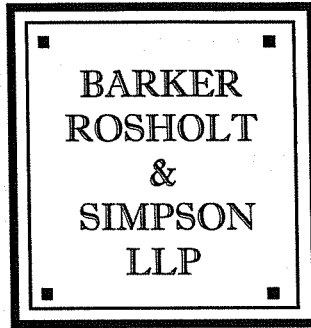


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June 12, 2012

RECEIVED

JUN 14 2012

DEPARTMENT OF
WATER RESOURCES

VIA US MAIL

Gary Spackman
Interim Director
Idaho Department of Water Resources
322 E. Front St.
Boise, ID 83720

Re: Notice of Change of Ownership of Water Right Nos. 65-585, 65-586, 65-587, and 65-7094

Dear Director Spackman:

This letter is in response to the letter of Deputy Attorney General Chris Bromley issued June 1, 2012. In the letter Mr. Bromley purports to deny the Notice of Change of Ownership re-submitted by Emerald Forest Products on May 30, 2012. Mr. Bromley found that 1) specific provisions of the Deed transferring ownership of the property that is the subject of the Notice of Change of Ownership controlled over the general statement that "[t]his conveyance shall include any and all appurtenances, ...and water rights in anywise appertaining to the Property;" and he further held that 2) "[u]nless expressly reserved, water rights in Idaho 'pass with the land even if they are not mentioned in the deed and the deed does not mention appurtenances,'" without explanation as to how certain appurtenant water right were expressly reserved in the deed.

Emerald Forest Products, Inc. objects to both the process employed by the Department of Water Resources to dispose of Emerald Forest Products Notice of Change in Water Rights Ownership, and to the internally inconsistent findings of Mr. Bromley denying the Notice of Change of Ownership. Furthermore, Emerald Forest Products, Inc. requests that Mr. Bromley's letter be rescinded so that either a preliminary order of the Director may be entered, or so that Emerald Forest Products, Inc. may file a quiet title action and have the legal issues determined by a court of competent jurisdiction.

At the outset, a letter issued by a deputy attorney general assigned to the Department of Water Resources, rather than a preliminary order or final order of the Director, fails to provide Emerald Forest with the necessary procedural assurances normally involved in the processing of

claims and transfers by the Department. When I received the letter from Mr. Bromley I made inquiries with Mr. Baxter, and with Danni Smith who was processing the Notice of Change of Ownership, to attempt to determine what the letter represented, and what appeal procedure might be available to Emerald Forest. I was informed by Mr. Baxter that a request for hearing under I.C. § 42-1701A might be the appropriate route, but since Mr. Bromley's letter is not an order or decision of the Director, I am unsure whether such a process is actually available. Alternatively I was instructed that filing a quiet title action may be the appropriate process, but with a letter by the Department in which the Department's counsel takes a firm position concerning the legal premises upon which this matter should be decided, I am not certain that is an available remedy. During my years of practice before the Department, if the Department determines that there are genuine issues of material fact concerning the parties' legal entitlement to ownership of water rights, the Department has historically deferred the determination to a court of competent jurisdiction rather than taking it upon itself to sort out the legal and factual disagreement of the parties. Emerald Forest Products, Inc. respectfully requests that the Department rescind Mr. Bromley's letter for lack of appropriate process.

In addition to the irregular procedural posture taken by the Department in this action, Mr. Bromley's legal determinations were also incorrect. As Mr. Bromley correctly pointed out, under Idaho law, unless water rights are expressly reserved in a deed, then they pass with the land to which such rights are appurtenant. The language relied upon by Mr. Bromley appears in *Joyce Livestock Co. v. United States*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007), where the Court there stated, "[u]nless 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.'" See *Bagley v. Thomason*, 149 Idaho 799, 803, 241 P.3d 972, 976 (2010), also see SRBA Subcase Nos. 63-31194A and 63-31194B, Memorandum Decision and Order Granting Motion for Summary Judgment, July 8, 2009.

The deed transferring ownership of the subject property from Boise Cascade to Emerald Forest's predecessor in interest states specifically:

(v) Grantor hereby conveys water right 65-07094 plus a portion of water right no. 65-00586 sufficient to allow a total combined water right from the well that is the point of diversion for water right 65-07094 of 150 gallons per minute (.33 cubic feet per second). Grantor further agrees to cooperate in the filing of documentation necessary to accomplish this conveyance.

This conveyance shall include any and all appurtenances, tenements, hereditaments, reversions, remainders, easements, rights-of-way and water rights in anywise appertaining to the Property.

See *Notice of Change of Ownership* submitted May 30, 2012, for water right nos. 65-585, 65-586, 65-587, and 65-7094, Special Warranty Deed recorded October 26, 2004, p. 1. There is no language identified in this Deed that purports to expressly reserve any water rights appurtenant to the property, but rather identified the transfer of some water rights appurtenant to the property, and then included "any and all....water rights in anywise appertaining to the Property." *Id.*

Nothing in the language of the deed in any way “expressly reserves” any water rights, and in fact, the deed makes express provision for the transfer of “any and all....water rights in anywise appertaining to the Property.” *Id.*

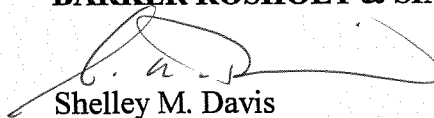
Mr. Bromley invoked a rule of statutory and contract interpretation that dictates that specific language shall prevail over general language where multiple terms relate to the same subject matter. However, that rule of contract and statutory interpretation is only applicable where the two terms are inconsistent and conflicting, and cannot be reconciled. *Madrid v. Roth*, 134 Idaho 802, 806, 10 P.3d 751, 755 (2000). “[A]s between two permissible constructions, that which established a valid contract is preferred to one which does not[.]” *Morgan v. Firestone Tire & Rubber Co.*, 68 Idaho 506, 519, 201 P.2d 976, 983 (1948). Further, “various provisions in a contract must be construed, if possible, to give force and effect to every part thereof.” *Twin Lakes Village Property Ass’n, Inc. v. Crowley*, 124 Idaho 132, 137, 857 P.2d 611, 616 (1993). Under Mr. Bromley’s analysis, the clause providing that “any and all....water rights in anywise appertaining to the Property,” shall be included in the sale of the property, becomes a nullity in violation of the rules of contract interpretation.

There is no clause or recital in the deed that serves as an express reservation of water rights appurtenant to the property, but Mr. Bromley nevertheless found that appurtenant water rights would not be transferred because of water rights clause (v) of the deed. In fact, the deed at issue here included two express grants of water rights appurtenant to the property, and nothing that could be interpreted as a reservation. “Court’s [cannot] interpret an agreement to mean something that it does not say, nor interpolate into a contract something the contract does not itself contain.” *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 290-291, 824 P.2d 841, 865-866 (1991). This same prohibition applies to the Idaho Department of Water Resources.

As a result of the improper procedure used to process Emerald Forest Products, Inc.’s Notice of Change of Water Rights Ownership, as well as the erroneous and internally inconsistent legal opinion issued in Mr. Bromley’s June 1, 2012, letter, Emerald Forest Products, Inc. respectfully requests that the Director rescind the letter issued June 1, 2012, by Mr. Bromley and either issue a preliminary order approving the Notice of Change of Water Rights Ownership, or provide an instruction to resolve any questions as to the ownership of the water rights before the proper tribunal in a quiet title action.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis

Cc: Richard Vinson, Emerald Forest Products, Inc.
Kyle Yearsley, Boise Cascade
Bruce Smith, Moore Smith Buxton & Turke