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Ken A. and Allison A. Hagman
799 Hagman
Nordman, Idaho 83848

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MAY - 4 2009

IDWR/North

Re: Hagman Beach Water System and your letter dated March 13, 2009

Dear Mr. and Mrs. Hagman,

I write today as legal counsel for Earl and Jan Forsman, who contacted me regarding Ken's letter dated March 13, 2009, in which he stated that effective June 30, 2009 the Forsmans would "no longer be able to obtain water from their current source, the Hagman well."

My clients have no intention of disconnecting their domestic water supply at your whim, and decline to accept your claim that the well is "the Hagman well." There are several reasons why the Forsmans believe they are not obligated to disconnect from their current domestic water supply or to drill their own well. Those reasons are discussed in this letter. I strongly suggest you consult legal counsel prior to answering this letter. I have provided enough information so that you and your counsel can clearly understand that it is in your interests to voluntarily settle the issues rather than depend on my clients seeking remedy elsewhere.

Please respond to this letter in writing by May 20, 2009, or I will recommend the Forsmans avail themselves of other legal remedies.

1) Forsmans have a property interest in the well. In Idaho, "a water right is tantamount to a real property right, and is legally protected as such." (*Nettleton v. Higginson*, 98 Idaho 87 (1977).) The right to use water by diverting it from a natural source and applying it to a beneficial use is a right that is appurtenant to (attached to) "the land or other things to which, through necessity, said water is being applied." (I.C. § 42-101.) In other words, the right to use water in Idaho is not a personal right belonging to an individual, but a real property interest, which runs with the land to which the water is applied. The phrase "runs with the land" means that as long as successive title owners to the property use the water, the water right survives successive ownerships. My clients have used the domestic water serving their vacation residence for over two decades, and have water rights in the well and the lines that serve their residence. You do not own a personal water right, including any right to disconnect my client's domestic water.

In addition, when a larger parcel is divided and smaller sections of it are conveyed without expressly reserving the water rights previously appurtenant to the larger parcel, the water right is automatically conveyed proportionally amongst the parcels. The Idaho Supreme Court in *Crow v. Carlson*, 107 Idaho 461 (1984) approvingly cited *Russell v. Irish*, 20 Idaho 194 (1911), which dealt with the allocation of water rights that had been acquired for a certain eighty acres. Twenty of those acres were conveyed *without reference to the water rights* that accompanied the conveyance. The *Russell* Court said, "this conveyance would carry with it the water right appurtenant to the land at the time of the conveyance, *unless it was specifically reserved in the deed . . .*" (*Russell*, at p. 198-199, emphasis added.)

In *Hunt v. Bremer*, 47 Idaho 490, 493 (1929), the Court cited *Russell* and stated, "a division of a tract of land to which water is appurtenant, without segregating or reserving the water right, works a division of such water right in proportion as the land is divided."

The two parcels my clients purchased from the Williams were created by an unrecorded survey that was completed on May 27, 1976 by Robert G. Bristol. Evidence of the first lot your parents sold the Williams' appears in instrument number 187870 on file at the Bonner County Recorder's office. James and Elizabeth Hagman signed that warranty deed on May 25, 1976. Neither that warranty deed, nor the second warranty deed under instrument number 271226 for the guesthouse lot reserve any water rights to the Hagman family parcel owners.

You have a statutory water right number 97-4215 that carries a priority date of 1961. In Ken's March 13 letter he stated the water pipes serving Forsman's property were installed in the 1950s and were "severely degraded." However, Ken sent the Forsmans a letter dated June 5, 1998 stating required upgrades to the system would be completed for \$200.00 per user. Your March 13 letter clearly misstated the facts, unless you used the \$200.00 for other expenditures unrelated to the water system upgrades. My clients want to know where their money was spent.

Also, my clients benefit from and claim an interest in the water right due to the receipt for \$1000.00 that Ken signed on September 8, 1986 for the monetary contribution the Williams made for "development of [a] shared water well." As your records will show, that receipt states, "[c]redit for this deposit is transferable to Herb Williams' heirs, successors or purchasers of his property - namely Earl and Janet Forsman; and will be refunded in the event that the well does not perform adequately." It is outrageous that you now claim a right to disconnect my client's domestic water supply on June 30, without regard for their rights to domestic water.

Further, a water right itself and the right to the facilities that convey the water to the property are separate rights under Idaho law. (*Morgan v. Udy*, 58 Idaho 670 (1938).) The *Morgan* case confirmed that a right-of-way, or what we with better clarity today call an easement, is created across the land of another for a beneficial user of water, here my clients and your other neighbors, where the water distribution facilities to convey the water are located. My clients not only claim a proportionate water right, but also easements

across any other person's property, including yours, that the pipes cross to reach the diversion point at the wellhead.

Your March 13 letter evidenced your misunderstanding of the law where it stated, "[m]uch of the existing system crosses private property not owned by me personally, and there is not a practical way to maintain or repair the system in those areas." In fact, you and the other water users have easements to repair the system over any lands upon which it runs, and you have no right under Idaho law to disrupt my client's domestic water use based on such an argument.

"The person entitled to the use of water or owning any land to which water has been made appurtenant . . . under the provisions of the Constitution and statutes of this state, may change the point of diversion, period of use, or nature of use, and/or may voluntarily abandon the use of such water, in whole or in part on the land which is receiving the benefit of the same . . . , if the water rights of others are not injured by such change . . ." (I.C. § 42-108.) My clients will not abide with your abandonment or alteration of their domestic water rights, unless you can show you have complied with applicable Idaho statutes. Since my clients would definitely be injured if you unilaterally cut off their water, and they would also be damaged if they had to expend money to drill their own well under your threat to disconnect their water, I warn you that a court would very likely rule that your unilateral disconnection of their domestic water would be illegal and disallowed by an injunction following a court's declaratory judgment regarding the matter.

Finally, if my clients have to sue you to enforce their rights, the Bonner County District Court must allot the waters of the water system:

. . . according to the rights and priorities of those using such waters, [and] such allotment shall be made to the use to which such waters beneficially applied, . . . [and] the right confirmed by such decree or allotment shall be appurtenant to and shall become a part of the land on which the water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such waters shall become so appurtenant.

(I.C. § 42-1402.) Thus, barring express reservation, every neighbor served by the water system could claim a proportionate right to the existing water system and its appurtenant easements. Also, my clients have enjoyed these rights longer than other supplied residences, so the Forsmans have a priority under Idaho law to maintain their domestic water supply over other claimant/users.

2) Forsmans have a legal interest in the water system due to Williams' \$1000 payment.

On September 8, 1986, Ken signed a receipt for the \$1000.00 he received from the Williams. That \$1000.00 "deposit" was given "for development of [a] shared water well." Additionally, the receipt states, "credit for this deposit is transferable to Herb Williams"

heirs, successors or purchasers of his property - namely Earl and Janet Forsman; and will be refunded in the event the well does not perform adequately."

On March 13, 2009, a letter of that date from Ken to my clients indicated "the pipelines that are in use date back to the late 1950s and are severely degraded. We are experiencing a tremendous loss of water from undetermined leaks and the pump is running continuously, causing our electrical bill to double and requiring a recent replacement of the water pump." Therefore, because the well is not performing adequately, you owe my clients at least \$1000.00. Until you pay them that thousand dollars, or whatever my clients may be entitled to since you require they provide their own water after June 30, 2009, they will insist you respect their legal interest in the water system, because the receipt states that its benefit accrues to the Forsmans specifically. Even if you had a legal right to cut my clients off from their water completely and did so, they have a valid claim for at least \$1000.00 against you, if not the price of a new well to compensate them for the damages and injury to the use of their property.

3) Forsmans have a statutory interest in the water right, and you cannot alter water right 97-4215 water right in such a way that it injures the Forsmans. This was previously discussed in this letter concerning Idaho Code section 42-108. Further, pursuant to that statute, "any person desiring to make such change . . . shall make application for change with the Department of Water Resources under the provisions of section 42-222, Idaho Code." (emphasis added.) You propose to abandon or alter my client's beneficial use of water for their domestic use, but I am not aware of your application to alter the water right in that manner.

In the *Simonsen* case, the Idaho State Supreme Court found that someone who wanted to make such a change had no option but to comply completely with the provisions of the statute and apply for the change through the Department of Water Resources according to the rules then in existence when the application was submitted. (*Simonsen v. Moon*, 72 Idaho 39 (1951).)

Thus, even if you want to make a change in the use of the water right, including cutting off users of the water system that has served them for over twenty years, you must make an application to the Idaho Department of Water Resources, which would evaluate the application based on its potential to injure third parties, including my clients and everyone else now hooked up to the water system. Please send me a copy of the completed application you submitted to the Idaho Department of Water Resources.

4) Forsmans have an equitable interest in the water system because they have been dependent on it for so long and your unilateral disconnection would be to their detriment. The operational equitable concept involved here is the concept of quasi-estoppel. "Estoppel" is "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." (Black's Law Dictionary, 8th Ed., p. 589 (2004).)

The Idaho State Supreme Court stated:

The doctrine of quasi-estoppel has its basis in acceptance of benefits; it precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit.

(*Infanger v. City of Salmon*, 107 Idaho 45, (2002) (Kidwell dissenting), citing *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 715 (1994).)

You assert a right to cut my clients off from their domestic water. However, this position is inconsistent with the position you have maintained in your relationship with my clients for a number of years. Further, you accepted the benefit of the \$1000.00 and "it would be unconscionable to allow [you] to maintain a position inconsistent with one in which [you] acquiesced or of which [you] accepted a benefit." (Id.) Thus, a court will probably enjoin you from implementing your asserted right to cut off Forsman's water. Even if you paid them the \$1000.00, that may not sufficiently overcome the estoppel, because the cost to drill a new well is many multiples of that thousand dollars you could pay them. This does not include any computation based on the inflationary value of the \$1000.00 since it was paid in 1986, or interest that has accrued on the deposit during the intervening years. You cannot cut off the Forsmans from their domestic water.

5) Forsmans are paying taxes to a water district. The Granite Reeder Water & Sewer District (GRWSD) was specifically created for the purpose of providing water to the Forsman's parcel, and even though the district has not acted to provide that water, it would be a waste for you to require district landowners to drill separate wells when at some point the district should be exercising its power and authority to supply water.

The *Petition for the Establishment of Water and Sewer District* in Bonner County case number CV-1974-13399 states, "it is intended that an adequate system of water and sewer facilities be constructed, installed, operated, maintained, and developed; and regulation of same, in conformity with law and good health and safety standards, be organized and imposed." The proposed and eventually confirmed boundaries of the initial district included "the southwest quarter of the southwest quarter of section 9, . . . in Township 61 North, Range 4 West of the Boise Meridian in Bonner County, Idaho." (*Petition*, p. 2, Oct. 23, 1974, and *Court's Order*, Dec. 23, 1974.)

The GRWSD does not actually provide water to the Hagman Beach area. This summer it is working on the installation of sewage facilities. It is unknown whether the district has plans to provide water facilities, but it is envisioned by Welch-Comer, the engineering firm for the sewer facilities installation, that the firm will need to work with you, the District, and its contractors to dig around, near, or past existing water pipes bringing water to the various landowners, including the Forsman's pipes that are served by the well on the Hagman property.

Even if the GRWSD takes another 35 years to have the funds to install a water system, the statutory powers of that district found at Idaho Code section 42-3212 include the power to work with third parties, “. . . in building, erecting or constructing works, canals, pipelines, sewage treatment plants, and other facilities within or without the district.” (I.C. § 42-3212(d).)

Further, that statute gives the district the power “to have the management, control and supervision of all the business and affairs of the district, and the construction, installation, operation and maintenance of district improvements therein or therefor.” (Id. at (h).) A court would probably find that your operation of a private water system within the district boundaries is included in the definition of “the business and affairs of the district.” Since the district was formed to provide water service, the water services provided by private parties would come within the business and affairs of the district, because the district could *and should* under law make decisions related to allocations of capital toward water system improvements based on existing systems, including the one serving my clients.

The district also has the power “to acquire, dispose of and encumber real and personal property, water, water rights, water and sewage systems and plants, and any interest therein, including leases and easements within or without said district.” (Id. at (f).) Also, that power to acquire provides the district the power of eminent domain “for the condemnation of private property for public use to take any property necessary to the exercise of the powers herein granted . . .” (Id. at (j).)

In other words, the GRWSD should exercise its statutory powers to assist you in handling this potential dispute with the Forsmans, thus I have sent copies of this letter to the district board and its engineer, Welch-Comer. Frankly, it seems a waste for the district to be digging up the streets to install the sewer pipes, and having that *public entity* replace or repair the *privately-owned* Hagman Water System pipes that it may encounter without having it exercise some control over how those water pipes are run in relation to its sewer lines, and therefore how you operate the neighborhood system. This is because the district is responsible for providing water within the district boundaries, and it has an interest in assuring that sewer collection pipes installed this summer do not require unnecessary alteration expenditures later when a water system is installed.

Additionally, the board has the power to take the existing water system from you with its powers of eminent domain and use it to continue to provide water services to the property owners it currently serves, including my clients, and even extending that system to serve as many owners as it is capable of serving, subject to Idaho Department of Water Resources applications approval and regulations. I think it's important that all parties to this equation understand their responsibilities to the community in documented form so a court may use that documentation to make judgments if the parties cannot agree voluntarily to solve these issues.

6) Ken has an entrenched conflict of interest. The Hagman family has owned the southwest quarter of the southwest quarter of section 9 since at least 1932 when it was first platted into 14 parcels by Arthur and Gladys Hagman. The Hagman family was

instrumental in the formation of the GRWSD and the inclusion of the entire Hagman Beach area into that district. The course of events is that you had a well in the late '50s, which was given a priority date of 1961, and then you assisted in the formation of the GRWSD in 1974. The Hagman family has been intimately involved with land and water issues in the Hagman Beach area for at least 70 years.

Upon the Court's Order of December 23, 1974, the GRWSD board and the district itself was "thereafter [to] be known, and designated the first board of directors selected, and thereupon the district shall be a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation." (I.C. § 42-3207.) According to the newsletter of the district dated March 2009, Ken is now a board member of the district. Board members of both public and quasi-municipal corporations have duties to the people served by such entities. (I.C. § 42-3209.)

The GRWSD is "a governmental subdivision of the state of Idaho and a body corporate with all the powers of a public or quasi-municipal corporation." (I.C. § 42-3207.) The Ethics in Government Act of 1990 at Idaho Code section 59-703(6)(b) defines governmental entity to include "counties and municipalities of the state of Idaho, all other political subdivisions including, but not limited to, highway districts, planning and zoning commissions or governmental bodies not specifically mentioned in this chapter."

Further, a "public official" is defined as "any person holding public office of a governmental entity, by virtue of an elected process . . . [, or] by virtue of formal appointment[.]" (Id. at (10).) Ken is a public official subject to the Ethics in Government Act of 1990. He is required to disclose his conflict of interest, given his position on the board of the district at the same time he is the operator of a private shared water system under contract for financial compensation to third parties taxed by said district, which was formed for the express purpose of providing water to those taxpayers. (I.C. § 59-703.) Even if you do not feel you have a conflict of interest and decide not to disclose to the board the terms of contracts you have with beneficiaries of the private shared water system, that potential violation of the Ethics in Government Act of 1990 "shall not preclude prosecution and conviction for any criminal violation that may have been committed." (I.C. § 59-705.)

Furthermore, your private water system falls within the description of a "Public Water Supply" pursuant to Idaho Code section 39-103(12), which is the health and safety code for environmental quality, even if it serves less than ten households, because it "serves water to the public in which the department declares to have potential health significance." Your water system's proximity to Priest Lake and the new sewer waste collection system may cause the department to find such potential health significance.

If your private water system is found to be operating as a municipality subject to environmental quality rules, it may be barred from operating within the boundaries of the GRWSD, and the district may be required to assume operation of the water system. In the case of the *City of Boise v. Bench Sewer District*, 116 Idaho 25 (1989), the Court determined that the powers granted to sewer district boards pursuant to Idaho Code section

42-3212, also applicable to water district boards, provide a "grant of authority to [] district boards [that] implicitly withdraw[] the same power from any *geographically coextensive* municipalities such as a city or county. There cannot exist two municipalities exercising the same or essentially similar powers within the same territory at the same time." (Id. at p. 33, citing other cases.) (emphasis added.) Since a court would likely find your private water system to be a municipal water provider geographically coextensive with GRWSD, it could act to bar your private water system from supplying water, and may require the district to pay for and assume control and management of that water system, amongst other remedies, including payment of damages for costs undertaken or for injury to the rights of water system users as they try to maintain their rights to have domestic water.

I have advised my clients that I hope that we can avoid a lawsuit that includes you and the district by creating a proper written agreement that protects my clients and the other district taxpayers' rights to their domestic water. If the Forsmans have to sue you to enforce their rights, I will request the court award them attorney's fees and costs of suit through the appeals process, if necessary. If you want my clients to assume your or the GRWSD's responsibilities for delivery of water to the Forsman parcel, it is proper for you or it pay for the new Forsman well. This would be reasonable governance on the part of the district and would make economic sense for you, because when the GRWSD is in a position financially to install a water system it will find it beneficial to already own wells in the area.

Please make sure I receive your written response on or before May 20, 2009.

Sincerely,



Arthur B. Macomber
Attorney at Law

Cc: GRWSD Board of Directors
GRWSD Engineer: Welch-Comer
Idaho Department of Water Resources
Idaho Department of Environmental Quality