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DISTRICT COURT - TWIN FALLS
JUL 1 2008

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 Nos.: 21-10557 and 21-13013

**REPLY TO OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT**

RLF I, LLC, RLF II, LLC, RLF III, LLC, and RLF IV, LLC ("RLF") and Del Kohtz ("Kohtz"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., and in accordance with this court's October 12, 2007 Trial Scheduling Order, hereby submit this Reply to Opposition to Motion for Summary Judgment. For the reasons set forth below, both water rights, as a matter of law, must be decreed as they are currently recommended to the SRBA court by the Idaho Department of Water Resources ("IDWR").

I. PROCEDURAL HISTORY FOR MOTION FOR SUMMARY JUDGMENT.

On December 10, 2007, both RLF and Kohtz (hereinafter collectively referred to as the "Claimants") moved for summary judgment in the above-entitled subcases. On January 14, 2008, the objectors in the above-entitled subcases, Robert E. Fuchs (deceased) and Donna T. Fuchs (collectively "Fuchs") filed a memorandum in opposition to the motion for summary judgment (the "Opposition Memorandum"). Based upon comments contained in the Opposition Memorandum,

Fuchs incorrectly believes that RLF and Kohtz are both associated with Water Right No. 21-13013, and therefore, contend that no motion for summary judgment has been filed as to Water Right No. 21-10557 on behalf of George Nedrow. The motion for summary judgment filed by Kohtz is specifically for Water Right No. 21-10557 as Kohtz and Nedrow are the two associated with this right. Thus, summary judgment may be entered as to 21-10557.

II. ARGUMENT.

A. Introduction.

As explained in further detail below, the primary difficult facing Fuchs is that they have not provided any deed severing any portion of the J.R. Silkey water right (21-102) and attaching it to Lots 3 and 4 of Section 7, Township 8N., R. 42 E. Fuchs has not addressed this issue in their Opposition Memorandum by not providing deeds to support their contention. RLF and Kohtz have provided chain of title evidence demonstrating where the water rights at issue went at each stage. Fuchs has argued for a different chain of title, but in doing so, have not provided the deeds to support that alternate chain of title.

For purposes of review, in the Rexburg Decree, 275 inches (5.5 cfs) of water was decreed to Z. Sundberg (Zach Sundberg) to the following land in Fremont County, Idaho: "Lots 1, 2, 3, and 4 in Sec. 7, T. 8N. R., 42 B.M. containing 149.85 acres."¹ The water right was subsequently numbered as 21-114. Water Right Nos. 21-13013 and 21-10557 are claimed portions of this right.

Another water right that is relevant to this matter is 21-102, which is a water right decreed to a neighboring landowner, J.R. Silkey. The decree was for 400 inches (8.0 cfs) to the following land: "S1/2 of SE 1/4, NE 1/4 of SE 1/4, and Lot 2 of Sec. 12, T. 8 N., R. 41 E. B. M. containing

¹ See "Exhibit B" attached to the Memorandum in Support of Motion for Summary Judgment.

152.35 acres.”² The places of use of both 21-114 and 21-102 are depicted in the map attached to RLF’s and Kohtz’s Memorandum in Support of Motion for Summary Judgment as “Exhibit C”.

On September 9, 1910, Zach and Annie Sundberg sold the land to which 21-114 was appurtenant (Lots 1, 2, 3, and 4 in Sec. 7, T. 8N. R. 42 E.B.M.) to Joseph Seeley.³ No mention is made of the water rights on the property, therefore, water right 21-114 was conveyed with the property. Later, on October 18, 1927, the 21-114 property (along with other property in section 12) was sold to Edgar Barney, and no water was withheld by the Seeleys.⁴ This means that Edgar Barney owned all 5.5 cfs of 21-114 as he owned Lots 1, 2, 3, and 4 in Sec. 7.

On April 10, 1947, Edgar and Lillie Barney sold Lots 3 and 4 to Earl Barney “[T]ogether with 100 inches of Silkie [sic] Decreed water.”⁵ It is at this point that the Claimant’s view and Fuchs’ view of the chain of title to 21-114 go down different paths.

B. Claimant’s Chain of Title.

Claimant’s chain of title to 21-114 is supported by the deeds attached to Claimant’s Memorandum in Support of Motion for Summary Judgment. The Claimants contend that the reference to “Silkie” simply refers to the ditch through which the water diverted pursuant to 21-114 was delivered, and is not a reference to 21-102. Fuchs acknowledge that the water used to irrigate Lots 3 and 4 and the remaining Barney Ranch were delivered through the Silkey Canal or Ditch.⁶

² *Id.*

³ See “Exhibit D” to the Memorandum in Support of Motion for Summary Judgment.

⁴ See “Exhibit E” to the Memorandum in Support of Motion for Summary Judgment.

⁵ See “Exhibit F” to the Memorandum in Support of Motion for Summary Judgment.

⁶ See Affidavit of Keith Barney at ¶6.

Furthermore, Claimant's view of the chain of title for 21-114 is supported by subsequent deeds and Department actions.

In the subsequent deed conveying the property from Earl and Eula Barney to George and Lela Nedrow on June 6, 1956, that deed stated that Lots 3 and 4 were conveyed "together with 100 miners inches of Fall River water decreed to Z. Sundberg and purchased by the parties of the first part herein from Edgar Barney, with a priority of June 1, 1890."⁷ This reference confirms the conveyance of 21-114 with the deed from Edgar and Lillie Barney to Earl Barney. Subsequent transfers and other administrative action taken by the Idaho Department of Water Resources ("IDWR") rely upon the language contained in these deeds as IDWR has interpreted these deeds to have conveyed 21-114, not 21-102.

C. Fuchs Alternate Chain of Title.

- 1. The Affidavit of Keith Barney wherein he claims that he believes the Barney Ranch included land formerly owned by J.R. Silkey and therefore could convey 21-102 does not create a question of fact.**

At the point where Edgar and Lillie Barney sold Lots 3 and 4 to Earl Barney "[T]ogether with 100 inches of Silkie [sic] Decreed water," Fuchs have offered an alternative chain of title explanation for where 21-114 went. In support of this alternate chain of title, they have provided the Affidavits of Keith Barney and Ray Rigby.

Fuchs argues that the reference to the 100 inches of Silkie Decreed in the deed from Edgar and Lillie Barney to water was to a water right decreed to J.R. Silkey (21-102) on neighboring property. In support of this argument, Fuchs relies upon the Affidavit of Keith Barney, which contains statements which are the subject to a motion to strike filed contemporaneously with this brief. Fuchs argues the following:

⁷ See Exhibit G attached to the Memorandum in Support of Motion for Summary Judgment.

Keith Barney believes that the J.R. Silkey Property was at one time part of the Barney ranch owned by his grandfather. 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."

The argument made by Fuchs, and the Affidavit of Keith Barney in support of this argument, is inappropriate as it is testimony of his "beliefs." Affidavits should only contain testimony of relevant facts. It is well established that:

Affidavits supporting or opposing a summary judgment motion must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated. Idaho Rule of Civil Procedure 56(e). These requirements "are not satisfied by an affidavit that is conclusory, based on hearsay, and not supported by personal knowledge."⁸

This is especially true in this instance as the item testified to by Mr. Barney (ownership of the J.R. Silkey property) is an item that can easily be determined by reviewed the deed history of the property. It is not clear why this was not done by Fuchs in response to Claimant's Motion for Summary Judgment because the deeds would control, not the beliefs of Mr. Barney. Thus, Fuchs has not established that Edgar Barney was empowered to transfer ownership of the J.R. Silkey Water Right (21-102) with the April 10, 1947 deed.

In addition, the Keith Barney Affidavit contains additional inappropriate testimony relative to his interpretation of the April 10, 1947 deed from Edgar and Lillie Barney to Earl Barney, which is addressed in the motion to strike filed contemporaneously herewith.

Furthermore, Water Right 21-102, the right decreed to J.R. Silkey, was diverted through the Silkey Ditch (which was named after J.R. Silkey). This water right, 21-102, has the same priority date—June 1, 1890—and point of diversion—the Silkey Ditch—as the Sundberg water right (21-114).

⁸ *Posey v. Ford Motor Credit Co.*, 141 Idaho 477, 483, 111 P.3d 162, 168 (Ct. App. 2005) (citing to *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 271, 899 P.2d 977, 981 (1995)).

It is obvious that Edgar and Lillie wanted to deed some water to Earl because the deed from them to Earl (the April 10, 1947 deed) specifically states that 100 inches of water was to go with the land. If both 21-102 and 21-114 had the same priority date and same point of diversion, then from a priority and convenience point of view, it would have made no difference as to which water right was conveyed to Earl. It therefore makes little sense then to assume that the water referred to in the April 10, 1947 deed was to 21-102, which was not appurtenant to the property. It is therefore clear that this language referred to 21-114, which was appurtenant to the property, as there was no reason to distinguish between the two rights.

2. Fuchs has still not provided a deed showing the severance of the water right 21-102 from Section 12 land and conveyance of the water right to Lots 3 and 4 of Section 7.

Without deeds showing that Edgar Barney owned the former J.R. Silkey property, it is undisputed that Edgar did not own that property, and therefore, would not have the ability to convey that portion of 21-102 along with Lots 3 and 4 of Section 7. This means that the only other way for a portion of 21-102 to make its way onto the Section 7 lands would be a deed severing 21-102 from the J.R. Silkey property and conveying it to the Lots 3 and 4 of Section 7. Fuchs has not provided such a deed, nor do we believe that such deed exists.

We would further note that this raises the argument we provided in our Memorandum in Support of Motion for Summary Judgment that the April 10, 1947 deed failed to reserve the proportionate amount of 21-114. Assuming for the sake of argument that somehow the "100 inches of Silkie Decreed water" did make its way onto Lots 3 and 4 of Section 7 and was actually conveyed to Earl Barney by Edgar and Lillie Barney so that 100 inches of 21-102 was conveyed to Earl Barney. This same deed would have also necessarily conveyed a proportionate amount of 21-114, which was still appurtenant to Lots 3 and 4, because this water was not specifically reserved in the deed, which

is required by Idaho law. Therefore, the deed from Edgar and Lillie to Earl would have essentially done three things:

- (1) Conveyed Lots 3 and 4 of Section 7 to Earl Barney;
- (2) Conveyed 100 inches (2.0 cfs) of 21-102 (J.R. Silkey water); and
- (3) Conveyed the proportionate amount of 21-114 (Z. Sundberg water).

Fuchs has argued that by specifically mentioning the 100 inches in the deed, this positive statement of water rights is the same as a reservation of water rights. In a normal circumstance, we would agree. For example, if 2.0 cfs is appurtenant to 100 acres, and all 100 acres are deeded along with a statement specifically stating that the 100 acres is to include .5 cfs of a water right, then by implication, the grantor has reserved 1.5 cfs. This is the same as if the grantor stated in the deed that the property is to be conveyed except for 1.5 cfs. Either way, .5 cfs goes with the 100 acres. We would agree with Fuchs on this end.

However, the context we are presently in is different than the scenario explained in the above paragraph. Fuchs is claiming that the April 10, 1947 deed conveyed part of 21-102, which was not appurtenant to Lots 3 and 4. In this instance, it would be necessary to specifically reserve 21-114 which was appurtenant to Lots 3 and 4. As agreed by Fuchs, if a water right is not reserved to a specific property, the presumption is that it goes with the land. If Fuchs is claiming that the water right in the April 10, 1947 deed is 21-102, then the deed would have necessarily had to exclude 21-114, which it did not. Thus, even under Fuch's alternate chain of title, a portion of 21-114 went with the property with the April 10, 1947 deed, a portion of 21-114 (indeed, a even a bigger portion than under RLF's and Kohtz's interpretation of this deed) was conveyed to Earl Barney. Either way, the deeds evidence that a portion of 21-114 was conveyed to Earl Barney, and therefore this matter can be resolved as a matter of law. It simply makes much more sense to conclude that the 100 inches

of Silkie Decreed water in the April 10, 1947 deed referred to 21-114, which was appurtenant to Lots 3 and 4 at the time. Subsequent deeds and actions of the Department further support RLF's and Kohtz's view of this matter.

3. The Edgar Barney transfer, which was approved on April 14, 1950, does not prove that Edgar Barney retained part of 21-114.

In addition to the above argument, Fuchs argues that a certificate of change of point of diversion which was granted on April 14, 1950⁹ supports Fuchs' claim that the "100 inches of Silkie water" was a reference to 21-102. However, the fact that Edgar Barney was listed as the applicant in this transfer does not prove ownership as a deed would prove ownership. As noted by IDWR, it is entirely possible that Edgar filed the transfer and Earl agreed to it because the Department of Reclamation still had the right in Edgar's name.¹⁰ Ownership of land and water rights is evidenced by deeds. With the conveyance of property, Idaho is a race-notice jurisdiction.¹¹ When land is therefore transferred to another person or entity, it is done by deed, and recorded in order to put all subsequent purchasers on notice.¹² Just like land, water rights are real property and are conveyed by deed.¹³ In Idaho, "it is well established that a water right is an appurtenance to the land on which it has been used and will pass by conveyance of the land."¹⁴ When land to which a certain water right is appurtenant is divided, "a division of the land would divide the appurtenant water right in the same

⁹ See Exhibit I attached to the Affidavit of Counsel in Support of Opposition to Motion for Summary Judgment.

¹⁰ See Exhibit G of Claimants' Memorandum in Support of Motion for Summary Judgment (Letter from Trent Galbraith of IDWR to Ray Rigby).

¹¹ *Froman v. Madden*, 13 Idaho 138, 88 P. 894 (1907).

¹² Idaho Code § 55-811.

¹³ Idaho Code § 55-101.

¹⁴ *Silverstein v. Carlson*, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990) quoting from *Russell v. Irish*, 20 Idaho 194, 198-99, 118 P. 501, 502 (1911).

proportion as it divided the land. . . unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed.”¹⁵ This principle is also articulated in Idaho Code § 42-220: “[A]ll rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted.”

Thus, the transfer does not create a question of fact as to who owned the water right that was transferred. Ownership is evidenced by deed, and as explained above, Fuchs has failed to demonstrate that the J.R. Silkey property was ever owned by the Barneys that would have allowed them the ability to convey 21-102, which was not appurtenant to Lots 3 and 4.

4. The affidavit of Ray Rigby does not support Fuchs’ argument that he made a mistake in drafting the June 6, 1956 deed conveying Lots 3 and 4 from Earl Barney to George and Lela Nedrow.

After Earl Barney received Lots 3 and 4 along with 100 inches (2.0 cfs) of 21-114, Earl sold the property to George and Lela Nedrow on June 6, 1956. The deed specifically stated that the land included “100 miners inches of Fall River water decreed to Z. Sundberg and purchased by the parties of the first part herein from Edgar Barney, with a priority of June 1, 1890”. In response to Claimants’ argument that this deed demonstrates that the 100 inches of Silkie water was a reference to 21-114, Fuchs claims that the Ray Rigby affidavit makes it “apparent that the 1956 deed erroneously mentions the Sun[d]berg Water Right.”¹⁶

However, we have reviewed the Ray Rigby Affidavit and cannot find where Mr. Rigby has alleged that the description he placed in the deed was erroneous, as argued by Fuchs. Mr. Rigby stated that Mr. Tout “pointed out the water rights that were to go with the sale of land from the

¹⁵ *Id.*

¹⁶ Opposition to Motion for Summary Judgment at 7.

Barneys to the Nedrows, and asked your affiant to prepare a deed of the land and water he desingated . . . Your affiant drafted the deed as directed by Mr. Tout, and had the Barneys come to his office to sign it before him as a notary.”¹⁷ It appears from the affidavit that Mr. Rigby did as he was instructed by Mr. Tout. We do not see how this testimony from Mr. Rigby demonstrates that the description he provided was an error. Based on the affidavit, no such error was made. Summary judgment in favor of the Claimants is therefore appropriate as Fuchs has failed to explain the language in the June 6, 1956 deed.

4. The April 10, 1947 deed is not ambiguous.

Fuchs argues that the April 10, 1947 deed is ambiguous, and that we have implicitly admitted as much. This is not so. Just because there are two opinions as to the meaning of a term or phrase does not mean the phrase is ambiguous. If this were the case, then any dispute over a deed would render it ambiguous merely by a party asserting a misunderstanding of a word or phrase.¹⁸

Fuchs has further confused the issue by arguing that the determination of an ambiguity is a question of fact. The *determination* of an ambiguity is a question of law, while the *interpretation* of an ambiguity is a question of fact. As discussed by the Idaho Supreme Court:

“When construing an instrument that conveys an interest in land, courts seek to give effect to the intent of the parties to the transaction.” *Neider v. Shaw*, 138 Idaho 503, 508, 65 P.3d 525, 530 (2003). If the instrument is unambiguous, its terms are settled as a matter of law using the plain language of the document. *Id.* “Interpretation of an ambiguous deed is a question of fact to be settled by the language of the conveyance instrument and the facts and circumstances of the transaction.” *Id.* Whether a conveyance instrument is ambiguous is a question of law. *Id.* Ambiguity may be found where the language of the deed is subject to conflicting interpretations. *Id.*¹⁹

¹⁷ Affidavit of Ray Rigby at ¶¶ 8, 11.

¹⁸ See *Swanson v. Beco Const. Co., Inc.*, 2007 WL 4150300, *5 (Idaho) for support of this argument in the context of an alleged ambiguous contract provision.

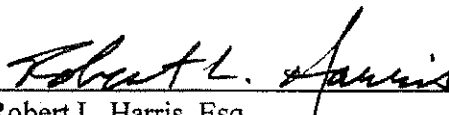
¹⁹ *Read v. Harvey* 141 Idaho 497, 499, 112 P.3d 785, 787 (Idaho, 2005)

The April 10, 1947 deed is unambiguous and refers to a water right that was then appurtenant to the property. The normal course of action when conveying property is to convey the property's appurtenant water rights, not water rights from another property. If Fuchs' argument is played out to its logical end, then a deed which does not specifically state with water rights are appurtenant to the property—in which the presumption is that the proportionate amount of water rights goes with the land—then it would also be ambiguous and a trial would be necessary in every instance because there are, as argued by Fuchs, questions of fact. This argument ignores well-settled Idaho law in regards to the transfer of appurtenances with water. The water rights to which the 100 inches of Silkie Decreed water referred to can be determined as a matter of law given the deed evidence provided by Claimants. This phrase is not ambiguous in light of this evidence, and an entry of summary judgment in favor of Claimants is appropriate.

III. CONCLUSION.

For the reasons set forth above, summary judgment in favor of RLF and Kohtz must be granted.

Dated this 21st day of January, 2008.


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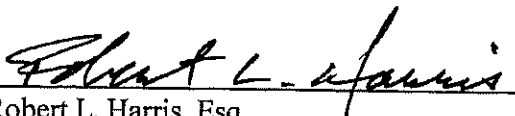
CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by mailing, with the correct postage thereon, a true and correct copy thereof on this 2nd day of January, 2008.

DOCUMENT SERVED: REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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