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**DEPARTMENT OF
WATER RESOURCES**

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**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. 63-31194A & 63-31194B

**MEMORANDUM IN SUPPORT OF
SUNDANCE INVESTMENTS LTD'S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Claimant/Responding Party, Sundance Investments Ltd. Partnership, (hereinafter, "Sundance") by and through its counsel of record, the law firm of Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, and hereby submits this Memorandum in Support of its Motion for Summary Judgment as follows:

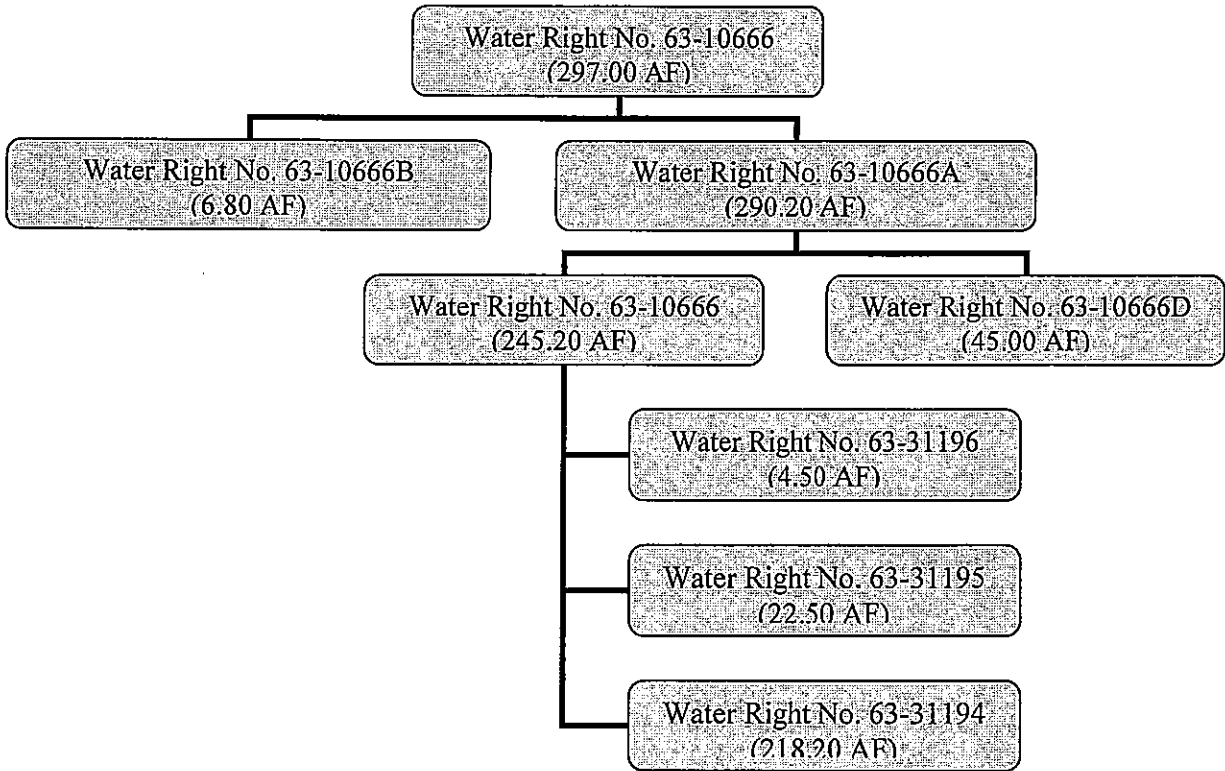
I. STATEMENT OF FACTS

On August 23, 1995, the Idaho Department of Water Resources ("IDWR") issued water right license 63-10666 to L. Darwin McKay ("McKay"). Exhibit "A" attached to the Affidavit of

Richard W. Stover (hereinafter, “Stover Aff.”). On January 5, 2000, McKay filed a petition with IDWR to correct water right license 63-10666 by removing certain approval conditions. *Id.* Specifically, of the six (6) conditions of approval for license 63-10666, McKay petitioned IDWR to remove Approval Conditions 4 and 5, which related to the use of water right 63-10666 in conjunction with a particular surface water right. *Id.* On February 1, 2000, IDWR granted McKay’s petition and ordered that an Amended Water Right License be prepared removing the two conditions. *Id.*

On February 1, 2000, IDWR issued Amended Water Right License 63-10666 to McKay, with a priority date of July 22, 1988, and with the following pertinent “Conditions of Approval and Remarks”: “1. This water right is appurtenant to the described place of use.” Stover Aff. Ex. “B” (emphasis added). Thus, the very first condition of approval with respect to water right license 63-10666 is that the water right is appurtenant to the land on which it is used. Moreover, for the thirty-year history of this water right, McKay has never objected to that condition – he did not seek administrative review of that condition when the license was initially issued, he did not object to that condition in 2000 when he petitioned to IDWR to remove two other conditions of approval, and he did not seek administrative review when Amended Water Right License No. 63-10666 was issued on February 1, 2000.

After a series of transfers, splits and abandonments, the balance of water right number 63-10666 was designated 63-31194 (the “Water Right”), which is the subject of the instant action. Stover Aff. Ex. “C-1” through “C-8.” Exhibits “C-1” through “C-8” are summarized in relevant part in the following flow chart:



Id.

In 2000, Sundance began to consider the real property (the “Property”) to which the Water Right is appurtenant for potential purchase and subsequent development. Affidavit of Roger L. Anderson (hereinafter, “Anderson Aff.”), ¶ 3. Around that time, the owners of the Property, through their marketing agent, provided Sundance with written marketing material concerning the Property. Anderson Aff. Ex. “A” and “B.” The Water Right and well are specifically referenced on two occasions in that marketing material as being included with the sale of the Property. *Id.*

In reliance on the marketing material, on January 9, 2003, Sundance entered into a

Purchase and Sale Agreement (“Agreement”) with the Property’s thirteen owners, including McKay, for the sale of the Property¹. Anderson Aff. Ex. “C.” The Agreement specifically and unambiguously identified scope of the purchase by Sundance, to wit:

1. PROPERTY TO BE PURCHASED. Buyer agrees to purchase, and Seller agrees to sell, the Property, together with all easement rights, mineral rights, other appurtenances, water and water rights appurtenant to or used on the Property and all shares, certificates, and other documents evidencing such water rights.

Id. (emphasis added). When it entered into the Agreement, Sundance intended and expected that the Water Right was included in its purchase of the Property. Anderson Aff., ¶ 8.

Along with the Agreement, all thirteen owners holding an interest in the Property, including McKay, unanimously “ratified and approved” the Agreement without reservation when they executed documents entitled “Action by Cotenants.” Anderson Aff. Ex. “D”; *see also*, Miller Depo., p. 53. Thus, McKay expressly agreed to sell his interest in the Property, together with all “water and water rights appurtenant to or used on the Property ...” Anderson Aff. Ex. “C” and “D.”

In February 2003, Sundance’s acquisition of the Property was completed when the prior owners executed a total of seventy-four (74) deeds conveying the Property to Sundance. Anderson Aff. Ex. “E” and “F.” Significantly, McKay personally executed ten (10) of those deeds to accomplish the conveyance of the Property to Sundance. Anderson Aff. Ex. “E.” Each and every one of the deeds specifically states that appurtenances are included with the

¹ The Agreement was executed by Jack Miller, “on behalf of the Co-Tenants and in accordance with the Co-Tenancy Agreement.” Anderson Aff. Ex. “C”. Regardless of whether the thirteen sellers of the Property were organized as a Joint Venture, Co-Tenants or otherwise, from 1978 when the sellers acquired the Property through 2003 when they sold the Property to Sundance in 2009, Mr. Miller was the designated “general manager” for the thirteen sellers with authorization to sign for the sale of Property. Deposition Transcript of Jack Miller attached to the Affidavit of Richard W. Stover as Exhibit “D,” pp. 11, 19, 22, 55 (hereinafter, “Miller Depo., p. ____.”)

conveyance, and none of the deeds specifically excludes the Water Right from the conveyance. Anderson Aff. Ex. “E” and “F.”

Throughout the course of the above-described transaction, there was never any mention that the Water Right would be excluded from the sale, and Sundance would have either not purchased the Property or it would have offered substantially less for the Property if it believed the Water Right was excluded from the sale. Anderson Aff., ¶ 8. In fact, when McKay developed the Water Right on the Property, the thirteen owners intended that the Water Right would stay appurtenant to the Property and would pass with any sale of the Property². Miller Depo., pp. 27, 41-2. Moreover, there were never any discussions between McKay and the other owners of the Property about the Water Right being excluded from the sale of the Property to Sundance. Miller Depo., pp. 51-2. Similarly, none of the thirteen owners ever mentioned to Sundance that the Water Right was excluded from the sale of the Property. Miller Depo., p. 52. Most importantly, McKay agreed with his co-owners that the Water Right would be an appurtenance to the land and would pass with any sale of the Property. Miller Depo., pp. 56-7, 58.

Additionally, there is absolutely no writing memorializing the exclusion of the Water Right from the sale. In fact, there are no documents referencing exclusion of the Water Right in any way because the purpose of the sale of the Property was to convey *all of the rights* the Property owners had in the Property, including the Water Right, to Sundance. Miller Depo, pp. 52-3, 59. (emphasis added). Sundance first learned that McKay wanted to retain the Water Right on September 2, 2004, when McKay’s attorneys wrote IDWR in response to the Notice of

² The thirteen owners of the Property did not distinguish between the Water Right and the well used to divert the water. To them, it was all one and the same, appurtenant to the Property, to pass with any conveyance of the property. Miller Depo., pp. 41-2, 52.

Change in Water Right Ownership filed by Sundance. *Id.* Notwithstanding, McKay signed all the documents related to the transfer of the Property and the Water Right and he never mentioned that he wanted to exclude the Water Right. Simply stated, McKay had ten (10) opportunities to exclude the water right by changing the terms of the deeds, but he did not. It is only now, after the fact, that McKay asserts his claim of ownership.

II. STANDARD OF REVIEW

Subcases referred to the SRBA Special Master are governed by the Idaho Rules of Civil Procedure and Idaho Rules of Evidence. I.C. § 42-1411(5); SRBA AO1 9(b); *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 749, 118 P.3d 78, 81 (2005).

Summary judgment is appropriate 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. Idaho R. Civ. P. 56(c). Failure of a party to make a showing sufficient to establish the existence of an element essential to that party's case and upon which that party bears the burden of proof entitles the moving party to summary judgment as a matter of law. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986)). Rule 56(e) requires a non-moving party to go beyond pleadings through affidavits, depositions, etc. to demonstrate that there are genuine issues of material fact. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986). If the non-moving party fails to do so, then the moving party is entitled to summary judgment as a matter of law. *Id.* at 469, 716 P.2d at 1241; *see also Sparks v. St. Luke's Reg. Medical Ctr. Ltd.*, 115 Idaho 505, 768 P.2d 768 (1988).

The non-moving party's responsibility in opposing a motion for summary judgment was

outlined by the Idaho Supreme Court in *Berg v. Fairman*, 107 Idaho 441, 690 P.2d 896 (1984), wherein the Court stated:

If a party resists summary judgment it is his responsibility to place in the record before the trial court the existence of controverted material facts which require resolution by trial. A party may not rely on its pleadings nor merely assert that there are some facts which might or will support his legal theory, but rather he must establish the existence of those facts by deposition, affidavit or otherwise. Failure to so establish the existence of the controverted material facts exposes the party to risk of a summary judgment.

Id. at 444, 690 P.2d at 899. Even the Idaho Court of Appeals has reiterated that “a non-moving party cannot rest on mere speculation, and must present opposing evidence.” *Butterfield v. MacKenzie*, 132 Idaho 62, 64, 966 P.2d 658, 660 (Ct. App. 1998). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of fact for trial. *Harpole v. State*, 131 Idaho 437, 439, 958 P.2d 594, 596 (1998). Moreover, when an action will be tried before the court without a jury, as in this case (I.C. § 42-1412 (5)), the Court “is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. Rather, the judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts.” *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991).

In applying the summary judgment standards to the facts and circumstances here, the Court may rule as a matter of law that Sundance is entitled to the entry of summary judgment in its favor.

III. ARGUMENT

A. McKay's Objection Should Be Denied As An Impermissible Collateral Attack On Previously-Decided Licensing Conditions.

The essence of McKay's Objection is that the Water Right did not transfer with the Property when it was conveyed to Sundance, and thus the Water Right is not an appurtenance to that Property. That argument is an impermissible collateral attack on the conditions of a license by a party involved in the original proceeding.

The law of the case in the SRBA is that a party may not subsequently challenge elements or conditions decided in a license where the party was involved in the original proceeding. *See Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue* (Subcase No. 36-02708) (Dec. 29, 1999). In that subcase, the license holder attempted to challenge a remark that was included on the licenses when they were issued. The Court noted that "some of the water rights licenses were issued with a facility volume remark which was not challenged by the license holder at the time." *Id.* at p. 14. In holding that the claimant was bound by the remarks in those licenses, the Court adopted the Special Master's findings and conclusions, to wit:

Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute [an impermissible] collateral attack on the license.

Id. at p. 16 (internal citations omitted). Thus, conditions of approval on a previously issued license cannot be appealed for the first time in the SRBA.

Here, McKay is attempting to circumvent the law of the case in the SRBA and

collaterally attack the license condition that the Water Right is appurtenant to the Property that was conveyed to Sundance. Specifically, as discussed above, the Water Right represents the balance of what was originally water right no. 63-10666 following a series of transfers. Stover Aff. Ex. “C-1” through “C-8.” The license for the Water Right was originally issued to McKay on August 23, 1995, containing, among its six Conditions of Approval, the condition that the Water Right is appurtenant to the Property. Stover Aff. Ex. “A.”

On January 5, 2000, McKay filed a petition with IDWR to correct the license by removing two of the six approval conditions on the license; however, McKay did not object to Condition 1, which provided “This water right is appurtenant to the described place of use.” *Id.* On February 1, 2000, IDWR issued its Preliminary Order Correcting License directing that the two conditions McKay complained of be rescinded. *Id.* On that same date IDWR issued to McKay an the Amended Water Right License, which still provided as Condition of Approval No. 1, “This water right is appurtenant to the described place of use.” *Id.*

Thus, McKay was a party to the initial licensing proceeding in 1995 when the license was originally issued. He did not challenge the appurtenance condition when the license was initially issued. He did not challenge the appurtenance condition in 2000 when he challenged two other approval conditions. And, he did not challenge the appurtenance condition upon receipt of the Amended Water Right License. In fact, it is in this subcase – over twenty years after the license was originally issued – that McKay first claims that the Water Right is not appurtenant to the Property. Since McKay did not appeal the appurtenance condition when the license was initially issued, he is estopped by the law of the case in the SRBA from attempting to collaterally attack the appurtenance condition to the license. Therefore, McKay’s Objection should be denied as an impermissible collateral attack on previously-decided license conditions.

B. The Water Right was Conveyed with the Property to which it is Appurtenant Because it was not Expressly Reserved in the Deed and there is no Evidence that the Parties Intended that McKay would Reserve it.

Even if McKay's Objection is not ruled to be an impermissible collateral attack on the license conditions, Sundance is entitled to summary judgment because the Water Right was conveyed with the land to which it is appurtenant. "[T]he director's report shall be a part of the record ... [and] shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law." I.C. § 42-1411(4). As the Objector, McKay bears "the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." I.C. § 42-1411(5). Simply stated, to withstand summary judgment, McKay must prove that the Water Right did not transfer along with the Property when it was conveyed to Sundance.

"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 ..." *Joyce Livestock Co. v. United States*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007). This clear and unambiguous rule of water law has been consistently applied by Idaho courts for over 100 years. See *Hall v. Blackman*, 8 Idaho 272, 68 P. 19 (1902); *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911); *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924). In fact, this general rule corresponds with Idaho Code, which provides: "... all 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." I.C. § 42-220.

Additionally, Idaho law clearly provides that a deed to real property that includes the provision “together with appurtenances” operates to convey the real property and the water rights appurtenant to the property at the time of the conveyance, unless the water right is “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.” *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (emphasis added); *see also Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924). Thus, since the deeds at issue in this case expressly include the “together with appurtenances” provision, the only “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.” *Joyce Livestock*, at 14, 156 P.3d at 515.

1. The Water Right was not Expressly Reserved in any Deed Conveying the Property to Sundance.

Here, it is patently clear that the Water Right was not “expressly reserved in the deed conveying the land ...” *Id.* In fact, since Sundance acquired the Property from thirteen sellers, a total of seventy-four deeds were executed to accomplish the conveyance to Sundance. Anderson Aff., Ex. “E” and “F.” Ten of those 74 deeds were executed by McKay. Anderson Aff. Ex. “E.” Notwithstanding the large number of deeds to accomplish the conveyance to Sundance, a review of those deeds reveals that the water right was not expressly reserved in any of the deeds. *Id.* In fact, each and every deed without exception expressly conveys the Property together “with their appurtenances.” *Id.* Therefore, in light of the standards announced by the Idaho Supreme Court in *Joyce Livestock* and *Russell*, McKay cannot meet his burden of proving that the Water Right did not pass to Sundance because the Water Right was not expressly reserved in the deeds. As such, McKay’s Objection should be denied as a matter of law.

2. There is no Evidence that Both Parties Intended that McKay would Reserve the Water Right.

Not only was the Water Right not expressly reserved in the deeds conveying the Property to Sundance, but McKay cannot produce any evidence, let alone clear evidence, that both parties intended to exclude the Water Right from Sundance's acquisition of the Property. In fact, other than McKay's self-serving assertions to the contrary, every bit of documentary evidence relating to the conveyance of the Property to Sundance expressly establishes that the Water Right was included in the sale of the Property. Specifically, the marketing materials relating to the Property that were provided to Sundance expressly identify the Water Right in the description of the Property. The Agreement expressly provides that Sundance was purchasing the Property, "together with all easement rights, mineral rights, other appurtenances, water and water rights appurtenant to or used on the Property and all shares, certificates, and other documents evidencing such water rights." Anderson Aff. Ex. "C." The Action by Cotenants documents show that McKay "ratified and approved" the Agreement. Anderson Aff. Ex. "D." Additionally, McKay executed ten deeds conveying the Property to Sundance, and in every one of those deeds, as well as the 64 other deeds conveying the Property to Sundance, the Property is conveyed together with appurtenances – there is no express reservation of any water right. Anderson Aff. Ex. "E" and "F." Finally, it is undisputed that Sundance intended and expected that the Water Right was included in the conveyance of the Property. Anderson Aff., ¶ 8. In fact, it was the intent of all of the parties that the Water Right would be conveyed to Sundance with the Property. Miller Depo., pp. 52-3, 59

Thus, because McKay cannot produce clear evidence that both parties intended to exclude the Water Right from the conveyance of the Property, Sundance is entitled to judgment as a

matter of law.

IV. CONCLUSION

Based upon the foregoing and the record before this Court, Sundance respectfully requests that the Court grant it summary judgment in its entirety and deny McKay's Objection.

DATED this 5th day of May, 2009.

**EBERLE, BERLIN, KADING, TURNBOW,
& McKLVEEN, CHARTERED**

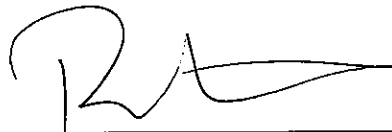
By 
Richard W. Stover, of the firm
Attorneys for Claimant/Responding Party,
Sundance Investments Ltd. Partnership

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **MEMORANDUM IN SUPPORT OF SUNDANCE INVESTMENTS LTD'S MOTION FOR SUMMARY JUDGMENT** was mailed on May 5th, 2009, with sufficient first-class postage prepaid to the following:

John C. Gould
Ringert Clark Chartered
P.O. Box 2773
Boise, Idaho 83701

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

A handwritten signature in black ink, appearing to read 'R. Stover', is written over a horizontal line.

Richard W. Stover