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Department of Water Resources

Attorney for Claimant

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

* * * * *

In Re: SRBA

Case No. 39576

Subcase: 36-00003B

**CLOSING ARGUMENT
AND PROPOSED FINDINGS
OF FACT**

I. Introduction.

The Claimant, Kingston Properties LP, submits this closing argument and proposed findings of fact in support of the conclusion that Kingston owns the water right at issue.

The sole issue in this case is whether Barbara Gardner, a previous owner of the water at issue, effectively conveyed the water right to Dave Kingston before signing a quitclaim deed to her children in July of 1998.

The Court should conclude Ms. Gardner effectively conveyed the water to Kingston, including by executing an agreement to convey the water on August 21, 1996, by executing a document assigning the water to Kingston on October 17, 1997, and by accepting and recording a license to use the water, which acknowledges Kingston is the owner of the right.

This Court should decline to hold that Maria Yvonne Anderson, one of Barbara Gardner's children and the objector in this case, may deprive Kingston of ownership, either under a July 2, 1998 quitclaim deed from her mother or for other reasons.

In short, the documents and testimony in this case show Gardner intended to and did convey the water right to Kingston in exchange for continued use of 12 inches of water, if needed, and Kingston's maintenance of an access road which divides the Kingston property from that owned by Ms. Anderson.

II. Proposed Findings of Fact.

In 1932, the Federal District Court of Idaho entered a decree concerning the water right at issue in this case. During the late 1980's and early 1990's when the Idaho Department Of Water Resources (IDWR) was taking claims in Snake River Basin Adjudication, it designated the third right listed in the 1932 decree as the 36-00003 right.

The 36-00003 water right was, at the time of the 1932 decree, appurtenant to a ranch comprised of hundreds of acres, known as the Buckeye Ranch.

Over the years, the Buckeye Ranch property has been divided into smaller parcels, which were sold by the family who owned it, the Gardner's.

To reflect its understanding of how the water right was divided as these parcels came into new ownership, IDWR assigned letter suffixes to the 36-00003 water right as part of its claims taking function in the SRBA .

By 1996, the time frame pertinent to the ownership issue, Barbara Gardner had sold the western part of the Ranch. In 1995, the Bothwells and Wickhams bought that ground, including all appurtenances. Exhibit 6. In turn, they conveyed it to David Kingston and his wife, including all appurtenances and "along with Water Right Number assigned by IDWR 36-00003B." Exhibit 7. Under the 36-00003 right, particularly the 03B designation, 358 inches (7.16 c.f.s.) of water right is appurtenant to the western part of the Ranch.

Consequently, as Exhibits 6 and 7 show, Kingston had acquired (1) all of the water right designated by IDWR as "36-00003B" and (2) those parts of Lots 4, 5, and 17 within Section 27 located "West of the access road" before 1996.

In 1996, Barbara Gardner owned parts of Lots 4, 5, and 17 east of the access road. See, exhibits 2, 3, and 4.

On August 21, 1996, Barbara Gardner signed an agreement which contains five significant statements:

1. She is "trading [with Kingston and Cash] 134 shares of Buckeye Ditch water delivered from source (Billingsly Creek) for road maintenance and graveling of access road between our properties. "
2. She is "transferring 134 inches of water delivered from the source (Billingsly Creek) which is part of my decreed Buckeye Ditch water to Dave Kingston and Judy Cash, owners of the land described below [which is the Western portion of the Ranch including] Lots 4, 5 and 17 West of access road. "
3. "Subject to this agreement Barbara Gardner (or any owner of her property) will be able to use 12 inches of Dave Kingston and Judy Cash's water, if needed .
4. " This agreement is to run with the land forever. " That land which Barbara Gardner owned and on which to 12 inches of use would be allowed includes Lot 4 North of the Buckeye and Lots 5 and 17 East of the access road on Buckeye Ranch.
5. Water Right numbers in Snake River Basin Adjudication before sale property:
(Right - 36 - 00003B)(Robert B. Gardner)(Barbara Gardner)
(Right - 36 - 00003J) (Barbara Gardner)

Dave Kingston has 358 inches.

The above agreement, Exhibit G, was recorded in Gooding County on May 3, 1999 at the request of Parker Warr.

Judy Cash is a realtor who acquired an interest in the Kingston property sometime after the Kingston purchase from Bothwells/Wickhams. Ms. Cash is familiar with Exhibit G because she prepared it with Barbara Gardner. The purpose of Exhibit G was to memorialize the terms of the agreement between Ms. Gardner, Mr. Kingston, and Ms. Cash, which would then be drafted into more formal documents by legal counsel.

Both Ms. Cash and Mr. Kingston testified that they understood and intended the reference in Exhibit G to the "358 inches" of water to be clarification that Kingston already owned that amount, which was not part of the 134" being conveyed by the agreement. See Exhibit 7.

According to Ms. Cash and Mr. Kingston, the agreement made with Ms. Gardner in the amount 134 inches was in that amount because it was the maximum amount of 36-00003 water they understood Ms. Gardner owned. In other words, she intended to sell and they intended to buy all water 36-00003 water from the property.

It was a large amount in relationship to the acres she owned because she had only conveyed one inch per acre in other, recent sales of parcels of the Buckeye Ranch based on the understanding that IDWR would only recognize one inch per acre in the SRBA. In other words, even

though the 36-00003 right arguably supplied more than one inch per acre to the various parcels of the Ranch, Ms. Gardner had been unwilling to warrant more than that in previous sales. For example, in 1993 Ms. Gardner warranted only "14 shares of Buckeye ditch water" when selling 14 acres to the Babingtons. Exhibit 5.

Mr. Kingston testified he understood and had agreed that he would; (1) be acquiring 134 inches of water in addition to the 358 inches he already owned; (2) would be granting a perpetual license for Ms. Gardner and subsequent owners to use 12 inches of that water on the property she retained; (3) would be responsible for maintaining the common access road and paying the Buckeye ditch assessments associated with the rights and; (4) would hold the remainder of the 134 inches available to the other owners, like the Babingtons, to make up the difference between the one-inch per acre those owners had acquired by warranty deed and the actual, per acre amount they used.

Mr. Kingston performed each of those obligations, with the exception of paying Buckeye ditch assessments for which he has never been billed. He testified that he will pay such assessments if and when he is billed.

On April 15, 1997, Kingston executed a document entitled "Perpetual License To Use Water" dated February 17, 1997. Exhibit H. It provides Kingston is to pay ditch assessments, Gardner is to maintain feed

ditches, and Gardner and her successors enjoy the perpetual right to use 12 inches of water on the property which is now owned by Andersons. Ms. Gardner's attorney, Mr. Nungester, who was at that time with the same law firm as Mr. Brown, who is now Kingston's counsel, prepared this document.

On July 7, 1999, the Perpetual License To Use Water was recorded at the request of Barbara Gardner. At trial, Ms. Anderson testified that she also attempted to have or had this exhibit recorded in the Gooding County during that same time frame.

On October 17, 1997, Barbara Gardner again assigned to David O. Kingston the 134 inches of water. Exhibit E. The document was prepared by Ms. Gardner's attorney, Mr. Nungester, as is indicated by his initials "WLN" at the bottom of the document. It states the 134 inches being assigned is water that was appurtenant to "Lots 3 and 4 N of the access road and Lots 5 and 17 E of the access road," - the only land Ms. Gardner owned. "

It further provides the said water right " shall be transferred from water right No. 36-00003B Snake River Basin Adjudication ." This document was recorded in Gooding County at the request of Kingston on November 3, 1997.

During the spring of 1998, Ms. Anderson became aware that her mother was ill. On June 4, 1998, Ms. Anderson and her brother were

appointed the legal, temporary guardians of Ms. Gardner based on representations that she was not competent to handle her own affairs. Exhibit 22.

On July 2, 1998, while Ms. Anderson was a co-guardian of the supposedly incompetent Barbara Gardner, Barbara Gardner signed a quitclaim deed conveying all of her land to Ms. Anderson and her brother. The land includes "Lots 3 and 4 North of Buckeye Ditch and East of Access Road and Lots 5 and 17 East of Access Road Buckeye Ranch Subdivision." Exhibit 9.

Under this quit-claim deed, the grant is "for love and affection," and comes with appurtenances. It was recorded on July 6, 1998. Water under the 36-00003 right was not, however, an appurtenance at this time, as it had all been conveyed off of the property.

In short, on August 21, 1996 Barbara Gardner had already effectively conveyed all of her interest in water right 36-00003 that was appurtenant to Lot 4, north of the Buckeye, and Lots 5 and 17, east of the access road.

At the trial held September 30, 2002, IDWR Senior Agent Steve Clelland testified as follows:

(a) it was his job to assign letter suffixes to divisions of the 36-00003 right based on his understanding of ownership of law and

documents provided to IDWR, and he made the ownership recommendation to Kingston in the amended director's report.

(b) IDWR ultimately recommended and reported Kingston as the owner because he understood from " the court " that exhibit G constituted a legally enforceable conveyance to Kingston, notwithstanding his own belief that the document may lack clarity or particularity he usually encountered in deeds.

(c) the " 36-00003J " designation had been previously assigned to water right claims appurtenant to Barbara Gardner's property east of the access road. IDWR later dropped the 03J designation and assigned the 03K designation to that property. This re-designation occurred at the same time IDWR assigned the 03L and 03M designations to claims made by the Babingtons and Simcoes, because he understood they were claiming part of the 134 inches of water.

Procedurally, this 12" of water, its place of use on the land east of the access road on Lots 4, 5 and 17 (and formerly owned by Ms. Gardner),and other elements are as set forth by written stipulation.

The parties also do not dispute that, if the water was duly conveyed to Kingston, that Kingston Properties LP , a holding company of Dave Kingston, now owns it.

III. Argument.

Based on the undisputed facts identified above, the court is respectfully requested to resolve the ownership issue in favor of Kingston for the following reasons:

1. Barbara Gardner effectively conveyed all of her interests in water right 36-00003 that were appurtenant to Lot 4, north of the Buckeye, and Lots 5 and 17, east of the access road on August 21, 1996.
2. To the extent to the October 1997 assignment and February 1997 license could be construed to mistakenly attempt to convey 36-00003B water or inaccurately described the lots from which Gardner was conveying the water, there was a mutual mistake of fact.
3. Contrary to the Anderson's position, the above transactions conveyed the water right to Kingston before execution of the July 2, 1998 quit claim deed in favor of Yvonne.

1. Barbara Gardner effectively conveyed all of her interests in water right 36-00003 that were appurtenant to Lot 4, north of the Buckeye, and Lots 5 and 17, east of the access road on August 21, 1996.

In interpreting the deeds, contracts and other documents which are part of this case, the primary aim of the court is to ascertain the intent of the parties at the time the documents were made or executed. *Opportunity, LLC v. Osse Warde*, 136 Idaho 602, 38 P.3d 1258 (2002).

Where possible, the intent of the parties should be ascertained from the language of the agreement itself, which is the best indication of their intent. *Id.*

It is only when the intent of the parties cannot be understood from the language of the writing that the court considers extrinsic evidence, with intent becoming a question of fact. *Id.*

The application of these rules of construction to Exhibit G leads to the conclusion that Kingston, Judy Cash and Barbara Gardner fully intended to presently convey the 12 inches of water at issue in this case to Kingston.

Exhibit G contains all material terms, including the identification of the three parties involved, the identification of Barbara Gardner as the owner of the lots at issue in this case, and, expressly states, in the present tense, that she is transferring the 134 inches of water appurtenant to the property.

On the other hand, the document neither states nor reasonably implies the transfer of 134 inches of water involves anything but the rights appurtenant to Ms. Gardner's property east of the access road.

Further, Exhibit G recites good and valuable consideration for this exchange, including road maintenance and graveling of the access road between the properties, which Kingston undisputedly has done. It further states that Ms. Gardner is receiving the right to use 12 inches of the water in exchange.

Apparently, Andersons contend the 12 inches was not involved because there is no designation or recitation to the "03K" designation. However, this argument is nothing more than an unsupportable attempt to ask the court to find such was necessary when it is not. It further ignores

the fact that undisputed testimony establishes that the only water right Ms. Gardner has claimed or owned at the time was that water.

Moreover, the Exhibit specifically acknowledges that the water in Ms. Gardner's name before the sale of the property included was the "03B" and the "03J" water. It further acknowledges Kingston already owned the 358 inches, which no one disputes is the "03B" right.

Combining with this is what the court's records already show and What Mr. Clelland confirmed – The "03J" designation referenced in the document was ancestor designation to the "03K" water covering the land at issue in this case.

Therefore, the court is respectfully requested to hold that Exhibit G, both on its face and under the undisputed evidence presented, conveyed the water right at issue from Barbara Gardner to Kingston and Cash.

2. To the extent to the October 1997 assignment and February 1997 license could be construed to mistakenly attempt to convey 36-00003B water or inaccurately described the lots from which Gardner was conveying the water, there was a mutual mistake of fact.

First and foremost, Kingston maintains that Exhibit G effectively transferred ownership of the water at issue. Alternatively, the court should hold that any failure to transfer such water resulted from a mutual mistake of fact.

Because there is clear and convincing evidence that the parties intended to convey the water at issue to Kingston, and did not intend to convey O3B water, the Court should reform the Exhibits. See, *Collins v. Parkinson*, 96 Idaho, 294, 527, P2d. 1252 (1972)(a court will reform instruments, including deeds, where there is clear evidence of a mutual mistake in the preparation of the deeds.)

In this case, the testimony of Cash and Kingston clearly establishes that they intended this trade. Ms. Gardner Has admitted this was her intent by signing the document itself.

To the extent the latter license and assignment of right reference the O3B right, they are clearly contrary to the evidence, and even contradict the themselves. For example, the only land M.s Gardner owned from which she could be conveying water was that east of the access road on Lots to which this right is appurtenant.

The water appurtenant was only cognizable under the 3J right which latter became the 3K right.

Consequently, while Kingston continues to maintain that Exhibit G was a valid, effective present transfer of water and not merely an agreement to transfer in the future. If the Court disagrees, it should nevertheless hold that clear evidence mutual mistake of fact in referencing the water right involved as O3B water, as the clear intent is otherwise.

3. Contrary to the Anderson's position, the above transactions conveyed the water right to Kingston before execution of the July 2, 1998 quit claim deed in favor of Yvonne.

The Andersons' may argue they own the right because Yvonne lacked notice the water had already been conveyed to Kingston, either when Exhibit 9 was executed by Ms. Gardner on July 2, 1998 or when it was recoded on July 6, 1998. The Court should reject this argument for several reasons

First, for reasons explained above, all water appurtenant to Lots 4, 5 and 17 **had already been conveyed** to Kingston.

Second, Exhibit E, the assignment of water from Gardner to Kingston, was previously recorded on November 3, 1997. Thus, Yvonne Anderson had constructive notice that water was being traded for the right to use water on the land involved.

Any argument that such notice was ineffective because Exhibit E references the 03B right or incompletely describes Lot 4 is unpersuasive. Notwithstanding any ambiguity or inaccuracies, the recording of Exhibit E did put Yvonne on notice that water from the property had been assigned to Kingston. *Glove v. Brown*, 32 Idaho 426, 184 p. 649, (1919) *(one claiming title to land is chargeable with notice of any matters he might have learned by inquiry about the recitals in the document, not just those matters clearly resolved by it).*

Third, as the duly appointed co-guardian of Barbara Gardner at the time Ms. Gardner purportedly conveyed the property to her, Yvonne stood in Barbara's shoes. Thus she is fully and fairly charged under the law with all notice that Barbara had, including notice of exhibits G, H and E.

Fourth, as Special Master Haemmerle already pointed out in his footnote to the Order Denying Anderson's Motion on Motion to Alter or Amend, dated June 7, 1999, Yvonne is not entitled to protection as a bona fide purchaser. She did not acquire the property in July of 1998 without notice even though she recorded that instrument before Exhibit H was recorded.

Exhibit E and H had been previously recorded. Any lack of notice she professes can only be attributed to her election to rely on some unproduced title report, which failed, according to Yvonne, to inform her that those Exhibits has been recorded.

Furthermore, Yvonne acquired the property in exchange for "love and affection" not as a bona fide purchaser. Thus, while that consideration is "good consideration" it is not "valuable consideration" under the statutory meaning. *See, I.C. 55-812; Gardiner v. Gardiner, 36 Idaho, 664, 214 p. 219 (1923) (holding that, under a predecessor statute of the same meaning, "love and affection" does not constitute valuable consideration passing property if the grantor has already executed and delivered a deed to another).*

Accordingly, the execution and delivery of exhibits G and E have effectively conveyed the water to Kingston.

Fifth, it is undisputed that either Barbara Gardner, Yvonne Anderson, or perhaps both, have availed themselves of the benefits of Exhibit H, the license to use water Kingston owns on the property east of the access road, by recording the document in July of 1999. This unequivocal act of publishing the license constitutes acceptance and ratification of the right to use something Kingston owns.

It constitutes acceptance for oneself of the bargain under which Kingston acquired the Buckeye ditch water appurtenant to Lots 4, 5, and 17 east of the access road. *Brown v. Miller*, 22 Idaho 307, 125 P. 981 (1912) (*one who participates in a transaction knowingly or receives the benefit of it is charged with notice under the law as to the whole of the consideration and circumstances involved*). Neither Gardner, nor the Andersons, all of whom have accepted the benefits of the bargain, may now repudiate or disavow it.

In sum, for each of the reasons stated above, there is no merit to Anderson's assertion they are entitled to the right because the July 2, 1998, quitclaim deed was recorded first.

IV. Conclusion

The undisputed evidence in this case, including exhibit G, establishes that Kingston, Cash, and Gardner clearly intended to

exchange ownership of the water right for the right to use 12 inches of that water and the benefit of having the common access road maintained. For this reason and the others discussed, the court should effectuate the clear intent of the parties by holding Kingston owns the water.

Respectfully submitted this 28 day of October, 2002.

HUTCHINSON & BROWN, LLP.



PATRICK D. BROWN
Attorney for Claimant

CERTIFICATE OF SERVICE

I certify that on the 28th day of October, 2002, I caused to be served a true and correct copy of the foregoing Closing Argument and Proposed Finding of Fact to the following persons, in the manner indicated and addressed as follows:

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Snake River Basin Adjudication
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