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Bremer v. East Greenacres Irrigation Dist.  
Appellant's Brief Dckt. 39942

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BREMER, LLC., an Idaho limited liability  
company, and KGG PARTNERSHIP,

Appellant/Plaintiff,

vs.

EAST GREENACRES IRRIGATION  
DISTRICT,

Respondent/Defendants.

Supreme Court Docket: 39942-2012

Kootenai County Case No. CV11-1921

Appeal from the District Court of the First Judicial District  
Of the State of Idaho, in and for the County of Kootenai

Honorable Lansing L. Haynes, Presiding

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**APPELLANT'S BRIEF ON APPEAL**

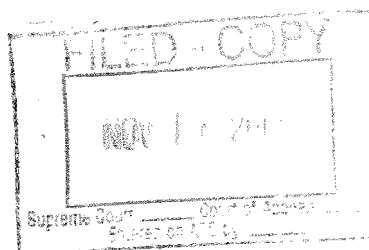
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## **I. STATEMENT OF THE CASE**

### **A. Nature of the Case**

Plaintiffs Bremer LLC, and KGG Partnership (hereinafter referred to collectively as “Bremer”), brought suit against Defendant East Greenacres Irrigation District (hereinafter referred to as “Greenacres”) seeking compensation because Greenacres had required Bremer to install water mainline extensions as a condition precedent to approval of the Bremer's additional use of Greenacres water system. Bremer alleges that the challenged mainline extensions were for the benefit of the entire water system and that Bremer cannot be made to bear the cost of the same.

### **B. Proceedings**

Greenacres moved for summary judgment on the grounds that Idaho Code §§43-330A-G granted Greenacres, "...the power to require landowners who subdivided agricultural lands for residential, commercial, industrial or municipal use to pay for the cost of extension of a pressurized system." (R. at 53) The District Court agreed and granted Greenacres summary judgment holding that "[t]he Idaho Legislature intended that irrigation districts have the power to require landowners who subdivide to pay for the costs extending the pressurized water system to the improved parcel," and that such an agreement was reached in this case. (R. at 245)

Bremer moved the District Court to reconsider on the grounds that Idaho Code §§43-330A-G only granted Greenacres the power to require landowners who subdivide to pay for the costs of improvements if those improvements were necessary for the proper distribution of water, (R. at 250), and that the record contained conflicting evidence regarding this fact. (R. at 251) The District Court denied the motion and held, "...therefore this Court finds there are to be no issues of material fact as to whether this was a proper action by the defendant because the action

was acceded to by the plaintiffs and therefore, no cause of action lies at this point. . . .” (Tr. Vol. I, p.10, Ln. 8-13)

Bremer moved the Court to alter or amend the Judgment because the Court's ruling that the "...action was acceded to by the plaintiffs..." was a ruling based on the voluntary payment rule which was not raised on summary judgment. (R. at 265) Bremer also moved the District Court to consider additional evidence on the issue of whether Bremer's agreement to install the mainline extension was voluntary and if the District Court was going to consider the voluntary payment rule. (R. at 267-268) The District Court denied the motion and reiterated its prior holding that Greenacres had the power to require landowners to bear the costs of the irrigation system improvement designed to improve the landowners subdivided and improved parcel and that such an agreement had been reached here. (Tr. Vol.II, p.14, Ln.22 - p.15, Ln.8)

### **C. Facts**

Plaintiff Bremer, LLC, operates a form injection business in Rathdrum, Idaho, on property owned by Plaintiff KGG Partnership. (R. at 24) In 2007, Bremer constructed an additional building for its business and in March of 2008, Bremer's representative, Jim Nirks, requested approval for Bremer to connect to the Greenacres system. (R. at 25, R. at 145, ¶11, R. at 57, ¶2) At some point in the process of dealing with Greenacres, Jim Nirks was told that Bremer would be required to extend Greenacres mainlines across his property and he communicated this to Gary Bremer, the owner of Bremer. (R. at 25, ¶7) Bremer had also retained Scott Jones, an engineer, to design the connection from Bremer's building/site to the Greenacres system. (R. at 24) During his interactions with Greenacres, Scott Jones developed the understanding that Greenacres was requiring the mainline extensions and that the reason for doing so was because Greenacres wanted to complete a loop of the line. (R. at 239, ¶4-5)



Looping the mainlines provides a benefit for the entire water system. (R. at 145) Greenacres did later loop the system. (R. at 144, ¶10)

Since Bremer believed the mainline extensions were unrelated and unnecessary for its connection to the system, exceeding \$80,000 to complete, he contacted his attorney, Brent Schlotthauer, who negotiated on his behalf. They were unable to make any progress on the issue. (R. at 8, ¶8) To avoid a \$6,000 per day operating loss, Bremer agreed to install the mainline extensions. (R. at 25, ¶9)

Bremer's contiguous property was already provided service by Greenacres and the existing water line could have been extended to provide service to the new building. (R. at 145-146) The cost of the challenged main line extension has reached \$48,340 thus far (excluding attorneys fees), (R. at 25), and will take an additional \$56,820 to complete. (R. at 27)

## II. ISSUES ON APPEAL

- A. Did the District Court commit error when it concluded that Bremer and Greenacres had reached an agreement pursuant to Idaho Code §§43-330A-G?
- B. Did the District Court commit error when it concluded that Greenacres had the ability to require Bremer to bear the cost of the challenged mainline extension?
- C. Did the District Court commit error by refusing to consider Bremer's additional evidence on the subject of the voluntary or involuntary nature of his commitment to pay for the challenged mainline extensions?
- D. Is Bremer entitled to attorneys fees on appeal?

### III. ARGUMENT

#### A. Standard of Review

An appeal from a grant of summary judgment is freely reviewed to determine if the pleadings, depositions, admissions, and affidavits in the file, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c); *Doe v. City of Elk River*, 144 Idaho 337, 338, 160 P.3d 1272, 1273 (2007). “The evidence is construed liberally and all reasonable inferences are drawn in favor of the nonmoving party.” citing *Id.* citing *O'Guin v. Bingham County*, 139 Idaho 9, 13, 72 P.3d 849, 853 (2003).

#### B. It was error to conclude that Bremer and Greenacres reached an agreement pursuant to the provisions of Idaho Code § 43-330A-G because that section was not complied with and Bremer's agreement to pay for the mainline extensions was coerced.

The District Court ruled that Bremer and Greenacres had reached an agreement pursuant to Idaho Code §§43-330A-G for Bremer to finance and construct the required main line extensions. This is in error because nothing in the record supports the conclusion that Bremer and Greenacres were proceeding pursuant to Idaho Code §§43-330A-G nor that any voluntary agreement was reached. Bremer's payment for the improvements was coerced.

Idaho Code §43-330A provides that when land is subdivided, and the construction of a pressurized system is necessary for the proper distribution of water to the land, the irrigation district can enter into an agreement with the owner or owners of the property for the construction of the improvements. Idaho Code §43-330B contains mandatory provisions for such contracts, and Idaho Code §43-330D requires the contract to be recorded. The alleged contract here was not in writing (R. at 245), and could not be recorded. No evidence supports a finding that Greenacres and Bremer were proceeding pursuant to Idaho Code §43-330A. Greenacres exacted the improvements from Bremer and when Bremer sued, Greenacres after the fact attempted to

justify its actions by arguing it was authorized by Idaho Code §43-330A. Furthermore, the record is clear that Bremer's acquiescence in Greenacres' demand was coerced and not the product of any agreement.

The District Court initially ruled that Idaho Code §43-330A allowed Greenacres to require landowners who subdivide to pay for the costs extending the pressurized water system to the improved parcel and that such an agreement was reached in this case. (R. at 245) After reconsideration, the District Court ruled that Bremer had no cause of action because Bremer acceded to the action. (Tr. Vol. I, p.10, Ln. 8-13) To the extent that the District Court ruled that Bremer voluntarily agreed to pay for the mainline extensions, that ruling is in error since Greenacres did not raise the voluntary payment rule on summary judgment and any such payment was the product of coercion.

Greenacres moved for summary judgment on the grounds that Greenacres had "...the power to require landowners who subdivided agricultural lands for residential, commercial, industrial or municipal use to pay for the cost of extension of a pressurized system." (R. at 53) Greenacres never argued that Bremer had voluntarily agreed to pay for the mainline extensions. The thrust of Greenacres affidavits was that the mainline extension was necessary for the proper distribution of water to Bremer's new building. Jim Sappington, Superintendent of Operations and Maintenance for Greenacres testified that:

At the time the construction was proposed, the existing water main dead ended on Hayden Avenue at the Emmett Burley parcel immediately west of the Bremer parcel. In order to obtain service from East Greenacres Irrigation District for this parcel, including the fire hydrants and sprinkler system required by Kootenai County Fire & Rescue, it was necessary to extend the existing 8" water main in Hayden Avenue east to the Bremer parcel.

(R. at 144, ¶7)

Greenacres argued that the line extensions were necessary to provide proper water distribution to Bremer's parcel, not that Bremer had voluntarily agreed to pay for the mainline extensions. The latter argument invokes the voluntary payment rule.

Under the voluntary payment rule, "...a person may not-by way of set-off, counterclaim, or direct action-recover money that he or she voluntarily paid with full knowledge of all the facts and without any fraud, duress or extortion, although no obligation to make such payment existed." *Med. Recovery Services, LLC v. Carnes*, 148 Idaho 868, 871, 230 P.3d 760, 763 (Ct. App. 2010) citing *Breckenridge v. Johnston*, 62 Idaho 121, 133, 108 P.2d 833, 838 (1940); *Chinchurreta v. Evergreen Management Inc.*, 117 Idaho 591, 593, 790 P.2d 372, 374 (Ct.App.1989); *McEnroe v. Morgan*, 106 Idaho 326, 335, 678 P.2d 595, 604 (Ct.App.1984). This rule/issue was not raised on summary judgment so it should not be the basis for granting summary judgment. "The trial court may not decide an issue not raised in the moving party's motion for summary judgment,..." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008) citing *Harwood v. Talbert*, 136 Idaho 672, 39 P.3d 612 (2001). Since was not raised, it should not have been considered, but even if this Court deems it have been raised, the evidence on summary judgment established that Bremer's agreement to pay was coerced and not voluntary.

The voluntary payment rule does not apply if the payment was coerced or made under duress. *Med. Recovery Services, LLC v. Carnes*, 148 Idaho 868, 871, 230 P.3d 760, 763 (Ct.App.2010). "The law governing economic duress is well settled. The party claiming economic duress must prove that it involuntarily accepted the terms offered by the other party, that the circumstances permitted no other alternative, and that the circumstances were the result of coercive acts of the other party. *Isaak v. Idaho First Nat. Bank*, 119 Idaho 988, 989, 812 P.2d

295, 296 (Ct. App. 1990) aff'd, 119 Idaho 907, 811 P.2d 832 (1991) citing Lomas & Nettleton Co. v. Tiger Enterprises, 99 Idaho 539, 585 P.2d 949 (1978). The existence of duress is a question of fact. Mountain Elec. Co. v. Swartz, 87 Idaho 403, 410, 393 P.2d 724, 729 (1964). The evidence in the record creates a question of fact as to whether Bremer agreed to construct the mainline extension under duress.

Gary Bremer testified:

After I learned that Greenacres was requiring me to expend somewhere around \$80,000 for improvements which had nothing to do with my company hook-up, I contacted my attorney Brett Schlotthauer. Mr. Schlotthauer negotiated on my behalf, but could not make any progress.

My business would have incurred costs of approximately \$6,000 per day if I did not move forward with the line extension as Greenacres had required, so I was coerced into installing the line.

(R. at 25, ¶8-9)

Viewing this evidence in the light most favorable to Bremer, his acquiescence to Greenacres demand that he pay for the mainline extension was the product of economic coercion and the voluntary payment rule does not prevent Bremer's claim. If this evidence is insufficient to establish that payment was not voluntary, the additional evidence Bremer asked the Court to consider pursuant to I.R.C.P. 61 is and should have been considered by the District Court, as more fully set forth below.

The affidavits of Gary Bremer (R. at 269-270) and Brent Schlotthauer (R. at 273-274) in support of Bremer's motion to alter or amend lay out the detail of the negotiation between Bremer and Greenacres regarding the mainline extension. Those affidavits establish that Bremer was not going to receive water unless he agreed to pay for the mainline extensions; that Bremer objected to that condition; and that Bremer agreed to the extensions only to mitigate the economic harm that would be visited upon him by litigating the issue before receiving water.

Considering the evidence in a light most favorable to Bremer, Bremer was economically coerced into agreeing to pay for the mainline extensions.

No evidence supports a conclusion that Greenacres and Bremer reached an agreement pursuant to the terms of Idaho Code §§43-330A-G. None of the requirements of those sections were complied with and the record is devoid of any mention of those section until Greenacres moved for summary judgment. Furthermore, no agreement was ever reached because Bremer's consent to pay for the mainline extensions was obtained by duress.

**C. Whether or not the mainline extensions were necessary for the proper distribution of water was a disputed material fact and summary judgment should not have been granted.**

Although Idaho Code §§43-330A-G was not complied with, irrigation districts do have the ability to require individual landowners to bear the cost of improvements necessary to provide for the proper distribution of water to the landowners property. However, the challenged mainline extension here were unrelated to providing the proper distribution of water to Bremer's property and were for the benefit of the entire Greenacres water distribution system. No statutory authority exists to impose this cost on Bremer.

An Irrigation District is considered a municipality for purposes of its power to assess taxes and fees. In *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326 (1995) the Idaho Supreme Court considered the exaction by the City of Coeur d'Alene of an impact fee incident to the issuance of a building permit. The Supreme Court identified two methods by which a municipality may asses charges upon the public or particular users: 1) by specific legislative action that allows a municipality to fund a particular project through assessment of taxes or fees; and 2) by exercise of its police powers pursuant to Article 12, §2 of the Idaho Constitution. 126 Idaho at 742-43, 890 P.2d at 328-29.

The Court in Idaho Building Contractors identified a two step process to determine the propriety of a municipality's exaction.

Under the first step of the analysis, we consider whether, on its face, the impact fee is a tax or a regulation. If it at least appears to be a regulation, we then reach the question of whether or not it is reasonably related to the regulated activity. If it is not reasonably related to the regulation, then it is purely a revenue raising assessment, and once again is not permissible without a specific legislative enactment.

Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene, 126 Idaho 740, 743, 890 P.2d 326, 329 (1995).

Here, there is no explanation for Greenacres action in requiring Bremer to pay for the mainline improvements so a regulatory purpose can be gleaned from the record. The exaction complained of is not a fee, and there is at least a question of fact as to whether any specific statutory authorization exists for Greenacres actions.

Article VII, §6 of the Idaho Constitution provides that the legislature may invest municipal corporations with the power to tax. It states:

The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

“Although the state legislature may not pass local laws for the assessment and collection of taxes, it may by law invest in municipal corporations, the power to assess and collect taxes for all purposes of such corporations,” City of Lava Hot Springs v. Campbell, 125 Idaho 768, 769, 874 P.2d 576, 580 (1994). “However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the Legislature.” Idaho Building Contractors Association v. City of Coeur d'Alene, 126 Idaho 740, 742, 890 P.2d 326, 328 (1985). “It is limited by what taxing power the legislature authorizes in its implementing legislation.” Sun



Valley Co. V. City of Sun Valley, 109 Idaho 424, 427, 708 P.2d 147, 150 (1985). Nothing in Idaho Code Title 43 pertaining to irrigation districts authorizes irrigation districts to require one land owner to provide for capital improvements which benefit the entire system.

The legislature has provided Greenacres with several different options to raise revenue for capital improvements such as at the mainline extension here:

- a. To issue its revenue bonds to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension of any works pursuant to Idaho Code §43-401 or Idaho Code §43-1909(d); or
- b. Call a special election to submit the issue of whether or not a proposed construction project should be pursued to the election, Idaho Code §43-329 and if approved, then levy an assessment pursuant to Idaho Code §43-330; or
- c. Enter into a contract with a private land owner for the construction of a pressurized system for the proper distribution of irrigation water pursuant to Idaho Code §43-330A; or
- d. To assess special assessments when the subdivision of land within the district has not made adequate provision for the proper distribution of water within its boundaries, or when an owner of irrigation works fails to maintain those works or when 50% of the owners within a tract of land request that the board provide for the proper distribution of water thereto or to any tract therein. Idaho Code §43-331; or
- e. To utilize reserves accumulated through the collection of hook-up fees and use fees authorized by Idaho Code §43-701(4) or 43-1905 and Viking Const., Inc. v. Hayden Lake Irr. Dist., 149 Idaho 187, 197, 233 P.3d 118, 128 (2010).

In this case, Greenacres claims that Idaho Code §§43-330A-G authorizes Greenacres to enter into an agreement with Bremer for the construction of a pressurized system. These code sections only allow such an agreement if improvements are for the proper distribution of water to the property. Idaho Code §43-330A. Whether or not the improvements are necessary for the proper distribution of water is determined by the board acting under the authority granted to it by Idaho Code §43-331 which provides, "...When a parcel of land lying within an irrigation district is subdivided and the owner has made no provisions which in the opinion of the board of directors is adequate for the proper distribution of water thereto,..." (Idaho Code §43-331(a)), "...the board may construct, repair or maintain such improvement, and levy and collect an assessment upon all tracts specially benefited thereby..." (Idaho Code §43-331(b)).

If the board determines that inadequate improvements exist to provide for the proper distribution of water, the board may either provide for the improvements and assess the benefited parcels, or enter into an agreement to have the benefited parcels pay for and construct the improvements. In either case, the improvements must be necessary for the proper distribution of water and in this case, the evidence was conflicting as to whether the improvements were necessary for the proper distribution of water.

Jim Sappington from Greenacres testified that the mainline extensions were required for proper fire flow, (R. at 144, ¶7), as did Greenacres' Manager, Ron Wilson. (R. at 57, ¶4) However, this evidence was directly controverted by Bob Skelton of Advanced Fire Systems, Inc., who designed Bremer's fire suppression system. He testified that the mainline extension was not necessary for proper fire flow. (R. at 197-198) In addition, Jim Sappington's affidavit reveals that the mainline already on Bremer's adjacent property could have been used to provide service to Bremer's new building. "To supply water to the new building adequate to support the

fire hydrants and sprinkler system from McGuire mainline, it would have required the mainline be extended cast (sic) through the Bremer property to the rear of the new building with an extension out to Hayden Avenue for placement of the hydrants.” (R. at 145, ¶11).

Lastly, Greenacres representatives informed Scott Jones that the reason Greenacres was requiring the mainline extension was because Greenacres wanted to loop the mainline, (R. at 239, ¶4-5), which Greenacres later did so. (R. at 144, ¶10) Looping the mainline was for the benefit of the entire system, (R. at 144, ¶10), and not necessary for the proper distribution of water to Bremer's new building.

Idaho Code §43-331 gives Greenacres the ability to impose the costs of improvements if those improvements are necessary for the proper distribution of water to a subdivision. Whether or not the mainline extension was necessary for the proper distribution of water to Bremer's parcel was a disputed material fact and it was error for the District Court to grant Greenacres summary judgment.

**D. The District Court should have considered Bremer’s additional evidence regarding the voluntary nature of his agreement to pay for the challenged mainline extensions.**

To the extent that the District Court ruled Bremer voluntarily agreed to pay for the mainline extension because the existing evidence on summary judgment was insufficient to establish that Bremer did not voluntarily agree for the same, then the District Court should have considered the additional evidence, as should this Court if deemed necessary.

The District Court decision to reopen a case and admit additional evidence is reviewed for an abuse of discretion. *Robert V. De Shazo & Associates v. Farm Mgmt. Services, Inc.*, 101 Idaho 154, 155, 610 P.2d 109, 110 (1980).

Greenacres moved for summary judgment on the grounds that Idaho Code §§43-330A-G granted Greenacres, "...the power to require landowners who subdivided agricultural lands for residential, commercial, industrial or municipal use to pay for the cost of extension of a pressurized system." (R. at 53) Greenacres did not argue that Bremer had voluntarily agreed to pay for the mainline extensions so Bremer did not focus on the negotiations surrounding the mainline extension.

After the District Court ruled that Bremer voluntarily agreed to the mainline extension, Bremer attempted to put on evidence to refute the same, showing his ongoing negotiations with Greenacres displayed an involuntary act. The District Court denied the motion because it did not believe the additional facts established mistake, surprise, or excusable neglect. (Tr.Vol. II, p.16, Ln. 1) The District Court did not clarify if the additional evidence would have changed its ruling, but if it would have, the additional evidence should have been considered.

Idaho Rule of Civil Procedure 60(b)(1) permits a Court to vacate a Judgment and allow additional evidence based on mistake, surprise or excusable neglect. "Erroneous and misleading acts by the court or the opposing party are plainly among the circumstances that merit consideration." *State, Dept. of Law Enforcement By & Through Cade v. One 1990 Geo Metro, VIN 2C1MR2464L6012694*, 126 Idaho 675, 681, 889 P.2d 109, 115 (Ct. App. 1995). Bremer is certainly not suggesting that either the Court or counsel did anything to intentionally mislead Bremer, however, nothing in Greenacres motion for summary judgment implicated the voluntary payment rule. If the District Court did rely on the voluntary payment rule, it would be considered a surprise to Bremer because it was not raised on summary judgment. Bremer was not on notice that it needed to focus on the voluntary or involuntary nature of its commitment to install the mainline extension.

The voluntary payment rule was not raised on summary judgment and in fairness if the rule is to be considered, then additional evidence brought by Bremer should be considered on the issue. It was error for the District Court to refuse to consider Bremer's additional evidence.

**E. Bremer is entitled to attorneys fees on appeal**

The exclusive means for an award of attorneys fees in a case having a taxing district as a party is Idaho Code §12-117. *Smith v. Washington County Idaho*, 150 Idaho 388, 392, 247 P.3d 615, 619 (2010). Attorneys fees may be awarded pursuant to that section only if Greenacres acted without a basis in law or fact. *City of Osburn v. Randel*, 152 Idaho 906, 909, 277 P.3d 353, 356 (2012).

In this case, it is clear that a material question of fact exists which prevented the granting of summary judgment. That question being whether or not the mainline extension was required to provide the proper distribution of water to Bremer's parcel. Bremer is entitled to attorneys fees on appeal.

#### IV. CONCLUSION

Considering the facts in a light most favorable to Bremer, Greenacres required Bremer to install a mainline extension which was unnecessary to provide water to his new building. Greenacres has attempted to justify the action by arguing that Greenacres reached an agreement with Bremer pursuant to Idaho Code §§43-330A-G, but it is clear that neither party was proceeding pursuant to those statutes and any acquiesce by Bremer was the product of economic coercion.

Greenacres does have the ability to require landowners to bear the cost of improvements necessary to provide proper water distribution to a landowners parcel, but only if the improvements are necessary to provide for the proper distribution to the parcel. Whether or not Bremer's property required any such improvements is a material, disputed question of fact and it was error for the District Court to grant Greenacres summary judgment.

This Court should reverse the holding of the District Court dismissing Bremer's cause of action and remand the matter to the District Court for further proceedings.

DATED this 14<sup>th</sup> day of November, 2012.



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ARTHUR M. BISTLINE  
Attorney for Appellant/Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14<sup>th</sup> day of November, 2012, I served a true and correct copy of the following APPELLANT'S BRIEF by the method indicated below, and addressed to the following:

Susan P. Weeks  
JAMES, VERNON & WEEKS, PA  
1626 Lincoln Way  
Coeur d'Alene, ID 83814

- |                                     |                             |
|-------------------------------------|-----------------------------|
| <input checked="" type="checkbox"/> | Regular mail                |
| <input type="checkbox"/>            | Certified mail              |
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| <input type="checkbox"/>            | Facsimile to (208) 664-1684 |
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| <input type="checkbox"/>            | Hand Delivered              |

  
JENNIFER JENKINS