

DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorney for Darwin McKay

RECEIVED

MAY 11 2007
DEPARTMENT OF
WATER RESOURCES

RECEIVED

MAY 17 2007

WATER RESOURCES
WESTERN REGION

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

APPLICATION FOR TRANSFER)
NO. 73341 IN THE NAME OF) PETITION FOR RECONSIDERATION
SUNDANCE INVESTMENT LIMITED)
PARTNERSHIP)
_____)

COMES NOW Protestant Darwin McKay (McKay), by and through his counsel of record, Daniel V. Steenson and Jon C. Gould of the law firm Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, hereby files this Petition for Reconsideration of the hearing officers April 27, 2007, Preliminary Order Dismissing Protest. This Petition is supported by the record herein and the Affidavit of Jon C. Gould filed concurrently herewith.

FACTUAL BACKGROUND

On April 10, 2007, the Idaho Department of Water Resources ("IDWR") received Darwin McKay's protest ("Protest") to the Application for Transfer No. 73341 ("Application"). *Preliminary Order Dismissing Protest*, April 27, 2007. The deadline for filing a protest in this matter was April 23, 2007. *Affidavit of Jon C. Gould*, ¶3. Due to a clerical error the filing fee was not included with the Protest to the Application. *Id.* at ¶ 4. From April 10, 2007 until April 23, 2007, Mr. Gould was

not notified that the Protest did not include the filing fee or that the protest was deficient in any manner. *Id.* at ¶ 5.

On April 24, 2007, the filing fee was hand-delivered to IDWR, *Id.* at ¶ 9, so that IDWR had a timely filed protest and the application fee. *Id.* at ¶ 10. On April 27, 2007, John Westra, IDWR Manger Western Region, issued the preliminary order dismissing protest to the Application even though a timely protest had been filed and the protest filing fee was submitted. *Id.* at ¶ 11.

The Application involves the transfer of water right no. 63-31194. *Id.* at ¶ 13. Ownership of this water right is contested. *Id.* at ¶ 14. The protestant has filed an objections to IDWR's recommendations for water right nos. 63-31194A and 63-31194B in the Snake River Basin Adjudication court. *Id.* at ¶ 15. The pending adjudication of water right nos. 63-31194A and 63-31194B will resolve this protest. *Id.* at ¶ 16.

ARGUMENT

A. Protest and Fee Were Submitted as Required

It is not mandatory that filing fees are submitted with a protest to an application for transfer. The Preliminary Order inaccurately states “[p]rotests together with the \$25.00 protest fee were to be submitted to IDWR on or before the deadline of April 23, 2007.” Idaho Code § 42-222(1), as relied upon by the hearing officer in supporting the Preliminary Order, states, inter alia, the following:

“ . . . Such notice shall advise that anyone who desires **to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication.** Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. . . .”

Idaho Code § 42-222.

The statutory law makes it clear the protest must be filed within ten (10) days of the last date of publication. However, the cited code does not require the filing fee to be accompanying the protest when filed or even be filed within ten (10) days of the last day of publication. Protestant's protest complies with the statutory requirements.

1. Protest Received Prior to Deadline of April 23, 2007

Protestant filed his protest to the Application on April 10, 2007, two weeks prior to the protest deadline. Furthermore, IDWR acknowledges receipt of the protest on April 10, 2007. See *Preliminary Order Dismissing Protest*, April 27, 2007.

2. Fee Accompanied Protest as of April 24, 2007

The Protestant hand delivered the appropriate filing fee to the IDWR immediately upon notice that the fee was, due to clerical error, not filed with the Protest. However, this insignificant delay in submitting the filing fee did not cause any delay to the application proceeding, did not prejudice the Applicant or the Department, and did not benefit the Protestant. Most importantly, it did not violate I.C. §§ 42-221 or 42-222(1).

The filing fee must accompany the protest at the time the director conducts a hearing on the application. I.C. § 42-222(1) requires the filing of the protest "within ten (10) days of the last date of publication." IDWR received a timely protest. Furthermore, the protest was "accompanied by the statutory filing fee as provided in section 42-221 Idaho Code" prior to a hearing thereon. The application fee accompanied the protest as of April 24, 2007 - one day after the closing of the protest period and before any hearing by the Director.

B. IDWR Delays Consideration of Transfers When Water Right Is Contested in the SRBA

IDWR will delay consideration of applications for transfer of a water right when the water

right is part of an ongoing contested case in the SRBA. Application for Transfer No. 71690 included the transfer of water right nos. 63-12, 63-13, and 63-15. Objections were filed against these water right claims in the Snake River Basin Adjudication ("SRBA"). In a letter to Charles Honsinger dated September 13, 2006, Hearing Officer Speckman stated that "IDWR will delay consideration of transfer no. 71690 until the contested cases in the SRBA for water right nos. 63-12, 63-13, and 63-15 are decided." A copy of the referenced letter is attached for your review.

Ownership of water right no. 63-31194 is contested and Protestant has filed objections to IDWR's recommendations for water right nos. 63-31194A and 63-31194B in the SRBA. IDWR has not considered the Application and should not hear the protest until the SRBA case is resolved. Therefore, the filing fee was not due on April 24, 2007 – the time when the fee was submitted. Additionally, the trial on the objections of water right nos. 63-31994A and 63-31994B will resolve the protest so it would be nonsensical to have a hearing on this transfer during the pendency of the SRBA cases. Regardless, the protest was not heard prior to April 24, 2007 when the filing fee was submitted.

C. Omission of the Filing Fee Is Simply a Clerical Error That Was Immediately Corrected

In the alternative, if the Hearing Officer determines that the protest and the \$25.00 must be submitted together, such a requirement should be excused when the noncompliance is immaterial. Idaho courts have long recognized that clerical errors occur. Dating back in 1927, the Idaho Supreme Court dealt with the significance of a clerical error. See *Small Claims Dep't v. Board of Comm'rs*, (1927). In that case the Court dealt with an appeal to a court order dated May 14, 1924. The appellant, in his notice of appeal, referenced the order as being dated April 14, 1924. The Respondent moved to dismiss the appeal because there was no order issued on April 14, 1924. The

Court held that “[t]his error is immaterial, it appearing that no one has been misled thereby ...” *Small Claims Dep’t v. Board of Comm’rs*, 44 Idaho 228, 232. The Court, realizing that the error was immaterial, did not prevent the appellant’s appeal from proceeding.

In *Turner v. Purdum*, 77 Idaho 130, 136-137 (1955), the Idaho Supreme Court recognized that a notice of appeal is to be liberally construed to preserve the right of review. Mere clerical errors and technical defects are not generally considered sufficient to make a notice of appeal fatally defective. *Citing Off v. Crump*, 40 Cal.App. 173, 180 P. 360; *Lewis v. Lambros*, 65 Mont. 366, 211 P. 212; 4 C.J.S., Appeal and Error, § 593(f), p. 1061.

The clerical error in this matter is similar to errors in the cases cited above. Submission of the filing fee on April 24, 2007 instead of April 23, 2007, when the protest was due, is a mere clerical error that was immediately corrected and not sufficient to make the protest fatally defective.

CONCLUSION

For the foregoing reasons the hearing officer should grant this petition for reconsideration of the preliminary order.

DATED this 11th day of May, 2007.

RINGERT CLARK CHARTERED

By Jon C. Gould
Jon C. Gould
Attorneys for Darwin McKay

CERTIFICATE OF SERVICE

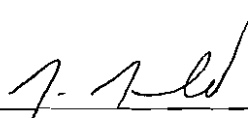
I HEREBY CERTIFY that on the 17th day of May, 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Sundance Investment LTD, Partnership
9100 W. Blackeagle Drive
Boise, Idaho 83709

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☐ Facsimile



Jon C. Gould

Attachment



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

JAMES E. RISCH
Governor

KARL J. DREHER
Director

September 13, 2006

CHARLES L HONSINGER
RINGERT CLARK
PO BOX 2773
BOISE ID 83701

RECEIVED

SEP 14 2006

RINGERT CLARK

Re: Application for Transfer no. 71690, in the name of
The Terteling Company, Inc. ("Terteling")

Dear Mr. Honsinger:

On April 19, 2006, you wrote me a letter about application for transfer no. 71690 (water right nos. 63-12, 63-13, and 63-15). On September 11, 2006, you called the Idaho Department of Water Resources (IDWR) and inquired about the status of the application. This letter responds to your earlier correspondence and your verbal inquiry.

Edwards Family, LLC ("Edwards") protested application for transfer no. 71690. IDWR appointed Peter Anderson as the hearing officer for the contested case. On April 10, 2006, Dana Hofstetter, attorney for Edwards, withdrew the Edwards protest. In the withdrawal of protest, Hofstetter stated that "there are no disputed issues of material fact and the matters at issue involve IDWR policy, and rules, Idaho statutes and other legal matters." Despite the withdrawal of protest, Hofstetter submitted an affidavit authored by Norman C. Young, and asked IDWR to consider the concerns raised therein. Your letter dated April 19, 2006 responds to the withdrawal of protest and the affidavit of Young.

Sometime shortly after the date of protest withdrawal, you and I conversed on the telephone about whether IDWR would consider the Young affidavit. I told you IDWR would probably review the information contained in the affidavit. In your letter, you requested that "[t]o the extent that IDWR considers the information provided by Mr. Young, [Terteling] requests that it be given further opportunity to rebut the information and present alternative information and/or theories."

After April 2006, objections were filed against Terteling's claims for water right nos. 63-12, 63-13, and 63-15 in the Snake River Basin Adjudication (SRBA). These objections raise many issues about the validity or the extent of elements of the water rights. Court proceedings for the objections have been scheduled for this fall and winter.

Charles L. Honsinger
September 13, 2006
Page 2

As a result of the ongoing contested cases in the SRBA, IDWR will delay consideration of transfer no. 71690 until the contested cases in the SRBA for water right nos. 63-12, 63-13, and 63-15 are decided. IDWR will hold application for transfer no. 71690 until it receives notice of resolution of the SRBA disputes.

Respectfully,

A handwritten signature in black ink, appearing to read "Gary Spackman", with a long, sweeping horizontal stroke at the end.

Gary Spackman

Cc: Dana Hoffstetter

RECEIVED

MAY 11 2007

DEPARTMENT OF
WATER RESOURCES

DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorney for Protestant

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF STATE OF IDAHO

_____)
IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 73341 IN THE) AFFIDAVIT OF JON C. GOULD
NAME OF SUNDANCE INVESTMENT)
LTD PARTNERSHIP)
_____)

STATE OF IDAHO)
) ss
COUNTY OF ADA)

JON C. GOULD, being first duly sworn upon his oath, deposes and says that:

1. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.
2. On April 10, 2007, the Idaho Department of Water Resources ("IDWR") received my client's protest to the Application for Transfer No. 73341 ("Application") that I prepared. A true and accurate copy of the protest with IDWR "received" stamp dated April 10, 2007 is attached hereto as Exhibit 1.
3. The deadline for filing a protest in this matter was April 23, 2007.
4. Due to a clerical error the filing fee was not included with the protest to the Application.

5. From April 10, 2007 until April 23, 2007, I was never notified that the protest did not include the filing fee or that the protest was deficient in any manner.
6. On April 24, 2007, two weeks after I filed the protest and one day after the protest deadline, I was contacted by the Idaho Department of Water Resources employee Denise Buffington, asking if a filing fee had been submitted.
7. I informed Ms. Buffington that I did not have a receipt but I would confirm that the filing fee had been submitted or would submit the filing fee. Ms. Buffington did not state that the protest may be dismissed for this clerical error.
8. I found no record of the filing fee being submitted with the protest.
9. A filing fee was hand-delivered to IDWR that same day, April 24, 2007.
10. On April 24, 2007, IDWR had a timely filed protest and the application fee.
11. On April 27, 2007, John Westra, IDWR Manager Western Region, issued the preliminary order dismissing protest to the Application even though a timely protest had been filed and the protest filing fee was submitted.
12. The omission of the filing fee was nothing more than a clerical error that was immediately corrected upon notification of the error.
13. The Application involves the transfer of water right no. 63-31194.
14. Ownership of this water right is contested.
15. The protestant has filed objections to IDWR's recommendations for water right nos. 63-31194A and 63-31194B.
16. The pending adjudication of water right nos. 63-31194A and 63-31194B will resolve this protest.

Further your affiant sayth naught.

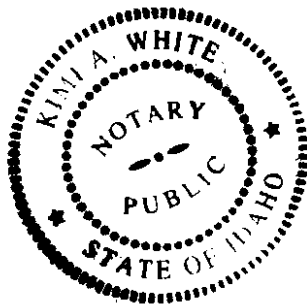
DATED this 11th day of May, 2007.

Jon C. Gould
Jon C. Gould

STATE OF IDAHO)
)ss.
County of Ada)

On this 11th day of May, 2007, before me, the undersigned, a notary public in and for said state, personally appeared Jon C. Gould, known to me to be the individual that executed the foregoing affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Kim A. White
Notary Public for *Idaho*
Residing at *Boise, Idaho*
My Commission Expires: *04/01/10*

CERTIFICATE OF SERVICE

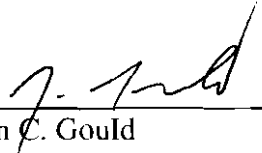
I HEREBY CERTIFY that on the 11th day of May, 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720

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Sundance Investment LTD, Partnership
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Jon C. Gould

Exhibit 1

DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorney for Darwin McKay

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

APPLICATION FOR TRANSFER)
NO. 73341 IN THE NAME OF) PROTEST
SUNDANCE INVESTMENT LIMITED)
PARTNERSHIP)
_____)

Darwin McKay (McKay), by and through his counsel of record, Daniel V. Steenson and Jon C. Gould of the law firm Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, hereby protests the Application for Transfer No. 73341 in the name of Sundance Investment Limited Partnership. This Protest is based upon the following factual and legal issues:

1. Ownership of water right no. 63-31194 is contested. McKay has filed objections to the Idaho Department of Water Resource's recommendations for water right nos. 63-31194A and 63-31194B in the Snake River Basin Adjudication. The pending adjudication of water right nos. 63-31994A and 63-31994B will resolve the protest.
2. McKay files this protest pursuant to Idaho Code sections 42-240 and 42-203A.
3. McKay contends the transfer proposed by the application would violate Idaho Code sections 42-222 and 42-240.

4. McKay contends that the proposed transfer will injure McKay's water right.

5. McKay contends that this transfer will expand and enlarge the place of use said right.

The mailing address for Darwin McKay, is c/o Jon C. Gould, Ringert Clark Chartered, P.O. Box 2773, Boise, Idaho 83701.

DATED this 15th day of April, 2007.

RINGERT CLARK CHARTERED

By 
Jon C. Gould
Attorneys for Darwin McKay

CERTIFICATE OF SERVICE

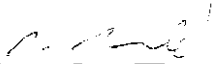
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Jon C. Gould

MEMORANDUM

TO: John Homan

From: J. Westra

Date: 5/17/07

RE: Sundance Transfer #73341 Protest Dismissal

Attached is the preliminary order dismissing the protest for the above transfer due to the \$25. fee not received by the protest deadline. Attorney Gould has submitted a "Petition for Reconsideration" for our consideration.

RECEIVED

APR 08 2009

WATER RESOURCES
WESTERN REGION

DANIEL V. STEENSON (ISB #4332)
JON C. GOULD (ISB #6709)
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Attorney for Protestant

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 73341 IN THE
NAME OF SUNDANCE INVESTMENT
LTD PARTNERSHIP

AFFIDAVIT OF JON C. GOULD

STATE OF IDAHO

COUNTY OF ADA

) ss

JON C. GOULD, being first duly sworn upon his oath, deposes and says that:

1. I make this affidavit based upon my own personal knowledge and belief of the facts contained herein.
2. On April 10, 2007, the Idaho Department of Water Resources ("IDWR") received my client's protest to the Application for Transfer No. 73341 ("Application") that I prepared. A true and accurate copy of the protest with IDWR "received" stamp dated April 10, 2007 is attached hereto as Exhibit 1.
3. The deadline for filing a protest in this matter was April 23, 2007.
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14. Ownership of this water right is contested.
15. The protestant has filed an objections to IDWR's recommendations for water right nos. 63-31194A and 63-31194B.
16. The pending adjudication of water right nos. 63-31194A and 63-31194B will resolve this protest.

Further your affiant sayth naught.

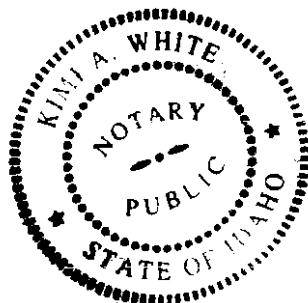
DATED this 11th day of May, 2007.

Jon C. Gould
Jon C. Gould

STATE OF IDAHO)
)ss.
County of Ada)

On this 11th day of May, 2007, before me, the undersigned, a notary public in and for said state, personally appeared Jon C. Gould, known to me to be the individual that executed the foregoing affidavit, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Kimi A. White
Notary Public for *Idaho*
Residing at *Boise, Idaho*
My Commission Expires: *04/10/10*

CERTIFICATE OF SERVICE

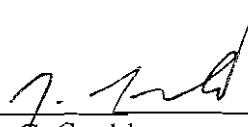
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Jon C. Gould

Exhibit 1

DANIEL V. STEENSON (ISB #4232)
JON C. GOULD (ISB #6709)
RINGERT CLARK CHARTERED
455 S. Third Street, P.O. Box 2773
Boise, Idaho 83701-2773
Telephone: (208) 342-4591
Facsimile: (208) 342-4657

Attorney for Darwin McKay

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

APPLICATION FOR TRANSFER)
NO. 73341 IN THE NAME OF) PROTEST
SUNDANCE INVESTMENT LIMITED)
PARTNERSHIP)
_____)

Darwin McKay (McKay), by and through his counsel of record, Daniel V. Steenson and Jon C. Gould of the law firm Ringert Clark Chartered, 455 S. Third Street, P.O. Box 2773, Boise, Idaho 83701-2773, hereby protests the Application for Transfer No. 73341 in the name of Sundance Investment Limited Partnership. This Protest is based upon the following factual and legal issues:

1. Ownership of water right no. 63-31194 is contested. McKay has filed objections to the Idaho Department of Water Resource's recommendations for water right nos. 63-31194A and 63-31194B in the Snake River Basin Adjudication. The pending adjudication of water right nos. 63-31994A and 63-31994B will resolve the protest.

2. McKay files this protest pursuant to Idaho Code sections 42-240 and 42-203A.

3. McKay contends the transfer proposed by the application would violate Idaho Code sections 42-222 and 42-240.

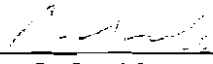
4. McKay contends that the proposed transfer will injure McKay's water right.

5. McKay contends that this transfer will expand and enlarge the place of use said right.

The mailing address for Darwin McKay, is c/o Jon C. Gould, Ringert Clark Chartered, P.O. Box 2773, Boise, Idaho 83701.

DATED this 10th day of April, 2007.

RINGERT CLARK CHARTERED

By 
Jon C. Gould
Attorneys for Darwin McKay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of April, 2007, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720

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Jon C. Gould



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

June 01, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

JOHN C GOULD
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

RE: Order In the Matter of Application for Transfer No. 73341

Dear Interested Parties:

Enclosed please find the Order Denying Petition for Reconsideration and Order Suspending Processing issued by the department in reference to the above listed information.

If you have any questions regarding this matter, please call me at 287-4948.

Sincerely,

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

Jeff Peppersack, Bureau Chief
Water Allocation Bureau

Enclosure

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

I hereby certify that on **June 1, 2007** I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER** to the person(s) listed below:

RE: Transfer 73341

**JOHN C GOULD
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773**

A handwritten signature in cursive script that reads "Darla Block". The signature is written in dark ink and is positioned above a horizontal line.

**Darla Block
Technical Records Specialist**

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 73341 IN THE NAME OF SUNDANCE INVESTMENT LTD. PARTNERSHIP	))))) _____)	ORDER DENYING PETITION FOR RECONSIDERATION AND ORDER SUSPENDING PROCESSING
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On May 26, 2004, Sundance Investment Ltd. Partnership ("Sundance") filed with the Idaho Department of Water Resources ("IDWR") an application for transfer, numbered by IDWR as application for transfer no. 73341. The application for transfer proposes changing the point of diversion and place of use for license no. 63-31194. On November 18, 2004, the application for transfer was amended.

Notice of the application for transfer was published twice in the Idaho Statesman Newspaper on April 5 & 12, 2007. The notice stated that a protest must be filed with IDWR together with the \$25.00 protest fee on or before April 23, 2007.

On April 10, 2007, the IDWR state office received a document titled "*Protest*" from Jon Gould, an attorney representing Darwin McKay ("McKay"). The document identified application for transfer no. 73341 as the filing McKay was seeking to contest. On April 13, 2007, the Western Regional Office received the McKay protest document.

On April 24, 2007, IDWR's Western Regional Office examined the protest document. Although the protest document was submitted prior to the April 23, 2007 deadline, the \$25.00 protest fee was not attached.

On April 24, 2007, staff at IDWR's Western Regional Office examined the protest document and discovered that the requisite filing fee had not been paid. Staff contacted Jon Gould, and, after some investigation, Gould determined the filing fee had not been paid. Gould's office hand delivered the \$25.00 protest fee to IDWR's Western Regional Office at 4:00 pm, on April 24, 2007.

On April 27, 2007, IDWR issued a *Preliminary Order Dismissing Protest*. On May 11, 2007, Jon Gould filed a *Petition for Reconsideration* of the order dismissing Darwin McKay's attempted protest.

Idaho Code § 42-222(1) states:

. . . Upon receipt of such application it shall be the duty of the director of the department of water resource to examine same, obtain any consent require in section 42-108, Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A, Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided section 32-221, Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and conduct a hearing thereon . . .

McKay argues that a payment of the fee after the expiration of the protest deadline results in the fee accompanying the protest.

The word “accompany” means “to go with.” A person accompanies someone else as two people together, at the same time, at a particular event. The same is true of objects or documents that accompany each other. IDWR must determine the event at which the protest document and the filing fee must be together. The event described is the “receipt of the protest.” IDWR may receive a protest within ten days of the last date of publication. The protest and the protest fee must be received within ten days of the last date of publication to accompany each other at the described event, the end of the protest period.

Counsel for McKay argues the nonpayment was a clerical error. Clerical errors are typically mistakes in text. The nonpayment may have been an oversight by clerical staff, but this does not qualify it as a clerical error.

The petition for reconsideration should be denied.

IDWR recommended to the Snake River Basin Adjudication (SRBA) Court that water right no. 63-31194 be decreed to Sundance. McKay objected to the recommendation and to Sundance’s claim of ownership of water right no. 63-31194.

An implied but integral part of processing an application to transfer a water right is a determination of likely ownership. The authority to quiet title is vested in the courts of the state of Idaho, however.

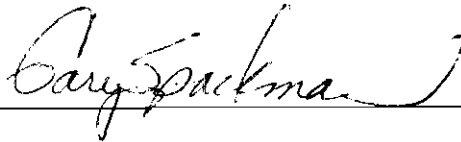
The issue of ownership is presently pending before the SRBA Court and it would be inappropriate for IDWR to attempt to determine the issue of ownership in the transfer process. Because the matter is presently being considered by the SRBA Court, the delay will not result in undue hardship to Sundance.

ORDER

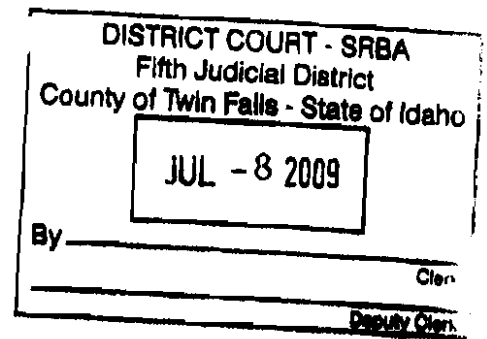
IT IS HEREBY ORDERED that the *Petition for Reconsideration* requesting that IDWR revoke the *Preliminary Order Denying Protest* is **Denied**.

IT IS FURTHER ORDERED that the processing of application for transfer no. 73441 is **Suspended**, and application for transfer no. 73341 shall be held by IDWR until the SRBA Court determines the ownership of water right no. 63-31194.

Dated this 1st day of June, 2007.

A handwritten signature in cursive script, reading "Gary Spackman", is written over a horizontal line.

Gary Spackman
Administrator



**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	)	Subcases 63-31194A and 63-31194B
	)	
Case No. 39576	)	MEMORANDUM DECISION AND
	)	ORDER GRANTING MOTION FOR
	)	SUMMARY JUDGMENT
	)	
	)	SPECIAL MASTER'S REPORT AND
	)	RECOMMENDATION
	)	

I. APPEARANCES

Richard W. Stover, Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered, for
claimant Sundance Investments Ltd.

Jon Gould, Ringert Law Chartered, for claimant / objector L. Darwin McKay.

II. PROCEDURAL AND FACTUAL BACKGROUND

The above-captioned subcases involve a dispute over the ownership of a water right between L. Darwin McKay¹ (hereinafter "McKay") and Sundance Investments Ltd. (hereinafter "Sundance"). The water right at issue was licensed (amended) to McKay on February 1, 2000, with a priority date of July 22, 1988. The amended license authorizes the diversion of 0.84 cfs and 297 AFY of groundwater for the irrigation of 66 acres, with a place of use located in the SENW and the NENW quarter-quarters of Township 03N, Range 01E, Section 21. *Affidavit of Richard W. Stover in Support of Sundance Investments Ltd's Motion for Summary Judgment*, Ex. B (hereinafter "*Stover Aff.*").

¹ Darwin McKay is the president of the Turf Company (McKay Aff. ¶ 2), and as used herein "McKay" refers to both Darin McKay personally as well as the Turf Company, unless the particular context indicates otherwise.

McKay and Sundance both filed claims in the SRBA based upon the license, each claiming 0.62 cfs and 218.2 AFY for the irrigation of 48.5 acres.²

The *Director's Report* recommended water right 63-31194B (Sundance's claim) as claimed; and recommended that water right claim 63-31194A (McKay's claim) be disallowed. McKay timely filed objections to the *Director's Report*, asserting ownership of the subject water right.

McKay is the president of Turf Company, which is a commercial sod provider. *Affidavit of L. Darwin McKay* p.1 (hereinafter "*McKay Aff.*"). In connection with the sod farming operation, McKay filed an application for permit (no. 63-10666) in July of 1988 for the right to appropriate groundwater for use of 71 acres of farm land that he was leasing from HCM Investments. *Id.* The permit was approved on October 6, 1988. The following year Turf Company began leasing an adjacent piece of farm ground, and McKay filed an amended application for permit for the purpose of moving the place of use to this new land. The Department approved this amendment on November 22, 1989. *Id.* Although the land leased by McKay had existing surface water deliverable by the Nampa & Meridian Irrigation District, such surface water supply is inadequate for growing sod because it contains weed seeds and pesticide residue that damage the sod, and because water is needed outside of Nampa & Meridian Irrigation District's standard irrigation season. *Id.*, p. 2.

The owner of the land leased by the Turf Company beginning in 1989 was TCM Joint Venture. *McKay Aff.* p.2. McKay grew sod on the land leased from TCM Joint Venture from 1989 through the growing season of 1999, at which time his lease with TCM Joint Venture was terminated. *Id.* After the 1999 growing season, McKay removed his pump and capped the well. *Id.*, p. 3. In the years following 1999, McKay sold and conveyed portions of the licensed water right to the LDS Church, and to Developers Diversified Realty, TCFM Associates, and Hermes Associates. Those conveyances are not at issue in this proceeding. The remaining portion of the licensed right at issue in these proceedings has not been used since the conclusion of the 1999

² The SRBA claims made by McKay and Sundance do not match the licensed quantities and acreage due to conveyances by McKay of portions of the licensed right. Those other conveyances are not at issue.

growing season, nor has McKay sought to transfer the place of use of the water right to other land.

The license for water right 63-10666 was initially issued by IDWR on August 23, 1995. *Stover Aff.* Ex. A. The license as originally issued was subject to conditions that made the right to the use of groundwater supplemental to the use of surface water on the land. On January 5, 2000, McKay filed a petition with the Department to remove those conditions. On February 1, 2000, the Department issued its *Preliminary Order Correcting License*, finding that water right 63-10666 was not developed for use as a supplement to a surface water source. Also on that date the Department issued an *Amended License* which omitted the conditions that had made the right a supplemental water right. The license as originally issued and as amended states: "This water right is appurtenant to the described place of use."

In addition to being the lessee of the land owned by TCM Joint Venture, McKay was also a 2.5% owner of TCM Joint Venture. *McKay Aff.*, p. 5. McKay never conveyed the subject water right to his lessee, TCM Joint Venture. *Id.* p. 4. In 2000, the real property underlying the place of use for the subject water right was being marketed for sale, and Sundance began to consider potential purchase of the land. *Anderson Aff.*, ¶ 3. On January 9, 2003, Sundance entered into a contract with thirteen (13) individual property owners, including McKay, for the purchase and sale of the land. *Anderson Aff.* ¶ 5. In anticipation of the sale of the property, and for purposes of facilitating 1031 exchange requirements, the owners of TCM Joint Venture executed an Agreement of Co-Tenancy. *Anderson Aff.*, Ex. C. The Agreement of Co-Tenancy terminated the TCM Joint Venture, and stated that each of the thirteen (13) cotenants would own an undivided interest in the real property in a specified percentage amount. The Co-Tenancy Agreement appointed Jack E. Miller as having the authority to make the ordinary and usual decisions concerning the property, but that Mr. Miller would not have the authority to sell the property without the written consent of cotenants holding at least 70% of the ownership interest in the property.

In connection with the sale of the land to Sundance, and for purposes of providing Mr. Miller the authority to sell the land, the thirteen (13) cotenants executed a document

entitled "Action by Cotenants" in which the thirteen (13) cotenants approved the Purchase and Sale Agreement with Sundance, ratified the execution and delivery of said Purchase and Sale Agreement, and authorized Jack E. Miller to execute and deliver the same to buyer Sundance. McKay signed the Action by Cotenants. *Anderson Aff.*, Ex. D.

The Purchase and Sale Agreement between the thirteen (13) cotenants and Sundance identifies the property being purchased 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.

1. PROPERTY TO BE PURCHASED. Buyer agrees to purchase and Seller agrees to sell, the Property, together with all easements 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 Purchase and Sale Agreement also states:

12. MISCELLANEOUS. . . . This written Agreement, including all exhibits attached hereto and documents to be delivered pursuant hereto, shall constitute the entire agreement and understanding of the parties, and there are no other prior or contemporaneous written or oral agreements not contained herein.

Id. The conveyance of the real property from the thirteen (13) cotenants to Sundance was effectuated in February of 2003 through the execution and delivery of seventy-four (74) deeds. *Anderson Aff.* Ex. E and F. McKay and the Turf Corporation executed ten (10) of those deeds. *Anderson Aff.* Ex. E. Each of the deeds specifically state that appurtenances are included with the conveyance, and none of the deeds exclude any water rights. In his affidavit, McKay states: "It was not my intention to convey, transfer, assign or relinquish any portion of my water right to Sundance or the Turf Company with the conveyances from the Co-Tenants to Sundance." *McKay Aff.* ¶ 48.

III. ISSUE PRESENTED

Was the subject water right conveyed via the deeds executed by McKay and/or the Turf Corporation and delivered to Sundance?

IV. STANDARD OF REVIEW

A motion for summary judgment shall be rendered if 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

V. ANALYSIS

Sundance argues that the subject water right was appurtenant to the land that was conveyed from the thirteen (13) cotenants to Sundance and therefore the water right passed with the conveyance. For the reasons set forth herein, this Special Master concludes that the subject water right was conveyed from Darwin McKay and/or the Turf Corporation to Sundance via the deeds executed by McKay and delivered to Sundance and therefore Sundance's *Motion for Summary Judgment* is **granted**.

At the outset, it should be noted that it is undisputed that prior to the conveyance to Sundance, McKay and/or the Turf Corporation was the sole owner of the subject water right. The affidavits on file show that McKay developed the water right as a lessee and that he never conveyed the water right to the TCM Joint Venture nor did he convey the

right to any or all of the other twelve (12) cotenants. Accordingly, the deeds from the remaining cotenants to Sundance did not convey the subject water right because those cotenants did not own the water right, McKay did.

A water right is legally treated in the same manner as an interest in real property and accordingly can only be conveyed in the same manner as real property. *Hale v. McCammon Ditch Co.*, 72 Idaho 478, 488, 244 P.2d 151 (1952). Title to real property may be transferred by contract or deed of the owners, adverse possession, or operation of law. *Id.* (citations omitted). However, in the situation where a water right is an appurtenance to real property, it can be conveyed without expressly mentioning the water right in the deed which conveys the real property to which the right is appurtenant. In *Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007), the Idaho Supreme Court stated: “Unless [water rights] 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 . . .” *Id.*, 144 Idaho at 14, 156 P.3d at 515.

The rules of construction for deeds and other instruments have been summed up by the Idaho Supreme Court as follows:

The legal effect of an unambiguous written document must be decided by the trial court as a question of law. If, however, the instrument of conveyance is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact. In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties. If the language of a deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible. Uncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading up to its execution, from the subject matter, and from the situation of the parties at the time.

Benninger v. Derifield, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (internal citations omitted). The analysis as to whether the subject water right was conveyed from McKay to Sundance necessarily begins with an examination of the ten (10) deeds executed by McKay. The first four deeds set forth in Exhibit “E” to the *Anderson*

Affidavit are quitclaim deeds from McKay to the Turf Corporation; two deeds conveying parcel 1 and two deeds conveying parcel 2.³ The next two deeds are warranty deeds from the Turf Corporation to Sundance; one for parcel 1 and one for parcel 2. Following are two quitclaim deeds from the Turf Corporation to Sundance, again one deed for parcel 1 and one deed for parcel 2. The final two deeds are quitclaim deeds from McKay and his wife, Patricia E. McKay to Sundance. Each of these deeds states that the property is being conveyed with appurtenances. The deeds do not expressly mention water rights.

Although there are no obvious ambiguities or uncertainties discernable from the face of these deeds, McKay asserts in this proceeding that he did not intend to convey the subject water right to Sundance. *McKay Aff.* ¶ 48. Therefore McKay has demonstrated an uncertainty as to what water rights, if any, passed as appurtenances with the conveyance of the land. The above-quoted rules of construction state that this uncertainty is to be treated as an ambiguity; that the interpretation of an ambiguous deed is a question of fact; and extrinsic evidence (i.e. evidence beyond the four corners of the deeds) may therefore be considered.

The first place to look and the most likely place to find an expression of the parties intent as to what water rights were intended to be conveyed as appurtenances is the Purchase and Sale Agreement. As stated above, the Purchase and Sale Agreement describes the property to be purchased as the land “together with all . . . water and water rights appurtenant to or used on the Property and all shares, certificates, and other documents evidencing such water rights.” In other words, the Purchase and Sale Agreement identifies the water rights to be transferred in two ways: (1) appurtenant to the property, or (2) used on the property.

Sundance argues that the subject water right transferred from McKay to Sundance as an appurtenance to the land. Sundance bases this argument on condition number 1 of the amended license, which states: “This water right is appurtenant to the described place of use.” Sundance also cites to Idaho Code § 42-220, which states that “all rights to water confirmed under the provisions of this chapter . . . shall become appurtenant to, and

³ The legal description of parcels conveyed in the first two of these deeds from McKay to Turf Corporation excepts a portion of land lying within Overland Road right of way. The other two do not have this exception.

shall pass with a conveyance of, the land for which the right of use is granted.” I.C. § 42-220; *See also* I.C. § 42-101 (Water rights “shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . .”). Sundance also argues that McKay’s objection constitutes an impermissible collateral attack on the license because the license states that the water right is appurtenant to the place of use. McKay argues that the water right could not have passed as an appurtenance because there was no unity of title between the owners of the land (the thirteen (13) cotenants) and the owner of the water right (McKay). In other words, McKay asserts that the thirteen (13) cotenants could not convey what they did not own.

In the *Memorandum Decision and Order on Challenge*, Subcases 55-10288B *et al.*, (April 25, 2000), then SRBA Presiding Judge Wood stated:

In situations where unity of title does not exist between the water right and the land on which the water is used it is paradoxical or nonsensical to characterize the water right as being “appurtenant” to the land on which the water right is being used. The legal effect of characterizing a water right appurtenant to a parcel of land is to create a legal relationship whereby the water right automatically passes with a conveyance of land unless it is otherwise specifically excluded. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). However, in the absence of unity of title between the water right and the land on which the water right is used, as a matter of law the water right cannot automatically pass as an appurtenance to the land via the instrument conveying the land. The landowner cannot convey something he/she does not own. Kinney’s treatise states:

The doctrine is well settled in the States of the arid region, that a water right used in connection with a certain tract of land for the irrigation thereof, where necessary to the beneficial enjoyment of the land, together with the ditch, canal or other works necessary to conduct the water to the place of use, become appurtenances to the land, **provided that they are owned by the same parties. But they must be the property of the owner of the land to which it is claimed they are appurtenant, and not the property of another.**

Clesson S. Kinney, *Kinney on Irrigation and Water Rights*, § 1011 (2nd Ed. 1912)(emphasis added). Also:

[W]here one in possession of a tract of land, simply under a contract from the owner, appropriates and uses water upon the land, such a water right

does not become appurtenant to such lands, without a conveyance in writing to the owner of the lands, there being no unity of title.

Kinney at § 1020.

The legal result of having non-unity of title between the water right and its place of use is at best ambiguous as to whether the water right is appurtenant to the land. Arguable, non-unity of title effectuates a severance of any alleged appurtenancy relationship. At a minimum, an examination of the intent of the grantor is required to determine if the water right was transferred.

Id., at 15-16. Judge Wood also discussed therein the application of Idaho Code §§ 42-220 and 42-101 in the situation where there is not unity of title between the water right and the land that constitutes the place of use, stating that “even if an appurtenancy relationship were established by operation of law it is clearly severable.” *Id.*, at 17, citing *Hard v. Boise City Irr. & Land Co.*, 9 Idaho 589, 601, 76 P. 331 (1904); *Frank v. Hicks*, 35 P.475, 483 (Wyo. 1894); *Kinney* at § 1015. Generally speaking, the land to which a water right is appurtenant and the land that constitutes the place of use are usually, but not always one in the same. In the situation where the water right and the land comprising the place of use are not owned by the same party a water right could not be conveyed as an appurtenance by the owner of the land. Also, in Idaho it is possible for a water right to be appurtenant to land that does not comprise the place of use. *See Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007) (stockwater rights used on federal grazing allotments passed as an appurtenance to the livestock owners’ patented property).

Under the particular facts in the record in the instant subcase, it is not accurate to state that there was no unity of title between the land being conveyed to Sundance and the water right. Although McKay separately appropriated and owned the subject water right apart from his lessor, TCM Joint Venture, the TCM Joint Venture was terminated under the Agreement of Co-Tenancy, and the land was conveyed to Sundance by the thirteen (13) cotenants. McKay was one of the thirteen (13) cotenants by virtue of having a 2.5% ownership interest in the land. Therefore, while the other twelve (12) cotenants could not have conveyed McKay’s water right for the reason that they did not have an ownership

interest in the right, it was certainly possible for McKay to have intended to convey the subject water right as an appurtenance to his undivided 1/40th interest in the land. The issue of whether McKay had such an intent is a question of fact to be determined by the trier of fact. The deeds executed by McKay state that he is conveying the land “with appurtenances.” As explained above, there is uncertainty in this case as to whether the subject water right was intended to be conveyed as an appurtenance to the land. In turning to the Purchase and Sale Agreement the question is likewise not clearly answered because the Agreement also uses the same terminology – i.e. the property to be purchased as described in the Agreement includes water rights “appurtenant to” the land. There is a disputed question of material fact as to whether McKay intended to convey the water right to Sundance as an appurtenance to the land described in the deeds executed by McKay, and therefore the question of whether the water right was appurtenant to the land at the time of the conveyance cannot be decided on summary judgment. Stated another way, neither the appurtenancy clause in the deeds nor the phrase “appurtenant to” in the Agreement clearly identify the water right(s), if any, that were to be conveyed to Sundance.

That being said, it is the opinion of this Special Master that this subcase can still be decided on summary judgment. The Purchase and Sale Agreement also describes the water rights that were to be conveyed to Sundance as water rights “used on” the land. Unlike the phrase “appurtenant to,” the phrase “used on” can be used to ascertain, with certainty and specificity, what water rights were intended by the parties to be included as part of the property being conveyed to Sundance.

One of the statutorily defined elements of a water right is the place of use. I.C. § 42-1411(2)(h). Often the term “appurtenant” is loosely used to refer to the place of use, but the concepts are separate and distinct. As explained by Judge Wood in the *Memorandum Decision and Order on Challenge*, Subcases 55-10288B *et al.*:

[T]he concept of ‘appurtenance’ is distinct from the concept of ‘place of use.’ The consequence of deeming a water right as appurtenant to land is to create a legal relationship whereby the water right automatically passes with a conveyance of that land, unless specifically excluded. *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984). The consequence of defining a particular tract of land as the ‘place of use’ for a water right is

to create a legal relationship whereby the use of the water cannot be relocated (transferred) to other land without following the procedures mandated by Idaho Code § 42-222. Place of use is a statutory element of a water right; appurtenancy is not. See I.C. § 42-1411(2)(h).

Id., at fn. 13. It is undisputed in this subcase that the place of use for the subject water right, as licensed and as reported in the *Director's Report* for Sundance's claim 63-31194B, is entirely within and upon the land purchased by Sundance. Therefore, there can be no dispute about what was meant by the phrase "water rights . . . used on the Property," as that phrase was used by the parties in the Purchase and Sale Agreement.

This Special Master recognizes that McKay has filed an affidavit in which he states that it was not his intent to convey the subject water right to Sundance. This Statement by McKay does not, however, create a genuine issue of material fact that would defeat summary judgment. The Purchase and Sale Agreement was an integrated document by reason of the merger clause quoted in the previous section of this opinion. The merger clause definitively establishes that the parties have agreed that the contract contains the parties' entire agreement, and therefore the contract is complete upon its face. *Howard v. Perry*, 141 Idaho 139, 141, 106 P.3d 465, 467 (2005). Accordingly, parol evidence of McKay's understanding or intent cannot be considered and is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract. *Id.* In a summary judgment proceeding, "the Court will consider only that material contained in the affidavits or depositions which is based upon personal knowledge and which would be admissible at trial." *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 847 P. 2d 1156 (1993). In the instant subcase, the words of the Purchase and Sale Agreement are clear and unambiguous – the parties intended that any "water rights . . . used on the Property" would be conveyed to Sundance. Again, it is undisputed that the place of use for the subject water right is located wholly upon the land conveyed to Sundance, and McKay never transferred the water right to other land prior to the land having been sold to Sundance.

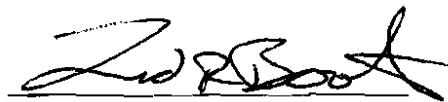
In sum, neither the deeds nor the Purchase and Sale Agreement specifically identify what water rights, if any, were intended to be conveyed to Sundance as an appurtenance to the land, and therefore that question cannot be decided on summary

judgment. That being said, the Purchase and Sale Agreement also defines the water rights to be conveyed to Sundance as the “water rights . . . used on the Property.” Because the place of use for the subject water right is wholly upon the land purchased by Sundance, such land is the only place that the water right can be used, irrespective of whether or not the water right is appurtenant to the land. Accordingly, the subject water right was unambiguously identified in the Purchase and Sale Agreement as part of the property being purchased by Sundance.

VI. REPORT AND RECOMMENDATION

Based on the file and record herein, IT IS RECOMMENDED that water right 63-31194B be **decreed** with the elements as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*. IT IS FURTHER RECOMMENDED that the SRBA District Court enter a final order disallowing water right claim 63-31194A with prejudice.

Dated July 8, 2009



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 63-31194B

NAME AND ADDRESS: SUNDANCE INVESTMENTS LTD
PARTNERSHIP
9100 W BLACKEAGLE DR
BOISE, ID 83709

SOURCE: GROUND WATER

QUANTITY: 0.62 CFS
218.20 AFY

This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands herein.

PRIORITY DATE: 07/22/1988

POINT OF DIVERSION: T03N R01E S21 NENW Within Ada County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-15 TO 11-15	0.62 CFS 218.20 AFY

The use of water for irrigation under this right may begin as early as March 1 , provided other elements of the right are not exceeded. The use of water before March 15 under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE:	Irrigation	Within Ada County
	T03N R01E S21	NENW 20.5
	48.5 Acres Total	SENW 28.0

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

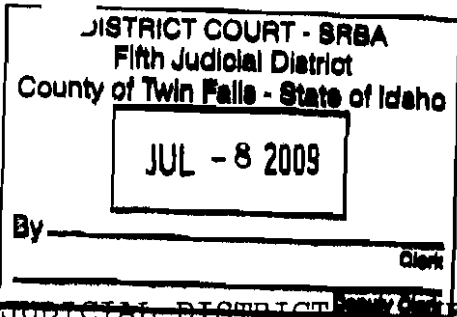
With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECOMMENDATION

JUL - 8 2009

SPECIAL MASTER



IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA)
Case No. 39576)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

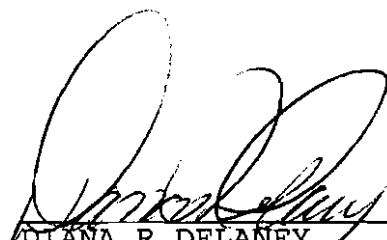
Water Right(s): 63-31194A
63-31194B

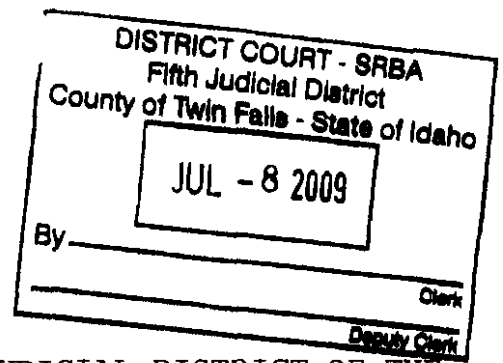
On July 08, 2009, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED July 08, 2009.


DIANA R. DELANEY
Deputy Clerk



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)
_____)

CERTIFICATE OF MAILING

Water Right(s): 63-31194A
63-31194B

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on July 08, 2009, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

L DARWIN MC KAY
Represented by:
JON C GOULD
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE, ID 83701

SUNDANCE INVESTMENTS LTD
Represented by:
STOVER, RICHARD W
EBERLE BERLIN KADING TURNBOW
PO BOX 1368
BOISE, ID 83701-1368

CERTIFICATE OF MAILING


DIANA R DELANEY
Deputy Clerk

PAGE 1
07/07/09



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Web Site: www.idwr.idaho.gov

September 1, 2009

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

Richard W Stover

William J McKlveen

Eberle, Berlin, Kading, Turnbow, McKlveen, & Jones Chtd.

PO Box 1368

Boise ID 83701

RE: Application for Transfer # 73341 (#63-31194B)—Sundance Investment LTD

Dear Mr. Stover:

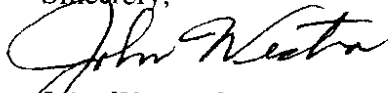
On May 26, 2004, Sundance Investment LTD ("Sundance") filed the above reference application for transfer with our agency. The transfer proposed to change the water right point of diversion, place of use, and establish a permissible place of use. Public notice of the application drew a protest from Mr. McKay. The protest was later ordered denied by our agency due to late submittal of the protest fee. The order also suspended processing of the application pending a resolution with McKay in the Snake River Basin Adjudication (SRBA) court .

It is my understanding, the SRBA case has been recently settled. Please provide our office in writing the application status and intentions of your client regarding final processing of the transfer application. copy enclosed. Should Sundance desire to withdraw the application, a withdrawal form is also enclosed.

Please provide your client's intent within 30 days. No response or an untimely response may result in the application ordered void.

Should you have questions, please contact me at the Western Regional Office, phone 34-2190.

Sincerely,



John Westra, Manager

Enclosure: application copy, withdrawal form.

**EBERLE, BERLIN, KADING, TURNBOW &
MCKLVEEN, CHTD.**

1111 West Jefferson Street, Suite 530
Post Office Box 1368
Boise, Idaho 83701-1368
Telephone No.: (208) 344-8535
Facsimile No.: (208) 344-8542

FAX COVER SHEET

NO. OF PAGES INCLUDING FAX COVER SHEET: 2

EBKT&M FILE NO: 79010-48

TO: John Westra

DATE: September 29, 2009

FAX NUMBER: (208) 334-2348

FROM: Richard W. Stover

MATTER: *Application for Transfer #73341 (#63-31194B) – Sundance Investments Ltd.,*

COMMENTS: Please see attached correspondence dated 9/2/09. Hard copy will follow via U.S. Mail. Thank you.

Information contained in this facsimile transmission and in any attachments hereto may contain information that is confidential, protected by the attorney/client privilege and/or attorney work product doctrine. This transmission is intended only for the use of the individual or entity named above. Inadvertent disclosure of the contents of the contents of this transmission or its attachments to unintended recipients is not intended to and does not constitute a waiver of the attorney/client privilege and/or attorney work product doctrine.

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* * * * *

If transmission is not properly received please call (208) 344-8535.

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

ATTORNEYS AND COUNSELORS AT LAW
BOISE PLAZA
1111 W. JEFFERSON STREET, SUITE 530
POST OFFICE BOX 1368
BOISE, IDAHO 83701

TELEPHONE
(208) 344-8535

FACSIMILE
(208) 344-8542

RICHARD W. STOVER
E-MAIL: rstover@eberle.com

September 29, 2009

VIA FACSIMILE TRANSMISSION: 334-2348
AND FIRST CLASS MAIL

John Westra, Manager
Idaho Department of Water Resources
Western Region
2735 Airport Way
Boise, ID 83705-5082

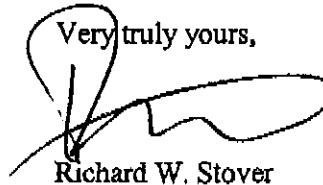
Re: *Application for Transfer #73341 (#63-31194B) – Sundance Investments LTD*

Dear Mr. Westra:

On behalf of Sundance Investments Ltd. Partnership ("Sundance"), I am writing in response to your September 1, 2009 correspondence regarding the above-referenced matter. Now that the SRBA Court has ruled that Sundance owns the water right, it is my client's intention to pursue the transfer application with IDWR. Sundance does not wish to withdraw the transfer application. As such, Sundance officially requests that IDWR proceed with processing the above-referenced transfer.

Please advise whether you need any additional information in order to further process the transfer application. Otherwise, if you have any questions, please feel free to contact me.

Very truly yours,



Richard W. Stover

RWS/js
00184999.000

cc: Christopher Anderson

- Confirmed per phone call Richard Stover
09/29/09 JFW

EBERLE, BERLIN, KADING, TURNBOW & McKLVEEN,

RECEIVED

OCT 01 2009

**WATER RESOURCES
WESTERN REGION**

RICHARD W. STOVER
E-MAIL: rstover@eberle.com

CHARTERED

ATTORNEYS AND COUNSELORS AT LAW
BOISE PLAZA
1111 W. JEFFERSON STREET, SUITE 530
POST OFFICE BOX 1368
BOISE, IDAHO 83701

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(208) 344-8535

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September 29, 2009

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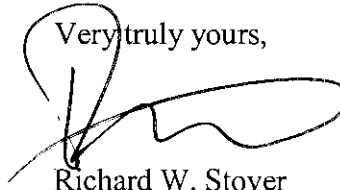
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