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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

**SUNDANCE INVESTMENTS LTD'S
REPLY BRIEF IN SUPPORT OF
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 Reply Brief in Support of its Motion for Summary Judgment.

I. INTRODUCTION

In his Memorandum in Response to Sundance's Motion for Summary Judgment (hereinafter "McKay's Memorandum"), Mr. McKay attempts to create issues of fact (1) by

misrepresenting the clear and unambiguous language of the contract and deeds by which Sundance acquired the land and water right from 13 individuals, rather than a single fictional entity; (2) by attempting to create a “sod farmer” exception to the well-established and often-reaffirmed rule of law applicable to the conveyance of water rights in Idaho; and (3) by making legal arguments and factual assertions that are inapplicable to the facts of this case and are completely lacking any cited supporting authority, controlling or otherwise. While the “kitchen sink” approach taken in McKay’s Memorandum succeeds in creating a confusing hodgepodge of irrelevant and inapplicable arguments, controlling case law and the indisputable documentary evidence in the record clearly establish that McKay has failed to create a genuine issue of fact to withstand summary judgment. Thus, for the following reasons, the Court should grant Sundance’s motion for summary judgment and deny McKay’s Objection in its entirety.

II. STANDARD OF REVIEW

While there is no dispute as to the legal standards applicable in summary judgment motions, for purposes of this Reply Memorandum it is important to emphasize that a “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8, 106 S.Ct. 2505, 2510 (1986) (emphasis in original). A fact issue will be genuine only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Finally, at summary judgment, the Court does not draw all possible inferences in favor of the nonmoving party, but only the reasonable ones. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054 (9th Cir. 2002), (citing *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986)) (“We scrutinize the *evidence* and *reasonable inferences* to determine whether there is sufficient probative evidence to

permit ‘a finding in favor of the opposing party based on more than mere speculation, conjecture, or fantasy.’”)

III. ARGUMENT

A. Sundance Acquired the Property and the Water Right From Thirteen Individuals, Including McKay, Pursuant to the Terms of the Purchase and Sale Agreement and Execution and Delivery of Seventy-Four Deeds.

Despite the plain and unambiguous language in the Purchase and Sale Agreement (Anderson Aff. Ex. “C”) and the 74 deeds (Anderson Aff. Ex. “E” and “F”), McKay’s Memorandum inaccurately asserts on numerous occasions that “the Co-Tenancy” owned the property to which the Water Right is appurtenant and that “the Co-Tenancy” sold that property to Sundance. McKay’s Memorandum, pp. 4-12. In doing so, McKay’s apparent argument is that “the Co-Tenancy” is a legal entity, separate and independent from the individual land owners, and that “the Co-Tenancy” cannot convey the Water Right. Not surprisingly, McKay’s Memorandum fails to cite to any authority in support of this argument, most likely because it is contrary to all reported authority.

“A voluntary association has no separate entity, and can neither hold nor assign property; the title to such property is vested jointly in the individual members who control, manage and dispose of it at their joint pleasure.” *Idaho Apple Growers’ Ass’n v. Brown*, 50 Idaho 34, 239 P. 320, 322 (1930). “Unincorporated associations, ... unless recognized by statute, have no legal existence.” Here, the thirteen prior property owners voluntarily organized as an unincorporated association as tenants in common (see, Agreement of Co-Tenancy, attached as Exhibit B to the Purchase and Sale Agreement, Anderson Aff. Ex. “C”), and McKay has produced no evidence that the co-tenancy is recognized in Idaho as a separate legal entity. Moreover, McKay’s argument that “the Co-Tenancy” is a separate legal entity is belied by the clear and unambiguous

language in the Agreement of Co-Tenancy, to wit:

... each of the Cotenants will own an undivided interest as tenants in common in the Property ... The Cotenants do not intend by this Agreement to create a partnership or joint venture, but merely to set forth the terms upon which each Cotenant shall hold, manage, and dispose of its undivided interest in the Property.

Id.

The universal rule regarding tenancies in common is that “the Co-Tenancy” itself owns nothing, but is instead “an estate in which there is unity of possession but separate and distinct titles” held by the individuals making up the co-tenancy. *In re Sale of Property of Dalessio*, 657 A.2d 1386, 1387 (Pa.Comm.w.Ct. 1995) (emphasis added). The United States Supreme Court stated the rule as follows: “The common law characterized tenants in common as each owning a separate fractional share ... Tenants in common may each unilaterally alienate their shares through sale ... or place encumbrances upon these shares.” *United States v. Craft*, 535 U.S. 274, 279-80, 122 S.Ct. 1414, 1421 (2002). *See also, In re Johnson*, 50 Idaho 573, 300 P. 492 (one co-tenant in a ditch may unilaterally sell or abandon his own share of the property, but only his share and not the entire estate making up the co-tenancy); *People v. Shaklee*, 89 Colo. 556, 5 P.2d 249, 254 (“Tenants in common hold several and distinct titles ... and each owner is considered solely and severally seized of his separate share.” (emphasis added); *Handy v. Shiells*, 190 Cal.App.3d 512, 517 (1st Dist. 1987) (“a deed executed by only some of the persons named as grantors *does* operate to convey the interests of those who actually sign it.” (emphasis in original) (*citing Colton v. Seavey*, 22 Cal. 496 (1863))).

The foregoing legal principles clearly explain why the Purchase and Sale Agreement was entered into between Sundance as the “Buyer” and the thirteen prior owners, individually, as the

“Seller.”¹ Anderson Aff. Ex. “C.” It also explains why 74 deeds were executed by the thirteen prior owners as grantors. Anderson Aff. Ex. “E” and “F.” McKay’s argument would only have merit if there were one single deed executed by “the Co-Tenancy” as grantor. Since that is not the case, and because McKay executed ten deeds, as grantor, this case must be determined in light of the following rule: “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). While McKay attempts to take the facts of this case out of the scope of this well-established rule by arguing that “the Co-Tenancy” owned the property, his argument fails as a matter of law for the reasons stated above. Since McKay has produced nothing that would satisfy his burden under the *Joyce Livestock* standard, McKay has failed to meet his burden and Sundance is entitled to summary judgment.

B. Idaho Does Not Recognize a “Sod Farmer” Exception to the Well-Established and Often-Reaffirmed Rule Most Recently Restated in *Joyce Livestock*.

McKay’s Memorandum devotes a significant amount of space describing the “unique” nature of sod farming and that vocation’s water needs. McKay’s Memorandum, p. 3. Not only is the nature of sod farming irrelevant to the determination of this case, but there is no legal support for McKay’s apparent attempt to distinguish sod farming in such a manner that it falls outside the universal rule announced in *Joyce Livestock*. Moreover, McKay’s Memorandum does not cite to a single case that even recognizes sod farming as “unique,” let alone a case holding that water

¹ It is important to note that the Purchase and Sale Agreement, to which McKay was a party, clearly, expressly, and unambiguously states that the thirteen sellers are selling to Sundance the real property “together with all easement rights, mineral rights, other appurtenances, water and water rights appurtenant to or used on the Property ...” Anderson Aff. Ex “C.” Thus, the thirteen sellers were selling their entire interests, including all water rights, without exception, to Sundance.

right rules applicable to everyone else in the world are inapplicable to sod farmers. Simply stated, a sod farmer's use of water is no more unique than that of a nuclear power generator or a sewer treatment facility, and the rule in *Joyce Livestock* applies to all of them.

McKay also states that IDWR "recognized" these "unique" circumstances when it amended the conditions on the Water Right in 2000. At best, this assertion is a liberal interpretation of the record; at worst, it is a blatant misrepresentation to the Court. IDWR's Preliminary Order Correcting License (McKay Aff. Ex. "C") speaks for itself, and it neither mentions sod farming nor the word unique. The IDWR Preliminary Order corrected a clerical mistake, and any assertion by McKay beyond that is without merit.

The bottom line in this case is that in order to withstand summary judgment, McKay must show that the Water Right was expressly reserved in the deeds or clearly show that both he and Sundance intended that he would reserve the Water Right. *Joyce Livestock Co.*, 144 Idaho at 14, 156 P.3d at 515. Since he does not do that, he cannot withstand summary judgment.

C. The Cases Relied On By McKay Actually Support Sundance's Position.

The cases cited in McKay's Memorandum actually support Sundance's position in this case. For example, McKay's Memorandum cites *Paddock v. Clark*, 22 Idaho 498, 126 P. 1053 (1912) for the proposition that a deed to land will only convey the water right if the land owner and water right owner are the same. As discussed above, the rules of co-tenancy are clear that tenants in common hold separate and independent titles, and since McKay owned the Water Right that was appurtenant to the land he owned as a co-tenant, McKay owned the land and the Water Right at the time he conveyed his interests to Sundance. Thus, under *Paddock*, his 10 deeds to Sundance conveyed the land and the Water Right. Moreover, in *Paddock*, the Court stated:

... the conveyance of the land, “together with appurtenances,” would convey not only the land, but the water right appurtenant to said land, unless it appeared by the term of the conveyance that such right was reserved or that it is clearly shown by the evidence that both parties intended not to include said water right by such conveyance.

Paddock, 126 P. at 1055. The *Paddock* Court went on to hold:

Where there is [an express contract], the case must be governed by it, “upon the ground of convention between those who have a disposing power ... we have here a deed in which the parties, by express contract, have said what particular water rights shall pass to, and in connection with the grant of, the several parcels of land. The grantee, therefore, takes only such water rights as are by the express terms of the contract of conveyance described.

Id. at 1057. Thus, in this case, where the express contract between the parties unequivocally stated that ALL water and water rights are to be conveyed, and where the 74 deeds ALL included the “together with appurtenances” provision, the holding in *Paddock* dictates summary judgment in favor of Sundance.

McKay’s Memorandum also cites to *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966) in support of his proposition that the Water Right is not necessary for the enjoyment of the property and thus did not pass to Sundance when McKay, as grantor, executed and delivered the 10 deeds. McKay’s argument is without merit and fails as a matter of law. Specifically, there is nothing properly in the record before this Court that establishes that the Water Right is not necessary for the enjoyment of the property. While McKay’s Memorandum repeatedly asserts this to be the case, such assertions are not supported by citation to evidence properly before the Court. At the summary judgment stage, the non-moving party must “produce specific facts showing that there remains a genuine factual issue for trial.” *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. den’d*, 445 U.S. 951 (1980); *see also, Anheuser-Busch*,

Inc. v. Natural Beverage Distribs., 69 F.3d 337 (9th Cir. 1995) (conclusory or speculative testimony is insufficient to raise genuine issues to defeat summary judgment). McKay has not only failed to produce specific facts showing the Water Right is not necessary, but the assertions in McKay's Memorandum are not even conclusory or speculative testimony; they are arguments of counsel unsupported by anything properly before the Court.

Additionally, the facts of *Sutton* are so clearly distinguishable to the case at bar that *Sutton* has no application here. Specifically, in that case the plaintiff brought an action to quiet title to a water pipeline that was not physically located on nor appurtenant to the property he acquired by deed. *Sutton*, 91 Idaho at 397, 422 P.2d at 64. Recognizing this lack of physical connection and appurtenance to his property, the plaintiff there attempted to argue that the pipe passed to him as a "structural appendant to the land deeded to him by the State." *Id.* at 400, 422 P.2d at 67. The court there ruled against the plaintiff, "[b]y reason of the absence of an express conveyance of such system to him in the deeds ..." *Id.* In this case, there is no dispute that the Water Right is appurtenant to the property, and since ALL appurtenant water and water rights were expressly conveyed by the Purchase and Sale Agreement and the deeds, *Sutton* provides no support for McKay's position.

Finally, McKay's Memorandum cites to *Federal Land Bank of Spokane v. Union Cent. Life Ins. Co.*, 54 Idaho 161 29 P.2d 1009 (1934) and *In re Rice*, 50 Idaho 660, 299 P. 664 (1931) for the proposition that a water right is real property and may be sold and transferred separately from the land up on which it has been used, the same as any other real property. Sundance agrees that this proposition is true, but points out that the operative phrase is "the same as any other real property." *Federal Land Bank of Spokane*, at 1011. "A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same ..." *Id.*

Here, McKay owned land and a water right appurtenant to that land, he ratified and approved a written contract expressly conveying the land and all water rights appurtenant thereto, and he subsequently executed 10 deeds, as grantor, conveying the land, together with appurtenances, to Sundance. Under these facts and the legal standards cited herein, there is simply no legal support for McKay's argument that he did not convey the Water Right to Sundance, and as such, Sundance is entitled to summary judgment.

D. The Prior Conveyance to ACHD Does Not Create a Genuine Issue of Material Fact.

McKay's Memorandum claims that the 2000 conveyance of a portion of TCM Joint Venture land to ACHD somehow proves that the Water Right was not conveyed to Sundance in 2003. Specifically, McKay's Memorandum summarily states, "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." McKay's Memorandum, p. 12. In other words, McKay's circular argument is that the Water Right was not conveyed to ACHD because it was not conveyed to ACHD. Again, the burden is on McKay to produce specific facts, not conclusory or speculative testimony in order to withstand summary judgment. *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. den'd*, 445 U.S. 951 (1980); *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337 (9th Cir. 1995). McKay has not produced any facts relative to the specifics of the ACHD conveyance – he did not produce the purchase and sale contract, testimonial evidence that the parties understood that the Water Right was excluded, or specific facts that the Water Right was even appurtenant to the property conveyed to ACHD. Without this evidence, the ACHD conveyance is irrelevant to this case.

E. McKay's Reliance Upon Attorney General Opinion No. 88-6 is Misplaced.

McKay's Memorandum relies upon Attorney General Opinion No. 88-6 for the proposition that if a grantor of land does not have the power to convey the water right, Idaho Code § 42-220 does not cause the water right to pass to a grantee of the land. With all due respect to the Attorney General, Opinion No. 88-6 is not controlling or persuasive authority; in fact, the Attorney General acknowledges that its opinion is not based upon any court decision on point. Nevertheless, assuming Sundance agrees with the Attorney General's conclusion, as discussed above McKay was both the owner of the land and the water right, and he thus had full authority to convey the Water Right to Sundance, which he did when he executed 10 deeds in his name, as grantor.

F. McKay Blatantly Omits Adverse Provisions in Idaho Code § 67-6537.

McKay's Memorandum cites to Idaho Code § 67-6537 in support of his Objection; however, he conveniently omits subsection (3): "Nothing in this section shall be construed to override or amend any provision of title 42 or 43, Idaho Code, or impair any rights acquired thereunder." I.C. § 67-6537(3). Since Idaho Code § 42-220 expressly states that water rights "shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted," it is understandable why McKay would choose to ignore § 67-6537(3), but he cannot ignore the century of Idaho Supreme Court precedent holding the same. *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); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007).

G. Idaho Code § 55-603 Is Inapplicable to the Facts of This Case.

Although McKay's Memorandum relies on Idaho Code § 55-603, that statute has no bearing on this case because there is a more specific controlling statute. Specifically, Idaho Code § 55-603 is a general statute dealing with the conveyance of easements, whereas Idaho Code § 42-220 specifically deals with the conveyance of appurtenant water rights. When statutes conflict, the more specific statute controls over the more general statute. *Johnson v. Boundary School Dist. No. 101*, 138 Idaho 331, 63 P.3d 457 (2003). Thus, Idaho Code § 42-220, which provides that appurtenant water rights pass with the conveyance of the land, governs.

H. McKay's "Illogical and Patently Unjust" Argument is Without Merit.

McKay's last argument is that Sundance's position in this case is illogical and patently unjust. Again, McKay fails to cite any supporting authority that would support a decision in his favor based on this argument. In fact, it is illogical and patently unjust for McKay to claim that, in light of the \$4.3 million that Sundance paid to McKay and twelve others for the property and ALL water and water rights, that McKay is being wronged in any way. Instead, McKay's Objection and his pursuit thereof is frivolous, unsupported by the indisputable documentary evidence in the record, and is completely lacking of any supporting legal authority.

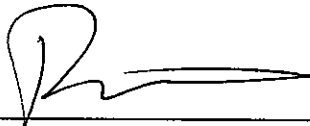
IV. CONCLUSION

In light of the controlling case law, a cursory review of the documentary evidence in the record leaves no doubt that the Water Right was conveyed to Sundance with the land when the thirteen owners, including McKay, executed the 74 deeds. Notwithstanding, McKay's attempts to create issues of fact by raising novel and unsupported legal arguments, McKay has failed to satisfy his burden to create genuine issues of material fact, and as such, Sundance is entitled to summary judgment as a matter of law.

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 June, 2009.

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

By 

Richard W. Stover, of the firm
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CERTIFICATE OF MAILING

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

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