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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

In the Matter of Water Users Association of
Grays Creek Ditch Lateral

**GRAYS CREEK CANAL ASSOCIATION'S
RESPONSE IN OPPOSITION TO PETITION
FOR RECONSIDERATION**

The Grays Creek Canal Association ("Association"), by and through undersigned counsel of record and pursuant to Idaho Code Section 67-5245 and Idaho Department of Water Resources Procedure Rule 730, hereby responds in opposition to the Legg Family Trust's ("Trust") Petition for Reconsideration, dated June 27, 2012. This response is supported by the existing records on file with the Department, and by the Affidavit of Dean Dunham, dated July 5, 2012, filed contemporaneously herewith.

**I.
BACKGROUND**

On May 10, 2012, the Trust filed its Petition for Appointment of Lateral Manager seeking to remedy water delivery and ditch administration deficiencies it perceived along the

Grays Creek Ditch. The Association opposed the Trust's petition on May 30, 2012, largely arguing that the Trust's petition improperly sought to impose additional ditch administrative costs and expenses against the Association concerning a private lateral over which the Association exercised no control, and from which the Association derived no benefit. *See, e.g.*, Response to Petition for Appointment of Lateral Manager, dated May 30, 2012, pp. 3-4.

On June 4, 2012, the Trust filed a Motion to Strike Grays Creek Canal Association's Response to Petition for Appointment of Lateral Manager and Memorandum in Support. The crux of the Trust's argument was that the Association lacked the legal standing necessary to oppose the Trusts' underlying petition. The Association disagreed, and filed its Answer to the Legg Family Trust's Motion to Strike on June 13, 2012, rebutting the Trust's arguments.

Later on June 13, 2012, the Idaho Department of Water Resources ("Department") issued its Preliminary Order ("Order") disposing of both the Trust's Motion to Strike, and its underlying Petition for Appointment of Lateral Manager. The Department's Order correctly denied the Trust's Motion to Strike on the grounds that the Association (or at least its members) did not lack standing. *See* Order, pp. 4-5 (noting that Idaho Code Section 42-1301 does not require formal legal entity formation for purposes of forming a valid lateral water users association under Idaho law). Specifically, the Department held: "[t]he determination of whether or not the GCCA is a legal entity or an informal group is not relevant to this matter and not for the Department to decide." *Id.*, p. 5.

Regarding the Trust's Petition for Appointment of Lateral Manager, the Department granted the petition in part and denied the petition in part. The Department's key findings included:

- “The Department recognizes the financial burden that [infrastructure upgrades and lateral manager appointment] would impose on water users. However, some level of measurement and control is necessary and should be a goal for all water users in the coming years to avoid future disputes up and down the ditch” (Order, p. 4);
- “In the current case, it would not be fair to require all water users on the Grays Creek Ditch system to install measurement and control devices and support the costs of a lateral manager, especially when the cause of the [Trust’s] alleged injury is not fully understood and the location and extent of the distribution ditches and laterals at the lower end of the system is not fully understood” (Order, p. 4);
- “Appointment of a lateral manager for the lower part of the Grays Creek Ditch system is necessary to provide someone who can begin to understand the system and the issues and who can assist water users in developing a plan for future measurement and control where needed” (Order, p. 4)
- “The Department should appoint a lateral manager for water right holders on the Grays Creek Ditch *beginning at the point identified as the concrete splitter at Location No. 13 described in Findings of Fact Nos. 9 and 16 and continuing through all distribution ditches or laterals serving three (3) or more parties.* The lateral manager’s oversight will not extend beyond any point from a distribution ditch or lateral that is used as conveyance to a single user. *The water right holders served by the lateral manager will constitute a water users association that will be referred to as the Water Users Association of the Lower Grays Creek Ditch Laterals*” (Order, p. 6, emphasis added); and
- “[T]he Department does HEREBY ORDER and APPOINT Norma Ratcliff, *to serve as lateral manager of the Water Users Association of the Lower Grays Creek Ditch Laterals* until October 31, 2012” (Order, p. 6, emphasis added).

In sum, the Department appointed a lateral manager as the Trust requested.

However, it did so only for those ditches and laterals located *downstream of* the concrete splitter located within the Grays Creek Ditch known as “Location” or Structure No. 13. Thus, the Department did not appoint a lateral manager for the Grays Creek Ditch itself (the canal/ditch located upstream of Structure No. 13 to the headgate on the Little Weiser River).

The Department also created an entirely *new and separate* ditch users association comprised of the water users located downstream of Structure No. 13 (the “Water Users Association of the Lower Grays Creek Ditch Laterals”). Consequently, the only water users obligated to compensate the new lateral manager (Ms. Ratcliff) are those located downstream of Structure No. 13, and not the entire Grays Creek Canal Association.

On June 27, 2012, the Trust filed a Petition for Reconsideration (“Petition”) of the Department’s June 13 Order. The Trust contends that the Department’s Order is insufficient because: (1) a lateral manager is needed for “the entire [Grays Creek] Ditch,” including the “upper end” of the ditch upstream of Structure No. 13; and (2) compensation for the lateral manager should be shared by all users of the Grays Creek Ditch, and paid for in the manner previously approved during the March 26, 2012 meeting of the Association members. *See* Petition, pp. 2-3.

For the reasons discussed herein, the Association requests the Trust’s Petition be denied in its entirety. The Trust continues to misunderstand and misconstrue the boundaries of the Grays Creek Ditch (*i.e.*, where the ditch ends and where the private lateral serving the Trust begins). This boundary is dispositive of the Trust’s underlying Petition for Appointment of Lateral Manager, and the Department’s Order already correctly decided the issue. The Trust’s current Petition perpetuates its attempts to improperly impose watermaster (or lateral manager) costs and expenses upon the Association concerning a facility (private user lateral) the Association does not own, operate or maintain, and a facility from which the Association derives no benefit.

II. ARGUMENT

A. **The Grays Creek Ditch Begins At The Little Weiser River And Ends At Structure No. 13**

Contrary to the Trust's assertions otherwise, the Grays Creek Ditch ("Ditch") does not extend beyond the concrete splitter structure referred to alternatively in this matter as "Location No. 13" or "Structure No. 13" (hereinafter referred to as "Structure No. 13"). *See, e.g.,* Response to Petition for Appointment of Lateral Manager, Exhibits F and G; the Department's Preliminary Order, pp. 2-3 (Findings of Fact Nos. 9 and 16); and the Affidavit of Dean Dunham ("Dunham Aff."), dated July 5, 2012, ¶¶ 2-3. Consequently, there is no such thing as the "lower end" of the Ditch downstream of Structure No. 13. Likewise, there is no such thing as the "upper end" of the Ditch upstream of Structure No. 13.¹

There are several private user laterals that divert water from the Ditch. Dunham Aff., ¶ 3. Those private sub-laterals include that which serves the Trust's property. *Id.* The private lateral serving the Trust's property begins at Structure No. 13, and continues downstream from that point. *Id.*

As stated in the Association's June 13 Answer to the Legg Family Trust's Motion to Strike, the Trust and its neighboring water users are free to organize and manage their separate sub-lateral system downstream of Structure No. 13. The Trust cannot, however, require the Association to absorb the added private lateral operation, maintenance, management, and oversight costs. To hold otherwise would create an impermissible subsidy paid for by Association members who derive no benefit from the private sub-lateral ditch serving the Trust's

¹ The Trust refers to the "lower Grays Creek Ditch" and the "upper end of the Grays Creek Ditch" at pages 2-3, respectively, of its Petition.

property. *See, e.g., Hale v. McCammon Ditch Co.*, 72 Idaho 478, 484-92 (1952). Consequently, the Department's June 13 Order was correct in:

- Forming the "Water Users Association of the Lower Grays Creek Ditch Laterals" downstream of Structure No. 13;
- Appointing Norma Ratcliff as the lateral manager of the Water Users Association of the Lower Grays Creek Ditch Laterals; and
- Ordering the compensation of Ms. Ratcliff by the members of the Water Users Association of the Lower Grays Creek Ditch Laterals (*i.e.*, those water users who also happen to be members of the Association as well, but who are located downstream of Structure No. 13).

Also contrary to the Trust's assertions, the assessments paid to the Association, both historically and in March 2012, only cover the operation and maintenance of the Ditch (*i.e.*, from the Little Weiser River to Structure No. 13), not the operation and maintenance of the several private sub-laterals diverting from the Ditch. *See, e.g.*, Response to Petition for Appointment of Lateral Manager, Exhibits F and G. Therefore, the Trust's contentions (Petition, p. 3) that previously collected Association assessments include operation, maintenance, and water distribution on the private user lateral serving the Trust's property are incorrect.

While it is true, as the Trust asserts, that assessments were collected from the entire Association membership ("all water users on the Ditch"), those assessments cover the costs of Ditch operation and maintenance from the Little Weiser River to Structure No. 13 only. The Association collects assessments from its entire membership (including those served by private sub-laterals) because its entire membership takes water delivery and, therefore, benefits from the Ditch. The same cannot be said for the private sub-laterals (such as the Trust's) diverting from the Ditch.

B. The Association Elected A Watermaster For The Grays Creek Ditch On June 20, 2012

The Trust's Petition states: "[t]here are numerous diversions from the Grays Creek Ditch above Location No. 13 that are unregulated and unmeasured." Petition, p. 2. Consequently, and according to the Trust: "a single Lateral Manager with jurisdiction over the entire Grays Creek Ditch is needed to ensure consistent and appropriate deliveries to all water users in accordance with their respective rights and priorities." *Id.*, pp. 2-3.

The Association vehemently disagrees with several of the Trust's assertions and accusations (including but not limited to those regarding the clearing and irrigation of new lands upstream of Structure No. 13, and those regarding unfettered or unregulated water diversions). The Association does, however, agree that all of its members are entitled to fair and equitable water distribution practices on the Ditch. To that end, and in part to address the concerns of the Trust, the Association elected a Ditch watermaster on the evening of June 20, 2012. *See Dunham Aff.*, ¶¶ 4-8. Thus, to the extent the Department harbors any concerns regarding administration of the Ditch in the absence of a watermaster, those concerns have already been addressed by the Association from within.

The Association elected its watermaster during a general meeting called by advance written notice provided to all Association members. *Dunham Aff.*, ¶ 4. The meeting was well attended, and representatives of the Trust (Marion and Delbert Ogle), and its counsel (Dana Hoffstetter) attended. *Id.*, ¶ 5.

At first, Association patrons moved that Director Jim Buchanan be elected watermaster. *Dunham Aff.*, ¶ 6. Though Mr. Buchanan was willing to serve, he recommended that the other Association Directors also be named so that responsibility for the position did not fall to just one individual who may not always be available to serve. *Id.* In response, the

Association patrons amended the motion to name all of the Association's Directors (Jim Buchanan, Dean Dunham, and Loren Brest) as watermasters for the Ditch. *Id.*

The amended motion carried by unanimous vote. Dunham Aff., ¶ 7. Only the Trust declined to vote. *Id.* Though it abstained from voting, neither the Trust, nor its counsel, voiced any opposition to the motion, the vote, or the resulting appointment of the Association's Directors to serve collectively as the watermaster for the Ditch. *Id.*²

As a result of the June 20 meeting and election, Jim Buchanan, Dean Dunham, and Loren Brest now serve as the Association watermaster. Dunham Aff., ¶ 8. The Directors patrol and administer the Ditch and water distribution from the Ditch headgate on the Little Weiser River down to Structure No. 13, where the jurisdiction of Norma Ratcliff and the Water Users Association of the Lower Grays Creek Ditch Laterals properly begins. *Id.*

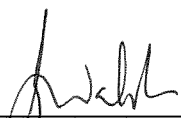
² This is an issue of significant frustration and expense for the Association. Representatives of the Trust and its counsel attended the watermaster election meeting a full seven (7) days in advance of the filing of its Petition for Reconsideration. Rather than address any issues or concerns it might have with the operation, maintenance, and administration of the Grays Creek Ditch (including the election of the watermaster) during the June 20 meeting, the Trust opted instead to file its current Petition on June 27. While it is certainly the Trust's right to file its Petition, the Association cannot help but feel sandbagged by the same, and frustrated by the continuing need to expend funds addressing these matters in administrative proceedings before the Department.

**III.
CONCLUSION**

For the foregoing, the Association respectfully requests the Department deny the Legg Family Trust's Petition for Reconsideration in its entirety. The Trust's concerns are unfounded. Moreover, the Association cannot be obligated to subsidize water distribution expenses corresponding to facilities it does not own, operate, and from which it derives no benefit.

DATED this 9th day of July, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

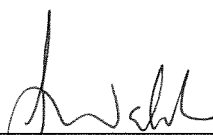
Andrew J. Waldera – Of the Firm
Attorneys for Gray Creek Canal
Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2012, I caused a true and correct copy of the foregoing **GRAYS CREEK CANAL ASSOCIATION'S RESPONSE IN OPPOSITION TO PETITION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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