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VIA E-MAIL

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Garrick L. Baxter
Idaho Department of Water Resources
322 East Front Street
Boise, Idaho 83702
garrick.baxter@idwr.idaho.gov

Re: Your Letter Dated March 17, 2016 in Reference to *Change of Ownership for Water Right Nos. 37-22915, 37-22916, 37-22917, 37-22918, and 37-22919*

Dear Mr. Arrington and Mr. Baxter:

This is in response the letter from Mr. Arrington on March 17, 2016 ("Letter"), to the Idaho Department of Water Resources ("IDWR"), in regard to the water rights listed above ("FSC Water Rights"), and the email addressed to Mr. Arrington that I was copied on that is dated March 29, 2016, from Deputy Attorney General John Homan ("Email").

I represent First Security Corporation ("FSC"), a subsidiary of Idaho Independent Bank ("IIB"), with regard to the FSC Water Rights. It was less than two days ago, by way of being copied on the Email, that I was made aware of Belle Ranch, LLC's ("Belle Ranch") ill-conceived and harassing attempt to "reverse" the lawful splits of the FSC Water Rights. I should note that Belle Ranch is raising this issue well over a year after receiving notice of IDWR's correction on January 13, 2015, when it sent Belle Ranch notice of its decision to correct the record. Because Belle Ranch was aware of the changes and allowed so much time to that pass, it should be precluded from now objecting.

IIB objects to the IDWR action to change the ownership of the FSC Water Rights to South County Estates, LLC ("South County") as being improper and contrary to the clear ownership records. IIB demands that IDWR restore its records of the ownership of the FSC Water Rights to FSC. Further, if the IDWR decision is not reversed, the ownership of the

similarly acquired water rights (37-481C, 37-482H, 37-483C, 37-577BT, and 37-2630) listed in Belle Ranch's name must also be changed for the same reason.

Mr. Arrington asserts in the Letter that IDWR's January 2015 decision to properly split water rights between Belle Ranch and FSC was "in error" on the assertion that SRBA is equated to a quiet title action.

The SRBA is a quiet title action with respect to the water rights being adjudicated. Under Idaho Code, the Director submits a report to the SRBA identifying several elements of the recommended water rights – including "the name and address of the claimant." I.C. § 42-1411(2)(a). Any challenges to the elements of the water rights – including ownership – must be addressed before the Court, which will then decree the water right and its elements. I.C. § 42-1412. Once issued, "the decree entered in a general adjudication shall be conclusive as to the nature and extent of all water rights in the adjudicated water system." I.C. § 42-1420.

Letter at 2.

This statement goes well beyond what the SRBA Court has ever described. The SRBA Court's reference to "quiet title" derives from the *Facility Volume* case, where the Court examined the very narrow issue of forfeiture tolling:

A claim to a water right made in the SRBA is essentially akin to a quiet title action. A notice of claim is a pleading within the SRBA. The filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA. A partial decree with a rule 54(b) certificate is akin to a final judgment for purposes of appealing as a matter of right. As a result, a water right claimant's action is pending from the time a claim is filed until a partial decree is entered.

It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action.

. . . .

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. . . . Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture.

Facility Volume at 26-28 (internal citations removed) (emphasis added).

The SRBA Court has never extended its quiet title analogy to anything other than the tolling of forfeiture. The quiet title analogy in *Facility Volume* does not prevent the passage of title to the FSC Water Rights pursuant to the recorded conveyances.

Moreover, arguing that the SRBA quieted title to ownership is wholly inconsistent with Idaho law. Idaho law clearly forbids quieting title in the SRBA as to ownership. Idaho Code § 6-401, entitled “Actions to Quiet Title,” explicitly recites which water right elements are at issue in the SRBA:

An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim, provided that all actions to adjudicate water rights and obtain a decree as to water source, quantity, point of diversion, place of use, nature of use, period of use, and priority against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code.

Emphasis added.

Critically, the legislature intentionally omitted any mention of ownership. This omission is wholly consistent with the adjudication statute, Idaho Code § 42-1411(2), which describes the water right elements that are to be addressed by IDWR and examined by the SRBA Court: (1) name and address of the claimant; (2) source of water; (3) quantity of water; (4) date of priority; (5) point of diversion; (6) purpose of use; (7) period of use; and (8) place of use. Emphasis added. Moreover, IDWR’s own *Adjudication Rules* specify IDWR, in examining the “Sufficiency of Claims” only examined the “name, address, and phone number of the claimant . . .” IDAPA 37.03.01.060.01. Thus, IDWR did not examine ownership, and neither did the SRBA Court in these subcases.

Be that as it may, the SRBA Court, on August 31, 2010, issued Partial Decrees for water right nos. 37-481C, 37-482H, 37-483C, 37-577BT, and 37-2630 (the “Parent Water Rights”) to South County. In the Letter, it is asserted that entry of the SRBA partial decrees somehow precludes splitting of the Parent Water Rights to IIB:

On August 31, 2010, Judge Wildman issued Partial Decrees for [the Parent Water Rights] Notice of the partial decrees was served on South County. *Id.* Therefore, at that time, both South County and John Scherer knew of the Court’s ownership determination. Yet, again, neither South County, John Scherer nor Charles Holt took any action to challenge the Court’s determination of ownership. . . . In fact, no action was taken on the attempted conveyance until the end of 2014 – four years after the SRBA had determined that South County owned the entirety of the water rights.

. . . .

To be sure, Belle Ranch does not mean to imply that the ownership of a decreed water right cannot be changed. Rather, the issue here is that the attempted

conveyance occurred before the SRBA decree and no effort was made by either the reputed buyer or seller (who were effectively the same person) to alter the ownership records prior to the Court's determination of ownership. The Partial Decrees, therefore, quieted title to the water rights, in their entirety, to South County. Any interest allegedly acquired by John Scherer and/or Charles Holt prior to the issuing of the Partial Decrees, therefore, was voided.

Letter at 3 (emphasis in original).

If the assertion that the SRBA quieted title as to the FSC Water Rights to South County is accepted as true, logic leads to the conclusion and necessary result that IDWR must also change ownership of the Parent Water Rights from Belle Ranch to South County. As argued in the *Letter*, if all conveyances recorded “before” entry of the Partial Decrees are void, then so is the title by which Belle Ranch took. If Belle Ranch continues to insist that ownership to the FSC Water Rights was improperly changed, then IIB affirmatively challenges ownership of the Parent Water Rights in Belle Ranch's name on the exact same basis. In order to understand this outcome, it is necessary to go through the chain of title.¹

Prior to June 25, 2009, South County owned the full diversion rate of the Parent Water Rights. In the SRBA, South County filed claims to the Parent Water Rights. On June 13, 2008, and due to its mortgage with South County, Mountain West Bank (“Mountain West”) filed a *Notice of Security Interest in a Water Right*, which was acknowledged by IDWR on June 20, 2008, and attached to the Parent Water Rights. Mountain West's mortgage was recorded in Blaine County on October 14, 2005, as Instrument No. 527439 (the “MWB Mortgage”).

On June 25, 2009, South County conveyed 7.5/289th of the diversion rate of the Water Rights to John Scherer and Charles Holt as tenants in common (“Scherer and Holt”) by quitclaim deed (the “2009 Quitclaim Deed”). A copy of the 2009 Quitclaim Deed was attached to the December 22, 2014 letter as Exhibit 1. The 2009 Quitclaim Deed states as follows:

FOR VALUABLE CONSIDERATION . . . South County . . . hereby bargains, sells, remises, releases, conveys and forever quitclaims to John Scherer, a married man as his sole and separate property . . . and to Charles Holt, a married man as his sole and separate property . . . to hold as tenants-in-common, all of its right, title and interest which it has, if any, in the property in the State of Idaho, County of Blaine, described as:

7.5/289th portion of Water Right Nos. 37-481C, 37-482H, 37-483C, 37-577BT, and 37-2630 as identified on the records of the Idaho Department of Water Resources

¹ The documents I will discuss were previously provided to IDWR in my December 22, 2014 letter, which is referenced in the *Letter*. The exhibit numbers that are referenced in this letter are the same as the exhibits numbers in my December 22, 2014 letter, and are incorporated herein by reference. Please refer to the December 22, 2014 letter for copies of the particular exhibits.

2009 Quitclaim Deed at 1 (emphasis added).

The 2009 Quitclaim Deed was recorded in Blaine County on June 25, 2009, as Instrument No. 568680. Also on June 25, 2009, Mountain West recorded in Blaine County, as Instrument No. 568681, a Partial Release of Lien, wherein Mountain West released the lien of the MWB Mortgage (as described above and therein) to the 7.5/289th of the diversion rate of the Water Rights (the “MWB Partial Release”). A copy of the MWB Partial Release was attached to the December 22, 2014 letter as Exhibit 2. The MWB Partial Release further stated: “that the lien of the Mortgage be released as it relates to the Water Rights appurtenant to the 7.5 acres of real property identified on the legal description attached hereto as Exhibit ‘A’ and incorporated herein by this reference and that the Notice of Security Interest in a Water Right filed with the Idaho Department of Water Resources be waived to the limited extent to relates to the Water Rights described above.” *MWB Partial Release* at 1.

Subsequently, Scherer and Holt executed a Mortgage in favor of IIB encumbering the 7.5/289th of the Parent Water Rights, and recorded in Blaine County on June 25, 2009, as Instrument No. 568682 (the “IIB Mortgage”). A copy of the IIB Mortgage was attached to the December 22, 2014 letter as Exhibit 3.

The recorded 2009 Quitclaim Deed notified subsequent purchasers and all others that 7.5/289th of the diversion rate of the Parent Water Rights were no longer owned by South County, but instead were owned undivided as between Scherer and Holt as tenants in common. The recorded IIB Mortgage notified subsequent purchasers and all others of IIB’s security interest in the 7.5/289th of the Water Rights. As such, on July 24, 2009, IIB filed a *Notice of Security Interest in a Water Right* (the “IIB Security Interest”) with IDWR regarding IIB’s security interest in the 7.5/289th of the Water Rights. A copy of the IIB Security Interest was attached to the December 22, 2014 letter as Exhibit 4. The IIB Mortgage was attached with the IIB Security Interest submittal to IDWR. On July 24, 2009, IDWR acknowledged the filing and included IIB on the proof reports for the Parent Water Rights.

South County, after having already conveyed the 7.5/289th of the diversion rate of the Parent Water Rights to Scherer and Holt by the 2009 Quitclaim Deed, quitclaimed the remaining diversion rate of the Water Rights by a Deed in Lieu of Foreclosure to Mountain West, which was recorded in Blaine County on June 17, 2010, by Instrument No. 578331 (the “MWB Deed in Lieu”). A copy of the MWB Deed in Lieu was attached to the December 22, 2014 letter as Exhibit 5. Again, the MWB Deed in Lieu was recorded prior to entry of the Partial Decrees by the SRBA Court on August 31, 2010.

Thereafter, Mountain West conveyed its interest in the property described in the MWB Deed in Lieu to GBCI Other Real Estates, LLC (“GBCI”) by Deed recorded in Blaine County on June 17, 2010, as Instrument No. 578364 (the “MWB/GBCI Deed”); however, such conveyance was specifically subject to the Partial Release of Water Rights, recorded as Instrument No. 568681. See MWB/GBCI Deed at 2, with reference to Partial Release of Water Rights recorded as Instrument No. 568681 (defined as MWB Partial Release above). A copy of the MWB/GBCI Deed was attached to the December 22, 2014 letter as Exhibit 6. Just like the MWB Deed in

Lieu, the MWB/GBCI Deed was recorded prior to entry of the Partial Decrees by the SRBA Court on August 31, 2010.

Therefore, as of June 17, 2010, and by the recorded deeds, 7.5/289th of the diversion rate of the Parent Water Rights were owned by Scherer and Holt as tenants in common, with a first position priority security interest in favor of IIB; the remaining 281.5/289th of the diversion rate was owned by GBCI. As of June 17, 2010, South County no longer had any interest in the Parent Water Rights. While FSC took its ownership interest in the Parent Water Rights through Scherer and Holt, Belle Ranch took its ownership interest through Mountain West/GBCI by the MWB Deed in Lieu and the MWB/GBCI Deed. Again, these conveyances all occurred “before” issuance of the SRBA Partial Decrees.²

On August 31, 2010, the SRBA District Court issued Partial Decrees to South County for the Parent Water Rights. Again, under Mr. Arrington’s theory, the issuance of the SRBA Partial Decrees somehow voided all of the previously recorded conveyances, which divested Scherer/Holt and Mountain West/GBCI from conveying anything. Consequently, if this theory is correct on the law, and because Belle Ranch obtained its ownership interest from Mountain West/GBCI, ownership of all the Parent Water Rights should be changed to South County.

Following issuance of the SRBA Partial Decrees, title was chained as follows. On July 22, 2011, after the SRBA Partial Decrees were issued, Mountain West filed a *Notice of Change of Ownership* with IDWR regarding the Parent Water Rights. According to Mountain West’s letter to IDWR, it acquired South County’s ownership of the Parent Water Rights “via a Deed in Lieu of Foreclosure” A copy of the June 17, 2010 MWB Deed in Lieu was enclosed with Mountain West’s submission to IDWR. On September 13, 2011, and because IDWR was not provided all of the deeds regarding the Parent Water Rights by Mountain West, IDWR processed Mountain West’s change of ownership for the entire diversion rate of the Parent Water Rights. The change in ownership was processed despite the fact that 7.5/289th of the diversion rate was conveyed to Scherer and Holt as tenants in common via the 2009 Quitclaim Deed, with a first position security interest in favor of IIB (which was on file with IDWR); and despite the fact that Mountain West had disclaimed all interest in 7.5/289th of the diversion rate by the MWB Partial Release.

On December 22, 2011, GBCI conveyed, without warranty, the Parent Water Rights, to Belle Ranch, by Special Warranty Deed, recorded in Blaine County on December 22, 2011, as Instrument No. 593252 (the “Special Warranty Deed”). The Special Warranty Deed was attached to the December 22, 2014 letter as Exhibit 7. Concurrently therewith, Mountain West conveyed its interest in the Parent Water Rights to Belle Ranch by Quitclaim Deed (the “MWB Quitclaim Deed”), recorded December 22, 2011, as Instrument No. 593254. The MWB Quitclaim Deed was attached to the December 22, 2014 letter as Exhibit 8.

² As stated in the Letter on page 3, Mr. Arrington alleges a possible consequence that no changes of ownership were filed prior to entry of the SRBA Partial Decrees. It must be noted that if there are legal consequences to FSC for not documenting the change in ownership (which there are not, as there is nothing in Idaho Code §§ 42-248 or 42-1406 that divests ownership), the same applies to Mountain West/GBCI and Belle Ranch’s purported interest.

Expressly by the recorded deeds, GBCI and Mountain West never obtained ownership of the 7.5/289th of the Parent Water Rights owned by Scherer and Holt as tenants in common due to the 2009 Quitclaim Deed, encumbered by a security interest in favor of IIB due to the IIB Mortgage. These documents were both recorded in the real property records of Blaine County prior to the recording of the MWB Deed in Lieu and all subsequently recorded deeds. Accordingly, neither GBCI nor Mountain West could rightfully convey the 7.5/289th of the Parent Water Rights to Belle Ranch. All GBCI or Mountain West could convey to Belle Ranch was 281.5/289th of the diversion rate of the Parent Water Rights.

On February 28, 2012, Justin Stevenson and Brett Stevenson, on behalf of Belle Ranch, filed a *Notice of Change of Ownership* in the Water Rights. On March 7, 2012, IDWR processed the change of ownership for the entire diversion rate of the Parent Water Rights. Because IDWR does not examine county recordings when ownership changes are filed, and without the benefit of all of the deeds, IDWR mistakenly followed Belle Ranch's erroneous request and changed ownership for the entire diversion rate of the Parent Water Rights to Belle Ranch. Later, when examined with benefit of the entire chain of title, the erroneous decision to change ownership of the entirety of the Parent Water Rights to Belle Ranch was remedied by IDWR in January 2015, with notice being properly given to Belle Ranch and notably no objection was filed by Belle Ranch to the correction.

On August 31, 2012, and as a result of the mortgage executed by Belle Ranch, Rabo Agrifinance, Inc. filed a *Notice of Security in a Water Right* with IDWR, which was acknowledged by IDWR on September 10, 2012.

On or about September 2, 2014, Scherer and Holt executed a Non-Merger Deed in Lieu of Foreclosure conveying the 7.5/289th of the diversion rate of the Parent Water Rights to IIB (the "IIB Deed in Lieu"). A copy of the IIB Deed in Lieu was attached to the December 22, 2014 letter as Exhibit 9. In the IIB Deed in Lieu, Scherer and Holt conveyed "all of the water rights, described in Exhibit 1, attached hereto" *IIB Deed in Lieu* at 1. In the 2009 Quitclaim Deed, Scherer and Holt took ownership in the Parent Water Rights from South County as tenants-in-common. Thus, in the IIB Deed in Lieu, Scherer and Holt unequivocally and properly conveyed their "undivided" tenant in common ownership of the 7.5/289th of the Parent Water Rights to IIB. The IIB Deed in Lieu was recorded in Blaine County on October 20, 2014, as Instrument No. 622055. Thereafter, IIB executed a Warranty Deed conveying the 7.5/289th of the Water Rights to its subsidiary, FSC (the "FSC Deed"). A copy of the FSC Deed was attached to the December 22, 2014 letter as Exhibit 10. The FSC Deed was recorded in Blaine County on October 20, 2014, as Instrument No. 622056.

On or about October 27, 2014, I mailed a *Notice of Change in Water Right Ownership* on behalf of FSC to IDWR, requesting a split of the Parent Water Rights. Of course, the reason for seeking a split of the Parent Water Rights was to correct the IDWR records to reflect the proper ownership by bringing to IDWR's attention FSC's ownership of the 7.5/289th of the diversion rate of the Parent Water Rights. Again, this was due to the 2009 Quitclaim Deed wherein South County split the Water Rights so that Scherer and Holt obtained ownership as tenants in common of the 7.5/289th of the diversion rate of the Parent Water Rights, and South County retained ownership of the remaining 281.5/289th of the diversion rate. South County conveyed the

7.5/289th of the diversion rate of the Parent Water Rights to Scherer and Holt prior to the MWB Deed in Lieu. On June 17, 2010, after having already conveyed the 7.5/289th of the diversion rate of the Parent Water Rights to Scherer and Holt by the 2009 Quitclaim Deed, and “before” entry of the SRBA Partial Decrees, South County quitclaimed the remaining diversion rate of the Parent Water Rights by the MWB Deed in Lieu. As such, the 7.5/289th diversion rate of the Parent Water Rights was never owned by Mountain West, GBCI or any subsequent purchasers, including Belle Ranch.

IDWR agreed with the full chain of title and, in January 2015, changed ownership of 7.5/289th of the Parent Water Rights to FSC, with the balance of the Parent Water Rights remaining with Belle Ranch.

Because of the clarity of the deeds, IIB demands IDWR restore the rightful ownership of the FSC Water Rights to IIB. If IDWR insists on changing ownership of the FSC Water Right to South County on the basis that the SRBA quieted title to South County, IIB demands that the Parent Water Rights in the name of Belle Ranch also be changed to South County on the same basis, as Belle Ranch took its interest in the Parent Water Rights in the same manner before entry of the SRBA Partial Decrees. If the decision is not reversed, IIB and FSC will protect all of its legal rights. Should it become necessary for IIB or FSC to file a lawsuit, it will include a claim for the attorneys’ fees and costs it has incurred, and will incur, pursuant to Idaho Code §§ 12-120(1) and 12-120(3).

Thank you for your attention to this matter. If you have any questions please call me at the number listed above.

Sincerely,



Chris M. Bromley
McHugh Bromley, PLLC

cc: John Homan, DAG
Doug Jones, IDWR
Trish Fawcett, IDWR
Kurt Gustavel, Idaho Independent Bank/First Security Corporation