

AUG 29 2017

DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF SYLTE'S PETITION
FOR DECLARATORY RULING
REGARDING DISTRIBUTION OF WATER
TO WATER RIGHT NO. 95-0734

Docket No. P-DR-2017-001

**RESPONSE IN OPPOSITION TO SYLTE'S
MOTION TO STRIKE THE BRIEFS AND
MEMORANDA OF COLBY CLARK**

COMES NOW Twin Lakes Improvement Association ("TLIA"), by and through its undersigned counsel of record, pursuant to IDWR's Rules of Procedure and IDAPA 37.01.01, and hereby submits its response in opposition to the portion of Sylte's August 22, 2017 motion that seeks to strike the briefs and memoranda previously filed in this matter by Colby Clark. There is no basis to retroactively strike these filings or to strike or disregard the brief that has been incorporated by reference in TLIA's briefing.

I. ADDITIONAL BACKGROUND

Colby Clark properly petitioned to intervene in this matter on May 5, 2017. *Petition to Intervene* (Colby Clark) (May 5, 2017). His petition to intervene was granted by the Hearing

Officer on May 26, 2017. *Order Regarding Intervention; Order Requiring Submittal of Information* (May 26, 2017). Colby Clark submitted the form required by the Hearing Officer on June 2, 2017. *Forms Required by 5-26-17 Order* (June 1-13, 2017). Colby Clark also filed his *Notice Regarding Participation* on June 26, 2017.

Clark's Response to Sylte's Motion for Summary Judgment was filed on July 6, 2017. TLIA adopted and incorporated Clark's Response in its own briefing on the next day, as follows: "In addition to the arguments set forth below, TLIA joins in, supports and hereby incorporates by reference *Clark's Response to Sylte's Motion for Summary Judgment* (July 6, 2017)." TLIA's *Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Sylte's Motion for Summary Judgment* at 2 (July 7, 2017).

All of Clark's briefing and other submissions to IDWR, as well as TLIA's incorporation of Clark's Response, occurred on or before July 7, 2017, while Colby Clark had a direct and substantial interest and was properly an intervenor in this matter. The Clarks' Warranty Deed, conveying their real property, wasn't executed until July 13, 2017 and was recorded on July 14, 2017. *Second Affidavit of Michael P. Lawrence* (August 22, 2017). Colby Clark has not filed any additional documents in this matter since he and his wife conveyed the property.

II. ARGUMENT

TLIA takes no position on the removal of the Clarks as intervenors or their future participation as parties in this matter. However, TLIA opposes Sylte's request that the Hearing Officer take the additional step of disregarding and striking Colby Clark's previously filed briefs, memoranda, and other papers from the record in this matter, for the reasons set forth below.

A. Colby Clark's Filings All Occurred While He Was Properly An Intervenor And There Is No Basis To Strike Them Retroactively.

Parties in contested cases are permitted to file briefs, memoranda, and other documents. IDAPA 37.01.01.564. Colby Clark was granted intervenor party status on May 26, 2017 and properly filed his Response to Sylte's motion for summary judgment and other documents with IDWR consistent with the authority set forth in Rule 564.

Colby Clark was properly a party when he filed his July 6, 2016 Response and all other documents in this matter. The Clarks did not convey their real property until after all of these filings were properly made. *Second Affidavit of Michael P. Lawrence* (August 22, 2017). As a result, Colby Clark still had a direct and substantial interest at the time the documents were filed with IDWR.

Removing Colby Clark as a party now would obviously eliminate his ability to file future briefs in this matter. However, there is no basis to retroactively apply his removal from this matter and strike or disregard filings that he made while he was properly an intervenor.

B. TLIA Has Adopted Colby Clark's Response Brief Through Incorporation By Reference And It Cannot Be Stricken From The Record.

In its July 7, 2017 brief, TLIA expressly incorporated Colby Clark's July 6, 2017 Response by reference. *See, TLIA's Memorandum in Support of Cross-Motion for Summary Judgment and in Opposition to Sylte's Motion for Summary Judgment* at 2 (July 7, 2017) ("In addition to the argument set forth below, TLIA joins in, supports and hereby incorporates by reference *Clark's Response to Sylte's Motion for Summary Judgment* (July 6, 2017).").

When used in a document in reference to another writing, "incorporation" means that the writing referred to is "incorporated" into or adopted and made part of the document. *Barron's Law Dictionary*, Second Edition (1984). In Idaho, as in other states, one document may be incorporated by reference into another document. *See e.g., City of Meridian v. Petra, Inc.*, 154

Idaho 425, 435 (2013) (quoting, *Harris, Inc. v Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 777 (2011)) (“a signed agreement may incorporate by reference to another agreement”). Incorporation by reference is a common legal doctrine, utilized widely by attorneys in Idaho and elsewhere.

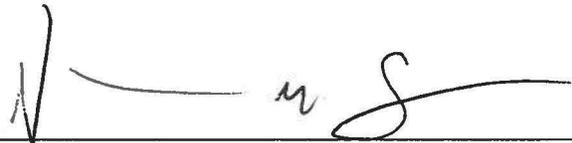
Colby Clark’s July 6, 2017 Response was properly incorporated by reference in TLIA’s July 7, 2017 summary judgment brief. As a result, Clark’s Response is also part of TLIA’s brief. Under these circumstances, it would be wholly improper to disregard or strike Clark’s Response from the record and there is no basis for the Hearing Officer to do so.

III. CONCLUSION

For the reasons set forth above, the Hearing Officer should deny the portion of Sylte’s August 22, 2017 motion that seeks to disregard and strike Colby Clark’s previously filed briefs, memoranda, and other papers from the record in this matter.

DATED August 29, 2017.

PARSONS BEHLE & LATIMER

By 
Norman M. Semanko
Attorneys for Twin Lakes Improvement Association

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2017, I served a true and correct copy of the foregoing document on the parties listed below by their designated method of service.

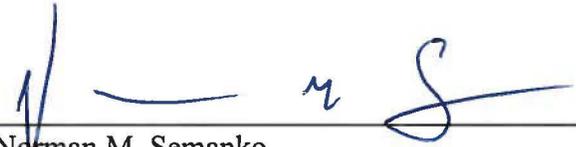
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