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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	RESPONSE TO MOTION FOR SUMMARY JUDGMENT
IN THE MATTER OF EXCHANGE NO. 81775 IN THE NAME OF TRAIL FAMILY FARMS, LLLP	

Applicant, Trail Family Farms, LLLP, ("Trails") by and through its counsel submits this *Response to Motion for Summary Judgment* ("Response") in response to the Protestants' *Motion for Summary Judgment* ("Motion") filed June 5, 2018.

SUMMARY OF RESPONSE

In this case, the Petitioner is not entitled to judgment as a matter of law because the Motion fundamentally mis-states the legal and factual application and interpretation of combined

use limitations and lacks an understanding of what constitutes an enlargement. Even if the Petitioner was correct on the legal application and interpretation of combined use limitations and enlargements, the Motion must still be denied because there are disputed issues of material fact over the proposed additional point of diversion and what water is and has been diverted at that location necessitating a hearing on the Trails' Applications.

STANDARD OF REVIEW

To grant a motion for summary judgment, the movant before IDWR must show that he is entitled to judgment as matter of law and there must be no genuine issues of material fact. *In the Matter of Sylte's Petition for Declaratory Ruling Regarding Dist. of Water to Water Right No. 95-0734* (IDWR Docket No. P-Dr-2017-001, Sept. 6, 2017). The party asserting that a fact is undisputed must support the assertion from facts in the record. (Idaho R. Civ. P. 56(c)(1)). The facts existing in the record are drawn in favor of the opposing party and all reasonable inferences from the record are concluded in the favor of the nonmoving party. *Fragnella v. Petrovich*, 153 Idaho 226, 271, 281 P3d 103, 108 (2012). In this case, the Motion is wrong on both the law and the facts and thus, must be denied.

DISCUSSION

1. The Combined Use Limitation and Source Explained

The Motion argues that because Water Rights 61-7236A and 61-7236B (the "junior" water rights) contain a combined use remark, this automatically means that there was (and is) no waste water available to divert because all the water was diverted under the "senior" water rights. (Motion at 9-10). However, this argument completely lacks an understanding of combined use remarks. As explained in the Affidavit of Ernest Carlsen filed herewith, combined use remarks

do not automatically render water unavailable to the junior priority water rights, especially when there are multiple sources involved. (Carlsen Aff. ¶4). Furthermore, as a matter of fact, the waste water rights are diverted when there is no longer natural flow in Little Canyon Creek and when there is only waste water that is collected at the point of diversion from run off from surrounding fields or tail water at the end of King Hill Irrigation District's ditch. (Trail Aff. ¶¶3-6).

Thus, not only is the Motion wrong on the legal operation of combined use remarks, it is wrong regarding the factual application of the remarks and the actual diversion and use of water under the two "junior" rights. Therefore, the Motion must be denied.

2. The Motion Improperly Seeks to Have IDWR Administer the Waste Water Rights as if They Were Little Canyon Creek Water Rights, Contrary to the Partial Decrees

"The Junior Rights have always been diverted from Little Canyon Creek, out of the Creek Pump. That the source on the partial decrees identifies the source as 'waste water' does not change this fact." (Motion at 6). The Motion essentially argues that the source as decreed on the water rights, waste water, should be ignored and the junior water rights should be treated as if they divert Little Canyon Creek water. (Motion at 4-5). To support this argument, the Motion improperly uses pre-decree information to question the source on the partial decrees to infer that the Director must review and administer the water rights as if waste water were not the source on the decrees. This argument, if made to a District Court would be considered frivolous and without any valid basis in law, resulting in attorneys fees to Trails because this argument has been wholly rejected by the Supreme Court in *In the Matter of the Dist. of Water to Water Right Nos. 36-2551 & 36-7694* (Rangen), 159 Idaho 798, 806 (2016). In that case, Rangen argued that while the source on its partial decrees stated "Martin-Curren Tunnel" the Director should

administer the water rights as if the source included other springs in the "entire spring complex" because Rangen's argument "was based on the idea that the decrees do not accurately reflect its historical beneficial use." Rangen at 807. The Supreme Court held that "any interpretation contrary to the plain language [of the decreed water rights] would necessarily impact the certainty and finality of the SRBA judgments, and therefore, requests for such interpretations needed to be made in the SRBA itself." Id. The Motion even acknowledges that Idaho Supreme Court explicitly held in *In re Distribution of Water to Water Right Nos. 36-02551 & 36-07649*, 160 Idaho 119 (2016) that such collateral attacks on the partial decrees are impermissible. (Motion at 9). Yet, the Protestants try to attack the validity of the decrees as if they decreed no water to these water rights and further attacks the decreed source in this proceeding.[1] Lastly the Motion argues that the waste water in the decreed rights does not in part derive from the King Hill system. This assertion is a disputed issue of material fact that necessitates a hearing and the Motion must be denied for this reason as well.

The decreed rights' source is waste water. The facts show that the waste water that is collected, measured and diverted is waste water from the irrigation of surrounding fields irrigated by King Hill Irrigation District shares, other surrounding surface water sources and tail water off of the King Hill ditch. (Trail Aff. ¶¶3, 4, 6) The Motion would have the Department ignore the actual decreed source, waste water, and instead treat the water rights as if the decreed source was Little Canyon Creek or find that the decreed rights are not valid, because they decreed "no water" that could actually be diverted, both contentions are contrary to the decrees. Thus, the

[1] The Motion also implies that by filing the exchange application, at IDWR's suggestion, that the Trails have somehow agreed that the exchange is the necessary vehicle. However, the Trails kept their Transfer on file because they believe adding a point of diversion is the proper vehicle and if not, then alternatively, IDWR could look at the exchange. At the very least, this would raise a material issue of fact that requires the Motion to be denied.

Motion must be denied because as a matter of law and fact Water Right Nos. 61-7236A and 61-7236B were validly decreed with the source as waste water.

3. Adding an Additional or Alternative Point of Diversion Does Not Automatically Create an Enlargement

The Applications are not asking to increase the diversion rate, acres or "create a new water right" as argued in the Motion. (Motion at 10-11), (Trail Aff. ¶¶5,6). Idaho Code 42-222(1) specifically authorizes a change in the point of diversion element. IDWR's forms actually contemplate as part of a change in a point of diversion, additional, multiple or alternative points of diversion. Adding additional points of diversion falls within the "change" to a point of diversion and is commonly done. (Carlsen Aff. ¶5). The Application simply asks that the Trails be allowed to continue to use up to 1 cfs of waste water on their property; this does not constitute an enlargement. (Trail Aff. ¶¶5,6) The Application is simply asking for an additional alternative point of diversion and adding a point of diversion does not automatically constitute an enlargement. (Carlsen Aff. ¶¶5,6)

The Motion again fundamentally misunderstands the nature of the change asked for and what constitutes an enlargement under Idaho law and thus, must be denied. At the very least, there is a dispute of fact surrounding whether or not adding an alternative point of diversion at the proposed new point of diversion would in fact result in an enlargement and thus, there is a dispute of material fact requiring that the motion be denied.

CONCLUSION

In summary, the Motion must be denied for several reasons. First, the combined use limits do not operate as a matter of law to render no water available for diversion under Water Rights 61-7236A and 61-7236B. To reach that conclusion one would need to conclude that the

decrees were invalid or assume that the source of water was Little Canyon Creek, contrary to the partial decrees which is prohibited under Idaho law. Second, if there is a question as to what water makes up the waste water under the decreed water rights that is a material issue of fact that necessitates a hearing. Finally, adding a point of diversion to these water rights will not automatically result in an enlargement as argued in the Motion and thus, the Motion must be denied under that theory as well.

Dated this 18th 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 18th day of June, 2018, by the following method:

Idaho Department of Water Resources – Western Region 2735 Airport Way Boise, ID 8370	☐ ☒ ☐ ☐ ☐	U. S. Mail, postage pre-paid Hand Delivered Overnight Mail Facsimile E-mail
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