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DEPARTMENT OF
WATER RESOURCES

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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

Case No. 39576

Subcase Nos.	63-00127A	63-00128A
	63-00129A	63-00130A
	63-00129A	63-00131A
	63-00127B	63-00128B
	63-00127B	63-00129B
	63-00130B	63-00131B
	63-00130B	63-00178B
	63-00178C	37-21530

TREE TOP'S MOTION TO VACATE AND
CONTINUE TRIAL SETTING AND PRETRIAL
DEADLINES

COMES NOW Tree Top Ranches, L.P. ("Tree Top"), by and through
undersigned counsel of record and pursuant to Idaho Rules of Civil Procedure 7 and 16, and
hereby moves the Court for an Order vacating and continuing the current trial setting and
corresponding pretrial deadlines in each of the above-referenced subcases. This motion is

supported by the affidavits of Andrew J. Waldera and Scott King filed contemporaneously herewith, and the memorandum contained herein.

I. BACKGROUND

On July 8, 2009, the Court set the above-captioned subcases for trial commencing March 29, 2010. *See* Trial Scheduling Order (“Scheduling Order”), entered July 8, 2009. Among other things, the Court’s Scheduling Order also set a discovery completion deadline of December 18, 2009, and a summary judgment filing deadline of January 11, 2010. *Id.* On November 17, 2009, the parties filed a motion and stipulation to extend the Scheduling Order’s witness disclosure deadline, the discovery completion deadline, and the summary judgment filing deadline. On November 27, 2009, the Court granted the parties’ combined motion and stipulation, and reset the foregoing deadlines accordingly. *See* Order Granting Motion and Stipulation to Extend Deadlines, entered November 27, 2009. The Court’s November 27, 2009 Order reset the witness disclosure deadline to December 14, 2009; the discovery completion deadline to January 18, 2010; and the summary judgment filing deadline to January 27, 2010. *Id.*

As the Court is aware, the above-captioned subcases involve *Stewart Decree*-based water rights conveyed through the Andrews Ditch. One of the primary contentions of the parties is whether the local duty of water exceeds one miner’s inch (or 0.02 cfs) of water per acre for irrigation purposes. *See, e.g.,* the Affidavit of Andrew J. Waldera (“Waldera Aff”) at Ex. A. At present, the Idaho Department of Water Resources’ (“Department”) recommendations of the above-captioned water rights (for those water rights not recommended “disallowed”) range from 1.63 inches of water per acre for irrigation purposes (63-00178C) up to 3.85 inches of water per acre for irrigation purposes (combination of 63-00127B, 63-00128B, 63-00129B, 63-00130B, and 63-00131B).

In addition to duty of water issues, Greg Obendorf also filed a Standard Form 4 Motion to File a Late Notice of Claim for water right no. 63-00160 on February 10, 2009. *See Waldera Aff. at Ex. B.* The Court granted Mr. Obendorf's motion on May 20, 2009. *See Waldera Aff. at Ex. C.* According to the late claim, water right no. 63-00160 is a *Stewart* Decree-based water right conveyed through the Andrews Ditch. *Waldera Aff. at Ex. B.* The water right is also purportedly appurtenant, in part, to the SESE quarter quarter section of Section 23, Township 05N, Range 05W. *Id.* This land overlaps with a portion of the place of use originally decreed in the *Stewart* Decree for water right nos. 63-00127, 63-00128, 63-00129, 63-00130, and 63-00131. The Department has yet to recommend Mr. Obendorf's late claim for water right no. 63-00160. *See Waldera Aff. at ¶ 5.*

II. ARGUMENT

A. Legal Standard

Idaho Rule of Civil Procedure 16(b) governs the creation and modification of trial scheduling orders. In pertinent part, and for purposes of this motion, Rule 16(b) provides that trial scheduling orders "shall not be modified except by leave of the [court] . . . upon a showing of good cause." *Id.* Because there is no fixed rule for determining what constitutes "good cause," decisions involving the good cause standard are discretionary. *See, e.g., Mercy Medical Center v. Ada County*, 146 Idaho 226, 230 (2008).

B. Good Cause For Continuance Exists

1. The Litigation Of These Subcases Requires Data/Analysis That Can Only Be Completed During The Irrigation Season

As discussed in Section I, *supra*, one of the primary contentions of the parties is the local duty of water for the irrigation-based water rights conveyed by the Andrews Ditch. A

comprehensive analysis of the local duty of water requires various field inspections and measurements that are more appropriately completed during the irrigation season. *See, generally*, Affidavit of Scott King (“King Aff.”) filed contemporaneously herewith.

Unfortunately, the present trial setting (March 29 through April 2, 2010) precludes the parties’ ability to perform these field investigations and measurements during the irrigation season given that the trial is set to commence prior to the irrigation season.

Among the studies and expert analyses that need be completed are: (1) a conveyance loss analysis of the Andrews Ditch; and (2) an inspection of irrigation practices and patterns on the lands irrigated by the parties. King Aff. at ¶ 2. Though a Hubble analysis (a paper-based theoretical equation used to determine a field irrigation requirement) can, more or less, be performed at any time of year, a ditch conveyance loss analysis (a component part of local duty of water determination) cannot.¹ For example, accurately determining the conveyance loss of an irrigation ditch, and by extension a local irrigation-based duty of water, requires the review and measurement of water flow through a ditch during the irrigation season. This is because conveyance losses can vary based upon water levels in the ditch. King Aff. at ¶ 2.

Though the Andrews Ditch is currently conveying water for winter wildlife purposes, the winter operation and management regime of the ditch is not necessarily the same as that found during irrigation season. King Aff. at ¶ 3. Overall winter ditch flows and/or the use or elevation of check structures designed to serve wildlife purposes likely creates a situation where the ditch is being operated at higher or lower water elevation levels than would be found

¹ As will be discussed below, however, though Hubble analyses do not necessarily require field verification, field verification is preferred for accuracy and credibility purposes. Consequently, field verification of field irrigation requirements can only take place during the irrigation season.

during the irrigation season. *Id.* This deviation from typical irrigation season operation can result in different conveyance loss rates. *Id.* Similarly, diversions and deliveries from the Andrews Ditch during the non-irrigation season may result in the use of headgates, turnouts, or other infrastructure that are not used during the irrigation season. King Aff. at ¶ 4. The use of these alternative headgates or infrastructure can alter ditch flow regimes which, in turn, also effect ditch flow elevations and corresponding conveyance losses. *Id.*

Ditch conveyance loss rates can also be influenced by local shallow groundwater levels. King Aff. at ¶ 5. Higher or lower seasonal groundwater levels can result in lesser or greater conveyance losses, respectively. *Id.* Seasonal evaporative demands can alter ditch losses, as can the seasonal presence of riparian vegetation and aquatic vegetation (such as in-stream moss). *Id.* Likewise, seasonal ground conditions (whether the ditch substrate is frozen) can affect ditch conveyance loss conditions. *Id.*

With respect to an analysis of irrigation practices and patterns (the on-site examination of ditches and fields for field irrigation requirement determination purposes), these field investigations also need to be conducted during the irrigation season while water is being diverted and applied under normal irrigation practices. King Aff. at ¶ 6. The quantity of water turned into a field headgate, and methods for applying water to fields for irrigation purposes can differ when compared to wildlife use operations. *Id.* Additionally, field runoff available for subsequent re-use on another field may also be available in different quantities and/or in different locations when comparing irrigation and non-irrigation operations and management. *Id.*

In short, accurate local irrigation duty of water-based analyses need to be conducted during the irrigation season. Off-season operational and management regimes can skew data and potentially lead to erroneous conclusions. Because the water rights at issue are

irrigation rights, the local irrigation duty of water can only be fairly and accurately determined during the irrigation season under irrigation based operation and management regimes.

2. Full Resolution Of The Andrews Ditch-Conveyed Water Rights Requires The Inclusion Of Late Claim No. 63-00160

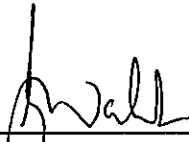
In addition to the seasonally-sensitive evaluations discussed above, the trial of this matter seeks to finally and completely resolve the ownership, elements, and administration of the water rights (particularly the *Stewart* Decree-based water rights) conveyed by the Andrews Ditch. Water right no. 63-00160 is one of those rights. Consequently, the full and complete resolution of this matter cannot occur until the Department recommends water right no. 63-00160 so that it can be considered in conjunction with the other Andrews Ditch-conveyed, *Stewart* Decree-based water rights. As discussed in Section I, *supra*, Mr. Obendorf's late claim states that water right no. 63-00160 is appurtenant, in part, to a portion of the *Stewart* Decree-identified place of use for water right nos. 63-00127 through 63-00131 (namely the SESE of Section 23). Judicial economy and the resources of the parties are best served by vacating and continuing the current trial setting and corresponding pretrial deadlines so that water right no. 63-00160 can be consolidated with the other similarly situated Andrews Ditch-conveyed water rights into one all-inclusive proceeding capable of resolving these matters once and for all.

**III.
CONCLUSION**

For the foregoing, Tree Top respectfully requests that the Court vacate the current trial setting and corresponding pretrial deadlines so that the parties can properly undertake the irrigation season studies and evaluations discussed above, and so that water right no. 63-00160 can be consolidated into this proceeding. It is well within the Court's discretion to grant Tree Top's motion for the good cause cited and discussed herein.

DATED this 29th day of December, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

Andrew J. Waldera – Of the Firm
Attorneys for Tree Top Ranches, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2009, I caused a true and correct copy of the foregoing **TREE TOP'S MOTION TO VACATE AND CONTINUE TRIAL SETTING AND PRETRIAL DEADLINES** to be served by the method indicated below, and addressed to the following:

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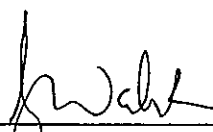
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