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DEPARTMENT OF
WATER RESOURCES

Roger D. Ling, ISB No. 1018
Michael P. Tribe, ISB No. 6816
LING, ROBINSON & WALKER
Attorneys at Law
P.O. Box 396
Rupert, Idaho 83350
Telephone (208) 436-4717
Facsimile (208) 436-6804

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	)	OBJECTOR'S CLOSING ARGUMENTS

COMES NOW William A. Poulton, the objector in Water Right No. 45-00167A,
by and through his attorneys of record Ling, Robinson & Walker, and pursuant to the Court's
instruction, submits closing arguments in written form, to-wit:

I. Introduction

This case is not about the Claimant's failure to hire an attorney. This case is not
about any disagreements between the parties. This case is about whether Water Right No. 45-
00167A was ever actually applied to the claimed place of use and if so, was the right abandoned
or forfeited prior to the commencement of the Snake Rive Basin Adjudication on November 19,
1987, or August 23, 1988, the date John and Margaret Koyle filed their Notice of Claim to a
Water Right. Either date produces the same result. Based on the testimony presented at trial,

LING, ROBINSON & WALKER
ATTORNEYS AT LAW
RUPERT, IDAHO 83350-0396

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3 there was a clear period of nonuse on the proposed place of use. The Claimant had the
4 opportunity to present defenses to the period of nonuse or to establish a claim of resumption of
5 the use prior to a claim by Poulton. However, after the trial on the merits, it is clear that the
6 Claimant did not present any defenses and therefore any claim to divert water from Willow
7 Creek, under Water Right No. 45-00167A, has been lost through abandonment or forfeiture.
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9 Mr. Poulton objected to the Claimant's claim based upon Idaho Code § 42-222(2),
10 alleging that the water right had been either forfeited or abandoned for five (5) consecutive years
11 prior to when a claim was filed on the right, and that the right should be therefore be forfeited. A
12 Supplemental Director's Report regarding Water Right No. 45-00176A was issued by the Idaho
13 Department of Water Resources (hereinafter "IDWR") on April 14, 2006. Poulton, as the
14 Objector, has the burden of going forward with evidence to rebut the Director's Report as to all
15 issues raised by the objection pursuant to Idaho Code § 42-1411(5). The Director's Report is
16 prima facie evidence and the facts contained therein are presumed to be correct until such time as
17 an objector produces sufficient evidence to rebut the presumption. *State v. Hagerman Water*
18 *Right Owners, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997). Once the presumption is rebutted, it
19 disappears and the facts upon which the presumption is based are weighed with all other facts
20 that may be relevant. *Id.*
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23 II. Legal Issues

24 a. *Thompson v. Poulton Decree* is Not Evidence of Water Right

25 IDWR presented the *Thompson v. Poulton Decree* of 1908, as the basis for its
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3 recommendation and for the existence of Water Right No. 45-00167A. The Claimant's proposed
4 place of use does fall within the decreed property description of Bill Poulton's predecessor in
5 interest – William Poulton. That right was originally recommended as Water Right No. 45-
6 00167 in the *Thompson v. Poulton* decree. The right was then split after the Koyles filed a
7 Notice of Claim in 1988. However, the existence of the decree on the described ground does not
8 establish that water from Willow Creek was ever used on the Claimant's recommended place of
9 use. Based on the testimony at trial, it is clear that the ground was never irrigated.
10

11 The Director of IDWR and the Claimant cannot rely on a prior decree to establish
12 the nature and extent of a water right.

13 Nowhere in Title 42 is the Director "obligated to accept a prior
14 decree" issued in a private adjudication "as being conclusive proof
15 of the nature of a water right." This is especially true in light of
16 longstanding decisions in Idaho that decreed water rights, although
17 protected like any other water rights, are not insulated from re-
18 examination by the court and may be lost or reduced based on
19 evidence that the water rights has been forfeited. *Graham v. Leek*,
65 Idaho 279, 287-88, 144 P.2d 475, 479 (1943), abandoned,
Albrethsen v. Wood River Land Co., 40 Idaho 49, 59-60, 231 P.
418, 421-22 (1924); *as cited in State v. Hagerman Water Right*
Owners, Inc. 130 Idaho 736, 741, 947 P.2d 414 (1997).

20 The same rationale applies to the SRBA decision makers. The SRBA is not obligated and should
21 not accept a decree issued in a private adjudication, which the *Thompson v. Poulton* decree was,
22 as conclusive proof of the nature of the Claimant's recommended water right.
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24 The Objector testified that his family had never irrigated the proposed place of
25 use. Grant Matthews confirmed that testimony. There was no testimony raised in opposition by
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3 the Claimant nor was there any testimony that there was ever irrigation on the proposed place of
4 use despite the decree.

5 **b. No Extension of Time Granted Pursuant to I.C. § 42-222(3)**

6 Several legal theories could have prevented Water Right No. 45-167A from being
7 forfeited. The Claimant could have claimed that an extension of time had been granted pursuant
8 to I.C. § 42-222(3), but did not and the right cannot be preserved based on that concept. The
9 Claimant offered no evidence and presented no testimony that she had applied for or received an
10 extension of time pursuant to I.C. § 42-222(3) and therefore is not entitled to such a defense.
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12 **c. No Evidence of Resumption of Use**

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14 The Claimant presented no evidence that Water Right No. 45-167A had been
15 resumed prior to January 3, 2005, the date Poulton filed his Objection to the claim. The reason
16 for this dearth of evidence is because none exists. The Claimant did not present any evidence
17 that the former property owners had ever put the waters of Willow Creek to beneficial use. On
18 cross-examination, the Claimant testified that on more than one occasion she had taken water
19 from Willow Creek with a bucket and that water was dumped on her garden and the trees in the
20 northeast corner of her property. There was no testimony on the amount of water she used. That
21 action cannot meet the constitutionally mandated requirement of diversion and application for
22 beneficial use contemplated by Idaho law. If the Court views that as evidence of resumption of
23 use, then there was no evidence of diversion rate or what amount of land was irrigated; it would
24 be a situation of partial forfeiture, with the Claimant entitled to several buckets of water per year
25 for her garden and trees only.
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3 The second reason no evidence of resumption of use was presented at the trial was
4 because the Claimant did not understand the legal principle. The first time the Claimant became
5 aware that a forfeited right could be resumed was when the Court raised the issue in its August
6 22, 2006, *Order Granting in Part and Denying in Part Poulton's Motion to Strike Affidavits*, etc.
7 The Claimant instead focused on the Burley Highway District, who in 2004 moved the Willow
8 Creek streambed so that it was no longer appurtenant to her eastern property line. The reality is
9 that the Claimant moved onto the property in August of 1998. The streambed was not moved
10 until the summer of 2004 – six years in which the Claimant did nothing to resume the long
11 forfeited right other than use a bucket to remove water to a largely unidentified place of use.
12 Furthermore, if the Claimant claims as a defense to forfeiture that there were circumstances
13 beyond her control, such a defense must fail because that defense cannot be successfully asserted
14 after a claim to a water right is filed in the SRBA. The defense of circumstance beyond the
15 Claimant's control will be discussed more fully below.
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18 **d. Abandonment**

19 It is well established that mere nonuse of a water source is not enough to establish
20 abandonment of a water right. Abandonment of a water right requires and intent to give up the
21 right and actual relinquishment or surrender of the right. *Jenkins v. State Dep't of Water*
22 *resources*, 103 Idaho 384, 647 P.2d 1256 (1982). The actual relinquishment or surrender does
23 not require a declaration or other affirmative act. Rather, it refers to the relinquishment of
24 possession, i.e., the physical act of not using the water
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26 To constitute abandonment, properly speaking, there must be a
27 concurrence of act and intent, the relinquishment of possession,

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3 and the intent not to resume it for a beneficial use, so that the
4 abandonment is always voluntary, and a question of fact. It has
5 been said that to constitute an abandonment of a water-right, there
6 must be a concurrence of the intention to abandon it and the actual
7 failure in its use.

8 *Samuel C. Wiel*, 1 Water Rights in the Western States § 567 (1911)(cited as authority in *Gilbert*
9 *v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976)). The intention of a party to abandon a
10 water right must be proved by clear and convincing evidence of unequivocal acts, and mere non-
11 use of the water, standing alone, is not sufficient for a per se abandonment. *Jenkins v. State*
12 *Dep't of Water resources*, 103 Idaho 384, 388-89, 647 P.2d 1256, 1260-61 (1982). However,
13 intent may be evidenced by non-use for a substantial period of time.

14 The evidence presented at trial, as will be discussed more fully below, was that
15 the Church of Jesus Christ of Later-day Saints (hereinafter "LDS Church") purchased the Rose
16 property in 1914 from Sara and William Poulton. (Objector's Exhibit "1".) The LDS Church
17 then sold the property in 1972 to Margaret and John Koyle. (Objector's Exhibit "2".) There was
18 testimony that the LDS Church never irrigated the property and that in 1947 the church house
19 was moved off the property. The LDS Church did not use the property for any purpose from the
20 abandonment of the church house until it was sold to the Koyles in 1972. The removal of the
21 church house off the property coupled with the 58-year period of nonuse is sufficient evidence
22 that any water right that may have been appurtenant to the Rose property was voluntarily
23 abandoned. The removal is a clear and unequivocal act of its intent to abandon the right. It is
24 clear that the subjective intent of the LDS Church was that if they had a right to the waters of
25 Willow Creek they were abandoning such right by failing to transfer it to another, sell it to
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another, or somehow continue its use. The Claimant presented no evidence that would overcome the evidence of abandonment of the claimed water right and the right should not be recommended based upon common law forfeiture.

e. No Defense to Forfeiture Presented by Rose Pursuant to Idaho Code § 42-223.

Idaho Code §42-223 presents nine (9) exceptions or defenses to forfeiture. The Claimant did not present evidence at trial that any of these exceptions applied to her property or claimed water right. The exceptions are as follows:

i. The Land Was Not in Crop Set-Aside Program I.C. § 42-223(1).

The Claimant presented no evidence, testimony or exhibits that the land to which the water right would be appurtenant to have been placed in a crop set-aside program as set out in I.C. § 42-223(1).

ii. The Claimed Water Was Never Held by a Municipal Provider to Meet Future Needs I.C. § 42-223(2).

It is undisputed that the water right was never held or used by a municipal provider to meet future needs. The right was always appurtenant to the Claimant's property and never used for municipal purposes or any other purpose subsequent to the purchase of the property by the LDS Church in 1914.

iii. The Water was Needed to Maintain Full Beneficial Use Under the Right and Waste for Disposal Purposes was not Used to Supplement the Right Pursuant to I.C. § 42-223(3).

Neither the Claimant nor her witness offered any evidence or testimony that the full decreed amount of water was not needed due to land application of wastewater for disposal

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3 purposes such as a discharge from dairy lagoons used in combination with or substituted for
4 water diverted under the water right.

5 **iv. No Ground Water Management Plan that Restricted**
6 **Beneficial Use was Presented Pursuant to I.C. § 42-223(4).**

7 At the trial there was no evidence offered that a ground water management plan
8 had restricted the beneficial application and use of the claimed water right.

9 **v. The Water Right was not Rented or Placed in the Water**
10 **Supply Bank I.C. § 42-223(5).**

11 The Claimant did not offer evidence that the claimed water right had ever been
12 rented or placed in the water supply bank, such that the periods of nonuse would be excused and
13 prevent forfeiture.

14 **vi. The Periods of Nonuse did not Result from Circumstances**
15 **Over Which the Various Owners of the Property had no**
16 **Control as Required by I.C. § 42-223(6).**

17 The Claimant offered no evidence that the previous owners' nonuse of water
18 resulted from circumstances over which they had no control. For the years 1914 through 1998
19 there was no testimony or circumstance over which the owners of the property had no control
20 that prevented them from using the waters of Willow Creek. This statutory defense is only
21 available to those owners of the property prior to the Claim of Right was filed by the Koyles in
22 1988.

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24 The Claimant is not entitled to claim that circumstances beyond her control
25 prevented her from using the right. But if she were, there was no admissible evidence presented
26 that her nonuse was due to circumstances over which she had no control. Despite her subjective
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3 belief that Poulton prevented her from using it, the Claimant was not prevented from using the
4 waters of Willow Creek. The Claimant testified that Poulton told her that her water right was no
5 good. That was the extent of the Claimant's admissible testimony as to her belief that the nonuse
6 of the water, after she purchased the property in 1998, was due to circumstances over which she
7 had no control. In addition, there was no evidence of wrongful interference of the water right.
8 The Claimant did not seek help from any governmental agency to investigate whether the water
9 right was valid until IDWR came looking for her.
10

11 There was testimony that the Burley Highway District moved the streambed of
12 Willow Creek in the summer of 2004. However, the period of forfeiture had occurred long
13 before. The Claimant had the opportunity to resume any use she was entitled to, in the six years
14 she resided on the property before the ditch was moved. She did not; the Claimant should not be
15 able to sit on her hands for six years and then claim that in the summer of 2004, her nonuse of
16 the water suddenly resulted from circumstances over which she had no control. It was less than
17 six months later, January 3, 2005, that Poulton filed his objection. This period of approximately
18 six months after the streambed was moved cannot be used to defeat nearly nine decades of
19 nonuse. If the Claimant had an existing diversion works the Highway would have moved it like
20 they did for the Objector or would have figured out how to ensure the continued use of the
21 Claimant's diversion system. There were never circumstances over which the Claimant had no
22 control.
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25 Furthermore, if the Claimant was granted the water right she has no means to
26 divert the right from the recommended point of diversion. The Claimant testified that the
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streambed would be moved back by the highway district. However, the Claimant did not name any person with authority to make such a statement. She has no promise from any person in authority with the highway district that they would move the streambed back. The stream was altered for a reason - safety and maintenance - and will not be moved back simply because the Claimant asks for it.

There was no additional testimony by other witnesses that the periods of nonuse resulted from circumstances over which they had no control. In fact, the only other former property owner who was present, Margaret Koyle, testified that she and her husband simply allowed the land to sit unoccupied and fallow from 1972 until 1988; they kept the property as a potential home site for their children and did not put the waters of Willow Creek to beneficial use during that period. The Objector testified that there was always some water available in Willow Creek. That testimony was not challenged. Therefore, the Claimant cannot rely on the defense that there was not water available during the years of nonuse.

vii. The Right was Never Held by an Irrigation District, Carey Act Operating Company, or Any Other Company, Corporation, Association, or Entity as Described in I.C. § 42-223(7).

There was no testimony that the water right associated with the property was ever held by an irrigation district, Carey Act operating company, or any other company, corporation, association, or entity. The Claimant is therefore not entitled to this defense.

viii. The Water Right was Never Held by an Irrigation District Pursuant to I.C. § 42-223(8).

There was no testimony that the water right was ever held by an irrigation district and was excluded from the district. The Claimant is therefore not entitled to this as a defense.

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3 **ix. There was no Evidence that the Nonuse Resulted from a**
4 **Water Conservation Practice. I.C. § 42-223(9)**

5 The Claimant did not offer any evidence that the nonuse had ever resulted from a
6 water conservation practice and therefore in not entitled to claim this as a defense to forfeiture.

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8 **III. Evidence Presented**

9 During the Course of the trial, the Claimant did not produce any admissible
10 evidence, which established that she was entitled to the waters of Willow Creek.

11 **a. Idaho Department of Water Resources Recommendation and Presentation**

12 The most striking testimony presented by the Idaho Department of Water
13 Resources was the fact that field agent Jeanie Robertson never visited the proposed place of use.
14 Robertson conducted what is referred to as a “desktop review” of the right, which means that she
15 never physically inspected the property. This is key for several reasons; one, if she would have
16 physically inspected the property she would have realized that there was no diversion works or
17 anyway to divert water from the claimed point of diversion; two, that there are no established
18 ditches running from the claimed point of diversion to the property; and three, any evidence of
19 irrigation in the last twenty years in the northern portion of the property is from a ground-water
20 well used to irrigate a lawn.
21

22 During her direct examination, Robertson simply recited her findings as contained
23 in the Director’s Report with little to no additional information. When questioned on direct
24 examination, Robinson conceded that the dark shades or hues in the northeast corner of the
25 Claimant’s property on the 1987 map or the ‘near infrared digital image’ (IDWR’s exhibit
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3 number "6") could be from the large trees located in the riparian zone of Willow Creek. Based
4 upon the aerial photographs, Robertson "felt like she could recommend" the right. She made no
5 mention that there were remains of a structure in the southwest corner of the Claimant's Property
6 or that it could cause one to find evidence of irrigation where there was none.

7
8 Robertson testified that she could not determine that there wasn't irrigation. This
9 hardly seems to be the standard for recommending a water right and she admitted that this was
10 not necessarily a department wide standard. However, based on the information that Robertson
11 had before her, the *Thompson v. Poulton* decree, the Notice of Claim filed by the Koyles, and the
12 aerial photographs it is understandable why she made the recommendation. After the
13 presentation of the evidence at trial it should be clear to the Court that if there was ever was
14 irrigation or beneficial use of water on the Rose property it has been forfeited for nonuse for over
15 90 consecutive years. The Department never attempted to measure the amount of water claimed
16 to have been irrigated from Willow Creek. Robertson testified that the .04 cfs diversion rate was
17 granted based on the standard of one inch per acre, not evidence of historical practice or
18 beneficial use.
19

20 Each of the relevant photographs of the Claimant's property can be explained
21 away by the testimony of the Objector's witnesses. Robertson claimed that she could identify
22 striations in the aerial photographs that indicated irrigation. However, the Objector's expert
23 witness testified that he could not identify striations in the same photographs. The presumption
24 of the director's report was rebutted at trial and should be treated as evidence just like the other
25 exhibits and testimony offered at the trial.
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b. Jacob Mundt

Jacob Mundt's qualifications and experiences to testify in this matter were established through his resume and direct examination. In addition to his professional background Mundt stated that he had grown up on a farm and had experience irrigating as a youth. After direct examination regarding his educational and professional experience, Mundt was qualified as an expert in mapping technology and the interpretation of mapping technology. The Claimant made no objection to Mundt's. The court then allowed Mundt to testify within his field of expertise.

During direct examination, Mundt testified that aerial photos are not as reliable as eyewitness accounts. Mundt testified that in the 1962 and 1968 photographs (IDWR exhibits "2" and "3") he found no evidence that the land was corrugated for irrigation. Mundt further stated that he did not find evidence of striations in the 1976 photographs of the Rose property (IDWR exhibits "3" and "4"). This was in direct contradiction to Robertson's testimony that IDWR had identified striations. While there were striations in the land to the north of the Claimant's property, he could not identify clear evidence of striations in the Claimant's property.

Mundt spent a significant portion of his testimony explaining why a pond may appear in certain digital imagery of the place of use and why darker spots appear on portions of the place of use that could be inaccurately described as irrigated. Using IDWR's exhibit 5, Mundt explained that apparent in the exhibit are stream channels that are associated with upward (uphill) dipping contour lines. In the case of the Claimant's property, there are sequences of uphill dipping contours that are indicative of an abandoned stream channel in exhibit 5.

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3 Channels such as this are commonly hundreds of years in age. In exhibit 5, Mundt identified the
4 dips (commonly referred to as "V's" in hydrology) that approximate the older stream channel of
5 Willow Creek. He then testified that this was likely the old drainage of Willow Creek before it
6 was routed along its present course. The V's forming the abandoned channel were identified as
7 being broad and distinct, indicating a relatively mature channel. Mundt then testified that the
8 water likely flowed down this older drainage for quite some time.
9

10 At the southeast of section 9, the V's in the abandoned channel fade away. This is
11 typical in this type of fluvial environment because stream channels will meander back and forth
12 and cover up traces of older drainages. Mundt testified that the V shapes defining the abandoned
13 channel terminate directly into what is identified as a pond on IDWR exhibit #5 on the
14 Claimant's property. This indicates a change in topography; the stream was no longer running
15 down hill, but was pooling on land that was flat. When water changes velocity in this fashion, i.e.
16 running downhill in a stream channel, then moving into a low velocity pool, it loses kinetic
17 energy and drops its sediment load. In smaller channels, this commonly results in the deposition
18 of finer sediments in the pool. That is, finer sediments are picked up by the stream, are
19 transported downhill with the water and when the stream flows into the pond, they are deposited
20 in the form of mud.
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22 Mundt concluded that because of the evidence of the pond and the surrounding
23 area showing more vegetation, based on the topography, the placement of the abandoned stream
24 channel and the location of the pond in the map, it was logical that the anomaly (the pond and
25 other evidence of irrigation) is due to preferential deposition of fine sediments in a low velocity
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1 hydrologic feature such as a pond or lake. This could have happened over hundreds of years.
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3 Mundt then explained that the reason this is important is that finer sediments hold soil moisture
4 better than do more coarse sediments. This results in different types of vegetative growth
5 regimes, one with more moisture and one with less. The source of the moisture could be simple
6 winter/spring precipitation. Assuming both types of soils receive the same amount of water in
7 the spring, the finer sediments in the low areas will hold more moisture for longer periods of
8 time, resulting in different, moister vegetative growth. This is not necessarily a function of spring
9 runoff, but any spring flooding could certainly amplify the effect.
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12 In addition, Mundt testified that based on his examination of the aerial
13 photography that he could find no evidence of ditch works or a diversion work within the
14 Claimant's proposed place of use. There was no evidence of an overall irrigation delivery
15 system on the proposed place of use that he could identify based on his years of education and
16 experience.
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18 **c. John Anderson**

19 The Claimant called John Anderson as a witness. Anderson offered no testimony
20 that the Claimant's water right had not been abandoned or forfeited nor did he contribute any
21 testimony that the Claimant was entitled to a statutory defense to forfeiture. Anderson offered
22 testimony that there are trees along the eastern boundary of the Claimant's property and that he
23 may have seen cattle on the Claimant's property, which "he thought" were Bill Poulton's.
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25 During cross-examination, Anderson testified that he had never actually been on
26 the Claimant's property and could therefore add nothing as to the condition of the property or
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3 whether any person had ever intentionally irrigated it. Second, Anderson admitted that he had
4 never personally inspected any of the cattle brands of the cattle he claimed to view at or near the
5 Claimant's property during his drive-bys of the property. Latter testimony by Grant Matthews
6 and Poulton established that the Claimant's property was commonly used as a cattle trail by area
7 ranchers and that Poulton or his family never grazed his cattle on the proposed place of use.
8 Finally, Anderson testified that he had been on the other side of Bill Poulton in an earlier dispute
9 over water several years ago thus giving him a reason and motivation to testify against Poulton in
10 this matter.
11

12 d. Grant Matthews

13 Grant Matthews testified that no person ever irrigated the Claimant's property
14 from as early as he could remember (he was born in 1926 in the area) until he left the area in
15 1978. Matthews is familiar with the property and has spent time on the proposed place of use.
16 Matthews testified that it was commonly referred to as the "Church House Corner" because the
17 Church of Jesus Christ of Latter-day Saint formerly owned it and maintained a meetinghouse on
18 the property. Matthews grew up in a house one mile to the east of the property and attended
19 church on the property in the 1930's and 1940's. Matthews was very clear in his testimony that
20 when the church was on the corner there was no irrigation of the property. He clearly
21 remembered the church house building with its attendant outhouse. When handed
22 Poulton/Objector's Exhibits 6, 7, and 8, Matthews was asked if the ground shown in those photos
23 was similar to the condition of the church house property when he attended church there. He
24 replied "yes", and also identified the young woman in Poulton/Objector's Exhibits 6. Matthews'
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3 testimony was not challenged at the trial.

4 After the church house structure was removed from the property, Matthews
5 continued to be familiar with the property as he drove cattle across it until 1978. Matthews
6 testified that there was never irrigation of the property. As it was the easiest way for cattle to
7 water that were being grazed on the open range near the property, and because the property was
8 never fenced in those days, cattle would often congregate on the property to drink out of Willow
9 Creek
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11 Matthews also testified that nearly every year he was familiar with it, Willow
12 Creek would overrun its banks in the spring and that the runoff would flow onto the Claimant's
13 property and collect in the northwest corner. He testified that the reasons for the flooding was
14 that the heavy spring flow would surge over its banks and the culverts used to pass Willow Creek
15 under the road running through the area. In addition, ice or other debris would clog the culverts
16 and the streambed causing water to overrun its banks.
17

18 Based on Mr. Matthews undisputed testimony the water right was clearly not used
19 during the years 1936 to 1978; these are the years that Matthews personally observed the
20 property, was on the property and was old enough to have a clear accurate memory of the
21 property. Water Right No. 45-00167A should therefore be forfeited for nonuse during the years
22 1936-1978.
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24 **e. Margaret Koyle**

25 Margaret Koyle supported Matthews' testimony by confirming that no irrigation
26 had occurred on the property from 1972, the year she and her husband purchased the property
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3 until 1988, when they sold the property to Clark Harmon. As the Court well knows, Koyle did
4 not voluntarily testify at the trial. She did not support the Objector or the Claimant, which makes
5 her testimony all the more credible and reliable. Koyle testified that she and her husband, John,
6 purchased the property from the LDS Church in 1972. The purchase was in anticipation that
7 either they or one of their children would build a home there. They never did. Koyle testified
8 that she and her husband never leveled or prepared the ground for agricultural purposes, they
9 never planted crops on the ground, never grazed cattle on the ground and never leased the land or
10 the water right to others so they could irrigate the property. Koyle further testified that when
11 they purchased the land there was no diversion works or evidence of irrigation ditches on the
12 property.
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14 The effect of her testimony is that during their ownership of the land it sat idle,
15 much as it had since the LDS meetinghouse was removed in 1947. Therefore, an additional
16 period of nonuse can be found from 1972-1988 when the Koyles owned the property. The
17 property sat unfenced and unused other than for a place for cattle to water from Willow Creek
18 and as a way for cattle to be moved from east to west and west to east as testified by Grant
19 Matthews. The Claimant offered nothing to refute or rebut Koyle's testimony. The Claimant
20 has not claimed a stock watering right to the waters of Willow Creek.
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23 f. Cory King

24 Cory King stated under oath that he had helped level the Claimant's property in
25 approximately 1988. King was physically on the ground and helped bury the abandoned church
26 house foundation and generally prepare the ground so Clark Harmon could place a house on the
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3 property. Through the use of his company's equipment, King along with several young men
4 from his church group completed the leveling of much of the property. King testified that he saw
5 no evidence of irrigation ditches, diversion works or any other evidence of irrigation on the
6 property at that time. The ground, according to King, was simply sagebrush and dirt.
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8 King's testimony will not establish a period of forfeiture but it does establish that
9 there could not have been a resumption of use of the water right because there was no physical
10 way for the subsequent owners to divert water from Willow Creek and put it to beneficial use.

11 **g. William "Bill" A. Poulton**

12 Bill Poulton testified that he was born in the Willow Creek area in 1953. He has
13 remained in the area with the exception of a two-year period for a LDS Church mission and for
14 one summer while he was employed out of the area. Mr. Poulton lives a quarter mile to the
15 northeast of the Claimant's property and he grew up in a home just north of the property.
16 Poulton testified that he had often played on the Claimant's property as a child. He explained
17 that the property was far enough from home that it was an adventure to play there – that he felt
18 like Huck Finn. Poulton stated that the remains of the church house foundation were on the
19 property and that in the spring he would play in the ponds created from spring runoff and that in
20 those temporary collections of water, tadpoles and frogs would appear, which made the property
21 especially attractive to children. In addition to playing on the ground as a youth, Poulton has
22 also recently been on the property to retrieve stray cattle and clean out the culvert over which the
23 Claimant's driveway runs. Also, Poulton's headgate lays approximately six to eight feet from
24 the northern boundary of the property. Prior to Willow Creek being rerouted, the Claimant's
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3 culvert would frequently become clogged with debris and Poulton would clean it out so he and
4 the other downstream water users could receive water. Based on the above, there is no one with
5 a better contemporary knowledge of the property than Poulton.

6
7 There was clear uncontroverted testimony that Poulton nor his parents ever
8 irrigated the Claimant's property. He testified that no one had ever irrigated the property, that
9 the property never had irrigation ditches or diversion works on it in his lifetime. There was no
10 way for water to ever be placed on the property for beneficial use. He testified that none of the
11 previous owners of the property ever had a headgate or other ditches running from Willow Creek
12 to the claimed place of use. In addition, no past owner had ever taken water from his headgate
13 and diversion works that run to the north and west of the property. This would be impossible
14 because Poulton's headgate was approximately six to eight feet from the north of the Claimant's
15 property. Poulton also testified that the northwest corner of what IDWR identified as the place
16 of use for the water right, was actually Poulton's based on a land exchange with the former
17 owner Clark Harmon. Poulton then testified that any evidence of irrigation in the aerial
18 photographs, after approximately 1988, was due to Clark Harmon watering a lawn with a well.
19 That testimony was not challenged and IDWR exhibits 7 and 8 establish this fact.
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22 Poulton testified that there were additional downstream users who take water
23 from Willow Creek such as Sharon Harrison. Poulton further testified that there is not always
24 enough water from Willow Creek for all the users on the creek and that any additional use would
25 lessen his rights and those users downstream of him and the Claimant's property. Willow Creek
26 flows past the Claimant's proposed place of use to other users but not in large quantities.
27

Poulton further testified that neither he nor his family ever pastured cattle on the place of use. This was directly contrary to the claim of John Anderson that he had seen cattle on the property. The court is the ultimate weigher of credibility issues and must determine whether Anderson saw cattle on the property after testifying that the angle of the road forces drivers to watch the road and not the Claimant's property, and to the fact that trees prevent drivers from actually viewing most of the property. Even if someone mysteriously pastured cattle on the Claimant's property, this is not evidence of irrigation or that it was the Poulton families cattle. Anderson did not testify when he saw cattle, during what season he may have seen them or how many he observed.

Poulton's testimony was clear that neither he nor his family had irrigated the Rose Property since the LDS Church purchased it in 1914. He testified that no one else had irrigated the place of use from Willow Creek and that he had never granted another the right to use his headgate of ditches to irrigate the property. Poulton's testimony was based on his experience on and around the Claimant's property for over fifty years and was not challenged by any witness at trial.

h. Leah Rose

The Claimant took the stand in her own behalf at the end of the trial. She never presented a theory on who irrigated the place of use or when or why someone would have irrigated it. Rather, the Claimant relied upon IDWR's recommendation and the presumption it carries. If one was to guess as to the Claimant's theory, it appears to be that Poulton must have clandestinely irrigated the property when no one was looking and then intentionally pastured his

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3 cattle on the property. If that is the Claimant's hypothesis, it remains simply that – a hypothesis.
4 Poulton denied irrigating the property or ever intentionally grazing cattle on it. Poulton testified
5 that there was never a means to irrigate the property. The Claimant presented no testimony or
6 exhibits that establish that the property was ever irrigated.

7
8 The majority of the Claimant's testimony was inadmissible hearsay that cannot be
9 considered by the Court even if it was relevant. The Claimant offered no testimony that a person
10 had intentionally watered the property before or after the LDS Church had purchased the
11 property from Sarah A. Poulton and William S. Poulton in 1914. She cannot, because there is no
12 one who ever irrigated the property.

13 **IV. Conclusion**

14 Based on the admissible evidence presented at trial, there is no evidence that
15 Water Right No. 45-00167A was ever beneficially applied to the recommended place of use.
16 Water Right No. 45-00167A should be decreed abandoned or forfeited for nonuse for a period of
17 over five consecutive years. The period of nonuse is over ninety consecutive years based on the
18 evidence presented at trial. The Claimant presented no defenses to forfeiture at trial. Poulton
19 has presented evidence to rebut IDWR's recommendation and produced clear and convincing
20 evidence that the right should be forfeited for nonuse. The Court's final determination should be
21 based on the evidence presented at trial and the Claimant should be treated as any other litigant
22 and the evidence weighed without regard to her lack of counsel. The users of Willow Creek
23 have for years managed the available water amongst themselves, without the additional use
24 alleged to be the Claimants. Any amount awarded to the Claimant would harm their delicate
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3 balance of sharing, which has developed over the course of decades amongst the users of Willow
4 Creek.

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6 Respectfully submitted this 25th day of January, 2007.

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8 LING, ROBINSON & WALKER

9
10 By: Michael P. Tribe
11 Michael P. Tribe
12 Attorneys for Objector, William A. Poulton
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3 CERTIFICATE OF MAILING

4 I hereby certify that on the 25th day of January, 2007, I served a copy of the
5 foregoing *Objector's Closing Arguments* upon:

6 1. Original to:

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

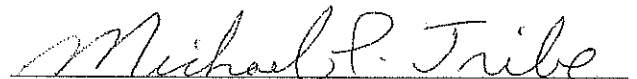
10 2. One copy to the claimant of the water right at the following address:

11 Leah Rose
12 994 S. 150 E.
Burley, ID 83318

13 3. Copies to:

14 Chris Bromley
15 State of Idaho, Office of the Attorney General
16 P. O. Box 44449
Boise, Idaho 83711-4449

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

19 
20 Michael P. Tribe