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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	)	Subcase No. 31-11845
	)	
Case No. 39576	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>MOTION FOR SUMMARY JUDGMENT</u>

This is a memorandum in support of claimant/objector's Motion for Summary Judgment pursuant to Idaho Rule of Civil Procedure 56(c) seeking an order that Water Right No. 31-11845 be partially decreed for groundwater at a quantity of 4.99 cfs used for the flood irrigation of 663 acres within Jefferson County, Idaho. The Idaho Department of Water Resources' ("Department" and "IDWR") 1986 Beneficial Use Field Exam, the license file for Water Right No. 31-7311 and the 1997 license for Water Right No. 31-7311 support such an order. It is undisputed that the Department originally licensed Ben D. Jernberg to irrigate the above-mentioned 663 acres at 4.99 cfs in Water Right No. 31-7311 license. The Department should not have the ability to ignore its prior findings and disregard its past determination by reaching behind that license and recommending less acreage to Mr. Jernberg.

I. Introduction

Jernberg's objection to the Department's partial decree is based upon the unlawful license originally issued for Water Right No. 31-7311. That right has been partially decreed and the unresolved portions of the right were renumbered and recommended as Water Right No. 31-11845. The Director's Report for Water Right No. 31-11845 recommended that Ben D. Jernberg was entitled to 4.99 cfs of groundwater to irrigate 324 acres within the place of use of 672.9 acres. This recommendation appears to be an attempt by the Department to effectively go behind its original license and decree Jernberg less than he has historically diverted. The Director's Report attacks the previous valid findings of its own employee.

Water Right No. 31-11845 should be decreed, at a minimum, for 4.99 cfs of ground water with a priority date of April 23, 1979. The recommendation of 4.99 cfs is a remnant from the original license for Water Right No. 31-7311; in addition, the place of use should be for 663 acres rather than the recommended total of 324 acres within a place of use of 672.9 acres. As required by Idaho law, Jernberg has put 4.99 cfs to beneficial use since he made application for Water Right No. 31-7311. Because Jernberg has used his requested rate of diversion, he is entitled to a decree that gives him the diversion rate normally decreed for water rights in Idaho.

II. Background

On June 28, 1979, Ben Jernberg and his father David Jernberg filed an application for a permit (31-7311) with the Department. The permit lapsed on June 5, 1984, but was reinstated on August 21, 1984. The Department on August 2, 1984, received proof of beneficial

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3 use. The beneficial use proof established that a well had been drilled and that water was diverted
4 from the well and used for irrigation at the rate of 15 cfs. On August 21, 1986, the Department
5 conducted a beneficial use field exam. During that exam, the examiner found approximately
6 1124 acres irrigated in Sections 9, 10, 15, 16, 21 and 22 of T7N, R34E, B.M., Jefferson County.
7 *Affidavit of Michael P. Tribe in Support of Motion for Summary Judgment, Exhibit A.* A portion
8 of the 1124 acres was planted with grain crops and the other portion of the 1124 acres was
9 established to be pasture and meadowlands used to pasture livestock; such pasture and
10 meadowlands consisted of natural grasses and vegetation.
11

12 A license for Water Right No. 31-7311 was issued on September 5, 1997, over ten
13 (10) years after the draft license was submitted to Jernberg on June 15, 1987. Once issued, the
14 license was for the diversion of 4.62 cfs of ground water for the irrigation of 461 acres. The
15 license also provided two conditions that permitted an additional 4.99 cfs of ground water to be
16 diverted onto 663 acres of uncultivated pasture owned by Jernberg. However, this additional
17 4.99 cfs of ground water was found not to be appurtenant to the land upon which it occurred.
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19 Partial Decrees for Water Right Nos. 31-7311, 31-2395 and 31-2357 were issued
20 on February 22, 2002. These three rights were for the irrigation on land owned by Jernberg. On
21 July 15, 2003, Jernberg filed a *Motion to Set Aside and Vacate Partial Decree and to Allow the*
22 *Filing of a Late Objection* with the SRBA Court. On January 30, 2004, Special Master Bilyeu
23 signed an *Order Recommending Partial Decree Be Set Aside*. In the *Order*, the Special Master
24 recommended that the elements of 31-7311 remain unchanged and deleted the "other provisions
25 necessary" conditions relating to the uncultivated land. The Special Master then recommended
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3 that IDWR file an Amended Director's Report addressing only the uncultivated pastureland and
4 that such land be given a new water right claim number. This uncultivated pastureland was
5 given claim number 31-11845.

6 On March 15, 2004, John M. Melanson, Presiding Judge of the Snake River Basin
7 Adjudication, signed the *Order Dismissing Motion to Set Aside Partial Decrees and Setting*
8 *Aside Partial Decree and Issuing Partial Decree for Water Rights: 31-0257, 31-02395, 31-*
9 *07311*. Judge Melanson wholly adopted the Findings of Fact and Conclusions of Law contained
10 in the Special Master's Report of January 30, 2004, and adopted them as his own.
11

12 III. Legal Standards

13 Administrative Order 1(1)(a) states that the Idaho Rules of Civil Procedure, Idaho
14 Rules of Evidence and the Idaho Appellate Rules will govern litigation in the Snake River Basin
15 Adjudication ("SRBA"). The SRBA procedures "supplement the I.R.C.P., I.R.E., I.A.R. and any
16 other applicable laws or orders of this court only to the extent necessary to allow for the fair and
17 expeditious resolution of all claims or issues in the SRBA." A.O.1 (1)(b).
18

19 Pursuant to Idaho Rule of Civil Procedure 56(c), an Order for summary judgment
20 must be entered when "the pleadings, depositions, and admissions on file, together with the
21 affidavits, if any, show that there is no genuine issue of material fact and the moving party is
22 entitled to a judgment as a matter of law." I.R.C.P. 56(c); *Steele v. Spokesman-Review*, 138
23 Idaho 249, 251, 61 P.3d 606, 608 (2002). "Judgment shall be granted to the moving party if the
24 nonmoving party fails to make a showing sufficient to establish an essential element to the
25 party's case." *Foster v. Traul*, 141 Idaho 890, 120 P.3d 278, 280 (2005). "All disputed facts are
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3 to be construed liberally in favor of the non-moving party, and all reasonable inferences that can
4 be drawn from the record are to be drawn in favor of the non-moving party.” *Id.* However,
5 when an action will be tried before the court without a jury, the judge is not constrained to draw
6 inferences in favor of the party opposing a motion for summary judgment, but rather the trial
7 judge is free to arrive at the most probable inferences to be drawn from the uncontroverted
8 evidence. *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785, 787 (2005).

9 10 IV. Argument

11 A. IDWR’s Determination of the Quantity of Water Used for Water 12 Right No. 31-11845 Should Remain as Recommended in the Director’s Report

13 Jernberg initially objected to both the recommended quantity of water used for
14 Water Right No. 31-11845 as well as the recommended place of use in the Director’s Report.
15 The Director’s Report recommended that the quantity of water should be for the diversion of
16 4.99 cfs. Jernberg objected, claiming instead that 8.83 cfs had been put to beneficial use under
17 this right. Mr. Jernberg has the capacity to divert the 8.83 cfs. However, during and after the
18 mandatory settlement conference between the parties, Mr. Jernberg has agreed to not pursue his
19 claimed amount of water in a good faith attempt to resolve this matter. Pursuant to Idaho Code §
20 42-1411, the Director’s Report is prima facie evidence of the nature and extent of the water right.
21 Therefore, Jernberg removes his objection to the quantity of water for Water Right No. 31-11845
22 and asks this Court to recommend the quantity of water as determined in the Director’s Report:
23 4.99 cfs. However, the Director’s Report recommends that 31-11845 and 31-02395, which have
24 been partially decreed for 3.65 cfs, are limited to a total combined diversion rate of 6.48 cfs. The
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3 combined rate should be for 8.64 cfs: 4.99 for 31-11845 and 3.65 for 31-02395. Jernberg's
4 objection to the recommended place of use remains.

5 **B. No Evidence Exists to Contradict the Findings of the License File and**
6 **the 1986 Beneficial Use Field Exam for Water Right No. 31-7311**

7 There is no question that Jernberg has put to beneficial use the 663 acres of
8 uncultivated pastureland formerly listed in the Conditions of Approval of the original license for
9 31-07311. It is not in dispute that Jernberg has watered the pastureland in the past. *See generally*
10 *Affidavits of Bryce A. Contor and Ben D. Jernberg*. Jernberg has the pumping capacity to
11 irrigate the ground. It is not in dispute that Jernberg has the capacity to irrigate the ground. Ben
12 Jernberg and his father David R. Jernberg first began appropriating ground water in Jefferson
13 County in 1956. As discussed above, during IDWR's Beneficial Use Field Exam, the examiner
14 "found approximately 1124 acres irrigated," with a portion of the 1124 irrigated acres planted
15 with grain crops and a portion irrigated as pasture and meadowlands. The pasture grounds are
16 the 663 acres currently at issue in Water Right No. 31-11845.

17
18 **1. 1986 Beneficial Use Field Exam**

19 After Jernberg submitted proof to the Department for Water Right No. 31-7311,
20 as required by Idaho Code § 42-217, the Department performed an examination of the place
21 where water from the right was diverted and used and the capacities of the ditches and pumps by
22 which the water was conducted to the place of use. The Department agent, John Arambarri, then
23 prepared and filed a Beneficial Use Field Report. The Report was prepared on August 21, 1986.
24 *Tribe Affidavit, Exhibit A*. The Report described two wells located at two points of diversion
25 from which groundwater was diverted for the flood irrigation of 1124 acres. In the Report it was
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3 determined that a new west well had a diversion capacity of 16 cfs, that the east well, which was
4 licensed to divert 8.25 cfs under Water Right Nos. 31-02395 and 31-2357 was diverting only
5 5.83 cfs, and the new west well was only diverting 13.45 cfs, for a total of 19.28 cfs. *Id.* The
6 19.28 cfs was greater than the 16 cfs sought under the permit. The Report recommended that a
7 license be issued for 16 cfs with an annual volume of 3,934 acre-feet for the irrigation of 1124
8 acres. On June 15, 1987, Ben Jernberg received a draft of the license to be issued pursuant to
9 Permit No. 31-7311 for a diversion of 13.45 cfs for the irrigation of 1124 acres and a letter from
10 Jim Johnson of IDWR. *Tribe Affidavit, Exhibit C.* Those were the elements Jernberg believed
11 31-7311 would be licensed for.
12

13 The license for Water Right No. 31-7311 was not issued until September 5, 1997,
14 over ten (10) years after the draft license was submitted to Jernberg on June 15, 1987. Once
15 issued, the license provided for the diversion of 4.62 cfs for the irrigation of 461 acres and
16 provided for an additional 4.99 cfs of ground water to be diverted onto 663 acres of uncultivated
17 pasture owned by Jernberg. The license, on its face, stated that an "examination indicate[d] that
18 the works have a diversion capacity of 19.280 cfs." *Tribe Affidavit, Exhibit B.* Based upon the
19 elements of the original license, Jernberg now requests that the 4.99 cfs of groundwater and the
20 663 acres of uncultivated pasture originally placed in the license for 31-7311 be recommend and
21 decreed for Water Right No. 31-11845
22

23 2. Water Right No. 31-7311 License File

24 In the license file for Water Right No. 31-7311, there are several statements and
25 documents that establish that Water Right No. 31-11845 should be decreed as licensed. In a
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2 memorandum to the file in Water Right No. 31-07311 dated August 11, 1997, Shelly W. Keen
3 states that, "[t]he field examiner for right 31-07311 reported that the permit holder is diverting
4 from two wells a combined capacity of 19.28 cfs to irrigate 461 acres of cropland and 663 acres
5 of uncultivated pasture land." *Tribe Affidavit, Exhibit D*. In the same memorandum, Keen
6 writes that "to bring the 663-acre area up to 0.02 cfs per acre, license 31-07311 should authorize
7 a diversion of 9.61 cfs, comprised of the 4.62 cfs licensed rate plus 4.99 cfs more." In another
8 memorandum to the file, Keen recorded that:
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11 When licensing right 31-07311, please include the following
12 conditions of approval, which are intended to:

- 13 1. Authorize Mr. Jernberg's historical practice of diverting water onto
14 uncultivated pasture in order to foster growth of native forage
15 plants.

16

17 Water diverted under this right, and an additional 4.99 cfs of
18 ground water diverted from the points of diversion described
19 above, may also be diverted onto 663 acres of uncultivated pasture
located in Sections 15, 16, 21 and 22 of Township 7 North, Range
34 East, B.M., but the right to this additional use is not an
appurtenance of the land upon which it occurs.

20 *Tribe Affidavit, Exhibit E*. Such statements demonstrate that the Department was aware that
21 Jernberg was validly pumping and using the amount of water stated in Keen's memorandum.
22 The condition that the irrigation of the pasture was not appurtenant to the land was removed from
23 the final license for Water Right No. 31-7311. It is difficult to fathom how the Idaho
24 Department of Water Resources can now endeavor to take away from Jernberg what it has
25 already determined was historically his.
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3 The amount of irrigated acres discussed by the Department has always supported
4 the fact that Jernberg irrigated 663 acres of pasture. A 1989 letter from Gary Spackman to Ben
5 Jernberg also stated that the permit "to appropriate water no. 31-7311 was examined by an Idaho
6 Department of Water Resources Examiner in 1986. The examiner found approximately 1124
7 acres irrigated in Section 9, 10, 15, 16, 21, and 22 pf T7N, R34E, B.M., Jefferson County."
8 *Tribe Affidavit, Exhibit F.* Again, it was never disputed that Jernberg irrigated 1124 acres: 663
9 acres of uncultivated pasture and 461 acres of cropland.

10 11 3. Other Evidence of Use

12 In 2003, Bryce Contor performed an analysis of the beneficial use represented by
13 the application of water to the 663 acres of uncultivated pasture identified in condition two of
14 Ben Jernberg's original license for Water Right No. 31-7311. Mr. Contor is a private consultant
15 with Water Resources Field Services LLC. *Contor Affidavit, par. 2.* In 2004, Mr. Contor
16 measured the discharge of the two Jernberg wells and confirmed that the historical pumping
17 capacity was still in place and in use. The discharge from the wells was measured at
18 approximately 13.45 cfs for the west well and 5.83 for the east well for a combined total of 19.28
19 cfs.
20

21 Mr. Contor reviewed the 1986 Beneficial Field Exam and because the 1986 exam
22 was based on an actual field inspection, while irrigation was occurring, determined that the 1986
23 Idaho Department of Water Resources field exam correctly represented the irrigation in place at
24 the time of the commencement of the Snake River Basin Adjudication on Jernberg's ranch land.
25 *Contor Affidavit, par. 9.* Contor noted that the IDWR examiner found a total of 1124 acres being
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3 used for irrigation, which was a similar number of acres being irrigated in Contor's analysis of
4 1987 aerial photos. In addition, the 1986 Beneficial Use Examination Report found similar
5 pumping rates to Mr. Contor's 2004 measurements. During Mr. Contor's analysis of a 1987
6 aerial photo, he found that approximately 1100 acres were being irrigated in 1987 and found
7 nothing that would contradict the 1986 IDWR findings that Jernberg was irrigating 1124 acres
8 under Water Right No. 31-7311. *Contor Affidavit*, par. 11. In conclusion to his analysis, Mr.
9 Contor stated that using analysis of 2004 aerial photos of the irrigated acres is not an adequate
10 representation of conditions at the commencement of the SRBA, which IDWR has relied upon,
11 and that the 1986 field exam is an adequate representation of past water use. *Contor Affidavit*,
12 *par. 12*. In other words, the Department should rely on the Beneficial Use Field Exam to
13 determine the amount of acres and at what rate Jernberg's license should be for.
14

15 Mr. Contor also prepared a digital map of the place of use for current and former
16 Water Right No. 31-7311. The map was constructed based upon his personal survey of the land
17 as well as statements from Ben Jernberg and two ranch workers, Joe and Omar Llamas. *Contor*
18 *Affidavit, Exhibit C*. The map demonstrates that Ben Jernberg and his ranch workers irrigated in
19 excess of the 663 acres of uncultivated pasture originally included in 31-7311.
20

21 Ben Jernberg is also an eyewitness to the rate of diversion and the amount of land
22 irrigated. Jernberg's father, David, previously owned the land. *Jernberg Affidavit, par. 4*.
23 David surveyed the land and then built ditches and dikes on the dry graze and pasture land.
24 David Jernberg also originally drilled the wells and placed pumps on the ground to pump enough
25 water for the irrigation of the crops, dry graze and pasture land. *Jernberg Affidavit, par. 4*. Ben
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2 Jernberg continued the irrigating and leveling of the ground so it would irrigate more efficiently.
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4 Ben Jernberg redid the wells and pumps so that there was enough water to irrigate the farm
5 ground, dry graze and pasture land. Since that time the dry graze and pasture land was used for
6 cattle, which required Ben Jernberg to pump his full capability from his east and west pumps.
7 *Jernberg Affidavit, par. 6.*

8 It is undisputed that the irrigation of land upon which there is a natural meadow,
9 sagebrush and other vegetation is a beneficial use of water for irrigation and the person using the
10 water is entitled to a water right. *Rudge v. Simmons*, 39 Idaho 22, 226 P. 170 (1924). Jernberg
11 has done just that and should be entitled to a decree that he or his successor in interest is entitled
12 to continue that historic practice. The Department of Water Resources should not be able to take
13 back what it has already tried to give once – 663 acres of flood-irrigated pastureland.
14

15 V. Conclusion

16 Based on the above, there is no material issue of fact that the Idaho Department of
17 Water Resources did find that 1124 acres were being irrigated under what was originally Water
18 Right No. 31-7311; the Order of Presiding SRBA Judge, John M. Melanson, split that right. In
19 that Order of March 25, 2004, the Partial Decree for 31-07311 was set aside and IDWR was
20 ordered to file an Amended Director's Report addressing the uncultivated lands referred to in the
21 original Partial Decree for 31-07311. The amount of acres and the rate of diversion that was
22 originally found by IDWR during the original licensing period (4.99 cfs and 663 acres) should be
23 the amount that Jernberg is entitled to and should be decreed under Water Right No. 31-11845.
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3 The most probable inference in this case is that Jernberg has irrigated the full
4 amount of 663 acres and that he is entitled to a decree entitling his successor in interest to irrigate
5 that amount based on historical use.

6 Respectfully submitted this 28th day of April, 2006.

7 LING, ROBINSON & WALKER

8
9 By: Michael P. Tribe
10 Michael P. Tribe
11 Attorneys for Claimant/Objector
12

13 **CERTIFICATE OF SERVICE**

14 I certify that on April 28, 2006, I served the original and copies of this
15 *Memorandum in Support of Motion for Summary Judgment* to the following:

16 1. Original hand delivered to:

17 Clerk of the District Court
18 Snake River Basin Adjudication
19 253 Third Avenue North
20 P.O. Box 2707
21 Twin Falls, Idaho 83303-2707

22 2. Copies mailed to:

23 IDWR Document Depository
24 P. O. Box 83720
25 Boise, Idaho 83720-0098

26 The United States Department of Justice
27 Environment and Natural Resources Division
28 550 West Fort Street, MSC 033
Boise, Idaho 83724

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3 Chief, Natural Resources Division
4 Office of the Attorney General
5 State of Idaho
6 P.O. Box 44449
7 Boise, Idaho 83711-4449

8 by depositing said copies in the United States mail with first-class postage prepaid, in envelopes
9 addressed to said parties at the foregoing addresses.

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Michael P. Tribe