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TO THE OFFICERS & DIRECTORS OF
BIG LOST RIVER IRRIGATION DISTRICT
MACKAY ID 83251

Dear Officers and Directors:

At the last meeting of the board, I understand there was a discussion concerning my representation of the district. Since Judge Herndon rendered his memorandum decision in the Timberdome case, some members of the district have felt that "Kent Foster wrote the decision for the judge", and "the district's attorney should be more aggressive". I am also aware of the desire on the part of some members to gain control of the board, change officers, employees and legal representation.

I believe you should each be advised of a few facts and circumstances surrounding the Timberdome case and the district affairs.

1. The Timberdome case was begun way back in June, 1980, years before I was employed as an attorney.

2. Many pleadings were filed by attorneys for all sides of the case, including requests for a trial setting in 1982.

3. I accepted the board's invitation to act as its attorney in October, 1986, and was asked to familiarize myself with the case and get it set for trial.

4. I spent considerable investigative time, much of which I didn't bill for because I hated to see the district have to pay a second attorney for the same thing. I even tried a couple public meetings trying to bring together all the good people of that area in a settlement, without having a devisive trial.

5. Settlement efforts failed and the case was tried in September, 1988, resulting in the decision of Judge Herndon which has caused such agitation.

6. I had nothing to do with the development of the case and its evidence for the years before the case filing in 1980, nor during the critical years 1980 - 1986. I prepared none of the pleadings, except the request for trial setting on February 24, 1988. In effect, I took over another's case, which had been pending for over 6 years. As most attorneys will tell you, this is not a wise thing to do.

7. Nevertheless, the attorney in any case doesn't manufacture facts. It is his responsibility to obtain the facts and evidence available and get them admitted and before the judge (when there's no jury).

8. In this case, I was instructed that nothing was to be submitted to the court without it being first submitted to the board for approval. All written material was delivered to Rita for the board.

9. In preparing for trial and during the trial, I constantly asked the members, directors and Rita to carefully advise me of any evidence or witnesses we didn't have. Before resting our case, everyone agreed that all proper evidence and testimony had been given to the court. No one had anything else to offer. I insist that every person who has doubts about this, go to the court and check out the evidence. In fact, they and the district should have a transcript made of the trial, and read it (you'll need it for an appeal if you take one, anyway).

10. The point I stress is that I accomplished my job, I got the evidence and testimony you had before the court.

11. I further stress the point that I have had <u>one</u> appearance before the judge, one chance to present <u>your</u> case, and that was at the trial. Implied in the statements I referred to at the beginning of this report, it seems to me, is the suggestion that I should have aggressively pursued the judge after the trial and helped him write our position into his decision. Surely everyone knows that once the case is submitted to the court, the attorneys don't further discuss the case with the court, unless he meets with all of them at the same time, pursuant to notice. No such meeting occurred. I can only assume the judge followed the usual practice of judges, and that was to study the notes he made during the trial, examine the evidence introduced by the parties, listen to the recording of the testimony, read the briefs of the parties, do his own legal research, and possibly, on his own, personally view the U-C

Canal and all parts of the system, and then write his own decision.

12. I can not believe anyone wrote the decision for the judge, nor suggested how he should write it, after the trial closed. There should have been no contact between the judge and the respective attorneys without me knowing about it. I have the highest respect for Judge Herndon. If any of you have doubts, you should address your concerns to the judge.

13. It seems evident that the judge was very highly influenced by three important facts, viz:

(a) He was aware that U-C Canal had, for years, been adequately serving the needs of both the Timberdome people and the district, and there was no serious reason to believe it couldn't continue to do so. In other words, his decision recognized the apparent status quo that you had allowed to exist for some time, and his decision recognized your right to continue to use the channel for flood control and surplus irrigation water, and at the same time, allow the Timberdome people to use it to carry their irrigation water from their wells to their farms. So, he gave something to both.

(b) He heard you complain that they had closed the bifurcation works, but again, he knew that you had allowed that condition to continue for years, without apparently any need for it.

(c) Since you wouldn't let the Timberdome Era Flats farms into the district and the owners thereof had paid the major part of the maintenance costs of the canal, Era Flats lands shouldn't be assessed for the use of a channel that had been virtually abandoned except for flood control and occasional excess irrigation water.

14. I emphasize that the above appears to me to be the rational of the judge's decision. I've never talked to him about it. I should not unless pursuant to proper hearing where both sides are present and can be heard.

15. Now, I want to point out a <u>very important procedure</u> the district should consider following, to-wit:

(a) The judge concluded his decision by stating that the parties could be heard on a motion to augment his

opinion to cover items the parties felt should be included. Until the judgment is issued (and it hasn't been yet) the opportunity still exists to ask the court to amend his Findings and Conclusions (in effect, to reconsider his opinion).

(b) Rita, three board members and I spent several hours in my office identifying the objections we had and the findings and conclusions the judge made which we thought were in error, and those we thought he should have included. When they left my office they said they wanted to present our conclusions to the entire board. I was told later the board decided to proceed 1st with a vote of the members on the question of totally abandoning the U-C Canal, advising the BLM to clear the records of any easement or "use" permits, and advising the land owners that the district would have no further responsibility for the U-C Canal and, as far as it was concerned the canal could be leveled, thus leaving any responsibility for it to those using it. So I haven't filed a motion to amend. This should be done by all means, but I can only do what I'm authorized to do.

(c) Once the Court makes final findings and conclusions (after considering the motion to amend) then a final judgment will be rendered, and if you don't approve of it, you can appeal it to the Supreme Court. These procedures should be diligently considered.

I have given you a review of this matter for the purpose of advising you, by this letter, that I wish to withdraw as attorney for the district. I believe it to be for the best interests of the district. It needs to unite the factions out there by selecting an attorney they can agree upon to immediately take the steps necessary to protect the interests of the district. I am submitting a bill herewith for the recent services rendered. I commit to you that I will spend as much time as your replacement attorney wants me to spend with him and with the board, even in the hearings and appeals, if he wants. And to show my good faith, and my desire to do what's best for the district, I will make no charges for my time.

This means you will still be paying for only one attorney, and yet there will be continuity in your representation by one who can be selected by all factions (even the attorney for those opposing the board, if you like) and who can be "as aggressive" as you like.

Now, I would like to make some suggestions as to how you might have a better relationship with your new attorney.

First, there must be better communications between all board members directly with the attorney, and that means, especially when you have such serious problems as you've had, that the attorney meet with the board, either at board meetings or at his office, and not conduct your business with him through one or two persons such as the president and/or secretary.

I've represented several boards for years. We meet together constantly and things work much better.

Second, your attorney should prepare the notices, resolutions, and documents that deal with rights of members. For instance, you are now proceeding to remove some lands and members from the district. There are strict statutory procedures to be followed. If they're not, you subject yourself to the possibility of lawsuits, because a member severed from the district, without the board having followed the proper procedures, will undoubtedly claim he has lost a valuable property right without due process of law, and a cloud hangs over the legality of the proceedings.

Lastly, I want the board and the members of the district to know that I have spent my life in farming, ranching, irrigation and related pursuits, and my 40 years of law practice have been devoted to water law as one of my specialties. I believe I understand the frustrations of the people of that water-short valley. Here they thought, reducing the size of the project by eliminating some area near INEL and especially the Era Flats, the rest of the district would have enough water, and the Era Flats land would not have any unless there was found an underground source on or near that land. Then, the wells were drilled within the district to take water outside the district to the Era Flats lands, giving those lands sufficient water to grow beautiful crops, while lands within the district were short of water, because, many there believe, of the lowering of the water table beneath district lands, taking away sub-waters and requiring more water to maintain proper levels of irrigation.

However, I don't believe those frustrations will be resolved by dividing up into factions and fighting each other.

I have stated several times, you need, in the worst way, to hire a capable engineer-hydrologist to determine whether your beliefs as to the cause of your water shortages are correct.

you see, the district protested but did not appeal the granting of licenses for those wells you claim are taking your water out of the

district. This is the day of the specialists. When you protested the granting of those licenses, you should have had that engineer-hydrologist's testimony and findings in the record to form the basis of an appeal.

I gave Rita a copy of the case entitled Birney v. Big Lost River Irrigation District, 94 Idaho 339. In it the court referred to a joint study of the Idaho Department of Reclamation and the United States Department of the Interior concerning "Water Resources in the Big Lost River Basin, South-Central Idaho." It said, "The ground and surface water of the Big Lost River Basin are so closely interrelated that they should be considered as a single resource."

Further, the Idaho water law has now been amended to provide that surface rights and underground rights will hereafter be administered together, as a unified source. Heretofore, you may not be able to obtain a surface water right in a particular area, but could readily get a permit to drill for underground water. The Swan Falls agreement and the subsequent legislation changed that, and, as the above mentioned report says.

I suggest you have a competent engineer-hydrologist develop the evidence to support your theory, as suggested by the report, and use that evidence before the Water Resource Department and the courts, if necessary, to protect your water.

Water conservation, in the delivery system, and in the manner of application, will also be required to stretch a limited supply of water to irrigate properly the district lands.

I want you to know I have enjoyed working with you and for you. You are an extremely conscientious group of people. I sincerely hope you can come up with satisfactory solutions. Be assured that I stand ready to assist your new attorney, because I will not walk away from your case, but am totally convinced that you need an attorney who can appeal to all of you, so he can lead out in doing the things that must be done.

Sincerely,

Ray W. Rigby

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Enclosure

cc: All Board Members
Rita Lundy