

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of)	
MOORE BEND WATER COMPANY, INC.)	
and)	
MOORE BEND WATER UTILITY, LLC)	File No. WM-2012-0335
)	
For authority of Moore Bend Water Company, Inc.)	
To Sell Assets to Moore Bend Water Utility, LLC)	

JOINT APPLICANT MOORE BEND WATER UTILITY, LLC’S MEMORANDUM

COMES NOW JOINT APPLICANT MOORE BEND WATER UTILITY, LLC (the “LLC”), and for its memorandum of issues raised at the pre-hearing conference on August 24, 2012. The main issue discussed at the prehearing dealt with access to the well, which is located on property owned by someone not connected to the Seller Moore Bend Water Company, Inc. (the “Company”).

From the outset, although there are advantages to having the operator of the Company own the property on which the well is located, it does not appear to have hampered the current operator. There are no reports of the current operator ever having been denied access to the water provided by the well or to the well itself, for purposes such as maintenance. Therefore, it would not affect the situation adversely to have a new operator step into the shoes of the old operator and have the same amount of access as the former operator had.

Having said this, it is the LLC’s desire to purchase to property upon which the well sits. It would clear up any possible issues related to access, and would eliminate any development of the property that might affect the water quality.

In dealing with the issue of access to the water under the current situation, regardless of whether it is the current operator or the LLC or some future operator, if push came to shove, does the operator have access to the well and the water? It is the LLC’s information that the wells were made in 1961, and the development to which the wells provided water was done also in the 1960s. There has been no claim that the water supply from the wells has ever been restricted in that entire time period, regardless of who owned the property upon which the well sits, and

regardless of who ran the Company (or the water system). A clear case could be made that whoever runs the water system and had control of the well has an **easement by prescription**. The statutory period of continuous and exclusive possession is ten (10) years, which is easily met in this instance. The method for obtaining or acquiring a prescriptive easement is analogous to that of establishing title by adverse possession. Adverse possession, however, denotes title acquired by the manner of possession which a prescriptive easement is a nonexclusive right acquired by use. *Glenville v. Strahl*, 516 S.W.2d 781 (Mo. App. 1974). The requirements of a prescriptive easement therefore are:

- (1) Use for the statutory period of ten (10) years (section 516.040 RSMo.);
- (2) The use must be adverse;
- (3) The use must be under a claim of right; and
- (4) Notice to the owner of the use and the clam of right.

Sutter v. Sims 563 S.W.2d 533 (Mo. App. 1984)

While some of the elements of adverse possession in this instance might be tenuous, a clear case of such a claim could be made. For example, the ten year period does not need to be the ten years before any action to enforce the claim. *Moore v. Hoffman*, 39 S.W.2d 339 (Mo. 1931), and actual notice is not necessary. Constructive notice will suffice. *Drainage District No. 48 of Dunklin County v. Small*, 318 S.W.2d 497 (Mo. banc 1958). Nor is continuous use necessary. *White v. Ruth R. Millington Living Trust*, 785 S.W.2d 782 (Mo. App 1990). Tacking uses of different “adverse possessors” if allowable also. *Johnston v. Bates*, 778 S.W.2d 357 (Mo. App. 1989). For possession to be hostile, neither knowledge of the actual titleholder nor intent to deprive him or her of title is required. It is only necessary that the claimant intended to occupy, and did in fact occupy, the land as the claimant's own. *Glenville v. Strahl*, 516 S.W.2d 781, 782 (Mo. App. E.D. 1974).

So it seems, with 50 or so years of using the well, and running the water over the owner’s land, a strong case of adverse possession creating a prescriptive easement can be made. However, LLC believes that there is an even stronger case to be made for the right to use the well and the property the well is on. It is the LLC’s understanding that in the past, the property upon which the wells are located was owned by the same person who owned the Company, or at least closely affiliated with the Company. Somewhere along the line, the titles diverged, which it is our understanding occurred more than ten (10) years ago. This would create a clear case for

an **easement by implication**. An easement created by implication is generally found only in connection with the conveyance of property and then only with the severance of adjoining properties or the division of a single property. *Meinhardt v. Luaders*, 575 S.W.2d 213, 216 (Mo. App. E.D. 1978). Missouri courts utilize a four-factor test for the establishment of an easement by implication:

1. There must be unity of common ownership followed by a separation of title into dominant and servient estates.
2. The common owner must have constructed, altered, or artificially arranged the purported easement so as to constitute an open, obvious, and visible benefit or advantage to the claimant's property and a burden to the servient portion of the premises.
3. The use that gives rise to the easement must have continued long enough to show that it was meant to be permanent.
4. The easement must be reasonably necessary to the full beneficial use and enjoyment of the dominant estate. *Hillside Dev. Co., Inc. v. Fields*, 928 S.W.2d 886, 889

If, in fact, the property that the wells are on was at some point in time owned by the same owner (or an affiliated owner) who ran the water system, then it appears that there is a clear case of easement by implication here.

The LLC is attempting to discover the past history of the ownership of the well property, and has inquired of a title insurance company to give it the ownership history, but has not received the title information yet. Once the LLC has this information, it will be in a better position to determine if there is an easement by implication over the well property, which appears to be an even stronger claim to an easement than a prescriptive easement.

The LLC will file an amendment to this memorandum upon receiving the title information, and will serve it on all parties. Regardless of the results, the users will not be in a worse position than they are now if the applied-for acquisition is approved in the current status of no written access to the well or the water. If approved, the LLC will have the same rights to assert a claim of prescriptive easement as the current operator is.

/s/ David L. Wieland

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