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AUG 16 2006

DEPARTMENT OF
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase No. 31-11845
	)	
	)	BRIEF IN SUPPORT OF STATE OF IDAHO'S
	)	MOTION TO SHORTEN TIME, TO COMPEL
Case No. 39576	)	DISCOVERY, AND FOR AN EXPEDITED HEARING
	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorneys general, files this *Brief in Support of the State of Idaho's Motion to Shorten Time, to Compel Discovery, and for an Expedited Hearing*, hereinafter "Idaho's Discovery Motion". The primary purpose of the Idaho's Discovery Motion is to provide for entry on the place of use of water right no. 31-11845 for Idaho's experts in order to conduct necessary inspections,

measurements, surveys, photographs, tests, and collection of samples of the property. This motion is limited to Request for Production No. 13 of Idaho's Discovery.

I. BACKGROUND

On Tuesday, August 8, 2006, the State informed Claimant's counsel, via telephone, that the State wished to conduct the property inspection described in Request for Production No. 13, which is stated below. On August 9, 2006, the State served its First Set of Discovery Requests upon the Claimants. Request for Production No. 13 therein requested the following:

Entry on lands of **Claimant Jernberg** and **Claimant Idaho Properties** is requested for the following purposes: (1) conducting soil tests, (2) making measurements of the ditch delivery system, (3) examining forage and plant species present, and (4) conducting other scientific investigations incidental thereto. The proposed date of entry would commence on or about August 21, 2006 and would continue through September 29, 2006. The soil tests would include the excavation of pits with a backhoe. The depth of the pit would not generally exceed six feet. A soil scientist would examine the soil horizons in each soil pit, would conduct certain tests to determine alkalinity and other properties of the soil, and may extract a sample from each soil horizon. The soil pits would be filled in following completion of the soil tests. The number of soil pits cannot be determined precisely without a surface examination of the **PPU**. The minimum number of pits is probably fifteen (15), and the maximum number of pits would not exceed forty (40).

The State of Idaho understands that a grain crop is being raised in the southwest corner of the **PPU**. The timing of the State of Idaho's visit is such that the State of Idaho expects that the grain crop will be harvested from the **PPU**. The State of Idaho will not dig any soil pits in a grain field that has not been harvested. If the grain crop is harvested, the State of Idaho expects to dig some soil pits in the existing grain field. The State of Idaho will make every effort to minimize any adverse impacts from its excavation of soil pits on the **PPU**.¹

State of Idaho's First Set of Discovery Requests to Ben Jernberg and to Idaho Properties, LLC,
at 12-13.

¹ The acronym "**PPU**" is defined in the discovery as the "permissible place of use" for water right no. 31-11845.

II. ARGUMENT

I. THE COURT SHOULD SHORTEN THE TIME FOR A RESPONSE TO THE DISCOVERY AND SHOULD HEAR THE MATTER ON AN EXPEDITED BASIS.

The State of Idaho's discovery was served on August 9, 2006 by e-mail and by U.S. Mail. Responses to this discovery are due on September 9, 2006. If the State of Idaho waited until September 9, 2006, for a response to this Request for Production No. 13, the State of Idaho would have a very limited period of time to conduct the necessary field examination, to prepare the expert reports, and to submit those reports to Claimant Ben Jernberg and Claimant Idaho Properties, LLC. Claimant Ben Jernberg and Claimant Idaho Properties LLC need sufficient time to review the expert reports, to determine whether to take any depositions, and to take any necessary depositions of Idaho's experts by the deadline of October 31, 2006 accordance with the *Order Granting Motion To Vacate Trial Date and Third Amended Trial Schedule*. It is therefore critical that the Court shorten the time for response to Request for Production No. 13 and that the Court hear this matter on an expedited basis.

II. THE COURT SHOULD COMPEL THE REQUESTED DISCOVERY.

The State hereby moves this Court for an order compelling the Claimants to submit to an inspection of the Claimants' lands pursuant to Idaho Rules of Civil Procedure 34(a). See also I.R.C.P. 34(b), 37(a)(2). Rule 34(a) authorizes a party to request permission to enter "upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)." Rule 26(b)(1) "permits broad discovery of any matter that is not privileged, even if it is inadmissible, so long as it is 'reasonably calculated to lead to the discovery of admissible evidence.'" *Kirk v. Ford Motor Co.*, 141 Idaho 697, 703-704, 116 P.3d 27, 33-34 (2005).

Control of discovery is within the discretion of the trial court. *Jacobson v. State Farm Mut. Auto. Ins. Co.*, 136 Idaho 171, 173, 30 P.3d 949, 951 (2001).

Here, the condition of the Claimants' lands and the water delivery system thereon are directly relevant to the issues in this case. Claimants are asserting a water right in the amount of 4.99 cfs to be used to irrigate 663 acres of uncultivated pastureland in Jefferson County, Idaho. The duty of water requested is 3.5 acre feet of water for each acre of land. Since this court has already entered a partial decree for water right no. 31-2395 in the amount of 3.65 cfs with an annual volume of 1,134 AFY, the net annual volume of water for the remaining acres in the place of use would be about 1,186 acre feet. In order for the State to determine whether such an application of water would be considered a "beneficial use" of such water under Idaho law, it is critical that the State be allowed to assess the value of the soils and vegetation on the property, as well as, to examine the ditch delivery system constructed to deliver the water.

Idaho Courts have long recognized the importance of considering the condition of the soil in making a determination of the duty of water. In *Washington State Sugar Co. v. Goodrich*, 27 Idaho 26, 147 Pac. 1073 (1915), the Idaho Supreme Court described the importance of considering soils as follows:

The duty of water depends upon the character and condition of the soil, and in determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation.

27 Idaho at 44. Here, the determination of the quality of soils is a critical factual issue that requires the best information obtainable within the time schedule for the trial. The Court should authorize the requested inspection to assist in providing that information.

In accordance with Rule 37(a)(2), the State has conferred with the Claimants in an effort to secure the Claimants' permission to conduct the requested inspection without court action. These discussions occurred on Tuesday August 8, 2006 and on Monday August 14, 2006.

Claimants' counsel informed the State on Monday August 14, 2006 that the Claimants would oppose the inspection requested.

CONCLUSION

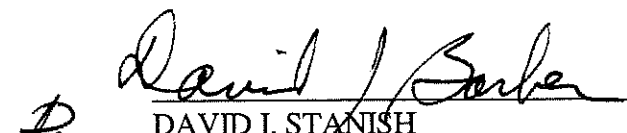
Based upon the relevancy of information sought in Request for Production No. 13, the State of Idaho is entitled to an order compelling the Claimants to submit to the inspection requested therein.

DATED this 14th day of August 2006.

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