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I charge a minimum/flat fee of $2,000.00 for file opening and preparation of a normal well sharing agreement, and will require a retainer of that amount to begin work. I will then track my real time and only charge more if it seriously exceeds 5 hours of time. (This only happens rarely because of a situation with unusual complexity (number of parties, lots, etc.) or the amount and quality of the "homework" information that is provided to me by the clients or their advisors is minimal or incorrect.

If I am to prepare a well-sharing agreement for you, please review the next page entitled:

"***What Noel Needs to Prepare Well Agreement***".

It describes the information I need for you to assemble so I can begin work. When that "homework" is ready, please call for an initial appointment, after which I can normally provide you with the finished document in a one or two day turn-around.

Well, Well, do they mind if you share your Well . . .

In evaluating the use of a domestic water wells here in the natural desert, it is becoming more common for parties to consider the use of shared wells, particularly in the areas where it is necessary to drill wells up to several hundred feet to find a sufficient supply of potable water.

It is important for these parties to recognize that there are four different state agencies that each enforce different sets of statutes and regulations relating to an area of concern that can have a direct impact on the use and operation of a shared well:

1. Dept. of Water Resources -- Exempt Well / Private Water Company
2. Dept. of Environmental Quality -- Semi-Public and Public Drinking Water System
3. Corporation Commission -- Public Service Corporation.
4. Dept. of Real Estate -- Subdivision Exemption

What I will do in the last 4 pages of this letter is briefly cover the nature and purpose of these four areas of regulation and the threshold considerations for when they apply to a shared well. If you feel you have crossed over any of these thresholds, and wish me to assist you in the necessary interaction with the relative agency(s), you must specifically notify me or I will presume that I am not being requested to do so, and I will limit my role to the other normal information and issues involved in the production of a well-sharing agreement applicable to your properties and situation.

Sincerely,

Noel J. Hebets
NJH:njh

Background Information – What I need to Prepare a Well Sharing Agreement

1. $2,000.00 Retainer / Minimum Fee.

2. Confirmation that client has read the letter/handout re: the 4 state agencies that can become involved with a shared well (ACC, DRE, DWR & DEQ).

3. Whether the Wellsite is:

   a. Is located on one of the major parcels with the other parcels being given an easement to use it; (Noel then uses his *Well Easement Agreement* -- most common approach); or

   b. A separate, commonly owned parcel; (Noel then uses his *Well Sharing Agreement*).

4. Do the best you can to obtain copies of the following:

   a. "Vesting" Deeds -- latest deed in chain of title -- shows current owners of record. (Get from your title company.)

   b. Any new addresses for owners of record of parcel(s) involved.

   c. Assessor's map showing parcel(s).

   d. Any recent lot split plats, maps or survey affecting the land in question.

   e. Surveys or very good legal descriptions of where the "Wellsite" and the "Waterline Easements" will go. Also the same for any water tanks or other equipment that is not located within the Wellsite or the Waterline Easements.

   f. How much of the capital improvements are already in place, and if any further payments or reimbursements are needed to reimburse any parties for the initial cost of the well and well equipment (or if the cost of the well is simply built into the prices of the parcels). Also what other capital improvements may still be needed.

   g. If the well is in, the Well Registration Number assigned by DWR.

   h. How the electrical cost of pumping the water to the surface and then to each parcel will be metered and paid for: (1.) flat rate, (2.) water meters used to split electric bill, or (3.) begin with flat rate but go to water meters later if appropriate.

   i. Who is the initial Well-Manager (person who reads the monthly meters and bills the other users for their share of the utilities and other operating costs, also normally the person on whose main meter the meter at the Wellsite is attached as a submeter; i.e. person who pays the monthly bill for the power at the wellsite).

NOTE: It may also be necessary to obtain the consent for the recording of this Well Agreement from any lender who has existing debt against any of the parcels involved. If you specifically ask for it, and bring me copies of the related deeds of trust (or mortgages), I will assist in providing you the information your lender needs, including the form we want them to sign, but it will be your job to obtain that consent and pay any processing fees required of your lender. (I have found that large modern national lenders can be about as bureaucratic as the federal government, so you would need to be prepared to exert some patience in dealing with them. They are accustomed to requests to release portions of the encumbered property from their debt, and almost don't know how to treat something as simple as beneficial as a well agreement that enhances the value of the encumbered property.)

Well, Well, do they mind if you share your Well . . .

1. Dept. of Water Resources -- Water Provider / Private Water Company

The first area of concern relates to *water quantity*, and the issue that arises is whether the well is governed by the statutes in the Groundwater Code (A.R.S. §§ 45-401 to 45-704), and the rules promulgated and procedures required thereunder.

Wells, whether shared or otherwise, which fall under the Groundwater Code, particularly those in an "active (groundwater) management area" (an "AMA"), are subject to extensive regulation, including restrictions and requirements for approval and permitting of the well before it is drilled, for monitoring, accounting and reporting of its use, and on the volume and use of the well. (The Phoenix AMA is very large, and will include any wells in the natural desert areas around Fountain Hills, Carefree, Cave Creek, New River, Black Canyon, etc.) Moreover, if the operation of the well is considered to be a "private water company," (defined in A.R.S. § 45-402 (30) as "any entity which distributes or sells groundwater") then a substantial number of additional requirements apply.

The question then is whether the shared well is wholly or partly exempted from the many restrictions and requirements of the Groundwater Code. The answer to this threshold question is found in A.R.S. § 45-454 A & B where non-irrigation wells having a pump with a capacity of not greater than 35 g.p.m. are exempted from nearly all requirements of the groundwater management act; where:

(a.) 35 g.p.m. (gallons per minute) is equivalent to 56.46 acre feet per year, (which is, roughly speaking, enough for 50 to 100 households); and

(b.) Water for non-irrigation uses, other than domestic purposes and stock watering, cannot exceed 10 acre feet per year, where:

(ii.) A.R.S. § 45-454 I (1) defines "domestic purposes" as ". . uses related to the supply, service and activities of households and private residences and includes the application of water to less than two acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock, or poultry, as such terms are defined in section 3-1201."

(iii.) A.R.S. § 45-454 I (2) defines "stock-watering" as ". . . the watering of livestock, range livestock or poultry, as such terms are defined in section 3-1201."

Even an exempt well does have to comply with a few logical requirements:

(a) In an AMA only one exempt well may be drilled or used to serve the same non-irrigation use at the same location.

(b) While your well driller will normally see to these requirements, you still must:

(i.) Use a well driller licensed by DWR;
(ii.) File a "Notice of Intent to Drill Well";
(ii.) Construct the well to certain minimum standards; and
(iv.) Have your well driller file his drilling log with DWR.

2. Dept. of Environmental Quality -- Semi-Public and Public Drinking Water Systems.
A similar area of concern relates to *water quality*, and the question is whether the well can be exempted from the specific Department of Environmental Quality regulations (R18-4-101 thru 509 -- which embody the federal clean water regulations and are administered by the county health department) and procedures required thereunder, which govern a "public water system."

In the DEQ rules a "public water system" is defined as:

> ". . . a system for the collection distribution of water to the public for human consumption which serves 15 or more service connections or which serves an average of at least 25 persons per day for at least 60 days a year."

A "service connection" is the connection of the water system at the water meter or (if no meter) at the curbstop or building inlet; so, for a residential water system, the term is equivalent to the number of residences on the system. The "persons per day" factor is intended to be standardized for the various areas of the state, but will often be determined by the individual county health official who is evaluating the system. For normal single family residential situations, you can reach the 25 persons per day limit well before you have as many as 15 houses on the system.

If your well falls into this regulated category, a qualified party must be assigned the task of being the "certified operator or owner" and a number of water quality tests much be taken on an ongoing and periodic basis, including monthly tests for coliform bacteria, tests every few years for inorganics (e.g. arsenic), volatile organics (e.g. benzene), synthetic organics (e.g. pesticides and herbicides), and gross alpha (radioactivity), and tests on a variable basis (depending on what is found) involving a special inorganic analysis for copper and lead.

A one or two house "domestic water system" is entirely unregulated by DEQ, and a similar, almost entirely unregulated category is the "semipublic water system" which includes from 3 to 14 service connections with less than 25 persons per day. While the certified well operator and ongoing testing are not required in a semipublic system, DEQ may require some periodic testing, at least for a temporary basis, if some pertinent health risk (e.g. contaminated water or a toxic spill) is discovered in the area.

One note of importance: Experienced hydrogeologists say that numerous aquifers in Arizona have been and are being polluted by industrial and agricultural chemicals, including those used on golf courses (which are not regulated as tightly as conventional agriculture). As a consequence, they say that water quality information is becoming as important as water quantity information (always a problem by itself in groundwater cases), and they recommend that water quality information be obtained on a routine basis. This means that shared well owners should agree on some type of routine water quality testing by their well manager even if they do not follow the more extensive testing schedule required for a public water system (described above).

3. Corporation Commission -- Public Service Corporation.

The next area of concern relates to regulation of the *rates charged for the water*, and the issue that arises is whether the parties providing the water are a "public service corporation" and therefore subject to rather intensive regulation by the Corporation Commission of the rates charged and other activity. Regulations that would certainly be onerous for a small shared well.

While the statutes do not define "public service corporation" the term will certainly be treated as synonymous with the definition of a "public utility company" found at Article XV, Section of the Arizona Constitution which includes:

> "All corporations other than municipal engaged . . . in furnishing water for irrigation, fire protection, or other public purposes; . ."

This broadscope definition will apply to any shared well owned by a corporation, possibly even a homeowner's association. The question is if and when it will apply to an ordinary shared well that is simply owned jointly with no corporation or corporate structure used.

While there is no precise answer, people at the Commission take the position that parties who get water from a well they own partially or completely are not getting water from a utility. They further interpret that shared ownership must be derived from an agreement among the property owners where each property owner owns a share of the well and has easements over any intervening property to connect to the well.

They may also take the positions that that none of the owners can profit from their ownership at the expense of any other owner, and that the initial set of owners cannot create additional shares of ownership, because then they would be acting as a water provider. This last position may raise questions as to whether the additional owner is adding new property to the area served by the well, or is simply purchasing a portion of the property already served by the well.

If these other criteria are met, they do acknowledge that the owners of a shared well can hire a manager to handle the administration and servicing of the shared well and distribution lines. And that the manager can be an individual, an independent company, or a property owners association.

The Commission also recommends that the well sharing agreement have clear guidelines for sharing water, operating costs, maintenance expenses, and the costs of well improvements or replacements in the event of water shortages or well failures. Also, there should be provisions for the continuing commitment or termination charge, if any, for the owner of a share who chooses to discontinue the use of his share for any reason such as drilling a private well, connecting to a public water company, or abandonment of the residence. Likewise, provision should be made for complete dissolution of the well sharing agreement, including the costs of abandonment and sealing of the well if necessary.

4. Dept. of Real Estate -- Subdivision Exemption

The last concern that arises with a shared well is with the form of *ownership of the well*, and the potential for unwittingly running afoul of the subdivision statutes by improperly creating a subdivision. The related analysis will focus on the configuration of the well; specifically, which of two normal forms of ownership of the well site is then used:

(1.) First, the ownership of the well site (the small area of land dedicated to the use of the well) can be shared by the parcel owners who will share in the use of the well. For instance, three lot owners can each share an undivided one-third interest in a fourth smaller well site. However, because the splitting of land into 6 or more parcels is considered to be the creation of a subdivision (with complex and expensive procedures involved -- A.R.S. § 32-2101 & §§ 32-2181 et. seq.), when five lot owners create and share an undivided one-fifth interest in a sixth and smaller well site, they need to obtain a exemption for that parcel from DRE so as not to run afoul of the subdivision statutes. This will be true even if the ownership of the sixth parcel is put into a property owners association or some other entity that is owned by the five parcel owners.

[Note: Even if ownership of the well site (the land) is retained to one parcel owner, the ownership of the improvements (the well itself, the pump, casing, wellhead, pumphouse, etc.) can still be shared between the various parcel owners. If so, the potential for these improvements themselves being considered as a sixth parcel could still invoke the subdivision statutes and make an exemption necessary.]

(2.) Second, the ownership of the well site can remain with a single parcel owner who gives adjacent and nearby parcel owners a easement to the well site for access to and use of a shared well thereon. In that case, the well site is not an additional parcel and will not, by itself, invoke the subdivision statutes.

Note: For a true subdivision, DRE requires the party, under A.R.S. §32-2181 C, to go to the Department of Water Resources to obtain a "Certificate of Assured 100 Year Water Supply," which can be a very difficult and expensive proposition. To provide the certificate for a new well, DWR requires an expensive geological study that is likely to fail outside of proven areas.