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RECEIVED**OCT 21 2016****DEPARTMENT OF
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October 20, 2016

Board of Directors
Paradise Homeowner's Association, Inc.
c/o Julene Walker
2752 Sundance Drive
Twin Falls, Idaho 83301

Re: Geothermal Hot Water Service to Grouse Creek Cabins, Inc.

Dear Directors:

I write you on behalf of Grouse Creek Cabins, Inc. ("GCC"). GCC retained me to address correspondence between you ("PHOA") and GCC shareholders Mickey and Dave Burney regarding their (Burney's) request for delivery of geothermal water for space heating purposes in a cabin they are proposing to build.¹ To date, PHOA appears unwilling to deliver the requested hot water for a variety of reasons stated in your September 23, 2016 letter, including:

- PHOA is not a "successor or affiliate" of Paradise Resorts, Inc. ("Resort");
- Neither PHOA nor Water Right License No. 63-10560 existed at the time of the 1977 Agreement between Resort and GCC; and
- PHOA has "never" provided geothermal water to GCC for space heating purposes.

GCC believes that PHOA's contentions are in error, and seeks an amicable resolution to this matter preserving its entitlement to, and continuing use of, geothermal water for space heating purposes as recognized and provided in a number of documents including, most importantly, Water Right License No. 63-10560 ("License"). The License alone is a fully vested property right appurtenant to GCC's lots, is binding on the parties, and cannot be taken absent just compensation. *See, e.g., IDAHO CODE §§ 55-101 and 42-220; see also, Crow v. Carlson*, 107 Idaho 461, 465 (1984).

¹ The Burneys are building a cabin to replace an older mobile home/trailer that they demolished and removed from their lot.

History of Paradise Inn and Willis Carrie's Paradise Subdivision

As the name of PHOA's subdivision implies, PHOA, its water rights, and the infrastructure it owns, operates and maintains, owes its existence to the Carrie family, notably Willis Carrie, Evelyn Carrie, and James Carrie. In 1973, Willis Carrie filed water right claim no. 63-4221 with a priority date of 1913 for purposes of irrigation, domestic, and heating on property now comprised of Willis Carrie's Paradise Subdivision ("Subdivision") (platted in 1979) and GCC (deeded from Resort to GCC in 1977—to be discussed in greater detail below). Claim 63-4221 identified the heating of seven structures and fourteen trailer sites as an existing use in 1973.

Though the water right claim identified Grouse Creek as the source of water, the explanatory information in the claim made clear that the geothermal water used for heating and recreational activities (a geothermal swimming pool dating from 1918) were diverted from a spring in the pool bottom (which supplied 2/3 of the hot water claimed), and a point "adjacent to" the Grouse Creek point of diversion where hot water rose, thereby supplying the remaining 1/3 of hot water claimed. Grouse Creek was used to supply irrigation water and to cool the swimming pool for use. Willis Carrie's 1973 water right claim left a bit to be desired in its failure to identify all points of water diversion and its failure to identify the recreational use for the swimming pool. Nonetheless, the claim was not an application for a new water right, and it provided the context for the overall development of the Subdivision, Paradise Inn, the GCC lots, and served as the genesis of several water rights, including 63-4221, 63-10559, and 63-10560.

In May 1976, Willis, Evelyn, and James Carrie (Willis' son) incorporated Paradise Resort, Inc. to begin developing what would become Paradise Inn, Inc. ("Inn") and the Subdivision. At the time, and as alluded to in the 1973 claim to water right no. 63-4221, there were existing structures and mobile homes/trailers on the property that would eventually become the Subdivision. Some of those structures and trailers were moved to accommodate further development of the Inn and Subdivision through Frank Carrie's (Willis' son and brother of James) incorporation (with others) of GCC on December 7, 1977. To incent the move needed to facilitate additional Inn and Subdivision development, Resort sold GCC 1.82 acres of its (Resort's) landholdings south of Grouse Creek Road for a mere \$10.00 on December 29, 1977. The formation of GCC and "sale" of land to it led to near concurrent Agreement between Resort and GCC, dated December 30, 1977. The Agreement further incented movement of existing structures and trailers off of the future Subdivision site through: (1) the surveying and marking of GCC lot sites at Resort's cost; (2) the installation of an electrical line to serve GCC's lots from the adjacent Grouse Creek Road right-of-way at Resort's cost; (3) installation of a sanitary sewer trunk line in the adjacent Grouse Creek Road right-of-way for GCC hook-up at Resort's cost; (4) the installation of a cold water domestic water line for GCC use at Resort's cost; and (5) the installation of geothermal hot water line for GCC use for domestic and culinary purposes, with the intent of upgrading the hot water line in the future to accommodate space heating on the GCC lots, also at Resort's cost. The 1977 Agreement provided water and sewer service to GCC from Resort's centralized systems at a rate not to exceed the municipal charges for such services levied by the City of Glenns Ferry, Idaho, which municipal rate has historically created a subsidized rate for the GCC locale.

With the structures and trailers moved to the new GCC lots, the Subdivision was platted in 1979. Consistent with the progressing development, Resort formed both: (1) Paradise Inn, Inc., and (2) PHOA on May 2, 1980. The purpose of Inn was to organize and operate a lodge and recreation facility centered around the existing hot spring pool referenced in Willis Carrie's 1973 water right claim no. 63-4221. PHOA was formed to, among other things, maintain the central sewer and water systems constructed (or in progress) "within or adjacent to" the Subdivision. PHOA's assumption of the sewer and water infrastructure and obligations of Resort was memorialized in the May 9, 1980 *Declaration and Acceptance of Association Members* (Elmore County Instrument No. 15096) in which Resort as "Declarant" (the then owner of the various roadways and sewer and water facilities) conveyed those items to PHOA for ownership, operation, maintenance, and improvement going forward. In this regard, PHOA is a direct successor of Resort and the water and sewer systems it (Resort) constructed to that point (which systems included sewer and hot and cold water services to GCC).²

Regarding the level of GCC water and sewer services existing in 1980, Resort had already installed the central sewer line, to which GCC was required to hook into by October 31, 1978. Resort was also obligated to install the cold water service no later than October 31, 1978. While the 1977 Agreement did not provide an express completion date for the hot water service (at that point domestic and culinary; not space heating), the PHOA's Application for Water Right Permit No. 63-10560 makes clear that the level of geothermal heating use it applied for included a level of use and development that "ha[d] been in place since fall of 1980," and which place of heating use included "a limited strip of unplatted property South of Grouse Creek Road and terminating at Featherville Road" as well as "a piece of property West of the Featherville Road and South of Grouse Creek that is commonly known as the Wagon Town property" (*i.e.*, an express acknowledgement by the PHOA that space heating use was occurring on the GCC lots by fall of 1980, and that not all heating use of geothermal water occurred exclusively on the Subdivision).

Application For and Development of Water Right License No. 63-10560

As discussed above, not only is PHOA a direct successor of Resort in relation to the water and sewer infrastructure Resort constructed (including those serving GCC), but Water Right License No. 63-10560 ("License") is a direct descendent of Willis Carrie's 1973 claim to water right no. 63-4221. While the PHOA's assertion that the License did not exist at the time of the 1977 Agreement between Resort and GCC is technically correct, that assertion is disingenuous given the background explanation enclosed with the PHOA's 1987 water right application.

² This direct successor relationship is further evidenced by years of PHOA utility billing to GCC lots for sewer and water service, including a March 2, 1994 letter from PHOA President Earl Jackson to GCC President Lynn Sherman apologizing for PHOA's failure to abide by the 1977 Agreement rate schedule, and further acknowledging PHOA's "obligation" to GCC to provide various utility services under the 1977 Agreement that the current PHOA Board now attempts to distance itself from. If PHOA had no connection to Resort or the 1977 Agreement, then billings and PHOA references to the 1977 Agreement would not exist.

In the 1987 permit application Attachment A, then PHOA Vice President Harold Johnson explained that the application was being filed in furtherance of the 1973 claim of Willis Carrie (63-4221) because of a variety of deficiencies perceived by the PHOA. The explanation acknowledged Willis Carrie as the “initial developer of the Paradise recreational development,” and noted his intent to develop water rights property-wide for irrigation, domestic, recreational, and heating purposes. Attachment A further attached a copy of Willis Carrie’s 1973 claim form “as support for past intent and the existence of past beneficial use,” and explained that the “present level of beneficial use and development” claimed in the application for permit “has been in place since the fall of 1980”; “The geothermal water system has not been touched other than for minor maintenance since that date.”

Regarding the level of geothermal development and use as of 1980, Attachment A, Section 8(e) explained that geothermal water use for “space heating” existed on Subdivision Lot Nos. 1-35, 38-53 “and a limited strip of unplatted property South of Grouse Creek Road and terminating at Featherville Road” (*i.e.*, the GCC lots), and the Wagon Town property across Featherville Road. When submitting proof of beneficial use to IDWR for water right licensing purposes in August 1988, PHOA again referred to the representations and explanations of the level of development and use of water as of “fall of 1980” as evidence of system completion, which level of use included “space heating” use on the GCC lots.

In April 1991, IDWR water right field examiner Steve Lester inspected the PHOA water distribution system and level of use as it then existed for purposes of licensing permit nos. 63-10559 (cold water domestic/potable system) and 63-10560 (the geothermal recreational and space heating system). Mr. Lester’s field exam report mapped the entirety of the cold and hot water systems, including existing residences using the same. He found domestic use of permit no. 63-10559 (cold water) on Subdivision lot nos. 1-56 “excluding 5 homes in subd. in vicinity of Lots 45-56”; “Plus 6 homes south of grouse cr. Rd. not in subd.”; “Plus Maas Home (1) west of Hwy.”

With respect to permit no. 63-10560 (hot water for recreational and space heating), Mr. Lester found the same place of use (his words “same units”) as described for use under 63-10559, albeit with “some differences.” Though Mr. Lester does not elaborate on what those “differences” were, his “Alternative Diagram” map of the system clearly identifies the GCC lots and shop immediately south of Grouse Creek Road as units “with well and spring H₂O,” though those units are “not in subd.” Mr. Lester likewise mapped the other units located outside of the Subdivision entitled to use of one or both of permit nos. 63-10559 (“wells” in his parlance) and 63-10560 (“springs” likewise in his parlance as described in his combined field exam report). Thus, Mr. Lester concluded that the place of use under both permits for licensing purposes included, “but [is] not limited to Willis Carrie’s Paradise Subdivision.”

As you likely recall, the License proceeded through various iterations between initial issuance on January 31, 1996, through its final issuance (and existing version) on December 31, 1997. The PHOA retained Ketchum, Idaho-based attorney James Speck for purposes of disputing the level of development represented in the initial versions of the License—PHOA sought greater use/development than IDWR provided. The controversy largely hinged on the level of credit

PHOA would receive for stubbed lots that had yet to be built on for cold and hot water service. The timeframe relevant to the licensing analysis was the level of water right development under the permits (63-10559 and 63-10560) prior to the August 1, 1988 proof of beneficial use form submitted on behalf of PHOA by Harold Johnson. The additional level of proof furnished by PHOA, and relied upon by IDWR, resulting in the December 31, 1997 final License came through a number of affidavits by PHOA members, directors, and GCC lot owners. Thus, PHOA again acknowledged the space heating use of permit no. 63-10560 within GCC, and PHOA relied upon that use to further substantiate amendment of the License to increase the level of development covered (which development included the GCC lots).

Among other affidavits provided by PHOA were those of Board President Norman Garlington, and members Michael Koelsch, Brad Christiansen, and Wes Farris. Each of the aforementioned individuals testified under oath that they were personally familiar with the PHOA water system used to divert and deliver geothermal water under the License prior to August 1988. They further testified that the PHOA system not only provided “hot water heating” within certain portions of the Subdivision (including then-existing stub lines), but also specifically to “seven cabins and a shop building on lots in the Grouse Creek Subdivision to the south of the Subdivision.” Heating use within the “Grouse Creek Subdivision south of the Subdivision” was also echoed by Mr. Speck in correspondence to IDWR based on the various affidavits he obtained.

As a result of the PHOA’s efforts (both in the application for permit Attachment A and the numerous later affidavits), License Condition No. 7 makes very specific reference to the “heating” place of use of the geothermal water: “a lodge, a shop, 11 cabins and 43 homes known as Lots 1-35 and 39-46, Willis Carrie’s Paradise Subdivision.” Even a cursory review of IDWR’s License file reveals that the “11 cabins” referenced in the License are comprised of the seven GCC lots and four cabin sites on Subdivision Lot 38 per the PHOA’s own affidavits and cover letters submitted by its counsel to IDWR in 1997, and Mr. Lester’s April 1991 beneficial use filed exam report.

The 1996 Mediation MOU with Trinity Springs Ltd.

PHOA’s acknowledgement of, and obligation to protect, GCC’s hot water use for heating extends beyond IDWR licensing records. As you likely recall, PHOA found itself in various disputes over ownership of the License with Trinity Springs Ltd. (“Trinity”). In April 1995, PHOA and Trinity participated in a formal mediation conducted by former Idaho Supreme Court Chief Justice Robert Bakes. The outcome of that mediation was a several page Memorandum of Understanding, dated April 19, 1996, and signed by then-PHOA President Norman Garlington, wherein the parties memorialized the existing uses of “hot water, domestic water, irrigation and sewer” under the PHOA’s water rights—existing uses that enjoyed “priority over any expanded use of such facilities by either PHOA or Trinity.”

The very first of the “priority” uses listed as protected under the MOU was: “Service to the Grouse Creek Subdivision lots (7 lots) for hot water, domestic water, irrigation and sewer disposal.” The MOU also protected as a “priority” use: “Service to the residential lots in

Paradise Subdivision (hot water, domestic, irrigation and sewer).” The MOU further provided the parties (PHOA and Trinity) cross-access to both geothermal springs (the upper and lower springs located on Lot 38 and the 44-acre parcel) if and when either spring declined in production to the point where it was inadequate for the uses already made of it.

Under the MOU, and at worst, GCC enjoys a co-equal “priority” right to hot water use on its “7 lots” compared to the Subdivision lots. This would, as the MOU stated, require a “reduction *pro rata*” if uses protected in the MOU outstripped spring production. However, as explained above, the License omits Subdivision Lot Nos. 47-53 from use of geothermal water for heating purposes because those lots apparently were not developed or stubbed prior to August 1, 1988. The parties to the MOU cannot legally create rights (additional water use and place of use) in the License beyond those contained within it. Thus, GCC’s use of the water for space heating on its lots is co-equal with Subdivision use on Lot Nos. 1-35 and 39-46, and the lodge and lodge-related cabin sites, but is superior to any other un-listed Subdivision use.

In December 1999, Trinity attempted to split ownership of the License based on allegations that PHOA was not honoring the existing priority uses of hot water under the 1996 MOU. Trinity accused PHOA of allowing its members to expand hot water use on the Subdivision, particularly in the form of private hot tubs/baths in Subdivision residences (*i.e.*, a non-space heating-related use). It appears Trinity’s accusations were not unfounded because on June 16, 2000, IDWR employee Jeff Peppersack issued a memorandum to the License file based on a phone conversation between he and then PHOA President Randy Fowers. In the phone conversation memorandum, Mr. Peppersack explained that the License’s hot water use was limited to space heating purposes in the form and to the extent found during Mr. Lester’s 1991 beneficial use field examination. Mr. Peppersack then “stressed” to Mr. Fowers that additional use of the hot water beyond the “heating” uses included in the License “would constitute an enlargement and require a new permit.”

Regardless of the expanded use allegations, PHOA defended against Trinity’s ownership split attempts by providing IDWR with a copy of the 1996 MOU because the same plainly stated that the subject water rights and related distribution infrastructure were/are the property of PHOA, not Trinity. PHOA President Randy Fowers wrote IDWR on March 14, 2000, enclosing the MOU and referring to the same as being dispositive of the ownership dispute and of the entitlement to hot water use:

This legally executed document attempted to settle disputes between PHOA and Trinity of which the hot water was one of the major items. The uses that are affirmed on the license can also be found in section 3 of the MOU and clearly show that PHOA was intended to be the OWNER/OPERATOR as it pertained to those uses . . . As a practical matter, IDWR affirmed that PHOA was indeed the owner when it performed the field study and issued the license to PHOA.

IDWR ultimately agreed with PHOA, and denied Trinity's proportionate interest-based water right ownership change request based, in part, on the MOU. I reference this dispute history to demonstrate PHOA's reliance on the MOU and IDWR's prior beneficial use field exam when it suits it, the Association cannot now choose to ignore these same documents in this dispute with GCC; doing so gives rise to an actionable estoppel claim.

PHOA Has a Long History of Providing Geothermal Water to GCC for Heating Use

The above-discussed 1980 *Declaration and Acceptance of Association Members*, 1991 IDWR beneficial use field exam report for water right nos. 63-10559 and 63-10560, the affidavits of Garlington, Koelsch, Christiansen, and Farris (among others), and the 1996 MOU all demonstrate PHOA's history of providing hot water to GCC for domestic and heating use. This service is also demonstrated by the 1997 supply line upgrades (including hot water/geothermal) performed by Bowman Plumbing, Inc. out of Mountain Home, Idaho. GCC would not have paid for additional service line upgrades had, as PHOA contends, the Association "never" provided GCC geothermal water for heating purposes.

PHOA assumed the obligations of Resort, and hot and cold water delivery to GCC was part of the deal. It only makes sense that GCC would be kept whole by Resort (and later PHOA) because the GCC lots were originally located on a portion of what is now the Subdivision. GCC was formed, and its shareholders' lots and property relocated, to accommodate the Subdivision. GCC was part of the place of use of water right 63-4221 and what is now the License before the Subdivision ever existed, and is a primary reason why GCC is included in the License.

PHOA and GCC Have a Long History of Working Together to Preserve PHOA's Water Rights

A further example of the intertwining of PHOA and GCC, and GCC's entitlements to (and use of) PHOA's central sewer and water systems, came in the parties' joint efforts to defend Willis Carrie's 1973 claim for water right 63-4221 when Trinity tried to transfer portions of the right and change points of diversion and nature of use to facilitate its proposed commercial spring water bottling operation. PHOA and GCC worked together to lodge a large number of protests to Trinity's Application for Transfer in 1991, based in part on GCC's own interests in the water, and the shared interests of both it and PHOA due to PHOA's supply of "hot, domestic and irrigation water" to GCC.

Then, when it came time to maximize the licensing of what is now License No. 63-10560 in 1997, PHOA directors and other members, together with GCC shareholders, submitted several sworn affidavits attesting to both on-Subdivision and off-Subdivision uses of the water, including heating uses on the GCC lots. GCC would like to see this history of partnership continue.

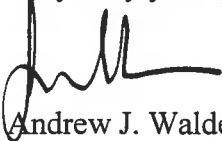
Presently, however, GCC is considering the following potential courses of action:

1. Petition for Water Right Administration before IDWR. This action would seek enforcement of hot water delivery for heating use on the GCC lots as is plainly provided in the License and supporting documentation in IDWR's file. The action would also seek preclusion of hot water use on Subdivision lots not listed in the License (including Lot Nos. 47-53) because such expanded use diminishes GCC's priority right of use.
2. A judicial action for declaratory judgment, seeking judicial confirmation of GCC's entitlements under the License and related documents. If such an action proves necessary, GCC will seek its reasonable fees and costs against PHOA given the weight of the evidentiary record in its favor.
3. GCC will formally protest any Application for Transfer PHOA may file seeking to conform any expanded and illegal uses of water under the License because expanding use diminishes GCC priority entitlement to what all seem to agree is a limited resource at present.
4. GCC will likewise formally protest any new Application for Permit PHOA may file seeking to authorize any expanded uses of water unless and until PHOA agrees in writing to protect and preserve GCC's priority entitlements under the existing License.

Despite these considerations, it is GCC's marked preference to resolve this dispute amicably. Though not a member of PHOA, GCC shareholders are good neighbors and friends of PHOA members. Further, the entities continue to share a common water and sewer system, and future partnership on additional capital improvements as the need arises is far more beneficial than the strained relationship that can result from the PHOA's current position regarding GCC geothermal entitlements.

Understandably, this correspondence contains a lot of information to digest. GCC is happy to assist PHOA's review of these materials, and looks forward to ongoing mutual benefit from all of the resources and amenities flowing from the Carrie family's vision decades ago. I and GCC look forward to your response. If a response is not received by Friday, November 11, 2016, GCC will proceed as outlined above.

Very truly yours,



Andrew J. Waldera

AJW/dll

cc: Grouse Creek Cabins, Inc.
Shelly Keen, IDWR