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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	ORDER GRANTING STATE OF
	)	IDAHO'S MOTION TO ENTER UPON
Case No. 39576	)	PRIVATE LAND AND CONDUCT
	)	INVESTIGATION; SCHEDULING
	)	EXPERT DEPOSITIONS;
	)	RESCHEDULING PRETRIAL
_____	)	SUBCASE NO. 31-11845

I. PROCEDURAL BACKGROUND

On August 14, 2006, the respondent, State of Idaho, filed a *Motion to Shorten Time, to Compel Discovery, and for an Expedited Hearing*.

The *Motion* requested an Order allowing entrance onto claimant Idaho Properties LLC's land for the purpose of conducting soil tests, ditch measurements, examination and sampling of forage and plants. At issue was the method of digging test pits for the soil tests, the permissible depth of the test pits, and the timing of all tests to allow experts for both sides to be present. A hearing was held on August 15, 2006 and was continued on August 18, 2006. Claimant, Idaho Properties LLC and objector, Ben Jernberg, presented the *Affidavit of Dale Stukenholtz in Opposition to State of Idaho's Motion to Compel*. The State of Idaho presented testimony of David Shaw and Glen Logan.

II. STANDARD

The Idaho Rules of Civil Procedure set forth the general scope of discovery in Rule 26(b)(1). The rule is that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . ."

The State of Idaho sought discovery in its *First Set of Discovery Requests, Request for Production No. 13*, of Idaho Properties, LLC to conduct a property inspection to test soils, measure

the ditch system, collect and examine forage and plant species, and other related inspections.

The testimony of David Shaw, Glen Logan and the *Affidavit of Dale Stukenholtz* all demonstrated that soil testing is relevant to determining “beneficial use” and the quantity of water for this water claim.

The State of Idaho requested permission to dig large, deep pits with a backhoe on the land of Idaho Properties, LLC to conduct soil tests. Idaho Properties, LLC raised the issue of the invasive nature of the proposed test pits, and suggested using hand dug pits or an auger.

The State of Idaho offered testimony from its experts that deeper pits were necessary to get through rock fragments and to obtain sufficient information about root systems, drainage and to adequately describe soil characteristics and delineate different soil types. The State’s expert testified that screw augers and tile spades are not sufficient to obtain sufficient test results.

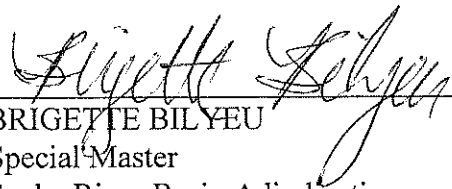
III. ORDER

This Special Master has considered the evidence and argument relating to the requested tests and finds that the testing is relevant to issues brought in this subcase. IT IS HEREBY ORDERED THAT:

- 1) The State of Idaho may access the land of the claimant on **Monday, August 21, 2006** for purposes of observing and flagging the field, for examining and measuring the ditch system, and for obtaining water samples from open ditches and existing well.
- 2) The Idaho Department of Water Resources may access the land of claimant on **Monday, August 21, 2006** and several days after for the purpose of mapping the place of use.
- 3) The State of Idaho may access the land of the claimant on **September 18 and 19, 2006** for the purpose of conducting soil samples. The Idaho Properties LLC and Ben Jernberg may also take soil samples on those days.
- 4) The methodology of conducting the soil samples may include the digging of up to 15 total pits. The pits may be dug with a back hoe. Five of the pits may be deeper than 6 feet. The remaining pits may be up to 6 feet deep.
- 5) It is expected that experts for both Idaho Properties LLC and Jernberg, and experts for the State of Idaho shall be allowed to be present during the observations and digging of and sampling from the pits.
- 6) Idaho Properties LLC and/or Ben Jernberg shall be allowed to be present during the observations and during the digging of and sampling from the pits.

- 7) The State of Idaho shall rehabilitate the place of use after digging the test pits. The rehabilitation of the place of use shall include replacing the removed dirt, with the top soil being replaced at the top. In addition, rehabilitation shall include reasonable efforts to reseed the pasture grass.
- 8) Depositions of the experts for Idaho Properties LLC and Jernberg and for the State of Idaho shall be scheduled between **November 1 and November 17, 2006**.
- 9) The Pretrial shall be rescheduled for **November 22, 2006 at 9:00 a.m.** Exhibit and Witness Lists shall be exchanged on that day as well. The Pretrial Conference set on November 1, 2006 at 10:00 a.m. is **vacated**.

DATED: August 25, 2006.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

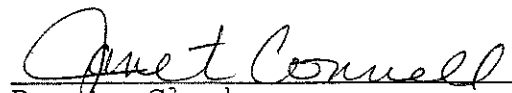
I certify that a true and correct copy of the ORDER GRANTING STATE OF IDAHO'S MOTION TO ENTER UPON PRIVATE LAND AND CONDUCT INVESTIGATION was mailed on August 25, 2006, with sufficient first-class postage to the following:

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ORDER GRANTING


Deputy Clerk