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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>PRETRIAL BRIEF</u>
	)	

COME NOW the Objectors/Claimants, Ben Jernberg and Idaho Properties, LLC (hereinafter "Jernberg") in the above-entitled action by and through their attorneys, Roger D. Ling and Michael P. Tribe of the firm Ling, Robinson & Walker, and submit to the court their Pretrial Brief as follows:

1. Nature of the Case.

This case has arisen from the objection filed by Ben Jernberg to the Director's Report for Water Right No. 31-11845. Jernberg's objection is based upon the unlawful license originally issued for Water Right No. 31-7311 by the Idaho Department of Water Resources (IDWR). Jernberg's objection was originally to the quantity of water listed in the *Director's Report for Water Right* No. 31-11845, which recommended a quantity of 4.99 cfs, as well as to the limitations placed on the acres to be irrigated in a single irrigation season. The focus of this trial will be on what the appropriate volume of water is for the 339 acres of uncultivated pasture

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3 not included in Water Right No. 31-2397 which allows 324 acres to be irrigated within the
4 combined place of use of 672.9 acres that Water Right Nos. 31-2397 and 31-11845 share.

5 The recommendation of a diversion rate of 4.99 cfs for Water Right No. 31-11845
6 is a remnant from the license for Water Right No. 31-7311; Jernberg originally objected to that
7 diversion rate based on the fact the IDWR placed improper conditions on the original license and
8 failed to consider all of Jernberg's evidence of his claim. However, since the time Jernberg
9 originally filed the objection to Water Right No. 31-11845, he has stipulated that 4.99 cfs is an
10 acceptable rate of diversion for Water Right No. 31-11845.

11 On February 20, 1979, Jernberg filed an application for a permit for 16 cfs of well
12 water. The application requested a license to irrigate approximately 1,200 acres. On August 2,
13 1984, Jernberg submitted information to IDWR to show that a well had been drilled and that
14 water was diverted from the well and used for irrigation at the rate of 15 cfs. A license for Water
15 Right No. 31-7311 was issued on September 5, 1997, over ten (10) years after the draft license
16 was submitted to Jernberg on June 15, 1987. Once issued, the license provided for the diversion
17 of 4.62 cfs for the irrigation of 461 acres and provided for an additional 4.99 cfs of ground water
18 to be diverted onto 663 acres of uncultivated pasture originally owned by Jernberg and currently
19 owned by Idaho Properties, LLC. However, this additional 4.99 cfs of ground water was found to
20 be not appurtenant to the land upon which it occurred. Jernberg objected to that portion of the
21 partial decree. This objection has proceeded to trial because there is historical evidence of
22 irrigation upon the uncultivated portion of the 663 acres based upon the beneficial use field exam
23 and those who have irrigated the Jernberg place of use. Based upon the historical practice, the
24 State and the Idaho Department of Water Resources cannot now claim that the ground was never
25 irrigated based upon the condition of the place of use in its current condition or upon isolated
26 satellite imagery.

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3 **2. ISSUES FOR TRIAL**
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5 **a. Amount of Acres Historically Irrigated**

6 Jernberg's May 18, 2005, objection stated that Water Right No. 31-11845 should
7 be licensed for 658 acres. The Director's Report listed the combined place of use for 31-11845
8 and 31-2395 as 672.9 acres. Furthermore, the parties have referred to the place of use as 663
9 acres of uncultivated pasture. All three of these numbers describe essentially the same area. The
10 correct place of use appears to be the combined 672.9 acres found in the Director's Report for 31-
11 11845 and the permissible place of use for Water Right No. 31-2395, which has been partially
12 decreed for 324 acres within the 672.9 place of use. Therefore the amount of acres that Jernberg
13 will establish at trial that have been put to beneficial use is the difference between the 324 acres
14 licensed in Water Right No. 31-2395 and the 672.9 acre place of use described in 31-11845 for a
15 total of 348.9 acres.

16 Jernberg will establish which acres have been flood irrigated based upon eye
17 witness accounts of those who witnessed the irrigation as well as the beneficial use field
18 examination undertaken by an Idaho Department of Water Resources field agent. Mr. Jernberg
19 will testify of his and his father's cattle raising operation prior to their purchase of additional
20 summer pasture land in other areas. Joe Llamas will testify as to the irrigation practice of the
21 Jernberg Ranch from as early as the summer of 1969 until the present time. Joe's son, Omar, will
22 also testify as to the Ranch's irrigation practices in addition to the cattle raising operation. Omar
23 has spent a good deal of his life working on the place of use and has had primary responsibility
24 for pasturing cattle in the place of use.

25 The recent historical practice of the ranch has been to flood irrigate the proposed
26 place of use throughout the summer so that when the cattle return from their summer grazing
27 lands, they then graze throughout the fall on the proposed place of use until snow covers the

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3 pasture grasses and remnants of the hay and oat fields. When properly irrigated, the native
4 grasses grow to over a foot tall and provide excellent forage for the Jernberg's cattle. Once the
5 snow covers the grasses, Jernberg then supplements the forage lands with hay. Jernberg generally
6 grazes between 800 and 1100 head of cattle on the proposed place of use throughout the fall.
7 Prior to the purchase of additional summer grazing lands, Jernberg would pasture approximately
8 300 head of cattle for up to six months on the uncultivated pastureland.

9 It is undisputed that irrigating natural grasses is a beneficial use of water in the
10 state of Idaho. The use of water for irrigating pastureland is a beneficial use. *Neil v. Hyde*, 32
11 Idaho, 576, 186 P. 710 (1919). Idaho courts have found that where wild hay and pasturelands are
12 materially increased in productiveness after water has been applied to them, such a use is
13 considered a beneficial one. *Rudge v. Simmons*, 39 Idaho 22, 226 P. 170 (1924). The Claimants'
14 uncultivated lands are materially increased in productiveness after water is applied to them in
15 sufficient volume.

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

22 *Rudge*, 39 Idaho at 24, 226 P. at 172; quoting *Pyke v. Burnside*, 8 Idaho 487, 69 P. 477. In
23 *McAtee v. Faulkner Land and Livestock, Inc.*, 113 Idaho 393, 744 P.2d 123 (Idaho App.1987),
24 the holding in *Rudge and Pyke* was upheld when the Idaho Supreme Court held that water is put
25 to a beneficial use when it is diverted to irrigate wild pasture.

26 Omar Llamas will testify that during the last four years, when the pasture lands
27 have not been irrigated he and the other ranch workers have had to begin providing supplemental
28 feed to the cattle several weeks earlier than if the ground was flood irrigated throughout the

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3 irrigation season. Or in other words, there is a difference to pasture yields when no irrigation
4 water was applied to the pasture and native grasses.

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6 **b. Rate of Diversion**

7 Jernberg has already stipulated that the proper rate of diversion for Water Right No.
8 31-11845 is 4.99. However, the Director's report for 31-11845 limits the rate of diversion to a
9 combined total of 6.48 cfs with 31-2395. Water Right No. 31-2395 was independently licensed
10 for a rate of diversion of 3.65 cfs with an annual volume of 1134 acre feet. This limitation, in
11 effect, fails to even recognize 31-11845 as a right. The combined diversion merely brings Water
12 Right No. 31-2395 to a full volume of water. Water Right No. 31-11845 should be decreed for
13 4.99 and should not be combined with the rate of diversion of 31-2395. The combined rights
14 should be for 8.64 cfs within the combined place of use. The appropriate volumes of water
15 together with the amount of acres that may be irrigated under Water Right No. 31-11845 are the
16 main issues to be resolved at trial.

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18 **c. Volume of Water**

19 What is the appropriate volume of water for Water Right No. 31-11845? That is
20 the issue that has perplexed IDWR since Jernberg first made application for a water right on his
21 uncultivated pasture land. Ben Jernberg will testify as to the historical practice of how he and
22 others at his ranch used water from the ranch's two main pumps. In past communications with
23 IDWR, Jernberg stated that he had one electrical pump which produced 400 inches (8 cfs) and a
24 second diesel pump, which has been replaced with an electric pump, that produced 600 inches (12
25 cfs) and that both wells were operated for approximately 180 days per year.

26 In an additional response to IDWR, Mr. Jernberg reported that prior to 1984 he
27 typically started irrigating about April 15 and would then apply the water exclusively to the

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3 proposed place of use in Water Right No. 31-11845. After that period he would then begin
4 irrigating the cultivated lands found in Water Right No. 31-7311. Once he started irrigating the
5 cultivated lands, he would irrigate the cultivated pastureland for seven days, the pasture lands for
6 31-1185 for ten to fourteen days and continue that pattern throughout the summer. The annual
7 volume can then be calculated by the diversion rate measured in the licensing exam and assuming
8 that the after August 15 the crop irrigation would be reduced due to grain ripening. A reasonable
9 assumption of 150 days of pumping at 19 cfs, or 5653 acre feet can be calculated. That figure will
10 be somewhat lower with merely 4.99 cfs being sought for 31-11845. Bryce Contor will testify as
11 to these calculations and his work with Mr. Jernberg's ranch. Mr. Contor will offer testimony
12 that based upon published research estimates of two to four feet of evapotranspiration for native
13 shrubs and grasses and reasonable irrigation efficiencies, it has been found that the reasonable
14 beneficial use for 663 acres of uncultivated pasture was between 1856 to 3713 acre feet per year.

15 3. Effect of License

16 Idaho Code section 42-220 discusses the effect of license:

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18 Such license shall be binding upon the state as to the right of such
19 licensee to use the amount of water mentioned therein, and shall be
20 prima facie evidence as to such right; and all rights to water
21 confirmed under the provisions of this chapter, or by any decree of
22 court, shall become appurtenant to, and shall pass with a
23 conveyance of, the land for which the right of use is granted. The
24 right to continue the beneficial use of such waters shall never be
25 denied nor prevented for any cause other than the failure, on the
26 part of the user or holder of such right, to pay the ordinary charges
27 or assessments which may be made or levied to cover the expenses
28 for the delivery or distribution of such water, or for other reasons
set forth in this title: provided, that when water is used for
irrigation, no such license or decree of the court allotting such
water shall be issued confirming the right to the use of more than
one second foot of water for each fifty (50) acres of land so
irrigated, unless it can be shown to the satisfaction of the
department of water resources in granting such license, and to the
court in making such decree, that a greater amount is necessary, and
neither such licensee nor any one claiming a right under such

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3 decree, shall at any time be entitled to the use of more water than
4 can be beneficially applied on the lands for the benefit of which
5 such right may have been confirmed, and the right to the use of
6 such water confirmed by such license shall always be held subject
7 to the local or community customs, rules and regulations which
8 may be adopted from time to time by a majority of the users from a
9 common source of supply, canal or lateral from which such water
10 may be taken, when such rules or regulations have for their object
11 the economical use of such water.

12
13 The Idaho Department of Water Resources and the State have maintained that when Jernberg had
14 the illegal provision removed from Water Right No. 31-7311 that the new right, 31-11845, had to
15 be relicensed. In reality, all that Jernberg requested was to have the illegal provisions of the
16 license put aside. The partial decree should have then been for the full rate of diversion of 4.99
17 cfs and all the acres stated within the license when combined with Water Right No. 31-2395.

18 Licenses are and have been consistently treated in the SRBA the same as prior
19 decrees for purposes of binding the parties. In *Order on Challenge (Consolidated Issues) of*
20 *"Facility Volume" Issue and "Additional Evidence" Issue*, subcases 36-02708 *et al.* (Dec 29,
21 1999), the SRBA Court affirmed a special master's ruling that the SRBA was not the appropriate
22 forum for collaterally attacking licenses previously issued through administrative proceedings.
23 The SRBA cannot serve as a second opportunity for IDWR to recondition a license, which it had
24 a full opportunity to condition when the license was originally issued. *Matter of Hidden Springs*
25 *Trout Ranch, Inc., v. Alred*, 102 Idaho 623, 636 P.2d 745 (1981).

26 In this case, IDWR never determined the appropriate volume for the uncultivated
27 portion of Water Right No. 31-7311. IDWR resolved their concern by attaching illegal conditions
28 that found that the water was not appurtenance to the land; that provision was set aside.
However, IDWR did find that 663 acres of uncultivated pasture was being irrigated. That should
not now be in question at trial. The only issue to be resolved by this Court is what is the proper
volume of water that Jernberg may use on the uncultivated pasture.

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a. **Beneficial Use Field Exam**

The original license exam found that the diversion works were adequate for the quantity of water and the claimed diversion rate in addition to listing all of the acres then being irrigated. The Idaho Supreme Court has found that: "one of the most conclusive methods of showing that an amount of water decreed to a particular system has not been beneficially used is to show that the canal or other diverting works through which the appropriation must be diverted...does not have the required carrying capacity to divert and distribute the full amount of the appropriation and carry the same to the point of intended use." *Albrethsen v. Wood River Land Co.*, 40 Idaho 49 at 59-60, 231 P. 418 at 421-22 (1924). At the time the license was issued there was no finding by the Idaho Department of Water Resources that Jernberg's diversion works did not have the required carrying capacity to divert and distribute the full amount of water requested. In fact, the exam stated that the diversion works were appropriate for their designed purposes.

4. **Motion In Limine**

Jernberg has reserved the right to file a motion in limine with respect to the testimony or expert reports of the State of Idaho's expert witnesses with regards to soils makeup, and beneficial use of the proposed place of use, each of which are not relevant to the proper volume of water used on Jernberg's proposed place of use. These experts are judging the proposed place of use currently not when the claim and license were originally filed. The relevant time of inquiry for beneficial use of proposed place of use is 1986 or earlier.

Pursuant to Idaho Rule of Evidence 403, Jernberg specifically seeks to prohibit the *Expert Reports of David B. Shaw and Norman C. Young, Robert W. Hill, Dr. Wayne Burkhardt and Glen Logan* because the probative value of the expert reports would be substantially outweighed by the danger of unfair prejudice, confusion of the issues or waste of time. Under

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3 Idaho Rule of Evidence Rule 403, certain evidence may be excluded if its probative value is
4 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading
5 the jury, or by considerations of undue delay, waste of time, or needless presentation of
6 cumulative evidence. The following provisions of IRE 403 are applicable to the State's expert
7 reports because their probative value is substantially outweighed by the danger of unfair prejudice,
8 confusion of the issues or waste of time.

9 **a. Unfair Prejudice**

10 The reports, with their accompanying exhibits, rely upon contemporary data for their
11 conclusions and findings. Specifically, Dr. Hill finds that there is no evidence of land leveling or
12 evidence of irrigation in his first and second opinions to be expressed at page seven (7) of his
13 expert report. The beneficial use field exam was done in 1986. The application for the license
14 was filed in 1979. This is the time frame from which Jernberg's right should be determined, not
15 the present condition of the proposed place of use, which admittedly has not been irrigated for
16 four years.

17 Because the proposed place of use has not been irrigated for four years and the area has
18 experienced drought conditions in the recent past, the expert report and testimony of Dr. Wayne
19 Burkhardt should also be prohibited from being offered at trial. Dr. Burkhardt's first opinion at
20 page three of his expert report states that "[c]urrent vegetation growing on the subject
21 property...has not been irrigated to a significant beneficial or productive purpose for at least two
22 decades and more likely has never been irrigated". Again the relevant inquiry as to the historical
23 practice of irrigation on the proposed place of use is over twenty years ago, making the recent
24 observations of vegetation immaterial. The next opinion states, "no irrigated pasture forage plants
25 and only limited dry range plants were found on this property." The property has not been
26 irrigated since 2002 and therefore any finding by an expert in vegetation is immaterial and unduly
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3 prejudicial because it does not characterize the property when it was being irrigated and when the
4 IDWR agent observed the proposed place of use during the licensing process.

5 The Expert Report of Dr. Glen H. Logan describes the current condition of the soils within
6 the Jernberg proposed place of use. Dr. Logan also make numerous statements regarding what
7 may happen to portions of the proposed place of use if it is continued to be irrigated in its current
8 condition. The future application of water to the proposed place of use is not relevant in this
9 hearing. This analysis and report relies on soil samples as they presently exist and not upon what
10 the soil conditions were at the time of the license examination, which is the proper inquiry. In
11 addition to that issue is whether the makeup of the soils is relevant to finding that the proposed
12 place of use was irrigated and how much water was irrigated onto those lands.

13 The Export report of David B. Shaw and Norman C. Young suffer from the same infirmity
14 as the above-mentioned reports: they describe the place of use in its present day condition. They
15 do not factor in the period of non-use or the fact that cattle continue to graze on the land. As
16 many as 1100 head of cattle graze the proposed of use during certain periods of the year and it is
17 well known that cattle create havoc with earthen irrigation canals. The report also does not take
18 notice of the irrigation practice used by Jernberg, which was to pool the water in low areas until it
19 could be poured out into higher or other low laying areas. In that manner a system of dams
20 worked with the existing canals to irrigate the entire proposed place of use.

21 Therefore, the submission of the State's experts' reports should be prohibited as they
22 create unfair prejudice by focusing the decision maker's attention to criteria that do not apply to
23 the license and partial decree of a water right in the State of Idaho.

24 **b. Confusion of the Issues**

25 As discussed above, the main issue to resolve at trial is what volume of water was used on
26 the proposed place of use. The condition of the soils, the vegetation currently found on the
27 proposed place of use and the current condition of the earthen canal ditches confuses that issues.

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3 Furthermore, the soil makeup and the vegetation merely confuse the issues of what grounds were
4 irrigated in the past and what amount of water was used to irrigate those lands.

5 **c. Waste of Time**

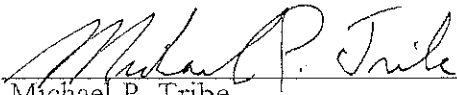
6 Consideration of the Report provides no beneficial information to help the fact finder in
7 this matter. The lengthy Reports and their authors' testimony will simply delay a decision by the
8 Court and needlessly extend the trial adding cost to both sides.

9 Therefore, the State of Idaho's expert reports and the testimony of such experts should be
10 excluded from evidence as is their probative value is substantially outweighed by the danger of
11 unfair prejudice, confusion of the issues and waste of time.

12
13 **5. Trial.** This action is presently set for a two and a half (2 ½) day court trial to
14 commence on December 4, 5 and 6 2006. Jernberg expects to take no more than one (1) full day
15 to present its case. Both Mr. Ling and Mr. Tribe will present at the trial.

16 DATED this 22nd day of November, 2006.

17 LING, ROBINSON & WALKER

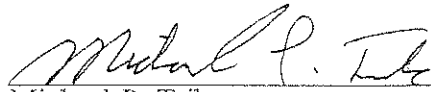
18
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20 By: 
21 Michael P. Tribe
22 Attorneys for Claimants/Objectors
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4 CERTIFICATE OF MAILING

5 I hereby certify that on the 22nd day of November, 2006, I served a true and copy
6 of the foregoing *Pretrial Brief* by the method indicated below, upon the following:

7 David J. Barber
8 Deputy Attorney General
9 State of Idaho
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x U. S. Mail
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Court Folder

10
11 
12 Michael P. Tribe