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May 9, 2008

Via Email & US Mail

Mr. Kevin Lakey
District 37 & 37M Water Master
107 West 1st
Shoshone, Idaho 83352-5425

Re: Water District No. 37 & 37M's Resolution No. 14 and Related Assessments

Dear Mr. Lakey:

I am writing on behalf of several District 37 & 37M water users including but not limited to several of our clients: the Meadows LLC, the Thomas Trust, Sun Valley Land & Minerals, Inc., Spring Creek Ranch LLC, and Sun Valley Ranch LLC; and clients of other firms who have authorized us to include them, including: Chaney Creek Ranch LLC, Redstone Partners LP, Harry S. Rinker and Myer Berlow ("**Claimants**"). We have conducted a preliminary investigation of the actions taken by the District through its Advisory Board ("**Board**") at the January 14, 2008 annual meeting. Our focus is on Resolution No. 14 and the related assessments ("**Resolution**") which purports to authorize the District to retain the services of an expert to research water rights and provide mapping information and expend up to \$90,000.00 for such research for 2008.

Based on our investigation we have determined that the District clearly has been hijacked by special interests who are employing their resources to further their litigation objectives in the Snake River Basin Adjudication. Among other things, the District's actions violate Idaho Code §§ 42-605 and 59-702. As set forth in detail below, the Board has breached its fiduciary duty to the water users and exceeded its statutory authority by passing a Resolution that has no necessary relationship to the District's responsibilities of assuring and improving the distribution of the waters of the District. This violates the Idaho Ethics in Government Act. Moreover, the District violated its statutory obligations to provide adequate notice of the purpose of the January 14, 2008 annual meeting. In addition, the Board violated the Claimants' federally protected rights under Title 42 U.S.C. §1983 when it passed the Resolution under the color of state law.

Before pursuing claims against you as the District Water Master, David Murphy as the Deputy Water Master, the Board, the individuals serving on the Board, and the Idaho Department of Water Resources (collectively referred to as "**District**") we request a meeting

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with you, Allen Merritt and Director David Tuthill to explore whether this matter can be resolved short of prolonged, public and costly litigation.

PERTINENT FACTS

The Resolution was adopted, and the assessments made, in the context of the following facts and circumstances:

Carl D. Pendleton, a member of the Board of Directors for the Big Wood Canal Company (“BWCC”) recently testified at his deposition that the BWCC met with a group of water users in Water District 37 and/or 37M who refer to themselves as the Concerned Water Users (“CWU”) in November of 2007. We understand that CWU consists of Gerald Bashaw, John F. Stevenson, Pepin Corso-Harris, Tom O’Gara, Grace Eakin, Rocky Sherbine, Bill Molyneux, and Pete Van Der Meulen. Pendleton stated that during the meeting, CWU informed BWCC that for the past year it has paid hydrologist Wendy Pabich to research and evaluate water rights in District 37 & 37M in support of their SRBA litigation. Pendleton confirmed in his deposition that BWCC and CWU thereafter joined forces and followed Pabich’s recommendations to file numerous objections in the SRBA cases. Mr. Pendleton also disclosed that David Murphy, Deputy Water Master, has been working for Pabich in support of this effort to challenge the water rights of other District water users.

A month later, on December 18, 2007, the Board met. During the week of January 7, 2008, Resolution entitled “2008 Resolution No. 14 Investigation of Water Usage & Assessment Therefore,” was mailed to Water Users by the District together with a memorandum stating it was considered at a Special Meeting. Dr. Pabich was designated as the researcher.

A week later, on January 14, 2008, the Resolution was substituted and a modified Resolution was circulated and posted on the door of meeting room. The Board Minutes reflect that the CWU wanted the Resolution 14 funds to be used to complete the litigation support research that it had started with Pabich. In addition, the Minutes state that Allen Merritt spoke to the attorney general and was informed that if the research was an appropriate activity for the delivery of water then it was appropriate activity for the District but not if the research was being conducted in support of the SRBA litigation.

On January 25, 2008, Nick Purdy, a Water District 37 water user, wrote the IDWR expressing his view that the Resolution was not properly adopted because it was not included in the meeting notice and is illegal because the \$90,000 is not funded from the Water Bank. On February 1, 2008, Tim Luke from the IDWR responded to Mr. Purdy’s letter advising him that resolutions do not have to be included in meeting notices and Idaho Code Section 42-612 only requires use of Water Bank revenue when it is available and there is none available in Water District 37, which does not have an operating water bank or rental pool. Nevertheless, the IDWR expressed concerns about the Resolution and the use of the assessment funds. IDWR

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requested that the Board to provide details concerning the intended use of the assessment funds. Moreover, the IDWR pointed out that it has responsibility to administer water rights in accordance with the official record, stating that “It would not be appropriate for the Watermaster, for example, to rely on the interpretation of water rights by an independent consultant and/or data that did not originate from either the Department or the SRBA Court.” That, however, is precisely what is occurring in Water District 37 under Resolution 14.

On February 8, 2008, the Board adopted a “Criteria and Explanations For Resolution No. 14” (“**Explanation**”). The Explanation states that the Resolution arose from investigation of potential water use abuses in the district and additional concerns raised by the SRBA from which it became apparent that ownership records were incomplete. The Explanation states that the Assessment will be used to update records and address 12 enumerated issues. Of course this after-the-fact justification of the assessment is at odds with earlier representations of the Board and Mr. Pendleton’s testimony.

On February 9, 2008, Mr. Purdy commented to the IDWR on, and objected to, the Board’s Explanation. On February 12, 2008, you wrote Mr. Luke for guidance on the 12 issues addressed in the Explanation. Mr. Luke supported the Assessment because of the lack of resources available to the District to research what enforcement issues exist.

On February 22, 2008, the IDWR responded to your request and approved implementation of the Resolution provided that certain precautions are taken. These precautions include: limiting the contractor’s scope of work, completing a bidding process in accordance with Idaho Code Section 67-5714 and providing a written explanation of scope of work and justification of expenses to accompany assessments.

On March 10, 2008, Pabich and ERO Resources submitted proposals to you in response to RFP. On March 19, 2008, I wrote to you requesting information regarding the Resolution from the District. On March 25, 2008, you responded stating that “The Big Wood Canal Company along with a group of water users calling themselves The Concerned Water Users proposed Resolution No. 14 at the 2008 annual meeting.”

Pabich was awarded the contract by the District to conduct the work.

LEGAL ANALYSIS

A. The District’s status and duties

A water district, such as jointly-operated Districts 37 and 37M, is “an instrumentality of the state of Idaho” formed “for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state....” I.C. § 42-604. The watermaster, and all watermaster assistants, are “responsible for the distribution of water within

said water district.” I.C. § 42-605(3). The watermaster’s duty is “to distribute the waters” of the district. I.C. § 42-607.

The advisory committee, the Board in this case, is chosen by the water users to “serve as advisors to the director and the watermaster in matters pertaining to the distribution of water within the district.” I.C. § 42-605(6). We believe the Board acted beyond its authority in seeking to implement the Resolution.

At an annual meeting, the district’s water users “may adopt resolutions to assure or improve the distribution of the waters of the district within state law...” I.C. § 42-605(2). At an annual meeting, the water users are required to adopt a budget for the district “covering the estimated expenses of delivering the water of the district for the ensuing year.” I.C. § 42-612(1). This budget may include the “costs of the advisory committee in implementing resolutions adopted by the water users . . . for activities other than the payment of the salary and operating expenses of the watermaster and assistants...” *Id.* However, the District has no authority to fund any resolution for activities other than those involving the distribution of water—except, arguably, a resolution to carry out the activities enumerated in section 42-613A. But section 42-613A applies only when the district has available to it “proceeds for the lease of stored water.” As noted, the District has no such proceeds and therefore has no authority to expend funds for the activities outlined in the Resolution, even if they were within the scope of section 42-613A, and we believe they are not within such scope in any event.

B. Violation of the Ethics In Government Act

The District is prohibited from allowing the special interests of the CWU and BWCC to unduly influence governmental actions. Our position is based in part on Idaho Code §59-702 which plainly states:

It is hereby declared that the position of a public official at all levels of government is a public trust and it is in the public interest to:

- (1) Protect the integrity of government throughout the state of Idaho while at the same time facilitating recruitment and retention of personnel needed within government;
- (2) Assure independence, impartiality and honesty of public officials in governmental functions;
- (3) Inform citizens of the existence of personal interests which may present a conflict of interest between an official's public trust and private concerns;

- (4) Prevent public office from being used for personal gain contrary to the public interest;
- (5) Prevent special interests from unduly influencing governmental action; and
- (6) Assure that governmental functions and policies reflect, to the maximum extent possible, the public interest.

The District has a duty to distribute water to decreed water rights of District water users. The Board is the representative of, and answerable to, the larger body of water users whom they represent and to whom they owe duties of a fiduciary in discharging their function. They cannot represent only special interests in derogation of the interests of all District water users, regardless of whether these special interests hold and vote a majority on District matters. There is no disputing that interested Board members participated in the passing of the Resolution during the special meeting and annual meeting in January. Moreover, the evidence establishes that the Resolution: has no necessary relationship to assuring and improving the distribution of the waters of the District; does not benefit the water users as a whole; and is intended to assist CWU and BWCC with their litigation in the SRBA against specific water users. In addition, we are extremely concerned by the District's employment of Pabich, a paid expert for the CWU, and by Pabich's employment of Deputy watermaster Murphy by Pabich and the CWU. This creates an untenable conflict of interest and raises serious questions about the propriety of an appointed governmental official (i.e., Murphy), whose salary is paid by the District water users, undertaking private employment to assist one group of water users whose rights he delivers in challenging the validity of water rights of other waters users whose rights he also delivers. This situation undermines the essential trust that must exist between the public and its governmental officials.

Moreover, we are hereby requesting the District to immediately provide us with a full accounting of the contract with Pabich, all monies collected and disbursed by the District to date pursuant to Resolution 14, including copies of all progress reports and invoices to the District for their work and documentation that no District funds have been disbursed to pay for any work performed by Ms Pabich, Mr. Murphy or others prior to the January 2008 adoption of Resolution 14. We further request a complete description of all work conducted by Ms Pabich and Mr. Murphy to-date, including a list of all decreed, licensed or claimed water rights that they have examined in any way as part of their "research."

C. Separate violation of Idaho Code §42-605

In addition to the other violations of Chapter 6 of the water code outlined above, the District provided inadequate notice of the purpose of the January 14, 2008 annual meeting.

Section 42-605(2) Idaho Code states in pertinent part that:

The director shall, at least twenty-one (21) days prior to the meeting date, send notification by regular mail to all persons, companies or corporations known by the director to hold rights to the use of the waters of such district, which right has been adjudicated or decreed by the court or is represented by valid permit or license issued by the department of water resources, of the time, date, location and *purpose* of the annual meeting.

(Emphasis added). The Board gave only hours of notice of the substituted Resolution 14 that was presented and ultimately adopted. Resolution 14 should have been noticed to the members 21 days before the vote.

D. Violation of Federally Protected Rights

Title 42 U.S.C. §1983 provides a cause of action for “deprivation of any rights, privileges, or immunities secured by the Constitution and laws by any person acting “under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.” *Gomez v. Toledo*, 446 U.S. 635 (1980). Section 1983 is “construed generously” to further the Congressional purpose of providing a damage remedy against the offending party in order to vindicate “cherished constitutional guarantees.” *See id.*; *Owen v. City of Independence*, 445 U.S. 622 (1980).

The court uses a two-prong analysis to determine whether a claim falls under Section 1983: (1) whether the defendant acts “under color of any statute, ordinance, or regulation, custom or usage of any State or Territory” and (2) whether the acts deprived plaintiff of any constitutional guaranteed rights. The facts surrounding the Board’s actions meet both prongs.

Here, the Board and its individual members were acting under color of state law in conducting the annual meeting and passing Resolution 14. Moreover, Wendy Pabich and Deputy Murphy would be deemed to be acting under the color of state law by their receipt of compensation from the District to continue their work for the CWU and BWCC. Furthermore, you and the Department are acting under the color of state law by collecting assessment dues to implement Resolution 14, under the threat of interruption of vested, constitutionally protected water rights. Lastly, the acts of the Board and its individual members deprived Claimants of their guaranteed right to vote on Resolution 14 by failing to comply with the statutory requirements set forth in I.C. § 42-605.

E. Injunctive and Declaratory Relief is Necessary

Unless the District repeals Resolution 14, the only relief that will address the Claimants’ injury is an injunction prohibiting the Board from continuing its bad acts. It is well-settled that

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"in the context of a request for injunctive relief, a plaintiff is threatened with 'irreparable injury' when he or she is unlikely to be made whole by an award of monetary damages or some other legal, as opposed to equitable, remedy at the conclusion of the trial. Thus, an injury is irreparable if the damages are estimable only by conjecture and not by any accurate standard." 42 Am. Jur. 2d Injunctions § 33 (2007).

Resolution 14 adversely affects Claimants' rights because it uses District assessment powers to require payment of monies to finance litigation for a specific group of water users in direct conflict with other District water users. This is sufficient to justify injunctive relief because the damage to district water users cannot be measured or compensated for. Although the members can be compensated for their unlawfully collected assessments, this does not stop the damage suffered by the District's actions. Injunctive relief is appropriate to stop the District from continuing its bad acts.

CONCLUSION

In light of the foregoing, it is our hope that we can meet with you, Allen Merritt and Director Tuthill to discuss and resolve this matter without imposing further undue hardship on our clients. If we do not receive a response from you by May 16, 2008, we will assume that you are not interested in meeting, and will pursue other remedies. We look forward to your response.

Sincerely,

LAWSON & LASKI, PLLC



Edward A. Lawson

cc: Claimants
David R. Tuthill
Allen Merritt