State ex rel. Kidwell v. Master Distribs* to suggest deceit on the part of Mr. Duspiva. In *State ex rel. Kidwell v. Master Distribs.*, 101 Idaho 447, 454 (1980), the court stated that "proof of intention to deceive is not required for finding that an act is unfair or deceptive." This holding is consistent with the definition of deceit "the act of intentionally giving a false impression."[4] However, Defendants, in citing the above statement, omitted the phrase "proof of" leaving "intent to deceive is not required to find an act is unfair or deceptive." *Defendants' Closing Argument Brief of Hohn and Clyde Fillmore* at 26. The statement is not only false, it is an absolute misrepresentation of what the *State ex rel. Kidwell v. Master Distribs.* court held.

At no time did Mr. Duspiva intend on deceiving the Defendants and there is no evidence that Mr. Duspiva deceived the Defendants. Mr. Duspiva made himself available to the Defendants and answered ever question raised by the Defendants. He informed the Defendants (1) of this drilling methodology, (2) that he did not use screens, (2) development results, (4) his drilling costs, and (5) that the well would be a LTG well if drilling continued. Moreover, he maintained communication

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[4]Black's Law Dictionary, Abridge Seventh Edition.

with IDWR and was response to IDWR's requests for over a year after he completed his performance under the contract.

H. Defendants' Time Line Is Inaccurate.

Defendants' time line contains the following false statements and misrepresentations:

1. *No valid BHT measurement.* False. All of Mr. Duspiva BHT measurements were valid. Also, as Rob Whitney testified, IDWR does not define how BHT is measured so it may be impossible to make an invalid BHT measurement.

2. *LTG 85 °/LTG/Condition 8/Rule 30.* False. The 85° temperature represents the temperature of the water in the well measured on August 8 at a depth of 400 feet when the casing extended to a depth of 692 feet (sealing off everything above) and the water entering the well at a depth of 701 feet. Condition 8 deals with BHT not LTG (see Plaintiff's Closing Argument for distinction of the two). Rule 30 deals with well construction. Rob Whitney testified that the Start Card Permit was valid to a depth of 836 feet. IDWR did not find that Mr. Duspiva violated Condition 8 or Rule 30.

3. *8/9/07; Duspiva notifies IDWR.* False. Duspiva notified IDWR on 8/8/07.

4. *10/23/07; R. Whitney informs Fillmores.* False. Mr. Whitney called the Fillmores to inform them that LTG conditions had been encountered in the well. Mr. Whitney became aware of this information on August 8, 2007. By August 20, 2007, he received and approved the permit application from John Fillmore. Additionally, Rob stated that he contacted the Defendants to make sure they understood what the implications were of this low temperature geothermal encounter and he relayed information about the requirements to complete a low temperature geothermal well. Lastly, Rob stated that there were multiple telephone conversations with the Fillmores. There would

be no reason for IDWR to contact a well owner with information about the implications of LTG encounter and consequences of owning a LTG well after the permit had been issued and drilling completed.

5. *1/1/08 Well abandoned.* False. The well was abandoned on 1/22/2009. Defendants are only off by a little over a year.

VI. CONCLUSION

The parties acknowledge that there was a contract between the Defendants and Mr. Duspiva for Mr. Duspiva to drill a well for the Defendants. The Defendants breached the contract by failing to pay Mr. Duspiva for his services. Any dispute as to Duspiva's costs under the contract were extinguished by the Fillmores assent and ratification of the costs Duspiva is seeking. The Fillmores, after knowing the well would be a LTG well and after knowing the costs of Mr. Duspiva's services, instructed and authorized Mr. Duspiva to continue performing under the contract. The Defendants have failed to demonstrate any defense to their breach of the contract. Mr. Duspiva is entitled to a money judgment for the value of the services he provided.

The Fillmores counterclaim that Mr. Duspiva violated the Consumer Protection Act is frivolous and not supported by the evidence presented at trial. There is no evidence of any unconscionable act or practice by Mr. Duspiva . For the reasons stated above the counterclaim must be dismissed.

DATED this 1 day of October, 2010.

RINGERT LAW CHARTERED

by: _____
Jon C. Gould

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of October, 2010, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Bruce Smith
Moore Smith Buxton & Turcke, Chtd.
950 W. Bannock Street, Suite 520
Boise, Idaho 83702

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivery
( ) Overnight Mail
( ) Facsimile

Jon C. Gould

Exhibit 1 - Temperature Data Presented at Trial

Mr. Duspiva presented temperature data consisting of two bottom hole temperatures, one soil cutting temperature and a temperature probe survey. (See Plaintiff's Exh. 4) IDWR testified about a temperature probe survey it conducted on or about October 17, 2007.

BHT No. 1: On or about July 28, 2007, Mr. Duspiva measured a bottom hole temperature of 72 degrees from water entering the well at a depth of 642 feet. The well was 660 feet deep. Before measuring the BHT, the well have been developed for nine (9) hours. At that time, the drive shoe was at 620 feet with casing from the surface to the drive shoe. The only water entering the well was coming from a layer at 642 feet. This temperature data is displayed on the right of the casing illustration on Plaintiff's Exh. 4.

BHT No. 2: On August 8, 2007, Mr. Duspiva measured a bottom hole temperature of 73 degrees from water entering the well at a depth of 701 feet. The well was 836 feet deep. Before measuring the BHT, the well have been developed for eight and one-half (8.5) hours. At that time, the drive shoe was at 692 feet with casing from the surface to the drive shoe. The only water entering the well was coming from a layer at 701 feet. This temperature data is displayed on the right of the casing illustration on Plaintiff's Exh. 4.

Soil Cuttings Temperature: On August 8, 2007, Mr. Duspiva measured the temperature of clay cuttings withdrawn from the bottom of the well at a depth of 836 feet. The temperature of clay cuttings was 92.5 degrees. There was no water produced at this depth. The last water bearing layer was encountered at 701 feet. All drilling stopped. This temperature data is displayed on the right of the casing illustration on Plaintiff's Exh. 4.

Duspiva Temperature Prove Survey: On August 8, 2007, Mr. Duspiva conducted a temperature probe survey. At that time, the drive shoe was at 692 feet with casing from the surface to the drive shoe. The only water entering the well was coming from a layer at 701 feet. Mr. Duspiva collected temperature measurements at 100 foot intervals beginning at a depth of 300 feet and continuing to a depth of 800 feet. Based on the testimony of Rob Whitney, this temperature probe survey represents the temperature of water entering the well at a depth of 701 feet. This temperature data is displayed on the left of the casing illustration on Plaintiff's Exh. 4.

IDWR Temperature Prove Survey: On or about October 17, 2007, IDWR personnel conducted a temperature probe survey. At that time, the drive shoe was at 1,088 feet with casing from the surface to the drive shoe. The only water entering the well was coming from a layer at 1,115 feet. IDWR personnel were unable to define the depths where temperature measurements were collected.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

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

GARY DUSPIVA, dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual, and JOHN FILLMORE, an individual, Defendants.	CASE NO. CV2008-010463*C FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of this matter was heard by the Court on August 23, 24, and 25, 2010, without a jury. Appearing on behalf of the defendants Clyde Fillmore and John Fillmore (collectively Fillmore) was Bruce Smith, attorney at law. Appearing on behalf of the plaintiff, Gary Duspiva, dba Gary Duspiva Well Drilling & Development (hereinafter Duspiva) was Jon C. Gould, attorney at law. Based upon the evidence produced at trial, a review of the applicable laws and regulations and its own research, the Court finds as follows:

FINDINGS OF FACT

1. In April, 2007, Clyde Fillmore contacted Gary Duspiva and asked Mr. Duspiva to drill a

domestic well for John Fillmore.

2. Gary Duspiva owns Gary Duspiva Well Drilling and Development. Mr. Duspiva holds Idaho Well Drillers License No. 395. Mr. Duspiva has been a licensed driller in the State of Idaho for over 30 years. As a licensed driller Mr. Duspiva is responsible for understanding and complying with all applicable laws and rules. He has previously drilled 342 wells. He holds a Master Ground Water Certification. Mr. Duspiva is the only master ground water contractor in the state of Idaho and one of approximately eighty (80) in North America.

3. Clyde Fillmore contacted Gary Duspiva because he was familiar with Gary Duspiva having grown up with him in the same area.

4. The well was to be paid for by Clyde Fillmore and constructed on a lot owned by John Fillmore, more particularly, 23258 Homedale Road, Wilder, Idaho.

5. Clyde Fillmore's experience with well drilling is limited to one domestic well, drilled on his property, located adjacent to the John Fillmore property upon which the proposed well was to be constructed. Clyde Fillmore's well is 180 feet deep.

6. On June 11, 2007, Clyde Fillmore and Gary Duspiva met at Clyde Fillmore's shop to discuss the well location and the terms and conditions of drilling services.

7. The location of the well was decided by Clyde Fillmore.

8. Clyde Fillmore was informed that the well would cost $32.50 per foot plus incidentals defined as the cost of a drive shoe, well cap, and permit. The cost of the permit was $80.00. No other costs were defined or discussed. Gary Duspiva stated that his allowance for sand in the water was a pinch of sand per five (5) gallons of water. Gary

Duspiva informed Clyde Fillmore that he did not use screens in his wells. No further explanation for this practice was provided to Clyde Fillmore. No guarantee of quantity or quality was provided.

9. The parties did not enter into a written agreement for the drilling of the well.

10. Also on June 11, 2007, Gary Duspiva met with John Fillmore to have John Fillmore sign the Start Card/Permit (hereinafter Start Card) required by the Idaho Department of Water Resources (hereinafter IDWR) prior to commencement of drilling.

11. A Start Card is an expedited drilling permit for the construction of cold water, single-family residential wells.

12. The Start Card was filled out by Mr. Duspiva and signed by John Fillmore and submitted to the IDWR by Duspiva.

13. The Start Card was admitted as Plaintiff's Exhibit 1 and Defendants' Exhibit C. The Start Card authorized Mr. Duspiva to drill a single family residential, six inch (6"), cold water well.

14. Section 5 of the Start Card provides that the proposed maximum depth is 200 feet. The Start Card further provided that "[i]f a bottom hole temperature of 85 F. or greater is encountered, well construction shall cease and the well driller shall contact the Department immediately."

15. A Start Card is valid with respect to the terms and conditions of its approval. IDWR would expect to receive notice if a driller exceeded the proposed depth of the Start Card.

16. Gary Duspiva commenced drilling on or about June 12, 2007.

17. The method used by Gary Duspiva in drilling wells is the cable tool drilling method.

18. Gary Duspiva first hit water at 85 feet. Thereafter, he hit water at 128-131 feet and 148-153 feet. At each layer, he noted the presence of brown sand and fine brown sand. He next hit water at 320-348 feet. At this level, the temperature was 70 degrees and he noted the presence of 3 tablespoons of sand per 5 gallon bucket and a flow of 10 gallons per minute. He next hit water at 360-362 feet. At this level, the temperature was 77 ½ degrees and he noted the presence of 2 teaspoons of sand per 5 gallon bucket and a flow of 12 gallons per minute. Mr. Duspiva continued to drill and next hit water at 580-585 feet and again at 642-650 feet, at 670 feet, at 691 feet, at 701 feet, and finally at 836 feet on or about August 8, 2007. With each development the temperature of the water increased. At approximately 600 feet the temperature of the water rose to 85 degrees and thereafter continued to increase and at 836 feet reached a temperature of 91 ½ degrees. All temperatures relied upon herein were taken by Gary Duspiva on August 8, 2007, in connection with a request for an as-built diagram of the well from Rob Whitney of Idaho Department of Water Resources.

19. Between June 12, 2007, and August 8, 2007, Mr. Duspiva provided periodic updates on the well progress to Clyde Fillmore and, at times, John Fillmore. These updates included information such as the static level, pumping level, depth, and sand count. The sand count was of particular concern to Mr. Duspiva. Water temperature was not discussed during these updates.

20. After each update, Gary Duspiva would always recommend that the Fillmores continue to drill deeper. The Fillmores agreed to continue to drill deeper based upon Gary Duspiva's recommendation. The Fillmores were never provided with an alternative to drilling deeper. In particular, at no time were the Fillmores provided with the option of using a filter pack and screen.

21. Use of a filter pack and screen is designed to address problems with sand and is standard for the industry.

22. The Fillmores were never provided with written documentation of the well progress.

23. On August 3, 2007, Clyde Fillmore made a payment to Gary Duspiva in the amount of $10,000.

24. The Fillmores did not see a written bill for services rendered until August 9, 2007. The Fillmores did not indicate to Mr. Duspiva that they disagreed with the charges contained in that bill.

25. At no time prior to August 9, 2007, were the Fillmores informed of the risks or the costs and liabilities associated with encountering low temperature geothermal (hereinafter LTG) conditions.

26. Owning a LTG well requires compliance with special regulatory and financial requirements promulgated by the IDWR. This includes proper maintenance, water right requirements, and bonding requirements for 1 year following completion of the well.

27. On August 9, 2007, Gary Duspiva informed Clyde Fillmore that he had encountered LTG conditions. At this time, the well depth was 836 feet. In fact, Mr. Duspiva had reached LTG conditions at approximately 600 feet.

28. Gary Duspiva did not explain the significance of reaching LTG conditions, only that an additional form would have to be filled out with IDWR. Mr. Duspiva recommended that the Fillmores continue to drill deeper. Clyde Fillmore was presented with the option of drilling deeper, which Mr. Duspiva recommended; or, going back up to 642 feet and

perforating the casing at the risk of ruining the well. At this juncture, Clyde Fillmore authorized Mr. Duspiva to continue drilling deeper.

29. Gary Duspiva expected that the Fillmores would pay the additional costs associated with resolving the issues surrounding the LTG well.

30. Mr. Duspiva contacted IDWR agent Rob Whitney on August 9, 2007, to inform Mr. Whitney that LTG conditions were encountered and he wanted to continue drilling to complete the well. Mr. Duspiva was asked to submit information as to what he had encountered so that a plan could be formed to deal with the LTG situation. On the same date, Mr. Duspiva faxed an as built diagram showing the details of the current well construction and temperature information. This submission included a request for variance and a request to drill deeper. Mr. Whitney subsequently requested additional documentation to show how Mr. Duspiva would propose to complete the well to applicable standards.

31. John Fillmore was presented with, and signed, the Application for Drilling Permit (hereinafter Long Form Permit) on August 16, 2007.

32. The Long Form Permit proposed a new well, with a casing diameter of 6 inches and a proposed maximum depth of 1000 feet, plus with an anticipated bottom hole temperature of 85 degrees Fahrenheit to 212 degrees Fahrenheit (Low Temp. Geo. Well).

33. On August 20, 2007, the Long Form Permit was approved, subject to two (2) specific conditions: (1) well construction shall be consistent with Rule 30 of IDAPA 37.03.09; and (2) the driller and well owner shall submit a completion plan/prospectus for IDWR review prior to completion of this well.

34. Thereafter, Mr. Duspiva re-commenced drilling operations. As he would encounter

additional layers he would provide the same information as that detailed above to Clyde Fillmore.

35. On August 29, 2007, Mr. Duspiva submitted additional information to Mr. Whitney detailing his proposal.

36. On September 13, 2007, Clyde Fillmore made a second payment of $10,000 to Mr. Duspiva.

37. On September 26, 2007, Mr. Duspiva completed drilling operations. He did air development for over 20 hours and was not satisfied with the results. He informed Clyde Fillmore that Clyde needed to do a pump test. Clyde Fillmore agreed to do the pump test.

38. The pump test was completed on October 10, 2007. Upon completion, the well was 1130 feet deep, produced 17 gallons per minute, water was 102 degrees, and contained 6 parts per million iron with a slight sulfur smell.

39. It was not until October 23, 2007, at a joint meeting with IDWR and Mr. Duspiva that the Fillmores became aware of the entirety of the ramifications associated with an LTG well. This included the fact that the Fillmores were equally liable to fulfill IDWR requirements for the well.

40. Mr. Duspiva has previously received at least two verbal warnings for violations related to LTG wells, once in 2001 (Enochs well, 865 feet deep) and again in 2005 (Rohn well 1333 feet deep).

41. The Fillmore well is located within a few miles of the Rhon well.

42. In November 2006, Mr. Duspiva was sent a written warning for drilling an LTG well

(Riggs well) without prior authorization. Repairs on this well were completed June 6, 2007, just days prior to the submission of the Start Card for the Fillmore well.

43. As a result of Mr. Duspiva's actions associated with the Fillmore well Mr. Duspiva was issued a notice of violation by the IDWR. The notice of violation was rescinded after Mr. Duspiva voluntarily agreed to a 1 year revocation of his Start Card privileges.

44. Following various communications between counsel for both Mr. Duspiva, the Fillmores, and IDWR, including an administrative proceeding, no resolution regarding completion of the Fillmore well was able to be reached.

45. Down Rite Well Drilling was hired to oversee closure of the well with the Fillmores and Mr. Duspiva splitting the cost which was approximately $13,000.

46. Thereafter, the Fillmores hired Down Rite to drill a new domestic well on the property. Down Rite drilled a productive domestic cold water well 40 feet from the original well, to a depth of 320 feet with a filter pack and screen, producing 40 gallons per minute, for approximately $18,000.

47. The Court heard expert witness testimony of Edward Squires on behalf of the Fillmores. Pursuant to Rule 702, Idaho Rules of Evidence, the Court finds that this witness was qualified by knowledge, skill, experience, training and education to testify regarding his experience in the drilling industry.

48. Mr. Squires has approximately twenty (20) years of experience in the geology and hydrogeology field. Mr. Squires is a Registered Professional Geologist in Idaho and in Arizona, a Professional Well Log Analyst, and a Certified Water Right Examiner for the Idaho Department of Water Resources.

49. Mr. Squires has completed extensive studies of the hydrogeologic framework of the Boise

area aquifer systems. In addition, he has worked on the development of well systems for local municipalities and commercial and agricultural wells. Mr. Squires is not a well driller; rather, he conducts close oversight of the well construction process. He analyzes and characterizes the subsurface physical characteristics of boreholes using a variety of electronic probes and equipment.

50. Mr. Squires has past experience in the geographic area where the Fillmore well was drilled. In the area surrounding the Fillmore property at roughly 400 feet deep there is a major change in the subsurface into low permeability mudstone with very fine grained, small, thin, and not very extensive sand layers. Above 400 feet, the sand layers are not as discontinuous and are connected to a much greater degree. The sand above 400 feet is coarser grained and more permeable thus creating a much more productive aquifer as compared with that found below 400 feet. The ability to effectively manage the sand production in a well is important because sand wears out pumps, gets into the house, fills in water mains, and fills in the well.

51. According to Squires, a reasonable drilling practice in the area surrounding the Fillmore well incorporates the use of a screen and filter pack. Screens and filter packs are specially graded and selected based upon the sediments to prevent sand production but still allow water to move through. Screens can be many tens-of-feet long in any given well. A screen increases the amount of area that water can flow into the well by an enormous amount because it allows water to flow in over the entire length of the screen from all directions, rather than trying to draw through bottom of sand filled pipe which is, at best, 25% of the open area of a 6" pipe. In this area, sands are different sizes, with fine grain sand "lenses" next to coarse grain sand. Because of the selective layers of sediments it is a rare case that screens are not used, though it can be done.

52. In Mr. Squires's experience, and based upon the studies he has conducted of the area, there is no question that he would expect to run into an LTG situation at a depth of 1000

feet, or less, depending on the area. This is because Idaho has relatively shallow LTG conditions. LTG conditions carry additional requirements and precautions, including better seals of the annular spaces. Water found at LTG levels is not desirable for potable water supplies because the warm water promotes chemical reactions in groundwater, promotes bacteria, is aesthetically unpleasing, and usually carries dissolved gas and other reduced constituents. By contrast, the water found above the approximate 400 foot level is fresher, recharged readily, contains more oxygen, and is cooler. In addition, it is a lot easier and more realistic to complete a well in this area without the added expense of extra depth.

CONCLUSIONS OF LAW

The Complaint filed by Duspiva alleges that the Fillmores breached their contract with him to drill a domestic well. Fillmores counerclaimed that there was no contract legally formed between the parties and that Duspiva violated the Consumer Protection Act by his conduct in dealing with the Fillmores.

Violation of the Consumer Protection Act

I.C. § 48-608 provides that any person who solicits services and suffers any ascertainable loss as a result of the use or employment by another person of a method, act or practice declared unlawful by the Consumer Protection Act, **"may treat any agreement incident thereto as voidable"**. Thus, if the Court finds a violation of the act, an analysis of whether or not a contract was formed between these parties is unnecessary as it may be treated as voidable.

The first question this Court must answer is whether the Consumer Protection Act is applicable to a well drilling transaction. I.C. § 48-605 provides nothing in the Act shall apply to transactions permitted by any state regulatory body acting under statutory authority. I.C. § 48-605 (1). As this case does not involve a transaction permitted under any state regulatory body acting under statutory authority, the Court finds that the agreement between the parties falls within the scope of the Consumer Protection Act.

In this case, the agreement that was reached between the parties was that Mr. Duspiva was to drill and develop a domestic well for the Fillmores. There was no discussion of water temperature; however, the Fillmores had no reason to expect that they were bargaining for

anything other than a cold water domestic well. The cost agreed to by the parties was $32.50 per foot of depth of the well. There was no specific discussion about depth at the outset of this transaction except that the Start Card that Mr. Duspiva had John Fillmore sign indicated that the well would not exceed 200 feet in depth. Clearly, the greater the depth of the well, the greater the price that would be billed by Mr. Duspiva. At the time that the agreement was reached, Mr. Duspiva knew, and the Fillmores did not know, that:

(1) there was a likelihood of reaching low temperature geothermal conditions in this geographic area;

(2) that a low temperature geothermal well is inferior to a cold water domestic well for domestic purposes;

(3) that a low temperature geothermal well necessarily required increased cost and obligations for the well owner and well driller; and,

(4) that common industry practice is to use screens and filters to eliminate or minimize sand in a domestic well.

I.C. §48-603 defines unfair methods and practices. It includes representing that services are needed if they are not needed or engaging in any misleading or deceptive act. I.C. § 48-603 (16) and (17). It also includes the situation where the alleged violator knowingly or with reason to know, induced the consumer to enter into a transaction that was excessively one-sided in favor of the alleged violator. I.C. §48-603C (c) and I.C. § 48-603 (18).

The evidence in this case showed that there was no reason that the Fillmore well drilled by Mr. Duspiva needed to reach low temperature geothermal conditions. Yet, knowing of the problems that would arise by drilling to these depths, Mr. Duspiva recommended it be done under the guise that there was too much sand in the water. The evidence introduced at trial clearly showed that it was and is common industry practice to use filter packs and screening to minimize or eliminate sand in the water. There was no reason given by Mr. Duspiva to support his practice of not using screens in his wells. The uncontroverted evidence in this case is that screening could have been done at relatively low cost at depths much less than what Mr. Duspiva was recommending. Mr. Duspiva failed to disclose information about the use of screening

techniques and its common practice in the industry. Thus, the Fillmores were never allowed to consider that option. The Court finds that Mr. Duspiva's actions in not disclosing this common industry practice constituted unfair practice in violation of subsections (16), (17) & (18) of I.C. § 48-603.

The Court further finds that pursuant to I.C. § 48-608, the Fillmores are entitled to consider their agreement with Mr. Duspiva to drill a well void. That code section also declares that they are entitled to an award of their actual damages. The actual damages incurred by the Fillmores consist of the $20,000 that they paid Mr. Duspiva for a well that was useless to them and the amount that they paid to seal the well in accordance with IDWR regulations, or $7,500. Consequently, actual damages suffered by the Fillmores were $27,500.

Fillmores' counsel is directed to prepare a written Judgment consistent with the Court's findings herein.

Dated this 17th day of October, 2010.

Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

JOHN C. GOULD
RINGERT LAW CHARTERED
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P.O. Box 2773
Boise, ID 83701-2773

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHARTERED
950 W. Bannock Street, Suite 520
Boise, ID 83702

OCT 18 2010

Date

Deputy Clerk

BRUCE M. SMITH, ISB #3425
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Attorney for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT Plaintiff, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants.	Case No. CV08-10463 **JUDGMENT**

It is hereby adjudged and decreed that **Judgment** is entered in favor of Defendants and against the Plaintiff for violation of I.C. §48-603 (16), (17), and (18) of the Idaho Consumer Protection Act, and I.C. §48-608 of the Idaho Consumer Protection Act pursuant to the Findings of Fact and Conclusions of Law entered on October 17, 2010, which document is incorporated by reference, for damages in the amount of $27,500.00. This Judgment is entered on all claims for relief asserted in this action excepting Defendants' claims for attorney fees and costs.

DATED this 13th day of December, 2010.

Thomas J. Ryan
Hon. Thomas J. Ryan
District Judge

ORIGINAL

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of December, 2010, a true and correct copy of the foregoing was served upon the following by the method indicated below:

Bruce M. Smith MOORE SMITH BUXTON & TURCKE, CHARTERED 950 W. Bannock St., Ste. 520 Boise, ID 83702 Facsimile: (208) 331-1800	✓ via U.S. MAIL ____ via HAND DELIVERY ____ via OVERNIGHT MAIL ____ via FACSIMILE
Jon C. Gould RINGERT LAW CHARTERED 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773 Facsimile: (208) 342-4657	✓ via U.S. MAIL ____ via HAND DELIVERY ____ via OVERNIGHT MAIL ____ via FACSIMILE

By _____
Deputy Clerk

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Attorneys for Appellant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff / Appellant, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants / Respondents.	Supreme Court No. _____ Case No. CV-08-10463 NOTICE OF APPEAL

TO: THE ABOVE NAMED DEFENDANTS/RESPONDENTS, CLYDE FILLMORE AND JOHN FILLMORE, AND THEIR ATTORNEY OF RECORD, BRUCE M. SMITH OF THE LAW FIRM OF MOORE SMITH BUXTON & TURCKE, CHARTERED, 950 W. BANNOCK STREET, BOISE, ID 83702.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant, Gary Duspiva, appeals against the above-named respondents to the Idaho Supreme Court from the *Judgment* entered in the above-entitled action on 13th day of December, 2010, Honorable District Judge Thomas J. Ryan, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and that the *Judgment* described in paragraph 1 above is an appealable order under and pursuant to Rule 11(a)(1), I.A.R.

3. Appellant intends to assert the following issue(s) on appeal:

a. Whether the District Court erred in finding that Mr. Duspiva's actions violated the Idaho Consumer Protection Act.

b. Whether the District Court erred in allowing Edward Squires to testify as an expert witness on behalf of the Fillmores.

4. Is a reporter's transcript requested? Yes. Pursuant to Rule 25(a), I.A.R., Appellant requests the transcript from the following:

a. The August 23, 24, and 25, 2010 trial in Case No. CR 2008-010463*C.

b. The August 19, 2010 Hearing on Motion in Limine to Exclude Defendants' Expert Witnesses.

5. Appellant requests the following documents to be included in the Clerk's record in addition to those automatically included in the Clerk's record pursuant to I.A.R. 28 :

a. Order Setting Case for Trial and Pretrial and Scheduling Order filed on October 23, 2009.

b. Affidavit of Gary Duspiva filed on June 25, 2009.

c. Second Affidavit of Gary Duspiva filed on July 9, 2010.

d. Affidavit of Ron Smith filed on July 9, 2010.

e. Affidavit of Schyler Enochs filed on July 9, 2010.

f. Defendants' Witness List filed on July 16, 2010.

g. Motion in Limine to Exclude Defendants' Expert Witnesses filed on July 27, 2010.

h. Defendants' Response to Plaintiff's Motion in Limine to Exclude Defendants' Expert Witness filed on August 2, 2010.

i. Plaintiff's Closing Argument filed on September 17, 2010 (fax).

j. Closing Argument Brief of John Fillmore and Clyde Fillmore filed on September 24, 2010.

k. Plaintiff's Reply to Defendants' Closing Argument filed on October 1, 2010.

6. I certify:

a. That a copy of this notice of appeal and any request for additional transcript have been served on the reporter.

b. (1) That the estimated fee for preparation of the clerk's record has been paid.

(2) That the appellate filing fee has been paid.

c. That service has been made upon all parties required to be served pursuant to I.A.R. 20.

Dated this 24th day of January, 2011.

RINGERT LAW CHARTERED

By _____
Jon C. Gould
Attorneys for Appellant

CERTIFICATE OF SERVICE

This will certify that I have on the 24th day of January, 2011, delivered a true and correct copy of the foregoing upon the following by the following method:

(X) U. S. mail, postage prepaid
( ) hand delivery
( ) express mail
( ) facsimile

BRUCE M. SMITH
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Person Serving Document

2-17 Ryan

FILED
A.M. 445 P.M.

FEB 07 2011

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

BRUCE M. SMITH, ISB #3425
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Attorney for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GARY DUSPIVA dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT Plaintiff-Appellant, vs. CLYDE FILLMORE, an individual and JOHN FILLMORE, an individual, Defendants-Respondents.	Case No. CV08-10463 **DEFENDANTS' REQUEST TO SUPPLEMENT CLERK'S RECORD ON APPEAL** **I.A.R. 19**

NOTICE IS HEREBY GIVEN, that the Respondents in the above entitled proceeding hereby request pursuant to Rule 19, I.A.R., the inclusion of the following material in the reporter's transcript or the clerk's record in addition to that required to be included by the I.A.R. and the notice of appeal:

1. Plaintiff-Appellant, Gary Duspiva dba Gary Duspiva Well Drilling& Development, by counsel filed a Notice of Appeal herein on or about January 24, 2011.

2. Idaho Appellate Rule 19 provides for a Respondent to request additional materials to supplement Clerk's Record identified by Appellant, and does therefore request the following documents:

A. Affidavit of Tom Neece dated July 6, 2010;

B. Defendants' Exhibits A, C, D and T;

C. Second Affidavit of Bruce Smith dated July 8, 2010;

D. Affidavit of John Fillmore in Support of Defendants' Motion for Summary Judgment filed June 18, 2010; and,

E. Affidavit of Clyde Fillmore in Support of Defendants' Motion for Summary Judgment field June 18, 2010.

3. I certify that a copy of this request was served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20 Idaho Code.

Dated this 7 day of February, 2011.

MOORE SMITH BUXTON & TURCKE, CHARTERED

BRUCE M. SMITH
Attorney for Defendants-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 7 day of February, 2011, a true and correct copy of the foregoing **DEFENDANTS' REQUEST TO SUPPLEMENT CLERK'S RECORD ON APPEAL** was served upon the following by the method indicated below:

Clerk of the Court Third Judicial District County of Canyon 1115 Albany Street Caldwell, ID 83605	✓ via U.S. MAIL ____ via HAND DELIVERY ____ via OVERNIGHT MAIL ____ via FACSIMILE
Court Reporter Third Judicial District County of Canyon 1115 Albany Street Caldwell, ID 83605	✓ via U.S. MAIL ____ via HAND DELIVERY ____ via OVERNIGHT MAIL ____ via FACSIMILE
Jon C. Gould RINGERT LAW CHARTERED 455 S. Third Street P.O. Box 2773 Boise, ID 83701-2773	✓ via U.S. MAIL ____ via HAND DELIVERY ____ via OVERNIGHT MAIL ____ via FACSIMILE

BRUCE M. SMITH

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

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

GARY DUSPIVA, dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual, and JOHN FILLMORE, an individual, Defendants.	CASE NO. CV 2008-010463*C MEMORANDUM DECISION AND ORDER RE: ATTORNEY'S FEES

This matter came on before the court for hearing on February 17, 2011, upon Defendants' Motion for Attorney Fees and Costs. Appearing on behalf of the defendants, Clyde Fillmore and John Fillmore (hereinafter, collectively Fillmore) was Bruce M. Smith, of the firm Moore, Smith Buxton & Turcke, Chartered. Appearing on behalf of the plaintiff was Jon C. Gould, of the firm Ringert Law, Chartered. The Court has considered the oral arguments of counsel and the briefing submitted by the parties. The Court's memorandum opinion is set forth below.

Factual and Procedural Background

The trial of this matter was heard by the Court on August 23, 24, and 25, 2010, without a jury. Closing arguments were filed with the Court in writing and the case was finally submitted on

October 1, 2010. Thereafter, on October 18, 2010, the Court entered its Findings of Fact and Conclusions of Law wherein the Court found that the plaintiff had violated the Consumer Protection Act, Idaho Code §§ 48-603, 48-608, as alleged in the defendants' counterclaim. The Court further found that as a result of plaintiff's violation of the Act, the defendants were entitled to consider the agreement with plaintiff void and to an award of actual damages in the amount of $27,500. Judgment was ultimately entered on December 13, 2010.

On November 3, 2010, the defendants filed a Motion for Attorney's Fees and Costs pursuant to Idaho Code § 12-120 and Idaho Code § 48-608. The motion was supported by a memorandum of costs and fees, as well as an affidavit of Bruce M. Smith, counsel for the defendants.

On November 15, 2010, the plaintiff filed a Motion to Disallow the costs and fees claimed by defendants.

On December 9, 2010, the defendants filed a reply to the plaintiff's Motion to Disallow.

LEGAL AUTHORITY & ANALYSIS

Idaho Code § 45-608 provides, in relevant part:

> (5) Costs shall be allowed to the prevailing party unless the court otherwise directs. ...

I.R.C.P. 54(d) provides in relevant part:

> (A) Parties Entitled to Costs. Except when otherwise limited by these rules, costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.
>
> (B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to the relief sought by the respective parties ...
>
> (C) Costs as a Matter of Right. When costs are awarded to a party, such party shall be entitled to the following costs, actually paid, as a matter of right:
>
> 1. Court filing fees. ...
>
> 9. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action.

> 10. Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action.

The memorandum of costs and attorney's fees and the objection thereto were filed in a timely manner. The plaintiff does not dispute that the defendants are the prevailing parties pursuant to Idaho Rule of Civil Procedure 54(d)(1)(B).

In this case, Defendants' request costs as a matter of right in the amount of $58.00 for the fee to file the Answer and $718.57 for the deposition of Gary Duspiva. The Defendants are the prevailing party in this case and the filing fee and charges for the deposition of Gary Duspiva are recoverable as costs as a matter of right pursuant to I.R.C.P.(d)(C)(1) and (9). The Court further finds that although Defendants' claim the costs associated with making copies of the depositions of Clyde Fillmore and John Fillmore as discretionary costs, those costs are more appropriately categorized as costs as a matter of right pursuant to I.R.C.P. 54(d)(C)(10). Defendants request $94.34 for the copy of the deposition of Clyde Fillmore and $67.84 for the copy of the deposition of John Fillmore. Therefore, the Court finds that Defendants are entitled to costs as a matter of right in the amount of $938.75.

DISCRETIONARY COSTS

Idaho Rule of Civil Procedure 54(d)(1)(D) provides:

> (D) **Discretionary Costs**. Additional items of cost not enumerated in, or in an amount in excess of that listed in subparagraph (C), may be allowed upon a showing that said costs were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed against the adverse party. The trial court, in ruling upon objections to such discretionary costs contained in the memorandum of costs, shall make express findings as to why such specific item of discretionary cost should or should not be allowed. In the absence of any objection to such an item of discretionary costs, the court may disallow on its own motion any such items of discretionary costs and shall make express findings supporting such disallowance. Emphasis added.

The grant or denial of discretionary costs is "committed to the sound discretion of the district court," and will only be reviewed by an appellate court for an abuse of that discretion.

Zimmerman v. Volkswagen of America, Inc., 128 Idaho 851, 857, 920 P.2d 67, 73 (1996), *cert. denied,* 520 U.S. 1115, 117 S.Ct. 1245, 137 L.Ed.2d 327 (1997). In considering whether the trial court abused its discretion in ruling on a request for discretionary costs, the appellate court will make a three-step inquiry: "(1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason." *Fish v. Smith,* 131 Idaho 492, 493, 960 P.2d 175, 176 (1998).

In this case, the Court, in exercising its discretion, finds that although costs associated with photocopies, trial transcripts, facsimiles, and postage may have been necessary and reasonably incurred, they are not "exceptional" in a case of this nature. *See Fish v. Smith*, supra. Rather, the above-listed costs are common to any civil litigation. Therefore, the Court is of the opinion that there is no basis for an award of discretionary costs as claimed by the defendants.

Notwithstanding the conclusion of the Court regarding discretionary costs, defendants are correct to point out that the Court earlier awarded one-half the costs incurred at the attempted mediation of this matter. The amount previously awarded was $62.66 which will be added to the award of costs.

ATTORNEY'S FEES

Idaho Code § 45-608 provides, in relevant part:

> (5) ... In any action brought by a person under this section, the court shall award, in addition to the relief provided in this section, reasonable attorney's fees to the plaintiff if he prevails. ...

The determination of the award of attorney fees under I.C. § 48-608 is made through an application of the prevailing party analysis in I.R.C.P. 54(d)(1)(B). *Israel v. Leachman,* 139 Idaho 24, 26, 72 P.3d 864, 866 (2003) (citing *Nalen v. Jenkins,* 113 Idaho 79, 81, 741 P.2d 366, 368 (Ct.App.1987)).

Idaho Rule of Civil Procedure 54(e)(1) provides, in relevant part:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to

> the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided by any statute or contract.

As noted above, Plaintiff does not contest that Defendants are the prevailing parties in this action. Therefore, the issue before the Court is the reasonableness of the attorneys' fees claimed by Defendants. The burden of persuasion as to what would be a reasonable award of attorney fees rests with the moving party, in this case, Defendants. *See Lettunich v. Lettunich*, 145 Idaho 746, 750, 185 P.3d 258, 261 (2008).

"The calculation of reasonable attorney fees is within the discretion of the trial court." *Id. At 749,* 185 P.3d at 261 (citing *Bott v. Idaho State Bldg. Authority,* 128 Idaho 580, 592, 917 P.2d 737, 749 (1996)).

Idaho Rule of Civil Procedure 54(e)(3) directs the Court to consider certain criteria in setting the amount of fees to be awarded to the prevailing party. It provides:

> In the event the court grants attorney fees to a party or parties in a civil action it shall consider the following factors in determining the amount of such fees:
> (A) The time and labor required.
> (B) The novelty and difficulty of the questions.
> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
> (D) The prevailing charges for like work.
> (E) Whether the fee is fixed or contingent.
> (F) The time limitations imposed by the client or the circumstances of the case.
> (G) The amount involved and the results obtained.
> (H) The undesirability of the case.
> (I) The nature and length of the professional relationship with the client.
> (J) Awards in similar cases.
> (K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
> (L) Any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3). In determining the amount of reasonable attorney fees the court is not required to make specific findings demonstrating how it employed any of the factors listed in I.R.C.P. 54(e)(3). *Post Falls trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018 (1998). The court is required only to consider the stated factors in determining the amount of attorney fees. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

The total attorney's fees being requested is $80,484.74. This amount represents a total of $79,825.00 for legal services and $659.74 in Westlaw automated research. Defendants have submitted an affidavit and memorandum of costs in support of the request. By his affidavit, Counsel for the defendants submits that the time and labor involved in this case was appropriate given the complex technical and factual matters involved. Specifically, that the applicability of the Consumer Protection Act has not been widely litigated and the facts were such that the case could not be resolved by summary judgment thus requiring a trial. Counsel further submits that the billing rate of $250.00 per hour for lead counsel is appropriate given Counsel's training and experience. In addition, that the billing rate of $125.00 for the two associate attorneys who participated in the defense of this case is appropriate given their respective training and experience. Counsel contends that the time limitations were dictated by the circumstances surrounding the resolution of this case in that a trial was necessary to resolve factual issues. Moreover, that Defendants' prevailed on their sole claim. The defendants further submit that the case was undesirable given the inability of Clyde Fillmore to pay for legal services and the specialized knowledge and experience required. Finally, Counsel states that, in his experience, the amount sought in this matter is consistent with fee awards in similar cases which go to trial. In addition, Counsel notes that the automated legal research was limited. With regard to the final factor to be taken into consideration, Counsel suggests that Plaintiff's claims were without reasonable basis in law or fact; that the claims and assertions in this case were extreme; Plaintiff refused all reasonable offers to settle and failed to mediate the matter; and Plaintiff has no basis for his claims given his asserted expertise.

A party opposing an award of attorney's fees "must file a motion to disallow the claimed attorney fees, I.R.C.P. 54(e)(6), which motion must state with particularity the grounds upon which it is based, I.R.C.P. 7(b)(1)." *Lettunich*, 145 Idaho at 750, 185 P.3d at 261, fn2.

The plaintiff timely filed a Motion to Disallow on November 15, 2010. Therein, Plaintiff contends, *inter alia*, that the costs and fees requested are unreasonable and excessive; that the costs and fees claimed are not entirely associated with the litigation of this Complaint; that the costs and fees associated with Defendants' motion for contempt are not appropriate and should not be included; and that the bulk of fees claimed was not incurred in pursuing the allegation that Plaintiff violated the Consumer Protection Act. Plaintiff asks the Court to exercise its discretion to disallow the costs and fees claimed.

However, the plaintiff has failed to state with particularity the grounds for denying Defendants' request. General objections are insufficient. *Lettunich, Id.*

This case has been aggressively pursued and defended on both sides for more than two (2) years. A review of the record demonstrates that following the filing of the Complaint and subsequent Answer and Counterclaim nearly a year passed before any further action was taken in this case. Indeed, from the time the defendants filed their Answer & Counterclaim on January 15, 2009 until the Court issued its Mediation Order, only $1,225.00 in attorney's fees had been incurred.

The Court ordered mediation was unsuccessful in late 2009 and thereafter, Defendants filed a motion for contempt and sanctions on the stated basis that Plaintiff refused to meaningfully cooperate with the mediation process. The Court entered its Memorandum and Decision & Order re: Contempt on January 20, 2010 wherein the Court denied the motion but reserved ruling on the issue of attorney's fees until resolution of the case. It seems obvious to this Court that had mediation been successful, it would have saved over $100,000 of attorney's fees incurred by the parties to litigate this matter. This is precisely why the Court orders mediation in a case such as this and why the parties need to recognize the strong economic need to enter into mediation seriously. The Court finds that an award of attorney fees to mediate and seek sanctions for failing to meaningfully make an effort toward mediation is appropriate in this case.

The case was ultimately tried to the Court following unsuccessful cross-motions for summary judgment. Following a three (3) day court trial, the Court entered its Findings of Fact

and Conclusions of Law on October 18, 2010. On December 13, 2010, Judgment was entered in favor of Defendants and against the Plaintiff for damages in the amount of $27,500.00.

Defendants' request for attorney fees contemplates fees that were incurred in defending and pursuing this action as well as the action involving the Idaho Department of Water Resources. A review of the billing statements attached as Exhibit A to the affidavit of Bruce M. Smith demonstrates that Defendants seek reimbursement for attorney's fees incurred for approximately eight (8) months before Plaintiff's Complaint was filed on October 3, 2008. The amounts billed for October, November, and December of 2008 suggest that the fees were incurred in working on a motion to reconsider an Idaho Department of Water Resources order. It does not appear that fees associated with responding to Plaintiff's Complaint were incurred until in or around January, 2009. The Answer and Counterclaim was filed January 15, 2009. It appears that $11,100.00 of attorney's fees was generated *prior* to the filing of the Answer and Counterclaim.

As stated above the motions for summary judgment were unsuccessful. Ultimately, the Court informed the parties that summary judgment was not appropriate as there remained material questions of fact that could only be determined by the Court from observing the parties' presentation of evidence at trial. The work associated with bringing their motion for summary judgment was unnecessary in the end. The billing statements in June and July of 2010 reflect that attorney Bruce Smith expended 48.3 hours working on the summary judgment and attorney Carl Withroe expended 3.5 hours working on the summary judgment and attorney Paul J. Fitzer expended 0.9 hours. At rates of $250 per hour for Mr. Smith's time and $125 per hour for Mr. Withroe and Mr. Fitzer, the dollar amount of fees charged was $12,625.00.[1]

The bottom line in an award of attorney fees is reasonableness. *See, Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 86 P.3d 475 (2004). In this case, and taking into consideration of the above-articulated factors, the Court finds that an award of attorney's fees in the amount of $56,100 ($79,825 minus $11,100 and $12,625) is reasonable and appropriate. The Westlaw research costs of $659.74 are also reasonable and appropriately awarded for a total of $56,759.74.

[1] The Court did it's best to allow those hours expended to respond to the plaintiff's motion for summary judgment.

ORDER

IT IS HEREBY ORDERED, and this does ORDER, that Defendant's Motion for Attorney Fees is GRANTED, in part.

IT IS HEREBY FURTHER ORDERED, and this does ORDER, that Defendants are awarded costs as a matter of right in the amount of $938.75, discretionary costs of $62.66 and attorney fees in the sum of $56,759.74 and this award shall bear interest at the statutory rate from the date hereof. The defendants are directed to prepare a Judgment consistent with this Order.

DATED: 3/9/11

Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

JOHN C. GOULD
RINGERT LAW CHARTERED
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHARTERED
950 W. Bannock Street, Suite 520
Boise, ID 83702

MAR 09 2011

Date

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

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

GARY DUSPIVA, dba GARY DUSPIVA WELL DRILLING & DEVELOPMENT, Plaintiff, vs. CLYDE FILLMORE, an individual, and JOHN FILLMORE, an individual, Defendants.	CASE NO. CV 2008-010463*C MEMORANDUM DECISION UPON MOTION FOR RECONSIDERATION

On March 9, 2011, this Court filed its Memorandum Opinion & Order Re: Costs and Attorney Fees. On March 18, 2011, the Defendants/Counterclaimants, hereinafter "Defendants" filed a Motion for Reconsideration of that decision. On March 25, 2011, Plaintiff filed a response to the motion for reconsideration. Finally, on April 5, 2011, the Defendants filed a reply brief. Neither party asked for oral argument. Therefore, the Court took the matter under advisement and renders its decision upon the briefing of the parties and the record before the Court.

SUMMARY OF THE ARGUMENTS

The motion asks the Court to reconsider its decision disallowing attorney fees to bring Defendants' summary judgment motion. The reasons cited by Defendants are that bringing the summary judgment motion was an attempt to avoid the expense of a trial and also served to help "with the preparation of witnesses for trial" and to organize the exhibits that would ultimately be

introduced at trial. Finally, Defendants argue that to disallow these attorney fees is inconsistent with the purpose of the Idaho Consumer Protection Act "which is to protect the public from the types of actions exhibited by Plaintiff".

Plaintiff responds by pointing out that the motion for reconsideration fails to cite to any case law or other legal authority to support its position. In addition, the Plaintiff implicitly brings his own motion to reconsider the issue of an award of attorney fees resulting from Defendants' contempt action.

Defendants reply citing *Irwin Rogers Insurance Agency v. Murphy,* 122 Idaho 270, 833 P.2d 128 (Ct.App. 1992) in support of their motion.

ANALYSIS

I.R.C.P. 11(a)(2)(B) provides that a motion for reconsideration must be brought within fourteen (14) days of any order following final judgment. Thus, Defendants motion is timely. Plaintiff's implicit motion on the issue of an award of attorney fees resulting from Defendants' contempt action is not timely.

The issue before the Court is the reasonableness of the attorneys' fees claimed by Defendants. The burden of persuasion as to what would be a reasonable award of attorney fees rests with the moving party, in this case, Defendants. *See Lettunich v. Lettunich*, 145 Idaho 746, 750, 185 P.3d 258, 261 (2008).

"The calculation of reasonable attorney fees is within the discretion of the trial court." *Id. At 749,* 185 P.3d at 261 (citing *Bott v. Idaho State Bldg. Authority,* 128 Idaho 580, 592, 917 P.2d 737, 749 (1996)).

Idaho Rule of Civil Procedure 54(e)(3) directs the Court to consider certain criteria in setting the amount of fees to be awarded to the prevailing party. It provides:

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> (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law.
> (D) The prevailing charges for like work.

(E) Whether the fee is fixed or contingent.
(F) The time limitations imposed by the client or the circumstances of the case.
(G) The amount involved and the results obtained.
(H) The undesirability of the case.
(I) The nature and length of the professional relationship with the client.
(J) Awards in similar cases.
(K) The reasonable cost of automated legal research (Computer Assisted Legal Research), if the court finds it was reasonably necessary in preparing a party's case.
(L) Any other factor which the court deems appropriate in the particular case.

I.R.C.P. 54(e)(3). In determining the amount of reasonable attorney fees the court is not required to make specific findings demonstrating how it employed any of the factors listed in I.R.C.P. 54(e)(3). *Post Falls trailer Park v. Fredekind*, 131 Idaho 634, 962 P.2d 1018 (1998). The court is required only to consider the stated factors in determining the amount of attorney fees. *Perkins v. U.S. Transformer W.*, 132 Idaho 427, 974 P.2d 73 (1999).

In their memorandum, Defendants argue that attempting to avoid a trial made the attorney fees incurred upon the motion for summary judgment reasonable. The Defendants and the Plaintiff filed motions for summary judgment at essentially the same time. The Court denied the motions on the basis that there clearly were material issues of fact as to what communications occurred between the parties. The Court was unable to make credibility determinations that had to be made regarding inconsistent recollections of what occurred. The Court's reasoning in denying the attorney fees on the summary judgment was because it was unsuccessful and it should have been apparent to the parties that these material issues of fact would require denial of the motions.

However, this was a strategic decision made with the advice of counsel by both parties. The Court cannot find that the motions were brought frivolously and without any foundation. In other words, the motion was not unreasonable. Therefore, in reconsidering the issue it seems that it would be unfair to visit those strategic decisions upon the prevailing parties. Furthermore, the Court does recognize that there is a trial preparation element that goes into preparation and filing a motion for summary judgment.

Finally, the Defendants cite to the case of *Irwin Rogers Ins. Agency, Inc. v. Murphy,* 122 Idaho 270, 833 P.2d 128 (Ct.App. 1992) for the proposition that the prevailing party to a case is entitled to attorney fees and costs related to an unsuccessful pretrial motion in the case. Specifically, the Court of Appeals found:

> Thus, unless a "prevailing party" is determined to have prevailed in part, that party is entitled to its full reasonable attorney fee.
> *Id* at pg. 277.

In this case, the Court awarded damages upon the Defendants' counterclaim and denied the Plaintiff's claims. The Defendants were clearly the prevailing parties, not just prevailing in part. Consequently, the Court has determined that the motion for reconsideration should be granted. Thus, this entails an award of an additional $12,625.00 in attorney fees to make the total award, $68,725.00.

Defendants counsel is directed to prepare a Judgment consistent with this Memorandum Decision as well as the Court's earlier decision.

DATED: 4/19/11

Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

JOHN C. GOULD
RINGERT LAW CHARTERED
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773

BRUCE M. SMITH
MOORE SMITH BUXTON & TURCKE, CHARTERED
950 W. Bannock Street, Suite 520
Boise, ID 83702

4-20-11
Date

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

GARY DUSPIVA, etal.,	)	
	)	
Plaintiff-Appellant,	)	
	)	Case No. CV-08-10463*C
-vs-	)	
	)	CERTIFICATE OF EXHIBITS
CLYDE FILLMORE, etal.,	)	
	)	
Defendants-Respondents.	)	

I, CHRIS YAMAMOTO, 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 the following exhibits were requested by the Defendants:

Defendant's Exhibits:

A	**Memorandum, dated 11-6-08**	**Admitted**	**Sent**
C	**Start Card/Permit**	**Admitted**	**Sent**
D	**Application for Drilling Permit**	**Admitted**	**Sent**
T	**Notice of Violation**	**Denied**	**Sent**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 24 day of May, 2011.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: J Rendall Deputy

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

GARY DUSPIVA, etal.,	)	
	)	
Plaintiff-Appellant,	)	
	)	Case No. CV-08-10463*C
-vs-	)	
	)	CERTIFICATE OF CLERK
CLYDE FILLMORE, etal.,	)	
	)	
Defendants-Respondents.	)	

I, CHRIS YAMAMOTO, 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 documents requested.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 24 day of May, 2011.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Rendall 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

GARY DUSPIVA, etal.,	)	
	)	
Plaintiff-Appellant,	)	Supreme Court No. 38480
	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
CLYDE FILLMORE, etal.,	)	
	)	
Defendants-Respondents.	)	

I, CHRIS YAMAMOTO, 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:

Daniel V. Steenson and Jon C. Gould, RINGERT LAW CHTD.

Bruce M. Smith, MOORE SMITH BUXTON & TURCKE, CHTD.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 24 day of May, 2011.

CHRIS YAMAMOTO, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.
By: J Randall Deputy

CERTIFICATE OF SERVICE