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DEPARTMENT OF
WATER RESOURCES
ORIGINAL

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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
ANSWER TO THE LEGG FAMILY TRUST'S
MOTION TO STRIKE**

The Grays Creek Canal Association ("Canal Association"), by and through undersigned counsel of record and pursuant to Idaho Department of Water Resources Procedure Rule 270, hereby responds in opposition to the Legg Family Trust's Motion to Strike Grays Creek Canal Association's Response to Petition for Appointment of Lateral Manager and Memorandum in Support ("Motion"), dated June 4, 2012.

**I.
BACKGROUND**

On March 26, 2012, the Legg Family Trust ("Trust") arranged for and attended an annual meeting of the Grays Creek Ditch Lateral water users. *See, generally*, Petition for

Appointment of Lateral Manager, filed May 10, 2012 (“Petition”), particularly Exhibit C attached thereto. The meeting was called through a broadcast notice to all landowners known to receive water from the Grays Creek Ditch. *Id.* at Exs. A and B.

During the course of the March 26 meeting, Grays Creek Ditch water users discussed their existing organizational structure, including the facts that:

- Though formal officer elections had not occurred for many years, elections did occur up until the late 1970s (*see* Petition, Ex. C; *accord* Affidavit of Marion Ogle, dated June 4, 2012, ¶ 5, stating that the Grays Creek Ditch Association “has been functioning in some form for at least 45 years,” and that the Ditch Association possessed an Assessment Book dating back to 1967);
- In the interim, Scotti Yantis had been acting as the Ditch Association’s Secretary/Treasurer since the late 1970s (*see* Petition, Ex. C);
- The Ditch Association possessed a centralized, Association-specific bank account. *Id.*;
- The Ditch Association used an existing assessment method based upon benefitted acreage. *Id.*, *see also*, Affidavit of Marion Ogle, dated June 4, 2012, Ex. A, which consists of the Ditch Association’s water user assessment records from 1967 through 2010; and
- Dean Dunham and Tom Grossen had been serving as directors for the Ditch Association historically, though they were not formally elected. *Id.*

Desiring more formal organization, the annual meeting attendees nominated and elected a board of three directors to manage the Ditch Association’s affairs. Those elected were Jim Buchanan, Loren Brest, and Dean Dunham. Petition, Ex. C. Those directors then received and accepted the resignation of the acting Secretary/Treasurer, Scotti Yantis, who provided the Ditch Association’s books to Director Brest that same day. *Id.*

Near the conclusion of the March 26 meeting, the Ditch Association, through formal vote, set an assessment of \$3.50 per benefitted acre. Petition, Ex. C. The Ditch Association also, through formal vote, appointed Roger Meyer as its watermaster. *Id.*

After the March 26, 2012 annual meeting further crystallized the more formal organization of the Ditch Association, the newly-elected Board of Directors executed a resolution, dated May 7, 2012, announcing that the name of the "Ditch Association" had been changed to the Grays Creek Canal Association ("Canal Association") effective April 1, 2012. *See* Response to Petition for Appointment of Lateral Manager ("Response"), Ex. A. After the name change, the Canal Association (formerly the Ditch Association) Board of Directors (the same Buchanan, Brest, and Dunham elected on March 26, 2012) held an open meeting of the Canal Association on April 19, 2012. Response, Ex. B. Subject matters discussed during the April 19 meeting included review of mapping of the Canal Association distribution system, spring flood water use and assessment therefor, the operation and maintenance responsibility of the landowners served by laterals heading from the Canal Association's delivery facility (known as the Grays Creek Ditch), where the Grays Creek Ditch began and ended, whether a watermaster was needed, and the need to hire an attorney to address concerns of the Trust and any potential future action the Trust might take with respect to the appointment of a watermaster. *Id.* The April 19 meeting adjourned after the Canal Association Board of Directors appointed Adrian Hust as the new Secretary/Treasurer after the March 26, 2012 resignation of Scotti Yantis. *Id.*

The Canal Association convened and conducted another general meeting on May 8, 2012. During this meeting, the Canal Association again discussed the boundaries of the Grays Creek Ditch, facility maintenance issues, privately owned laterals diverting water from the Grays Creek Ditch, and whether a watermaster was necessary on the Grays Creek Ditch, or whether a watermaster was more needed to address private lateral water use and distribution downstream of the Grays Creek Ditch terminus. Response, Ex. C.

During the May 8 meeting, the Canal Association hired legal counsel to assist with the watermaster questions and determined that the primary functions of the watermaster sought by the Trust concerned water distribution issues downstream of the terminus of the Grays Creek Ditch. The Canal Association did not necessarily disapprove of the appointment of such a watermaster, but the appointment and compensation of that downstream watermaster would have to be the responsibility of the private lateral users/owners, not that of the Canal Association as a whole. *Id.*

On May 10, 2012, the Trust filed its Petition. On or about May 30, 2012, the Canal Association filed its Response. The Canal Association does not oppose the appointment of a watermaster for the administration of water distribution downstream of the Grays Creek Ditch terminus. The Canal Association does, however, disagree that it and its landowners should bear the costs associated with such administration and oversight for what amounts to a private lateral over which the Canal Association exercises no ownership or control, and from which the Canal Association, as a whole, derives no benefit. *See Response*, generally. Thus, the crux of this dispute between the Trust and the Canal Association is not the Canal Association's failure or refusal to appoint a watermaster, but rather a dispute over where the Grays Creek Ditch ends, and where the downstream private lateral serving the Trust's property, among others, begins. The scope and reach of the Grays Creek Ditch is determinative of the extent of the Canal Association's obligation, if any, to bear the operation and maintenance costs and costs of the watermaster the Trust seeks.

II. ARGUMENT

A. **The Grays Creek “Ditch” Association And “Canal” Association Are One And The Same And The Canal Association Possesses Standing**

The Trust’s primary contention is that the Canal Association is not a legally valid entity and, that as a result, the Canal Association lacks standing to oppose the Trust’s Petition. Motion, pp. 1-2. The filings in this case demonstrate that the Canal Association and the formerly existing “Grays Creek Ditch Association” are the same entity, regardless of name. The Trust’s Motion rests more upon meaningless distinctions than it does applicable law.

To the extent the Trust contends the Canal Association does not exist whatsoever, regardless of name, that contention is incorrect. The records already on file in this matter demonstrate that the Canal Association, though loosely organized, was organized and conducting business at least since the 1960s. *See*, Section I, *supra*; *see also*, Affidavit of Marion Ogle. Several organizational informalities were recently addressed during the March 26, 2012 annual meeting convened at the behest of the Trust. The Canal Association was organized enough to hire counsel and SPF Water Engineering to investigate and participate in this matter on its behalf. Therefore, there can be no serious argument that the Canal Association does not exist.

Further, Idaho Code Section 42-1301 does not require the organization or creation of any formal, state-recognized corporate entity for purposes of functioning as a Lateral Ditch Water Users’ Association. Instead, the creation of such an entity is automatic under the statute. IDAHO CODE § 42-1301 (“Where three or more parties take water from same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or a

distributing ditch . . . *such parties shall constitute a water users' association.*”) (Emphasis added).¹

Because the Canal Association clearly exists, there is no question it possesses standing to challenge the Trust’s Petition. The Canal Association, for the benefit of its water user members, operates and maintains the Grays Creek Ditch. The Trust seemingly does not dispute this. What the Trust substantively disputes is where the Grays Creek Ditch ends, and where the private lateral serving its property, the Grossen property, and the Kretten property begins. This boundary is determinative of the Trust’s Petition, and the respective obligations of the parties for ditch operation and maintenance costs and for purposes of retaining and compensating a watermaster.

What the Trust disputes procedurally via its Motion, the legal organization of the Grays Creek Ditch Association versus the Grays Creek Canal Association, amounts to the proverbial red herring. This nomenclature dispute has no bearing upon where the Grays Creek Ditch ends, and where the private lateral used by the Trust begins. The name of the Canal Association is a meaningless distinction without a difference, particularly in light of the fact that the challenged name change was effectuated by the same Jim Buchanan, Loren Brest, and Dean

¹ The Trust may attempt to argue that Idaho Code Section 42-1301, *et seq.* does not govern this matter because the Grays Creek Ditch diverts water from the Little Weiser River (a natural source), rather than from a canal or reservoir. These arguments would be disingenuous given the Trust’s prior application of Title 42, Chapter 13 in its Petition. *See* Petition, p.1 (wherein the Trust invokes the jurisdiction of the Department under Idaho Code Section 42-1308); *see also*, p. 3 (wherein the Trust cites to Idaho Code Sections 42-1301, 42-1302, and 42-1308, among others, as applying to this dispute). If the Trust applies Idaho Code Title 42, Chapter 9 in an attempt to defeat the Association’s organization and legal status, then the Trust must seek its remedy in district court, not before the Department. *See* IDAHO CODE § 42-901. The Trust cannot cobble together statutes from different code chapters only when it suits its needs, and then abandon such a course when it proves less advantageous.

Dunham who were duly elected to lead the Canal Association by the Trust, among others, on March 26, 2012. The record makes clear that the so-called different entities (the “Ditch Association” and the disputed “Canal Association”) are one and the same.

The Trust’s hyper-technical standing arguments find no more support in the Department’s Procedural Rules than they do in Idaho Code Title 42, Chapter 13. For example, Procedure Rule 52 provides for the liberal construction of the Department’s rules in order to secure the “just, speedy, and economical determination of all issues presented to the agency.” *Id.* To that end, Procedure Rule 210 provides that formal affidavits “may be filed” in response to pleadings such as the Trust’s underlying Petition and its Motion; the rule does not provide that formal affidavits (sworn statements) “must” be filed. *Id.*

Likewise, Procedure Rule 600 provides that the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not, as a general matter, apply to Department proceedings. *Id.* Instead, the Department is to accept evidence in a manner that assists the parties’ development of a record, not to exclude evidence and frustrate record development. *Id.* Consequently, the Department admits all evidence that is “of a type commonly relied upon by prudent persons in the conduct of their affairs.” *Id.*

The signed statements appended to the Canal Association’s Response may not meet the strict formality requirements of Idaho Rule of Civil Procedure 56(e) for example (*see* Trust’s evidentiary complaints; Motion, p. 3), but they do meet the more relaxed evidentiary requirements of the Department. Moreover, the time to take and consider testimony under oath is at hearing, not during the petition and answer stage as the parties’ respective filings demonstrate (*i.e.*, the Trust’s underlying Petition and its attachments are not supported by any

sworn oath or verification, yet the Trust disingenuously seeks to hold the Canal Association's Response to a higher standard). *See, e.g.*, Procedure Rule 559.

The Trust's Motion fails the Department's liberal construction and relaxed evidentiary standards. The Motion does nothing to secure the just, speedy, and economical determination of this matter. Instead, the Motion attempts to exploit meaningless technical distinctions in an effort to quash the Department's consideration of a legitimate dispute. The Canal Association, through its individual water user members (including, but not limited to, Board Directors Buchanan, Brest, and Dunham), has a right to be heard and to offer sworn testimony when appropriate (*i.e.*, at hearing). Certainly, the Trust cannot dispute that the individual water user members of the Canal Association lack standing in this matter because, at a minimum, those individual water users are co-owners of the Grays Creek Ditch possessing ditch right real property interests. *See, e.g., Savage Lat. Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 242 (1993). Assuming *arguendo* the Department agrees that the Canal Association lacks standing—which it should not—the Department should not divest the Canal Association's members the opportunity to be heard in this matter.

B. The Canal Association Is Not Violating Or Evading Statutory Or Fiduciary Duties And Obligations, Rather The Canal Association Is Protecting Its Members From Disputed And Improper Expenses The Legg Family Trust Seeks To Impose Against Those Who Receive No Benefit

The Canal Association agrees that all of its members are entitled to fair and equitable water distribution practices. Consequently, the Canal Association does not disagree with the Trust's attempts to appoint a watermaster. The disagreement lies in the Trust's attempt to improperly impose watermaster costs and expenses upon the Canal Association concerning a

facility the Association does not own, operate, or maintain, and a facility from which the Association derives no benefit.

This matter is not unlike that considered by the Idaho Supreme Court in *Hale v. McCammon Ditch Co.*, 72 Idaho 478 (1952). In part, the Idaho Supreme Court held that the McCammon Ditch Company had no obligation to operate and maintain private delivery laterals diverting water from the company's main supply ditch. In so holding, the Court invalidated a blanket and, therefore, unequal stock share assessment scheme designed to support the operation and maintenance of the private laterals. The company's proposed assessment scheme impermissibly spread the costs of the entire system (the main delivery canal *and* the private laterals) across the entire shareholder base even though various shareholders derived no benefit from the operation and maintenance of the private laterals. *Id.* at 484-87. Contrary to the arguments of some, the irrigation system and works of the company did not include the private laterals and infrastructure delivering water "down to the last man." *Id.* at 487-90. The Court's opinion (on rehearing) made clear that it is the responsibility of the lateral water users to organize and fund the management of the private laterals, not that of the company or its shareholders. *Id.* at 492.

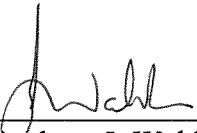
The Trust and its neighboring water users are free to organize and manage their separate sub-lateral system. Consequently, they are free to appoint a watermaster to oversee the distribution of water on their separate sub-lateral system. The Trust cannot, however, require the Canal Association to absorb the added private lateral operation, maintenance, management, and oversight costs. To hold otherwise would create an impermissible subsidy paid for by Canal Association members who derive no benefit from the private sub-lateral ditch serving the Trust's property.

**III.
CONCLUSION**

The Grays Creek Canal Association respectfully requests the Department deny the Legg Family Trust's Motion to Strike in its entirety. The Canal Association and its members do not lack standing, the Trust's standing contentions are needlessly technical and not supported by applicable law, and the Canal Association does not oppose the appropriate appointment of a watermaster contrary to the Legg Family Trust's assertions otherwise. However, the Canal Association is not obligated to subsidize water distribution expenses corresponding to facilities it does not own, operate, or derive any benefit from.

DATED this 13th day of June, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By  _____
Andrew J. Waldera – Of the Firm
Attorneys for Grays Creek Canal
Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2012, I caused a true and correct copy of the foregoing **GRAYS CREEK CANAL ASSOCIATION'S ANSWER TO THE LEGG FAMILY TRUST'S MOTION TO STRIKE** to be served by the method indicated below, and addressed to the following:

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