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 DEPARTMENT OF
 WATER RESOURCES

Attorneys for Objector, William A. Poulton

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. 45-00167A
	)	
Case No. 39576	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>MOTION FOR UMMARY JUDGMENT</u>

COMES NOW William A. Poulton, the objector in Water Right No. 45-00167A, by and through his attorneys of record Ling, Robinson & Walker, and files this *Memorandum in Support of Motion for Summary Judgment* and accompanying affidavits for an order finding that Water Right No. 45-00167A is not a lawful right, as Leah Rose and her predecessors in interest never appropriated the waters of Willow Creek on the claimed place of use and, if they did, that such right has been abandoned or forfeited. Mr. Poulton seeks to have Water Right No. 45-00167A disallowed as recommended by the Department of Water Resources ("IDWR" or "Department").

I. Factual Background

Through Water Right No. 45-00167A, Leah Rose has claimed and the Idaho

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3 Department of Water Resources has recommended that Rose is entitled to .04 cfs of the waters of
4 Willow Creek. Willow Creek is located in Cassia County, Idaho. Rose claims that the place of
5 use for the right is 1.6 acres within the SE ¼ SE ¼ of Township 12 South, Range 23 East Section
6 9. The property is located at the corner of 1000 South and 150 East in Burley, Idaho. Because
7 there was a church there at one time, the property is known locally as the “church house corner”
8 or the “Church Property.” *Affidavit of Florence Poulton Gibson*, par. 7; *Affidavit of J. Dennis*
9 *Koyle*, par. 2; *Affidavit of William A. Poulton*, par. 5.

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11 The elements of what eventually became Water Right No. 45-00167 were
12 originally decreed in the *Thompson v. Poulton Willow Creek Decree* of March 18, 1908.
13 *Affidavit of Michael P. Tribe in Support of Motion for Summary Judgment*, Exhibit A.
14 November 23, 1881, was the priority date assigned to Water Right No. 45-00167. In its Basin
15 Director’s Report for Irrigation and Other Uses filed with the SRBA District Court on September
16 7, 2004, the Department recommended Water Right No. 45-167A to its current owner, Leah
17 Rose; the amount of water diverted under 45-167A, 45-167B and 45-13666 was limited to 25%
18 or 1/4 of the stream flow of Willow Creek. William Poulton currently is the owner of both
19 45-167B and 45-13666, and both of those rights also have Willow Creek as a source. Because
20 the above-mentioned rights are limited to one-quarter of the flow of Willow Creek, Poulton will
21 be injured if Rose is permitted to unlawfully divert water from Willow Creek. Water Right No.
22 45-00167A has never been lawfully put to beneficial use and, if it was ever lawfully diverted, it
23 has been abandoned or forfeited by nonuse for over five (5) years.
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26 The 1.6-acre place of use originally belonged to the Poulton Ranch, which was
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2 owned by Thomas Arthur Poulton. *Affidavit of Don W. Green*, par. 4. Since at least 1947, the
3 1.6 acres has not been irrigated. *Id.* at par. 7; *see also Affidavit of Florence Poulton Gibson*, par
4 5. There has never been a culvert or ditch or any other means for water to be used for irrigation
5 from Willow Creek. *Id.* at par. 6. No one ever has intentionally diverted water onto the claimed
6 place of use. There are no structures that could divert water onto Rose's place of use. *Affidavit*
7 *of William A. Poulton*, par. 14.
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10 Around 1930, Thomas Arthur Poulton gave permission to LDS Church officials to
11 construct a church on the 1.6-acre parcel. Church representatives were given permission to build
12 a church on the property with the understanding that when the church was abandoned or had no
13 further use for it, the land would revert back to Mr. Poulton. *Affidavit of Don. W. Green*, par. 8.
14 When the church was on the 1.6 acres, there was no water or electricity on the property, nor was
15 there lawn or vegetation to water. *Id.* at par. 9. The church building was located on the 1.6 acres
16 from 1930 until 1945. *Affidavit of Grant M. Matthews*, par. 5. Eventually, the building portion
17 of the church was moved to a different location and all that remained was a basement with
18 exposed walls. *Affidavit of Florence Poulton Gibson*, par 7. After the removal of the church
19 building, the property was considered vacant and its only use was for a storage area for beehives.
20 *Id.* at par. 8.
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22 After the property was left vacant, Thomas Arthur Poulton did not re-fence the
23 ground back into his property because the church parcel was in an out-of-the-way area. After the
24 Church abandoned the property, it sat vacant and was full of weeds and sagebrush. *Affidavit of*
25 *Don W. Green* at pars. 9-10. In addition, the property was never cultivated or irrigated, but was
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2 infested by tall sagebrush and "June grass." *Affidavit of William A. Poulton*, par. 7. Subsequent
3 to the abandonment of the property, local landowners John and Margaret Koyle bought the
4 corner 1.6 acres which the Church's building had stood on. *Affidavit of Don W. Green* par. 11.
5 Ownership remained with Thomas Arthur Poulton, but Mr. Koyle purchased the ground from the
6 Church anyway. *Id.*

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8 As stated in the *Supplemental Director's Report Regarding Subcase No. 45-167A*,
9 John and Margaret Koyle filed a claim to Water Right No. 45-167A for 0.04 cfs from Willow
10 Creek for the year-round irrigation of 1.9 acres on August 23, 1988. *Affidavit of Michael P. Tribe*
11 *in Support of Motion for Summary Judgment*, Exhibit A at p.3. Nevertheless, the Koyles never
12 farmed or irrigated the property. *Affidavit of J. Dennis Koyle*, par 4. The Koyles eventually sold
13 the 1.6 acres to Clark B. Harmon and Tina M. Harmon on May 8, 1989. The Koyles "never
14 diverted" water for use on the property during their period of ownership. *Affidavit of J. Dennis*
15 *Koyle*, par 6.

16
17 When the Harmons purchased the Church House Corner from the Koyles, they moved a
18 mobile home onto the property. *Affidavit of William A. Poulton*, par. 9. Between the time Mr.
19 Harmon purchased the property and the time that he moved the mobile home onto the property,
20 extensive excavation work was done to cover the remains of the old church structure. *Id.*
21 Harmon had some fill-dirt hauled onto the lot where the home is located. The home was placed
22 on additional fill-dirt to avoid the run-off sometimes caused by Willow Creek during high water.
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24 *Id.*

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26 As of 1985, the property was a dry piece of ground, with concrete footings of an

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2 old structure scattered on it. *Affidavit of Cory King*, at par 3. Cory King was asked by Mr.
3 Harmon "to bury the structure rubble" with his Caterpillar after the Harmons purchased the
4 ground. Mr. King did so and "pretty much" covered the entire parcel of property. *Affidavit of*
5 *Cory King*, at par 4. As Mr. Clark worked the piece of ground, he found no evidence of "ditches
6 or headgates that would provide a way to irrigate the property." *Id.* Since that time there has
7 never been any irrigation on the 1.6 acres, whether when the Harmons owned it or since its
8 purchase by Rose. *Id.* at 5.
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11 There are presently no known neighbors or residents of the Willow Creek area
12 that have witnessed the irrigation of the 1.6 acres. In fact, it appears that neither Rose nor any
13 other person has ever diverted water from Willow Creek. *Affidavit of Sharon K. Harrison*, at
14 pars. 5 and 6; *Affidavit of Florence Poulton Gibson*, at par. 5. Furthermore, Rose's claimed point
15 of diversion in Section 9 cannot provide the water claimed by Rose because there is no means of
16 diversion. The claimed point of diversion in Section 26 has never been used to irrigate her place
17 of use and would require piping the water from Section 26 to her place of use in Section 9.
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19 Willow Creek no longer is adjacent to Rose's eastern boundary line, which further
20 makes the irrigation of her property impossible. In 2002, the Idaho State Highway Department
21 moved a portion of the Willow Creek streambed. *Affidavit of Michael P. Tribe in Support of*
22 *Motion for Summary Judgment*, Exhibit B. The reason for the move was that the Burley
23 Highway District wanted Willow Creek moved off the Highway District's right-of-way.
24 *Affidavit of William A. Poulton*, par. 13. The Highway District cut down trees and moved the
25 Willow Creek streambed approximately 20 to 30 feet west from where it ran alongside 150 East.
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3 *Id.*

4 Prior to the Highway District making this change, Rose objected to having the
5 stream moved. At some point after Rose objected, officials from the Highway District came to
6 Mr. Poulton and asked him if he had any ideas on how to solve the issue of relocating the
7 streambed. *Id.* Mr. Poulton discussed the matter with the Highway District and they decided to
8 move the streambed to where it is currently located. *Id.* At that time, Rose's driveway, which
9 crossed the Willow Creek streambed, was too low and was continually causing weeds and trash
10 coming downstream to form a dam and obstruct the natural flow of Willow Creek, making it
11 difficult for Mr. Poulton to take water at his point of diversion in Section 9. On occasion, when
12 Rose failed to clean out the built-up obstructions in her driveway crossing, Willow Creek would
13 run out of its bank to the south and west. Rose, at that time, was unable to maintain the driveway
14 crossing and it was partly for that reason that the Highway District decided to move the Willow
15 Creek stream so that it would no longer run inside Rose's driveway crossing. *Id.* With the
16 Highway District's rerouting of Willow Creek, the streambed no longer runs parallel to Rose's
17 property on the east side. *Id.*

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20 Because Rose never had a headgate or diversion works, the Highway Department
21 didn't replace any pumps or rebuild any diversion works for her as they did for Mr. Poulton.
22 Neither Rose nor her predecessors in interest have ever used Poulton's diversion works to
23 irrigate Rose's place of use. Poulton's headgate is located approximately 10 to 12 feet from the
24 Northeast corner of Rose's property in Section 9 and has always been at that location. *Affidavit*
25 *of William A. Poulton*, par. 8.
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II. Legal Standards

A. Summary Judgment

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

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

B. Objector Has Burden of Going Forward with Evidence to Rebut the Director's Report and Supplemental Director's Report

Any party filing an objection to any portion of the Director's Report shall have the burden of going forward with the evidence to rebut the Director's Report as to all issues raised by the objection. Idaho Code § 42-1411(5). The Director's Report for 45-167A recommended a water right for Rose. The Director's Report is prima facie evidence and the facts contained therein are presumed to be correct until such time as an objector produces sufficient evidence to rebut the presumption. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). Once the presumption is rebutted, it disappears and the facts upon which the presumption is based are weighed with all other facts that may be relevant. *Id.*

C. Forfeiture/Abandonment

The law of the State of Idaho has long included a provision declaring that if a water right is not placed to beneficial use for a period of five (5) years, it is forfeited regardless of the intent of the current or past users.

All rights to the use of water acquired under state law shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter.

Idaho Code § 42-222(2). The Department is authorized to extend the five-year period for an additional five years upon a showing of "good and sufficient reason for nonapplication." I.C. § 42-222(3). However, this provision requires an affirmative action by the user to obtain the extension prior to the expiration of the first five-year period. That has not happened in this case.

Common law abandonment requires the occurrence of an intent to abandon and an

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2 actual relinquishment or surrender of the water right. *Jenkins v. State, Dept. of Water Resources*,
3 103 Idaho 384, 647 P.2d 1256
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5 **III. Argument**

6 **A. The Points of Diversion do not Support Rose's Claim** 7 **of the Right to Divert the Waters of Willow Creek**

8 Rose has two claimed points of diversion, one for Section 9 of Township 12
9 South, Range 23 East and one for Section 26 of Township 12 South, Range 23 East. Neither of
10 these two diversion points have ever been used to irrigate Rose's place of use. The points of
11 diversion do not support her claim or the Department's recommendation that water has been
12 diverted from Willow Creek for irrigation upon the claimed place of use.
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14 **1. Section 9 of township 12S, Range 23E**

15 **a. No Diversion Works**

16 There is no structure from which Rose can divert the waters of Willow Creek onto
17 her claimed place of use. There are no headgates, pipes, culverts or ditches from which she or
18 her predecessors in interest could have ever diverted water from the creek onto the place of use
19 in the SESESE of Section 9. In the *Supplemental Director's Report Regarding Subcase No.*
20 *45-167A* (706 Report), the Department relies on photographic evidence that it deems
21 demonstrates evidence of irrigation. The photographs do not reveal whether there was
22 intentional irrigation or not. Despite a lack of evidence of a way to divert water, the Department
23 still marked the hypothetical place of diversion on the aerial photographs. "In each of the
24 photographic attachments prepared by Agent Robertson, the claimed point of diversion has been
25 marked with a yellow and black point." *Affidavit of Michael P. Tribe in Support of Motion for*
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3 *Summary Judgment*, Exhibit A at p. 6. It is unclear whether the agent ever visited the place of
4 use. The Department further stated that, “[i]n 1992 and earlier, aerial photography demonstrates
5 that Willow Creek entered the claimed place of use in the SESE of Section 9 at the marked point
6 of diversion and continued its flow north along the property line.” *Id.* It is not disputed that at
7 one time, Willow Creek did enter the claimed place of use. However, that does not
8 automatically mean that water was being diverted.

9
10 With limited exceptions, it has long been the law in Idaho that a water right will
11 not be recognized absent a diversion of the water to beneficial use. “In order to acquire a prior or
12 superior right to the use of...water, it is essential that a riparian owner locate or appropriate the
13 water and *divert* the same.” *Hutchinson v. Watson Sough Ditch Co.*, 16 Idaho 484, 493, 101 P.
14 1059 (1909); *see also State v. United States (In re SRBA Case No. 39576, Minidoka National*
15 *Wildlife Refuges, SRBA Subcase No. 36-15452)*, 134 Idaho 106, 996 P.2d 806 (2000).

16
17 In this case, any evidence of irrigation is likely a result of wastewater, stray water from
18 Willow Creek or after 1998, the watering of the lawn with water from a source other than
19 Willow Creek. *Affidavit of J. Dennis Koyle*, par 7. Rose does maintain the lawn around her
20 doublewide, albeit with a sprinkler and not with flood irrigation from Willow Creek. *Affidavit of*
21 *Boyd Richins*, par. 6-7.

22 The Claimant has failed to provide any evidence of diversion works. In 1988, The
23 Koyles filed a Notice of Claim to a Water Right. The place of use is the same as Rose claims as
24 is the claimed quantity. When asked to describe the diversion works, the Koyles wrote,
25 “Headgate, Pipe & Ditch.” *Affidavit of Michael P. Tribe in Support of Motion for Summary*
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3 *Judgment*, Exhibit A. No evidence of those diversion works was provided and none has been
4 provided as of the time of the filing of Poulton's Motion and Memorandum.

5 For most of the time covered by the photographs, no one lived at the claimed
6 place of use and certainly no one was farming the ground, so it is hard to imagine why anyone
7 would be intentionally irrigating the claimed place of use. There has never been a claim of
8 irrigation for pasturing livestock or other similar use.

9
10 Based on the above, there exists no issue of material fact that there does not exist nor has
11 there ever existed a means to divert the water of Willow Creek onto the claimed point of
12 diversion from Section 9. Because water has never been lawfully appropriated the right should
13 be forfeited and disallowed.

14 **b. If a Valid Right Existed, it Has been Forfeited or Abandoned**

15 If water was ever diverted from the claimed point of diversion, it was forfeited at
16 several different periods of time based on inactivity or abandoned based on the intentional
17 relinquishment of the right.

18
19 **i. 1930 to 1945**

20 There was no irrigation of the place of use from 1930 through 1945. During those
21 years, the LDS church used the place of use. *Affidavit of Grant M. Matthews*, par. 6. When the
22 church was there, there was no water or electricity on the property and there was no lawn or
23 vegetation to water. *Affidavit of Don W. Green*, par. 9. In addition, there were never headgates
24 of any kind at Rose's claimed place of use; the lot was always a dry parcel of ground. *Affidavit*
25 *of William A. Poulton*, par. 8. The claimant can offer no evidence that Water Right No. 45-167A
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3 was diverted between the years of 1930 and 1945. The claimant has produced no records of
4 delivery or any evidence that water was diverted during the fifteen (15) year period discussed
5 above. Therefore, based on the laws of the state of Idaho, the right was forfeited as early as 1935
6 due to nonuse. If there is evidence of use that the Church did irrigate from Willow Creek, then
7 that right was forfeited in 1950, five years after the Church stopped irrigating water and removed
8 the church house.

9
10 If the LDS church did irrigate the ground during this period of time, such a right
11 was abandoned once the church deserted the property and removed its structure from the
12 property. The intent to abandon may be "evidenced by non-use for a substantial period of time."
13 *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976). The intent to abandon and the
14 required relinquishment or surrender of the water right in this case was evidenced by the physical
15 removal of the church and an absence of any record of a transfer or attempted transfer of such a
16 right coupled with a substantial period of nonuse. Therefore, if the LDS Church established any
17 right, it was abandoned when the church building was removed, the place of use deserted and a
18 "substantial period of non-use" transpired.
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20 **ii. 1963 to 1973**

21 As stated in the *Affidavit of J. Dennis Koyle*, Mr. Koyle's father at one time
22 owned the property known as the Church Property. Dennis Koyle never saw the Church
23 Property being irrigated during between 1963 and 1973, nor was the property farmed during
24 those ten years. *Affidavit of J. Dennis Koyle*, at pars. 2-4. Any evidence of water at the place of
25 use was wastewater or stray water, which "may have run across the property but . . . there was
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2 never any water diverted for use on the property while my father owned it or before.” *Id.* at par.

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4 7.

5 In addition to Koyle, Florence Poulton Gibson observed the property during 1963
6 to 1973, specifically 1963 to 1968. *Affidavit of Florence Poulton Gibson*, par. 3. Gibson played
7 at the claimed place of use and is familiar with the irrigation practices used on the property
8 during this period of time. *Id.* The place of use was never irrigated in any form and there has
9 never been a culvert or ditch or any means for water to be used for irrigation from Willow Creek.
10
11 *Id.* at par 6.

12 Also observing the claimed place of between 1963 through 1973 was Grant H.
13 Matthews. He “cannot remember any water used for irrigation on the land,” and “[i]f any water
14 got onto this land it would have been floodwater.” *Affidavit of Grant M. Matthews*, pars. 6-7.
15 William Poulton also stated that, in the 53 years he has lived in the Willow Creek area, he has
16 never seen any person intentionally irrigate the place of used claimed by Leah Rose. *Affidavit of*
17 *William A. Poulton*, par. 14. This non-use includes 1963 to 1973. Based on the affidavits of
18 Gibson, Matthews and Poulton there is no disputed issue of material fact preventing Water Right
19 No. 45-167A from being declared forfeited.
20

21 The Department states that in a 1968 aerial photograph, there is evidence of
22 irrigation and that the picture shows a small pond. *Affidavit of Michael P. Tribe in Support of*
23 *Motion for Summary Judgment*, p. 5. As stated by the multiple affiants above, if the photograph
24 does show a pond or evidence of irrigation, such evidence is simply the result of wastewater or
25 stray water from Willow Creek
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3 **iii. 1973 to 1986**

4 There is no evidence of beneficial use of the waters of Willow Creek from 1973
5 to 1986 in the claimed place of use except for what the Department claims are “small striations”
6 appearing in a 1976 aerial photograph, “which are indicative of irrigation ditches, along with
7 evidence of irrigation.” *Affidavit of Michael P. Tribe* at Exh. A, p. 6. This 1976 aerial
8 photograph is actually a copy of a USGS map that does not reveal anything about the irrigation
9 practices of the place of use. As of 1985, the property was a dry piece of ground with concrete
10 footings with an old structure scattered on it. *Affidavit of Cory King*, at par 3.

12 Again, it is unclear whether the Department’s agent ever walked the claimed
13 place of use. However, there are no structures or evidence of old structures that could ever have
14 diverted water onto Rose’s place of use. *Affidavit of William A. Poulton*, par. 14. Any proof of
15 irrigation provided by the Idaho Department of Water Resources from aerial photos is the result
16 of either periodic flooding when Willow Creek overruns its banks or when the water was
17 clogged by Rose’s driveway culvert and forced to the south and west. *Id.* The more recent
18 photographs purporting to show the irrigation of a lawn simply show a lawn that was actually
19 watered with a pump from a personal well. The waters of Willow Creek have never been
20 diverted to irrigate grass, shrubbery or a garden on Rose’s property. *Id.* The vegetation shown
21 by the aerial photo is actually large trees, which run along the eastern portion of the claimed
22 place of use, and is in a riparian zone where Willow Creek ran prior to 2002. *Affidavit of*
23 *William A. Poulton*, par. 14.

26 **iv. 1987 to Present**

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3 In approximately 1987, Clark Harmon purchased the subject property. Mr.
4 Harmon asked Cory King to bury the structure rubble with his Caterpillar. He did so and "pretty
5 much" covered the entire parcel of property. At that time, King saw no evidence of irrigation on
6 the piece of ground. There were no ditches or headgates that would provide a way to irrigate the
7 property. *Affidavit of Cory King*, par. 4.

8
9 As discussed above, after 2002, Willow Creek's streambed does not even enter
10 Rose's claimed place of use. The 1992 aerial photo, provided in the 706 Report, clearly shows
11 vegetation growing on Rose's property. The vegetation includes a large grove of trees on her
12 east boundary. The map also shows a lawn surrounding the residence. As described above, this
13 lawn has never been irrigated from Willow Creek, rather it is watered by a domestic pump.

14
15 **2. Section 26 of township 12S, Range 23E**

16 For Rose's claimed point of diversion in Section 26, the Department appears to
17 have simply listed this as a point of diversion because it was found in the Koyle's Claim for
18 45-167A and in the Moncur's Transfer Application for Water Right No. 45-166. As evidenced
19 by the *Notice of Claim to a Water Right Acquired Under State Law* filed by the Koyles in August
20 of 1988, the Koyles did not claim that they diverted water from Willow Creek out of Section 26.
21 *Affidavit of Michael P. Tribe*, Exhibit A. The Department instead relied upon the Moncur's 1983
22 Application for Transfer of Water Right and apparently Poulton's Claim for 45-167B.

23
24 As stated in the Supplemental Director's Report Regarding SRBA Subcase No.
25 45-167A:

26 Attached to the original claim filed by the Koyles was a diagramed
27 map depicting the points of diversion in the SWNWSE of Section

26 and SESESE of section 9, along with depicted irrigation in the SESE of Section 9...Water right no. 45-166 was originally decreed to Thomas Poulton in the *Poulton* decree. Ruth Moncur, also know as Ruth Koyle, is presumably related to John and Margaret Koyle, original claimants of water right no. 45-167A. Unlike the map associated with the application for transfer, the map attached to the claim depicts irrigation in SESE of Section 9. Both diagramed maps mimic the historic channel of Willow Creek, as evidenced by aerial photography from 1992 and earlier.

Based on the above, Agent Robertson determined that water had been used for irrigation on the claimed place of use and determined that water right no. 45-167A could be recommended.

It appears that the Koyles, in their 1988 Notice of Claim merely copied the Moncurs' map attached to their 1983 Application for Transfer of Water Right. *Affidavit of Michael P. Tribe*, Exhibit A. The Koyles did shade-in a place of use in the SESESE quarter of Section 9, which Rose now claims as a point of diversion and place of use. This still does not establish that the Koyles, Harmons or Rose ever actually diverted the waters of Willow Creek to the claimed place of use. In fact, there is no evidence that these parties ever put to beneficial use the waters of Willow Creek on Rose's 1.6 acre claimed place of use.

Rose does not divert water for Section 26, nor have her predecessors in interest. The point of diversion in Section 26 is unique to Cory King and Bill Poulton. *Affidavit of William A. Poulton*, par. 12. Leah Rose has never had permission, nor has she or her predecessors in interest ever diverted water from any point of diversion in Section 26, specifically from the pipe Cory King and William Poulton use. *Id.* The pipe is the only way to get Willow Creek water from Section 26 to Poulton's property or Rose's property and the delivery point is approximate a 1/2 mile from Rose's west property boundary line. *Id.* Rose

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3 cannot physically divert water from Section 26; her predecessors in interest never diverted water
4 from Section 26. Therefore, no valid point of diversion ever existed in Section 26 for her place
5 of use and, if it ever did, it has been forfeited based upon nonuse.

6 **B. Idaho Department of Water Resources 706 Report**

7 As stated above, the Director's Report and Supplemental Director's Report are
8 prima facie evidence and the facts contained therein are presumed to be correct until such time as
9 an objector produces sufficient evidence to rebut the presumption. However, once the
10 presumption is rebutted, it disappears and the facts upon which the presumption is based are
11 weighed with all other facts that may be relevant. In this case, Poulton has presented eight (8)
12 affiants who have stated that no water has ever been diverted from Willow Creek to Rose's place
13 of use. Furthermore, Rose's claimed points of diversion cannot physically deliver water to her
14 place of use. Any presumption originally in Rose's favor has been shifted and requires Rose to
15 offer evidence that the water right is valid. Rose has offered no evidence of diversion or
16 beneficial because she cannot. Poulton has met his burden of production and persuasion.
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19 **IV. Conclusion**

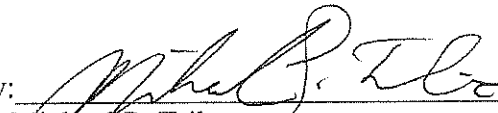
20 It is respectfully submitted that, based on the above, an Order for summary
21 judgment is proper. Rose has never diverted water from Willow Creek, which is required for a
22 valid water right in the State of Idaho, nor have her predecessors in interest. Even if a right
23 could be established, such a right has clearly been abandoned/forfeited through the intentional
24 withdrawal of the use of the waters of Willow Creek or the forfeiture of such right through five
25 years or more of nonuse, absent a valid statutory defense. William Poulton will be harmed if
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27

Rose is allowed to illegally divert the waters of Willow Creek, as his Right No. 45-167B is tied together with Rose's by the Department's recommendation.

Respectfully submitted this 1st day of May, 2006.

LING, ROBINSON & WALKER

By:



Michael P. Tribe

Attorneys for Objector, William A. Poulton

1
2
3 CERTIFICATE OF MAILING

4 I hereby certify that on the 1st day of May, 2006, I served the original and true
5 and correct copies, respectively, of the foregoing MEMORANDUM IN SUPPORT OF
6 MOTION FOR SUMMARY JUDGMENT, as follows:

7 1. Original to:

8 Clerk of the District Court
9 Snake River Basin Adjudication
10 253 Third Avenue North
11 P.O. Box 2707
12 Twin Falls, Idaho 83303-2707

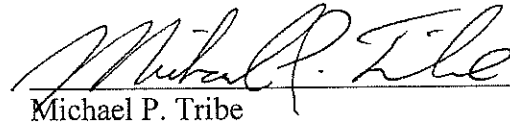
13 2. One copy to the claimant of the water right at the following address:

14 Leah Rose
15 994 S. 150 E.
16 Burley, ID 83318

17 3. Copies to:

18 IDWR Document Depository
19 P. O. Box 83720
20 Boise, Idaho 83720-0098
21 Chief, Natural Resources Division
22 Office of the Attorney General
23 State of Idaho
24 P. O. Box 44449
25 Boise, Idaho 83711-4449

26 by depositing said document in the United States mail, postage prepaid, in envelopes addressed
27 to said persons/entities at the foregoing addresses.

28 
Michael P. Tribe