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DEPARTMENT OF
WATER RESOURCES

Attorney for Robert E. Fuchs (Deceased) and Donna T. Fuchs

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

)
) SUBCASES: 21-10557 and 21-13013
)
) **OPPOSITION TO MOTION FOR**
) **SUMMARY JUDGMENT**
)

Robert E. Fuchs (deceased) and Donna T. Fuchs (collectively "Fuchs"), by and through counsel of record, hereby submit this Opposition to Motion for Summary Judgment filed by RLF I, LLL, RLF II, LLC, RLF III, LLC, RLF IV, LLC (collectively "RLF") and Del Kohtz. For the following reasons, the Motion for Summary Judgment must be denied.

INTRODUCTION

There are genuine issues of material fact which are disputed in this case. As a result, the Special Master must deny the Motion for Summary Judgment.

It should also be noted that that this matter involves two separate subcases, i.e. 21-10557 and 21-13013. RLF and Kohtz, who have filed the instant Motion for Summary Judgment, are parties to subcase 21-13013. They do not appear to be parties to 21-10557. George Nedrow is the claimant in subcase 21-10557. Mr. Nedrow has not filed a Motion for Summary Judgment. Therefore, summary judgment cannot be entered in subcase 21-10557.

STANDARD OF REVIEW

When considering a motion for summary judgment, all disputed facts are to be liberally construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res.*, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007). Summary judgment is appropriate only when the pleadings, depositions, affidavits and admissions on file show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*; see also I.R.C.P. 56(c). If there are conflicting inferences contained in the record or reasonable minds might reach different conclusions, summary judgment must be denied. *Am. Falls Reservoir Dist. No. 2*, 143 Idaho at 869, 154 P.3d at 440.

APPLICABLE LEGAL STANDARD

This matter focuses primarily upon a deed executed in 1947 between Edgar Barney and his son Earl Barney, which transferred from Edgar to Earl a parcel of real property identified as Lots 3 and 4 of Section 7 "Together with 100 inches of Silkie Decreed water." It is the Fuchs position that this language did not transfer certain water that had previously been appurtenant to this property. The law concerning whether appurtenant water rights pass with property is well established in Idaho and has recently been reiterated by the Idaho Supreme Court in *In re SRBA Case No. 39576 (Subcase Nos 55-10135, 55, 11061, 55-11385 and 55-12452)*(aka "*Joyce Livestock Company v. United States*"), ____ Idaho ____, 156 P.3d 502 (2007). In that case, the Idaho Supreme Court held the following:

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention "appurtenances." Thus, the inquiry is not whether there is evidence indicating that the grantor intended to convey the water rights with the land. Rather, the inquiry is whether the water rights were expressly reserved in

the deed conveying the land or whether there is clear evidence that the parties intended that the grantor would reserve them.

Id. at ___, 156 P.3d at 515 (citations omitted).

ISSUES OF MATERIAL FACT

The Rexburg Decree decreed 275 inches (5.5 cfs) of water with a priority of 6/1/1890 to Z. Sunberg for use upon Lots 1, 2, 3, and 4 in Section 7, T8N, R42 (hereinafter “Sunberg Water Right”).¹ Pursuant to a deed dated 10/18/1927, Edgar Barney became the owner of these lots.² The Sunberg Water Right transferred to Edgar Barney as appurtenant to these lots.

These lots were merely a small portion of a much larger ranch owned by Edgar Barney along and near the Snake River.³ Additional portions of the ranch were located in Section 6, T8N, R42 and Section 12, T8N, R41.⁴ The entirety of the ranch was irrigated for purposes of growing hay, grain, and potatoes, and for purposes of livestock watering.⁵ At the time, the water used to irrigate the ranch was diverted primarily through what was known as the “Silkey ditch.”⁶

Edgar Barney was very concerned about his ranch.⁷ It was his desire that the ranch pass to his son Earl Barney upon Edgar Barney’s death and that the ranch stay together as long as possible.⁸ As a preliminary step towards this goal, Edgar transferred Lots 3 and 4 of Section 7 to his son Earl pursuant to a deed dated 4/10/1947.⁹ A map indicating the general boundary of Edgar’s ranch and the general boundary of Lots 3 and 4 of Section 7 is attached to the Affidavit

¹ See Affidavit of Counsel at paragraphs 2, 3 and 4 (Exhibits A, B and C).

² See Affidavit of Counsel at paragraph 6 (Exhibit E).

³ See Affidavit of Keith Barney; *see also* Affidavit of Counsel at paragraphs 8 and 9 (Exhibits G and I).

⁴ *See id.*

⁵ See Affidavit of Keith Barney.

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*

of Keith Barney.¹⁰ The 4/10/1947 deed stated that Lots 3 and 4 were transferred to Earl Barney "Together with 100 inches of Silkie Decreed water" which is equivalent to 2.0 cfs.¹¹

According to Keith Barney, who is the son of Earl Barney and the grandson of Edgar Barney, the term "Silkie Decreed water" as used in the 4/10/1947 deed did not refer to water diverted in the "Silkey ditch."¹² Rather, it is the Fuchs' contention that the term "Silkie Decreed water" refers to water "Decreed" to "J.R. Silkie" in the Rexburg Decree (hereinafter "J.R. Silkie Water Right").

RLF and Kotz correctly acknowledged in their memorandum that the J.R. Silkie Water Right was appurtenant to Lot 2, NESE, SESE, and SWSE of Section 12, T8N, R41E (hereinafter "J.R. Silkie Property"). Keith Barney believes that the J.R. Silkie Property was at one time part of the Barney ranch owned by his grandfather.¹³ Because it appears from Keith Barney's affidavit that Edgar owned the J.R. Silkie Property, he also owned the J.R. Silkie Water Right and was empowered to transfer ownership of the J.R. Silkie Water Right to Earl Barney when transferring ownership of the adjacent Lots 3 and 4 of Section 7 "Together with 100 inches of Silkie Decreed water."

Therefore, under the 4/10/1947 deed, Edgar transferred the J.R. Silkie Water Right to his son Earl and retained the Sunberg Water Right for himself and his ranch. Having retained the Sunberg Water Right, Edgar filed a transfer application dated 4/14/1950 which was approved by IDWR to transfer most of the Sunberg Water Right.¹⁴ Notably, the transfer application was only in the name of Edgar Barney and was signed by only Edgar Barney. Had Edgar not retained the Sunberg Water Right, he could not have on his own accomplished this transfer.

¹⁰ See *id.*

¹¹ See Affidavit of Counsel at paragraph 7 (Exhibit E).

¹² See Affidavit of Keith Barney.

¹³ See *id.*

¹⁴ See Affidavit of Counsel at paragraph 10 (Exhibit I).

By a deed dated 4/20/1956, Edgar Barney transferred his interest in most of his ranch (including Lots 1 and 2 of Section 7) to Bill Tanner who later transferred the ranch to his daughter Donna Fuchs and her husband Robert Fuchs (deceased).¹⁵

ARGUMENT

Resolution of this case is dependent upon the interpretation and application of the language in the 4/10/1947 deed from Edgar Barney to Earl Barney stating the property was transferred "Together with 100 inches of Silkie Decreed water." Because there remain genuine issues of material fact at dispute with regard to this phrase in the 4/10/1947 deed, the Special Master must deny the pending Motion for Summary Judgment.

I. There are disputed genuine issues of material fact concerning whether the phrase "100 inches of Silkie Decreed water" in the 4/10/1947 deed refers to the Sunberg Water Right or the J.R. Silkie Water Right.

There are disputed genuine issues of material fact concerning whether the phrase "100 inches of Silkie Decreed water" in the 4/10/1947 deed refers to the Sunberg Water Right or the J.R. Silkie Water Right. As a result, summary judgment is improper.

Initially, it must be pointed out that RLF and Kohtz have implicitly admitted in their memorandum that the phrase "100 inches of Silkie Decreed water" is ambiguous. In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006); *Neider v. Shaw*, 138 Idaho 503, 65 P.3d 525 (2003); *C & G, Inc. v. Rule*, 135 Idaho 763, 25 P.3d 76 (2001). If the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238; *Simons v. Simons*, 134 Idaho 824, 11 P.3d 20 (2000). **"Uncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up**

¹⁵ See Affidavit of Counsel at paragraph 7 (Exhibit G).

by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time.” *Benninger*, 142 Idaho at 489, 129 P.3d at 1238 (emphasis added); *City of Kellogg v. Mission Mountain Interests*, 135 Idaho 239, 16 P.3d 915 (2000). **“The interpretation of an ambiguous document is a question of fact.”** *Sells v. Robinson*, 141 Idaho 767, 772 , 118 P.3d 99 (2005)(emphasis added); *DeLancey v. DeLancey*, 110 Idaho 63, 65, 714 P.2d 32, 34 (1986). When the language of a deed is ambiguous and the intentions of the parties of the conveyance is unclear based upon the submitted evidence, a question of fact exists which must be determined at trial precluding the entry of summary judgment. *Read v. Harvey*, 141 Idaho 497, 500, 112 P.3d 785 (2005) (reversing a grant of summary judgment because question of fact existed with regard to ambiguous deed). Because the phrase “100 inches of Silkie Decreed water” is ambiguous, questions of fact remain which preclude summary judgment in this case.

RLF and Kohtz contend that the phrase “100 inches of Silkie Decreed water” refers to the Sunberg Water Right which was diverted through the Silkey ditch and which they claim was appurtenant to Lots 3 and 4 of Section 7. RLF and Kohtz also point to a 6/6/1956 deed from Earl Barney which transferred Lots 3 and 4 to George Nedrow, which deed stated that it was conveyed “together with 100 miners inches of Fall River water decreed to Z. Sunberg.” RLF and Kohtz have no other evidentiary support for their contention.

The Special Master can only grant summary judgment with regard to this issue if these facts contended by RLF and Kohtz are not disputed and if they are entitled to summary judgment as a matter of law. The alleged facts proffered by RLF and Kohtz are disputed by the evidence contained in the affidavits submitted herewith by the Fuchs. This evidence shows that the phrase “100 inches of Silkie Decreed water” as contained in the 4/10/1947 deed does not and could not

refer to the Sunberg Water Right. The Affidavit of Keith Barney shows that Edgar Barney owned the J.R. Silkie Property and the J.R. Silkie Water Right. As its owner, Edgar Barney was empowered to transfer the J.R. Silkie Water Right to his son Earl. Other than the J.R. Silkie Water Right, no other "Silkie" water rights were ever "Decreed" in the Rexburg Decree. Consequently, the only reasonable conclusion is that Edgar Barney only intended to transfer the decreed J.R. Silkie Water Right when he signed the 4/10/1947 deed which included "100 inches of Silkie **Decreed** water." (Emphasis added).

The evidence also shows that Edgar Barney later transferred most of the Sunberg Water Right in 1950 which he could not have done on his own if he had not retained the Sunberg Water Right for use on his remaining ranch property.¹⁶ The evidence also shows that the 1956 deed from Earl Barney to George Nedrow was drafted by attorney Ray Rigby and that Mr. Rigby did not perform any type of investigation of the water rights before drafting the deed. Based upon the Rigby affidavit and the other mentioned evidence, it is apparent that the 1956 deed erroneously mentions the Sunberg Water Right. Because Earl Barney only owned the J.R. Silkie Water Right, he could only transfer that water right to Nedrow in the 6/6/1956 deed and could not have transferred any portion of Sunberg Water Right which he did not own.

Based upon the foregoing, it is apparent that there are genuine issues of material fact which are disputed concerning the admittedly ambiguous language in the 4/10/1947 deed from Edgar Barney to his son Earl Barney which create factual issues that must be decided at trial. Because these genuine issues of material fact remain disputed, it is respectfully requested that the Special Master deny the Motion for Summary Judgment filed by RLF and Kohtz.

¹⁶ In their memorandum, RLF and Kohtz suggest that water rights can only be made appurtenant to other property through the use of a recorded deed. In other words, they are suggesting that in the absence of a recorded deed, water rights cannot be transferred to other property. That is clearly not the law. It is well established in Idaho that water rights can be transferred and made appurtenant to other property through approved transfer applications with IDWR and through the accomplished transfer doctrine. In both cases, a recorded deed is not required.

II. There are disputed genuine issues of material fact concerning whether the 4/10/1947 deed reserved the Sunberg Water Right thereby excluding it from the transfer of Lots 3 and 4 from Edgar Barney to Earl Barney.

As mentioned above, appurtenant water rights pass with the land “[u]nless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them.” *Joyce Livestock Company*, ____ Idaho at ____, 156 P.3d at 515 (2007). The evidence reveals that both of these alternative exceptions to the general rule apply in this case.

First, the evidence shows that 4/10/1947 deed executed by Edgar Barney reserved the Sunberg Water Rights. That deed only transferred the J.R. Silkie Water Right to Earl Barney (*see argument above*). In granting only a small portion of the family ranch to Earl and thereupon identifying only the J.R. Silkie Water Right which also only represented a small fraction of all the water used on the family ranch, Edgar clearly reserved for the family ranch all other water rights not identified in the deed. It is no different than when a farmer owns 1000 acres and 100 shares of water and then sells 500 acres and the deed states that he is transferring only a mere 10 shares. By specifically identifying only 10 shares, the farmer is expressly reserving the other 90 shares. That is the same situation that occurred in the 4/10/1947 deed from Edgar to Earl. That deed identified only the J.R. Silkie Water Right and thereby expressly reserved the Sunberg Water Right for use on the remaining family ranch.

Second, and in the alternative, the evidence clearly shows that both Edgar Barney and Earl Barney intended for the Sunberg Water Right to be excluded from the 4/10/1947 deed. The extent of the parties “intentions” is a question of fact that cannot be determined on summary judgment. Moreover, Keith Barney, who is the son to Earl Barney and the grandson of Edgar Barney, specifically recalls both his father and his grandfather discuss on numerous occasions

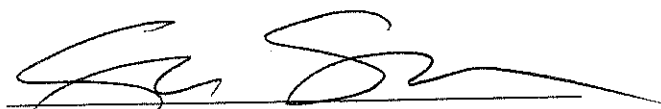
how the Sunberg Water Right had not been transferred with Lots 3 and 4 and that they never intended for that water to transfer with those lots. *See* Affidavit of Keith Barney. This is further supported by the evidence discussed above which shows that Edgar Barney later transferred most of the Sunberg Water Right in 1950 which he could not have done on his own if he had not retained the Sunberg Water Right for use on his remaining ranch property.

Based upon the aforementioned evidence, it is apparent that there are genuine issues of material fact remaining to be decided in this matter concerning whether the 4/10/1947 deed expressly reserved the Sunberg Water Right or whether Edgar and Earl Barney intended to reserve the Sunberg Water Right. Therefore, it is respectfully requested that the Special Master deny the Motion for Summary Judgment filed by RLF and Kohtz.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Special Master deny the Motion for Summary Judgment filed by RLF and Kohtz.

DATED this 14 day of January, 2008.


SCOTT J. SMITH

CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of January, 2008, I caused a true, correct and complete copy of the foregoing document to be served by U.S. first-class mail, postage prepaid, upon the following unless a different method of service is indicated:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

2. Copies to:

Director of IDWR
P.O. Box 83720
Boise, Idaho 83720-0098

Chief, Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

US Department of Justice
Environment & Natl' Resources
550 West Fort Street, MSC 033
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