

## Jean Jewell

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**From:** r. calvin cathcart [rccathcart@msn.com]  
**Sent:** Monday, July 29, 2013 10:49 AM  
**To:** Jean Jewell  
**Subject:** Case Number: FCW-W-13-01

July 28, 2013

Commissioners Marsha Smith, Paul Kjallander, Mack Redford.  
Idaho Public Utilities Commission  
P.O.Box 83720 Boise, Idaho 83720-0074

Case number: FCW-W-13-01  
Fox Creek Water and Sewer, L.L.C.

Dear Commissioners;

Re: Management of the Water System.

We have been at our home in the subdivision of Fox Creek Country Club Estates for approximately twelve years. During and before this time frame, the developer of this subdivision has had several name changes, some apparent changes of ownership and recently formed an LLC for operation of the water system which is the subject of this case (as well as a sewer system). We believe that Mr. Robert Kincaid is the sole beneficial owner of this Fox Creek Water and Sewer, LLC. The same entities active as the developer, although starting much later than our subdivision, also platted and developed an adjoining, but separate, subdivision of Fox Creek Village. The same water and sewer systems also serve Fox Creek Village.

Our property owners' association has had a long and contentious struggle with the developer to provide us with an adequate water system with sufficient water pressure, regular water testing and with a reservoir for adequate water storage and fire suppression. This struggle started years before development activity began with Fox Creek Village. The struggle required the extensive involvement of the Idaho DEQ over a period of years because the system did not meet their requirements for a public water system. Ultimately, after much administrative process and improvement of the system by the developer the DEQ determined that the water system met their requirements. This milestone in the process marked a new series of issues.

At about this time a water rights permit was acquired for the water system from the Idaho Dept. of Water Resources by the developer. The DWR permit allows a number of domestic water hookups to the system equal to the total number of lots for single family residences in the 2 subdivisions. As the process of meeting the DEQ requirements was coming to a close and the improvements to the water system were moving toward completion, Mr. Kincaid approached the Fox Creek Country Club Estates Property Owners' Association with a proposal for sharing use of the water system with the new Fox Creek Village which the developer was bringing to a stage where they could sell lots. This proposed agreement also involved sharing the expenses of operating the system. Mr. Kincaid's attorneys drafted a "Shared Well Agreement" for this purpose. The Property Owners' Association Board of Directors went along with the dubious and naïve suggestion that the attorneys were representing both the developer and the Property Owners' Association and signed the proffered Shared Well Agreement. That document was signed by the 2 parties to the agreement on October 10, 2006, and we believe it continues in force. This document, which we refer to as the Shared Well Agreement should be in you file for this case and we expect you have a copy, but if not please let us know and we will provide a copy.

Re: Terms of the Shared Well Agreement.

There are some rather unusual terms in the Shared Well Agreement. The process described for sharing the direct costs of operation of the water system consists of 2 parts. The first of these is for the cost of periodic water testing. The Shared Well Agreement provides for an equal share of the cost of this service for each residence hooked up to the water system. For the other direct costs of operation the agreement provides that such costs will be shared equally between the 2 parties to the agreement. The 2 parties expressly described in the agreement are first, the Fox Creek Country Club Estates Property

Owners' Association and second, Mr. Kincaid as a member of the LLC which was then the developer, essentially standing in the shoes of the "to be formed" Property Owners' Association of the Fox Creek Village subdivision until that association was formed.

At first impression, this 50/50 sharing of these expenses seemed favorable to the much larger, by number of lots, Fox Creek Country Club Estates. However, as negotiations continued between Mr. Kincaid and the Fox Creek Country Club Estates Property Owners' Association over the terms on which the water system would be transferred to the property owners' associations, it became clear that Mr. Kincaid would not agree to turn over the water system unless he retained the right to connect adjacent land which he owned and intended to use for multi-family and commercial purposes. This was not acceptable to the Board of Directors of the Fox Creek Country Club Estates Property Owners' Association and the impasse occurred which resulted in the current IPUC case. This intention also was not compliant with the terms of the DWR water permit.

In the meantime, nearly 7 years and continuing to the present, during the continued operation of the water system by Mr. Kincaid and his several entities ostensibly under the terms of the Shared Well Agreement the Fox Creek Country Club Estates Property Owners' Association was never able to acquire from Mr. Kincaid the financial statements of the water system despite numerous requests. The effects of this were that we were never able to tell several things about whether the operation and billing were in accord with the Shared Well Agreement. The first thing was whether the billings consisted only of the costs to be shared under the Shared Well Agreement. This problem was exacerbated about 2 years ago when Mr. Kincaid started imposing a \$5.00 per month, per user "management fee" which we don't believe was provided for in the Shared Well Agreement as a shared cost. The second thing was that we could not tell whether the costs were being shared as provided by the formula in the Shared Well Agreement.

Re: Problems with the operation of the water system.

In addition to the basic issues of whether the regular billings by the water system are in accord with the Shared Well Agreement set out above, Mr. Kincaid also requires us to pay all repair expenses to the well, pump, and reservoir, his personal draws and his attorney fees. This has been a hardship to many, since his billings are net 30, or you are threatened that your water service will be turned off. These billing practices are reflected in a letter that has been sent to Beverly Barker, Idaho PUC supervisor and Chris Hecht, investigator, copies of which are hopefully available to you.

Re: Financial Statements.

We have asked for financial statements from the water system for six years now with no success. A few days ago, the certified well operator sent the board members of our property owners' association a copy of the water system's last five years expense report only. Apparently this was furnished to the PUC at the same time. No revenue numbers were provided, nor was the method of sharing the expenses provided. Given this critical omission we don't know what expenses were actually passed on to and paid by the POA. We do know a few of these items because they were reported to us individually, such as the Lightning Strike expense in 2010, but other than these few items we are in the dark about the actual charge backs.

Issues with the expense report:

Some of the expenses seem to be inflated or misrepresented.

In the 2013 projected expenses, Robert Kincaid states that management fees charged to us will be \$2,640.00. In the Shared Well Agreement there is no provision for a management fee. Neither does the Shared Well Agreement provide for sharing the operator's finance charges, and attorneys' fees that he has projected at \$1,643.25. I have a problem with his projected stamp expenses of \$250.00, as most all billings are done electronically.

At this juncture I would like to repeat for you what it says on cost sharing in our Shared Well Agreement dated Oct. 10, 2006.(page 3):

The list of Items that will require cost sharing:

1. System maintenance, including repairs, testing, inspection and disinfection.
2. System component replacement, due to wear, obsolescence, corrosion, and
3. System improvements to increase the service life of any well component.

Stated 2012 expenses: \$22,332.88

Well repairs are listed at \$3,807.53. This has not been billed to the P.O.A. yet. Nowhere is there an accounting for what this is for. Robert Kincaid wrote checks to himself in this year, one for \$1,920.00 and one for \$2,880.00. Nowhere in the Shared Well Agreement does it state that we have to supply him with an income for owning the well. The Shared Well Agreement stipulates that we share only in the above aforementioned items. By taking these non-shared deductions, totaling \$4800.00, he has overstated his expenses by this much. Net expenses should read \$17,532.86, instead of \$22,332.88.

Stated 2011 expenses: \$17,047.70

Robert Kincaid wrote a check to himself for \$1,200.00 and called this a business expense. Therefore if you deduct this non-shared expenses from his expense report, his actual expenses were \$15,847.70 instead of \$17,047.70.

Stated 2010 expenses: \$31,916.58

Lighting Strike Expenses of \$11,224.90 were billed to the P.O.A. and paid by us. Total legal fees he passed on to us were \$5,203.00. This non-shared expenses that was passed on to us should reduce his expenses charged to us to \$26,713.58

Stated 2009 expenses: \$15,536.88. I have no issues with this year's reported expenses.

Stated 2008 expenses: \$14,934.41.

In this year we were charged a finance charge of \$95.92. I believe that our Shared Well Agreement does not stipulate that we should have to "share" in his finance charges. Postage of \$298.00. How can this be possible when everyone except a few is on e-billing? Moulton Law Firm Legal Fees were passed on to the H.O.A. in our monthly fees. (\$4,378.60). Again, I don't believe it is stipulated in our Shared Well Agreement that we have to share in his legal fees. This would reduce the expenses chargeable to us to \$10,161.89.

My calculation for the accurate expense totals for Fox Creek Water during this 5 year period is the following:

2008:	\$10,161.89
2009:	\$15,536.88
2010:	\$26,713.58
2011:	\$15,847.70
2012:	\$17,532.86

We expect that these issues are also representative of the years prior to 2008 after the Shared Well Agreement was signed, but have no data.

2013: (projected expenses \$26,401.72) This includes a dubious postage expense, a draw for himself and I don't know what else to make this so high.

We were not provided an revenue statement for the last 6 years so I would estimate his income to be 51 water users X 12 months X \$39.75 = \$24,327.00 . This amount is in excess of his actual reimbursable expenses of \$17,532.86 in 2012. Total profit for 2012 would be estimated at \$6794.14. The certified system operator has just informed us that the well pump is operating 24/7 and will wear out shortly. This cost of \$12,000.00 will be passed on to us in one lump sum if regulate Fox Creek Water and Sewer is not regulated. We are also informed that we have leaks in our reservoir and pump house. Robert Kincaid has also mentioned that he too, will raise his monthly water rates since the city of Victor raised theirs to \$53.00/month. This change by the City of Victor is intended to deal with that system's specific expenses and is not relevant to our situation. Our neighboring H.O.A.s are paying on average \$20.00 per month based on a phone survey I did. I believe that our water rates should be lowered to approximately \$26.00 a month, since this is not supposed to be a profit-making regime (according to our shared well agreement and my analysis).

I hope this analysis has been informative. My husband and I hope that you will hasten the process of regulation of Fox Creek Water.

Very Truly Yours,

Myra and Cal Cathcart  
5135 Country Club Drive  
Victor, Idaho 83455