

COPY

RECEIVED

AUG 21 2006

DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

DAVID J. BARBER (ISB #2597)
DAVID I. STANISH (ISB #7310)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 334-2690

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
	)	
	)	REPLY BRIEF IN SUPPORT OF THE STATE OF
	)	IDAHO'S MOTION TO COMPEL DISCOVERY
Case No. 39576	)	
	)	
	)	
_____	)	

COMES NOW, the State of Idaho, by and through the undersigned deputy attorneys general, files this *Reply Brief in Support of the State of Idaho's Motion to Compel 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. On August 15, 2006, Special Master Bilyeu heard oral arguments on the State of Idaho's Motion to Shorten Time, to Compel Discovery, and for an Expedited Hearing. At the conclusion of the hearing, Special Master Bilyeu continued the matter for further consideration pending an evidentiary hearing to be held on August 18, 2006.²

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

² During the August 15, 2006 hearing, the State informed the Court and the Claimants that the State intended to call an in-courtroom expert witness at the August 18, 2006 hearing.

II. ARGUMENT

A. THE COURT SHOULD COMPEL THE DISCOVERY REQUESTED BECAUSE THE SOIL CONDITIONS ON THE CLAIMANTS' PROPERTY ARE DIRECTLY RELEVANT TO ASSESSING CLAIMANTS' CONTENTION THAT THE WATER IN THIS CASE IS BEING PUT TO A "BENEFICIAL USE."

As an essential element of a water right claim, each claimant must prove that their appropriation of water is being made for a "beneficial use." Idaho Const. art. XV, § 3; Idaho Dep't of Parks v. Idaho Dep't of Water Admin., 96 Idaho 440, 530 P.2d 924 (1974). "What is a beneficial use, of course, depends upon the facts and circumstances of each case." Idaho Dep't of Parks, 96 Idaho at 448, 530 P.2d at 932 (Donaldson, J., concurring) (quoting Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist., 45 P.2d 972, 1007 (Cal. 1935)). One conceptual tool for implementing beneficial use is the duty of water, which is "that measure of water, which, by careful management and use, without wastage, is reasonably required to be applied to any given tract of land for such period of time as may be adequate to produce therefrom a maximum amount of such crops as ordinarily are grown thereon." United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 854 (9th Cir. 1983). Duty of water "is not a hard and fast unit of measurement, but is variable according to conditions." Id.

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, 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 26, 44, 147 P. 1073, 1079 (1915) (emphasis added); see also Farmers' Coop. Ditch Co. v. Riverside Irrig. Dist., 16 Idaho 525, 538, 102 P. 481, 484–485 (1909) (recognizing that the duty of water will vary according to the character of the lands—in that case, the Boise bench and

Boise bottom lands—to be irrigated); Muir v. Allison, 33 Idaho 146, 150, 191 P. 206, 210 (1920) (recognizing that a water user’s water right may be limited where the soil is adapted only to one or to limited kinds of crops); Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 F. 9 (9th Cir. 1917) (affirming the trial court’s findings as to the duty of water, which were based in part upon the court’s consideration of the quality of the soil). The importance of considering soil conditions has also been recognized in other states. See Little Walla Irrig. Union v. Finis Irrig. Co., 124 P. 666, 668 (Or. 1912) (“Neither the law nor the decisions of the courts have fixed a definite or uniform amount as constituting the duty of water for irrigation in all cases, but it depends upon the character of the soil, the climate, and other conditions, as well as the manner of its application.”); Cook v. Evans, 185 N.W. 262, 265 (S.D. 1921) (“Another matter, that must be taken into consideration in determining the amount of water which a claimant is entitled to, is the nature of the soil to be irrigated.”); Mt. Shasta Power Corp. v. McArthur, 292 P. 549, 552 (Cal.Ct. App. 1930) (“Respecting the duty, . . . it ordinarily becomes a question of fact . . . , which is governed largely by the nature of the soil, climatic conditions, and circumstances surrounding the tract involved and the use to which it is applied.”).

Here, the soil conditions on the Claimants’ property are directly relevant to the issue of beneficial use, and therefore, the Court should order the Claimants to comply with Request for Production No. 13. See Kirk v. Ford Motor Co., 141 Idaho 697, 703–704, 116 P.3d 27, 33–34 (2005) (holding that Idaho Rule of Civil Procedure 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’”). 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 Claimants’ property.

B. IDAHO RULES OF CIVIL PROCEDURE ALLOW A REQUESTING PARTY TO MOVE FOR AN ORDER TO COMPEL AN INSPECTION AT ANY POINT WHEN THE RESPONDING PARTY OBJECTS TO THE INSPECTION AS REQUESTED.

The State’s motion to compel discovery is timely. Claimants’ contention that they are entitled to thirty days to respond to the State’s inspection request is incorrect. Idaho Rule of Civil Procedure 34(b)(2) dictates that a responding party “shall serve” a response within thirty days; Rule 34(b)(2) does not state that the responding party shall have thirty days to respond. In fact, Idaho Rules of Civil Procedure 34(b)(2) and 37(a)(2) authorize a requesting party to move for an order to compel an inspection upon either an objection by the responding party or upon any failure to permit the inspection as requested. In this case, the Claimants voiced their objection clearly on August 14, 2006, when Claimants’ counsel informed the State that the Claimants would object to the inspection as requested. This matter is, therefore, properly before the Court for its consideration.

C. CLAIMANTS ARE NOT ENTITLED TO HAVE THEIR EXPERTS ON-SITE DURING THE STATE’S INSPECTION.

There are a number of reasons why the property investigation in this case should commence on or about August 21 as requested. First, although the State recognizes the

Claimants' interest in having their experts on-site during the State's investigation, nothing in the Idaho Rules of Civil Procedure require their attendance. Second, the timing of the Court's scheduling order necessitates expediting the property inspection. The order requires all expert reports be filed no later than October 31, 2006, and the State's experts have indicated that they may need three or four weeks to finish their reports. Third, the State is not contesting the Claimants' ability to have non-expert observers present during the investigation as long as they do not interfere therewith. As a result, the Court should order the Claimants to comply with the property investigation to commence on or about August 21, 2006.

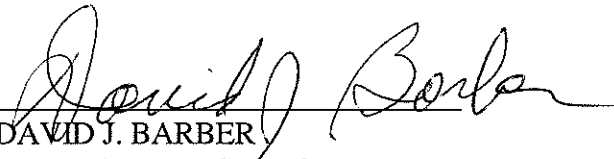
III. CONCLUSION

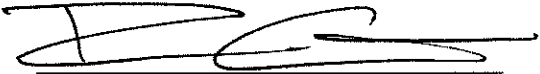
Based upon the relevancy of information sought in Request for Production No. 13, the State of Idaho is entitled to an order compelling the Claimants to submit to the inspection requested therein.

DATED this 17th day of August 2006.

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division


DAVID J. BARBER
Deputy Attorney General
Natural Resources Division


DAVID I. STANISH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 17th day of August 2006, I caused to be served the original and/or copy of this REPLY BRIEF IN SUPPORT OF STATE OF IDAHO'S MOTION TO COMPEL DISCOVERY on each of the following persons by the indicated method.

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to

United States Department of Justice
Environment and Natural Resource
Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☐ Statehouse Mail

Claimant Ben Jernberg
Claimant Idaho Properties, LLC
Represented by:
Roger D. Ling
Michael P. Tribe
LING ROBINSON & WALKER
PO Box 396
Rupert, ID 83350

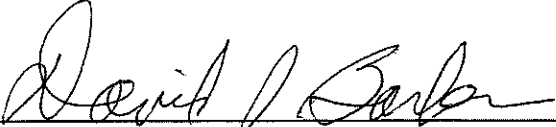
- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ E-Mail: rdl@idlawfirm.com
- ☒ E-Mail: mpt@idlawfirm.com
- ☐ Statehouse Mail

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID J. BARBER
Deputy Attorney General