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Honorable Laird Noh
State Senator, District 23
Idaho State Senate
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Water Delivery to Subdivisions Located Within Irrigation
Entities

Dear Senator Noh:

You have asked for an opinion regarding Idaho Code § 31-1805 which sets forth certain requirements for water delivery in subdivisions located within irrigation districts, and Idaho Code § 31-1806 which provides for penalties for failure to comply with § 31-1805. The questions you present are:

- (1) Can county commissioners and planning and zoning commissioners be held liable both as a group and individually for failure to implement Idaho Code § 31-3805 and, hence, subject to the penalties of § 31-3306?
- (2) Can a county recorder become liable under these sections for accepting a plat for recording without compliance with the statute?
- (3) Must the requirements of Idaho Code § 42-108 be satisfied in order to complete a valid transfer of water right to satisfy the requirements of Idaho Code § 31-3805(1)?

Conclusions:

(1) and (2). A review of the language of §§ 31-3805 and 31-3806 as a whole and the Statement of Purpose of the enacting legislation of those statutes reveals that § 31-3805 is directed towards owners or sellers of property to be subdivided, and the sanctions of § 31-3806 are intended to be imposed against such owners and sellers for not taking one of the three options regarding water delivery to subdivisions afforded by the statute. Although county commissioners, planning and zoning commissioners and county recorders are charged with ensuring compliance with § 31-3805 before approving or recording a subdivision plat, the fact that a third option is provided to the subdivider in the event that a noncomplying subdivision plat is approved and recorded leads to the conclusion that the sanctions of § 31-3806 are not directed towards public officials involved in the subdivision approval and recording process.

A zoning authority's approval of a subdivision plat in absence of compliance with § 31-3805 would, however, provide adequate basis to challenge the validity of that approval.

(3). Although § 31-3805(1) affords the owner of the land to be subdivided the opportunity to comply with the statute by having the water rights appurtenant to that land transferred from the land by the owner of the water rights, it does not provide any short cut methods of effecting such transfer. The owner of the water rights must comply with all legal requirements to make a valid transfer of those rights, including compliance with § 42-108.

Discussion:

Applicability of the Statutes: Idaho Code § 31-3805 sets forth certain requirements for the delivery of water to subdivisions located within an irrigation district, canal company or similar "irrigation entity." The statute provides that one of two actions must be taken concerning water delivery before a proposed subdivision will be approved:

[N]o subdivision plat will be accepted, approved and recorded unless:

(1) The water rights appurtenant to the lands in said subdivision which are within the

irrigation entity will be transferred from said lands by the owner thereof; or

(2) The subdivider has provided for underground tile or other like satisfactory underground conduit to permit the delivery of water to those landowners within the subdivision who are also within the irrigation entity, with the following appropriate approvals:

(a) For proposed subdivisions within the incorporated limits of a city, the irrigation system must be approved by the city zoning authority and the city council with the advice of the irrigation entity charged with the delivery of water to said lands.

(b) For proposed subdivisions located outside incorporated cities but within one (1) mile outside the incorporated limits of any city, both city and county zoning authorities and the city council and county commissions must approve such irrigation system in accordance with section 50-1306, Idaho Code. In addition, the irrigation entity charged with the delivery of water to said lands must be advised regarding the irrigation system.

(c) For proposed subdivisions located in counties with a zoning ordinance, the delivery system must be approved by the appropriate county zoning authority, and the county commission with the advice of the irrigation entity charged with the delivery of water to said lands.

(d) For proposed subdivisions located in counties without a zoning ordinance, such irrigation system must be approved by the irrigation entity charged with the delivery of water to said lands.

A third option is available to the subdivider, however, in the event that a subdivision plat is approved and recorded without compliance with either subsection (1) or (2). Section 31-3805(3) first states that if such an event occurs, the

assessments of the irrigation entity will still be valid against landowners who have purchased subdivided lots, despite the fact that water cannot be delivered from the irrigation entity to their property. Subsection (3) then requires purchasers of subdivision lots to be advised that such assessments will occur:

(3) In the event that the provisions of either subsections (1) or (2) of this section have not been complied with, the assessments of the irrigation entity for operation, maintenance, construction, and other valid charges permitted by statute shall in no way be affected. However, any person, firm or corporation or any other person offering such lots for sale, or selling such lot shall, prior to the sale, advise the purchaser in writing as follows:

(a) that water deliveries have not been provided; and

(b) that the purchaser of the lot must remain subject to all assessments levied by the irrigation entity; and

(c) that the individual purchaser shall be responsible to pay such legal assessments; and

(d) that the assessments are a lien on the land within the irrigation entity; and

(e) that the purchaser may at a future date petition the appropriate irrigation entity for exclusion from the irrigation district.

(4) A disclosure statement executed by the purchasers and duly acknowledged, containing the representations required in subsection (3) of this section, shall be obtained by the seller at the time of receipt of the earnest money from the purchaser, and affixed to the proposed sales contract and a copy thereof shall be forwarded to the appropriate irrigation entity.

Section 31-3806 provides a penalty which is directed against "any person, firm or corporation who shall omit, neglect, or refuse to do any act required by section 31-3805. . . ."

Standing alone, the term "any person, firm or corporation" does seem broad enough to include zoning authorities, county recorders, and any other public officials who might play a part in ensuring that the requirements of § 31-3805 are met before a proposed subdivision is approved or recorded. However, a reading of both statutes together, along with a consideration of the legislative intent as evidenced by the Statement of Purpose of the enacting legislation leads to the conclusion that such public officials are not subject to the penalty provisions of § 31-3806.

One indication that "any person, firm or corporation" was not meant to include zoning officials and county recorders is that the identical terms are used in § 31-3805(3) which allows "any person, firm or corporation or any other person offering such lots for sale". . . to provide notice to potential buyers of subdivision lots that they will be subject to the irrigation entity's assessments and will not be delivered water. This method of compliance with § 31-3805 is available only to owners or sellers of subdivision lots. Thus, it can be argued that the penalty provisions of § 31-3806 were only meant to apply to "any person, firm or corporation" having the opportunity to take one of the three options offered by the statute.

This conclusion is bolstered by the legislative intent evidenced in the Statement of Purpose of 1976 House Bill No. 593 which created §§ 31-3805 and 31-3806:

RS 1141 provides three options in subdividing:

1. That irrigation water be transferred from the subdivision to other lands;
2. distribution of water to subdivision lots;
3. or a written statement to buyers that they will not receive water but will receive bills even though water is not delivered.

This Statement of Purpose again indicates that the statute is directed towards subdividers and provides three options to them in order to comply with § 31-3805 and avoid the penalty imposed by § 31-3806.

From the analysis above, it can be concluded that although county commissioners and planning and zoning commissioners are charged with ensuring compliance with §§ 31-3805(1) or

31-3805(2) before approving or recording a subdivision plat, the sanctions of §31-3806 are not directed towards such public officials, but are rather directed at subdividers who fail to take one of the three options offered to them by § 31-3805.

Transfer of Water Rights.

Although § 31-3805(1) affords the owner of land to be subdivided the opportunity to comply with the statute by having the water rights appurtenant to that land transferred from the land by the owner of the water rights, it does not provide any specialized procedure for such a transfer. The owner of the water rights must therefore comply with already existing laws regarding transfers of water rights, such as § 42-108, to ensure that the transfer is legally valid.

Very truly yours,



PATRICK J. KOLE
Chief, Legislative and
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PJK/mkf