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DEPARTMENT OF
WATER RESOURCES

Leah Rose
Claimant
994 S. 150 E.
Burley, ID 83318
Pro Se

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. 45-00167A

**CLAIMANT'S OPPOSITION TO
OBJECTOR'S MOTION TO STRIKE
AFFIDAVITS;**

**SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO THE MOTION FOR
SUMMARY JUDGMENT; and**

**MOTION TO STRIKE AFFIDAVIT OF
WILLIAM POULTON.**

COME NOW the CLAIMANT, Leah Grace Rose, and files this Opposition to Defendant's Motion to Strike Affidavit of Leah Grace Rose. Additionally, Claimant intends that this merno be used to supplement her Reply to Memorandum in Support of Motion for Summary Judgment, which subsumed her affidavit. Finally, Claimant moves the Court to strike certain affidavits, in whole or in part, filed by Objector. In support of these matters, Claimant states as follows:

1. The Objector, Bill Poulton, filed his motion to strike the Claimant's affidavit on May 22, 2006.
2. At the hearing on June 1, 2006, the Special Master granted Claimant additional time to respond.

3. Objector seeks to strike all of Claimant's Affidavits supporting her opposition to the Motion for Summary Judgment.
4. Claimant admits that her Affidavit contains both statements of fact within her personal knowledge and argument in opposition to the Motion for Summary Judgment, and that submitting both together may not conform to general legal custom and practice.
5. Claimant avers that her Affidavit was intended to be both her Memorandum in opposition to the Motion for Summary Judgment and an Affidavit presenting statements of personal knowledge. This is evidence by the cover page to the Affidavit which state "Reply to Memorandum in Support of Motion for Summary Judgment." Claimant contends that if the Special Master were to strike the Affidavits in whole or in part, the Court would be placing form over substance and would essentially preclude Claimant's meaningful response and opposition to the Motion for Judgment.
6. Claimant admits that her affidavit may include deficiencies in form, but the Claimant is not a lawyer, is representing herself, and is a teacher's aid with extremely limited resources. Claimant is merely trying to protect her rights.
7. Rather than striking the affidavit and attached exhibits, the Objector can and has directed his argument to the weight of the affidavit and has also filed responsive affidavits. The Special Master can consider the Claimant's affidavit in light of the Objector's argument and responsive affidavits and rule accordingly. In light of the circumstances, this is a much more appropriate way to handle the affidavit, rather than to strike the affidavits.
8. Claimant believes that rather than striking affidavits or postponing the hearing, it is more reasonable to construe the Affidavit as containing both argument in opposition to the Motion for judgment and statements of fact within the affiant's personal knowledge. Additionally, it may be appropriate to allow the Objector the opportunity to file whatever additional responsive affidavits he now deems necessary.
9. Regarding her motion to strike certain portions of Objector's affidavit, Claimant contends that portions of the Affidavit of William A. Poulton contain inadmissible hearsay, irrelevant statements, and other information that could not be within the personal knowledge of the affiant.

MEMORANDUM IN OPPOSITION TO MOTION TO STRIKE

I. THE AFFIDAVIT OF LEAH ROSE SHOULD NOT BE STRICKEN BECAUSE IT WAS INTENDED TO BE BOTH AN AFFIDAVIT AND A MEMORANDUM IN OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT.

Because Claimant is unable to afford an attorney, she is representing herself *pro se*.

Accordingly, she is unfamiliar with the form of various pleadings, motions, and affidavits. In effect, the Claimant intended the Affidavit of Leah Rose to serve as both an affidavit alleging

facts within the personal knowledge of the affiant, and as her memorandum in opposition to the Objector's Motion for Summary Judgment. In the affidavit, Claimant-Affiant Rose makes

factual assertions within her personal knowledge, but also makes assertions and arguments in opposition to the Motion for Summary Judgment based on evidence in the Director's Reports,

as well as statements contained in other affidavits. The affidavit was intended to be both her Memorandum in opposition to the Motion for Summary Judgment and an Affidavit presenting

statements of personal knowledge. This is evidence by the cover page to the Affidavit which state "Reply to Memorandum in Support of Motion for Summary Judgment." Claimant

contends that if the Special Master were to strike the Affidavits in whole or in part, the Court would be placing form over substance and would essentially preclude Claimant's meaningful

response and opposition to the Motion for Judgment. Therefore, to the extent that the Affidavit of Leah Rose is argumentative, the Special

Master should consider such arguments to have been made and intended as argument in opposition to the Motion for Summary Judgment. To the extent that the Affidavit makes

statements attributed to other affiants, the Special Master should consider these as assertions cited in support of the Claimant's opposition to the Motion for Summary Judgment, and not as

Paragraph 8 argues that Mr. Poulton will not in fact suffer any injury because he has more than enough water for his needs, and in fact has excess. Mr. Poulton has argued that Claimant's right should be deemed forfeited or abandoned. Therefore, whether Claimant is successful in securing the water right or Mr. Poulton is successful in seeing the right revert to the State of Idaho, Mr. Poulton will not have lawful use of the 0.04 CFS. Further, the statements from John Anderson are merely citations of his affidavit in support of the argument. Therefore, Paragraph 8 is a relevant argument regarding the Objector's claim of injury.

D. Paragraph 9

Like the preceding paragraphs, number 9 was also intended to be argument in opposition to the Motion for Summary Judgment. The argument goes to the weight of the affidavits and evidence presented by the Objector on the Motion for Summary Judgment. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to be an argument.

E. Paragraph 10

Again, paragraph 10 was also intended to be argument in opposition to the Motion for Summary Judgment. It summarizes statements made in affidavits presented by the Claimant. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to be an argument supporting her contention that Mr. Poulton's grazing of the property is evidence that water was used on the property to provide sufficient grass for cattle to graze.

F. Paragraph 11

Again, paragraph 11 was also intended to be argument in opposition to the Motion for Summary Judgment. It argues that the Objector's affiant's lacked personal knowledge, or that

they did not or could not have perceived what they stated in their affidavits. This paragraph challenges the credibility of the affiants by challenging their ability to perceive the matters to which they swore. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to be an argument supporting her challenge to the affiant's personal knowledge. This paragraph also relates to the credibility of the witnesses, which credibility should be determined by the Special Master at trial.

G. Paragraph 12

Paragraph 12 is relevant and admissible because it alleges bias on the part of affiant Cory King. Bias, interest or prejudice are always relevant. The paragraph also goes to the issue of Mr. King's ability to have perceived that which he claimed to have knowledge.

H. Paragraph 13

Again, paragraph 13 was also intended to be argument in opposition to the Motion for Summary Judgment. It summarizes statements made in affidavits presented by the Claimant and Objector. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to be an argument supporting her contention of a lawful water right. The paragraph also challenges the credibility of statements made by the Objector's affiants.

I. Paragraph 15

Paragraph 15 was also intended to be argument in opposition to the Motion for Summary Judgment. It summarizes statements made in affidavits presented by the Claimant. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to

be an argument, citing evidence supporting her contention that there was no intention to abandon the claimed water rights.

J. Paragraph 16

Paragraph 16 similarly was intended to be argument in opposition to the Motion for Summary Judgment. It summarizes statements made in affidavits presented by the Claimant. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to be an argument supporting her contention that there was never any intent to abandon the water rights, and that Mr. Poulton affirmatively acted to prevent any diversion of the claimed water.

K. Paragraph 17

While argumentative, Paragraph 17 is within the personal knowledge of the Claimant-Affiant. She has lived on the property and states that she has been denied access to water for the reasons stated. She states that she was not consulted when the Highway District rerouted Willow Creek. She also has personal knowledge of the trees on her property and states that because she has not had access to water, the trees are dying. To the extent that Paragraph 17 is argumentative, it argues what the Claimant has argued from the beginning: that she has a water right. This paragraph could be used either as argument in opposition to the Motion for Summary Judgment or as a sworn statement within the personal knowledge of the Affiant.

Regarding Exhibit E, Claimant-Affiant presented Exhibit E as a true and correct copy of what was given to her by the Highway District. To the extent that this exhibit may be inadmissible, as lacking foundation, Claimant requests the opportunity to correct such deficiencies by securing an affidavit or certificate from the employee of the Highway District to authenticate the exhibit.

L. Paragraph 20

Paragraph 20 was also intended to be argument in opposition to the Motion for Summary Judgment. It summarizes statements made by the Objector to affiant Blane K. Rose, as stated in Mr. Rose's affidavit, and is relevant because it tends to show that the Objector has a bias. Claimant did not intend this paragraph to be a statement of personal knowledge, but rather to be an argument supporting her contention that Mr. Poulton is biased.

Regarding Exhibit F, Claimant did not clearly pronounce that the Deed was a true and correct copy made from the Public Records, but Claimant intended as much. The Exhibit is relevant both in showing the chain of title.

M. Paragraph 21

Paragraph 21 is also intended to be argument in opposition to the Motion for Summary Judgment. It raises questions as to the sufficiency of evidence presented by the Objector in support of his motion. Additionally, Objector's Motion for Summary Judgment is supported, at least in part, by an affidavit of his attorney, Michael Tribe. Claimant finds it unusual for an attorney in the case to be the source of substantive evidence in support of a motion for summary judgment, but in any case, Claimant believes it is her right to challenge the credibility and sufficiency of such evidence. Again, Paragraph 21 was not intended to be a statement of sworn fact, but argument.

N. Paragraph 22

Paragraph 22 is also intended to be argument in opposition to the Motion for Summary Judgment. It raises questions as to the credibility and perception of an affiant.

O. Paragraph 23

Paragraph 23 was also clearly intended by the Claimant-Affiant to be legal argument in

opposition to the Motion for Summary Judgment. It specifically responds to arguments made in Objector's Motion for Summary Judgment and raises questions about conclusory statements made by Objector in support of his motion.

P. Paragraph 24 and Conclusion

Paragraph 24 was also clearly intended by the Claimant-Affiant to be legal argument in opposition to the Motion for Summary Judgment. It specifically responds to arguments made in Objector's Motion for Summary Judgment.

As for the conclusion, Claimant admits that it is colored by her frustration in dealing with this case. However, the conclusion includes both Claimant's argument against the motion for Summary Judgment, and also statements within her personal knowledge. She is competent to testify about her perceptions and the effect that Mr. Poulton's words and actions have had on her. She stated her opinion and her state of mind regarding Mr. Poulton's grudge.

Additionally, the statements are not hearsay; the referenced statements are either admissible as a statement of a party-opponent, or statements made by an agent of party-opponent. IDAHO RULE OF EVIDENCE 801.

III. CLAIMANT'S EXHIBITS AND OTHER AFFIDAVITS SHOULD NOT BE STRICKEN

A. Exhibit E

As previously stated, Claimant-Affiant Rose intended, by including Exhibit E as an attachment to her affidavit to aver that it was a true and correct copy of the map given to her by the Burley Highway District. If the Special Master were to find that more were needed to authenticate the map, Claimant asks that the court grant more time, as discussed below, to cure any defects and provide proper foundation.

B. Affidavit of John Anderson

The Affidavit of John Anderson should not be stricken in part or in whole. Mr. Anderson's affidavit contains statement well within Mr. Anderson's personal knowledge. Specifically, the affidavit states what Mr. Anderson actually saw and perceived. (Affidavit of John Anderson, 1). Mr. Anderson is a long-time resident and his statements were supported by his personal knowledge. The statement is entirely relevant because, as Claimant alleges, for Mr. Poulton to have grazed cattle on the property, there must have been water accessible and in fact in use on the property to keep the land green and ripe for pasture. Mr. Poulton has argued that no water has ever been diverted or used, and is incapable of being diverted to the property. Therefore, the observations of Mr. Anderson are relevant and tend to show that water was used on the property.

Further, Mr. Anderson's statements of what the Poultons have said to him are not hearsay, but are admissible as a statement of a party-opponent.

C. Affidavit of Blane K. Rose

The statements of Mr. Rose are also relevant because they express Mr. Rose's perceptions of the use of water on the property. They are based on his personal knowledge or express his opinion on matters of common understanding.

The sixth paragraph is entirely relevant because it states, from personal knowledge, why the Claimant was prevented from using water. This is relevant to the objector's claims of abandonment and forfeiture.

IV. IF THE AFFIDAVIT OR EXHIBITS OF LEAH ROSE ARE STRICKEN, IN WHOLE OR IN PART, THE SPECIAL MASTER SHOULD ORDER A CONTINUANCE TO PERMIT CLAIMANT TO CURE ANY DEFECTS OR MAKE AND SECURE ADDITIONAL AFFIDAVITS.

Pursuant to Rule 56(f) of the Idaho Rules of Civil Procedure, if the Special Master finds that "the affidavits of the party opposing the motion for summary judgment cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained . . . as is just." I.R.C.P. 56(f).

Claimant has, however clumsily, presented affidavits and exhibits in opposition to the Objector's motion for Summary Judgment. The Idaho Department of Water Resources has also issued expert reports and provided competent evidence recommending the Claimant's water right. This evidence should be considered by the Special Master in ruling on the Motion for Summary Judgment. However, if the Special Master were to find that the affidavits are deficient or lack essential facts to justify Claimant's opposition to the motion for judgment, Claimant asks the Special Master for a continuance to allow time to submit additional affidavits in the interest of justice.

To the extent that the Exhibits attached to Claimant's affidavit are deficient, Claimant asks the Court for permission and additional time to redraft and refile the affidavits to provide the proper foundation for the exhibits.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Because the Special Master will rule on the Motion to Strike before considering the Motion for Summary Judgment, Claimant asks the Special Master to consider the following with regards to the Motion for Summary Judgment.

I. STANDARD OF REVIEW

The Special Master may draw inferences in favor of the Claimant, who is opposing the

Motion for Summary Judgment. Under Rule 56(c), the non-moving party is usually entitled to have the court liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence. *Mitchell v. Sinqueiros*, 99 Idaho 396 (1978).

Because this case is not before a jury, the Special Master may, but is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. *Loomis v. City of Hailey*, 119 Idaho 434 (1991). Rather, the Special Master is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Id.*

II. CONFLICTING EVIDENCE ON CREDIBILITY SHOULD BE RESOLVED AT TRIAL

There are conflicting statements in the Affidavits presented by both parties in this case. The Affidavits presented by the Objector are also contradictory to the reports prepared by the Idaho Department of Water Resources. Claimant contends that this raises an issue of the credibility of the affiants. The Affidavits presented by the Objector include his own statements and statements from family members, all who are interested and biased.

Therefore, these assertions raise issues of credibility of a party, and where such issues of credibility could be determined by the Special Master in court, a determination should not be made on summary judgment. *Argyle v. Slemaker*, 107 Idaho 668 (Idaho Ct. App. 1984).

III. OBJECTOR SHOULD BE ESTOPPED FROM ARGUING THAT THERE WAS NO DIVERSION OR USE OF THE WATER BECAUSE HE HAS UNCLEAN HANDS

The Objector seeks to void the claimed water rights, arguing that there was never a diversion and use of the water, or that if there were, such use was abandoned or forfeited. Claimant stated in her affidavit/memorandum in opposition to the Motion for Summary Judgment that she was unable to secure statements and affidavits from some neighbors because

they feared conflict with the Objector, Mr. Poulton, who is arguably a powerful and aggressive figure in the area. Additionally, Claimant's estranged spouse, Blane K. Rose, and Clark Harman have also stated, by affidavit, that the Objector, Mr. Poulton, denied them access to the water rights now claimed. (Affidavit of Blane K. Rose and Affidavit of Clark Harman). Mr. Rose also stated that Mr. Poulton actually confronted the Roses to preemptively intimidate the Roses from trying to pursue any water claims. (Affidavit of Blane K. Rose).

Claimant maintains her contention that water was available for diversion from Willow Creek prior to the Highway District's action to change the stream channel. However, assuming the facts to be as Mr. Poulton himself stated in his affidavit, he never gave permission to the Claimant or any of her "successors[sic]" to divert water and there was no other way to get Willow Creek water to the property except by his pipes.. (Affidavit of William A. Poulton, 3). If this were true, Mr. Poulton, by his own admission, actively denied Claimant and her predecessors in interest access to their water.

These alleged actions on the part of the Objector, as sworn to by the affiants, represent specific acts that support claims of duress and intimidation on part of the Objector. They also are affirmative acts of the Objector to actually prevent diversion and use of the claimed water right. Because the Objector actually acted to prevent diversion of water under the claimed right, then the Objector should not be allowed to, or should be estopped from arguing that the water was never diverted, used, abandoned or forfeited.

MOTION AND MEMORANDUM IN SUPPORT OF STRIKING AFFIDAVIT OF WILLIAM POULTON

Pursuant to Idaho Rule of Civil Procedure 56(e) and the Idaho Rules of Evidence, Claimant moves the court to strike certain portions of the Affidavit of William A. Poulton. This motion is made and based on the following:

1. Paragraph 13 of the Affidavit of William A. Poulton contains statements of inadmissible hearsay and should be stricken. Specifically, the sentence beginning on line 22 and ending on line 23 and the first part of the next sentence on line 23 include statements of what the claimant said or did. The affiant, Mr. Poulton, has not indicated that he personally spoke with the Claimant, nor that the Claimant made statements to the affiant regarding any objection to the Highway District moving Willow Creek. He has demonstrated no personal knowledge of the alleged statements and therefore that portion of Paragraph 13 should be stricken.

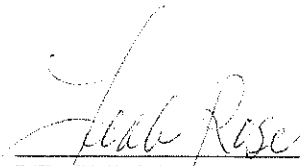
2. Paragraph 14 should be stricken because it purports to state as fact, conclusions about the use of water in contradiction to the Department of Water Resources report. Mr. Poulton is not an expert on aerial photos nor is he an hydrologist who can opine as to the source of the water depicted in the IDWR aerial photographs. Mr. Poulton is not competent to state that the irrigation ponds depicted on the property in the photos were the result of "period flooding."

3. Likewise, Paragraph 15 of his affidavit should be struck for the same reason. Such statement is merely conclusory. It does not state any facts and only makes unsupported conjecture as to why a pond may have been present on the property.

WHEREFORE, based on the forgoing argument, Claimant prays as follows:

1. For denial of Objector's Motion to Strike, or in the alternative for a continuance to cure any defects in the Affidavits and Exhibits;
2. For denial of Objector's Motion for Summary Judgment;
3. For this Court to grant Claimant's Motion to Strike Portions of the Affidavit of William A. Poulton;.
4. For such other and further relief as the Court may determine to be appropriate.

DATED this 9th day of June, 2006.


LEAH ROSE
Pro Se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9th day of June, 2006, I served a true and correct copy of the foregoing document on the person(s) whose names and addresses appear below by the method indicated:

- SRBA Court Fax 208 736 5121 - Twin Falls, ID 83301	~ U.S. Mail, postage prepaid ~ Hand Delivery ~ Court Folder ~ Facsimile ~ Federal Express
- Roger D. Ling and Michael T. Robinson, Walker - P.O. Box 394 - Rupert, ID 83350	~ U.S. Mail, postage prepaid ~ Hand Delivery ~ Court Folder ~ Facsimile ~ Federal Express

Leah Rose
Leah Rose

Also to:

- Director, IDWR
- P.O. Box 83720
- Boise, ID 83726-0698

- Chief, Natural Resources Division
- Office of the Attorney General
- State of Idaho
- P.O. Box 44449
- Boise ID 83711-4449