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

REPLY BRIEF

OF

MEL AND CONNIE KROKER, INTERVENORS

February 16, 2017

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I. INTRODUCTION

Intervenors Mel and Connie Kroker ("Intervenors" or "Mel and Connie Kroker") submit this Reply Brief in response to the Mountain Home Water District's ("Applicant" or "District"), and Public Utility Commission's ("Staff") opening briefs filed herein on February 3, 2017, in accordance with the schedule set in Administrative Law Judge Power's ("ALJ") Ruling issued January 19, 2017.

This reply brief will further confirm that Staff and the District have failed to provide the evidence sufficient to justify a grant of the District's Application to Terminate Water Service and Abandon Water Utility ("Application"). For the reasons set forth herein, Intervenors request the District's Application be denied.

As a reply brief, this brief does not argue all of the positions previously asserted in Intervenor's Opening Brief. Intervenors are not abandoning those issues and arguments.

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II. REPLY TO STAFF'S OPENING BRIEF

A. INTRODUCTION

In its opening brief, as has been the occurrence throughout the proceedings, Staff continues to disregard the factual evidence and expert testimony presented by Intervenors in its determination and recommendation to the Commission that the District's Application be granted. For the reasons stated below, Intervenor's request the ALJ disregard Staff's recommendations in their entirety.

B. ARGUMENT

In its opening brief, Staff asserts that the Original Well failed. As asserted various times throughout the record, and more fully in Intervenors Opening Brief, the record herein reflects that the Original Well has not failed, is repairable, and its current status is the result of Applicant's, and by association the well drilling company's, wholly unnecessary attempts to alter the well by casing it to the bottom. Staff has never introduced, nor sought the introduction of, evidence addressing the questions as to whether the original well actually failed. Further, Staff did not contest the findings of Groundwater Hydrology Expert John Lambie ("Lambie"), who testified (1) any additional casing of the well was entirely unnecessary and (2) the attempted repair of the Original Well failed due to mistakes made by the well drilling company. . (Company/100, Ironside/1; Testimony at 181.) Lambie additionally testified that the well could be rehabilitated and still supply a redundant water supply. (Company/100, Ironside/1; Testimony at 181.)

While Staff did not contest the findings of Lambie, it fails to reference Lambie's findings as a considering factor as to the operability of the Original Well, both prior to and following the well drillers failed attempt to access the well, in its Opening Brief. Further, the District's own witness, Mr. Wagner, acknowledged that the Original Well was still operational. (Transcript at

76.) Further, Ironside conceded that the "Pete's Mountain Aquifer is so good under our well, that we have not had to re-bore below the pump." (Intervenors/303, Kroker/1.)

a. Contrary to Staff's arguments, the circumstances do not substantiate granting of the Districts' Application.

i. Availability of alternate water sources

Staff incorrectly asserts that "[a]ll parties agree that each of the Company's customers has the option of either drilling his or her own well or pursuing a shared well with an adjacent property owner." (Staff's Brief, at 6). Contrary to Staff's assertion, Intervenors have presented other viable options and asserted a right to the District's water supply in Intervenor's Opening Brief. (Intervenors Brief at 10-11.)

Intervenors provided various details and a cost estimate of drilling a well on their property. (Intervenors/300, Kroker/18; Staff/102.) Staff has repeatedly failed to take note of the extensive effort and cost necessary to construct a water system on Intervenors property. Staff asserts that in their cost analysis, Intervenors included unnecessary components in the estimated cost to construct a new well. (Staff's Brief at 14.) Staff bases this assertion on concerns raised by the District regarding the installation of a cistern, completely disregarding evidence and information to the contrary supplied by Intervenors.(Staff/104, Hari/14; Staff's Brief at 14.) Notably, Staff is summarily giving more weight to the Applicant's perspective on what is to be considered an adequate water system than what has been supplied by Intervenors. This is totally inappropriate as Staff is thus choosing to rely on Applicant's testimony which is based on no technical authority while the water supply system proposed by Intervenors is based on the recommendations of the Oregon Water Resources Department ("OWRD"). *Id.*

Staff also asserts that Intervenors would save in potential costs of well construction if a new well is constructed using Buckman Road instead of Turner Road as there would be no need to construct a road. (Staff's Brief at 14.) However, Staff provides neither a cost scenario nor

other assessment confirming that would be the case, nor has Staff shown in these proceedings that it possesses any expertise in matters involving the installation and completion of water systems.

Staff also continues to assert the concept of a shared well among Intervenors and Seymour, stating it would be substantially less cost with improved property value to Intervenors for having their own dedicated water supply with a right to irrigate beyond what would be available as customers of District. (Staff's Brief at 14.) However, the record lacks any evidence that such a shared well opportunity even exists. Staff acknowledges as much in Staff's Brief at 6. Further, Intervenors discussed the reasons why at length in their response to the District's DR 8. (Staff/104, Hari/9.)

Staff cites three cases as further support of its argument that alternatives do exist: *In re Fruitvale Water Utility,* OPUC Docket No. UW 12, Order NO. 88-255 (1988); *In re Marlstone Water Co* OPUC Docket No. UM 303, Order No. 91-32 (1991); and *In re Western Estates Water Co.* OPUC Docket No. UW 41, Order No. 93-545 (1993). However, none of these cases are sufficiently analogous to the circumstances faced by Intervenors here.

In *Fruitvale*, the applicant water utility sought to terminate water service to all of its 180 customers, however, no reasons were discussed in the order confirming the basis for termination. All the order indicates is that of the 180 customers that were going to lose service, eventually all but six of them either secured service from the city Grants Pass or drilled their own wells. Of the remaining six users who, at the time the order was entered, had not identified an alternative water supply, the Commission determined without any confirming analysis that it would not be economically feasible for *Fruitdale* to continue serve them alone and so chose to grant the application. The Commission further stated that the remaining six could pursue water from Grants Pass or drill their own wells, opportunities that were presumably available given that the

remaining 174 customers had already begun or engaged those options. Water from Grants Pass was especially attractive as they had extended their water system infrastructure to the affected area. Unlike the water customers in *Fruitdale*, there are no available options to Intervenors in this case that are anywhere nearly as cost effective as the opportunity to simply hook up to city water .

In *Marastoni* (discussed further below) the utility was in need of significant capital improvements, however, the utility's low rates were fixed by prior deed covenants. While the Commission determined that the rates could be increased, the capital improvements necessary to repair the system would have been cost prohibitive. Fortunately, a local water utility of another service area contained the homes all of the *Marastoni* customers. There, a very low cost, and, therefore, very viable option existed by simply having all customers hook up to that system. Again, in the instant case, Intervenors do not enjoy receiving alternative water service *via* the mere cost of connecting to another existing water system.

In *Western Estates*, the utility filed to terminate water service to 62 customers in the city of Keizer. With a hookup of fee of no more than $2,116, and the water customers close proximity to the city's municipal water infrastructure, the Commission granted the requested termination of service. Intervenors do not disagree that such service was a viable alternative. However, yet again, Intervenors enjoy no such cost effective remedy Applicant's request for termination of service and abandonment of the utility.

ii. Company's concerns regarding compliance with OWRD statutes and rules

In its Opening Brief, Staff asserts that it relied upon Ironside's opinion as to whether compliance with OWRD regulations was possible. (Staff's Brief at 8.) Staff neither provides any evidence, nor points out any evidence in the record provided by the District which would support the allegation that the District is unable to comply with OWRD regulations. In fact, the District

has not made any attempts to even try to comply with OWRD regulations. Staff completely disregards the lack of supporting evidence in its acceptance of Ironside's opinion to the contrary.

Throughout this proceeding, the District stated that compliance with OWRD restrictions for exempt wells cannot be reasonably achieved under current operations. (Staff's Brief at 7.) It has made these allegations yet failed to supply any evidentiary support that it even attempted to come into compliance. As Intervenors have consistently asserted, evidence of the District's abject failure to even attempt to be in compliance does not as a matter of law and public policy justify an award of termination or abandonment.

Further, Staff takes the leap in its assumption that the only way for the District to comply with OWRD restrictions would be if the water customers agreed on a designated half-acre total split among them. (Staff's Brief at 8.) It additionally asserts that even if meters were functional, the issue is designation of irrigation areas, and not a concern of whether the 15,000 gpd limit has or will be exceeded. (Staff's Brief at 8.) Thus, Staff, with no expertise or authority of its own, essentially advocates that the law simply cannot be adhered to. There is no evidence on the record, nor did Staff or the District provide any that such is the case. One can reasonably assume that if a law has been in existence since the 1950's, as this one has, then it is enforceable. Again, Staff attempts to make a baseless argument on the District's behalf in support of abandonment.

Such is all more frustrating to Intervenors when Staff at the same time admits that there is no evidence in the record showing that the District has even tried to come into compliance. (Transcript at 194.) Further, the District itself lists compliance as an impossibility without providing any evidence that it has even tried to come into compliance much less legitimately think about it. (Company/100, Ironside/2.)

The presumption Staff makes is an inability for the District to comply with existing regulations, when in fact here it isn't an inability, it is a refusal to try as a matter of public policy.

An unwillingness to gain such compliance should not under any circumstances be received by the Commission as a basis for termination or abandonment. Staff's suppositions that the District is unable to come into compliance must fail. .

In support of its untenable position, Staff cites granting orders entered in two cases—*In re Westland Estates Water Systems*, OPUC Docket No. UP 244, Order No. 08-360 (July 7, 2008), and *In re Vista Dale Water Company*, OPUC Docket No. UP 183, Order No. 02-044 (Jan. 24, 2002)—for the proposition that acknowledgement of compliance can be a basis for supportive abandonment. However, these two cases confirm that there has to be some material implementation or attempt at compliance, and not just a desire to avoid it as a matter of convenience, as in the Districts case. Neither of these cases support Staff' recommendation that the District's Application be granted.

In *Vista Dale Water*, it was determined that the water system at issue was very old and that it also created a significant risk to public health. The health risk resulted from a water system sourced by a 30-foot well to meet the needs of water service to between 20 and 27 homes in a subdivision. The primary issue was the health concerns posed by the well given the close proximity of the well to surrounding septic systems. So bad was the resulting health risk to the well that the Department of Human Services Drinking Water Program informed the utility's owner that the well would have to be abandoned for failure *to ever be able to meet* state drinking water standards. One option was to upgrade the system with a new well and distribution system at a cost of just over $5,000 per customer. However, given the geology, there was no guarantee that good well water could be located. Although at nearly four times the cost per customer of the uncertain system upgrade, it was determined that, given such uncertainty, the customers would need to hook into a nearby municipality's water system with the utility obligated to continue water service until such was accomplished.

Hence, unlike the instance case, where the record fails to include *any* evidence that the applicant has made any effort whatsoever to comply with the half-acre irrigation limitation associated with permit exempt wells, in *Vista Dale Water*, the lack of the utility's ability to ultimately address non-compliance with applicable drinking water standards was unavoidable thereby compelling termination of service.

In *Westland Estates*, the utility served approximately 22 customers, however, it possessed no water right and endured a history of high nitrate levels in its water supply. Additionally, the utility alleged that it was not financially sound. *Id.* at 1.

Like the Ironside in the instant case, the applicant in *Westland Estates* did not possess a permitted or certificated water right, but rather sourced its water from a permit exempt well, the appropriation and use of water from which is subject to the limitations provided in ORS 537.545. As has been confirmed previously in these proceedings, ORS 537.545 in part allows for "[si]ngle or group domestic purposes in an amount not exceeding 15,000 gallons a day" and the "[w]atering [of] any lawn or noncommercial garden not exceeding one-half acre in area." Hence, one well may be used to provide water for domestic use to as many homes in the aggregate can be met by a total 15,000 gpd, however, total non-commercial irrigation from that same well would be limited to ½ acre.

Also like the instant case, the order notes that the applicant in *Westland Estates* was not in a position to secure a new permitted groundwater right as such opportunity was not afforded as a matter of law due to the existing area being designated as a Critical Groundwater Area by the OWRD, the terms of which designation precluded any development of new permitted water rights, but did, and continues to, allow the completion of permit exempt wells.

Although the applicant additionally acknowledged that the utility was suffering "dire financial conditions," it also was of the opinion that a rate increase could reestablish its financial

stability. However, while the Commission determined a rate increase would secure the needed financial stability, such would still not be able to address either the utility's lack of a certificated water right and ultimately the ongoing nitrate problem. In order to address the nitrate problem, regardless of cost, the applicant still needed to secure a certificated water right because the use of its 22 customers exceeded the 15,000 gpd limit for domestic use associated with its permit exempt well.

With no manner in which to secure a water right, and therefore no way to justify addressing the nitrate problem on the existing permit exempt well given the 15,000 gallon per day limit, the Commission determined based on the report of the Department of Environmental Quality, the Oregon Water Resources Department, the Department of Health Drinking Water Program, USDA, Staff and others that the only viable option was to drill new exempt wells for individual use or with one well to be shared among the utility customers up to 15,000 per day. *Westland Order, Appendix A, p. 3 – 4, 7.*

Further, the report accompanying the order specifically stated that each well could serve "up to three homes." Id. at p. 6, ¶6. This limitation, however, deserves some clarification. The three home limitation per well is not a creature of how many homes can be served by an exempt well. As stated above, pursuant to ORS 537.745, as many homes can be served by one exempt well as can in the aggregate, not use more than 15,000 gpd. Rather, the "up to three homes" per well limitation likely reflected the affected agencies' desire to avoid any of these small water systems triggering obligations to meet drinking water regulations administered by the Oregon Department of Health, Drinking Water Program.[1] However, what this also means is that neither

[1] Pursuant Dept. of Health, Drinking Water Program regulations, a well becomes subject to public drinking water regulations upon serving more than three customers. See, e.g., OAR 333-061-0020(154) which defines a "Public Water System" in pertinent part as a "system for the provision to the public of piped water for human consumption, if such system has *more than three service connections*."(Emphasis added).

Commission Staff nor the Oregon Water Resources Department had compliance concerns regarding the ability of these small shared water systems being unable to meet the half-acre limitation.

Hence, in *Westland Estates* and in *Vista Dale*, cases which Staff seeks to rely on to show that non-compliance can be a basis for granting abandonment, both cases presented issues of non-compliance that simply could not be remedied as a matter of fact and/or law. No such compliance circumstances or issues exist in the instant case.

The alleged non-compliance issues raised by both Staff and Ironside in their respective opening briefs are matters of fiction as the applicant in bad faith has not only failed to make any effort to achieve such compliance, but with nothing more than bald allegations, states that it cannot be done. (Company/100, Ironside/2.) Nowhere in Staff's Opening Brief or in that of the District's is any information provided that demonstrates that the Applicant has even tried to regulate the use of water from the utility in excess of the half-acre irrigation limitation.

Furthermore, 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.) A fact that is all the more disturbing since Ironside has denied the very existence of such meters in these proceedings. (Transcript at 97.) The Applicant should not be summarily excused from ever having to meet such obligation, especially when, as here, (a) it has provided absolutely no evidence confirming that complaint irrigation use from one permit exempt well cannot be achieved; (b) it has never even so much as attempted to meet such an obligation, and worse yet has gone so far to say there are no meters to make any such effort to begin with, an allegation which is a complete and knowing misrepresentation of fact. Further, Commission's own rules affirmatively vest in a water utility the right to set meters or other devices for detecting and preventing fraud or waste, without notifying the customer. (OAR 860-036-0105(5).)

iii. *Personal circumstances of the owner*

Staff asserts as a consideration the age and health of Keith Ironside, stating that Ironside is 75 years old, resides in Kennewick Washington, works days-per-week, and is not physically able to manage daily affairs of running utility. (Staff's Brief at 9.) As legal support for considering the personal circumstances of the District owner in consideration of its recommendation for abandonment, Staff cites the order in *Marastoni*. In *Marastoni*, while it is true as Staff alleges that the applicant's health was at issue, this was not the material reason for why abandonment was approved.

In *Marastoni*, the applicant owner of the water utility sought to terminate water service to the utility's eight customers. *Id* at 2. The owner owned two residences on the acreage that also held the water system. *Id.* Six of the eight customers were deeded rights to receive water from the water system at fixed rates by a prior owner of the utility in the 1970s. *Id*. The Commission also noted that the owner was in poor health, and was experiencing physical difficulty to operate the system. In its order, the Commission concluded that operation and maintenance costs of the water system exceeded that which could be recovered under the fixed rate structure, resulting in the utility having lost money in each of the previous six years. In deciding whether to allow the termination of water service, the Commission's primary concern was whether the customers would have adequate service at reasonable rates in the future. The Commission felt that was feasible. In considering potential increases of the utility's rates, the Commission stated that, "In regulating rates, the Commission allows a public utility to charge rates sufficient to compensate it for use of its property, generate revenue sufficient to pay the utility's reasonable expenses, including depreciation and salaries, and a fair rate of return on invested capital." The Commission went on to conclude that the fixed rates charged by the utility were inadequate to meet such a standard, and that it would have to raise its rates. Thus, the raising of rates was not

an issue.[2] The Commission's order also noted, however, that for a $2,500 hookup fee, the customers could receive water from another local water utility. Thus, at such a low cost for an alternate water supply, the Commission determined that in consideration of the owner's poor health termination was warranted.

In the instant case, Ironside's busy schedule does not relieve him of his responsibility to provide water service to the remaining customers especially when no financially reasonable alternative exists for the Intervenors to secure an alternative water supply. Additionally, Staff asserts Ironsides' inability to effectively operate the utility and conduct effective recordkeeping constitute personal circumstances supporting approval of the District's Application. (Staff's Brief at 9.) Such a conclusion is lacking as it has been Ms. Meyer, not Ironside, who has been effectively and successfully managing the District since approximately 2013.

As Intervenors have persistently stated throughout these proceedings, mismanagement of the District is not grounds for abandonment. It would be wholly inequitable to permit Dr. Ironside's ineffective management to lay as sufficient grounds for termination of water service. Such a result would again, and by example only, fly in the face of his failure to not seek reimbursement of costs, as well as his showing initial interest in and his subsequent rejection in 2010 of having all the customers equally assume an interest in the water utility to spread all costs associated with the operation and maintenance of the water utility and water system. (Intervenors/300; Kroker/20.) Also, there is nothing which prevents the District from engaging a sub-contractor to manage all aspects of the water system and relieving both Ironside and Ms. Meyer of any management responsibilities.

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[2] The PUC also determined it necessarily assumed jurisdiction to set higher rates for the utility by virtue of the fact that the "proposed abandonment of service, in and of itself, would result in inadequate service." *Id.*

Future Management of Utility and Water System

Because the District, and 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. Such an approach would also afford Ironside the freedom from management responsibilities while providing the remaining customers a legitimate water supply.[3]

Staff also asserts that Ms. Meyer does not wish to run the water utility. However, the record demonstrates that Ms. Meyer has every intention of operating the water system should the Application be granted. Ms. Meyer has already engaged in the operation of the "Buckman Water District," a fact clearly demonstrated by the invoice for water service she delivered to Intervenors. (Kroker/406.) There is no reason but to believe that Ms. Meyer has every intention of continuing to be responsible for and operating the water system following any grant of the Application. As discussed in Intervenors Opening Brief, but for the well house and a short section of the distribution system that is located on Parcel 2 (tax lot 2107) the remainder of the water system is located on Ms. Meyer's property. Therefore, should Ironside as an individual and as Trustee of the Trust convey the water system to Ms. Meyer, she could additionally own it and not the Trust, manage it as she already is doing as the Buckman Water District. The point being, regardless of whether Ironside or Ms. Meyer ultimately owns the water system, the record shows based in part on the (a) relocation of the lot boundaries for the 2013 Partition Plat; (b) the fact that Ms. Meyer now owns the land upon which most of the water system is located; (c) enjoys an easement to the well houses; and (d) is already "operating" under the name of the Buckman Water District, that it is a foregone conclusion that Ms. Meyer can just as easily continue the maintenance of water service to Intervenors.

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[3] As confirmed in Staff's Brief, Mr. Seymour is also apt to continue to receive water service if the application is denied. Staff Brief at p. 6.

Furthermore, the fact that Staff and the District allege Ms. Meyer does not wish to run the water utility, the record clearly dictates otherwise. It is thus reasonable to presume that this entire abandonment proceeding is little more than a sham to simply rid the water system (as the District would no longer exist upon approval of the Application) to ensure Ms. Meyer can ultimately take full title to the water system with no obligations to provide service.

iv. *Financial hardship of continuing to operate the utility*

Staff asserts as one of its considering factors that the District Company generally provided service at a financial loss, and that the monthly charge paid by customers is only enough to recover ongoing, regular expenses such as electricity and water quality testing. (Staff's Brief at 9; Staff/102 – Response to DR 11 and sup response to DR 11.) As Intervenors asserted in their Opening Brief, the financial hardship of the utility exists only because Ironside failed to take the steps necessary to make sure the District was and is properly managed. (Intervenors Brief at 21.)

The record reflects that Ironside and Ms. Meyer failed to bill the customers or where appropriate, seek approval from the Commission 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.) It is also confirmed throughout the record that during the years that Ironside managed the District, additional compensation for repairs and non-routine maintenance was requested a mere handful of times. Customers have attended to such costs when asked.(Intervenors/300, Kroker/12.) Further, Staff states that Ironside incurred expenses that were never recovered by customers. (Staff's Brief at 9.) Intervenors acknowledge that the District has endured these costs, however the District does so on its own and without seeking reimbursement from customers. As Staff admitted during cross-examination, 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. (Transcript at 191.)

Staff nevertheless asserts the Districts' contention that customers were behind on payments or missed altogether, for extended periods of time (Staff's Brief at 9.) However, again Staff's allegations are misleading. 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; Intervenors Brief at 21.) As expressed in Intervenors Opening Brief, debts incurred by the District exist only because Ironside has failed to take the steps necessary to make sure the District is properly managed.

In support of its arguments, Staff relies upon *In re Judy Bedsole and Fish Mill Lodges Water System*, and *Marastoni*. In *Fish Mill*, the financial hardship incurred by the utility was not driven by the utility's failure to seek reimbursement of costs as is the case here. To the contrary the utility in *Fish Mill* actually sought rate regulation prior to seeking abandonment in an effort to further bolster its ability to become more financially stable so it could meet its operation and maintenance obligations. *Id*. at 5.

The record in this case lacks any evidence confirming that Ironside as an individual and Trustee of the Gladys M. Beddoe Credit Shelter Trust, has ever suffered a financial hardship resulting from the operation of the Bel-Ridge Water Utility. As previously set forth in Intervenors' Opening Brief, and as yet further evidenced by Staff's testimony on cross-examination, it was wholly the lack of the Ironside's willingness to seek reimbursement that created the alleged "hardship" that he now complains of today. (Transcript at 191.) Such is the case even when considering his allegations that the additional Intervenors, the Kelleys ("Kelleys") had not paid a water bill in as much as two years. While the Commission rules specifically allow for disconnection of water service in such circumstances, Ironside chose not to

exercise such authority. (OAR 860-036-0205(6); OAR 860-036-0245.) The record does not even reflect that he ever provided a notice of delinquency per ORS 757.069 to the customer in arrears. Hence, his alleged hardship cannot even be attributed to low rates. Rather, it is primarily, if not completely the product of his unwillingness to seek payment. In addition, the Commission's rules specifically allow for Ironside to raise his rates. (OAR 860-036-0030**;** OAR 860-036-0405.)

In this case, Ironside has made no effort to properly manage rates relative to overall costs both to operate and maintain the water system. As testified to by Keith Ironside and as acknowledged by Staff, rates which were charged to customers covered the ongoing operation of the water system. (Staff/102 – Response to DR 11 and sup response to DR 11.) However, the rates did not allow for recouping material repairs beyond general maintenance. (Staff/102 – Response to DR 11 and sup response to DR 11.) The fact that they did not willingly does not provide a basis to establish a "financial hardship" to justify abandonment, especially as here, where the record shows that the customers historically have paid additional costs when requested.

Furthermore, Ms. Meyer (and not Ironside) can just as easily continue to run the utility, especially when the record suggests that is exactly what she intends to do regardless, but simply under a different name as the "Buckman Water Utility." (Intervenors/406.)

In addition and as further discussed below, Intervenors should not be compelled to unilaterally pay the cost associated with Ironside's needless damage done to the original well when such an alteration was entirely unnecessary. (Transcript at 184. Transcript at 76.) (agreeing well would have been operational without the installation of the casing).

As yet, further evidence of Staff's predisposition to seek approval of Applicant's application, Staff also asserts as an additional basis for abandonment, the potential scenario of

remaining customers leaving the system at any time which could leave the system with stranded costs. (Staff's Brief at 10.) Such an allegation possesses no merit. No evidence has been provided that would even raise the possibility of such an occurrence. Further, such a concern could apply to any water utility and not just those seeking abandonment. In addition, given the extreme financial hardship associated with the completion of a well, it is reasonable to assume that a customer would possess little inclination to seek to disconnect. Such a future hypothetical scenario is not worth consideration for abandonment, and, given the absolute lack of bases, truly questions if not confirms the extent to which Staff seeks to support Irosnide's Application, irrespective of what the facts actually are.

Finally, Staff asserts that Ironside would be unable to sell property if he doesn't abandon utility. (Staff's Brief at 9.) It is well within Ironsides means to hire a third party contractor to operate and maintain all aspects of the District. Further, because the District, and the assets consisting of the complete water system, is 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. However, as previously discussed above, Ms. Meyer can just as easily assume all title to the system, as the Buckman Water District, at which point Ironside can sell his property at his convenience.

v. Conveyance History indicates that Applicant intended to convey system to Valerie Meyer so she could operate her own water utility for the exclusive benefit of her property.

As the Commission cannot act in a manner to deprive a customer of its real property interests, nor would it be appropriate it for the Commission to advance the charade sought to be completed by the Applicant in their effort to acquire the entire system for their exclusive benefit. It is already of record that Ms. Meyer has every intention of operating a "new" water utility on

the occasion, and apparently under the Applicants' and Ms. Meyer's assumption that the abandonment request will be granted.

As Ironside testified, it was his intent to convey much of the water system to Valerie Meyer out of the Trust and Ironside. (Testimony at 112.) However, there is no reason that the water utility and its assets were conveyed as well. As the title chain to the water utility and related assets reveal, such property was never conveyed under the general appurtenance clause of any deed to land upon which the utility's water system assets were located. Rather, they were always conveyed as separate and distinct assets.[4] upon which the assets were located. Even when Ironside and Gladys Beddoe first entered into their contract to buy property upon the which the water system was located, that same contract only entitled to purse the ability to hook up to the system. (Intervenors/401.) It wasn't until they later received an actual deed to the property that they also acquired the Water utility. However, as expressly noted on the deed, the Water Utility was intended as a separate asset. (Intervenors/401.)

b. ***Under continued service, Intervenors should only be required to pay for such costs as properly incurred by the District as well***

i. ***A Costs to customers to remain on the system / Financial Hardship to customers of continuing to operate the utility***

Contrary to Staff's assertion, Intervenors have continuously stated that they are willing to pay its proportion share of the costs that were "legitimately incurred" at the time, when there were six customers of the District. Staff, however, also seeks to establish that such costs would necessarily be exorbitant, a claim that is not supported by the record.

In support of its recommendation, Staff references the age and condition of the water system. In its analysis, Staff relies on Rushmer's testimony that the pipe was thin and brittle PVC. (Staff's Brief at 13.) However, that is little more than a layperson opinion. Also

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[4] As noted in Intervenors Opening Brief at 3-11.

Rushmer's testimony is limited to what he allegedly found on the line that crossed the street from the well house and headed north to his property. The point is that the water system distribution system that is at issue in this proceeding consists of the facilities installed by Dale Belford and which is now located almost entirely on the Parcel 1 (aka Tax Lot 2101) as identified on the 2013 Partition Plat.

Staff also seeks to rely on Mr. Hougak's testimony that the lines are a combination of galvanized pipe and black poly pipe and that the system is 43 years old, and consists of materials that have life expectancy of 50 years, with a number of leaks. (Staff's Brief at 13). However, Staff ignores Mr. Hougak's testimony that leaks are considered general maintenance as it is fairly common for water systems to experience leaks. (Transcript at 49.) In addition, Staff pays no heed to Intervenor's testimony that at no time have Intervenors ever experienced a loss of water pressure in their home. (Intervenors/300, Kroker/6.)

Staff asserts for further consideration the potential for past and future costs to be assessed to the remaining customers. Staff states that the Commission has no authority to set rates or determine the prudence of capital expenditures that the District could assess to customers. (Staff's Brief at 14.) More specifically, Staff stated that the District could assess the full 65K to remaining customers in addition to charging for operational costs and future costs. (Staff's Brief at 13-15.) In making such statements, Staff, however, ignores the Commissions specified rate thresholds that, when exceeded, allow for the customers to petition for rate regulation.

While it would seem reasonable enough that charging remaining customers for future operational and maintenance costs may be appropriate there has been no estimate of what those may consist of. Furthermore, any such costs would be limited to the maintenance of the system that is necessary for service to the remaining customers only.

If the circumstances were such that the Original Well had indeed failed of its own accord,

resulting in the necessary completion of the new well, Staff's argument may have some merit. As cited above, the well driller, Mr. Wagner testified that the Original Well would have remained operational without ever installing any additional casing. Such testimony, thus confirms that, but for the Applicant's decision and/or the well contractor's decision to attempt to case the well, the costs incurred by the applicant, and ultimately the customers, would have been limited to the cost to simply clean out the bore hole down to the original depth of 600 feet below ground surface (bgs). There was no need to insert an inner casing.

As a result of the unnecessary attempt to case the well below the original casing, the Mr. Wagner's company should be compelled to pay for any costs incurred by the applicant beyond costs incurred to complete the initial clean out of the Original Well, including not only the additional costs related to the unnecessary alteration of the Original Well via the attempted installation of an inner casing, but also the unnecessary installation of the New Well.

Staff's allegations that such costs associated with Mr. Wagner's subsequent damage to the Original Well in addition to the unnecessary completion of the Replacement Well is without basis and shows again Staff's continuing preference to find ways to grant the Application rather than evaluate it on the merits.

Furthermore, requiring the remaining customers to pay the entire cost of the well replacement would be inequitable as the Company has not charged any customers since June 2016 and has not assessed the existing customers for any portion of the costs incurred related to repairing Well 3. (Staff's Brief at 13.)

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III. REPLY TO DISTRICT'S OPENING BRIEF

A. INTRODUCTION

Contrary to the evidence of record, the District begins its Opening Brief by asserting that it submitted its Application on April 1, 2016, *following the failure of its original well*. (District's Brief at 1.) As stressed in Part II of the brief above, there is absolutely no evidence on the record confirming that the Original Well failed. In actuality, the record reflects the opposite. Intervenors expert witness John Lambie asserted that the Original Well remains able to provide a redundant water supply. (Staff/200, Hari/1-2; Transcript at 181.) Further, the Districts own witnesses, Mr. Hougak and Mr. Wagner, were unable to provide information confirming the Original Well failed. Mr. Wagner further acknowledged on record that the Original Well was and is operational. (Transcript at 76.) There is no evidence on the record to substantiate the bald assertions made by the District and Staff that the Original Well failed.

In its Opening Brief, the District continues to reiterate the factual history of the Original Well in early 2016, stating that Mr. Hougak inspected the facilities in March 2016 to address a loss of water pressure, determined that the pump needed to be lowered and recommended that Mr. Wagner clean the bore hole in order to make it possible to lower the pump. (District's Brief at 2-3.) According to the District, because of blockage in the well, the pump had been set at 389 feet in 1994 (the total well depth is 600 feet). (Company Ex. 300 at 1; District's Brief at 2.) The District then confirmed that Mr. Wagner cleared the Original Well and began installing casing, found the bore hole was crooked and that he could not install casing. (Company Ex. 400 at 1; Hearing Transcript at 70-71, 88, District's Brief at 3.)

Intervenors expert, John Lambie stated on the record that removal of groundwater, over the past 43 years, by the Districts 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. (Staff/200, Hari/1-2.) Mr. Lambie also asserted that the attempted repair of the Original Well failed due to mistakes made by the Mr. Wagner. (Staff/200, Hari/1-2.) As stated in Part II hereinabove, by attempting to install the 6-inch casing in the Original Well, Mr. Wagner changed the state of the well from operational to unusable. .

B. ARGUMENT

In its Opening Brief, the District described several reasons for seeking to abandon the water system: (a) regulatory compliance; (b) financial burden of maintaining and operating the system; and (c) the owner's personal circumstances. (District's Brief at 4). It is worth noting that these are not standards set forth in statute or rule, but rather generated by the Applicant. Although the District alleged standards without authority, statute or Commission rule, as described below, the District has failed to provide the evidentiary support necessary for each of the cited reasons to substantiate granting of the District's Application.

a. Regulatory compliance

The District alleges as its first reason for seeking abandonment, its purported inability to comply with OWRD regulations, specifically state law limiting total irrigation by the Original Well to half-acre. (District's Brief at 5.) As has been addressed at length above in Part II, and in Intervenors Opening Brief, it is not possible for the District to claim it is incapable of complying with OWRD regulations when it has not made any attempts to do so. (Staff Ex. 102 at 17, Company Ex. 100 at 2; Staff Ex. 102 at 4; District's Brief at 5.)

The District further provides the testimony of Mr. Rushmer, who alleged that he didn't think it was possible for the District "to even come close" to complying with the half-acre limitation. (Company Ex. 200 at 1.) District's Brief at 5. Mr. Rushmer is not an expert witness and has not provided any evidence to back up his allegations. The District further states that Intervenors failed to provide any guidance, suggestions, or even hypothetical scenarios for how

such enforcement could be accomplished. (Intervenors Ex. 300 at 11; District Brief at 5.) The District relies on this as the basis for the outlandish assumption that it is not possible for the District to comply with OWRD's exempt-use restrictions. (District Brief at 6.) Intervenors are not required to provide alternative scenarios for Ironside, nor has the District sought Intervenors input or recommendations on compliance. Ironside has the means to hire a third party contractor to operate and maintain all aspects of the District, and to provide counsel as to the appropriate measures to take to bring the District into compliance with OWRD.

In its argument, the District incorrectly asserts that customer connections are not metered. In fact, as stated above, the District already has meters in place at the customers' homes. (Staff/102, Hari/5, District Response to DR 11, Exhibit 10.)

As Intervenors have consistently asserted, the District's failure to be in compliance, without having ever made any effort to come into compliance, does not justify an award of termination or abandonment. In addition, any recognition by the Commission of such lack of compliance as a basis for abandonment would effectively amount to a tacit grant to ignore the confines of state law. Such a ruling could also present a damaging precedent before other water utilities which are also faced by enforcement of such restrictions. While the Commission possesses the authority to enforce specified statutes, it doesn't possess the authority to make determinations that encourages lack of compliance with regard to other statutes, the implementation of which are not its responsibility.

The District further asserts that in a groundwater-limited area, having one exempt well per parcel, or one shared well between two parcels, is a far more efficient use of water facilities than the District's service to six households. (District's Brief at 6.) The District, however, provides no basis for such an allegation.

The District's unwillingness to gain such compliance should not under any circumstances be used as a basis for termination or abandonment. The District should not be summarily excused from having to meet such obligation, nor have it be recognized as a means to now seek termination and abandonment.

b. Financial burden of maintaining and operating the system

As did Staff, the District states in its Opening Brief that the monthly fee charged to customers was not sufficient to meet system's ongoing expenses and maintenance costs, and that Ironside used personal funds to pay for non-routine repairs and improvements. (Staff Ex. 102 at 4-5, 24-25, 32, 33; District Brief at 6.) As stated above, in Part II, the rate charged covered ongoing operations. Further, on several occasions only, Ironside requested additional compensation from customers for repairs and non-routine maintenance, and customers paid such costs when requested. (Intervenors/300, Kroker/12.) Failure of Ironside to seek approval from the Commission to raise rates as needed, or bill customers as appropriate, does not substantiate financial hardship, an admission made by Staff as well (also stated above). Ironside's hardship stems from his failure to take the steps necessary to make sure the District is properly managed.

The District asserts that when the Original Well "failed" during an attempt to clear a cave-in and install casing, the owner elected to bear the resulting expenses himself. (Staff Ex. 102 at 28-30; District's Brief at 6.) According to the District, instead of seeking to recoup the costs from customers, it decided to encourage customers to use those funds towards securing their own water sources. As stated above, the costs of drilling the replacement well and/or repair of the Original Well should be attributed to the acts of Mr. Wagner, not passed on to customers.

Ironside submitted the Application because he does not wish to continue subsidizing the cost of providing water service. (District's Brief at 6.) The distribution system is more than 40 years old, however, contrary to mere allegations made by the Company and Don Rushmer, there

is no evidence in the record that it is near the end of its useful life. (Company Ex. 300 at 2; Company Ex. 200 at 2 (Rebuttal Testimony of Don Rushmer); District's Brief at 6.) The District asserts, also without evidentiary support, that the costs of maintaining the system can be expected to increase significantly in the next decade because of age. (District's Brief at 6.)

The District asserts that not all customers paid even the monthly charge on time (Company Ex. 100 at 3; Company Ex. 101), and one customer, Elizabeth Kelley, remained almost three years in arrears when she sold her property in 2016. (Company Ex. 100 at 3; District's Brief at 6.) The District concedes that Ironside requested funds on only three occasions and that Ironside's attentions to details of management were inadequate. (District's Brief at 7.) The District further contends that if it continued to provide service, there is no guarantee requests for additional funds would be successful, especially if large portions of the system failed and required expensive repairs. (District's Brief at 7.) The Districts concerns regarding recoupment of payment are unfounded as customers historically have paid such costs when requested. (Intervenors/300, Kroker/12.)

Relying on Intervenors cross-examination testimony, the District states that Intervenors would be unwilling to pay the costs that the District could reasonably assess if the Application were denied and they were the only remaining customer. (District's Brief at 7.) However, Intervenors should not be penalized for being the only remaining customer of the District as a result of the District attempting to abandon an operable water system to the detriment of its customers. Further, as stated above in Part II, Intervenors argue that the costs associated with repairing of the Original Well and drilling of the Replacement Well should be borne by Mr. Wagner and his company, and neither the District nor its customers, given that the evidence on record reflects it was his error that caused any harm to the Original Well. (Staff/200, Hari/1-2.)

As an additional argument, the District relies upon ORS 756.040, to state that it would be

unjust to require Ironside to continue providing subsidized water service. First, any debts incurred by the District are from Ironside's mismanagement of the system and failure to request a rate increase or request additional reimbursement from the customers and, therefore, certainly do not amount to a subsidy. These failures are on the part of Ironside and the District, and are not attributable to Intervenors. In addition, the District previously has not been rate regulated and ORS 756.040 does not apply and should not be utilized as any sort of measure or guidepost for the present proceedings.

c. Owner's personal circumstances

The District asserts that Ironside is 76 years old, does not reside on the property, works six days per week, and is not well suited for tasks associated with operating a water utility. (Staff Ex. 102 at 5-6, 28; District's Brief at 8.) Ironside's busy schedule, failure in time management and failure to devote time to management of the utility, does not relieve him of his responsibility to provide water service to the customers and is not an adequate reason for abandonment. The District contends that Ms. Meyer is not willing to take on management of the system (Staff Ex. 102 at 6; District's Brief at 8), however it has been Ms. Meyer, not Ironside, who has been effectively managing the District since approximately 2013. (Intervenors/300, Kroker/16).

In its Brief, the District insists Intervenors are attempting to encourage the Commission to "conscript Valerie Meyer into involuntary service as manager."(District's Brief at 8.) Intervenors have neither indicated that Ms. Meyer be forced into involuntary servitude at the behest of the Commission, nor have Intervenors indicated the Commission has the power to force Ms. Meyer to perform such acts. Ms. Meyer has willingly assumed management of the District since 2013 and, as discussed above in Part II, has gone so far as to create the Buckman Water District, from which she has sent invoices to Intervenors. (Intervenors/406.) This invoice alone demonstrates Ms. Meyers intent to continue to manage a water system, if not the Mountain

Home Water District.

The District alleges that while Intervenors suggest the District should pay for a subcontractor, they do not specify how the District would fund this given its financial constraints and Intervenors unwillingness to assume a significant share of the District's costs. (Transcript at 166-167; District's Brief at 8.) Again, the District makes false assertions as to Intervenors' history of paying additional costs when requested, and their admission on record that they would pay their fair share of the costs of maintaining the system. Intervenors have always expressed a willingness to financially contribute to the costs of running and maintaining the water system. Ironside's failure to recoup the costs is his own personal burden.

It is further asserted by the District that Ironside should be permitted to retire from his duties as District owner, without having to sell his property. Ironside already has effectively retired from managing the District as his daughter, Ms. Meyer, has been managing the District since 2013. Intervenors suggested the District hire a subcontractor to manage the system, which would effectively relieve Ironside and Ms. Meyer from their unwanted duties to the District. Further, the Districts allegations that the present action and ramifications to Intervenors is little more than an "inconvenience" (District's Brief at 8) demonstrates an extremely skewed view of the impact this has had on Intervenors. There is no evidence in the record that would confirm such a bald allegation.

Like Staff, the District alleges that Intervenors possess two viable alternative water sources for Intervenors: (a) sharing a well with Seymour; and (b) constructing their own water system. (District Brief at 10.) Contrary to the District's allegations, and as discussed above in Part II, there currently is no shared well option with the Intervenors.

The District's statements misrepresent the circumstances that initially led to Intervenors being without a shared well option. The District cites to a few words from a full page

explanation Intervenors made (Staff/104, Hari/10), delineating why a shared well option did not exist, attempting to show that the Intervenors simply did not want to consider a shared well. When reviewing Intervenors response, in its entirety, it is abundantly clear that while Intervenors certainly pursued shared well option with the neighbor's property owner, Elizabeth Kelley, due to Ms. Kelley's circumstances at the time no such option materialized. Further, as noted by Intervenors, the District indicated it "would negotiate with each property owner separately." Needless to say the circumstances under which Intervenors were trying to pursue a shared well arrangement was not ideal, and mainly one which did not reflect lack of desire to secure a shared well opportunity, but more an inability to find a way to do so. Contrary to the District's assumption otherwise, Intervenors did not decide to abandon a shared well option.

As also discussed above in Part II, and in Intervenor's Opening Brief, the completion of its own well is not viable, especially when compared to the exponentially less costly alternative considered in the prior Commission cases cited by Staff. Hence, while the option for the Intervenor's to install a well can technically be accomplished, that fact alone does not necessarily make it feasible as the District suggests. (District at 11.) As discussed in the cases cited in Part II above, and upon which Staff relied for purposes of identifying examples of viable alternatives, many of the preferred alternatives were considered not viable based upon cost concerns that were less than $15,000. For that matter, the Commission in some of the cases recognized hardship when costs to be incurred were well below $10,000.

IV. CONDITIONS FOR ABANDONMENT

In addressing proposed conditions for abandonment, the District considered a total of three conditions of which two were proposed by Staff and the third by Intervenors: (1) that the District be required to provide water services to all customers until August 1, 2017; (2) that the District execute a document confirming Intervenor's permanent access from Buckman Road for

construction and maintenance of a water system; and (3) a permanent right to the Original Well.

i. ***Deadline of August 1, 2017***

Intervenor's object to the August 1, 2017, deadline as it is not certain that, if compelled to do so in consideration of the abandonment, Intervenors at this time have no certainty that it could obtain a loan against their property sufficient to fund the completion of a well and water system on their property. Furthermore, on the occasion they cannot obtain such a loan, then the Intervenors would be left without a water supply.

ii. ***Access right from Buckman Road***

The District objects to the access right proposed by Staff because neither the Commission nor the District possesses access over the Seymour property. Such access would be necessary to access Intervenors' property from Buckman road. With the understanding that Intervenor's object to an order of abandonment, Intervenor's would prefer such access road as it would be much easier for purposes of completing construction of a water system on their property.

iii. ***Permanent right to the Original Well***

The District objects to Intervenor's request for the District's repair of and access to the Original Well. The District objects to such request on grounds that the Original Well is not operational. The District further objects in that compelling the District to pay the costs necessary to repair the Original Well would be unjust as the damage to the well was not the responsibility of the District, but rather that of the contractor. Finally, the District claims that to compel Ironside to convey the right to the well would be unjust and unreasonable.

As demonstrated in the record, Intervenors enjoy a deeded right to water from the water system that Ironside intends to retain title to should abandonment be granted. (Intervenors/208.) In seeking a permanent right to the Original Well (or the Replacement Well as necessary) (Intervenors Brief at 24-25) Intervenors are only asking that their property right be respected.

Just as the Commission cannot compel a private party to convey property, nor can it compel a party to dispose of its real property interests either. The Intervenors request does not compel the District or Ironside to convey any interest in the system or the property on which it is located to Intervenors. Rather, Intervenors are only requesting that they do not be denied their right to water from the system. Such a condition does not require, in the case of abandonment, such a conveyance of real property interest in the District. It does require that Ironside and his successors, as owners of the water system, continue to provide him water and at rates that are reasonable.

V. CONCLUSION

As a result of the Application, Intervenors have been compelled to challenge 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. Based on the record, it is abundantly clear that no later than 2013, Keith Ironside and Valerie Meyer have had every intention to ultimately enjoy the water system for their exclusive use. The Application for abandonment, therefore, is not sought in good faith on the grounds alleged, but rather is sought solely to exclude others from receiving water from the system regardless of the hardship faced.

As the ALJ is aware, Intervenors, Mel and Connie Kroker, possess a deeded right to receive water from the water system. In consideration of Keith Ironside's and Valerie Meyer's intent to maintain the system and operate it in the future as the Buckman Water District, it is only appropriate that the Application be denied in order to ensure that the Intervenors' deeded rights are necessarily protected. Just as the Commission does not possess the authority to compel a private party to convey property interests to another, nor does it possess the authority to deny a customer's property interest for the benefit of the Applicant. To the extent that a grant of

abandonment would prevent Intervenors, Mel and Connie Kroker, continuing their deeded access to the water system, such request for abandonment must be denied. As a result, Intervenors, Mel and Connie Kroker, request that if the Application is not to be denied, but granted, such grant be conditioned to ensure that Intervenors still be entitled to receive their deeded right to water from the water system, which necessarily includes, but is not limited to, the Replacement Well. Furthermore, Intervenors request that they be assured all access necessary to complete a water system on their property should any grant of abandonment be issued.

Dated this 16th day of February, 2017.

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CERTIFICATE OF FILING AND SERVICE

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

Filing Center
Public Utility Commission of Oregon
PO Box 1088
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I further hereby certify that on the date shown below, I served a true and correct copy of the foregoing REPLY BRIEF OF MEL AND CONNIE KROKER, INTERVENORS by electronic transmission on:

Jennie L. Bricker
Jennie Bricker Land & Water Law
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☐ by first class mail, postage prepaid.
☐ by hand delivery.
☐ by facsimile transmission and first class mail, postage prepaid.
☒ by electronic transmission.
☐ by electronic transmission and first class mail, postage prepaid.

DATED: February 16, 2017.

s/ Peter D. Mohr
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Attorney for Mel and Connie Kroker, Intervenors