BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1769

In the Matter of MOUNTAIN HOME WATER DISTRICT, Application to Abandon Water Service And Abandon Water Utility

OPENING BRIEF

OF

MEL AND CONNIE KROKER, INTERVENORS

February 3, 2017

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I. INTRODUCTION

Intervenors Mel and Connie Kroker ("Intervenors") submit this Opening Brief in response to the Mountain Home Water District's ("Applicant" or "District") application to terminate water service and seek abandonment of the water utility (the "Application"). The Application as filed alleges irreparable "well failure" as the sole basis for terminating water service and abandoning the water system. Although not presented in its Application, or as required by rule, the Applicant additionally alleges financial hardship, personal circumstances, and lack of its ability to comply with applicable state water use laws in its discovery responses and subsequent testimony as additional support for its Application.

II. ISSUES BEFORE THE ADMINISTRATIVE LAW JUDGE

The issues before the Administrative Law Judge ("ALJ") consist of the following:

1. Whether there is sufficient evidence in the record to confirm that the Applicant's Original Well has failed;

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2. Whether there is sufficient evidence in the record to confirm that the Applicant has suffered an unavoidable financial hardship as a direct result of its operation of the water system and provision of water service;
3. Whether there is sufficient evidence in the record to confirm that the personal circumstances of Keith Ironside, as an individual, and as Trustee of the Gladys M. Beddoe Credit Shelter Trust, are sufficient to justify termination and abandonment;
4. Whether there is sufficient evidence in the record to confirm that the Applicant is unable to achieve compliance with applicable state water use laws governing the use of ground water for non-commercial irrigation from a permit exempt well; and
5. Whether there is sufficient evidence in the record to confirm that the Applicant has satisfied its legal obligation to evaluate alternative water supplies for existing customers and the costs that may be incurred by such customers to establish such water supplies.
6. Whether the Evidence additionally shows that Keith Ironside Intended to Ultimately Deprive the Customers of Access to the Bel-Ridge Water Utility as Far Back as 2013.

For the reasons discussed below, Intervenors submit that the evidence of record demonstrates that the Applicant, even with Staff's affirmative support, has not shown that any of the above questions can be answered in the affirmative.

III. PROCEDURAL BACKGROUND

On April 1, 2016, Mountain Home Water District ("District") filed an application to terminate water service and abandon the water utility. Mel and Connie Kroker ("Intervenors") filed their Petition to Intervention on May 11, 2016.

The Public Utility Commission ("Staff") and Intervenors filed their reply testimony to the District's Application on November 2, 2016. Staff and Intervenors filed cross-answering testimony on November 18, 2016. The District filed its rebuttal testimony on November 18,

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2016. Cross-examination hearing was held on January 9, 2017 before Administrative Law Judge Patrick Power (the "ALJ") and Commissioner Stephen Bloom.

On December 7, 2016, the ALJ issued a ruling establishing January 30, 2017 as the date by which the parties would file post-hearing briefs. In response to the parties' request at the conclusion of the hearing on January 9, 2017 to consult and propose a post-hearing briefing schedule, the ALJ agreed and on January 18, 2017, Staff filed a motion with the other parties' consent requesting that Opening Briefs be filed on February 3, 2017 and Reply Briefs on February 16, 2017. On January 19, 2017, the ALJ granted Staff's motion and set February 3, 2017 as the date for filing Opening Briefs and February 16, 2017 as the date for filing reply briefs.

IV. BACKGROUND

A. The Water Supply and Distribution System

The water supply and distribution system design and as-built drawings subsequently approved in June of 1979 by the Oregon State Health Division of the Office of Preventive Health Services are attached hereto and incorporated herein as Intervenors/ 501 ("Water System Drawings"); see also, Testimony of Mel Kroker confirming he acquired a copy of the Water System Drawings for the first time on May 18, 2016 from the Oregon State Health Authority, Intervenors/ 300, Kroker/3, Ln 10-16. The Water System Drawings refer to the water system as being initially designed and built for the Belford Subdivision, the completion of which subdivision was never realized. As shown on Sheet 1 of 3 of the design drawings and on the accompanying as-built drawings, the water distribution system is located almost entirely within what is now the southern half of what is today called Buckman Road. As discussed further below, Dale Belford, as the then owner of the water system, established the water system as the "Bel-Ridge Water Utility."

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B. Title History Summary of the Water System

1. Keith Ironside, and his wife, obtained title to the Bel-Ridge Water Utility water system as an asset separate and distinct from the land upon which it is located.

In 1973, Dale Belford ("Belford") constructed the water system which he would refer to and manage as the Bel-Ridge Water Utility ("Bel-Ridge Utility") to provide water service to the then proposed Belford Subdivision. At that time, the Bel-Ridge Utility consisted of the Original Well and the related water distribution system is currently located along the southern half of 50' wide access road. Intervenors/200, Kroker/3, Intervenors/203. The purpose of the Bel-Ridge Utility was to provide a water supply to the lots that Belford at that time had sought to develop in the area identified as the Belford Subdivision. Intervenors/200, Kroker /5, ln 24 – Kroker/6, ln 1.

On October 20, 1978, Belford entered into a contract to sell the Bel-Ridge Utility as an Investor Owned Utility to Douglas H. McGriff ("McGriff"). Intevenors/400. The contract provided for the conveyance of parcels consisting of the proposed Belford Subdivision *and* the "Bel-Ridge Water Utility." Addendum B to the contract specifically provided as follows:

> "The Bel-Ridge Water Utility includes the well, the well house, and all of its equipment, water lines, valves, meters, etc. The Seller will prepare the annual report to the Oregon Department of Revenue and forward it to the buyer for signature and filing prior to its due date on February 1, 1979."

On June 12, 1979, and in fulfillment of the prior contract to purchase, by a Bargain and Sale Deed, recorded at Document No. 79-26832 in the Clackamas County Records, Belford conveyed to McGriff the tax lots 1601, 2100 (upon which all facilities representing the Bel-Ridge Utility were located), 2101, and 2105 *and* "the Bel-Ridge Water Utility." Intervenors/502.

On March 23, 1979, McGriff entered into a contract to sell portions of the same property he would soon acquire from Belford to Keith Ironside and his wife, Gladys Beddoe. Intevenors / 401. Addendum A to the contract provided only for the sale of tax lot 2100 to Keith Ironside and

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tax lot 2105 to Gladys Beddoe and specifically confirmed in both of them the "right, at their sole expense, to apply for and obtain connection to water service from Bel-Ridge Water District."

2. Applicant's Obtained the Bel-Ridge Water Utility subject to record notice of Intervenors' rights to receive water from such water system.

On June 25, 1979, and in fulfillment of the March 23, 1979 contract, McGriff conveyed by Warranty Deed to Keith Ironside and Gladys Beddoe tax lots 2101 and 2105, as well as tax lots 2100 (which contained the entirety of the Bel-Ridge Water Utility water system including the pump house and distribution system) *and* the Bel-Ridge Water Utility (as a distinct asset separate from the land). Intervenors / 402. In addition, the deed specifically warranted that the property conveyed was "free of all encumbrance Except . . . , Easement as recorded 3/14/74 as Fee no. 74-1627 and blanket easement for sanitary sewer, storm drainage, utilities & drainage."

Document No. 74-6127 is a Declaration of Conditions and Restrictions ("Declaration'') executed by Belford on March 14, 1974 and recorded against the lands he then owned and in part consisted of tax lots 2101 and 2105. Intervenors /203. The Declaration creates (a) an easement for ingress and egress to all of the remaining lands initially identified in the proposed Belford Subdivision and (b) a five-foot wide easement expressly allowing access for conveyance of Bel-Ridge Utility water from the Bel-Ridge Utility water distribution system to the Intervenors' property. Hence, with their receipt of the Warranty Deed from McGriff, Keith Ironside, Gladys. Beddoe, and their respective heirs, successor and assigns took title to the Bel-Ridge Water Utility and the lands upon which such water system assets were located subject to record notice of Intervenors' right to receive water service from the Bel-Ridge Water Utility.

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3. Applicant assumes complete title to the Bel-Ridge Water Utility as an individual and in his capacity as Trustee of the Gladys Beddoe Credit Shelter Trust.

On July 13, 1979, McGriff executed an Assignment of that same Bargain and Sale Deed referenced above and recorded at Document No. 79-26832, to Keith Ironside and Gladys M. Beddoe as Trustees of the Gladys M. Beddoe, M.D., P.C. Retirement Trust which was recorded at Document No. 79-31658 in the Clackamas County Records, and encumbered tax lots 1604, 2100 (again, containing the entire Bel-Ridge Water Utility water system), 2101, and 2105. See Intervenors/503

On April 9, 1999, Keith Ironside and Gladys Beddoe executed a Warranty Deed for the benefit of Gladys M. Beddoe as grantee, which is recorded at Document No. 99-041210 in the Clackamas County Records and conveyed tax lots 1604, 2100, 2101, and 2105. The conveyance is noted as encumbered in part by the Declaration recorded at Document No. 74-6127 described above and which confirms in Intervenors an easement to access and receive water from the Bel-Ridge Water Utility water system. The last page of Exhibit A to the deed which describes the property conveyed further states that the lands conveyed "include the Bel-Ridge Water Utility." See Intervenors/504.

On May 9, 2001, Gladys Beddoe conveyed by a Bargain and Sale Deed, recorded at Document No. 2001-035394 in the Clackamas County Records, tax lot 2100 to Gladys Beddoe and Keith Ironside as tenants by the entirety.

On August 31, 2005 and pursuant to an Order entered by the Clackamas County Circuit Court in Probate Case No. P041203, Keith L. Ironside, as Personal Representative of the Estate of Gladys M. Beddoe, conveyed to Keith L. Ironside, an individual, by Personal Representative's Deed recorded at Document No. 2005-095824 in the Clackamas County Records, an undivided one-half interest in tax lots 1604 and 2100, and conveyed the remaining one-half interest in such

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property and the complete interest in tax lots 2101 and 2105 by Personal Representative's Deed recorded at Document No. 2005-095825 in the Clackamas County Records, to Keith L. Ironside, as Trustee of the Gladys Beddoe Credit Shelter Trust. See Intervenors/506 and Intervenors/507. Therefore, full ownership of tax lots 2101 and 2105 by this conveyance appeared to remain with the Gladys Beddoe Credit Shelter Trust.

4. Applicant filed Partition Plat 2013-015 with the intention to eventually place nearly complete ownership of the Bel-Ridge Water Utility distribution system in and for the exclusive use of his daughter, Valerie Meyer.

Nearly four years ago, on April 15, 2013, Keith Ironside, both as an individual and as Trustee of the Gladys M. Beddoe Credit Shelter Trust, filed Partition Plat Number 2013-015 ("2013 Partition"). Intervenors/ 03. The 2013 Partition reconfigured tax lot 2100, creating two parcels – referred to as "Parcel 1" and "Parcel 2" – where there previously was one. With the approval of the 2013 partition, Parcel 1 became the new tax lot 2100 and Parcel was designated as tax lot 2107. An Assessor's map showing the new configuration of tax lots 2100 and the new tax lot 2107 is provided as Intervenors /404.

As a result of the partition, nearly all of the Bel-Ridge Water Utility distribution system remains located on the then newly configured tax lot 2100 (aka, Parcel 1), with only a short remaining section of the water distribution system located on new tax lot 2107 (aka, Parcel 2) as it is connected to and leaves the pump house which is also then located on new tax lot 2107. Intervenors/400, Kroker, p. 3, Ln 18 – 25, p.4, Ln 1 – 5. As shown on the 2013 Partition, the short section of water line leaves the pump house and then extends down to the southern boundary of Parcel 2, briefly crosses the east end of Buckman Road, and then enters onto Parcel 1. It also is worth noting that the 2013 Partition specifically identifies a new easement for this section of the water line in order that it may continue to extend to Parcel 1. This easement is

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referenced on Sheet 1 of 3, the centerline of which is called out as the "CENTERLINE OF NON-EXCLUSIVE 10' WATER LINE EASEMENT FOR THE BENEFIT OF PARCEL 1, SEE DETAIL SHEET 2." Once the water line for the water distribution system enters Parcel 1, it then continues on as originally constructed south and easterly along the access route on Parcel 1, as clearly depicted on the design and as-built drawings of the Bel-Ridge Utility. Intervenors / 501.

Such configuration of the water line was originally intended to provide water as necessary in order to provide water to additional parcels consisting of tax lots 2101 and 2105 within the proposed Belford Subdivision as one acre lots, as still depicted on the Clackamas County Assessor map. Intervenors / 404; Intervenors/200, Kroker /5, ln 24 – Kroker/6, ln 1 (confirming Belford's original intent to provide water to numerous tax lots within the proposed Belford Subdivision). This also explains why the 2013 Partition calls out the existence of a 50 foot wide easement that extends from the most western boundary of Parcels 1 and 2 and wraps all the way around what is now the northern boundary of Parcel 2 in order that Belford could make sure that all such lands could be accessed for future development (the "Ingress and Egress Easement"). This easement for the access road ("Access Road") is confirmed under the Declaration discussed above, recorded at Document No. 74-6127 and which is expressly noted on the 2013 Partition near the most eastern boundary of Parcel 1.

On April 18, 2013, by a Bargain and Sale Deed recorded in the Clackamas County Records under Document No. 2013-027244, Keith Ironside, as Trustee of the Gladys Beddoe Credit Shelter Trust, conveyed the Trust's half interest in Parcel 1 of the 2013 Partition to himself as an individual, thereby making him the full fee owner of Parcel 1. See Intervenors/ 206. On the same date, in a deed recorded in the Clackamas County Records under Document No. 2013-027245, Keith Ironside conveyed the full fee title interest in Parcel 1 of the 2013

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Partition to his daughter, Valerie Meyer. See Intervenors/207. No additional reference is made in the deed to the conveyance of what was originally known as Bel-Ridge Utility water system. The Applicant, however, conveyed all of Parcel 1 to his daughter with the intent of conveying all portions of the water distribution system located on such parcel to her as well. 1.9.17 transcript of Ironside, p.116, ln 16-19. .

5. Nearly the Entire Water Distribution System of the Bel-Ridge Utility is located on Parcel 1 within the Southern Half of the Access Road.

With the conveyance of Parcel 1 to his daughter, Keith Ironside, as an individual and the Gladys Beddoe Credit Shelter Trust only then retained Parcel 2 where the Pump house, the Original Well, the Interim Well, and the Replacement Well, and a short section of the water distribution system are located.

As also discussed above, the location of the water distribution system was such that it enabled Intervenors to receive water from the Bel-Ridge Water Utility *via* access to such system provided under the 5 foot wide water line easement also established under the Declaration. The waterline easement created by the Declaration for the express benefit of the Intervenors property, was *not* identified on the 2013 Partition. Intevenors / 403. That easement, however, is expressly shown on Intervenors / 405, which consists of Partition Plat 2000-117 ("2000 Partition") concerning the property located adjacent to and immediately south of the what was then identified as Lot 11 of the Mapleheights subdivision and which is today Parcels 1 and 2 as established under the 2013 Partition.

Sheet 1 of the 2000 Partition generally describes and locates the easement exclusively benefiting Intervenors as extending off the south boundary of Parcel 1 as a "5' Water Line Easement Deed Document No. 74-6127." The detailed figure on the right side of Sheet 2 of the 2000 Partition notably – and correctly – shows that the water line easement does *not* extend to

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the northern half of the Access Road because the water distribution system is located almost entirely in the southern half, but for the short section that extends from the Pump House down to Parcel 1.

6. Intervenors Mel and Connie Kroker's right to water from the Bel-Ridge Utility water system.

On December 01, 1974, Intervenors executed a real estate contract with Belford which was recorded on December 24, 1974 under Document No. 74-35545 in Clackamas County Records ("contract") and which provided for Intervenors' purchase of the property which they later acquired fee title and upon which they completed the construction of their existing residence in 1976. Intervenors' / 208. With respect to assuring Intervenors the right to a reliable water supply, the contract expressly provided as follows:

> Seller warrants that he is owner the Bel-Ridge Water System, approved as to design and quality to satisfy all know existing regulations and, from which the buyer will be supplied water, on demand at going rates, from any day on or after the date of this contract and that such water service will continue for so long as the well supplying the system, the well being a part of the system, continues to be adequate for such supply.
>
> The parties hereto understand that the seller has granted a five-foot wide water line easement through his contiguous property to that being sold, which assures uninterruptable water line access to the property herein described. The contiguous property is described in deed identified on Clackamas County records as number 73 39756; the restrictive easement is established by declaration filed March 14, 1974, Clackamas County recorded number 74 6127.

The purpose of the Bel-Ridge Water System was to supply water to the then existing eight homes with the idea that it could meet the needs of no less than a total of twenty upon completion of the then proposed Belford Subdivision. See Intervenors /501, Sheet 1 of Belford Subdivision Water System Design – Distribution, Sheet 1 of 3, and Narrative in bottom left hand corner.

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Although as described above, contrary to his testimony during the hearing, Keith Ironside did take title to the Bel-Ridge Water Utility subject to record notice of Intervenors deeded right to receive water service from the system. 1.9.17 testimony of Ironside, p. 101, Ln 20, through p. 102, Ln. 9. . In addition, no recognition of the Intervenors' vested right to a water supply from the Bel-Ridge Water Utility was made in the 2013 Partition.

V. ARGUMENT

The application alleges the alleged failure of the Original Well as the basis for abandonment. Subsequent to that time, and without refilling or amending their application, the applicant has argued that abandonment is also justified based on additional allegations of financial hardship and the applicant's lack of ability comply with state law governing the use of water from an exempt well for irrigation purposes. While these supplemental reasons for abandonment have never been properly submitted, even if they were to be considered, neither they nor the allegation of well failure are supported by the record.

In addition, the applicant was compelled to provide a "description of the customers' alternative water service options and estimated, average customer cost for each option." Again, the application as submitted fell well short of what is required under the applicable rules.

Finally, Staff would additionally have the ALJ believe that not only has the applicant provided sufficient evidence that the original well failed, but that he has shown that he has suffered financial hardship as a consequence of choosing to purchase the Bel-Ridge utility and has shown as a matter of fact, a confirmed inability to restrict use of water from the Original Well and more recently, presumably, from the Replacement Well. Staff's rationale, however, finds little support as well, and not surprisingly because it relies entirely on the bald allegations contained in the Application and in the Applicant's testimony as fact without questioning whether such statements or true. This is especially troubling given that the evidence applicant

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has introduced to support the applicant's allegations reveals that (a) the Original Well did not fail, (b) the applicant suffered no financial hardship (at the hands of others or because the water system could not pay for itself – remember to argue the second part), and (c) that there is absolutely no evidence whatsoever confirming that the use of water by customers could not have been managed in a manner so as to conform with applicable laws.

Given the little if any material evidence of record in this case that actually supports the Application, the Application should be denied. For reasons discussed below, absent such a finding would make the abandonment approval process under OAR 860-036-0708 superfluous. Such a finding would equate the requirement for termination and abandonment to be nothing more than a request under any circumstance. The fact that Intervenors have further introduced evidence directly contradicting the Applicant's allegations not only requires such a determination all the more, but calls into question the commitment of Staff's role in considering this Application and protecting the public.

A. There is Insufficient Evidence in the Record Confirming that the Applicant's Original Well has Failed so as to Justify the Termination and Abandonment

Neither the Applicant nor Staff has provided any evidence that demonstrates that the well has failed. To the contrary, the record reflects that not only has the original well not failed, but that its current status is not the reason of the well failing. Rather, the current condition of the well is the result of this Applicant's unnecessary attempt to alter the well by casing it to the bottom.

1. Staff Provided No Evidence that the Well has Failed.

In this proceeding, Staff has introduced no evidence whatsoever that addresses the question of whether the Original Well has failed. Staff merely assumes the Original Well failed based on the Applicant's allegations alone. However, Staff has provided no evidence that it

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actually investigated whether or not the Original Well failed. However, any bald conclusions drawn by Staff that failure did occur is without support. Other than its belief that the Applicant's assessment and conduct regarding the well is appropriate, Staff possesses no expertise in evaluating whether the well has actually failed nor did it engage the expertise of someone who could. As a result, Staff's conclusions that the well has failed based on the allegations of the Applicant alone must be construed as having no weight and should be disregarded.

The only Staff testimony that seeks to address the current condition of the Original Well is found in Staff/200, Hari/1-2, wherein Staff states that Groundwater Hydrology Expert John Lambie did offer observations, including (1) "that [e]xtraction of groundwater over the past 43 years by the [Applicant's] wells and other wells nearby have not lowered groundwater pressures and thus water is and should remain available to all current users of groundwater in the area;" and (2) that the attempted repair of the original well failed due to mistakes made by the well drilling company; and (3) the well could still supply a redundant water supply. Notably, Staff did not contest those findings.

2. <u>The Record Reflects that Applicant has not Introduced Evidence Demonstrating the Original Well has Failed.</u>

Applicant takes issue with Intervenors expert witness John Lambie's assertions that the Original Well remains able to provide a redundant water supply. However, such allegations fail to refute Intervenors and Mr. Lambie's statements regarding the continuing viability of the Original Well. Furthermore, as referenced below, the Applicant's own witnesses, Mr. Hougak and Mr. Wagner, either failed to provide information confirming that the well had failed, and with respect to Mr. Wagner, acknowledged that the Original Well was still operational.

Applicant attempts to challenge Mr. Lambie's opinions as to the remaining viability of the Original Well, arguing that Mr. Lambie concludes that the well would have to be

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"rehabilitated." Company/100, Ironside/1; 1.9.17 Testimony, Lambie Cross (applicant's Counsel p. 181). Mr. Lambie responded, confirming that the Original Well remains a legitimate water source:

> Q. Okay. Can I pump water from that well right now –
>
> A. Yes.
>
> Q. -- if it had a pump?
>
> A. There's a variety of ways to lift water to the surface. So yeah, you can get water out of that well today. You just have to put something down it that will extract water.
>
> Q. Okay.
>
> A. I could, for example, put a small diameter jet pump down there that would induce water to flow to the surface. Now, rate and volume would be, you know, subject to concern as to whether it was sufficient to supply a home and that type of thing, but yeah, absolutely. There's a variety of ways to take water out of that well. The suggestion of a video logging is to take a look to see what shape Wagner left it in, but I was able to get instruments past it when I visited the site, so it's clear and open.

On redirect, Mr. Lambie further testified that the Original Well, even given that the Applicant's Contractor left casing in the well when no casing was necessary, the bore hole was still open down to 600 feet. 1.9.17, Lambie Redirect, p. 184. In addition, the Applicant's pump service company, and well driller, also could not essentially rebut Mr. Lambie's findings that the well is still operational, and at a minimum has not failed of its own accord..

According to Mr. Hougak, the Applicant's pump installer was called out to the site by Keith Ironside because apparently they were losing a lot of water pressure. Mr. Hougak investigated the well and determined that the well may have caved in some. Company/300, Hougak/1. Mr. Hougak also stated that it is likely the ground had shifted some since 1973.

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Company/300, Hougak./1. However, when asked if he had any information confirming that's why the well caved in, he said he did not. Company/300, Hougak/1.

With no supporting evidence, Mr. Hougak also alleged that the static water level in the original well fluctuates already in that area as numerous other wells are completed nearby. 1.9.17 testimony of Hougak, p. 34, ln 18 through p. 35, ln 8. Mr. Hougak went on to explain the completion of more wells makes it more likely that the static water level will go or at least fluctuate greatly. 1.9.17 testimony of Hougak, p. 35, lns 2-8. When asked if he knew of any wells recently completed in the area that would have that effect, he knew of none.

Furthermore, Mr. Hougak has not even considered the implications of additional wells, if any, within the area nor does he have the expertise of a hydrologist. 1.9.17 testimony of Hougak, p. 17, ln 13. (confirming he has no special background in matters of groundwater hydrology).

In addition, as John Lambie testified, the aquifer is more than adequate to sustain a reliable water supply and relatively consistent static water level. While the static water level may be subject to some fluctuations, the odds that they are as extreme as Mr. Hougak would like to believe is unsupported. Notably, the static water level for the well upon its completion in 1973 and in March of 2016 when the Applicant's well driller took such level again was virtually identical is not surprising.

With respect to the Applicant and well driller, there is good reason to believe that the original well needed to be cleaned out. However, a sloughing of material off the walls of a bore hole over 43 years old does not make a failed well. As Mr. Wagner initially testified, he succeeded in cleaning out the well, drilling to the bottom of this bore hole which was about 600 feet. Company/400, Wagner/1. This is the same depth as when the hole was originally bore in 1973. Intervenors/102.

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According to the well log, the Original Well was only cased to 9 feet below ground surface. Id. In addition, nor is there any requirement that it be cased further than that now. Mr. Wagner, however, attempted to case well down hundreds of additional feet. Mr. Wagner was only able to get the casing down to about 340 feet, at which time he could not go further down. Company/400, Wagner/1. Mr. Wagner then proceeded to attempt to withdraw as much of this casing as he could. Id.

Mr. Wagner acknowledged that further casing the well was not required, but that was his practice and preference. 1.9.17 testimony of Wagner, p. 80, ln 8-16. When questioned as to whether the Original well could have been operational without adding the additional casing, Mr. Wagner also acknowledged that it would. 1.9.17 testimony of Wagner, p. 76, ln 1-7. In addition, Mr. Lambie indicated that by attempting to install the 6-inch casing, Mr. Wagner has violated OAR 690-210-0230. 1.9.17 testimony of Lambie, p. 180 , ln 19 through p. 181, ln. 2. OAR 640-210-0230 specifically provides as follows:

> Inner casing installed into a well must meet the minimum requirements of well casing (OAR 690-210-0190). The space between the two well casings shall be sealed so as to prevent the movement of water between the two casings. Inner casing installed in a well shall extend or telescope at least eight feet into the lower end of the well casing. The inner casing must be centered and must be a minimum of one inch smaller in diameter than the outer casing if an under reaming method system is used. If other methods are used, the inner casing must be a minimum of two inches smaller in diameter than the outer casing. The grout must be placed in a positive manner in accordance with method A, B, D, or E.

Based on the records, including but not limited to, the well drillers testimony, the Applicant has violated applicable rules governing the alteration or installation of inner casing in a well as the casing as installed exceeded the depth of the existing casing. Regardless of the fact that the Original Well was unnecessarily encumbered by the needless installation of the 6-inch

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casing, as stated above, Mr. Lambie testified that the Original Well may still be managed to provide a legitimate water supply.

B. There is Insufficient Evidence in the Record to Confirm that the Applicant has Suffered an Unavoidable Financial Hardship as a Direct Result of its Operation of the Water System and Provision of Water Service so as to Justify the Termination and Abandonment.

As Keith Ironside would later claim in his testimony, the alleged well failure was not the primary reason for going forward with the Application. After the Application was filed, Keith Ironside stated that the real reason stemmed from alleged financial hardship he incurred as a result of running and maintaining the water system. Keith Ironside stated:

> Q**.** Was failure of the District's well the reason for applying for abandonment of the utility?
>
> A. No, the well's failure was simply the impetus for going forward with the application. I had a choice between trying to ask for cost-sharing from customers, or bearing those costs myself and letting the customers put their resources toward drilling their own wells or making other arrangements to secure an alternative water supply. I chose the second option. I had several important reasons for seeking abandonment that were independent of the well failure.

As an initial matter, the logic between asking the customers to bear a cost distributed across numerous houses as compared to asking them to individually develop their own water system is hard to fathom. Furthermore, it would seem that such a choice would, at a minimum, benefit from consulting with the customers first.

As the record reflects, through the course of time, the customers have generally kept current on monthly payments and have stepped up to pay more when requested. Such a conclusion with few exceptions is well established in the record. The record is replete with evidence that bills are generally paid and additional charges have been made:

- In January 1985, the District began charging an additional $5 per month for "maintenance & repairs." *See Staff/102, Hari/24.*

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- In June 1994, District requested that customers contribute $466.00 toward well and pump maintenance. *See Staff/102, Hari/25.*
- On February 13, 2007, Dr. Ironside sent a letter to the five customers itemizing electrical repair costs, tree trimming expenses, a new transformer, and removal of the original pressure tank and adding a new pump ("2007 correspondence"). *Intervenors/*303. These expenses totaled $6,533, of which $5,132.97 was the estimate for the pump and pressure tank removal. Dr. Ironside stated that the cash from the current billing cycle should cover this amount.
- On May 08, 2008 Dr. Ironside sent correspondence to customers indicating further costs would be assessed due to additional testing requirements required by the Department of Human Services, Public Health Division ("2008 correspondence"). *See Intervenors/*304. This correspondence contained the same items of repair and maintenance from the 2007 correspondence, but also included additional costs for pump house roof and wall construction.
- On January 15, 2009, the quarterly invoice included the normal $80 per month for water and an extra amount of $253.59 to cover each customer's pro-rata share of the repair discussed at the meeting to fix the well. *See Intervenors/*305; *See also Staff/102, Hari/25.*
- On the April 15, 2009, quarterly invoice, Dr. Ironside detailed the cost, difficulty and penalties for testing the water and finished by saying, "As you know, the well is deeply behind in what it earns and what it costs to run the system. In order to catch up with the monthly costs, the monthly bill is being increased to $100. If I can catch up with the costs, I will reduce the bill in the future." *See Intervenors/*306.

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For instance, the District asserts that the monthly rates charged to customers are only enough to cover the Company's ongoing regular expenses, such as electricity and water quality testing, and are not enough to cover repairs, particularly large repairs. Staff/102 – Response to DR 11 and sup response to DR 11.

The District charges customers $80 per month for water service and even with all customers contributing the monthly charge/ $3840 per year is only enough to cover the District's ongoing regular expenses, such as the cost of the electricity required to operate the pump and the cost of water quality testing. Staff/102, Hari/4. The Applicant goes on to say that Keith Ironside has subsidized all other District expenses from his personal funds, including repairs to the electrical line serving the well house, pump maintenance and repairs, repairs to the water lines, and repairs to the well house. Staff/102, Hari/4.

The District provided documentation that Keith Ironside has used his personal funds to pay for several repairs, including repairs to an electrical line serving the well house, pump maintenance and repairs, repairs to the water lines, and repairs to the well house. Staff/102 – Response to DR 11. The Company also provided documentation that it covered expenses with personal contributions from Dr. Ironside and his family members, which were not recovered from customers. Staff/102- Response to DR 20 and 21

Intervenors do not dispute that the Applicant has borne these costs, but it is critical to consider that it does so on its own and without seeking reimbursement. Further, the Applicants statements that costs incurred above routine maintenance are not reimbursed when requested is not true. To the contrary, customers have historically paid such costs when approached by Keith Ironside. Intervenors/300, Kroker/12.

The Applicant argues that such financial challenges (of its own doing) are further exacerbated by the "failure of the Original Well." Staff/102, Response to DR 9 and 11. For

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reasons discussed above, the original well has not failed and only is currently not in use for reasons of improper management by the Applicant and its well driller. In addition, had the well supply been cleaned out, such cost would not have been incurred.

Notwithstanding such fact, what is most significant is the Applicant is one again claiming financial hardship when not seeking to properly manage the financial aspects of the utility through seeking customer reimbursement. As Staff acknowledged during the hearing, Keith Ironside should not be entitled to claim a financial hardship burden on account of costs he has incurred if he has not asked or taken the necessary steps to be reimbursed for costs he has incurred. 1.9.17 Transcript – cross examination of Hari, p. 191. Such a principle is all the more applicable here where the evidence shows that historically the customers have attended to such costs when asked.

C. There is Insufficient Evidence in the Record to confirm that the Personal Circumstances of Keith Ironside, as an Individual, and as Trustee of the Gladys M. Beddoe Credit Shelter Trust, are Sufficient to Justify the Termination and Abandonment.

The Applicant asserts that the personal circumstances of its owner, Keith Ironside, make it way too difficult for him and his daughter to continue to manage the water utility. Appellant's response to DR 11, Staff/102, Hari/5. The Applicant raises as the primary reasons, Keith Ironside's age, his personal skill set, and the geographical demands of his work commitments.

Intervenors recognize that such obligations may be considered burdensome; however it does not relieve the Applicant of its responsibility to provide water service. Intervenors/300, Kroker/16. Further, Keith Ironside has not been the one managing much of the District's affairs. From 2006 to 2013, Keith Ironside managed the District. However, in 2013, his daughter, Valerie Meyer, has primarily been responsible for managing it. Id. The point being that neither Keith Ironside nor Valerie Meyer is in a position to run the District, which still cannot serve as

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grounds for termination and abandonment. District's response to DR 11, Staff/102, Hari/5. Staff (and the ALJ) is well aware there is nothing which prevents the District from engaging a sub-contractor to manage all aspects of the water system.

As stated previously above and in the record, debts incurred by the District only exist because Keith Ironside has failed to take the steps necessary to make sure the District is properly managed. As Intervenors testimony has shown, and as Staff and the District has acknowledged, the customers have historically paid their bills and also paid additional fees when necessary as billed. Intervenors/300, Kroker/20. Further, Keith Ironside and Valerie Meyer failed to bill the customers or where appropriate, seek approval from the PUC to raise rates as needed. Intervenors/300, Kroker/20. Such failures do not equate to a financially failed or failing entity, but rather one that is mismanaged or seeking to paint a picture that it is not economically viable. Intervenors/300, Kroker/20. As shown from its testimony, Applicant is simply unwilling to manage the District, yet eager to assume ownership of the District's assets. Intervenors/300, Kroker/20. The District's customers, including Intervenors, met with Keith Ironside in 2010 with the concept that all the customers equally assume an interest in the water utility, however Keith Ironside elected to withdraw from that approach and maintain control of the water system himself. Intervenors/300, Kroker/20.

Finally, in Keith Ironsides rebuttal testimony, he states his agreement with Staff's summary that his personal circumstances justify his proposed termination and abandonment. First he claims that "the District operates with [Ironside] subsidizing the system: It has never generated income." Company/100, Ironside/3. Second, Keith Ironside states that he doesn't "expect to be able to sell [his] property if the obligation to continue water service continues, because the water service obligation is a large liability. No one is going to want to take that on." Company/100, Ironside/3.

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With respect to the financial burdens, Keith Ironside willingly assumes to maintain the District due to his repeated failure to seek reimbursement, such assumption of cost on his part cannot be considered as a personal circumstance in support of justifying termination and abandonment. Regarding his second statement concerning his alleged inability to be able to sell his property should the obligation to provide water service continue such statement is absolutely without basis. As previously discussed above, it is well within Keith Ironsides means to hire a third party contractor to operate and maintain all aspects of the District. Further, because the District, and more pertinently, the assets consisting of the complete water system are independent and separate from the lands upon which such facilities are located, such facilities could be sold to an entity or individual wishing to own and operate the same.

D. There is Insufficient Evidence in the Record to confirm that the Applicant is Unable as a Matter of Fact to Achieve Compliance with Applicable State Water Use Laws Governing the use of Ground Water for Non-Commercial Irrigation from a Permit Exempt Well.

The District incorrectly alleges without any supporting facts that compliance with state law limiting total irrigation by the original well to ½ acre is not possible. The Districts existing circumstances surrounding failure to be in compliance, don't justify an award of termination or abandonment.

In its testimony, the District states that it does not believe that its existing water service obligations would be in compliance with the ½ acre limitation. Staff/102, Hari/4 – District response to DR 11. The District misses the point. The issue is not whether its existing provision of water would be in compliance, but rather whether the District can be in compliance. There is no evidence in the record showing that the District has even tried to come into compliance, a finding equally assumed by Staff. 1.9.17, cross examination of Hari, p. 194. Such is confirmed

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by Keith Ironside's own statement that "it would actually be impossible to comply with the limitation, with six houses on the system." Company/100, Ironside/2.

The presumption is an inability to comply with existing regulations, assuming one has tried. Here, the District hasn't made any effort to pursue compliance. An unwillingness to gain such compliance should not under any circumstances be used as a basis for termination or abandonment. Such an approach could only encourage a willingness to ignore the law as a basis to seek termination or abandonment. Id. Staff's testimony in support of the District's lack of compliance also must fail for essentially the same reasons.

Staff cites two cases where it was determined that the water systems at issue were very old and that they also created risk to public health. Replacement of the same would have been very expensive and possibly not a solution. The circumstances in this case are entirely different. No expensive retrofits are required to encourage compliance among users. Rather, the meters to each are already in place. Staff/102, Hari/5, District Response to DR 11, Exhibit 10. The infrastructure does exist to properly meter water use to avoid running afoul of the irrigation limitation. The District should not be summarily excused from every having to meet such obligation, nor have it presented as a means to now seek termination and abandonment.

E. The Evidence additionally shows that Keith Ironside Intended to Ultimately Deprive the Customers of Access to the Bel-Ridge Water Utility as Far Back as 2013.

Independent of the Applicant's allegations made to justify its desire to terminate water service and abandon the Bel-Ridge Water Utility, the record reflects that no later than 2013 Keith Ironside possessed an intention to terminate water service, but not abandon the Bel-Ridge Water Utility. As discussed above, his submittal of the 2013 partition and its subsequent approval, showed a clear intent to take over the Bel-Ridge Water Utility for his, and his family's' exclusive use. The fact that (a) tax lot 2100 was so reconfigured by the 2013 partition to place in Parcel 1

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nearly the entire Bel-Ridge Water Utility Distribution system; and (b) an express easement was created for the benefit of Parcel 1 to maintain access to the existing water line from the pump house located on Parcel 1 and the water line down to Parcel 1. This clearly indicates that more than 4 years prior to submitting the application, Keith Ironside was intent to never abandon, but own the Bel-Ridge Water Utility for his own benefit.

Such a conclusion is also supported by his testimony, as he is of the opinion that when he conveyed Parcel 1 to his daughter, Valerie Meyer, in 2013, it was his understanding he conveyed all the Bel-Ridge Water Utility Facilities to the extent they were located on Parcel 1. Among the more material examples of such intent is, of course, the invoice Intervenors received from the "Buckman Water District." Intervenors/406. When asked what the Buckman Water District is, and why Intervenors would have received such an invoice, Keith Ironside dismissed it as mere confusion among the people tasked with the District's administrative responsibilities. Of course, such a claim seems lacking especially given the address of the Buckman Water District is listed as the address of none other than that of Valerie Meyer, Keith Ironsides' daughter.

There is every legitimate reason to believe that when taking these and other events to account in the aggregate, that Keith Ironside intended no less than four years ago to take over the Bel-Ridge Water Utility for his exclusive to the detriment of the water customers. Such evidence therefore can only call into question the sincerity of the District's Application.

VI. CONCLUSION

As a result of the Application, Intervenors have been compelled to challenge Keith Ironside's desire to deny them the water supply, a right to which they acquired upon the purchase of their property and in reliance on which they built their home. The significance of these proceedings, therefore, to the Intervenors, Mel and Connie Kroker, cannot be understated. For these, and the additional reasons stated above, Intervenors Mel and Connie Kroker request that

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the Application be denied, or in the alternative, that (1) that they be granted ownership of Original Well together with access to all material portions of water system to benefit their property to the extent it benefits their property; (2) rights of access to and use of water from the Replacement Well pending confirmation that Applicant's prior compromising of the Original Well can be addressed to allow the Original Well to be operational to the satisfaction of Intevenors; (3) that all costs associated with any work to be completed on the Original Well be borne by Applicant; and (4) on the occasion the Original Well is confirmed as a reliable water supply, that the Replacement Well shall solely operate to (a) provide water to Parcel I as identified on the 2013 Partition Plat and (b) to provide a backup supply of water to the Original Well for purposes of ensuring Intervenors and their successors and assigns a backup water supply.

Dated this 3rd day of February, 2017.

JORDAN RAMIS PC

By: s/ Peter D. Mohr

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date shown below, I filed the foregoing OPENING BRIEF OF MEL AND CONNIE KROKER, INTERVENORS electronic transmission on:

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Public Utility Commission of Oregon
PO Box 1088
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PUC.FilingCenter@state.or.us

I further hereby certify that on the date shown below, I served a true and correct copy of the foregoing OPENING BRIEF OF MEL AND CONNIE KROKER, INTERVENORS by electronic transmission on:

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☐ by first class mail, postage prepaid.

☐ by hand delivery.

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☒ by electronic transmission.

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DATED: February 3, 2017.

s/ Peter D. Mohr
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