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DEPARTMENT OF
WATER RESOURCES

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	)	CHALLENGER'S OPENING BRIEF
	)	
	)	
	)	

COMES NOW William A. Poulton, the objector in Water Right No. 45-00167A,
by and through his attorneys of record Michael P. Tribe of Robinson & Associates, and pursuant
to A.O.1, section 13, respectfully submits this *Challenger's Brief* pursuant to the *Order Modifying
Briefing Schedule on Challenge* of October 22, 2007.

I. Background

Leah Rose has claimed and the Idaho Department of Water Resources has recommended
that Rose is entitled to divert .04 cfs of the waters of Willow Creek. The elements of what
eventually became Water Right No. 45-00167 were originally decreed in the *Thompson v. Poulton*

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3 *Willow Creek Decree* of March 18, 1908, with a priority date of November 23, 1881. In its Basin
4 45 Director's Report filed with the SRBA District Court on September 7, 2004, the Department
5 recommended 45-167A to its current owner, Leah Rose. The amount of water diverted under 45-
6 167A, 45-167B and 45-13666 was limited to 25% or 1/4 of the stream flow of Willow Creek.
7 William Poulton is the owner of both 45-167B and 45-13666. Willow Creek is located in Cassia
8 County, Idaho. The property is located at the corner of 1000 South and 150 East in Burley, Idaho.
9 The claimed place of use for the right is 1.6 acres within the SE ¼ SE ¼ of Township 12 South,
10 Range 23 East Section 9.
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12 The 1.6-acre place of use originally belonged to the Poulton Ranch, which was owned by
13 Thomas Arthur Poulton. Around 1930, Thomas Arthur Poulton gave permission to LDS Church
14 officials to construct a church on the 1.6-acre parcel. When the church was on the 1.6 acres, there
15 was no water or electricity on the property, nor was there lawn or vegetation to water. The church
16 building was located on the 1.6 acres from 1930 until 1945. Eventually, the building portion of the
17 church was moved to a different location and all that remained was a basement with exposed walls.
18 After the removal of the church building, the property was considered vacant and its only use was
19 for a storage area for beehives and the occasional pasturing of cattle as they were driven from
20 various BLM allotments.
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22 After the property was left vacant, Thomas Arthur Poulton did not re-fence the ground back
23 into his property because the church parcel was in an out-of-the-way area. After the Church
24 abandoned the property, it sat vacant and was full of weeds and sagebrush. In addition, the property
25 was never cultivated or irrigated, but was infested by tall sagebrush and "June grass." Subsequent
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3 to the abandonment of the property, local landowners John and Margaret Koyle bought the corner
4 1.6 acres which the Church's building had stood on in 1972.

5 As stated in the *Supplemental Director's Report Regarding Subcase No. 45-167A*, John
6 and Margaret Koyle filed a claim to Water Right No. 45-167A for 0.04 cfs from Willow Creek
7 for the year-round irrigation of 1.9 acres on August 23, 1988. Nevertheless, the Koyles never
8 farmed or irrigated the property. The Koyles eventually sold the 1.6 acres to Clark B. Harmon
9 and Tina M. Harmon on May 8, 1989. The Koyles "never diverted" water for use on the property
10 during their period of ownership.
11

12 When the Harmons purchased the Church House Corner from the Koyles, they moved a
13 mobile home onto the property. Between the time Mr. Harmon purchased the property and the
14 time that he moved the mobile home onto the property, extensive excavation work was done to
15 cover the remains of the old church structure. Harmon had some fill-dirt hauled onto the lot
16 where the home is located. The home was placed on additional fill-dirt to avoid the run-off
17 sometimes caused by Willow Creek during high water.
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19 As of 1985, the property was a dry piece of ground, with concrete footings of an old
20 structure scattered on it. Cory King, a neighbor, was asked by Mr. Harmon to bury the structure
21 rubble with his Caterpillar after the Harmons purchased the ground. Mr. King did so and
22 covered the entire parcel of property. As Mr. Clark worked the piece of ground, he found no
23 evidence of ditches or headgates that would provide a way to irrigate the property. Since that
24 time there has never been any irrigation on the 1.6 acres, whether when the Harmons owned it or
25 since its purchase by Rose.
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3 There are presently no known neighbors or residents of the Willow Creek area that have
4 witnessed the irrigation of the 1.6 acres. Furthermore, Rose's claimed point of diversion in
5 cannot provide the water claimed by Rose because there is no means of diversion. Willow Creek
6 no longer is adjacent to Rose's eastern boundary line, which further makes the irrigation of her
7 property impossible. In 2002, the Idaho State Highway Department moved a portion of the
8 Willow Creek streambed. The reason for the move was that the Burley Highway District wanted
9 Willow Creek moved off the Highway District's right-of-way. The Highway District cut down
10 trees and moved the Willow Creek streambed approximately 20 to 30 feet west from where it ran
11 alongside 150 East.
12

13 Prior to the Highway District making this change, Rose objected to having the stream
14 moved. At some point after Rose objected, officials from the Highway District came to Mr.
15 Poulton and asked him if he had any ideas on how to solve the issue of relocating the streambed.
16 Mr. Poulton discussed the matter with the Highway District and they decided to move the
17 streambed to where it is currently located. At that time, Rose's driveway, which crossed the
18 Willow Creek streambed, was too low and was continually causing weeds and trash coming
19 downstream to form a dam and obstruct the natural flow of Willow Creek, making it difficult for
20 Mr. Poulton to take water at his point of diversion. On occasion, when Rose failed to clean out
21 the built-up obstructions in her driveway crossing, Willow Creek would run out of its bank to the
22 south and west. Rose, at that time, was unable to maintain the driveway crossing and it was
23 partly for that reason that the Highway District decided to move the Willow Creek stream so that
24 it would no longer run inside Rose's driveway crossing. With the Highway District's rerouting
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3 of Willow Creek, the streambed no longer runs parallel to Rose's property on the east side.

4 Because Rose never had a headgate or diversion works, the Highway Department didn't
5 replace any pumps or rebuild any diversion works for her as they did for Mr. Poulton. Neither Rose
6 nor her predecessors in interest have ever used Poulton's diversion works to irrigate Rose's place of
7 use. Poulton's headgate is located approximately 10 to 12 feet from the Northeast corner of Rose's
8 property.
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10 II. Legal Argument

11 12 A. WATER RIGHT NO. 45-167A SHOULD HAVE BEEN 13 DISSALLOWED AFTER THE SPECIAL MASTER FOUND 14 THAT POULTON CLEARLY ESTABLISHED NON-USE OF 15 WILLOW CREEK BETWEEN 1908 AND 1962 IN THE 16 SPECIAL MASTER REPORT OF MARCH 20, 2007

17 Throughout this case, Rose has presented no credible evidence that Water Right No. 45-
18 167A had been resumed prior to January 3, 2005, the date Poulton filed his Objection to the
19 claim. Rose has instead wholly relied upon the Department's recommendation and report. The
20 Department of Water Resources at the January 11, 2007, trial stated that there was some
21 indication of use of the water of Willow Creek on Rose's property. Tr. p. 23 LL 23-25.
22 However, there never was a determination of the season of use or whether the water was put to a
23 beneficial use as required by Idaho law.

24 Poulton raised the issue that water had never been diverted under Water Right No. 45-
25 167A. He testified that he was unaware who allegedly used the water right. Rose took the stand in
26 her own behalf at the trial but failed to present a theory on who irrigated the place of use or when or
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3 why someone would have irrigated it. She did state that some livestock had used the pasture since
4 she moved on the property. However, she failed to present evidence as to diversion of the claimed
5 rights. Rose relied upon IDWR's recommendation and the presumption it carries. Rose presented
6 no testimony or exhibits that establish that the property was ever irrigated. The majority of Rose's
7 testimony was inadmissible hearsay that should not be considered by the Court even if it was
8 relevant. Rose offered no testimony that a person had intentionally watered the property before or
9 after the LDS Church had purchased the property from Sarah A. Poulton and William S. Poulton in
10 1914. She cannot, because there is no one who ever irrigated the property.
11

12 Bill Poulton testified that he was born in the Willow Creek area in 1953. He has remained
13 in the area with the exception of a two-year period for a LDS Church mission and for one summer
14 while he was employed out of the area. Mr. Poulton lives a quarter mile to the northeast of the
15 Rose's property and he grew up in a home just north of the property. Poulton testified that he had
16 often played on the Rose's property as a child. He explained that the property was far enough from
17 home that it was an adventure to play there. Tr. p. 158 LL 21-25. Poulton stated that the remains of
18 the church house foundation were on the property and that in the spring he would play in the ponds
19 created from spring runoff and that in those temporary collections of water, tadpoles and frogs
20 would appear, which made the property especially attractive to children. In addition to playing on
21 the ground as a youth, Poulton has also recently been on the property to retrieve stray cattle and
22 clean out the culvert over which the Rose's driveway runs. Also, Poulton's headgate lays
23 approximately six to eight feet from the northern boundary of the property. Prior to Willow Creek
24 being rerouted, the Rose's culvert would frequently become clogged with debris and Poulton would
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3 clean it out so he and the other downstream water users could receive water. Based on the above,
4 there is no one with a better contemporary knowledge of the property than Poulton.
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7 **B. THERE WERE NO SPECIFIC FACTS DEMONSTRATING**
8 **RESUMPTION OF USE AFTER THE FINDINGS OF THE**
9 **DIRECTORS REPORT WERE REBUTTED BY**
10 **TESTIMONY OF OBJECTOR AND HIS WITNESSES**

11 There was clear uncontroverted testimony that Poulton nor his parents ever irrigated the
12 Claimant's property. He testified that no one had ever irrigated the property, that the property never
13 had irrigation ditches or diversion works on it in his lifetime. There was no way for water to ever
14 be placed on the property for beneficial use. He testified that none of the previous owners of the
15 property ever had a headgate or other ditches running from Willow Creek to the claimed place of
16 use. In addition, no past owner had ever taken water from his headgate and diversion works that
17 run to the north and west of the property. This would be impossible because Poulton's headgate
18 was approximately six to eight feet from the north of the Claimant's property. Poulton also testified
19 that the northwest corner of what IDWR identified as the place of use for the water right, was
20 actually Poulton's based on a land exchange with the former owner Clark Harmon. Tr. p. 158 LL
21 3-11. Poulton then testified that any evidence of irrigation in the aerial photographs, after
22 approximately 1988, was due to Clark Harmon watering a lawn with a well. That testimony was
23 not challenged and IDWR exhibits 7 and 8 establish this fact.
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25 Poulton testified that there were additional downstream users who take water from Willow
26 Creek such as Sharon Harrison. Tr. p. 165 LL 5-16. Poulton further testified that there is not
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3 always enough water from Willow Creek for all the users on the creek and that any additional use
4 would lesson his rights and those users downstream of him and the Claimant's property. Tr. p. 165
5 L. 17 - p. 166 L. 16. Willow Creek flows past the Claimant's proposed place of use to other users
6 but not in large quantities.

7
8 Poulton's testimony was clear that neither he nor his family had irrigated the Rose
9 Property since the LDS Church purchased it in 1914. He testified that no one else had irrigated
10 the place of use from Willow Creek and that he had never granted another the right to use his
11 headgate of ditches to irrigate the property. Poulton's testimony was based on his experience on
12 and around the Claimant's property for over fifty years and was not challenged by any witness at
13 trial.

14
15 Jacob Mundt also testified for Poulton at the trial. Mr. Mundt was qualified as an expert in
16 imagery and interpretation of aerial photography. Tr. P. 40 LL 6-10. When he was directly asked
17 whether based on his training and experience if an eyewitness account is more accurate for
18 determining conditions on the ground than an aerial photo he responded:

19 We have found – and we've done studies on exactly this. In fact
20 there is one publication in my CV that is directly related to user
21 interpretation of field plots, and that's directly correlative to remote
22 sensing imagery. And what we've found is it's really all over the
23 board and what you need to do, you have to go to the field. You
24 have to see it in order to have a good control over how well you've
25 actually interpreted it. It's very important to do.

26
27 Tr. p. 93 LL 4-12. After the testimony of Mr. Mundt, Poulton then produced several witnesses
28 who have personal knowledge of the property and testified that the property had not been
irrigated based on their personal knowledge. Mr. Mundt provided alternatives to IDWR's

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3 interpretation and the eyewitnesses provided personal accounts of the disputed irrigation
4 practices.

5 Mundt testified that in the 1962 and 1968 photographs (IDWR exhibits "2" and 3") he
6 found no evidence that the land was corrugated for irrigation. Mundt further stated that he did not
7 find evidence of striations in the 1976 photographs of the Rose property (IDWR exhibits "3" and
8 "4"). This was in direct contradiction to Robertson's testimony that IDWR had identified striations.

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10 While there were striations in the land to the north of the Claimant's property, he could not identify
11 clear evidence of striations in the Claimant's property.

12 Mundt spent a significant portion of his testimony explaining why a pond may appear in
13 certain digital imagery of the place of use and why darker spots appear on portions of the place of
14 use that could be inaccurately described as irrigated. Using IDWR's exhibit 5, Mundt explained
15 that apparent in the exhibit are stream channels that are associated with upward (uphill) dipping
16 contour lines. In the case of the Claimant's property, there are sequences of uphill dipping contours
17 that are indicative of an abandoned stream channel in exhibit 5. Channels such as this are
18 commonly hundreds of years in age. In exhibit 5, Mundt identified the dips (commonly referred to
19 as "W's" in hydrology) that approximate the older stream channel of Willow Creek. He then
20 testified that this was likely the old drainage of Willow Creek before it was routed along its present
21 course. Tr. p. 86 LL 1-20. The W's forming the abandoned channel were identified as being broad
22 and distinct, indicating a relatively mature channel. Mundt then testified that the water likely
23 flowed down this older drainage for quite some time.

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26 At the southeast of section 9, the W's in the abandoned channel fade away. This is typical
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3 in this type of fluvial environment because stream channels will meander back and forth and cover
4 up traces of older drainages. Mundt testified that the W shapes defining the abandoned channel
5 terminate directly into what is identified as a pond on IDWR exhibit #5 on the Claimant's property.

6 This indicates a change in topography; the stream was no longer running down hill, but was
7 pooling on land that was flat. When water changes velocity in this fashion, i.e. running downhill in
8 a stream channel, then moving into a low velocity pool, it loses kinetic energy and drops its
9 sediment load. In smaller channels, this commonly results in the deposition of finer sediments in
10 the pool. That is, finer sediments are picked up by the stream, are transported downhill with the
11 water and when the stream flows into the pond, they are deposited in the form of mud.

12 Mundt concluded that because of the evidence of the pond and the surrounding area
13 showing more vegetation, based on the topography, the placement of the abandoned stream channel
14 and the location of the pond in the map, it was logical that the anomaly (the pond and other
15 evidence of irrigation) is due to preferential deposition of fine sediments in a low velocity
16 hydrologic feature such as a pond or lake. This could have happened over hundreds of years.
17 Mundt then explained that the reason this is important is that finer sediments hold soil moisture
18 better than do more coarse sediments. This results in different types of vegetative growth regimes,
19 one with more moisture and one with less. The source of the moisture could be simple
20 winter/spring precipitation. Assuming both types of soils receive the same amount of water in the
21 spring, the finer sediments in the low areas will hold more moisture for longer periods of time,
22 resulting in different, moister vegetative growth. This is not necessarily a function of spring runoff,
23 but any spring flooding could certainly amplify the effect. Tr. p. 93 L 15 – p. 94 L 5.
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3 In addition, Mundt testified that based on his examination of the aerial photography that he
4 could find no evidence of ditch works or a diversion work within the Claimant's proposed place of
5 use. There was no evidence of an overall irrigation delivery system on the proposed place of use
6 that he could identify based on his years of education and experience. Tr. p. 94 LL 6-15.
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9 **C. THE SPECIAL MASTER DID NOT DETERMINE THE**
10 **PROPER POINT OF DIVERSION FOR A RESUMPTION OF**
11 **USE WHEN THERE WAS NO TESTIMONY THAT THE**
12 **CLAIMED POINT OF DIVERSION WAS CAPABLE OF**
13 **DIVERTING WATER**

14 There were several witnesses who testified at trial that the claimed point of diversion was
15 never used as a point of diversion. Cory King testified that the claimed point of diversion was
16 nothing more than where Willow Creek runs through a culvert under an existing driveway. *See*
17 *generally* Tr. p. 145 L 14 -Tr. p. 146 L 19. After being asked if there ever was a means to divert
18 from the Claimant's claimed point of diversion Mr. Poulton testified that:

19 Mr. Poulton. I've never saw one there

20 Mr. Tribe. Never seen a head gate?

21 Mr. Poulton. Never

22 Mr. Tribe. Never seen a ditch?

23 Mr. Poulton. No.

24 Tr. p. 166 LL. 17-25. This was given after Mr. Poulton testified that he had been familiar with the
25 property in question for his entire life and that he had played on the property as a boy because it was
26 south and within walking distance from where he grew up.

27 Idaho Code § 42-1411 requires certain that certain elements must be present for any lawful
28 water right. This includes a point of diversion as well as the period of use, purpose of use and place

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3 of use. Despite the recommendation by the Department of Water Resources, which has been
4 rebutted by the testimony of the above-mentioned witnesses, Rose has not demonstrated how that
5 claimed point of diversion was ever used. The testimony of Grant Matthews also emphasizes the
6 absence of a point of diversion. There is no testimony or evidence of a point of diversion and
7 Poulton respectively requests that this Court remand the matter back to the Special Master for
8 additional testimony of the subject. If Rose cannot offer evidence that the claimed point of
9 diversion was historically used the right should be denied for failing to comply with Idaho Code §
10 42-1411.
11

12 **E. THE SPECIAL MASTER FAILED TO CONSIDER THAT**
13 **THE WATER RIGHT WAS ABANDONED BASED UPON**
14 **THE EXTENDED PERIOD OF NONUSE.**

15 At page eight (8) if the *Order Denying Motion to Alter or Amend*, the Special Master
16 found, “[i]n this subcase, there was no clear and decisive act of abandonment, only nonuse.
17 *Order Denying Motion to Alter or Amend*, pg. 8 (issued September 6, 2007). Abandonment of a
18 water right requires 1) an intent to give up the right, and 2) an actual relinquishment or surrender
19 of the right. *Gilbert v. Smith*, Idaho 735, 738, 552 P.2d 1220, 1223 (1976). The standard of
20 proof must be established by clear and convincing evidence of unequivocal acts, and mere non-
21 use of a water right, standing alone, is not sufficient for a per se abandonment.” *Jenkins v. State*
22 *Dep’t of Water Resources*, 103 Idaho 382, 388-89, 647 P.2d 1256, 1260-61 (1982). Such intent
23 may be evidenced by non-use for a substantial period of time, but mere non-use is not per se
24 abandonment. *Gilbert v. Smith*, 97 Idaho at 738, 552 P.2d at 1223.
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27 However, there was uncontested testimony at the trial that the church house was removed

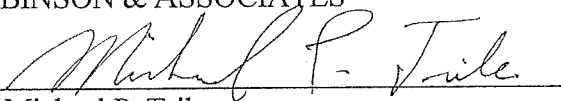
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3 in the late to mid 1950's. Tr. p. 119 LL. 20-22. Abandoning the property for which it was
4 formerly used is evidence that supports the Objector's theory of abandonment of any claim to a
5 water right in this case. In addition, the Church of Jesus Christ of Latter-day Saints latter sold the
6 property to Margaret Koyle and her husband. Mrs. Koyle testified at trial that she and her
7 husband purchased the property in 1972.
8

9 III. Conclusion

10 For the foregoing reasons, Poulton requests that Water Right No. 45-00167A be declared
11 forfeited or abandoned for nonuse and failure to comply with the provisions of the Idaho Code
12 regarding the mandatory elements of a water right.
13

14 Respectfully submitted this 30th day of November, 2007.
15

16 ROBINSON & ASSOCIATES

17 By: 

18 Michael P. Tribe

19 Attorneys for Objector
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CERTIFICATE OF MAILING

I hereby certify that on the 30th day of November, 2007, I delivered the original **CHALLENGER'S OPENING BRIEF**, and served true and correct copies, upon:

Original to: Clerk of the District Court
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Copies to: Leah Rose
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by hand delivering said original to the SRBA Clerk, and depositing copies of same in the U.S. Mail, postage prepaid, in envelopes addressed to all known parties to this action at the foregoing addresses.


Michael P. Tribe