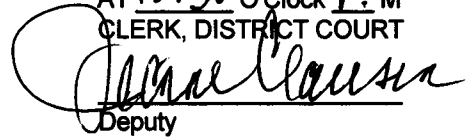


STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 9/3/2020

AT 12:30 O'Clock P. M.
CLERK, DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**THE STATE OF IDAHO, IDAHO
TRANSPORTATION BOARD,**

Plaintiff,

VS.

**17568 N. HIGHWAY 95, LLC, an Idaho
limited liability company, ET AL,**

Defendants.

Case No. **CV28-19-7953**

**MEMORANDUM DECISION
AND ORDER GRANTING
PLAINTIFF'S MOTION TO
AMEND COMPLAINT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on plaintiff the State of Idaho, Idaho Transportation Board's (ITB) Motion to Amend the Complaint filed on August 6, 2020. The Complaint in this case was filed by ITB on November 6, 2019. ITB seeks to condemn land owned by defendant 17568 N. Highway 95, LLC (HWY 95). Compl. 2. Tom Paschane is the majority owner of HWY 95. In addition, Tom Paschane owns Eagles Landing, which in turn owns and operates the Alpine Country Store and RV Park which operates on the real property at issue in this action located at 17568 N. HWY 95, Hayden Idaho. Decl. of Thomas Pachane in Resp. to Pl.'s Mtn. to Strike Business Damages 1-2. It is entirely unknown why HWY 95 waited until August 14, 2020, to file Defendant 17568 N. Highway 95, LLC's Answers and Affirmative Defenses.

Defendants Lamar Company, LLC; Mountain West Bank, Division of Glacier Bank; Kathleen Associates, LLC; and Brewed Coffee Company, LLC are also named in the complaint as defendants who may have an interest in the property. Compl. 2. “[T]he property sought to be condemned is to be used for a right of way...” for “the Highway system of the State of Idaho.” *Id.* at 3.

This Court issued an Order Granting Possession of Real Property on March 17, 2020. Counsel for ITB states that:

On or about June 15, 2020, on behalf of my client, I attempted to reach an agreement with defendant to revise Exhibit A and Exhibit B to the Complaint, reducing the temporary easement from 2.574 acres to 0.428 acres. See Declaration of Renee R. H. Vogelpohl, exhibit A. On or about June 26, 2020, Defendant responded that they were unwilling to agree to the request. See Declaration of Renee R.H. Vogelpohl, Exhibit B. On or about July 6, 2020, on behalf of my client, I attempted again to reach an agreement on behalf of my client to amend the temporary easement acquisition. On or about July 7, 2020, Defendant responded again they were unwilling to agree to the request. See Declaration of Renee R. H. Vogelpohl, Exhibit C.

Mem. in Supp. of Mot. to Amend Compl. 2.

ITB now seeks through its August 6, 2020, Motion to Amend the Complaint, for “leave to file a First Amended Complaint, for the reason that the ITB needs to change the acreage requirement of the temporary easement.” Mot. to Amend the Compl. 2.

On August 19, 2020, ITB filed a Memorandum in Support of Motion to Amend Complaint, and a Declaration of Renee R. Hollander-Vogelpohl in Support of Memorandum in Support of Motion to Amend Complaint. On August 26, 2020, HWY 95 filed Defendant 17568 N. Highway 95, LLC’s Response to Plaintiff’s Motion to Amend, a Declaration of Kevin W. Roberts in Response to Plaintiff’s Motion to Amend, and a Declaration of Thomas Paschane in Response to Plaintiff’s Motion to Amend. On August 28, 2020, ITB filed a Reply to Defendant 1768 N. Highway 95, LLC’s Response

to Motion to Amend Complaint, and a Second Declaration of Renee R. Hollander-Vogelpohl in Support of Motion to Amend Complaint.

II. STANDARD OF REVIEW

The Supreme Court of Idaho has held that “[t]he determination of the meaning of a statute and its application is a matter of law over which this Court exercises free review.” *Woodburn v. Manco Prods., Inc.*, 137 Idaho 502, 504, 50 P.3d 997, 999 (2002)

III. ANALYSIS

A. Arguments by the parties.

In furtherance of ITB’s Motion to Amend the Complaint, ITB argues that:

The State’s request to reduce the size of the reduction in size of the temporary easement does not cause any additional damage to the Defendant. If anything, the reduction in temporary easement mitigates damages alleged by the Defendant. The Defendant has not suffered any additional damages due to the reduction in size of the temporary easement. The State has had possession of the property since March 17, 2020. The State has not begun to construct any of the temporary easement involved in the area seeking to be reduced. The State is not seeking any reimbursement of any funds paid to the court due to the possession hearing. The State is not changing the size of the acquisition of the fee simple sought in this condemnation action. The request by the State to amend the right of way plans to reduce the temporary easement is not similar to the *Buckley* case. The State is not seeking refund and not changing the fee simple acquisition, only reducing the size of the temporary easement.

Mem. in Supp. of Mot. to Amend Compl. 7-8. Additionally, ITB argues that:

The State’s request is not an abandonment of the condemnation proceeding, either material or constructive, as the State is still moving forward with the condemnation proceedings as to the fee simple property sought. The State is seeking only to reduce the temporary easement.

Id. at 8.

First, HWY 95 argues that:

ITB has not provided any legal authority which would allow the taking to be amended after possession and use...

In this case, the State requested use and possession and represented to this Court the property rights they requested to take, including the easement and right to construct a road on the 2.574 acres, was necessary to their public use. The Court granted the motion and entered Final Order finding necessity of the requested take and granting possession and use of the property upon payment by the State of \$2,302,511. See Appendix A. The State paid the funds and obtained possession and use of all the property rights included in the Order on April 1, 2020. Ex. B to Dec. of Roberts. As a result, Alpine has not had use or possession of the property since April 1, 2020....

There is no prejudice to denying ITB'S motion. ITB can proceed with the action as filed based on the necessity represented to the Court to obtain possession. On the other hand, if amendment is truly required, ITB may either reach agreement with the Property Owner on terms for allowing amendment or it may abandon the action and refile a new proceeding. In any event, there is no authority supporting a request to amend the take after possession and use has occurred.

HWY 95's Response to Mot. to Amend 3-5. Next, HWY 95 argues that:

This action was filed based upon the authority provided by the Idaho Transportation Board in its Order of Condemnation. See Appendix B. That authority was tied to the plans on file at the time. Those plans match the description of the property to be taken as set forth in the Order Granting Possession of Real Property. The present Motion to Amend does not identify any formal action by the Idaho Transportation Board establishing it has entered an Order modifying its prior Order of Condemnation. As a result, there is no authority for an amended eminent domain action.

Id. at 5. Finally, HWY 95 argues that:

The only case cited by ITB that applies or addressed an attempt to amend after possession is Buckley. Notably, ITB fails to explain why the analysis of Buckley does not apply here. The other cases cited by ITB do not address the factual issues at bar and are inapplicable.

The issue at bar does not trigger the "change of plans" doctrine. The change of plan doctrine is for the benefit of a landowner and applies when just compensation has been decided based on construction plans submitted by the condemnor. The change of plans doctrine allows the landowner to come back in a separate lawsuit and seek additional damages if the as-built construction does not match the plans which the condemnation action was decided upon. See Olson V. State, 467 P.2d. 945, 948 (1970). The "change of plan" doctrine simply does not apply in situation where the condemnor has taken possession and seeks to amend the taking.

Central Puget Sound Regional Transit Authority v. Airport Investment Company, 376 P.3d 372 (2016) also was not decided based on facts like the ones at bar. The crucial difference is that in Central

Puget Sound, the condemnor had not been provided with possession and use. As a result, as recognized by Buckley, the condemnor was free to reduce the take. In contrast, ITB has obtained possession and use, as a result, its request for amendment should be denied.

ITB argues in their reply Brief that:

Neither Idaho Code §§ 7-707 or 7-721 prohibits revision to the acquisition after the possession hearing is held. The current request by Plaintiff to revise the temporary easement before final judgment is entered is allowable.

Reply to Def. 17568 N. Hwy 95, LLC's Resp. to Pl.'s Mtn. to Amend Compl. 3. Next,

ITB argues that:

Defendant has not shown any damages he will suffer by reduction in temporary easement. Instead, the Defendant's Response relies on two facially contradictory positions.

First, Defendant states the deletion of the temporary easement that was planned to be an internal drive to the convenience store will cause additional damage to the Defendant if it is not constructed; however the Defendant is already seeking 100% damage to the convenience store. It is impossible for the convenience store to be damaged greater than 100%, but nevertheless the Defendant has chosen to rely upon this argument in his Response.

Second, it should not go unnoticed that Defendant believes he is damaged no matter what ITD does with regard to the temporary easement. Previously, Defendant sought damages for the construction of the temporary easement based on alleged loss of RV spaces and loss of usable land. Now that Plaintiff does not intend to construct the temporary easement, the Defendant has abandoned his argument about the loss of RV spaces and loss of usable land to focus on implausible additional damages to convenience store already alleged to be damaged at 100%. In the process of shifting his argument, Defendant completely fails to take into account that if ITD does not construct the temporary easement, there is no loss of RV spaces and no loss of usable land, both of which accrue entirely to the benefit of the Defendant, as opposed to damaging it.

The fee simple take has not changed. The temporary easement compensation has been determined and has been paid to the court... The Plaintiff is not requesting reimbursement of the funds paid or changing the fee simple acquisition, but only seeking revision in the size of the temporary easement addressing factors to mitigate damages to the landowner and changed understanding of the viability of the business currently located on the property.

Id. at 4-5.

/

B. Amending a Taking after the State has Taken Possession and Use.

1. There was no Answer filed at the time of ITB's Motion to Amend Complaint.

First, this Court finds as a matter of law, that plaintiff's Motion to Amend must be granted. ITB's Motion to Amend the Complaint was filed on August 6, 2020. At that time, defendants had not filed an Answer to the Complaint. Under I.R.C.P 15(a), ITB has the ability to amend its complaint "as a matter of right." Up until defendants filed their Answer on August 14, 2020, plaintiff could file an amended complaint without even seeking leave of the Court. *Rhino Metals, Inc. v. Craft*, 146 Idaho 319, 321, 193 P.3d 866, 868 (2008). ITB did not even have to file its Motion to Amend Complaint, they could have just filed the Amended Complaint as it had the unfettered right to do so, given the fact that defendants chose not to file an answer until over a year and a half into the litigation.

2. From a factual standpoint, ITB's Motion to Amend Complaint must be granted.

HWY 95 concedes that the exact issue of whether a taking can be amended after the state has taken possession and use has not been directly addressed by Idaho Courts. HWY 95 cites the Washington case of *State V. Buckley*, 572 P.2d 730, 18 Wn. App. 798 (Wash. Ct. App. 1977) as on point regarding this issue. HWY 95 states that, "[t]he Buckley Court's analysis is equally applicable to Idaho's quick-take statute." Response to Pl's. Mot. to Amend 4. Furthermore, "[l]ike RCW 8.04.090, nothing in LC. §7-721 allows the State to renege on the final order it had entered after possession has been transferred." *Id.*

The Court in *Buckley* stated that:

The principal question is raised by the State's contention that it has the right to unilaterally reduce the size of a parcel of property condemned at any time before title vests in the State by a decree of appropriation and

payment of the award. RCW 8.04.120; *State v. Calkins*, 54 Wash.2d 521, 342 P.2d 620 (1959). As a general proposition, the State does have that right, *Public Util. Dist. No. 1 v. Washington Water Power Co.*, 43 Wash.2d 639, 262 P.2d 976 (1953), if it has not taken possession. *Greenwood v. Seattle*, 73 Wash.2d 741, 440 P.2d 437 (1968).

Buckley, 572 P.2d at 730, 18 Wash. App. at 799.

ITB argues that the facts in the case at hand are more similar to *Central Puget Sound Regional Transit Authority v. Airport Investment Company*, 376 P.3d 372, 186 Wash. 2d 336 (2016) (hereinafter “*Sound Transit*”) rather than *Buckley*. In *Sound Transit*, the plaintiff reduced the scope of the Temporary Construction Easement (TCE) based on a “changed understanding of its construction needs and to ameliorate AIC’s concerns about decreased parking. Despite the scaled-back TCE, it kept the same settlement offer on the table until trial.” *Sound Transit*, 376 P.3d at 378, 186 Wash. 2d at 347-48.

The Court in *Sound Transit* ultimately held that changes to the scope of the taking were allowed under the statute, because:

Sound Transit made no reduction to its permanent taking (the PGE); the only change was to reduce the area impacted by the TCE by 25 percent and to limit its duration to fewer nonconsecutive days of exclusive possession. Moreover, Sound Transit’s settlement offer never changed despite the reduced TCE. The Court of Appeals properly rejected AIC’s claim that it is entitled to attorney fees under RCW 8.25.075(l)(b).

Sound Transit, 376 P.3d at 378-79, 186 Wash. 2d at 349-50.

This Court agrees with ITB that the facts of the present case are more in line with *Sound Transit* than *Buckley*. The present case, *Sound Transit*, and *Buckley* all involve a proposed amendment after the State has taken possession of the land but before a final decree. In *Buckley*, “Pending trial to determine the amount of damages arising from the taking, the State decided that it did not require all of the property and filed a notice and motion to ‘amend description, tender back, reduce offer and demand

reimbursement.” *State v. Buckley*, 572 P.2d 730, 730, 18 Wash. App. 798, 799 (1977). In the present case, “[t]he State is not seeking a refund and not changing the fee simple acquisition, only reducing the size of the temporary easement.” Mem. in Supp. of Mot. to Amend Compl. 7-8. Those facts are more in line to those found in *Sound Transit* where, “Sound Transit made no reduction to its permanent taking (the PGE); the only change was to reduce the area impacted by the TCE by 25 percent and to limit its duration to fewer nonconsecutive days of exclusive possession.” *Sound Transit*, 376 P.3d at 378-79, 186 Wash. 2d at 349–50.

This Court finds that there is no language in I.C. § 7-707 or I.C. § 7-721 that prevents the alteration of a temporary easement after possession has been taken. While no Idaho case law has directly addressed this issue, the reasoning used in neighboring state cases such as *Sound Transit* and *Buckley* help inform this Court. For similar reasons as found in *Sound Transit*, this Court finds that the proposed amendment to the Complaint is lawful because the amendment is in regards to proposed changes to the temporary easement, and ITB has not sought an alteration to the fee simple acquisition of the property or a refund of the temporary easement compensation deposited to the Court.

This Court must note that while ITB does not seek to adjust the deposited temporary easement compensation through its Motion to Amend the Complaint, such a statement is misleading as to the actual award that may be paid out following a final judgment. Idaho Code § 7-721 reads:

(5) After the court has entered its order of determination of the amount of just compensation, the plaintiff may deposit such amount with the court and the court shall thereupon enter an order fixing a date from which the plaintiff shall be entitled to take possession of and use the property. After such deposit and order have been made the cause shall proceed to trial in the regular manner.

* * *

(8) Upon trial of the cause the court shall enter judgment against the plaintiff for the amount of the award, and the plaintiff shall pay to the defendant or defendants the amount, if any, by which such judgment exceeds the amount previously deposited; provided that if the award and judgment shall be less than the amount withdrawn under subsection (6) of this section, the defendant or defendants shall refund the difference to the clerk of the court and if such refund is not made within thirty (30) days the court shall enter judgment in favor of the plaintiff and against such defendant or defendants for the amount of the difference.

As these subsections of I.C. § 7-721 show, the final judgement can be increased above or decreased below the deposited temporary easement compensation. The significance of this is that, ultimately, the changes proposed through the elimination of the roadway project sought through ITB's Motion to Amend the Complaint could result in a lower, or conceivably a higher, money judgment than that which ITB has currently deposited pursuant to this Court's March 17, 2020, Order Granting Possession of Real Property.

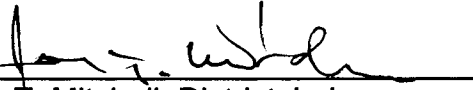
This Court understands HWY 95's position that ITB's decision not to construct a roadway on the temporary easement may increase damages to HWY 95, as well as HWY 95's assertion that new estimates may be required to assess the damages incurred due to the elimination of the roadway from ITB's construction plans. Despite these considerations, ITB has acquired full possession and paid the Court the temporary easement compensation as required by this Court's March 17, 2020, Order Granting Possession of Real Property. Therefore, ITB is not required to start over with a new taking in order to pursue alterations to the temporary easement that appear likely to alleviate damages incurred by HWY 95 as opposed to increasing damages.

IV. CONCLUSION AND ORDER

For the Reasons Described above, Plaintiff ITB's Motion to Amend the Complaint is GRANTED.

IT IS HEREBY ORDERED the plaintiff ITB's Motion to Amend the Complaint is **GRANTED.**

Entered this 3rd day of September, 2020.



John T. Mitchell, District Judge

3rd **Certificate of Service**


I certify that on the 3rd day of September, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

Renee Hollander-Vogelpohl
P. O. Box 7129
Boise, ID 83707
renee.hollander-
vogelpohl@itd.idaho.gov ✓

Paul Schlegel
P. O. Box 7129
Boise, ID 83707
paul.schlegel@itd.idaho.gov ✓

Kevin Roberts
1325 W. 1st Avenue, Ste 303
Spokane, WA 99201
kevin@robertsfreebourn.com ✓

Mark Ellingsen
608 Northwest Blvd, Ste 300
Coeur d'Alene, ID 83814
mae@witherspoonkelley.com ✓

By 

Jeanne Clausen, Secretary