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MAR 20 2015

Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR
TRANSFER NO. 79125 IN THE NAME OF
SCOTT NELSON

**PETITION FOR
RECONSIDERATION**

Scott Nelson (the "Applicant"), by and through his attorney of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby files this *Petition for Reconsideration* ("Petition") regarding the Idaho Department of Water Resources' ("IDWR" or "Department") issuance of a *Preliminary Order Rejecting Transfer* concerning Transfer No. 79125 issued on March 6, 2015. This Petition is brought pursuant to Idaho Code § 67-5243(3) and IDAPA 37.01.01.730.02.a.

As set forth below, the Applicant requests that the Department (1) reinstate Transfer No. 79125, (2) allow a reasonable time (which is suggested by Applicant to be six (6) months) for the Applicant to pursue actions to address the ownership issue; and (3) to schedule a status conference on this matter on a mutually agreeable date approximately six (6) months from now.

As an initial matter, at this stage of the proceedings, it appears that the *Preliminary Order* accurately describes the relevant background as to why the transfer cannot be approved. The water right subject to Transfer No. 79125—Water Right No. 11-73—has unanswered questions regarding its ownership. Unfortunately, this is a typical occurrence in the Bear River Basin, and one of many issues that has led to efforts to commence the Bear River Adjudication. See, e.g., IDWR's website dedicated to the Bear River Basin Adjudication (http://www.idwr.idaho.gov/WaterManagement/Bear_River_Basin_Adjudication/). Many water rights in the Bear River Basin are still listed in IDWR's records as being owned by the person or entity to which the water right was originally decreed in prior adjudications dating back almost a century.

The Applicant requests additional time to contact the landowners to which 11-73 was originally decreed to determine if they have information concerning the water right, and/or if such persons would be willing to execute a quitclaim deed for all or a portion of 11-73. To the extent such landowners will not agree to our request, the Applicant intends to file a quiet title action to address and resolve the question of ownership. The Department was too quick to reject the transfer, and with counsel now employed, the Applicant anticipates moving forward to address the issue as soon as possible.

In addition, while the *Preliminary Order* focuses on the relevant deeds describing the property to which 11-73 was originally appurtenant, other documents are likewise appropriate to review and consider. Rather than have the Department definitively determine this ownership issue—an issue that the Department may not have authority to determine—the more prudent course of action is to resolve the matter in the court system rather than have the Department review evidence other than the deeds to decide the ownership issue. Idaho law allows the decision-maker to review such additional evidence.

Generally speaking, Idaho defines “real property” to include water rights. Idaho Code 55-101.¹ The first section of Idaho's water code, Idaho Code § 42-101, provides that a water right

become[s] the compliment of, or one of the **appurtenances of, the land or other thing to which, through necessity, said water is being applied,** and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expense of delivery of such water.

(emphasis added).

Idaho court decisions hold that as an appurtenance to land, irrigation water rights beneficially used on real property are presumed to be included in a sale of the property unless the water right is expressly reserved in the deed or it can be clearly shown that it was known to both parties that the water right was not intended to be conveyed:

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention ‘appurtenances’”

Bagley v. Thomason, 149 Idaho 799, 241 P.3d 972 (2010) (citing *Joyce Livestock Co. v. United States*, 144 Idaho 1, 56 P.3d 502 (2007)).²

¹ Real property or real estate consists of:

1. Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer.
2. That which is affixed to land.
3. That which is appurtenant to land.

² *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (a deed conveying land “together with appurtenances” carries with it the water right appurtenant at the time of the conveyance “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); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933) (water rights “pass with land though not mentioned as such or as appurtenances[,]...unless it affirmatively appears to the contrary directly or by implication”); *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924) (in the absence of fraud or mistake or a reservation to the contrary, a deed conveying real property with the “usual appurtenance” clause effects a transfer of appurtenant water rights);

The general rule is therefore that water rights of any kind appurtenant to the property are transferred with the property unless the water rights, or one of the water rights, are specifically reserved with language in the deed or the purchase and sale documents. This is the law *even if* the deed does not mention the water rights and *even if* the deed does not contain the generic “appurtenances” language. The above rules concerning conveyances of land involving water rights by deed also apply to deeds of trust and mortgages. *See* Idaho Code § 55-813 (the term “conveyance” embraces every instrument by which an estate or interest in real property is created, alienated, mortgaged or encumbered, or by which the title may be affected, except wills).

We also note that quiet title actions over water rights appear to be more and more common, and as such, Transfer No. 79125 does not present a difficult issue that should warrant rejection of it by the Department at this point. For example, in a recent Idaho Supreme Court case, the court recounted a case decided just a few months prior, where an ownership issue over water rights was discovered when a notice of change of ownership was submitted to the Department:

For example, in *Brown v. Greenheart*, 157 Idaho 156, 335 P.3d 1 (2014), on January 29, 2007, the owners of real property conveyed it by a warranty deed, but the deed mistakenly failed to reserve the water rights appurtenant to the property. The grantors continued to exercise the water rights, but on February 17, 2012, the grantee filed a notice of change in water right ownership with the Idaho Department of Water Resources. About two months later, the grantors filed an action to quiet their title in the water rights. The matter was tried to the court, and it “ruled that the evidence showed a mutual mistake was made by the parties when the warranty deed included unqualified appurtenances language.” *Id.* at 161, 335 P.3d at 5. The court reformed the warranty deed to reserve the water rights to the grantors. *Id.* On appeal, this Court held that the claim of mutual mistake was not barred by Idaho Code section 5-218. We rejected the grantee's argument that “a party is expected to realize the alleged fraud or mistake at the time of execution of a deed.” *Id.* at 162, 335 P.3d at 7. We did so even though the deed granted the premises “with appurtenances,” and under Idaho law it was “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,” *Russell v. Irish*, 20 Idaho 194, 198, 118 P. 501, 502 (1911). We upheld the trial court's finding that the cause of action did not accrue until the grantors met with an attorney, after the grantee asserted a claim to the water, and “were informed of the issue caused by the language ‘with their appurtenances.’” *Brown*, 157 Idaho at 163, 335 P.3d at 8.

Regan v. Jeff D., 339 P.3d 1162, 1166 (Idaho 2014).

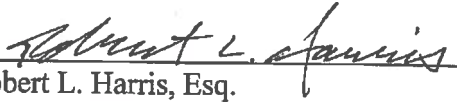
As indicated in the *Preliminary Order*, Transfer No. 79125 has been advertised and not protested. Rather than void the transfer, and require the Applicant to start the process over and risk future protests, the more prudent course of action would be to stay processing of Transfer No. 79125 to give the Applicant more time to sort out the ownership issues. As described above, the deeds describing the property conveyed generally controls, but the Idaho Supreme Court standard allows consideration of other information when determining the intent of the parties as it pertains to conveyance of water rights: “Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, . . .” *Bagley v. Thomason*, 149 Idaho 799, 241 P.3d 972 (2010).

Some of the evidence of the parties’ intent for Nelson to own 11-73 include the June 4, 2014 Froerer document and other documents on file with the Department, the fact that the Applicant and a predecessor owner of 11-73, Sterling Wallentine, have paid assessments to Paris Water District 11-E, actual use of the water for many years on lands other than the listed place of use for 11-73 without objection from the landowners who own the listed place of use for 11-73, lack of protests to Transfer No. 79125, and (based on information and belief) the fact that there is no delivery system to the landowners who own the listed place of use for 11-73.

The Applicant requests a reasonable time period to engage in efforts to address the ownership issue. We note that the transfer was only recently advertised in December, and it

seems that a period of at least six (6) months to pursue these efforts is reasonable. Therefore, we request that the Department (1) reinstate Transfer No. 79125, (2) allow a reasonable time (which is suggested by Applicant to be six (6) months) for the Applicant to pursue actions to address the ownership issue; and (3) to schedule a status conference on this matter on a mutually agreeable date approximately six (6) months from now.

DATED this 20th day of March, 2015.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C

CERTIFICATE OF SERVICE

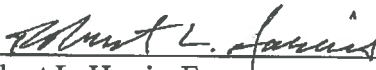
I hereby certify that I served a copy of the following described pleading or document on the parties listed below by hand delivery, email, mail, or by facsimile, with the correct postage thereon, on this 20th day of March, 2015.

DOCUMENT SERVED: PETITION FOR RECONSIDERATION

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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() *First Class Mail*
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(✓) *Facsimile*
() *Overnight Mail*
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