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RECEIVED
JAN 30 2008
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January 29, 2008

Jeff Peppersack
Manager
Water Allocation Bureau
Water Rights Permits Section
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Chris and Jackie Flanigan, Water Right No. 37-8870

Dear Jeff:

Thank you for speaking with me, Deputy Attorney General Phil Rassier, and Jill Eshman on September 18, 2007 and for my follow-up meeting with you on January 16, 2008. This letter also follows the exchange of letters between Jill Eshman and Shelly Keen of January 9, 2007 and August 23, 2007. As you know, Jill represents Chris and Jackie Flanigan, the owners of the above-captioned water right. Jill has retained me as special water counsel.

Following our initial conversation, the Flanigans surveyed the property, allowing us to provide the Department with more accurate information as to locations. We agreed that it would be appropriate for me to send a letter memorializing our understanding of the situation. I ask that this letter be made a part of the record in this water right.

For reasons discussed more fully below, you advised us that there is no need for the Flanigans to file either a transfer application or a change in ownership form in connection with Water Right No. 37-8870.¹ In a nutshell, the original place of use was incorrectly described in the license. However, the place of use has now changed to a new home in a new location that corresponds accurately to the original description in the water right license. (The water right

¹ As we discussed, a transfer application may be appropriate to clarify the record with respect to other water rights held by the Flanigans. We will follow up on that separately.

used to serve a house and cabin now owned by Gregg and Laura Welsh; it now serves a new home owned by the Flanigans.)

Re-platting of lots and change in delivery system

Water Right No. 37-8870 authorizes diversion of 0.6 cfs (capped at 1.2 AFA) of water from a spring near the Flanigans' property. The water right is represented by a license issued on February 12, 1999, with a priority date of February 26, 1998. This is a post-SRBA right; no SRBA claim was filed.

For many years prior to licensing, the spring served domestic uses on the old Graham property. In 1977 or 1978 an intermediate owner, Alexia Maresi Haller, capped the spring and installed piping in order to protect the water quality in the delivery system from cows, horses, sheep, and chickens on the property. No water right was sought at this time, because Ms. Haller believed that the use was covered by a domestic exemption. Some time later, the property was conveyed to Claire Bailey.² When Ms. Bailey became aware that a water right was required, she obtained a permit in 1998 and license in 1999. Later in 1999, the property was sold again, this time to our clients, Chris and Jackie Flannigan.

The license for Water Right No. 37-8870 shows that it is a spring water right for domestic use only. Its place of use is a forty-acre tract, T5N R17E §10 SWSE. The license contains a condition stating that use is for two homes (referring to the main house and a cabin located on the old Graham property) located within Lots 2 and 3, Block 1, North Fork Subdivision.³

Upon further examination, we have determined that the main house and cabin were never located in the North Fork Subdivision at all, but in the parcel to the immediate south then known as Tax Lot 7579. This was the case all along, since the water right was first permitted and licensed. Please see the enclosed maps and plats.⁴

² According to the IDWR file, she was formerly married to Charles B. Kendall and was known as Claire Kendall. She later married Lynn Bailey. At the time of permit application, she went by Claire Kendall Bailey. At the time of proof, she was known as Claire Bailey.

³ This condition appears to be based on a hand-written notation on the permit application stating: "Lots 2&3, Bk. 1 per atty 5/12/98".

⁴ It is difficult to pin down the exact location of the place of use and point of diversion on this right, because, I am advised, section 10 has never been surveyed. The maps provided were prepared recently by our clients' engineer based on existing maps, aerial photography, and a site visit. They constitute the best information available to us.

Subsequent to purchase of the property by the Flanigans in 1999, the following events occurred: The land was replatted in 2005.⁵ The main house and cabin were included within new Lot 2 of the North Fork Subdivision First Addition, and sold by the Flanigans to a third party, Gregg and Laura Welsh. (Thus, while the main house and cabin were not part of the original North Fork Subdivision, they are now part of the North Fork Subdivision First Addition.)

Before selling new Lot 2 of the First Addition, the Flanigans drilled a new well for the Welshs' main house and cabin. (Well Driller's Report dated Dec. 27, 2004, relating to Well Tag No. D-0034446.) That well now serves as the sole source of domestic water for those homes. No water right permit was sought in conjunction with the new well; instead we understand that the main house and cabin rely on exempt domestic water rights associated with the new well. To our knowledge, these post-SRBA domestic rights have not been claimed in the SRBA.⁶

The Flanigans' conveyance of new Lot 2 to Mr. and Mrs. Welsh expressly reserved all right, title and interest in Water Right No. 37-8870 and all other appurtenant water rights on the property.⁷ Upon installation of the new well serving the Welshs' main house and cabin, the Flanigans physically altered the delivery system from the spring so that the spring water no longer went to the Welshs' main house and cabin on new Lot 2, but instead serves the newly constructed residential and ancillary building recently built by the Flanigans on the land they retained (in new Lot 3 of the North Fork Subdivision First Addition).

Coincidentally, the new domestic uses currently made by the Flanigans take place within the land originally demarcated as Lots 2 and 3 of the original North Fork Subdivision, which are located within the SWSE of section 10.⁸ Thus, even though the original description of the place of use in the license was incorrect (when it referred to the main house and cabin now owned by the Welshs), it is now correct (where it is being used by the Flanigans).

⁵ A new plat, known as North Fork Subdivision First Addition left the original Lot 1 unchanged, but modified Lots 2 and 3. The new plat combined Lots 2 and 3 of the original subdivision and added a portion of the original Tax Lot 7579 to form a new Lot 3 of the North Fork Subdivision First Addition. Another portion of Tax Lot 7579 was combined with another parcel known as Tax Lot 3508 to form two new lots: Lots 1 and 2 of North Fork Subdivision First Addition. Another lot (Lot 4) was also created out of Tax Lot 7579. Copies of the original and new plats are reproduced as attachments to this letter.

⁶ We include this information solely as background. Ms. Eshman and I do not represent the Welshs, we and make no representation on their behalf as to the status of their water rights.

⁷ A separate quitclaim from the Flanigans to the Welshs conveyed the Flanigan's interest, if any, in the exempt domestic well water right as well as certain nonconsumptive rights.

⁸ The enclosed map shows a small portion of the subdivision crossing over into the SESW of section 10. However, the domestic uses associated with this right all occur within the SWSE of section 10.

It is my understanding, based on Shelly Keen's letter of August 23, 2007 to Jill Eshman, and on our further discussions with you on September 18, 2007 and January 16, 2008, that there is no need to file either a transfer application or a new ownership form to update the Department's records with respect to the new plat. This is so because the current place of use remains within what was originally described as Lots 2 and 3 of the original North Fork Subdivision (even though that subdivision has been replatted as the First Addition).

Point of diversion

Now, let me turn to the point of diversion. We have surveyed the location of the source spring and the cistern.⁹ A copy of an engineer's drawing based on the survey is included with this letter for your reference and file. Water is piped from the spring about 300 feet to the cistern, and from there to the current place of use at the Flanigan's new residential complex. The spring, rather than the cistern, is the point of diversion for water right purposes.

The location of the point of diversion (as described in the permit application, license condition number 3, and the proof of beneficial use) is inaccurate. The water right license identifies the point of diversion as the NWSWSE of section 10. Based on the recent survey, we have determined that it is actually located in the SESESW of section 10. This difference is not a result of any physical change in the water right. The location of the spring has not changed. The only change is in the place of use and the delivery from the cistern, as discussed above.

In our last meeting, you advised that there is no need to address this discrepancy in the Department's records. So long as there has been no change in the point of diversion, any inaccuracy in the location of the point of diversion would not be a basis for curtailment or other administrative action against the water right holder.¹⁰ In other words, a transfer to correct this error would be permissible, but is not required. Since it is not required, our clients will not proceed with a transfer application at this time.

I inquired as to whether an administrative correction of the license (without a transfer application) was appropriate. You advised that it was neither appropriate nor necessary.

⁹ The section of Blaine County in which the property is located is unsurveyed in the sense that it has not been subject to a cadastral survey. However, the original and First Addition plats were based on actual surveys, and the map we are providing today is based on an actual (albeit unrecorded) survey.

¹⁰ In support of this conclusion, you pointed me to Administrator's Memorandum, Transfer Processing No. 24 (Oct. 30, 2002), which provides, for example, at page 4: "Refined Descriptions: An application for transfer is not required when a change in the description of the location of the point of diversion or place of use is only the result of improved methodology for referencing and displaying the location, which results in a more accurate description of the same physical location."

Jeff Peppersack
January 29, 2008
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I trust this letter is consistent with our prior discussions and that you continue to believe that no further action is required by either the Flanigans or the Department to preserve and protect this water right. If that is not the case, please advise.

I hope that this letter will clarify the record and avoid confusion in the future. I also trust that this letter will prove useful to future owners or other persons that may have occasion to review this water right.

Sincerely,

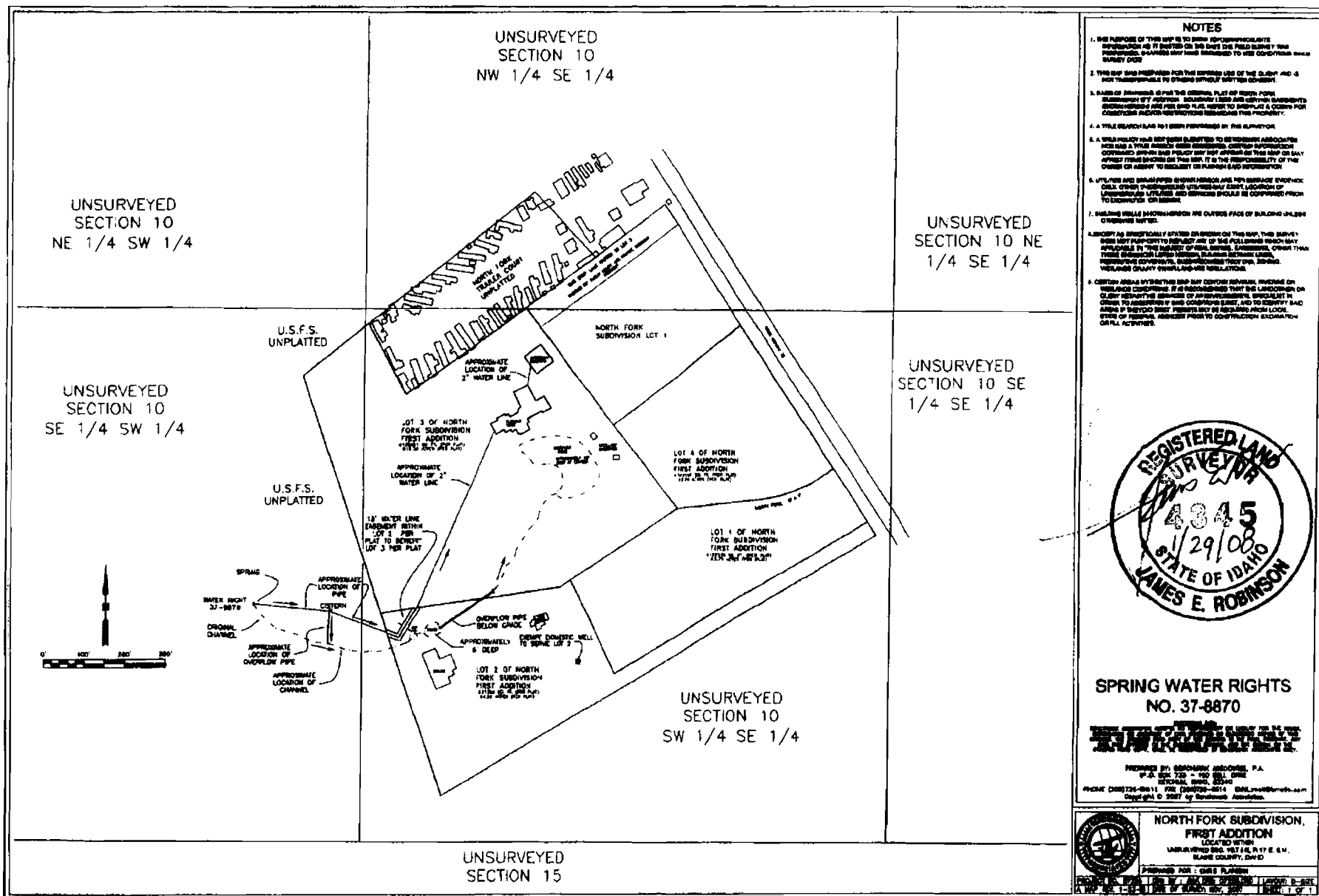


Christopher H. Meyer

Encl: Exhibit 1: Aerial photograph depicting North Fork Subdivision First Addition (lots 1, 2, 3 and 4) and section lines (with property boundary hand drawn by attorney, not by engineer)
Exhibit 2: Engineer's drawing showing location of POD and POU based on Nov. 2007 survey
Exhibit 3: Plat of North Fork Subdivision
Exhibit 4: Plat of North Fork Subdivision First Addition

cc: Phil Rassier, IDWR
Shelley Keen, IDWR
Chris and Jackie Flanigan
Jill Eshman, J. Eshman Law, P.C.
Robby Robinson & Jason Von Lindern, Benchmark & Associates, P.A.





NORTH FORK SUBDIVIS J FIRST ADDITION

OWNER'S CERTIFICATE

KNOW ALL MEN BY THESE PRESENTS that CHRIS FLANIGAN and JACKIE FLANIGAN, husband and wife, do hereby certify that they are the owners of three parcels of land described as follows:

Parcel 1

Lots 2 & 3, of NORTH FORK SUBDIVISION, according to the official plat thereof, recorded as Instrument No. 229263, records of Blaine County, Idaho.

Parcel 2

TAX LOT 7579

A parcel of land located within H.E.S. 123 and H.E.S. 124, and also within unsurveyed Section 10, Township 5 North, Range 17 East, Boise Meridian, Blaine County, Idaho, more particularly described by metes and bounds as follows:

Commencing at a U.S.F.S. brass cap marking corner No. 5 of said H.E.S. 123, said corner lying N18°32'00"W, 2849.91 feet from Corner No. 4 of said H.E.S. 123; thence S18°32'00"E, 609.59 feet along the westerly boundary of said H.E.S. 123 to the southerly corner of the North Fork Subdivision, which point is the TRUE POINT OF BEGINNING.

Thence N82°12'58"E, 740.00 feet along the southerly boundary of said North Fork Subdivision to the southerly corner of Lot 1, said North Fork Subdivision; thence N82°12'52"E, 402.39 feet along the southerly boundary of said North Fork Subdivision to the easterly corner of said Lot 1, said corner lying on the westerly boundary of Idaho State Highway No. 75; thence S35°14'41"E, 563.77 feet along said westerly boundary of Idaho State Highway No. 75 to a point on the southerly boundary of said Lot 1, said Lot 1, 7579 and 3508 to a point on the westerly boundary of said H.E.S. 123; thence N18°32'00"W, 287.98 feet along said boundary to the True Point of Beginning.

Parcel 3

TAX LOT 3508

A parcel of land located within H.E.S. 123 and H.E.S. 124, and also within unsurveyed Section 10, Township 5 North, Range 17 East, Boise Meridian, Blaine County, Idaho, more particularly described by metes and bounds as follows:

Commencing at a U.S.F.S. brass cap marking corner No. 5 of said H.E.S. 123, said corner lying N18°32'00"W, 2849.91 feet from corner No. 4 of said H.E.S. 123; thence S18°32'00"E, 609.59 feet to the TRUE POINT OF BEGINNING.

Thence N82°12'58"E, 723.99 feet along the boundary common to Tax Lots 7579 and 3508 to a point on the westerly boundary of Idaho State Highway No. 75; thence S35°14'41"E, 70.24 feet along said westerly boundary of Idaho State Highway No. 75 to the southeasterly corner of Tax Lot 3508; thence S59°28'47"W, 1264.58 feet to the TRUE POINT OF BEGINNING.

Pursuant to Idaho Code 50-1334, I, the undersigned, as owner, do hereby state that the individual lots described in this plat will not be served by any water system common to one or more of the lots but will be served by an individual well.

The easements shown hereon are not dedicated to the public, but the right to use said easements for the intended purposes is hereby reserved forever. No structures other than for such utility and other designated uses are to be erected within the lines of said easements.

It is the intention of the undersigned to, and they do hereby include said land in this plat.

Signed this 15 day of November 20 05.

CHRIS FLANIGAN

JACKIE FLANIGAN

ACKNOWLEDGEMENT

COUNTY OF BLAINE

STATE OF IDAHO

On this 15th day of November 20 05, before me, Notary Public, appeared the undersigned, CHRIS FLANIGAN and JACKIE FLANIGAN, whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in this certificate first above written.

My commission expires: 9/20/2008

Reading at: Kasaan, Idaho

Notary Public: Paula P. Davis



SURVEYOR'S CERTIFICATE

I, JAMES E. ROBINSON, a duly Registered Land Surveyor in the State of Idaho, do hereby certify that the foregoing plat is a true and accurate map of the land surveyed under my direct supervision and that it is in accordance with Idaho State Code relating to plats and surveys.



COUNTY SURVEYOR'S APPROVAL

This is to certify that I, Jim W. Kearns, County Surveyor for Blaine County, Idaho, have checked the foregoing plat and accompanying information for stating the same and have determined that they comply with the laws of the State of Idaho relating thereto.

Jim W. Kearns 11/10/05 Date

COUNTY PLANNING & ZONING APPROVAL

The foregoing plat was approved and accepted this 22nd day of November 20 05 by the Blaine County Planning & Zoning Administrator.

By: [Signature]

COUNTY COMMISSIONER'S APPROVAL

The foregoing plat was approved and accepted this 22nd day of November 20 05, by the County Commissioners, Blaine County, Idaho.

By: [Signature]

COUNTY TREASURER'S CERTIFICATE

On this 24th day of December 2005, the foregoing plat was approved and accepted by the Blaine County Treasurer, Blaine County, Idaho.

By: [Signature]

COUNTY RECORDER'S CERTIFICATE

I hereby certify that this instrument was filed at the request of [Name] on this [Day] day of [Month], 20 [Year], A.D., in my office and duly recorded in book [Page] of [Volume] of plats at page [Page].

Instrument No. [Number] Fee: \$ [Amount]

INSTRUMENT # 229263
JACKIE E. FLANIGAN
Recorded by: [Name]
Blaine County, Idaho
Date: 11/10/05



NORTH FORK SUBDIVISION
FIRST ADDITION

LOCATED WITHIN: T5N, R17E, B1W,
BLAINE COUNTY, IDAHO

PREPARED FOR: CHRIS & JACKIE FLANIGAN

FINAL PLAT
PROJECT NO. 0516
DATE: 10/29/05
SHEET 2 OF 2