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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	**MOTION TO STRIKE**
IN THE MATTER OF EXCHANGE NO. 81775 IN THE NAME OF TRAIL FAMILY FARMS LLLP	

Protestants Pearson Farms & Ranch, LLC and Nathan Jones, through undersigned counsel of record, hereby file this Motion to Strike portions of the affidavits of Ernest Carlsen and Walter Trail, pursuant to IDWR Rules of Procedure 260, 565, and 600 and Idaho Rule of Civil Procedure 56. Pursuant to Rule of Procedure 260.03, the Protestants request oral argument on this Motion.

INTRODUCTION AND PROCEDURAL BACKGROUND

The Protestants filed their Motion for Summary Judgment in these two proceedings on June 5, 2018. The Applicant timely filed its opposition to that motion on June 18, 2018. The opposition papers included affidavits of Ernest Carlsen and Walter Trail. With this Motion to Strike, the Protestants are challenging the admissibility of certain portions of those two affidavits in the Department's consideration of the Motion for Summary Judgment.

STANDARD OF REVIEW

The Department has articulated its summary judgment standards as follows:

> The Department's Rules of Procedure (IDAPA 37.01.01) do not explicitly authorize motions for summary judgment. The rules do, however, authorize the filing of pre-hearing motions, which would include motions for summary judgment. *See* IDAPA 37.01.01.565. Although the Idaho Rules of Civil Procedure generally do not apply to contested cases before the Department (*see* IDAPA 37.01.01.052), ***the Department relies on the standards set forth in Rule 56 of the Idaho Rules of Civil Procedure and the associated case law as a guide for addressing motions for summary judgment.*** A motion for summary judgment may be granted if a hearing officer determines that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56, I.R.C.P.

In the Matter of Sytle's Petition for Declaratory Ruling Regarding Distribution of Water to Water Right No. 95-0734, Order on Motions for Summary Judgment, at p. 3 (Sept. 6, 2017) (emphasis added), available at https://tinyurl.com/ybxa2gm6 (last visited June 1, 2018).

Critical to this Motion, Idaho Rule of Civil Procedure 56(c)(4) provides:

> An affidavit used to support or oppose a motion ***must be made on personal knowledge***, set out facts that ***would be admissible*** in evidence, and show that the affiant or declarant is ***competent to testify on the matters stated.*** Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to or served with the affidavit. The court may permit affidavits to be

> supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

I.R.C.P. 56(c)(4) (emphasis added).

Furthermore, Rule 56 provides that, "[a] party may object that the material cited to support or dispute a fact is not admissible in evidence at the hearing." I.R.C.P. 56(c)(2). Therefore, "[t]he admissibility of evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold matter to be addressed before applying the liberal construction and reasonable inferences rule to determine whether the evidence creates a genuine issue of material fact for trial." *Fragnella v. Petrovich*, 153 Idaho 266, 271, 281 P.3d 103, 108 (2012). A motion to strike is a procedurally appropriate mechanism to challenge the admissibility of affidavit testimony offered in support of or in opposition to a summary judgment motion. *See generally La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 353 P.3d 420 (2015).

According to the Department's Rules of Procedure:

> The presiding officer, with or without objection, ***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. 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 expertise, technical competence and specialized knowledge may be used in the evaluation of evidence.

IDWR Rule of Procedure 600 (emphasis added).

LEGAL ARGUMENT

1. Paragraph 4 of the Carlsen Affidavit Should Be Stricken Because It Lacks Personal Knowledge, Is Conclusory, and Is Contrary to the Prior Appropriation Doctrine

After providing some general background, Paragraph 4 of the Carlsen Affidavit states:

> Contrary, however, to the argument in the Motion for Summary Judgement, filed by the Protestants, the combined use limit does not foreclose the possibility of diverting waste water under 61-7236A and 61-7236B. As the facts will show, Little Canyon Creek is an ephemeral stream that is subject to declining flows and drying up in the latter part of the irrigation season. When the natural flow ceases to reach the Applicant's point of diversion on Little Canyon Creek then decrees 61-7236A and 61-7236B with a source of waste water can be diverted up to 1.0 cfs, their combined total.

(Carlsen Aff. of 6/18/18, ¶ 4.)

There are two problems with this testimony. First, as previously noted, Rule 56 specifically requires affidavits offered in the summary judgment context to be based on "personal knowledge" and must show that the affiant is "competent to testify on the matters stated." I.R.C.P. 56(c)(4). However, this portion of the Carlsen Affidavit is conclusory; it does not provide any basis or explanation for the bald assertions quoted above, and it does not explain how Mr. Carlsen arrived at those conclusions. "As the facts will show," does not satisfy Rule 56 and its requirements of personal knowledge and a demonstration of competence regarding the matters stated. The cited portion of Paragraph 4 should be stricken on this basis alone.

In addition, Rule 56 requires affidavit testimony to be admissible. I.R.C.P. 56(c)(4). To be admissible, evidence must be "of a type commonly relied upon by prudent persons in the conduct of their affairs." IDWR Rule of Proc. 600. The Department may exclude evidence that is irrelevant or that is inadmissible on statutory or constitutional grounds. *Id.* In evaluating the admissibility of evidence, the Department may utilize its expertise, technical competence and specialized knowledge in water resource and administration. *Id.*

The testimony above is contrary to the prior appropriation doctrine. According to Mr. Carlsen, there are times when water present within the natural channels of Little Canyon Creek is available to satisfy 61-7236A and 61-7236B, but is ***not*** available to satisfy more senior water rights

that are also diverted from Little Canyon Creek—despite the facts that (1) those rights share a point of diversion with more senior rights, and (2) there are senior rights such as 61-371A and 61-372 that are diverted from Little Canyon Creek immediately downstream of 61-7236A and 61-7236B.

"Priority of appropriation shall give the better right as between those using the water...." IDAHO CONST., art. XV, § 3. A water right owner "shall be entitled to such quantity measured ***at the point of diversion***, subject, however, to ***all prior rights***." IDAHO CODE § 42-110 (emphasis added). Mr. Carlsen's testimony is not consistent with Idaho law and should therefore be excluded under Rule 600.

In this regard, Trail's argument that Protestants' motion for summary judgment "improperly uses pre-decree information to question the source on the partial decrees" is misplaced. (*See* Resp. Br. of 6/18/18, p. 3.) Protestants do not argue that the designation of "waste water" as the source is incorrect. Instead, they reference the pre-decree information in order to establish the historical source from which the waste water was diverted.

The treatment of ground water rights provides a useful analogy: The vast majority (if not all) of the ground water rights in the SRBA were decreed with a source of "ground water," without referencing the specific aquifer or other source of ground water. *See generally* IDWR Adjudication Rule 060.02(c)(i). However, ground water rights are not administered as if they are all diverted from one giant source of "ground water." Instead, it is necessary to identify the actual source of the ground water – even though it is not a decreed element of the water right:

> An application for transfer proposing to change the point of diversion from one distinct aquifer to a totally separate aquifer is not approvable, just as an application for transfer proposing to change the point of diversion for a surface water right from one distinct surface

> water source to a totally separate surface water source is not approvable.

(Lawrence Decl. of 6/5/18, Ex. M, p. 27 (IDWR transfer processing memorandum).)

If water rights 61-7236A and 61-7236B were ground water rights, there would be no argument that referencing pre-decree information to identify the particular source associated with those rights was an attempt to question their decreed source of "ground water." There is no difference here. The rights were decreed with the generic source of "waste water," so Protestants have put information into the record establishing the source from which that waste water was diverted. And, that information is not in dispute; the Carlsen Affidavit acknowledges that the point of diversion for 61-7236A and 612-7236B diverts from Little Canyon Creek. (Carlsen Aff. of 6/18/18, ¶ 4.)

Again, the point here is that the Carlsen Affidavit's position that there are times when water is available to satisfy junior water rights but not senior rights from Little Canyon Creek conflicts with the prior appropriation doctrine. It should therefore be excluded pursuant to IDWR Rule of Procedure 600.

2. Paragraph 5 of the Carlsen Affidavit Should Be Stricken Because It Responds to an Argument the Protestants Have Not Made

The Carlsen Affidavit states:

> The addition of a point of diversion does not automatically constitute an enlargement in use. When there is potential for enlargement, conditions are normally included to prevent an enlargement from occurring.

(Carlsen Aff. of 6/18/18, ¶ 5.)

The Protestants have not argued that the addition of a point of diversion "automatically constitute[s] an enlargement in use." Instead, their summary judgment motion (1) provides a

detailed discussion of enlargement and the different ways it can occur, and (2) establishes that, as a matter of law based upon the specific water right terms, neither the transfer application nor the exchange application can be approved without enlargement occurring.

Paragraph 5 of the Carlsen Affidavit responds to an argument the Protestants have not made, and is therefore irrelevant pursuant to Procedural Rule 600. The Department should exclude it in its consideration of the pending motion for summary judgment.

3. Paragraph 6 of the Carlsen Affidavit Should Be Stricken Because it Lacks Foundation and Does Not Address the Enlargement Argument Protestants Have Actually Asserted

Paragraph 6 of the Carlsen Affidavit states in its entirety:

> In the case of the above captioned matter, the Applicant is proposing an additional or alternative point of diversion to utilize a more efficient system for collection and delivery of waste water to the decreed place of use. Applying the conditions specified in the decrees will address issue of enlargement for the rate of diversion and enlargement in the place of use isn't an issue because there is no change in place of use for either decree proposed by the Application.

(Carlsen Aff. of 6/18/18, ¶ 6.)

This passage is composed entirely of (1) statements that either lack foundation because they fail to establish Mr. Carlsen's "personal knowledge" and "competen[ce] to testify on the matters stated" pursuant to the requirements of Idaho Rule of Civil Procedure 56, and (2) statements that respond to enlargement arguments the Protestants have not made and which are therefore irrelevant under IDWR Procedure Rule 600. The Department should therefore exclude them from the record in its consideration of the pending motion for summary judgment.

4. Paragraph 4 of the Trail Affidavit Should Be Stricken Because It Lacks Foundation and Is Conclusory

Paragraph 4 of the Affidavit of Walter Trail states in its entirety:

> When Little Canyon Creek dries up in mid to late summer, the water at the point of diversion is waste water that flows from surrounding fields north and east and west of the point of diversion, which are irrigated by shares in King Hill Irrigation District and by other surrounding surface water sources, such as Sand Springs Gulch, upstream storage and tail water off the end of King Hill ditch.

(Trail Aff. of 6/18/18, ¶ 4.)

The Trail Affidavit does not even attempt to establish or explain the bases for these statements, what "personal knowledge" they are based upon, or how the affiant is "competent to testify on the matters stated." Quite literally, the only attempt at laying any sort of foundation is the statement that the Applicant "purchased the property and water rights in question on March 17, 2016." (*Id.*, ¶ 2.) This is not adequate, and the Department therefore cannot reasonably rely upon Paragraph 4 under civil rule 56 or Rule of Procedure 600.

5. Paragraph 6 of the Trail Affidavit Should Be Stricken Because It Lacks Foundation

Paragraph 6 of the Trail Affidavit states in its entirety:

> The additional or alternative point of diversion contained in the proposed transfer application, is not for a new water source, it is still for waste water that derives from King Hill tail water and field run off which was collected at the point of diversion located in Little Canyon Creek.

(Trail Aff. of 6/18/18, ¶ 6.)

Implicit in this passage is a statement regarding the previous source of "waste water" for water right 61-7236A and 61-7236B. Again, however, there is simply no foundation laid or attempt to establish the basis of the affiant's "personal knowledge" of such matters or how he is "competent to testify on the matters stated" pursuant to the standards of Idaho Rule of Civil Procedure 56.

In addition, the particular origin of the waste water is irrelevant because, as this passage acknowledges, the point of diversion for the two rights diverts water from Little Canyon Creek. It is therefore irrelevant pursuant to Procedural Rule 600, and should be stricken pursuant to both that rule and Idaho Rule of Civil Procedure 56, and not considered by the Department in its evaluation of the pending motion for summary judgment.

CONCLUSION

For the forgoing reasons, the Protestants respectfully request that the Department grant this Motion, and strike the referenced portions of the Affidavits of Ernest Carlsen and Walter Trail in its consideration of the pending Motion for Summary Judgment.

DATED THIS 26th day of June, 2018.

Varin Wardwell LLC

FOR

Dylan B. Lawrence
Attorneys for Pearson Farms & Ranch, LLC and Nathan Jones

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2018, I caused the original of this document to be filed with the state office of the Idaho Department of Water Resources via hand delivery and a true and correct copy of the foregoing to be served by the method indicated below, and addressed to the following:

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FOR Dylan B. Lawrence