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Attorneys for Trail Family Farms, LLLP

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WATER RESOURCES
WESTERN REGION

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF TRANSFER NO.
81459

IN THE NAME OF TRAIL FAMILY
FARMS, LLLP

IN THE MATTER OF EXCHANGE NO.
81775

IN THE NAME OF TRAIL FAMILY
FARMS, LLLP

RESPONSE TO MOTION TO STRIKE
AND OBJECTION TO ORAL ARGUMENT

Applicant, Trail Family Farms, LLLP, ("Trails") by and through its counsel submits this *Response to Motion to Strike* response to the Protestants' *Motion to Strike* filed June 25, 2018. The Trails object to the Protestants' request for oral argument on the Motion to Strike as the issue is straight forward and can be decided fairly on the *Motion to Strike* and this *Response to the Motion to Strike* without further burdening the parties.

RESPONSE

The Idaho Department of Water Resources' Rules of Procedure, contained in IDAPA 37.01.01 are intended to assist the Department and the parties to fully develop a record and evaluate all facts and evidence. Furthermore, the rules are to liberally construed "to secure just, speedy and economical determination of all issues" and the Idaho Rules of Procedure and Evidences "do not apply to contested case proceedings." IDAPA 37.01.01.51. Thus, in evaluating the testimony, evidence, facts and opinions contained in Mr. Carlsen and Mr. Trail's affidavits, the presiding officer has discretion to liberally allow information and evidence into the record. Specifically, IDAPA 37.01.01.600 ("Rule 600") states with regard to the "evaluation of evidence":

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence.... All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence.

(emphasis added).

Mr. Carlsen's Affidavit

While it is true that the "presiding officer, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho" (emphasis added) the presiding officer is not required to exclude such testimony. In this case, Mr. Carlsen's Affidavit does not offend any of the criteria that may permit the presiding officer to exclude it. Mr. Carlsen's statements are certainly relevant as they go directly to the interpretation and

application of combined use limits contained in the water rights that are part of the pending applications and the pending *Motion for Summary Judgment* puts the meaning and interpreting of those limits directly at issue. Mr. Carlsen's Affidavit, explains the combined use limits, how administration of such limits works and why adding the additional point of diversion as proposed in the pending applications do not constitute enlargements, a criteria that is directly raised by the Protestant's *Motion for Summary Judgment*.

The *Motion to Strike* argues that Mr. Carlsen should be struck because he lacks personal knowledge, is not competent to testify to the matters, is conclusory and his statements are contrary to the prior appropriation doctrine. (Motion at 3,7). Yet, as set forth in his affidavit, Mr. Carlsen, a former long-time IDWR employee has evaluated "hundreds of cases" involving different points of diversion or single points of diversion with limited capacity. (Carlsen Aff. ¶4). Mr. Carlsen has vast personal knowledge regarding the criteria, knowledge and information regarding the evaluation of transfers and water right combined use limits. Furthermore, Mr. Carlsen has the kind of expertise and information that will assist the presiding officer in evaluating the pending applications, he can explain the import of the water rights' combined use limits and how they actually operated in ephemeral streams, like Little Canyon Creek, and is certainly the type of evidence and testimony that is "commonly relied upon by prudent persons." Furthermore, he can offer his opinions as an expert regarding how such conditions are interpreted and applied when it comes to administration

The *Motion to Strike* also claims that portions of Mr. Carlsen's Affidavit is inadmissible because it is contrary to Idaho's constitution which incorporates the prior appropriation doctrine. However, Mr. Carlsen's Affidavit doesn't offend the prior appropriation doctrine. As explained

in Mr. Carlsen's Affidavit, the senior water rights at issue, are not water rights that divert waste water, but are Little Canyon Creek water rights. In many places in Idaho, when streams dry up other sources of water may still be diverted at a shared or common point of diversion, yet that does not automatically mean that these other water rights from other sources, such as wastewater, are subject to downstream prior rights. If that is in fact Protestants' assertion, that the water is Little Canyon Creek water or tributary thereto and thus subject to Little Canyon Creek priorities, then there is a genuine issue of material fact that would necessitate a denial of Protestants' *Motion of Summary Judgment*. Furthermore, Mr. Carlsen can rely on Mr. Trail's Affidavit that explains clearly the sources of water that are diverted at a common point of diversion for his conclusions. (Trail Aff. ¶ 4, 5, 6)

Based on the foregoing, the *Motion to Strike* portions of Mr. Carlsen's Affidavit should be denied.

Mr. Trail's Affidavit

Protestants' *Motion to Strike* to Mr. Trail's Affidavit argues that it lacks foundation and is conclusory. However, Mr. Trail is the Applicant and the landowner and has actually irrigated the property in question. (Trail Aff. ¶¶1-6). In addition, Mr. Trail is known to IDWR staff as a long-time farmer in the Glenns Ferry area and board member of King Hill Irrigation District. To claim that Mr. Trail (as the landowner and irrigator of the property) does not have personal knowledge, of the water that irrigates the property and how the common point of diversion is used is simply wrong. The facts, evidence and testimony that Mr. Trail offers in his affidavit is helpful to the hearing officer and need not contain every single piece of information that Mr. Trail may have; his affidavit is not his full prepared testimony. However, the facts he does state are entirely


within his personal knowledge and made with his affirmation. His testimony regarding the use of the water, how the point of diversion operates and what is proposed in the transfer is entirely relevant, not repetitious and is the type of evidence that would assist the presiding officer and a prudent person in evaluating the pending applications. Thus, the *Motion to Strike* portions of Mr. Trail's Affidavit should be denied.

CONCLUSION

Based on the foregoing, the Protestants' *Motion to Strike* should be denied.

Dated this 27th day of June, 2018.

McHugh Bromley, PLLC


Candice McHugh
Attorneys for Trails

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 27th day of June, 2018, by the following method:

Idaho Department of Water
Resources – Western Region
2735 Airport Way
Boise, ID 8370

<input type="checkbox"/>	U. S. Mail, postage pre-paid
<input checked="" type="checkbox"/>	Hand Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	E-mail

Dylan R. Lawrence
VARIN WARDWELL LLC
242 N 8th St., Ste 220
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