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DEPARTMENT OF
WATER RESOURCES

Attorneys for L. Darwin McKay

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 63-31194A and 63-31194B
)
) MEMORANDUM IN RESPONSE TO
) TO SUNDANCE'S MOTION FOR
) SUMMARY JUDGMENT
)

COMES NOW L. Darwin McKay, by and through his counsel of record, Ringert Law Chartered, submits to this Court, pursuant to Rule 56 of the Idaho Rules of Civil Procedure, its *Memorandum in Response to Sundance Investments Ltd's Motion for Summary Judgment.*

SUMMARY

This case involves two distinct and separate pieces of real property; the Property, currently owned by Sundance Investments LTD ("Sundance") and purchased from the Co-Tenants in January 2003 and the McKay Water Right, owned by Mr. McKay. Sundance is seeking a grant of summary judgment claiming that the Property conveyed to it by the Co-tenants included the McKay Water Right because the conveying instruments did not expressly reserve the McKay Water Right and there is no evidence that the parties intended that McKay would reserve the McKay Water Right. The

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questions before the Court are whether a seller can convey real property it does not own and whether the McKay Water Right is necessary for the enjoyment of the Property. Because Mr. McKay has raised genuine issues of material fact, Sundance's motion should be denied.

FACTS

I. Real Property Owned by McKay - the Water Right

Mr. McKay's company leases approximately eighty percent (80%) of the land it uses for sod production. *Affidavit of L. Darwin McKay ("McKay Affidavit")* at 4. Mr. McKay's sod production requires a ground water source for a number of reasons. *Id* at 5. The presence of noxious weeds in sod crops makes those crops non-sellable. *Id*. Noxious weeds are often carried in surface waters. Also, the leased lands do not always have a reliable surface water source, in terms of both quality and quantity, making possession of a ground water right essential. *Id* at 5, 6, 7, 8 and 9. Owning ground water rights makes it feasible for Mr. McKay to transfer his water right as the land leases change. *Id* at 6. Lastly, sod production requires a longer irrigation season than is typically provided by Nampa and Meridian Irrigation District. *Id* at 5, 9.

Mr. McKay developed the water right in question ("McKay Water Right") as a lessee in 1988 on land he was leasing from HCM. *Id* at 10 and Exhibit "A". HCM had surface water available although, as stated above, his sod production required assurances and the ability to change the place of use that a ground water source provided. *Id* at 12. The lease between McKay and HCM was terminated.

In 1989, Mr. McKay began leasing property for sod production from TCM. *Id* at 13. He amended this water right application to change the place of use accordingly. *Id* at 14. The amended

application is clear that Mr. McKay is developing this water right as a lessee and not as the property owner. *Id* at 15 and Exhibit “B”. The water right permit listed Mr. McKay as the water right owner. *Id*. The water right license issued in 2000, after the lease with TCM had terminated, identifies Mr. McKay as the water right owner. *Id* at 17.

Not only was the McKay Water Right developed by a lessee, the water right is a stacked water right meaning that the Property has surface water rights capable of satisfying all irrigation demands as well as the McKay Water Right. Idaho Department of Water Resources (“IDWR”) in amending the conditions on the McKay Water Right recognized McKay’s unique water needs. *Id* at 17 and Exhibit “C”.

Mr. McKay conveyed portions of the Water Right on at least three occasions. *Id* at 26, 27, and 28. At no time did he ever seek nor was it required that he obtain the authorization of TCM Joint Venture (“TCM”). *Id* at 32. TCM did not object or protest these conveyances of the water right.

Mr. McKay never conveyed nor intended to convey any portion of the McKay Water Right to TCM. *Id* at 33. He never had any discussion with any of the TCM members regarding conveying his water right to TCM. In fact, in 2000 after the McKay lease terminated, Jack Miller the general manager for TCM and the Co-Tenancy, executed a statement addressed to Idaho Department of Water Resources (“IDWR”) stating that TCM had no interest in the McKay water right. *Id* at 22 and Exhibit “D”. Also in 2000, TCM conveyed a portion of the Property to Ada County Highway District (“ACHD”). *Id* at 22 and Exhibit “E”. The conveyance, similar to the conveyance to Sundance, did not include any portion of the McKay Water Right.

II. Water Rights For Real Property Owned by the Co-Tenants

The Property has surface water rights delivered through Nampa and Meridian Irrigation District. Both the surface water rights and the McKay Water Right each provide an adequate quantity of water to irrigate the Property, independently. Surface water under these rights was used by the lessee prior to McKay's leasing the TCM property and after the McKay lease ended. *Id* at 23, 24, and 25. Mr. McKay is the only person to use water diverted under the McKay Water Right.

III. Real Property Owned by the Co-Tenants

The Co-Tenancy was formed in late 2002 on the verge of a conveyance to Sundance by TCM Joint Venture. The Property owned by the Co-Tenants and conveyed to Sundance in January 2003 is described in the Purchase and Sale Agreement. Affidavit of Roger L. Anderson in Support of Motion for Summary Judgment ("Anderson Affidavit"), Ex. "C". The Agreement of Co-Tenancy further describes the Property. Anderson Affidavit, Ex. "C". The most recent marketing material, prepared in 2002, described the Property as approximately 77 acres along Overland Road. See McKay Affidavit at 40 and Exhibit "F". The marketing material does not mention of the McKay Water Right.

The seller fo the Property was the Co-Tenancy and Sundance was the buyer. The Purchase and Sale Agreement states as follows:

- A. Seller owns as tenants-in-common that certain property depicted on Exhibit A, attached hereto and made a part hereof, (the "Property"), consisting of approximately 78.39 acres.

- B. Buyer desires to purchase, and Seller desires to sell, the Property according to the terms and conditions set forth below.

...

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 certificates, and other documents evidencing such water rights.

...

15. Two Parcels: It is understood that the Property is comprised of two parcels and that the Seller shall convey the property by two warranty deeds.

The Purchase and Sale Agreement was signed by Jack Miller, on behalf of the Co-Tenants and in accordance with the Co-Tenancy Agreement. Anderson Affidavit, Ex. "C". The Agreement of Co-Tenancy states "each of the Co-Tenants will own an undivided interest as tenants in common in the Property." Anderson Affidavit, Ex. "C".

Additionally, the Co-Tenants executed the Action by Co-Tenants which further defines the scope of the conveyance. See Anderson Affidavit, Ex. "D". The document states in part "the Co-Tenants approve the Agreement for Purchase and Sale of Assets"; "the execution and delivery of the Sale Agreement of [sic] behalf of the Co-Tenancy is hereby ratified and approved"; and that Jack Miller is authorized and empowered in name and on behalf of the Co-Tenants to execute and deliver to the Buyer any instruments or agreements of this Co-Tenancy which may be required for the closing of the sale in accordance with the Sale Agreement. Anderson Affidavit, Ex. "D". The Co-tenancy ratified and approved the sale of what it owned, the Property and nothing more. *Id.*

As stated in *Memorandum in Support of Sundance Investments LTD's Motion for Summary Judgment* ("*Sundance Memorandum*"), Sundance acquired the Property from the Co-Tenants when the co-tenants executed a total of seventy-four (74) deeds. *Sundance Memorandum* at 4. The deeds are identical in form, convey the real property held by the Co-Tenancy and were executed by the Co-tenants to complete the conveyance to Sundance. See *Anderson Affidavit*, Ex. "E" & "F". Mr. McKay and the other Co-tenants signed and executed the documents necessary for the conveyance of the Property they owned as Co-Tenants.

The marketing material describing the Property included in the *Anderson Affidavit* as Exhibits A and B were prepared in 2000. Mr. Miller, the general manager of the Co-Tenants, has no knowledge of how the information contained in the marketing material was obtained. Deposition Transcript of Jack Miller attached to the *Affidavit of Richard W. Stover* as Exhibit "D" pp. 40-41 ("Miller Depo."). Absent from the marketing material is any affirmative statement that the McKay Water Right was included with the Property.

Jack Miller stated that he was unaware of the Water Right had been perfected by Darwin McKay until after the Property was sold to Sundance. Miller Depo at p. 31. Moreover, in speaking of the McKay Water Right, Miller testified that "nobody [tenants] knew about it [prior to the conveyance to Sundance]." *Id.*

When the lease with TCM expired, Mr. McKay intended on transferring his water right to lands he leased, just as he had done in the past. *McKay Affidavit* at 7. Transferring his ground water rights is a necessary component of his business. *Id.* at 5, 6, and 7. Sundance inaccurately represents the statements of Jack Miller regarding the Co-Tenant's intention regarding the McKay Water Right.

Sundance states that “the thirteen owners intended that the Water Right would stay appurtenant to the Property and would pass with any sale of the Property.” *Sundance Memorandum* at 5 citing Miller Depo 27, 41-42. Miller’s actual testimony was that the well would become TCM Joint Venture property and the water right was never discussed. Miller Depo., p. 27. Miller also testified as follows:

Miller: We used that as – the well as a selling feature for the property. Darwin was at those meetings and we agreed to do that. And – but none of us understood what that really meant because we were under the assumption that that was appurtenant to the property, that it was part of it; and therefore when we sold it, it would go with the property.

Gould: And you’re talking about the well now?

Miller: Yes.

Miller Depo., p 41-42.

Sundance inaccurately represents another statement by Jack Miller claiming Mr. McKay agreed that the Water Right would pass with any sale of the Property. *Sundance Memorandum* at 5 citing to Miller Depo. p. 56-57. Mr. Miller’s statement was that “when [McKay] left the lease or we sold the property, then that well and whatever his costs were go in the partnership.” Miller Depo., p. 57. When the McKay lease expired in 1999, McKay left the well and never sought costs for well construction.

In the March 2000, after the McKay lease expired, Mr. Miller, as General Manager of TCM, provided Mr. McKay with a signed statement stating the TCM owns the Property “and does not object to an application of L. Darwin McKay to transfer his water right No. 63-1066 to other lands.

L. Darwin McKay acquired the water right while leasing the above property from TCM.” McKay Affidavit, Exhibit “D” (emphasis added). Jack Miller recognizes the ownership distinction between the Property owned by TCM, subsequently conveyed to the Co-Tenancy and then Sundance, and the McKay Water Right.

STANDARD OF REVIEW

Summary judgment must be granted when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that 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); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion must be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367. However, if the evidence reveals no disputed issues of material fact, what remains is a question of law, over which the court exercises free review. *Id.*

ARGUMENT

I. McKay’s Object To Sundance’s Water Right Claim Is Not An Attack On The Licensing Conditions

Mr. McKay’s objects to the Sundance claim because he owns the water right. Mr. McKay

is not collaterally attacking the appurtenance condition on water right no. 63-31194. Sundance purchased the Property from the Co-Tenancy. The Co-Tenancy did not own the water right at the time of the conveyance nor has the Co-Tenancy ever owned the water right. The grantor, the Co-Tenants in this case, can only convey what the grantor owns. *Riley v. Rowen*, 131 Idaho 831, 834, 965 P.2d 191, 194 (1998). The following discussion further explains the bifurcation of ownership of a water right and of the underlying land and identifies the real property conveyed to Sundance.

II. A Water Right Must Be Owned By The Seller To Be Conveyed With The Property To Which It Is Appurtenant

Sundance incorrectly assumes that a water right is conveyed with the property to which it is appurtenant unless the water right was expressly reserved and there is evidence that both parties intended that water right would be reserved. This assumption is only correct when the grantor has the power to convey the appurtenant water right. See *Paddock v. Clark*, 22 Idaho 498, 126 P. 1053 (1912) (in order for a water right to be conveyed by the owner of land by deed of conveyance, the owner of land must own the water right).

The case at hand is rare and unique in that the owner of the Property and the owner of the Water Right are not the same. Therefore, common assumptions and general rules premised on the owner of the underlying property and the owner of the water right being one in the same are not applicable. Additionally, the Property has surface water rights so the McKay Water Right is not necessary for the beneficial use of the land.

III. Bifurcation Of Water Right and the Underlying Land

Idaho courts have long recognized a bifurcation of ownership of a water right and of the

underlying land. "One who has appropriated water and beneficially used it has a right to the use of the water independent of his ownership of the land." *Joyce Livestock Co. v. United States (In re SRBA Case No. 39576)*, 144 Idaho 1, 7 (2007) quoting *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 160, 199 P. 999, 1003 (1921). "A water right is real property and may be sold and transferred separately from the land upon which it has been used, the same as any other real property." *Federal Land Bank v. Union Cent. Life Ins. Co.*, 54 Idaho 161, 168 (1934); *In re Rice*, 50 Idaho 660, 229 P.664, and cases therein cited. In the case at hand, there are two pieces of real property; the McKay Water Right owned by Mr. McKay, the former lessee, and the underlying land that was owned by the Co-Tenancy. The Co-Tenancy conveyed its real property to Sundance. However, the Co-Tenancy never held an ownership interest in the McKay Water Right.

IV. Seller Can Only Convey What It Owns

A seller cannot convey a water right he does not own. *Riley* 131 Idaho at 834, 965 P.2d 191, 194. The seller in this case is the Co-Tenancy. A co-tenancy or tenants in common are a common law organization defined as "tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right to survivorship." *Black's Law Dictionary, Seventh Edition*. As tenants in common each tenant owed a pro-rata share of the entire Property. As such, each tenant owns a portion of the entire Property and each tenant must convey their pro-rata share of the entire Property for an effective conveyance.

The Co-Tenants held no ownership interest in McKay's Water Right and therefore could not convey any interest in the McKay Water Right. Only when a grantor holds both the appurtenant water right and the real property is a water right appurtenant to real property conveyed with the real

property. In *Paddock v. Clark*, 22 Idaho 498, 498, 126 P. 1053, 1053 (1912), the Supreme Court stated the law regarding water rights passing as appurtenance as follows:

Where it is shown that a water right is acquired by the owner of land by deed of conveyance, and that such water right after purchase is used by the purchaser upon the land for a beneficial use, such water right becomes an appurtenance to such land, and where after such use such land is conveyed, and in the deed of conveyance said land is described, and the deed further provides 'together with appurtenances,' such deed of conveyance not only conveys the land, but the water rights appurtenant to said land (emphasis added).

Clearly, the owner of the land must also own the water right. In *Joyce Livestock*, the Supreme Court analyzed this very issue. *Joyce Livestock v. United States*, 144 Idaho 1, 156 P.3d 502 (2007). The first step in the Court's analysis was to determine if the predecessor of Joyce Livestock, the grantor, owned the stockwater rights in question. *Id* at 14, 156 P.3d at 515. The court held that the predecessor did in fact own the water rights. *Id*. In *Paddock v. Clark*, the Court first determined whether the owner of the land also owned the water right. The results in *Joyce Livestock* and *Paddock* are distinguishable from this case because in those cases the owner of the land being conveyed was also the owner of the water right.

Because the owner of the land and the owner of the water right used on that land are almost always synonyms, it is presumed that the owner of the land is the owner of the water right. In the cases cited by Sundance, the owner of the land being conveyed was also the owner of the water right in question. See *Joyce Livestock*; *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (the predecessor, Lydia Irland, owned both the land and the water right and the conveyance of the land included the water right), *Hall v. Blackman*, 8 Idaho 272, 68 P. 19 (1902) (the predecessor-grantor, David Ethel, owned both the land and the water right so the conveyance of the land included the water right.), and

Koon v. Empey, 40 Idaho 6, 231 P. 1097 (1924) (predecessor-grantor, Olive, acquired from one Curd title to certain lands along the South Fork of the Snake River in what is now Madison County, together with certain water rights. In conveying his land, Olive conveyed his water rights).

Sundance's reliance on the common law rule of appurtenances and Idaho Code §42-220 is flawed. The premise underlying both the common law rule and Idaho Code §42-220 is that the Grantor of the land and the owner of the water right in question is one in the same.

A. Similar Conveyance of the TCM Property Did Not Include the McKay Water Right

This very issue has been addressed in the year 2000 conveyance from TCM to ACHD when a portion of the TCM Property was conveyed to ACHD. McKay Affidavit, Exhibit "E". The deed conveying the property to ACHD includes the boiler plate language:

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, its heirs and assigns forever.

The conveyance from TCM to ACHD did not include the McKay Water Right because the Water Right was not the real property being conveyed and the grantor did not own both the Property and the McKay Water Right. Just as ACHD did not acquire any portion of the McKay Water Right resulting from the conveyance from TCM to it, Sundance has not acquired any portion of the McKay Water Right resulting from the conveyance from the Co-Tenancy to it.

B. Attorney General Opinion Favors McKay

This very issue was explained in Attorney General Opinion No. 88-6 when the Attorney General interpreted the common law rule of appurtenances and Idaho Code §42-220 as those apply to the situation where the water right owner is held by a person other than the landowner – as is the

case here. The pertinent portion of the opinion is as follows:

A more logical interpretation of Idaho Code § 42-220 is that it codifies the common law rule concerning the conveyance of appurtenances with a conveyance of land. This common law rule provides:

In the absence of any language in a deed indicating a contrary intention on the part of the grantor, everything that is properly appurtenant to the land granted thereby -- that is, everything which is essential or reasonably necessary to the full beneficial use and enjoyment of property and which the grantor has the power to convey -- is to be considered as passing to the grantee.

23 Am. Jur. 2d Deeds § 65 (1988) (footnote omitted) (emphasis added). See also *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (a division of land produces a proportional division of the water right, absent a reservation of the water right). This common law rule creates a presumption in favor of the passing of appurtenances upon the conveyance of the underlying land. However, if a grantor of the land does not have the power to convey the water right or if a grantor reserves the appurtenant water rights, Idaho Code § 42-220 does not cause the water right to pass to a grantee of the land.

Attorney General Opinion No. 88-6, 12-13 (AG 1988)(emphasis added). In this case, the grantor, the Co-Tenancy, did not have the power, ability or authority to convey the McKay Water Right.

V. Only Appurtenances that Necessary for the Enjoyment of the Conveyed Land Are Passed

"[The] word 'appurtenant' will only carry with it easements and servitudes used and enjoyed with the land for whose benefit they were created.. Even an easement will not pass unless it is necessary for the enjoyment of the thing granted." *Sutton v. Brown*, 91 Idaho 396, 400, 422 P.2d 53, 67 (1966) quoting *Humphreys v. McKissock*, 140 U.S. 304, 11 S.Ct. 779, 781, 35 L.Ed. 473. The McKay Water Right is not necessary for the enjoyment of the Property. Water diverted under the McKay Water Right was only used on the Property while McKay leased the Property from TCM.

The McKay Water Right was created for McKay's business use. When his lease expired in 1999, the use of water under the McKay Water Right stopped. However, irrigated agriculture on the Property continued by the new lessee using surface water, just as was done prior to leasing the Property to McKay.

A. McKay's Water Right Was Created For McKay's Sod Production

Use of ground water as the source of irrigation water is necessary for McKay's sod production for a number of reasons. The presence of noxious weeds in sod crops makes them non saleable. Noxious weeds are often carried in surface waters. McKay's company leases approximately eighty percent (80%) of the land used for sod production. When a lease expires, new land in a different area must be leased to maintain sod production. Often the leased lands do not have a reliable surface water source, in terms of both quality and quantity, making possession of a ground water right necessary for the sod production. Sod production requires a longer irrigation season than is typically provided by Nampa and Meridian Irrigation District. Idaho Department of Water Resources ("IDWR") in amending the conditions on the McKay Water Right recognized McKay's unique water needs. See Gould Affidavit at .

B. Preference to Use Surface Water

Idaho Code § 67-6537 states the following:

Use of Surface and Groundwater. --

(1) The intent of this section is to encourage the use of surface water for irrigation. All applicants proposing to make land use changes shall be required to use surface water, where reasonably available, as the primary source for irrigation. Surface water shall be deemed reasonably available if:

(a) A surface water right is, or reasonably can be made, appurtenant to the

land;

(b) The land is entitled to distribution of surface water from an irrigation district, canal company, ditch users association, or other irrigation delivery entity, and the entity's distribution system is capable of delivering the water to the land; or

(c) An irrigation district, canal company, or other irrigation delivery entity has sufficient available surface water rights to apportion or allocate to the land and has a distribution system capable of delivering the water to the land.

State law favors the use of surface water over ground water for irrigation. In a case where both water rights for surface water and ground water exist, the use of ground water is not reasonable necessary.

Both the surface water rights and the McKay Water Right each provide an adequate quantity of water to irrigate the Property, independently. Sundance would not be allowed to use both the surface water rights and the McKay Right on the Property at the same time. Not only is the McKay Water Right not reasonably necessary for the beneficial use of the land, Sundance would be required to refuse available surface water in order to use water under the McKay Water Right and such a practice is contrary to Idaho law.

C. McKay Water Right Was Not Being Used At the Time The Transfer Was Agreed Upon or Completed

Idaho Code § 55-603 provides:

A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

At the time of the conveyance, water under the McKay Water Right had not been used on the Property for more than three years. McKay is the only person to use this water right.

VI. Sundance Seeks And Illogical and Patently Unjust Result

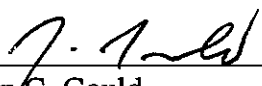
Mr. McKay held a two and one-half percent (2.5%) interest in the Property. *McKay Affidavit* at 41. Under the Co-Tenancy Agreement, a super majority of greater than seventy percent (70%) of the members could authorize a conveyance of the Property. *Id* at 42 and 43. Under Sundance's claim, McKay, as a lessee and minority co-tenant, would be forced to convey his water right against his will if greater than seventy percent (70%) of the members decided to convey the Property. This illustrates the illogical result Sundance is seeking by claiming that the owner of one piece of real property can convey real property belonging to another to a third party.

CONCLUSION

Mr. McKay has raised genuine issues of material fact as to whether the conveyance of the Property from the Co-Tenancy to Sundance also conveyed the McKay Water Right owned by Mr. McKay and whether the McKay Water Right is necessary for the enjoyment of the Property. Therefore, Sundance's Motion for Summary Judgment must be denied.

DATED this 29th day of May, 2009.

RINGERT LAW CHARTERED

By 
Jon C. Gould
Attorneys for L. Darwin McKay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below to the following:

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