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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
ANSWER IN OPPOSITION TO MOTION TO
STRIKE AFFIDAVIT OF DEAN DUNHAM**

The Grays Creek Canal Association (the "Association"), by and through undersigned counsel of record and pursuant to Idaho Department of Water Resources Procedure Rule 270 ("Procedure Rule"), hereby opposes the Legg Family Trust's (the "Trust") Motion to Strike Affidavit of Dean Dunham ("Motion"), dated July 13, 2012.

**I.
BACKGROUND**

On June 27, 2012, the Trust filed a Petition for Reconsideration challenging the Preliminary Order issued by the Department on June 13, 2012. The Association responded in opposition to the Trust's petition on July 9, 2012. See Grays Creek Canal Association's Response in Opposition to Petition for Reconsideration ("Response").

On July 11, 2012, counsel for the Trust requested an opportunity “to Reply to the Response to the Petition for Reconsideration in the above-referenced matter,” asking that the Department “hold off” of issuing any decision until after Friday, July 13, 2012. *See* Affidavit of Andrew J. Waldera (“Waldera Aff.”), Ex. A. Out of courtesy, and in hopes of having the matter decided on the merits with finality, counsel for the Association did not oppose the Trust’s request. *Id.* The Department also acquiesced to the Trust’s reply opportunity request. *Id.*

On July 13, 2012, the Trust, as expected, filed its reply. However, the Trust’s reply also contained a separate, unexpected component—a Motion to Strike the Affidavit of Dean Dunham filed with the Department on July 9, 2012, in support of the Association’s Response.

II. ARGUMENT

A. The Trust’s Motion To Strike Is Baseless And Should Be Denied

As the Trust rightly concedes, the formal Idaho Rules of Evidence *do not*, as a general matter, apply to Department proceedings. *See* Procedure Rule 600. 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 Trust’s effort to strike the Dunham affidavit is baseless and disingenuous. In its Motion to Strike Grays Creek Canal Association’s Response to Petition for Appointment of Lateral Manager, dated June 4, 2012, the Trust decried the Association’s use of “[u]nnotarized written statements” that were “improperly proffered as evidence.” Motion to Strike Grays Creek Canal Association’s Response to Petition for Appointment of Lateral Manager, p. 3. Despite the

fact that the “unnotarized written statements” do comply with the Department’s Procedure Rules for the reasons discussed at pages 7 and 8 of the Association’s Answer to the Trust’s Motion to Strike (dated June 13, 2012), apparently sworn affidavit testimony is not good enough for the Trust either. The Trust’s hyper-technical procedural challenges have no end and utterly frustrate the “just, speedy, and economical determination” of this matter in derogation of Procedure Rule 52. *See, id.*, (promoting the liberal construction of the Department’s Procedure Rules).

Most telling of the Trust’s efforts to frustrate these proceedings is that for all of its procedural bluster, the Trust does not challenge or dispute the substantive content of the Dunham Affidavit. Surely the Trust and its counsel, *both of whom attended the June 20, 2012 meeting discussed in the subject affidavit*, are in a position to lodge their own affidavits to the extent they dispute Mr. Dunham’s testimony. Not once, however, does the Trust allege, or even suggest, that the contents of the Dunham Affidavit are inaccurate or incorrect. The fact of the matter is that the contents of the Dunham Affidavit are truthful and accurate, and the Trust’s silence in this regard is deafening.

In sum, the Affidavit of Dean Dunham more than complies with Procedure Rules 52, 210, and 600. More important than the procedural integrity of the affidavit, however, is the affidavit’s substantive integrity. Not only does the Dunham Affidavit comprise evidence “of a type commonly relied upon by prudent persons in the conduct of their affairs” (*see* Procedure Rule 600), but it also accurately *testifies under oath, first hand* regarding the circumstances, content, and events of the June 20, 2012 Association meeting—substantive facts the Trust does not challenge or otherwise dispute.

B. The Trust's Motion To Strike Reeks Of Gamesmanship

The Association does not appreciate what it perceives to be an end-run around its support of the Trust's July 11, 2012 reply request. The Trust requested the opportunity to reply to the Association's response. The Association supported that request in an effort to promote a final decision on the merits in this matter. *See* Waldera Aff., ¶ 3. Rather than gamely responding to the merits of the Association's Response, the Trust included its additional motion to strike.

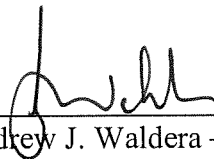
Apparently, it is true that no good deed goes unpunished. Worse yet, is the Trust's motion to strike does not challenge the substance of the Dunham Affidavit in any way whatsoever. The Trust abused the courtesy afforded it by both the Association and the Department, and its motion is a blatant violation of Procedure Rule 52.

**III.
CONCLUSION**

For the foregoing, the Association requests the Department deny the Trust's Motion to Strike the Affidavit of Dean Dunham in its entirety. The motion is baseless, disingenuous, and does nothing to promote the decision of this matter on the merits.

DATED this 17th day of July, 2012.

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FIELDS, CHARTERED

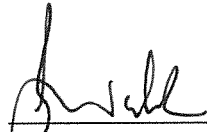
By  _____
Andrew J. Waldera – Of the Firm
Attorneys for Gray Creek Canal
Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2012, I caused a true and correct copy of the foregoing **GRAYS CREEK CANAL ASSOCIATION'S ANSWER IN OPPOSITION TO MOTION TO STRIKE AFFIDAVIT OF DEAN DUNHAM** to be served by the method indicated below, and addressed to the following:

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Andrew J. Waldera