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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	)	REPLY MEMORANDUM IN SUPPORT OF
	)	<u>MOTION FOR SUMMARY JUDGMENT</u>

COME NOW Ben D. Jernberg and Idaho Properties, LLC (Claimants), by and through their attorneys of record Ling, Robinson & Walker, and submit this *Reply Memorandum in Support of Motion for Summary* and the *Affidavits* of Joe Llamas and Michael P. Tribe in response to the State of Idaho's *Brief in Opposition to Motion for Summary Judgment*.

I. Introduction

The State is correct when it states in its *Brief in Opposition to Motion for Summary Judgment* that the primary issue for determination is the extent of beneficial use on the designated place of use for Water Right No. 31-11845. However, the Idaho Department of Water Resources (IDWR) through its 1986 Field Exam has already established beneficial use as well as through its

REPLY MEMORANDUM

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3 inquiries of Ben Jernberg. Based upon the beneficial field exam, the amount of irrigated acres, the
4 diversion rate and the annual volume have each been established. Because there is no issue of
5 material fact based upon the information provided to IDWR in the license file, the affidavits of
6 Bryce Contor, Ben Jernberg and Joe Llamas, and the exhibits attached thereto, the Claimants'
7 summary judgment Motion should be granted.

8 II. Affidavit of Cater Fritschle

9
10 Carter Fritschle's Affidavit does not raise any issue of material fact to preclude
11 summary judgment. In paragraph 5 of the Fritschle Affidavit, Fritschle states: "These conditions
12 were an attempt to recognize that the water user applies water to the pasture land, even though the
13 Claimant was not able to prove beneficial use at the time of licensing." The conditions refer to the
14 provisions originally placed on the 663 uncultivated acres in the license for 31-7311. The original
15 license limited the 461 cultivated acres to 367.5 acre feet but, in Condition 5, the right was limited
16 to no more than .02 cfs per acre nor more than 3.5 acre feet per acre for irrigation of the 461 acres.
17 Fritschle's account is repeated in the State's *Brief in Opposition to Motion for Summary Judgment*
18 at page 9. These statements are made in error for two reasons: First, it is a legal conclusion upon
19 which Fritschle is not qualified to make, and second, beneficial use was established by IDWR and
20 confirmed by Jernberg in his March 10, 1989 letter to IDWR's eastern district office. (Attached as
21 Exhibit "A" to the *Second Affidavit of Michael P. Tribe*.) Jernberg reported that he irrigated with
22 two wells: One well for a total of 400 inches, and a second well for 600 inches from April 15 to
23 October 15 (180 days).
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26 In a note to IDWR, Mr. Jernberg stated that the electric pump
27 produced "400 inches" (8 cfs) and the diesel pump produced "600
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3 inches" (12 cfs) and that both wells were operated for 180 days per
4 year. This is typical practice in this area for surface irrigated lands.
5 This is a volume of about 7000 acre feet per year. Even assuming
ditch losses, this volume supports full irrigation of the 1124 acres
identified as irrigated by the field examiner.

6 (Bryce A. Contor's *Analysis of Equivalent Irrigated Acreage for Water Right 31-7311*, pp. 4-5,
7 attached as Exhibit "B" to the *Second Affidavit of Michael P. Tribe*.) 1124 is the original number
8 of acres found to be irrigated under 31-7311 by IDWR's own field agent.

9
10 In August of 1995, Jernberg again provided IDWR information regarding his
11 irrigation practices on his Mud Lake Ranch. (See attached Exhibit "C" of the *Second Affidavit of*
12 *Michael P. Tribe*.) Again, quoting from Contor's *Analysis of Equivalent Irrigated Acreage for*
13 *Water Right 31-7311*:

14 In response to a 1995 letter from Mr. Keen asking for more detail
15 about his irrigation practices, Mr. Jernberg reported that prior to 1984
16 he typically started irrigation about April 15. He applied water
17 exclusively to the pastures for about one month, then began irrigating
the cultivated lands. He would irrigate the crop land for seven days,
18 then the pasture for ten to fourteen days, and then repeat the rotation
throughout the summer. Assuming the 19 cfs measured in the
19 licensing exam, and assuming that after August 15 the crop irrigation
would be reduced due to grain ripening, a reasonable assumption
20 appears to be 150 days of pumping at 19 cfs, or 5653 acre feet.
Again, even assuming ditch losses this is adequate volume to support
21 full irrigation of the acreage found by the examiner. Using Mr.
Jernberg's data of a month of exclusive pasture irrigation, followed
22 by 1/3 cropland - 2/3 pasture rotation, indicates that the diversion
volume per acre on the pasture exceeded that applied to the crop
23 land.

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25 *Analysis of Equivalent Irrigated Acreage for Water Right 31-7311*, p. 5. In addition to Mr.
26 Contor's and Jernberg's statements, the Court can look to the Beneficial Field Exam attached to the

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3 *Affidavit of Michael P. Tribe in Support of Motion for Summary Judgment* as Exhibit "A". The
4 best measure of beneficial use was recorded by IDWR in 1986, when its agent walked the ground
5 when irrigation was actually occurring. Therefore, there is sufficient evidence of beneficial use
6 that has not been controverted by the State.

7
8 In paragraph 6 of his *Affidavit*, Fritschle states that the major concern for the
9 Department in issuing the license for Water Right No. 31-7311 was volume. Citing to the IDWR
10 field examiner, he quoted: "It was obvious that the pasture needs and receives less acre feet per
11 annum than the grain crop, and I recommend the licensing volume be reduced accordingly for the
12 pasture land." This is nothing more than a conclusion. There is no scientific evidence before this
13 Court to back up this statement. As will be discussed below, the proper annual acre feet per year
14 for 663 acres of uncultivated pasture in this area is between 1,856 to 3,713 acre feet per year.

15 III. The Duty of Water

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17 The State of Idaho has attempted to shape this subcase as one over the duty of
18 water, and the Idaho Department of Water Resources' reluctance to agree that the claimants' land
19 is entitled to a full water allotment of 3.5 acre feet for irrigated lands. (*Brief in Opposition to*
20 *Motion for Summary Judgment*, pp. 9-10.) It is true that in Idaho, "it is a cardinal principle
21 established by law and the adjudications of this court that the highest and greatest duty of water be
22 required. The law allows the appropriator only the amount actually necessary for the useful or
23 beneficial purpose to which it applies." *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 207, 252 P.
24 865 (1926). However, the duty of water will include a reasonable amount of seepage, evaporation
25 and carriage loss, and can vary from place to place depending on conditions. In addition, the
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3 presumption that a full duty of water is not needed can be overcome by evidence that more water is
4 reasonably needed. The Claimants' land is obviously not a perfectly leveled pasture land. It takes
5 a large diversion volume to push the water from the point of diversions to the entire 663-acre place
6 of use. The Department acknowledged as much as early as March 17, 1989, in a memorandum
7 from Gary Spackman to Jim Johnson. (Exhibit "D" to the *Second Affidavit of Michael P. Tribe*.)
8 IDWR has failed to provide why the specific volume restrictions have been recommended for 31-
9 11845 and has failed to provide any evidence of the appropriate annual diversion for uncultivated
10 pasture in eastern Idaho. The Claimants have provided such information to IDWR.
11

12 Based on published research estimates of two to four feet of
13 evapotranspiration for native shrubs and grasses and reasonable
14 irrigation efficiencies, it was found that the reasonable beneficial use
15 for 663 acres of uncultivated pasture was 1856 to 3713 acre feet per
16 year. However, the authorized diversion rate of 4.99 cfs for 184 days
17 is inadequate to produce this potential volume, so the analysis
18 determined that the reasonable equivalent beneficial use of this
19 condition/remark was the 184-day pumping volume of 1821 acre feet
20 per year.

21 (*Second Affidavit of Michael P. Tribe*, Exhibit B, pp. 1-2.) Based on Contor's analysis and
22 calculations, the Claimants have provided valid evidence that the uncultivated pasture land is not
23 only entitled to a larger volume of water than recommended, but requires a larger volume to be
24 able to put the acreage to beneficial use.
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26 Any evidence the State has produced regarding the current condition of the
27 uncultivated pasture land is irrelevant. What is relevant is the condition of the land at the time of
28 the 1986 beneficial use field exam due to its proximity to the commencement of the Snake River
29 Adjudication in 1987. A true picture of the beneficial use cannot be gleaned from the photographs

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3 taken by Fritschle and offered by the State because irrigation of the place of use for 31-11845 in
4 2006 literally began while the parties were walking/driving the Claimants' place of use, which did
5 not give the parties the opportunity to see where the water goes and the result the water has on the
6 vegetation and natural grasses on the place of use. The Court should give no weight to the pictures
7 submitted in the State's *Brief in Opposition to Motion for Summary Judgment* and accompanying
8 documents or Fritschle's conclusions to what ground may be irrigated by the Claimants.

9 10 IV. Irrigation of Pasture is a Beneficial Use

11 Idaho courts have found that where wild hay and pasture lands are materially
12 increased in productiveness after water has been applied to them, such a use is considered a
13 beneficial one. *Rudge v. Simmons*, 39 Idaho 22, 226 P. 170 (1924). The Claimants' uncultivated
14 lands are materially increased in productiveness after water is applied to them in sufficient volume.

15 Where one constructs a ditch and conducts water upon his land year
16 after year, and permits the same to spread out over wild hay land for
17 purposes of making hay, or using such land for pasture, he thereby
18 secures the right to the use of sufficient water to irrigate such land,
provided the amount of water so used is sufficient for that purpose,
such use being a beneficial one.

19 *Rudge*, 39 Idaho at 24, 226 P. at 172; quoting *Pyke v. Burnside*, 8 Idaho 487, 69 P. 477. In *Rudge*,
20 water users cleared and plowed portions of their land, which they watered by surface irrigation.
21 The remainder of the water was carried through their ditch to higher lands and allowed to flow out
22 in such a manner as to subirrigate a considerable area of their land which had not been cleared and
23 plowed, but which was a natural meadow that produced native grass sufficient to generate a partial
24 crop of hay which they yearly harvested, and also upon the remainder of the land that was used for
25 pasturing their stock. The respondent/water users followed all the existing laws necessary for
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3 establishing their right to 445 inches to the waters of the subject creek. On appeal, a competing
4 water user contended that there was a failure on the part of the original water user to increase the
5 beneficial application of the water with reasonable diligence, and that the original water users had
6 abandoned their right to the use of all water except that which was applied to their cultivated lands
7 and which was necessary to irrigate the cultivated lands. It was also claimed that because they had
8 failed to extend the area of the cultivated land and to apply the water claimed to have been
9 appropriated by the their delivery system with sufficient diligence, they were not entitled to the
10 water as against the competing users' claim. In short, the appellants took the position that it does
11 not matter how much water respondents were diverting from the stream through the diversion
12 works at the time appellants made their filings for a permit, respondents' rights were to be
13 measured by the amount of land they then had in cultivation and were irrigating. Like 31-11845,
14 there was no objection that the water users' diversion works had the capacity to use the claimed
15 amount or that the water users and their predecessor in interest had used the full capacity of the
16 ditches and diversion works.
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19 The Idaho Supreme Court ruled that when water increases the yield of wild hay and
20 pasture land, it was enough to show a beneficial use. The court did not attempt to limit the 445
21 inches based on the fact that a portion of the irrigation was for uncultivated pasture.

22 **V. 663 Acres should be Decreed as Found in the Beneficial Use Field Exam**

23
24 The original license for 31-7311 stated that an additional 663 acres could be
25 irrigated with a diversion rate of 4.99. IDWR's own examiner found that there was 1124 acres
26 irrigated by Jernberg—461 acres of cropland and 663 acres of uncultivated pasture. Ben Jernberg
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3 and Joe Llamas have provided sworn statements that the entire uncultivated pasture land was
4 irrigated by Jernberg's two wells. IDWR and the State have offered nothing more than interoffice
5 memorandums that express apprehension over granting a full duty of water to uncultivated pasture.
6 There is no scientific reason proffered, simply an uneasiness to grant the Claimants a full right on
7 ground they don't believe serves a beneficial purpose. There have been aerial photographs
8 provided which purport to show less irrigation. However, IDWR's field examiner found 663 acres
9 of uncultivated pasture were being irrigated. Bryce Contor reviewed that finding and found that it
10 was reasonable.
11

12 VI. Conclusion

13 Based on the above, there is no material issue of fact that the amount of acres and
14 the rate of diversion that was originally found by IDWR during the original licensing period (4.99
15 cfs and 663 acres) should be the amount that Jernberg is entitled to and should be decreed under
16 Water Right No. 31-11845. If a volume limitation is added to the right, it should be for 3.5 acre
17 feet per annum, which is the rate necessary to properly irrigate the place of use. Contrary to the
18 State and IDWR, the Claimants have demonstrated beneficial use of the requested amount on the
19 place of use.
20

21 Respectfully submitted this 26th day of May, 2006.

22 LING, ROBINSON & WALKER

23
24 By: Michael P. Tribe
25 Michael P. Tribe
26 Attorneys for Claimants/Objectors
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3 CERTIFICATE OF SERVICE

4 I hereby certify that on the 26th day of May, 2006, I served copies of the foregoing
5 *Reply Memorandum in Support of Motion for Summary Judgment* upon:

6 IDWR Document Depository
7 P. O. Box 83720
8 Boise, Idaho 83720-0098

9 The United States Department of Justice
10 Environment and Natural Resources Division
11 550 West Fort Street, MSC 033
12 Boise, Idaho 83724

13 Chief, Natural Resources Division
14 Office of the Attorney General
15 State of Idaho
16 P.O. Box 44449
17 Boise, Idaho 83711-4449

18 by depositing said copies in the United States mail, postage prepaid, in envelopes addressed to said
19 parties at the foregoing addresses.

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Michael P. Tribe