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DEPARTMENT OF
WATER RESOURCES

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 Objector

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	)	MOTION TO STRIKE AFFIDAVITS
	)	IN REPLY TO
	)	<u>MOTION FOR SUMMARY JUDGMENT</u>

COMES NOW William A. Poulton, the objector in Water Right No. 45-00167A,
 by and through his attorney of record Michael P. Tribe of the firm Ling, Robinson & Walker,
 and pursuant to Idaho Rule of Civil Procedure 56(e) and the Idaho Rules of Evidence, hereby
 moves the Court to strike certain affidavits and exhibits or, in the alternative, certain paragraphs
 contained in the affidavits filed by Leah Rose ("Rose") in her reply to Poulton's *Motion for*
Summary Judgment and *Memorandum* in support thereof. When evidence presented in
 opposition to a motion for summary judgment is challenged as being inadmissible, the trial court
 must determine the admissibility of the evidence before ruling on the motion. Ryan v. Beisner,
 123 Idaho 42, 844 P.2d 24 (Id. App. 1992). This Motion is made and based upon the following:

MOTION TO STRIKE AFFIDAVITS IN REPLY
TO MOTION FOR SUMMARY JUDGMENT

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3 1. Both affidavits of Leah Rose should be stricken. Rose has submitted two
4 affidavits, one as a single-paragraph statement signed May 16, 2006, with an attachment of a
5 1978 aerial map, and the second as a 9-page affidavit with various exhibits attached thereto. The
6 one-page affidavit of Leah Rose should be stricken because Rose has not laid a proper
7 foundation that she is qualified to interpret aerial photography, she has not been qualified as an
8 expert to state that the aerial photograph may or may not show. Based on I.R.C.P. 56(e) and
9 I.R.E. 602, the entire single-paragraph affidavit of Rose should be stricken.

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11 2. The 9-page affidavit of Leah Rose should be stricken because the
12 document as a whole is not based on personal evidence and contains argumentative, irrelevant
13 and immaterial statements. Specifically, the following paragraphs should be stricken if the Court
14 allows those few paragraphs that are proper to be admitted:

15 A. Paragraph 6 is not based on personal knowledge of the affiant and is
16 therefore not admissible into evidence as required by I.R.C.P. 56(e) nor is it relevant, which
17 makes it inadmissible under I.R.E. 402. Specifically, Rose has no personal knowledge why
18 Poulton has filed an Objection to Water Right No. 45-00167A other than what Poulton stated in
19 his Objection, Motion and Memorandum.

20
21 B. Paragraph 7 is not based on personal knowledge of the affiant under
22 I.R.C.P. 56(e) and I.R.E. 602. Furthermore, Rose's statements are argumentative, claiming that
23 Poulton's *Memorandum* contains nothing more than unreasonable conclusions

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25 C. Paragraph 8 should be stricken in its entirety for the reasons that any
26 statements regarding Water Right 45-13666 is irrelevant and therefore immaterial, and is not

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3 admissible under I.R.C. P. 56(e). Further, Rose has included statements from John Anderson
4 that are not based upon her personal knowledge, in addition to being inadmissible hearsay
5 statements which John Anderson has related to Rose regarding Poulton.

6 D. Paragraph 9 should be stricken in its entirety. None of the statements
7 contained in this paragraph are based upon Rose's personal knowledge and are therefore
8 inadmissible under I.R.C.P. 56(e) and I.R.E. 602. Furthermore, Rose's statement that Poulton's
9 affiants have provided merely anecdotal evidence is argumentative not inadmissible.

10
11 E. Paragraph 10 should be stricken in its entirety because it is not based upon
12 Rose's personal knowledge under I.R.C.P. 56(e). Rose has inserted statements made by John
13 Anderson, Don Green, Florence Poulton Gibson, Garth Osterhout, and Blane K. Rose. Rose
14 further states that other neighbors have witnessed Poulton's cattle on the property during certain
15 years. Again, these statements are beyond the scop of Rose's personal knowledge and therefore
16 should be stricken under I.R.C.P. 56(e).

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18 F. Paragraph 11 should be stricken in its entirety as Rose's statements are
19 beyond the scope of her personal knowledge, and therefore should be excluded under I.R.C.P.
20 56(e). Specifically, that certain affiants supporting Poulton's *Memorandum* and *Objection* did
21 not walk the property, and the further inclusion of statements by John Anderson regarding what
22 the people who drive the road by Rose's property see and where their attention would be when
23 driving by her property.

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25 G. Paragraph 12 should be stricken in its entirety as it is irrelevant and
26 inadmissible at trial.

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3 H. Paragraph 13 should be stricken in its entirety as it is not based upon
4 Rose's personal knowledge. Rose has relied on the affidavits of Sharon Harrison, Dennis Koyle,
5 and Grant Matthews to try establish that her claimed water right should exist. Furthermore, Rose
6 draws conclusions regarding whether or not John Koyle's statements can be counted as fact,
7 whether or not Sharon Harrison's statements can be considered as fact, and further states that
8 Dennis Koyle would not harm any water claim by his father unless he was misled. Again, these
9 statements are not based upon Rose's personal knowledge and, therefore, must be stricken under
10 I.R.C.P. 56(e).
11

12 I. Paragraph 15 should be stricken in its entirety as it is not based upon Leah
13 Rose's personal knowledge. Rose claims to know the intent of the Koyles regarding the property
14 during their ownership which is, again, not based upon her personal knowledge.
15

16 J. Paragraph 16 should be stricken in its entirety as Leah Rose states that
17 Poulton willfully tried to prevent Clark Harmon from accessing Willow Creek water. Again,
18 Rose relies upon the affidavits of Clark Harmon and Blane Rose, rather than her own personal
19 knowledge as required by I.R.C.P. 56(e). Further, paragraph 16 contains inadmissible hearsay,
20 which is prohibited by I.R.E. 801.

21 K. Paragraph 17 should be stricken in its entirety as Leah Rose makes a legal
22 argument and conclusory statements that the water was taken from her and has been used by
23 Poulton, and presupposes that she is entitled to a water right. Furthermore, inadmissible hearsay
24 statements are contained in the paragraph when Rose states that Poulton told the Highway
25 District where to move the stream. Additionally, Rose makes statements regarding ten trees on
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3 her eastern boundary and that she is concerned for their safety, which is irrelevant as to whether
4 or not she has a valid water right in the waters of Willow Creek.

5 L. Paragraph 20 should be stricken in its entirety as the statements in such
6 paragraph are not based upon Rose's personal knowledge as required by the I.R.C.P. 56(e).
7 Futher, the last sentence of paragraph 20 is inadmissible hearsay as Rose claims that Poulton
8 makes a point of telling everyone that the property is his, which is a statement other than one
9 made by Poulton while testifying at the hearing and is offered in evidence to prove the truth of
10 the matter asserted.
11

12 M. Paragraph 21 should be stricken in its entirety as it is confusing and
13 argumentative and should be stricken by I.R.C.P. 56(e) and I.R.E. 402 as it is not relevant to this
14 proceeding.
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16 N. Paragraph 22 should be stricken in its entirety as it is legal argument and
17 not based on Rose's personal knowledge and should be prohibited by I.R.C.P. 56(e) and I.R.E.
18 602.

19 O. Paragraph 23 should be stricken in its entirety. Again, Rose relies on
20 statements that are not within her personal knowledge and it nothing more than an attempt at
21 legal argument.

22 P. Paragraph 24 should be stricken in its entirety. This paragraph appears to
23 be more legal argument and not based upon Rose's personal knowledge as required by I.R.C.P.
24 56(e). The conclusion contained therein contains a large portion of inadmissible hearsay
25 claiming to represent what Roger D. Ling has relayed to Rose and what Poulton has allegedly
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3 relayed to certain neighbors. This constitutes inadmissible hearsay under I.R.E. 801 and should
4 be stricken. Furthermore, Rose's rambling conclusion confuses the issues as to whether or not
5 there is a valid water right and if that right has been forfeited and/or abandoned. Rose makes
6 statements that are beyond her knowledge when she states that Poulton bears a grudge against
7 her.

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9 Based upon the above recitations, the entire affidavit of Leah Rose consisting of
10 nine pages should be stricken. If the Court is unwilling to strike the affidavit in its entirety, it is
11 respectfully prayed that the Court strike the above-mentioned paragraphs for the above-
12 mentioned reasons

13 3. The hand-drawn map listed as Exhibit "E" to the Rose affidavit should be
14 stricken based on lack of foundation. It is unclear whether a member of the Burley Highway
15 District actually drew this map. Rose has drawn all over it and it contains inadmissible hearsay
16 statements and confuses the issue under I.R.C.P. 56(e) and I.R.E. 801.

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18 4. The affidavit of John Anderson should be stricken in its entirety due to the
19 immaterial/irrelevant statements contained therein pursuant to I.R.E. 402. If the Court is
20 unwilling to strike the affidavit in its entirety, it is respectfully requested that the Court strike
21 specific statements contained in the first paragraph for lack of foundation, to-wit: "I saw
22 Poulton's cattle feed on the Rose acreage all the time during the years prior to the Harmon's
23 purchasing the property (which purchase occurred around 1987 or 1988.) I know the cattle
24 belong to the Poultons because they are the only people who run cows in this area." In the third
25 paragraph of the Anderson affidavit, it is requested that the Court strike as inadmissible hearsay
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3 under I.R.E. 801 the statement: "The Poultons have said the water that Ms. Rose is asking for
4 amounts to only about a 'cup' of water and they are upset she is fighting for this small amount."
5 The remainder of the third paragraph should be stricken as well because it contains irrelevant
6 statements that would not be permitted at trial under I.R.E 402 and therefore should be stricken
7 under I.R.C.P. 56(e).

8 5. The Affidavit of Blane K. Rose contains statements of inadmissible
9 hearsay and statements not based upon personal knowledge of the affiant, and therefore should
10 be stricken in its entirety based on I.R.E. 801 and I.R.C.P. 56(e).

11
12 A. Specifically, in the second full paragraph, Mr. Rose includes inadmissible
13 hearsay statements made by Clark Harmon regarding Poulton and disagreements over certain
14 water rights. The entire second paragraph should be stricken based on I.R.E. 801.

15 B. The fourth paragraph should be stricken because it is not based on
16 personal knowledge as is required by I.R.C.P. 56(e). Specifically, in the third sentence of the
17 fourth paragraph to the end of the paragraph, Mr. Rose makes statements that he "would think if
18 there was feed on the ground and Poulton felt it was his property, any resourceful livestock
19 owner would not let the feed go to waste but would use it and irrigate the ground for that
20 livestock. Mr. Poulton has never explained why the Harmons are not using the water." These
21 statements are not based upon personal knowledge, are irrelevant to the claim of water use as
22 well as immaterial and should be excluded under both I.R.C.P. 56(e) and I.R.E. 401 and 402.

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24 C. The fifth paragraph should be stricken in its entirety as it is a statement not
25 based upon the personal knowledge of the affiant. Mr. Rose states that he "understands what
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3 Poulton was trying to do now.” Again, it is not based on his personal knowledge of what
4 Poulton was or was not planning on doing.

5 D. The sixth paragraph should be stricken as it is irrelevant under I.R.E. 402.

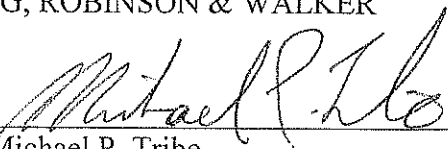
6 E. The eighth paragraph should be stricken in its entirety and, if not in its
7 entirety, it is respectfully suggested that the statements, beginning with the second full sentence
8 to the end of the paragraph, constitute inadmissible hearsay under I.R.E. 801 and should be
9 stricken. Specifically, “Clark Harmon mentioned he would have accessed the water from that
10 ditch because it was quite easy to get the water into the subject pasture that way. In fact, I was
11 later told the highway district considered an option to move the Willow Creek stream to the
12 south of the property for an easy way for the subject property to access it. But, since Poulton
13 told them we did not have a valid water claim, they decided against it.” Those statements should
14 be stricken from the record based upon I.R.E. 801.
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16 F. Paragraph nine should also be stricken in its entirety based upon the
17 statements that are no more than an attempt at a legal argument. Mr. Rose is not in a position to
18 ask Poulton to “prove whether or not the water came from his ‘personal well’ or not.” In
19 addition, Mr. Rose cites statements by Boyd Richins that are beyond Mr. Rose’s personal
20 knowledge and should be stricken from the record.
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22 Therefore, based upon the foregoing argument, the Idaho Rules of Civil
23 Procedures, and the Idaho Rules of Evidence, it is respectfully requested that this Court grant this
24 Motion in its entirety.
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3 DATED this 22nd day of May, 2006.

4 LING, ROBINSON & WALKER

5
6 By: 

Michael P. Tribe

7 Attorneys for Objector, William A. Poulton

8
9
10 **CERTIFICATE OF MAILING**

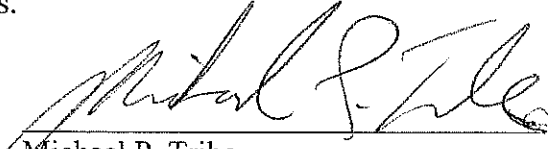
11 I hereby certify that on the 22nd day of May, 2006, I served true and correct copies
12 of the foregoing *Motion to Strike Affidavits in Reply to Motion for Summary Judgment* as
13 follows:

14 Leah Rose, Claimant
15 994 S. 150 E.
16 Burley, ID 83318

17 IDWR Document Depository
18 P. O. Box 83720
19 Boise, Idaho 83720-0098

20 Chief, Natural Resources Division
21 Office of the Attorney General
22 State of Idaho
23 P. O. Box 44449
24 Boise, Idaho 83711-4449

25 by depositing said document in the United States mail, postage prepaid, in envelopes addressed
26 to said persons/entity at the foregoing addresses.

27
28 
Michael P. Tribe