



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

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SEP 18 2006

Department of Water Resources
Eastern Region

September 14, 2006

VIA U.S. MAIL &
FACSIMILE (208) 525-7177

Mr. Roger Warner
Idaho Department of Water Resources
900 n. Skyline Dr., Suite A
Idaho Falls, ID 83402

Re: Application for Permit No. 74-15613

Dear Roger:

I have some further comments and suggestions about the schedule for the administrative hearing for application for permit no. 74-15613. Enclosed for your information is the *Order Granting State of Idaho's Motion to Enter upon Private Land and Conduct Investigation; Scheduling Expert Depositions; Rescheduling Pretrial* in subcase no. 31-11845, which is set for trial on December 4-6, 2006 in Twin Falls, Idaho. This order set the period from November 1-17, 2006 as the time for depositions of witnesses, including experts. This short period will be an intense period of taking or defending depositions. The week following this period is the week of Thanksgiving, and Wednesday of that week is taken up with a pre-trial conference for subcase no. 31-11845. The week after Thanksgiving, which is the week before the trial, will be used for my final trial preparation in subcase no. 31-11845.

Several conclusions follow from this schedule. My suggestion at the pre-hearing conference to move the end of discovery for the administrative hearing to December 1, 2006 was not a good idea. If I were in depositions for this administrative matter during the week before the trial of subcase no. 31-11845, my final trial preparation for subcase no. 31-11845 would be severely jeopardized. If you recall at the pre-hearing conference, I stated that I would prefer a period of 120 days for discovery, instead of the more normal 60-90 days. This request was made in light of the trial schedule in subcase no. 31-11845. I understand Mr. Whittaker opposed such a time frame for discovery. If the hearing date in February 2007 is not movable, my preference would be to have the ending date of discovery extended for the administrative matter to the date of December 22, 2006.

Mr. Roger Warner
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Thank you for considering my request.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Barber", with a stylized flourish at the end.

DAVID J. BARBER
Deputy Attorney General
Natural Resources Division

DJB/ov

Encl.

cc: F. James Whittaker
Tom Curet
Bureau of Land Management
Lemhi Irrigation Distric
Ellsworth Angus Ranch
David Tuthill
Candice McHugh

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

Mail - 79696

**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

**ORDER GRANTING STATE OF
IDAHO'S MOTION TO ENTER UPON
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 BIL-YEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

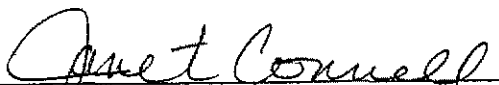
I certify that a true and correct copy of the ORDER GRANTING STATE OF IDAHO'S MOTION TO ENTER UPON PRIVATE LAND AND CONDUCT INVESTIGATION was mailed on August 25, 2006, with sufficient first-class postage to the following:

BEN D JERNBERG
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STATE OF IDAHO
Represented by:
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DIRECTOR OF IDWR
PO BOX 83720
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ORDER GRANTING


Deputy Clerk