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**DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO**

IN THE MATTER OF APPLICATIONS
FOR PERMIT NOS. 63-34403, 63-34652,
63-34897 AND 63-34900 IN THE NAME
OF CAT CREEK ENERGY, LLC

**Cat Creek Energy, LLC’s Motion to
Compel SBar Ranch, LLC, and The
District at Parkcenter, LLC, to
Provide Complete Answers to
Discovery Requests**

Cat Creek Energy, LLC (“Cat Creek”), pursuant to Rules 520.02 and 531 of the Rules of Procedure of the Idaho Department of Water Resources (“IDWR” or “Department”) and Rule 37 of the Idaho Rules of Civil Procedure, respectfully moves the Director for an order compelling SBar Ranch, LLC and The District at Parkcenter, LLC (referred to collectively herein as “SBar”) to provide full and complete answers to *Cat Creek Energy, LLC’s First Set of Discovery Requests to S Bar Ranch, LLC, and District at Parkcenter, LLC*. This motion is supported by the *Declaration of Thomas J. Budge* filed herewith.

Introduction

Cat Creek served discovery requests on SBar on June 29, 2020. (Budge Decl., Ex. A.) SBar served responses on July 29, 2020. (Budge Decl., Ex. B.) On August 13, 2020, Cat Creek sent SBar a letter pointing out the inadequacy of its responses and requesting complete answers to its discovery requests. (Budge Decl., Ex. C.) On August 26, 2020, SBar responded by letter and refused to supplement its discovery responses. (Budge Decl., Ex. D.) As of the date of this motion, SBar has provided no additional information in response to Cat Creek’s discovery requests. SBar’s failure to engage in a good faith exchange of information has prejudiced and continues to prejudice Cat Creek’s ability to understand SBar’s protests and prepare for the hearing in this matter.

This motion pertains specifically to interrogatories and requests for production propounded by Cat Creek, as set forth below.

Applicable Law

Rule 520.02 of the Department's Rules of Procedure provides that discovery is governed by the Idaho Rules of Civil Procedure. Rule 531 of the Department's Rules of Procedure authorizes sanctions against any party who fails to comply with the discovery procedures set forth in the Idaho Rules of Civil Procedures.

I.R.C.P. 26 authorizes discovery of "any nonprivileged matter that is relevant to any party's claim or defense." "The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonably inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." I.R.C.P. 36(a)(5); *Schwan's Sales Enterprises, Inc. v. Idaho Transp. Dept.*, 142 Idaho 826, 835 (2006). Interrogatories must be "answered separately and fully in writing under oath." I.R.C.P. 33(b)(3) (emphasis added). "[A]n evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond." I.R.C.P. 37(a)(4). By signing a discovery response, an attorney certifies that the response "is complete and correct as of the time that it is made" and is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." I.R.C.P. 26(f)(1).

"The principle purpose of interrogatories is to afford parties information in the possession of the other party regarding the issues in suit to enable the propounding party to prepare for trial and to reduce the possibility of surprise in the trial." *Lester v. Salvino*, 141 Idaho 937, 940 (Ct. App. 2005). Upon a violation of discovery rules, the court "must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both," which "may include an order to pay the reasonable expenses, including attorney fees, caused by the violation." I.R.C.P. 26(f)(3); I.R.C.P. 37(d) (emphasis added). Sanctions may include dismissal of defenses, *Southern Idaho Production Credit Ass'n v. Astorquia*, 113 Idaho 526, 531 (1987), and the exclusion of evidence that a party fails to properly or timely disclose, I.R.C.P. 26(e)(3). Sanctions are warranted in response to an "unreasonable refusal to admit the truth of facts requested under Rule 36 and for [] other attempts to prevent [a party] from obtaining evidence." *DesFosses v. DesFosses*, 122 Idaho 634, 639 (Ct. App. Idaho 1992).

Discovery requests are also subject to I.R.C.P 11, which requires attorneys "to perform a prefiling inquiry into both the facts and the law involved." *Koehn v. Raggins*, 126 Idaho 1017, 1021 (1995). "Rule 11 imposes an affirmative duty upon parties to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of the discovery rules." *Southern Idaho Prod. Credit Ass'n*, 113 Idaho at 531. Zealous advocacy of a client's position is no excuse for a violation of Rule 11. *Lanvik v. Herbert*, 130 Idaho 54, 63-64 (Ct. App. 1997).

Argument

SBar is a party to this case because SBar filed protests against Cat Creek's application nos. 63-34403 and 36-34652 on September 20, 2018, and June 19, 2019, respectively. By statute, each protest must "clearly set forth his objections to the approval of such application." Idaho Code 42-203A(4). SBar's protests claim that Cat Creek's applications fail every criterion for approval under Idaho Code 42-203A(4).

In order to understand the basis for SBar's concerns, Cat Creek served interrogatories that ask SBar, with respect to each statutory criterion, to explain the basis for its protest and to identify all information that SBar relies upon to support its position. (Budge Decl, Ex. A, Interrogatories 2-8.) For example, Interrogatory no. 3 states:

Your Notice of Protest states that the Applications will reduce the quantity of water under existing water rights. Identify the water right numbers that you contend will have a reduced water supply, explain why you believe the Applications will reduce the quantity of water under such rights, and identify all information that you contend supports your position.

SBar refused to answer any request. Instead, SBar provided the following boilerplate objection to each of the foregoing interrogatories:

Objection. Compound. Overbroad. Mischaracterizes Protests. Vague. Ambiguous. Requests legal conclusions. Premature. Requests privileged information and attorney work product. Without waiving these objections and reserving the right to reassert the same, SBar and The District respond as follows: Case investigation is in its early stages and the basis for each such contention has not been finalized. The response to this interrogatory be supplemented as appropriate in accordance with applicable case deadlines. (Budge Decl., Ex. B, Response to Interrogatories s 2-8.)

This boilerplate objection is a model of an evasive and incomplete response to discovery in violation of I.R.C.P. 37(a)(4). It does nothing to assist Cat Creek in understanding SBar's position and what evidence SBar has to support it. At this stage of the proceeding, with all of the information that Cat Creek included in its applications, and all of the additional information that Cat Creek has produced under Water Appropriation Rule 40.05, there is no reason why SBar, with its retained experts and seasoned water law attorney, cannot explain why it contends that the Applications violate each element of Idaho Code 42-203A(5). They have obviously put much time and thought into analyzing such information, as evident by their numerous motions related to Rule 40.05. The fact that additional information may be developed is simply no excuse for not providing complete answers based on the information currently available. Indeed, the Idaho Rules of Civil Procedure grant no such exception.

When Cat Creek pointed out the deficiency in SBar's responses and requested complete answers, SBar asserted that it has no duty to answer Cat Creek's discovery because Cat Creek has not, in SBar's view, "met its burden of proof," "provided the required Rule 40.05 information," or "proved its case." (Budge Decl., Ex. D.) This novel argument has no support in the Idaho Rules of Civil Procedure, which provide no exemption from answering discovery until a party has "proven its case" or met some preconceived disclosure threshold.

SBar did address its claim of injury with the most generic response imaginable: "Possible impacts include, but are not limited to, reductions in surface water flows and ground water sources." (Budge Decl., Ex. B, Response to Interrogatory 1.) This does nothing more than restate that SBar claims injury to its water rights. It does nothing to explain how SBar contends that injury will occur. Surely SBar's has by now figured out how it believes the purported injury will occur. If there is any merit to the claim, SBar will undoubtedly put on evidence at the hearing showing

how Cat Creek's diversions will intercept water that would otherwise accrue to SBar's water rights. It is this explanation that the Idaho Rules of Civil Procedure require SBar to disclose.

Instead, SBar's counsel proudly proclaimed: "I do not see what further explanation about possible interconnection of surface and ground water sources would be necessary to explain this to someone who already should have an understanding of the conjunctive management of ground and surface water sources and the associated hydrogeologic principles." (Budge Decl., Ex. D.)

Unfortunately, Cat Creek's counsel and engineers are not aware of how the storage of water in Cat Creek Reservoir will have any impact on SBar's small (0.02 cfs) in-stream stock water rights located 8-10 miles away, over a mountain, in a different drainage, with no known hydrologic connection. (SBar has not identified any groundwater rights it claims will be injured if Cat Creek's applications are approved.) A summary of SBar's water rights, together with a map depicting their points of diversion relative to Cat Creek Reservoir, and maps depicting the distance and elevation profile between Cat Creek Reservoir and SBar's water rights, are attached to the *Declaration of Thomas J. Budge* and are also attached hereto as Appendix A for ease of reference.


SBar's failure to provide meaningful and complete answers to Cat Creek's simple and straight-forward interrogatories can mean only one of two things: (i) SBar had no factual basis for filing protests and still has no factual basis for maintaining its protests, or (ii) SBar is intentionally hiding from Cat Creek the reasoning behind its protests, in violation of Rule 520.02 of the Rules of Procedure of the Department and Rules 11, 26 and 37 of the Idaho Rules of Civil Procedure. The Idaho Supreme Court does not take kindly to such gamesmanship: "The purpose of our discovery rules is to facilitate fair and expedient pretrial fact gathering. It follows, therefore, that discovery rules are not intended to encourage or reward those whose conduct is inconsistent with that purpose." *Edmunds v. Kraner*, 142 Idaho 867, 873 (2006).

Conclusion

For the forgoing reasons, Cat Creek respectfully requests an order compelling SBar to provide meaningful and complete responses to Cat Creek's discovery requests, in a responsible manner that is consistent with the spirit and purposes of the discovery rules, within 14 days of the order. In addition, given SBar's intentional and substantial violation of both the spirit and letter of discovery rules, Cat Creek requests a sanction, as required by Rule 531 of the Department's Rules of Procedure and Rule 26(f)(3) of the Idaho Rules of Civil Procedure, that SBar be required to reimburse all attorney fees incurred by Cat Creek to prepare and file this motion and the supporting *Declaration of Thomas J. Budge* filed herewith.

DATED this 19th day of November, 2020.

RACINE OLSON, PLLP

By: 
Randall C. Budge
Thomas J. Budge
Attorneys for Cat Creek Energy, LLC

Appendix A

Summary of SBar water rights

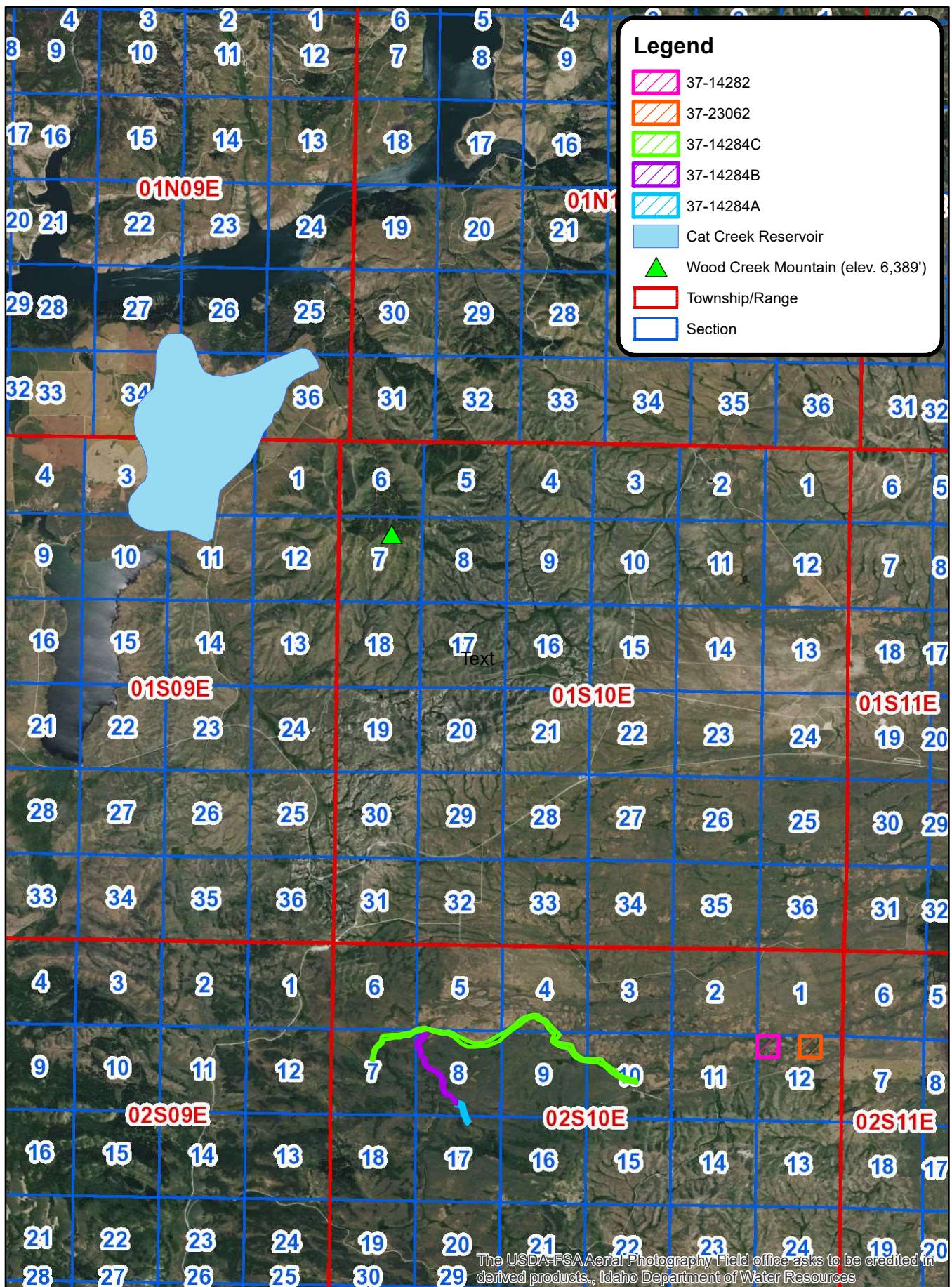
Map depicting locations of SBar water rights relative to Cat Creek Reservoir

Google Earth images depicting the distance and elevation profile between SBar's water rights and Cat Creek Reservoir

SUMMARY OF WATER RIGHTS - S BAR RANCH LLC

WR Number	Owner	Source	Beneficial Use	Diversion Rate
37-14282	S Bar Ranch LLC	Unnamed Stream	Stockwater	0.02
37-14284A	S Bar Ranch LLC	Unnamed Stream	Stockwater	0.02
37-14284B	S Bar Ranch LLC	Sheep Creek	Stockwater	0.02
37-14284C	S Bar Ranch LLC	Camas Creek	Stockwater	0.02
37-23062	S Bar Ranch LLC	Camas Creek	Stockwater	0.02

SBar Water Rights



The USDA-FSA Aerial Photography Field office asks to be credited in derived products., Idaho Department of Water Resources





SBar water rights East

Distance (10.8 miles) and elevation profile from Cat Creek Reservoir to SBar water rights 37-23062 and 37-14282

Anderson Ranch Reservoir

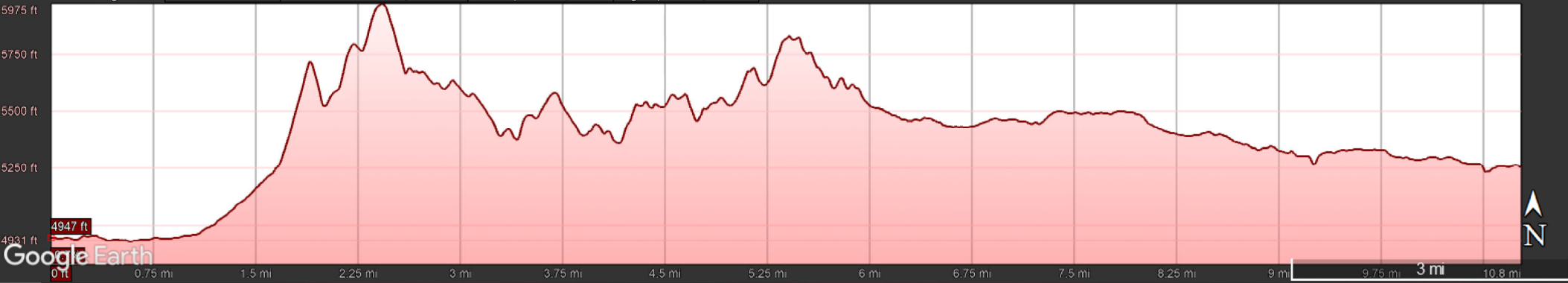
Legend

 Anderson Ranch Reservoir

 CCR - SBar WR West



Graph: Min, Avg, Max Elevation: 4931, 5410, 5975 ft
Range Totals: Distance: 10.8 mi Elev Gain/Loss: 2973 ft, -2660 ft Max Slope: 43.3%, -43.7% Avg Slope: 9.5%, -7.7%



SBar water rights West

Distance (8 miles) and elevation profile from Cat Creek Reservoir to SBar water rights 37-14284A, 37-14284B & 37-14284C

Legend

- Anderson Ranch Reservoir
- CCR - SBar WR West



Graph: Min, Avg, Max Elevation: 4933, 5187, 5772 ft
Range Totals: Distance: 8.07 mi Elev Gain/Loss: 2191 ft, -1734 ft Max Slope: 42.0%, -28.2% Avg Slope: 8.9%, -7.6%

