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DEPARTMENT OF  
WATER RESOURCES

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)**  
**of the Grays Creek Ditch Lateral )**  
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**REPLY IN SUPPORT OF  
PETITION FOR RECONSIDERATION  
AND MOTION TO STRIKE  
AFFIDAVIT OF DEAN DUNHAM**

Petitioner, Legg Family Trust, by and through its counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, pursuant to Title 67, Chapter 52, Idaho Code and IDAPA 37.01.01, respectfully files this Reply in Support of Petition for Reconsideration of the Preliminary Order appointing a lateral manager for the Grays Creek Ditch and also moves the Idaho Department of Water Resources to strike the July 5, 2012, Affidavit of Dean Dunham filed with the Grays Creek Canal Association's Response in Opposition to Petition for Reconsideration on the basis that it is replete with hearsay. This Motion and the Petition for Reconsideration are supported by the following Reply and other matters of record in this matter.

## REPLY

### **I. Motion to Strike Affidavit of Dean Dunham.**

In significant part, the July 5, 2012, Affidavit of Dean Dunham, submitted in this matter, discusses a June 20, 2012, Grays Creek Canal Association (“Association”) meeting (paragraphs 4-8). Rather than attaching Association records concerning the meeting’s content, Mr. Dunham in paragraphs 6-8 describes motions and statements made at the meeting. Clearly, such descriptions of statements and oral motions made at a meeting constitute impermissible hearsay. *See* Idaho Rule of Evidence, 801(c) (“ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”) and 802 (“Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho.”).

While the Idaho Rules of Evidence may not strictly apply in all proceedings before the Idaho Department of Water Resources, such a flagrant flouting of the typical Rules of Evidence should not be accepted. *See* IDAPA 37.01.01.600. There are legitimate reasons behind the Rules of Evidence, including its hearsay prohibitions. There are more reliable sources of such information and unnecessary violations of the Rules of Evidence should not be encouraged. Accordingly, paragraphs 6-8 of Mr. Dunham’s Affidavit should be stricken as they are based on extensive impermissible hearsay.

**II. The effort to bifurcate the Grays Creek Ditch is a thinly veiled effort to avoid comprehensive lateral distribution of water rights according to Idaho law and, therefore, such bifurcation should be avoided.**

The Association asserts that the Grays Creek Ditch ends at Location No. 13 and that after that point the Association has no jurisdiction and has never exercised any such jurisdiction. Thus, the Association concludes that separate lateral managers should have jurisdiction over the different halves of the Grays Creek Ditch. In support of this contention, the Association provides no legal basis for division of the Grays Creek Ditch into two separately managed systems, nor does it provide any factual basis justifying separate management of the upper and lower portions of the Grays Creek Ditch.

On the other hand, there can be no question that Idaho law requires the distribution of water based on water rights among all users and it is the duty of the State ultimately to assure that this occurs:

All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose.

Idaho Code § 42-101. *See also* Idaho Code § 42-102 (“[I]t shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water.”).

Indeed, Idaho Code § 42-1308, at issue in this proceeding, requires the Idaho Department of Water Resources to appoint a lateral manager where it finds that water is not being apportioned and distributed properly and the rights of water users are being injured thereby:

[T]he director of the department of water resources may appoint and fix the compensation of a lateral manager, upon the written petition of a water user alleging that water is not being apportioned and distributed properly among the

users from the ditch or lateral and that the rights of the water user are being injured thereby.

Idaho Code § 42-1308(1) (emphasis added). The statute speaks in terms of the appointment of a single lateral manager, not multiple lateral managers with disparate jurisdiction over portions of a single lateral system.

Although the word “may” is used, instead of the word “shall,” this statute should not be interpreted to afford the Idaho Department of Water Resources unfettered discretion in deciding whether to appoint a lateral manager. The language of Idaho Code § 42-1308 is properly interpreted to require the Idaho Department of Water Resources to appoint a lateral manager where it finds that water is not being apportioned and distributed properly and rights are being injured thereby. The use of the word “may” should not be interpreted to afford the Idaho Department of Water Resources to leave unaddressed situations where water is not being properly distributed and parties are being injured as a result. Similarly, Idaho Code § 42-203A(5) states that “the director of the department of water resources may reject such application and refuse issuance of a permit;” however, the use of the word “may” in this provision does not and cannot, under our system of law, allow IDWR to reject permit applications in complete disregard of applicable statutory standards. Likewise, the use of the word “may” in Idaho Code § 42-1308 does not negate the stated statutory standard. In fact, Idaho Code § 42-1308(6) requires that the Idaho Department of Water Resources issues an order “with findings either appointing a lateral manager or declining to appoint a lateral manager.” Clearly, such findings must be based on the legal standard in Idaho Code 42-1308(1).

The Association focuses on abstract metaphysical issues, such as whether the ditch ends at Location No. 13 or whether it ends at its last point of water delivery. However, the

appointment of a lateral manager should not be determined based on abstract metaphysical principles akin to debating whether the glass is half full or half empty. Common sense and practicality need to prevail in matters concerning water delivery. It is well known that the users at the end of a ditch suffers the most when water is not fairly distributed and it is also basic that consistent and thorough management of water distribution along the entire system is necessary to ensure proper delivery at the end of a ditch.

The Association has submitted no solid factual evidence disputing the Second Affidavit of Marion Ogle regarding the excessive water deliveries above Location No. 13 or the allegations regarding the inadequate deliveries of water to the Legg Family Trust and the injury occasioned thereby. These factual issues are the appropriate legal considerations under the applicable standard in Idaho Code 42-1308(1) and the Association has ignored addressing these issues in favor of meaningless metaphysical arguments concerning where the Grays Creek Ditch ends in an apparent attempt to avoid the proper distribution of water according to law.

A single lateral manager responsible for ensuring appropriate deliveries along the entire Ditch is necessary under the record in this proceeding for the proper apportionment and distribution of the water and to assure no further injury in accordance with Idaho Code 42-1308.

**III. The election of any watermaster(s) at the June 20, 2012, meeting (after issuance of the Preliminary Order in this proceeding) would not affect the Department's ability to appoint a lateral manager for the entire Ditch pursuant to Idaho Code 42-1308.**<sup>1</sup>

The Association alleges that at the June 20, 2012, meeting, the three directors were appointed "watermaster" for the upper end of the Grays Creek Ditch from the Little Weiser River diversion point to Location No. 13. However, such meeting postdated the issuance of the

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<sup>1</sup> This section is intended to address the portions of the Association's Response based on the hearsay in the Affidavit

Preliminary Order in this matter establishing bifurcated administration of the Grays Creek Ditch. Thus, any such election of a separate watermaster for the upper end of the Grays Creek Ditch was based on the Preliminary Order which is under reconsideration at the present time.

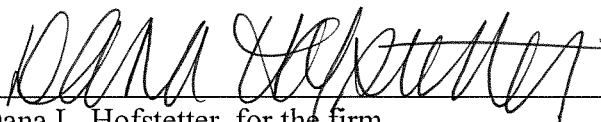
In any event, the Association's election of a watermaster (or watermasters) serving only the upper end of the ditch system is not consistent with the mandates of Idaho Code Title 42, Chapter 13. These statutes clearly indicate that multiple laterals can comprise a single water user's association. "Where three (3) or more parties take water from the same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users' association known as 'Water Users' Association of Lateral or Laterals.'" Idaho Code § 42-1301. Clearly, where multiple ditches or laterals comprise a single integrated system, the lateral association is intended to include the entire system.

**IV. Conclusion.**

For the foregoing reasons, a lateral manager should be appointed for the entire Ditch, on the same terms and paid with the assessments, as approved at the March 26, 2012, meeting.

DATED this 13th day of July, 2012.

HOFSTETTER LAW OFFICE, LLC

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

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of Dean Dunham in the event that the Motion to Strike is not granted.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 13th day of July, 2012, I caused the foregoing **REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION AND MOTION TO STRIKE AFFIDAVIT** (with any attachments) to be served by the pre-paid method(s) indicated on the following:

**Original to:**

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