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DEPARTMENT OF WATER RESOURCES

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E-Mail: Dana@IdahoWaterLaw.com

Attorney for the Legg Family Trust, Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

| In the Matter of Water Users' Association |) | MOTION TO STRIKE GRAYS CREEK |
|---|---|------------------------------|
| of the Grays Creek Ditch Lateral |) | CANAL ASSOCIATION'S RESPONSE |
| |) | TO PETITION FOR APPOINTMENT |
| |) | OF LATERAL MANAGER AND |
| |) | MEMORANDUM IN SUPPORT |
| · | - | |

The Legg Family Trust, by and through its counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and pursuant to IDAPA 37.01.01.260 and .640, moves the Idaho Department of Water Resources ("IDWR") to strike the Grays Creek Canal Association's Response to Petition for Appointment of Lateral Manager ("Response") on the basis that the "Grays Creek Canal Association" is not a legal entity duly established pursuant to law and, therefore, can have no standing to participate in this proceeding. This Motion is supported by the following Memorandum and the Affidavit of Marion Ogle contemporaneously filed herewith.

MEMORANDUM

I. Based on the Information Supplied by the "Grays Creek Canal Association" in its Response to Petition for Appointment of Lateral Manager, the "Grays Creek Canal Association" Was Not Properly Established Pursuant to Idaho Law, Has Not Been Operating Pursuant to Idaho Law, Is Not a Legally Valid Entity and, Therefore, Can Have No Standing In this Matter.

In its Response, the "Grays Creek Canal Association," asserts that it was established on April 1, 2012, and attaches only a brief one paragraph written statement, dated May 7, 2012, and signed by its purported President and Secretary/Treasurer, to document its establishment. No other information about why the "Grays Creek Canal Association" was formed, the procedure that was followed, the notice that was sent out, how the directors and officers were selected or the applicable legal code is provided. According to Marion Ogle, a representative of the Legg Family Trust who handles its business affairs, the Legg Family Trust, a water users on the Grays Creek Ditch, received no notice of any April 1, 2012, meeting or the establishment of such Grays Creek Canal Association. *Affidavit of Marion Ogle*.

On the other hand, with its Petition for Appointment of Lateral Manager, the Legg Family Trust provided information about the Notice mailed pursuant to Idaho Code Title 42, Chapters 9 and 13 for the March 26, 2012, meeting of the Grays Creek Ditch Association, along with the detailed Minutes from that meeting. Further, the Grays Creek Ditch Association has been functioning and assessing users since at least the 1960's. *Affidavit of Marion Ogle, Exhibit A*.

Based on the information provided with its Response, the "formation" of the Grays Creek Canal Association did not comply with applicable legal requirements. In the absence of information establishing it as a legal organization, any of its actions, including the filing of a Response to the Petition for Appointment of a Lateral Manager, are *ultra vires* and invalid as a matter of law.

II. Pursuant to Idaho Law, A Lateral Manager is Required and the Directors of the Grays Creek Ditch Association are Violating their Statutory and Fiduciary Responsibilities by Not Appointing a Replacement to the Lateral Manager Elected at the Duly Noticed and Conducted March 26, 2012, Meeting.

The formation of the Grays Creek Canal Association, is a thinly veiled (illegal) attempt to avoid the fair distribution of water by a lateral manager, as required by law. *See* Idaho Code §§ 42-901, -907, -908, -909, -910, -1301, -1302, and -1308. The appointment of a lateral manager is not an optional matter; under Idaho statutory law, a lateral manager is required. *Id.*

The Response of the Grays Creek Canal Association asserts (without any legal support) that any obligation to ensure the delivery of water ends at a certain concrete splitter.

Unnotarized written statements are improperly proffered as evidence of such a historic practice.

While the Legg Family Trust also disputes numerous "facts" asserted in these statements and the other Exhibits, it notes that even if historic practices improperly did not ensure delivery to all users in the past, historic practices would not be a basis for failing to appoint a lateral manager and ensuring delivery to all users on the ditch pursuant to law, now and in the future. Under Idaho law, a lateral manager is required to be appointed to deliver water to all users on the Grays Creek Ditch, not just some.

¹ It should be noted that none of the Exhibits attached to the Response are provided by notarized affidavit with adequate foundation, as required for evidence to be admitted in a legal proceeding. Accordingly, all such Exhibits should be stricken for the failure to properly submit such information by the notarized affidavit of witnesses with demonstrated personal knowledge.

CONCLUSION

For the foregoing reasons, the Response of the "Grays Creek Canal Association" should be stricken and a replacement Lateral Manager for the one duly elected at the March 26, 2012, meeting of the Grays Creek Ditch Association should be granted.

DATED this 4th day of June, 2012.

HOFSTETTER LAW OFFICE, LLC

By

Dana L. Hofstetter, for the firm Attorney for Legg Family Trust

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of June, 2012, I caused a true copy of the foregoing document to be served by the pre-paid method(s) indicated on the following:

Original to:

Gary Spackman
Acting Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
□ U.S. Mail □ Fed Ex X Hand □ Fax

Copies to:

Jeff Peppersack
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
□ U.S. Mail □ Fed Ex X Hand □ Fax

Scott L. Campbell
Moffat Thomas
P.O. Box 829
Boise, Idaho 83701-0829
X U.S. Mail □ Fed Ex □ Hand □ Fax

DANA L. HOFSTETTER

4103.1\10182

JUN 0 4 2012

Dana L. Hofstetter, ISB #3867 Hofstetter Law Office, LLC 608 West Franklin Street Boise, Idaho 83702

Telephone: (208) 424-7800 Facsimile: (208) 424-8774

E-Mail: <u>Dana@IdahoWaterLaw.com</u>

Attorney for Legg Family Trust, Petitioner

DEPARTMENT OF WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

| n the Matter of Water Users' Association of the Grays Creek Ditch Lateral | |) | AFFIDAVIT OF MARION OGLE |
|---|-------|---|--|
| | |) | , , , , , , , , , , , , , , , , , , , |
| STATE OF OREGON |) | | |
| |) ss. | | |
| COUNTY OF MALHEUR |) | | |

Marion Ogle, being first being duly sworn upon oath, deposes and says:

- (1) I am Marion Ogle and am over 18 years of age.
- (2) My mother is Kathleen Legg, the Trustee of the Legg Family Trust. I reside in Indian Valley, Idaho and I assist my mother with the business and legal matters of the Legg Family Trust.
- (3) On behalf of the Legg Family Trust, I attended the March 26, 2012, meeting of the Grays Creek Ditch Association and the subsequent April 19, 2012, meeting held by Dean Dunham, Jim Buchanan and Loren Brest. The Legg Family Trust never received any notice, written or otherwise, of an April 1, 2012, meeting and, therefore, I did not attend any April 1, 2012, meeting. I believed that the April 19, 2012, meeting was for the same organization that met on March 26, 2012. At no time during

the April 19, 2012, meeting, was there any mention of a new organization having been formed on April 1, 2012, nor was there any election of directors or officers for such new organization.

- (4) Sometime after the April 19, 2012, meeting, I received an assessment statement from what I believed to be the Grays Creek Ditch Association, unaware of any attempts to form a new association. On behalf of the Legg Family Trust, payment by check payable to "Grays Creek Ditch" in the amount of \$477.50 was made on or about May 11, 2012. On the front of the check, I noted a reference to the March 26, 2012 meeting as the basis for the assessment payment. On June 1, 2012, I confirmed that the check had been deposited on May 21, 2012. Now, I question whether the assessment payment that the Legg Family Trust made will be properly used for the purposes of the Grays Creek Ditch Association, as authorized by the membership at the March 26, 2012, meeting, including for the hiring and payment of a lateral manager.
- Book for the Grays Creek Ditch Association, dating back to 1967, that I obtained from Scotti Yantis, another user on the Grays Creek Ditch. I recall my father, Alvin Legg, being involved with the Gray's Creek Ditch Association, back in the 1960's and 1970's. Thus, the Grays Creek Ditch Association has been functioning in some form for at least 45 years. These records establish that the Grays Creek Ditch Association historically has assessed all water users obtaining water from the Grays Creek Ditch, along its entire length. While the basis of the assessments of the Grays Creek Ditch Association has been the number of acres entitled to receive storage water, the Grays Creek Ditch Association Association assessments have always been additional to any assessments made by the Little Weiser Irrigation District for storage water delivered in the same ditch.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 4th day of June, 2012.

SUBSCRIBED AND SWORN to before me this 4 day of June, 2012.

OFFICIAL SEAL KAREN A ROTH NOTARY PUBLIC - OREGON COMMISSION NO. 451181 NY CONNISSION EXPIRES DICTOBER 03, 2014 Notary Public in and for the State of Idaho Oregon Residing at: Organ.

My Commission Expires: October 03, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of June, 2012, I caused the foregoing **AFFIDAVIT OF MARION OGLE** (with any attachments) to be served by the pre-paid method(s) indicated on the following:

Facsimile Original to:

Gary Spackman
Acting Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
□ U.S. Mail □ Fed Ex X Hand □ Fax

Copies to:

Jeff Peppersack
Idaho Department of Water Resources
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□ U.S. Mail □ Fed Ex X Hand □ Fax

Scott L. Campbell
Moffatt Thomas
P.O. Box 829
Boise, Idaho 83701-0829
X U.S. Mail □ Fed Ex □ Hand □ Fax

Dana L. Hofstetter

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The Indian Valley-Gray Creek Ditch The figures in this book represent lacres of land under the Ben Ross Reservoir and not shared in the Indian Valley Grays Creek Ditch

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