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DEPARTMENT OF
WATER RESOURCES

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11 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**
12 **STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

13 In Re SRBA) Subcase No. 45-00167A
14 Case No. 39576) **RESPONSE BRIEF TO CLAIMANT'S**
15) **OPPOSITION TO OBJECTOR'S**
16) **MOTION TO STRIKE AFFIDAVITS**

17 COMES NOW William A. Poulton, the objector in Water Right No. 45-00167A,
18 by and through his attorneys of record Ling, Robinson & Walker, and files this *Response Brief to*
19 *Claimant's Opposition to Objector's Motion to Strike Affidavits*. The claimant has also labeled
20 her response brief to *Motion to Strike* as a *Supplemental Memorandum in Opposition to the*
21 *Motion for Summary Judgment and Motion to Strike Affidavit of William Poulton*. Poulton
22 would bring to the attention of the Court that the deadline for filing supplemental memorandum
23 or other dispositive motions, including motion to strike, has long since passed, that the hearing
24 was held on June 1, 2006, and that any motions or supplemental motions cannot be filed without
25 leave of the Court after that date. Therefore, the portions of *Claimant's Opposition to Objector's*
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28 **RESPONSE BRIEF TO CLAIMANT'S OPPOSITION TO**
OBJECTOR'S MOTION TO STRIKE AFFIDAVITS

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3 *Motion to Strike Affidavits* at pages 11 through 14 should not be reviewed by this Court, as they
4 are untimely. Claimant had the opportunity prior to the hearing and at the hearing to object to
5 any of Mr. Poulton's affidavits and to supplement her *Memorandum in Opposition*. Therefore,
6 the *Supplemental Memorandum in Opposition to the Motion for Summary Judgment and Motion*
7 *to Strike Affidavit of William Poulton* should not be considered by the Court. A claimant
8 represented by counsel would not be permitted to do so under Idaho law and, therefore, neither
9 should this *pro se* claimant.

10
11 In *Claimant's Opposition to Objector's Motion to Strike Affidavits* at paragraph 4,
12 "Claimant admits that her Affidavit contains both statements of fact within her personal
13 knowledge and argument in opposition to the Motion for Summary Judgment, and that
14 submitting both together may not conform to general legal custom and practice." and in
15 paragraph 5, claimant "avers that her Affidavit was intended to be both her Memorandum in
16 opposition to the Motion for Summary Judgment and an Affidavit presenting statements of
17 personal knowledge." The claimant cannot have it both ways. Either she has filed a valid
18 affidavit or she has not. At paragraph 6 of *Claimant's Opposition to Objector's Motion to Strike*
19 *Affidavits*, claimant again contends that she is not a lawyer, is representing herself, and is a
20 teacher's aid with extremely limited resources. Nevertheless, the claimant is held to the same
21 standard as an attorney and is bound by the Idaho Rules of Evidence, the Idaho Rules of Civil
22 Procedure and Idaho case law.
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24 I. Affidavit of Leah Rose

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26 The claimant, Leah Rose, claims that her affidavit should not be stricken because
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3 it was intended to be both an Affidavit and a Memorandum in Opposition to the Motion for
4 Summary Judgment. She further states at page 3 of *Claimant's Opposition to Objector's Motion*
5 *to Strike Affidavits* that the Special Master should consider the arguments that have been made in
6 her Affidavit as assertions cited in support of her opposition to the Motion for Summary
7 Judgment and not as specifically sworn to by the affiant Leah Rose. Again, simply because
8 claimant is unwilling or unable to retain an attorney, she cannot have separate rules apply to her
9 by the Special Master. The affiant has presented the statements as sworn statements and that
10 they should be treated as such. If not, then the "memorandum" is not supported by any sworn
11 statements and should be evaluated as such by the Court.
12

13 **II. Paragraphs identified by objector should be**
14 **stricken based upon the Idaho Rules of Evidence.**

15 The claimant has attempted to refute the objector's reasons for striking the various
16 affidavits by relying on the simple statement that all of the affidavits were intended to be
17 argument for claimant's Motion. The claimant has apparently done some research with the
18 Idaho Rules of Evidence and, at page 4, states that paragraph 6 of the *Affidavit of Leah Rose* is
19 supported by the *Affidavit of Blane K. Rose* and is, therefore, admissible as an admission by a
20 party-opponent. What statement is an admission by a party-opponent is unclear. The exception
21 to the hearsay rules for an admission by a party-opponent under Idaho Rule of Evidence
22 801(d)(2) provides: "A statement is not hearsay if the statement is offered against a party and is
23 the party's own statement in either an individual or representative capacity." How this relates to
24 claimant's paragraph 6 in the *Affidavit of Leah Rose* is unclear. Paragraph 6 states: "That
25 William A. Poulton's objection to Water Right No. 45-00167A is based upon personal grievance
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3 and not on need." This certainly is not a valid admission by a party-opponent and therefore is
4 inadmissible.

5 The objector will not respond paragraph-by-paragraph to Rose's *Objections* as the
6 objector believes he has fully briefed the matter in his *Motion to Strike Affidavits* and *Reply to*
7 *Motion for Summary Judgment*. The claimant's assertion that a majority of the statements in the
8 Affidavits were intended to be an argument in opposition to the *Motion for Summary Judgment*,
9 is not supported by the law, and does not raise a disputed issue of material fact.
10

11 **III. Claimant's exhibits and other affidavits should be stricken.**

12 Again, objector will rely on his *Motion to Strike Affidavits* and *Reply to Motion*
13 *for Summary Judgment* with respect to the *Affidavit of John Anderson* and the *Affidavit of Blane*
14 *K. Rose*. Furthermore, the oral motion made by objector at the hearing on the *Motion for*
15 *Summary Judgment* to strike certain exhibits of claimant should be granted for the following
16 reasons:
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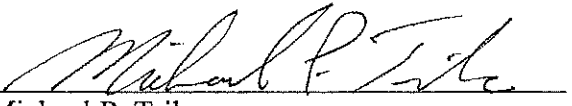
18 A. Claimant's Exhibits A through G have not been sworn or certified as
19 required by Idaho Rule of Civil Procedure 56(e). Rule 56(e) requires that items offered in
20 support of opposition to a motion for summary judgment must be attached to the party's affidavit
21 verifying the item's authenticity. *Puckett v. OakFabco, Inc.*, 132 Idaho 816, 979 P.2d 1174
22 (1999). Therefore, sworn or certified copies of all papers or parts thereof referred to an affidavit
23 shall be attached thereto or served therewith. Claimant has not verified any of the exhibits
24 except Exhibit H, but the *Affidavit* that verifies that exhibit should be prohibited based on
25 claimant's lack of foundation to testify as an expert. Therefore, Exhibits A through G should not
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3 be accepted into evidence and stricken from the record as they were not properly sworn to as
4 required by Idaho Rule of Civil Procedure 56(e). Therefore, based on the above, the *Affidavits* of
5 Leah Rose, John Anderson, and Blane Rose, and Exhibits A through G should be stricken and
6 not considered by the Special Master in the *Motion for Summary Judgment*. In addition, the
7 *Affidavit of Garth Osterhout* should not be considered, as it is irrelevant. The fact that Mr.
8 Osterhout may have pastured his horses on the claimant's property in 2005 deals with events that
9 occurred well after the Snake River Basin Adjudication commenced. It is not relevant to
10 whether the water right 45-167A has been forfeited prior to the Adjudication. Furthermore the
11 *Affidavit of Clark B. Harmon* should be stricken, as it is irrelevant for the same reason as the
12 *Osterhout Affidavit*.

13
14 Therefore, based upon the foregoing argument, Idaho Rules of Civil Procedure
15 and the Idaho Rules of Evidence, it is respectfully requested that this Court grant the objector's
16 *Motion* in its entirety.

17 DATED this 15th day of June, 2006.

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19 LING, ROBINSON & WALKER

20 By: 
21 Michael P. Tribe
22 Attorneys for Objector, William A. Poulton
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3 CERTIFICATE OF MAILING

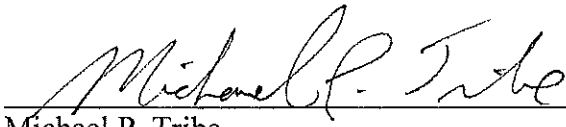
4 I hereby certify that on the 15th day of June, 2006, I served true and correct
5 copies of the foregoing *Response Brief to Claimant's Opposition to Objector's Motion to Strike Affidavits* as follows:

6 Leah Rose, Claimant
7 994 S. 150 E.
8 Burley, Idaho 83318

9 IDWR Document Depository
10 P. O. Box 83720
11 Boise, Idaho 83720-0098

12 Chief, Natural Resources Division
13 Office of the Attorney General
14 State of Idaho
15 P. O. Box 44449
16 Boise, Idaho 83711-4449

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

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28 
Michael P. Tribe