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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

Case No. 39576

Subcase No. 31-11845

**MEMORANDUM IN SUPPORT
OF MOTION IN LIMINE**

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 *Memorandum* in support of Objectors'/Claimants' *Motion in Limine* as follows:

I. Introduction

This matter is set for trial on December 4, 5 and 6, 2006. Based upon the original objection filed by Jernberg and the subsequent pleadings by both parties, the trial will involve a determination of these basic issues: 1) the amount of acres Jernberg has historically irrigated on his place of use, and 2) and the amount of water which was used on such land. Jernberg files his *Motion in Limine* with respect to the testimony or expert reports of the State of Idaho's expert witnesses based upon Idaho Rules of Evidence 402 and 403 to prohibit evidence and testimony

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3 regarding the current condition of the soil, conclusions of what may happen to the soil in the
4 future and evidence of the current vegetation growing on the permissible place of use for Water
5 Right No. 31-11845, each of which are not relevant to the determination of which acres were
6 irrigated and what amount of water was used on those acres.

7 Idaho Rule of Evidence (IRE) 402 declares that “[e]vidence which is not relevant
8 is not admissible”. In this case, evidence of the current condition of the Jernberg property is not
9 relevant to this action where the historical beneficial use of the claimed right is at issue. Idaho
10 Rule of Evidence 401 defines relevant evidence as “evidence having any tendency to make the
11 existence of any fact that is of consequence to the determination of the action more probable or
12 less probable than it would be without the evidence”. The current condition of the soils and the
13 existence of certain vegetation do not have any tendency to make the existence of any fact that is
14 of consequence to the determination of the action more probable or less probable than it would be
15 without the evidence. The facts of consequence in this matter are whether the place of use was
16 irrigated and by what amounts. The evidence to be offered by Dr. Logan and Dr. Burkhardt
17 impermissibly focuses the attention of this Court to the current conditions of the property and not
18 the historical use of the property and therefore is not relevant pursuant to IRE 402.

19 Pursuant to Idaho Rule of Evidence 403, Jernberg also seeks to prohibit the expert
20 reports of Dr. Wayne Burkhardt and Glen Logan because the probative value of the expert reports
21 or testimony based on such reports would be substantially outweighed by the danger of unfair
22 prejudice, confusion of the issues or waste of time. Under Idaho Rule of Evidence Rule 403,
23 certain evidence may be excluded if its probative value is substantially outweighed by the danger
24 of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue
25 delay, waste of time, or needless presentation of cumulative evidence. The following provisions
26 of IRE 403 are applicable to the State’s expert reports because the danger of unfair prejudice,
27 confusion of the issues or waste of time substantially outweigh their probative value.

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3 In short, these experts are judging and forming opinions of the permissible place of
4 use based upon its current condition and not upon when the claim and license were originally
5 filed. The relevant times of inquiry for the amount of water used of the proposed place of use is
6 1984, the date the underlying license was reinstated by the Idaho Department of Water Resources
7 ("IDWR") or 1986, the time IDWR conducted its beneficial use field exam of the place of use.

8 II. Discussion

9 The Idaho Supreme Court has stated that "motions *in limine* seeking advanced
10 rulings on the admissibility of evidence are fraught with problems because they are necessarily
11 based upon an alleged set of facts rather than the actual testimony which the trial court would
12 have before it at trial in order to make its ruling." *States v. Hester*, 114 Idaho 688, 760 P.2d 27
13 (1988). However, in this case, based upon the expert reports submitted by the State of both Dr.
14 Burkhardt and Dr. Logan, the Court is well aware what the actual testimony will be.

15 Jernberg is well aware that IRE 403 does not offer protection against evidence that
16 is merely prejudicial in the sense of being detrimental to his case. The rule protects against
17 evidence that is unfairly prejudicial, that is, it tends to suggest decision on an improper basis.
18 *State v. Floyd*, 125 Idaho 651, 873 P.2d 905 (Ct.App.), *cert. denied*, 513 U.S. 935 (1994). The
19 improper basis in this case would be the Court relying on the current conditions of the property
20 rather than evidence of the historical practice on the place of use.

21 A. Unfair Prejudice

22 The expert reports of Dr. Logan and Dr. Burkhardt, with their accompanying
23 exhibits, rely upon contemporary data for their conclusions and findings and should therefore be
24 excluded from evidence at the trial for Water Right No. 31-11845.

25 1. Expert Report of Dr. J. Wayne Burkhardt

26 Because the place of use for Water Right No. 31-11845 has not been irrigated for
27 four (4) years and the area has experienced drought conditions in the recent past, the expert report

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3 and testimony of Dr. J. Wayne Burkhardt should be prohibited from being offered at trial. The
4 expert report of Dr. Burkhardt, *Vegetation Reconnaissance of the Jernberg Property Relative to*
5 *Irrigation Water Rights Claims*, lists several opinions regarding the place of use. Dr. Burkhardt's
6 first opinion at page three (3) of his expert report states that "[c]urrent vegetation growing on the
7 subject property...has not been irrigated to a significant beneficial or productive purpose for at
8 least two decades". Again the relevant inquiry as to the historical practice of irrigation on the
9 proposed place of use is over twenty years ago, making the recent observations of vegetation
10 immaterial. The next opinion states, "no irrigated pasture forage plants and only limited dry range
11 plants were found on this property." The property has not been irrigated since 2002 and therefore
12 any finding by an expert in vegetation is immaterial and unduly prejudicial because it does not
13 characterize the property when it was being irrigated and when the IDWR agent observed the
14 proposed place of use during the licensing process.

15 Opinion number four (4) concludes with a legal conclusion that irrigation of arid
16 and semi-arid native rangeland vegetation "has not proven to be a beneficial or productive
17 economic practice." This is an impermissible legal conclusion which comments upon the ultimate
18 decision that can only be made by the fact finder. Opinions number five (5) and six (6) further
19 comment upon the current condition of the land and vegetation growing thereon. Further
20 evidence of hay and manure residue is consistent with the fact that the ground has not been
21 irrigated for the past four years and that such absence of water creates the need to supplement the
22 cattle's food supply.

23 At page four (4) of Dr. Burkhardt's expert report, he explains the purpose of his
24 survey and subsequent report. "The purpose of this survey was to identify and characterize the
25 **current vegetation growing on this property** and make interpretations regarding past or current
26 application of irrigation water to this property." *Vegetation Reconnaissance of the Jernberg*
27 *Property Relative to Irrigation Water Claims*, p. 4. The review of the current prevalence of plants

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3 or the lack of certain vegetation is highly prejudicial to whether Jernberg regularly irrigated the
4 ground prior to and at the time he filed for the license on the subject property.

5 Dr. Burkhardt's expert report lists approximately eighteen (18) photographs of the
6 Jernberg property as it looked in August of 2006. Again, the relevant inquiry is what amount of
7 water was being used on the Jernberg property at the time the Application for Permit was filed by
8 Mr. Jernberg, not the current condition of the property. These photographs merely show the
9 present condition of the property after a four-year period of non-irrigation. In addition, the
10 photographs at page seventeen (17) of Dr. Burkhardt's report are four (4) photographs of a portion
11 of the ditch delivery system as it presently looks on the proposed place of use. Again, these
12 photographs are highly prejudicial in that they show the present condition of the diversion works
13 with a four-year gap in irrigation and after years of wear from the weather and several hundred
14 head of cattle that graze on the place of use. Therefore, any testimony or portion of Dr.
15 Burkhardt's expert report that discusses the current status of the Jernberg property should be
16 prohibited from being offered as testimony or entered into evidence.

17 2. Expert Report of Glen H. Logan

18 Dr. Glen H. Logan submitted an expert report entitled *Expert report of Glen Logan,*
19 *Professional Soil Scientist, regarding the Physical and Chemical Characteristics of soil on 672.9*
20 *acres of land in Jefferson County.* In that report, Dr. Logan describes the current condition of the
21 soils within the Jernberg place of use. Dr. Logan also makes numerous statements regarding what
22 may happen to portions of the proposed place of use if it the current irrigation practice is
23 continued. The future application of water to the place of use is not relevant at this trial. Dr.
24 Logan's report relies on soil samples, as they presently exist, not upon what the soil conditions
25 were at the time of the license examination, which is the proper inquiry.

26 In addition to the query into the present-day soil makeup is the question as to
27 whether the makeup of the soils is relevant to finding that the place of use was irrigated and how

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3 much water was used on those lands. Therefore, the submission of the State's experts' reports
4 regarding the current vegetation found on the subject property and the makeup of the soils of the
5 property should be prohibited as they create an unfair prejudice by focusing the decision maker's
6 attention to criteria that should not apply to the licensing and partial decree of a water right in the
7 State of Idaho.

8 **B. Confusion of the Issues**

9 As discussed above, the main issues to resolve at trial are what amount of water
10 was used on what amount of acres. The condition of the soils and the vegetation currently found
11 on the proposed place of use merely confuse the issues of what grounds were irrigated in the past
12 and what amount of water was used to irrigate those lands. The test of beneficial use is to be
13 made at the time the license was applied for, not twenty years later. The portions of the expert
14 reports of both Dr. Burkhardt and Dr. Logan which propose to establish the amount of water
15 beneficially used of the Jernberg property by examining the current conditions of the Jernberg
16 property should not be allowed at trial as they confuse the issue of what water Jernberg put to
17 beneficial use and to what acres that water was applied.

18 **C. Waste of Time**

19 Consideration of the reports provides no beneficial information to help the fact
20 finder in this matter. The lengthy reports and their authors' testimony will simply delay a decision
21 by the Court and needlessly extend the trial, adding cost to both sides. Therefore, the State of
22 Idaho's expert reports and the testimony of such experts should be excluded from evidence as
23 their probative value is substantially outweighed by the danger of unfair prejudice, confusion of
24 the issues and waste of time.

25 **III. Conclusion**

26 Based on the above, the export reports of Dr. Glen H. Logan and Dr. J. Wayne
27 Burkhardt and any testimony regarding the findings of such reports should be excluded from

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3 evidence as they are not relevant and their probative value is substantially outweighed by the
4 danger of unfair prejudice, confusion of the issues and the time that would be wasted on
5 inadmissible testimony. Objectors/Claimants request a ruling from the Court that the expert
6 reports of Dr. Glen H. Logan and Dr. J. Wayne Burkhardt and any testimony regarding the
7 findings of such reports be prohibited because such reports have inflammatory characteristics or
8 aspects that outweigh whatever materiality they possess. Claimants/Objectors request that the
9 Court enter an order absolutely prohibiting counsel from offering such evidence at the trial

10 DATED this 28th day of November, 2006.

11 LING, ROBINSON & WALKER

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13 By: Michael P. Tribe
14 Michael P. Tribe
15 Attorneys for Claimants/Objectors
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November, 2006, I caused to be served a true and correct copy of the foregoing *Memorandum in Support of Motion in Limine* by the method indicated below, and addressed to the following:

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