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June 16, 2015

Idaho Dept. of Water Resources
Northern Region
Attn: Adam Frederick (Allocations)
7600 Mineral Drive, Suite 100
Coeur d'Alene, Idaho 83815

RECEIVED
JUN 19 2015
IDWR / NORTH

Re: Water Rights Application No. 95-14979

Dear Mr. Frederick,

I am writing today on behalf of our clients, John and Sjoukje Bungen, Trustees of the John and Sjoukje Bungen Family Trust who on February 24, 2015 submitted an application for the above-referenced water right permit found in your records at number 95-14979.

On March 16, 2015, the Bungens' neighbor, Eileen Hawley filed a Notice of Protest to that Application For Permit. Ms. Hawley claimed, "[t]he Applicant is not the owner of the property upon which the spring in 'P.O.D. #1' is located or the spring or the water therein contained."

On May 15, 2015, Ms. Hawley sued my clients in First District Court for the State of Idaho, which case was assigned number CV-2015-3479. In that lawsuit, plaintiff Hawley is claiming title by adverse possession over my client's property, and this is the basis for her protest of my clients' application for a water rights permit from your department.

A pre-hearing conference was scheduled by your office for July 7, 2015, which I understand has been delayed at the request of Ms. Hawley's legal counsel, Michael Verbillis pending the outcome of the Hawley lawsuit. I do not find reason for delay of your processing of my client's water rights application, and respectfully request IDWR cancel Ms. Hawley's protest and continue its normal processing.

I find nowhere in Idaho statutes or the rules governing your agency that IDWR has jurisdiction over an adverse possession claim related to title in fee simple to real property in a boundary dispute, or for delay in the processing of a permit while a quiet title action proceeds in District Court. While a water right is a real property interest in Idaho, and is appurtenant to the land upon which the beneficial use occurs, Ms. Hawley has never to my knowledge filed for IDWR recognition of a water right. Further, her protest of my clients' water rights application does not

state she has been injured in her use of water by my client's application. My client believes Ms. Hawley has filed the water rights protest in bad faith to use IDWR's processes to harass my clients.

Initially, Ms. Hawley has no right to the spring or the water from it, and if she claims such a right she is making an admission of an illegal diversion. If she is not illegally diverting water, then she may be taking advantage of the domestic water rights application filing deferral allowed in the Coeur d'Alene Spokane River Basin Adjudication. However, even if Ms. Hawley claims she is lawfully deferring her adjudication filing, her protest alleges no injury to her water use whatsoever.

When I telephoned you on June 1, you acknowledged as correct my findings in the online public records of IDWR that Ms. Hawley has never applied for a water right anywhere near my client's point of diversion. IDWR has no idea what Ms. Hawley's claims are to Idaho water.

As far as my clients' application goes, Idaho Code section 42-213 states:

All applications to the department of water resources for permits to divert or appropriate the waters of any lake, pond, pool or spring shall state whether such lake, pond, pool or spring is wholly or entirely upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water.

The Application for Permit No. 95-14979 states the spring is entirely on my clients' property. The statutory wording "in the event that it is," does not give jurisdiction to quiet title to such real property to IDWR, it only means that if the application states the water source is "entirely upon the land of any person or corporation other than the applicant" that the application also has to include "that the applicant has the written permission from such owner."

Since my clients' application clearly stated the spring is entirely on my clients' property, there is no "event" of ownership triggering any written permission is required from Ms. Hawley, or any jurisdiction conferred upon IDWR to quiet title pursuant to Ms. Hawley's protest. Further, Ms. Hawley's protest provides no survey or other evidence except assertion that the spring is not entirely on my client's property. Ms. Hawley does not state that it is not on my clients' property, she states that she has a superior title through unproven adverse possession.

However, since the property belongs to my clients, "[i]t is established that a valid water right cannot be initiated by trespass onto another's property." *Matter of General Determination of Rights to Use of Surface and Ground Waters of Payette River Drainage Basin*, 107 Idaho 221, 687 P.2d 1348, 1353 (1984); citing *Lemmon v. Hardy*, 95 Idaho 778, 519 P.2d 1168 (1974); *Jones v. McIntire*, 60 Idaho 338, 91 P.2d 373 (1939); *Bachman v. Reynolds Irrigation District*, 56 Idaho 507, 55 P.2d 1314 (1936); *Short v. Praisewater*, 35 Idaho 691, 208 P. 844 (1922);

Rabido v. Furey, 33 Idaho 56, 190 P. 73 (1920). Therefore, Ms. Hawley's claim to any right to any water from the property she claims is at issue should fail, because adverse possession can only be initiated by trespass.

In the *Lemmon* case, the Idaho State Supreme Court stated:

In the case of *Bassett v. Swenson*, it was held that, 'It is quite generally held that a water right initiated by trespass is void. That is to say, one who diverts water and puts it to a beneficial use by aid of a trespass does not, pursuant to such trespass, acquire a water right. Any claim of right thus initiated is void.' The *Bassett* case involved a trespass upon land privately owned. The rule as to trespass and water rights in Idaho appears to be that a water right initiated on the unsurveyed public domain is valid, but a water right initiated by trespass on private property is invalid.

In the case at bar, the land designated as the point of diversion and place of use in appellants' original application was private property not owned by the appellants and therefore no valid water right could be developed on it. Since no valid water right was possible, it can be concluded that the application was filed for speculative purposes, not for development of a water right.

Lemmon v. Hardy, 95 Idaho 778, 780, 519 P.2d 1168, 1170 (1974). Therefore, the *Lemmon* case proves that Ms. Hawley's protest cannot be based upon a water right she claims originated in trespass, and IDWR should dismiss her protest. "[T]o acquire adverse possession, [the adverse claimant] would be under the necessity of initiating and maintaining such possession by an act or acts of trespass." *Fountain v. Lewiston Nat. Bank*, 83 P. 505, 521, 11 Idaho 451, 467 (1905); citing *Farish v. Coon*, 40 Cal. 33 (1870).

In fact, regarding the land itself, Ms. Hawley's Notice of Protest states point of diversion number one is on my clients' land -- which comports with my client's application for permit -- or else she would not then be making an adverse possession claim to its title. The department should reasonably question why Ms. Hawley only makes this claim in adverse possession after my clients filed for their water rights, and recognize Ms. Hawley's claim for what it is: use of IDWR processes for harassment.

Second, Ms. Hawley admits in her protest that she trespassed onto my clients' property and therefore that her claim about anything related to water rights is void. The core of an adverse possession claim is that the adverse possessor originally trespassed, but then that the trespass ripened into a claim of title due to certain elements being proven to a court by clear and convincing evidence. *Fountain*, 11 Idaho at 467. Ms. Hawley has acknowledged that the doctrine of adverse possession is not within the jurisdiction of IDWR, because she sued my clients in First District Court on that theory. My clients' application for permit should not be delayed.

“The burden of proof rest[s] upon the party asserting the trespass.” *Idaho Power Company, a Corp. v. City of Buhl*, 111 P.2d 1088, 1096, 62 Idaho 351, 359 (1941). Ms. Hawley needs to present proof that she owns the property to the First District Court. If she claims title to it by adverse possession, IDWR has no subject matter jurisdiction to adjudicate a quiet title claim by Hawley. The adjudication of Ms. Hawley’s adverse possession claim is properly before the First District Court of the State of Idaho, and IDWR lacks jurisdiction, as admitted by Ms. Hawley through the fact of her filing that complaint in the District Court. If Ms. Hawley felt IDWR had jurisdiction for a quiet title action, she would have filed her complaint with IDWR, instead of with the First District Court.

Third, if this is not yet abundantly clear, IDWR has no jurisdiction for a boundary dispute, specifically it has no jurisdiction to adjudicate a quiet title action related to *the property itself*, which is the entire substance of Ms. Hawley’s protest. I reviewed Idaho Code sections 42-1701, 42-1706, 42-1409, 42-1805, and Idaho Administrative Procedure Rules 37.03.08.025.01, 37.03.08.035.03(b), and 37.03.08.045, finding nothing giving IDWR jurisdiction over this land dispute. Further, I found no statute or rule allowing IDWR to delay the processing of my clients’ application based on Ms. Hawley’s protest.

Specifically, when processing applications for permit IDAPA Rule 37.03.08.025.01 “requires an assessment to be made of the impact of the proposed use on water availability for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability of the applicant to complete the project, and the effect of the proposed use on the local public interest.” First of all, there are no existing water rights, and if Hawley believes she has one -- and that it is being injured by my client’s application -- she should go ahead and file it with the department.

Further, pursuant to IDAPA Rule 37.03.08.035.03(b), subsections i through xvii of that subsection (b) do not list anything requiring an applicant to state on their application who owns the land. The requirement is only due to Idaho Code section 42-213 as discussed above. Ms. Hawley’s protest has no standing before IDWR, because the District Court has subject matter jurisdiction for a quiet title action to land. I.C. §§ 1-701; 1-705(1); 5-401(1); and 6-401.

Idaho Code section 42-1404 does not apply, because private adjudications are only “for the purpose of adjudicating rights to the use of water from any water system *for which a general adjudication has not been commenced or completed.*” The CSRBA has commenced, and Ms. Hawley has no claim for a water right that could be a subject of dispute. Ms. Hawley is unlawfully protesting my clients’ water right, where the substance of her claim has nothing to do with the water itself, but everything to do with the land itself. Even though Ms. Hawley has filed her boundary dispute lawsuit in First District Court, her bad faith filings are proven by her not filing for an order of survey. I.C. § 6-405.

Finally, pursuant to IDAPA 37.03.08.045.01, the Criteria for Evaluating All Applications to Appropriate Water, nothing exists in those criteria giving IDWR the jurisdiction over a quiet title action generated by a boundary dispute.

In short, IDWR has no subject matter jurisdiction over a quiet title to land, but only to water. Ms. Hawley has not filed for any water right with the department, and even if she had she has not alleged nor shown any injury by my clients' water diversions or by their application for a water right.

I have also sent a copy of this letter to Ms. Hawley's legal counsel, Michael J. Verbillis. In addition to requesting IDWR dismiss Ms. Hawley's protest, and proceed with the processing of my client's application, I am also requesting Mr. Verbillis accord with that dismissal in writing to acknowledge IDWR has no subject matter jurisdiction over a quiet title lawsuit for a boundary dispute.

Ms. Hawley's claims as an adverse possessor will be fully adjudicated in First District Court. There is no jurisdiction for IDWR to delay my clients' application for permit.

Sincerely,



Arthur B. Macomber
Attorney at Law

Cc: Michael J. Verbillis, Attorney for Eileen E. Hawley
Clients