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April 14, 2005

Toni DuGal, President
Reflection Lane Home Owner's Association, Inc.
8801 Reflection Lane
Middleton, ID 83644

Re: Pond and pumping system for pressurized irrigation system
Our File No. 737.002

Dear Ms. DuGal:

This firm represents Kimberly Bailey, the owner of property located at 8982 Reflection Lane in Middleton, Idaho. As you are aware, Ms. Bailey's property is subject to the Declaration of Covenants, Conditions and Restrictions recorded as Instrument No. 200106990 on February 27, 2001 and amended by First Amendment to Declaration of Covenants, Conditions and Restrictions recorded as Instrument No. 200128967 on July 20, 2001¹ and further amended by Second Amendment to Declaration of Covenants, Conditions and Restrictions recorded as Instrument No. 200248750 on October 16, 2002.² As you are also aware, a pond together with a pump house and pumping equipment are located on Ms. Bailey's property for the purpose of the pressurized irrigation system contemplated under the Declaration of Covenants, Conditions and Restrictions. There are multiple issues which need to be addressed in connection with the pond and the irrigation water supplied by the pond.

¹ There is some question as to whether or not Ms. Bailey's property is subject to the First Amendment to the CC&Rs given the fact that the CC&Rs were recorded the same day as the warranty deed to the prior property owner, Tami Spaulding, and Ms. Spaulding did not sign the First Amendment to the CC&Rs. Section C of the Recitals to the First Amendment to the CC&Rs specifically states that "[U]nless executed by the then parcel owners, such amendment shall apply only to those parcels unsold at the time of the Amendment."

² Ms. Bailey's property is not subject to the Second Amendment to the CC&Rs because the Second Amendment was not signed by the prior property owner, Tami Spaulding. Rather, the Second Amendment was signed by Jim DiDonato, Ms. Spaulding's boyfriend. However, Mr. DiDonato did not have an ownership interest in the property and, therefore, could not bind the property.

The existence of an easement. From my review of Ms. Bailey's Warranty Deed, the Warranty Deed of the prior property owner, Tami Spaulding, the Record of Survey and the Declaration and its Amendments (assuming that the Amendments even apply to Ms. Bailey's property), it is not clear to me that an easement for the pond exists in favor of the Reflection Lane Home Owner's Association (the "Association"). Neither Ms. Bailey's nor Ms. Spaulding's warranty deeds contain a reservation of an irrigation easement, pump house easement, pond easement or any other type of easement in favor of the Association. The record of survey refers to a purported 15 foot irrigation easement along the west boundary of the property, but contains no other reference to an easement, including any pond easement. Neither the pump house nor the pond fall within the purported 15 foot irrigation easement identified on the record of survey. As a matter of law, a record of survey does not create or grant easement rights.

It appears that the original Declaration of Covenants, Conditions and Restrictions ("CC&Rs") does not actually establish a pressurized irrigation system in favor of the Homeowners Association nor does it establish any easement for the pump house or pond. The only reference to any type of pressurized irrigation system is set forth in subsections C and D of Article IV, Water Systems, Irrigation and Septic Systems, as follows:

- C. For each lot on which a residence is constructed, the lot owner shall, at owner's expense, provide an independent well to be drilled on the lot for domestic use.
- D. Each Owner shall enter into a shared irrigation agreement, which outlines the pressurized irrigation system, and the required maintenance to retain and repair said system.

The reference to the pressurized irrigation system in Article IV(D) is vague and does not actually define the extent of the system. Further, there is no reference in the CC&Rs to a pump house or pond. Further, it is my understanding that with respect to the "pressurized irrigation system" referenced under Article IV(D), neither the Association nor the property owners have ever entered into a shared irrigation agreement outlining the irrigation system and its required maintenance as required under Article IV(D).

Article III(E)(3) of the First Amendment to the CC&Rs references a pond located on Parcel 42B to provide irrigation water to each of the parcels. However, Article III(E)(3) contains no granting language to create an easement to the pond in favor of the Association. There is a legal description attached as Exhibit C which is entitled "Irrigation Easement," however, the reference to Exhibit C in Article III(E)(3) is to the location of the irrigation system, not the location of an easement. Although the last sentence of this section provides that "No activity shall take place on Parcel 42B, including within the pond or the easement for the pond, which shall interfere with the delivery of the irrigation water to the irrigation system," such language

does not actually create or grant a pond easement in favor of the Association. In fact, it is unclear from the language in the First Amendment as to whether the pond is even part of the "pressurized irrigation system." Since no easement exists for the pond, Ms. Bailey has the right to remove any improvements located on her property including the pump house and irrigation lines and the Association does not have a right to use the pond for irrigation or any other purpose. Further, the pump house and equipment are permanently affixed to Ms. Bailey's property and, therefore, are owned by Ms. Bailey.

Even if the Association successfully files an action to establish/condemn an easement over Ms. Bailey's property, the Association would be subject to the law of eminent domain and would be required to pay Ms. Bailey just compensation for the taking of the right of way/easement. See Idaho Code § 42-1106; Idaho Code § 7-701 *et. seq.*; *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), *overruled on other grounds*, *Carr v. Magistrate Court*, 108 Idaho 546, 700 P.2d 949 (1985).

Maintenance obligations of the Association. The pond has not been maintained by the Association. It has been covered with several inches of algae, duck weed and other growth, which have not been treated and the pond has not been sprayed for mosquitoes and other insects. If it is determined that an irrigation/pond easement exists over Ms. Bailey's property in favor of the Association, the Association has the duty to maintain the easement. That duty to maintain is not limited to maintenance required to run the irrigation system. It has long been the law in Idaho that an easement owner has a duty to maintain, repair and protect the easement, which duty requires the easement owner to maintain the easement so that it does not create an additional burden on the servient estate. *Rehwalt v. American Falls Reservoir District No. 2*, 97 Idaho 634 (1976), citing *Bellevue v. Daly*, 14 Idaho 545 (1908) and *Coullsen v. Aberdeen-Springfield Sea Co.*, 47 Idaho 719 (1929). See also, *Gibbens v. Weissaupt*, 98 Idaho 633 (1977). The Association's failure to maintain the easement, including treating the water so that the algae, weeds and mosquitoes do not become a problem, installing a proper aeration/circulation system to properly aerate the water, maintaining liability insurance on the pond and enclosing the pond with parameter fencing to prevent the pond from becoming an attractive nuisance to small children violates Idaho law. Failure to maintain the easement in that manner creates an additional burden on Ms. Bailey's property, decreases the value of her property and creates a health and safety hazard for her and her family.

Water Rights. The pond is supplied by ground water and the pressurized irrigation system is a ground water irrigation system. Water rights for ground water must be appropriated in the same manner as water rights for surface water. See Idaho Code §§ 42-226 and 42-229. That is, in order to divert and use ground water for irrigation purposes, each individual appropriator must have valid ground water rights. *Id.* The only exception to the requirement to appropriate a ground water right is if the water is used solely for domestic purposes by the property owner only (Idaho Code § 42-227), and the use is limited to not more than one-half acre of land, provided the total use does not exceed 13,000 gallons per day. See Idaho Code § 42-

111(1)(a). However, if the ground water is used for a multiple ownership subdivision, the ground water use cannot exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of 2,500 gallons per day. *See* Idaho Code § 42-111(1)(b) and (2). Ms. Bailey has consulted with the Idaho Department of Water Resources, as well as an independent hydrographer/geological engineer, and has determined that the domestic purpose exception does not apply to the Association's use of the pond ground water for the community pressurized irrigation system since it exceeds the limits set forth in Idaho Code § 42-111(1)(b). Further, a search at the Department of Water Resources reveals that no ground water rights have been appropriated for the pond and any diversion of water from the pond by any of the property owners is unlawful. *See* Idaho Code §§ 42-201, 42-226, 42-229, 42-351. The Department of Water Resources (the "Department") will be conducting an investigation into this matter. Further, the Department has advised Ms. Bailey that anyone who diverts water from the pond without adequate ground water rights will be deemed to be unlawfully diverting ground water in violation of Idaho law. *Id.* In the event water is diverted from the pond without valid ground water rights, the state can issue a cease and desist order and can levy monetary sanctions against the users and refer the matter to the Office of the Attorney General for criminal prosecution. *See* Idaho Code §§ 42-237g, 42-237h and 42-351.

The Department has further advised Ms. Bailey that the installation of the pipes running from the pond to the canal on the north boundary of the property for the purposes of supplementing the ground water fed pond with surface water for which the individual property owners have water rights, does not eliminate the legal necessity to have ground water rights.

When the pond and pressurized irrigation system were originally installed in 2001, it was set up as a ground water system and the pond was not fed by surface water. Both Alan Mills, the developer's representative, and Agrilines, the subcontractor who installed the pressurized irrigation system, have confirmed to Ms. Bailey that the pond is a ground water pond. In fact, Article III(E)(4) of the First Amendment to the CC&Rs specifically states that "There are ditches for irrigation and drainage crossing various parcels in the Addition. . . The ditches serve properties other than the parcels in the Addition." (Emphasis added). Thus, the pond was never intended to be a surface water pond.

According to Alan Mills and Jeff Forsberg of Agrilines, the pipes running from the pond to the canal were not installed until sometime in late 2002/early 2003, at least one year after the pond and irrigation system had already been operating as a ground water system. In fact, I believe that Toni DuGal informed both Ms. Bailey and her husband that she was the person who actually requested that pipes be installed from the pond to the canal in order to supplement the level of ground water in the pond with surface water from the canal and in an attempt to circulate water in the pond to eliminate algae growth. The Association Board minutes indicate that the pipes from the pond to the canal were added sometime in late 2002 or early 2003. Although the pipes from the canal to the pond functioned initially to transport canal water to the pond during the 2003 irrigation season, the pipes were not operational and were ineffective during the 2004

irrigation season. In 2004, the ditch rider dredged the bottom of the canal lower and, as a result, the pipes from the pond to the canal were above water for most of the season and virtually no water was delivered from the canal to the pond. Only on those few occasions when there was significant rainfall did the water level in the canal rise enough to cover the pipes in the canal and permit the flow of water from the canal to the pond. However, for most of the 2004 irrigation season, the pipes were above the canal water level and were ineffective and failed to transport water from the canal to the pond. Thus, any irrigation that took place was from the pond ground water.

Even if the current pipes from the pond to the canal are lowered to permit the flow of water from the canal to the pond to supplement the ground water, Steve Lester, Water Rights Supervisor, Department of Water Resources (334-2190), has advised Ms. Bailey that each individual property owner is still required to have ground water rights in order to divert water from the pond to irrigate their property. Further, during the non-irrigation season the canal ditch is closed and no surface water can flow from the canal to the pond. The water in the pond during the non-irrigation season is strictly ground water. At this time, there is a state moratorium on the issuance of new ground water rights. Thus, in order to acquire ground water rights, each property owner will need to purchase existing water rights. The cost to purchase ground water rights is substantial. Ms. Bailey has consulted a local ground water broker and has been advised that ground water rights are scarce and difficult to obtain. The market rate for such water rights is approximately \$5,000 per acre of ground to be irrigated. For example, if each property owner irrigates approximately 2 acres of their property from the ground water pond, the cost would be \$10,000 per property owner for 2 acres of ground water rights. However, even if each individual property owner is able to purchase ground water rights, the Association still will need to have a right of way/easement to the pond on Ms. Bailey's property. For the reasons set forth above, no such easement exists.

Finally, to the extent that any surface water is diverted from the canal to the pond, Idaho law requires that the water company install a head gate and water measuring device at the point of the community diversion from the canal to the pond to ensure that the Association only diverts as much water as it is entitled to under the property owners' cumulative water shares. It is my understanding that the Canyon County Water Company has refused past requests to install a head gate in the canal. Thus, if the water company continues to refuse to install such a head gate, it would be incumbent upon the Association to file an action against the water company and obtain a court order authorizing the installation of a head gate and other measuring device.

Further, by combining their water shares and diverting the canal water to the pond, none of the individual property owners will be able to use their water rights to the canal water for any other purpose since those rights will be pooled and used for a community irrigation system. Thus, pooling individual property owners' canal surface water rights for a community pressurized irrigation system will restrict any other individual use of such rights for any other purpose. Those property owners who do not irrigate from the pressurized irrigation system will

be forced to use their individual canal surface water rights solely for the community pressurized irrigation system and for no other purpose. The pooling of the individual property owners' surface water rights will need to be approved by the Canyon County Water Company.

Thus, as you can see, the issues associated with the pond and maintaining or even modifying the current pressurized irrigation system are extremely complicated and will require a great deal of time and financial resources to resolve and will require consultation with numerous experts. These costs to the Association will include, at a minimum, the following:

- a. The costs of litigation to establish a right of way/easement over Ms. Bailey's property in favor of the Association. If the Association succeeds in establishing such an easement, it will need to pay Ms. Bailey just compensation in accordance with the laws of eminent domain.
- b. The costs of maintaining the pond easement (in the unlikely event an easement is established), including chemical treatment for weeds and algae growth and mosquito abatement, water aeration/circulation system, liability insurance to cover the pond, parameter fencing to keep neighborhood children away from the pond and to avoid personal injuries, and the establishment of a method for collecting assessments from the property owners sufficient to cover ongoing costs of maintenance of the pressurized irrigation system and the pond easement.
- c. Development and implementation of an irrigation water sharing agreement between the nine property owners, including installation of a water measuring device on the system to regulate and monitor the amount of water appropriated to each lot. This will be extremely important since the individual property owners will need to purchase ground water rights based upon the amount of land they each intend to irrigate. The water measuring device will ensure that property owners do not encroach upon each other's water rights.
- d. Consultation with and retention of a hydrographer to work with the Department of Water Resources and calculate ground water and surface water consumption, evaporation, seepage and flow to determine the quantity of ground water rights each property owner will need to purchase in order to irrigate from the pond.
- e. Acquisition costs to purchase individual ground water rights, if available, which will cost approximately \$5,000 per acre of land to be irrigated.
- f. Costs of installing a head gate and water measuring device at the point of diversion of surface water from the canal if surface water is used to supplement the ground water in the pond, or installation of a weir and/or additional dredging and excavation of the pond if the pressurized irrigation system is to be supported

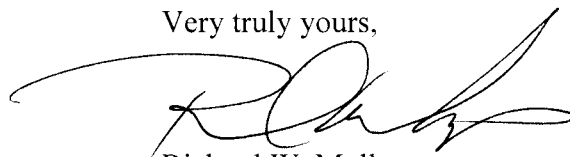
solely by ground water to ensure an adequate water supply for the pressurized irrigation system and to avoid the creation of a mud hole and safety hazard on Ms. Bailey's property and diminution in value of Ms. Bailey's property.

- g. Transfer of individual property owners' water shares to the Association or creation of a pooling agreement to use surface water rights from the canal subject to necessary approval from the Canyon County Water Company and the Department of Water Resources.
- h. Securing of proper permits from the Department of Water Resources for the diversion of ground water and/or surface water for the pressurized irrigation system and approval of any surface water diversion and usage for said system by the Canyon County Water Company.

In light of the foregoing, Ms. Bailey demands that the Association, at its expense, fill in the pond and remove any irrigation pipes that Ms. Bailey deems necessary to restore her property to its original condition before the installation of the unlawful pressurized irrigation system. Ms. Bailey is in the process of obtaining an estimate for those costs. In the interim, Ms. Bailey will not participate in diverting water in violation of state law, therefore, the pump house will be locked and no water will be diverted from the pond until all issues are resolved. Please note that any person or entity that unlawfully diverts water for irrigation purposes without a lawful water right shall be subject to a civil penalty not to exceed \$10,000 per violation or \$150 per day for a continuing violation, whichever is greater. *See* Idaho Code § 42-1701B(6). Further, any person that unlawfully appropriates water for irrigation purposes may be charged with a misdemeanor and any continuing violation shall constitute a separate offense for each day that such violation occurs. *See* Idaho Code §§ 42-237g and 42-237h.

I would appreciate the Association's response to the issues raised in this letter within ten (10) days. It is Ms. Bailey's sincere desire that this issue can be resolved without resorting to litigation.

Very truly yours,



Richard W. Mollerup

RWM/aab

cc: Kim Bailey

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