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2
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12 Attorneys for Attorneys for Objector/Claimant,
13 Ben D. Jernberg and Idaho Properties, LLC

14 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**
15 **STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

16 In Re SRBA) Subcase No. 31-11845
17)

18 Case No. 39576)

19 **SECOND AFFIDAVIT OF**
20 **MICHAEL P. TRIBE IN SUPPORT OF**
21 **MOTION FOR SUMMARY JUDGMENT**

22 STATE OF IDAHO)
23) ss.
24 County of Minidoka)

25 Michael P. Tribe, being first duly sworn on oath, deposes and states:

26 1. That I am one of the attorneys representing Ben D. Jernberg and Idaho
27 Properties, LLC in the above-entitled subcase, and make the following affidavit upon my personal
28 knowledge of the facts and circumstances set forth below.

2 2. Attached hereto as Exhibit A is a true and correct copy of a letter dated
3 March 10, 1989 from Ben D. Jernberg to the Idaho Department of Water Resources.

4 3. Attached hereto as Exhibit B is a true and correct copy of the Analysis of

5 SECOND AFFIDAVIT MICHAEL P. TRIBE

6 - 1 -

1
2
3 Equivalent Irrigated Acreage for Water Right 31-7311 dated May 12, 2003 prepared by Bryce A.
4 Contor, Hydrologist for Water Resources Field Services.

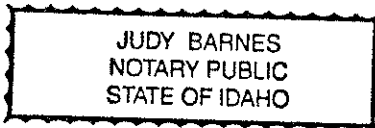
5 4. Attached hereto as Exhibit C is a true and correct copy of the letter dated
6 August 5, 1995 from Ben D. Jernberg to Shelley Walter Keen, Water Rights Supervisor.

7 5. Attached hereto as Exhibit D is a true and correct copy of a Memorandum
8 dated March 17, 1989 to Jim Johnson and File no. 31-7311 from Gary Spackman re: Licensing of
9 permit to appropriate water no. 31-7311 in the name of Ben David Jernberg.
10

11 FURTHER THIS AFFIANT SAITH NAUGHT.
12

13 
14 Michael P. Tribe

15
16 SUBSCRIBED AND SWORN to before me this 26th day of May, 2006.

17
18 
19 (SEAL)

20 
21 Notary Public for Idaho
22 Residing at: Rupert, Idaho
23 My Commission expires: 02/12/2011
24
25
26
27

1
2
3 CERTIFICATE OF SERVICE

4 I hereby certify that on the 26th day of May, 2006, I served copies of the foregoing
5 *Second Affidavit of Michael P. Tribe 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.

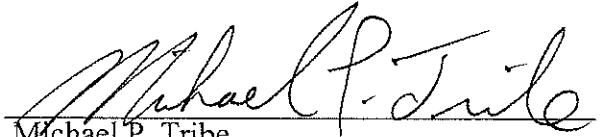
20
21
22
23
24
25
26
27
28 
Michael P. Tribe

EXHIBIT A

3-10-89

(Use water from 2 Mills)
Approx ^(Electric) 400 in - ^(Diesel) 600 in - From April 15 to Oct 15
180 day approx

Ben D. Jensen

620 Acres of leveled Farm Ground plus
the balance of grazing ground

RECEIVED
MAR 9 1989

Department of Water Resources
Eastern District Office

RECEIVED
MAR 10 1989

Department of Water Resources
Eastern District Office

RECEIVED
MAR 16 1989

Department of Water Resources

MICROFILMED

SEP 10 1997

EXHIBIT B

ANALYSIS OF EQUIVALENT IRRIGATED
ACREAGE FOR WATER RIGHT 31-7311

May 12, 2003

Background. License 31-7311 was issued in 1997 and a partial decree has issued in the Snake River Basin Adjudication (SRBA). Earlier this spring, Water Resources Field Services prepared a transfer application that sought to change the point of diversion and place of use of the irrigation of uncultivated pasture authorized by condition/remark two of water right 31-7311. The remark reads in part: "An additional 4.99 cfs of ground water diverted from the points of diversion described above may also be diverted onto 663 acres of uncultivated pasture located in T07N, R34E, Sections 15, 16, 21, and 22, but this additional use is not an appurtenance of the land upon which it occurs." Condition/remark one reserves the right of the director to modify or curtail "all or any part of the use of water on the uncultivated pasture land" in connection with a transfer of the right. There is no mention of overlap of this special use with any other rights, though the decree mentions overlap of other portions of the right.

At the request of the Idaho Department of Water Resources (IDWR), the application included an analysis of the "equivalent beneficial use" represented by this water use. The analysis was based upon the assumptions that "the recent IDWR recommendation and SRBA court decree of this right were correct and that the described use represents a legitimate right to use water. It is an attempt to quantify the reasonable water use that this remark authorizes. The words 'additional' and 'may also be diverted' are interpreted to mean that the use is additive to the use of water described elsewhere in the water right."

Based upon published research estimates of two¹ to four² feet of evapotranspiration for native shrubs and grasses and reasonable irrigation efficiencies, it was found that the reasonable beneficial use for 663 acres of uncultivated pasture was 1856 to 3713 acre feet per year. However, the authorized diversion rate of 4.99 cfs for 184 days is inadequate to produce this potential volume, so the analysis determined that the reasonable

¹ S.A. Goodell. Water Use on the Snake River Plain, Idaho and Eastern Oregon. USGS Professional Paper 1408E. 1988.

² L.R. Rich. Forest and Range Vegetation. American Society of Civil Engineers Transactions. 1951.

equivalent beneficial use of this condition/remark was the 184-day pumping volume of 1821 acre feet per year.

This analysis was rejected by IDWR. Based on this rejection, Mr. Jernberg has been unable to conclude the proposed sale of part of right 31-7311 upon which the transfer application was based. In a phone conversation May 9, 2002, Shelley Keen of the Allocations Bureau in the Boise State Office said that the intent of the conditions and remarks was not to make this water right non-transferable, but to preserve the department's ability to review the use in question. He specifically was interested in a quantification of use of water on the pasture lands. At the suggestion that the recent administrative memorandum³ directs that "the amount of consumptive use of water under a water right is not an element of the right" and a "change [of] irrigation to a more water consumptive crop" is not a transfer consideration unless there is a change in nature of use (for instance, from irrigation to commercial), Mr. Keen responded that the department had been very careful to not describe the water use as irrigation, and again requested more analysis of the historical use of water on the pasture lands.

In response to this request, Water Resources Field Services obtained copies of the licensing exams for all three rights from the two wells described in 31-7311, examined the microfiche of the full water rights file at the Eastern Region of IDWR, and copied many pertinent documents. Copies of records of the North Water Measurement District were also obtained. This research revealed some apparent inconsistencies in the licensing of the right as well as some legal questions which Water Resources Field Services is not qualified to explore.

Apparent Inconsistencies. This right appears to have been a "problem child," with eleven years elapsing from the date of the field exam to the issuing of the license. Possible inconsistencies that appear in the documentation include:

Place of Use. The licensing examiner mapped the place of use of the uncultivated pasture irrigation and described it in the exam, but the license and partial decree list only four Public Land Survey sections within which the water may be applied. Lands are described that do not belong to Mr. Jernberg, though he has not applied water to the lands of others. This

³ K.J. Dreher and N.C. Young. Transfer Processing Policies and Procedures. Administrator's Memorandum: Transfer Processing No. 24. 2002.

ambiguity could affect future transfers; transfer procedures require documentation of ownership of the described place of use.

Diversion Rate. Right 31-7311 utilizes two wells, an older well originally developed under rights 31-2357 and 31-2395 and a newer well drilled under permit 31-7311. When those older licenses were perfected, the Department measured the discharge of the older well at 8.25 cfs, the licensed rate of the two licenses. At the time of the exam for 31-7311, the older well was producing somewhat less (about 5.83 cfs) and the new well was producing 13.45 cfs, for a total of 19.28 cfs. Rather than recognizing the need and the right of the water user to perform periodic maintenance to restore the capacity of the older pump, it appears that the department allocated some of the production of the new well to satisfy the older rights. Another reduction was apparently made for reasons that are not clear from the record; the current rights (including the 4.99 cfs of diversion to uncultivated pasture) sum to 17.86 cfs, or about one and one-half cfs less than the examiner found. The alternate interpretation - that the older well still has a right for 8.25 cfs to service the older rights and that the full 13.45 cfs of the new well should have been available for right 31-7311 - still would have produced less than the standard diversion rate of 0.02 cfs per acre on the lands found to be irrigated in the licensing exam. Though it appears the department sought to reduce the total annual diversion volume on the pasture lands, a 1989 memo from Gary Spackman acknowledges the need for a full diversion rate because "it may be necessary to obtain all the head possible for irrigation of the uneven uncultivated pasture."

Overlap. Though it appears to be in Mr. Jernberg's favor, the failure to acknowledge the overlap in place of use between right 31-2395 and the pasture lands under condition/remark two of 31-7311 makes resolution of what is actually authorized under 31-7311 problematic and may affect the ability to transfer any of these rights.

Use of Data. Letters in the water right file document the Department's requests to Mr. Jernberg to describe historical (pre-1984) use of water under the permit, and his responses. However, the department analyses appear not to consider the data he provided.

Legal Questions. Mr. Keen's remark about not calling the use "irrigation," combined with the wording "but this additional use is not an appurtenance of the land upon which it occurs" suggest an intent to authorize use of water without creating a full-fledged water right. The question arises whether it is within the authority of the Department to allow water use without creating a

water right, and whether the application of water to increase the growth of vegetation constitutes "irrigation" despite the wording of the authorization. The answers to these questions may determine whether Mr. Jernberg is entitled to what is described in the partial decree and license, or something less as determined by further Department analysis.

Analyses. Several analyses have been performed to describe what should be the authorized use under these three rights, based on various assumptions.

Literal Interpretation of Partial Decree. As outlined above, the partial decree authorizes diversion of 4.99 cfs to 663 acres of uncultivated pasture for 184 days, or 1821 acre feet per year. Even the most conservative estimates of consumptive use of native brush and grass show that this full amount would be required to satisfy vegetative needs. The resulting 1821 acre feet of diversion volume at the current standard IDWR rate of 3.5 acre feet per acre indicate this condition/remark represents the equivalent of 520 acres of cultivated crop irrigation. Since the partial decree and license include no overlaps for the pasture lands, the literal interpretation considers this additive to the combined 461 acres of "regular" irrigation under 31-7311 and 31-2357, and 324 acres of irrigation under 31-2395. The combined total is 17.86 cfs on 1305 acres.

Water Measurement District Data. The two wells are close to one another and are expected to have similar pumping lifts and pumping characteristics. Based on a theoretical Power Consumption Coefficient and actual power data, the North Water Measurement District calculated an annual volume of 2640 acre feet for one of the wells, though it is not clear whether this was the 100 horsepower pump or the 75 horsepower pump. Assuming that volume was from the larger pump, and that the smaller pump produced similar volume per horsepower, the total diversion for 1997 was about 4620 acre feet. At the standard volume of 3.5 acre feet per acre, this implies equivalent beneficial use of about 1320 acres. Assuming that the volume was from the smaller pump would produce an even larger equivalent beneficial use. No other volume data appear in the Measurement District files.

Mr. Jernberg's 1989 Report. In a note to IDWR, Mr. Jernberg stated that the electric pump produced "400 inches" (8 cfs) and the diesel pump produced "600 inches" (12 cfs) and that both wells were operated for 180 days per year. This is typical practice in this area for surface irrigated lands. 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.

Mr. Jernberg's 1995 Report. In response to a 1995 letter from Mr. Keen asking for more detail about his irrigation practices, Mr. Jernberg reported that prior to 1984 he typically started irrigating about April 15. He applied water exclusively to the pastures for about one month, then began irrigating the cultivated lands. He would irrigate the crop land for seven days, then the pasture for ten to fourteen days, and then repeat the rotation throughout the summer. Assuming the 19 cfs measured in the licensing exam, and assuming that after August 15 the crop irrigation would be reduced due to grain ripening,⁴ a reasonable assumption 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 full irrigation of the acreage found by the examiner. Using Mr. Jernberg's data of a month of exclusive pasture irrigation, followed by a 1/3 cropland - 2/3 pasture rotation, indicates that the diversion volume per acre on the pasture exceeded that applied to the crop land.

Recommendation. The above analyses using a variety of different approaches and sets of assumptions indicate that the 1989 IDWR memo from Gary (presumably Gary Spackman) was correct in recommending that no reduction in volume be applied to the pasture lands. The three rights should have a combined acreage of 1124 acres, with a full volume of 3934 acre feet per year. At a minimum the combined diversion rate should equal the 19.28 cfs found by the licensing examiner, and probably should equal the sum of the original rates of 31-2357 and 31-2395 (8.25 cfs) plus the additional 13.45 found to be produced by the new well, or 21.7 cfs. Because the older rights were deficient in diversion rate, and some of the water from the new well is applied to lands originally licensed under the old rights, a permissible place of use with individual and combined limitations would be appropriate.

Whether this correction is best accomplished by an amended license, a transfer clarifying the use described by condition/remark two of 31-7311, or an amended partial decree, is a legal question beyond the scope of this

⁴ Hay and pasture irrigation typically continues later into the fall.

analysis and the abilities of Water Resources Field Services. This analysis does describe the reasonable equivalent beneficial use under the condition/remark, both from a historical perspective and from a technical analysis of what is described.

A handwritten signature in cursive script, reading "Bryce A. Contor". The signature is written in dark ink and is positioned above a horizontal line.

Bryce A. Contor
May 12, 2002

EXHIBIT C

Aug 5, '95

P.O. Box 1442
Billings, MT. 59103

Shelley Walter Keen
Water Rights Supervisor

R.E. Water Right No. 31-07311

RECEIVED

AUG 08 1995

Department of Wildlife & Fisheries

Dear Mr. Keen

In reference to your letter of July 31, 1995
I will try to give you the history as accurate
as possible before 1984.

We run our full stream of water on the
452 A. of ~~farm~~ ground about 7 days then
move it to the pasture ground for from
10 days to 14 days then back on the farm ground
for about 7 days again or however long it takes.

We usually start the water on the pasture
about 1 month earlier than the farm ground
and water approx 30 days straight. To get
plenty of water on the natural pasture is very
~~necessary~~ necessary to make more pasture for the
cattle because it is dry country.

At this time I have plenty of water out
of my 2 open flow wells to irrigate all this
land. I would very much like to get
a license on this water to help insure that
I can keep doing this. It's my livelihood.

Thank You
Ben O. Luning

MICROFILMED
SEP 10 1987

EXHIBIT D

MEMORANDUM

TO: Jim Johnson and File no. 31-7311
FROM: Gary Spackman *Gary*
DATE: March 17, 1989
RE: Licensing of permit to appropriate water no. 31-7311 in the
name of Ben David Jernberg

For approximately two years, we have struggled to determine how this permit should be licensed. When the field examiner examined the beneficial use, he found that approximately 1/3 to 1/2 of the place of use was irrigated cropland, and the other 1/2 to 2/3 of the place of use was uncultivated pasture ground. The field examiner suggested that the license be split into two parts, one for the cultivated ground, and the other for the uncultivated pasture. He did not suggest, however, the restrictions which ought to be placed on the license for the uncultivated pasture.

I originally suggested since the cultivated ground was grain, and not alfalfa, that if the annual volume was to be reduced for the native pasture, it also ought to be reduced for the grain crop, which does not consumptively use as much water as alfalfa. Because of difficulty in determining these amounts, I decided since we have licensed for the volume required by alfalfa in the past, that we should not selectively restrict the annual volume for irrigation of the uncultivated pasture.

Concerns were raised about my suggestion, and I have subsequently corresponded with the permit holder to obtain annual volume numbers that would confirm the extent of his beneficial use. Ben Jernberg submitted some information on instantaneous flow rates, which does not help me in determining the annual volume.

Because of expressed concern over exaggerated annual volume licensing, I want to retract my initial position, and suggest that this water right be split in two parts. The A part should be licensed as a normal irrigated use, and should describe those acres that were found to be irrigated, cultivated cropland at the time of the examination. The B portion of the split should represent those acres that were uncultivated natural pasture, but still irrigated. One of the technical reviewers probably should determine the number of acres for each part.

We do not need to restrict the instantaneous flow rate to the natural pasture ground. It may be necessary to obtain all the head possible for irrigation of the uneven uncultivated pasture. I suggest, however, the following special conditions be imposed

ENCLOSURE

FILE 10 1987

on the license:

1. The lands described as the place of use under this license shall not be irrigated as cultivated cropland without filing a transfer with the Department of Water Resources.

2. The total acres irrigated under this right, if changed by a transfer to cultivated irrigation, shall be reduced by one-half prior to irrigation of the cultivated land.

Finally, I suggest that the field headgate ^{volume} capacity normally recommended be divided in half for the uncultivated pasture. Although a 50% reduction is not supported by evidence of less water use, a reduction is necessary to insure against enlargement of the use at a later time.

MICROFILMED

SEP 16 1967