

Rushing, Emalee

From: Peter Smith [psmith@lukins.com]
Sent: Wednesday, September 24, 2008 10:12 AM
To: Rushing, Emalee
Subject: Memo on Big Sky HOA Water Rights
Attachments: Memo on Big Sky HOA Water Rights 092208.pdf

Emalee,

This email follows up our telephone conversation earlier this week. Attached is a memorandum prepared by this office presenting the evidence establishing Water Right No. 95-2162 in Big Sky Estates Owner's Association, Inc. I welcome your response.

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9/25/2008

MEMORANDUM

TO: Emalee Rushing, Idaho Department of Water Resources (via email
Emalee.Rushing@idwr.idaho.gov)

FROM: Peter J. Smith IV, Lukins & Annis, P.S.

DATE: September 24, 2008

RE: Big Sky Estates Owner's Association, Inc. – Water Right Ownership

Issue Presented

Whether the Big Sky Estates Owner's Association, Inc. owns Water Right No. 32079/95-2162.

Discussion

Idaho Code § 42-248 governs the transfer of ownership of a water right. It provides in pertinent part that:

All persons owning or claiming ownership of a right to use the water of this state . . . shall provide notice to the department of water resources of any change in ownership of any part of the water right or of any change in the owner's mailing address Notice shall be provided within one hundred twenty (120) days of any change using forms acceptable to the director. Any notice received by the department of water resources more than one hundred twenty (120) days after the change in ownership or mailing address has occurred shall be accompanied by a late filing fee. The late filing fee shall be one hundred dollars (\$100). The director may waive the late filing fee or a portion thereof for good cause.

I.C § 42-248(1). When filing a notice of change of ownership with respect to a water right with the Idaho Department of Water Resources, Idaho Code § 42-248(5) requires that the notice "shall be accompanied by evidence showing the basis for the change in ownership, and how the right is divided if the change divides the right among multiple owners."

An issue has arisen as to whether the water right ownership transfer applicant, the Big Sky Estates Owner's Association, Inc., an Idaho nonprofit corporation ("Big Sky Estates HOA"), is the present owner of the water right it seeks to transfer into its name. The Idaho Department of Water Resources has taken the position that the Big Sky Estates HOA failed to submit sufficient evidence showing the basis for the change of ownership pursuant to Idaho Code § 42-

248(5), specifically asserting that the Big Sky HOA did not established via required documentation that it is the owner of the water right at issue.

A. Water right ownership.

Under Idaho law, an appropriative right in public water is a valuable real property right that can be conveyed together with, or apart from, the land to which it is appurtenant. *In re Robinson*, 61 Idaho 462, 103 P.2d 693, 696 (1940). However, the Idaho Supreme Court has made clear that a water right appurtenant to land will be conveyed with that land via a deed of conveyance unless the appurtenant water right is “specifically reserved in the deed,” or, in the alternative, it is “clearly shown that it was known to both parties that the water right was not intended to be conveyed.” *Russell v. Irish*, 20 Idaho 194, 188 P. 501 (1911). Thus, unless specifically reserved in the language of a deed conveying land, a conveyance of land carries with it the water right appurtenant to the land. *Id.* Furthermore, if land to which a water right is appurtenant is divided and sold off in parcels, said division divides “the appurtenant water right in the same proportion as it divided the land. *Id.*

In this case, Thomas A. Brickert was the owner of the real property which now includes the Big Sky Estates (“subject property”). Mr. Brickert conveyed title to the Subject Property to John and Ann Beutler (“Developers”). The deed of conveyance to the Developers did not specifically reserve any water right appurtenant to the Subject Property from the conveyance. Thus, Idaho law presumes that the Developers acquired the water right with the conveyance of the land. *Russell*, 20 Idaho 194, 188 P. 501. Thereafter, the Developers subdivided the Subject Property into individual private residential lots and conveyed the same to private lot owners. At the time the Developers subdivided the real property, they contemporaneously recorded a Declaration of Covenants, Conditions and Restrictions (“CC&R’s”).

When the Developers subdivided the Subject Property, it is presumed the water right was also subdivided. *Russell*, 20 Idaho 194, 188 P. 501. This presumption can be rebutted, however, if it is otherwise shown that it was known to the Developer and the private lot owners that the water right was not intended to be conveyed to the private lot owners, but the Big Sky HOA.

The question is whether the Developer and the private lot owners knew that the water right was to be conveyed to the Big Sky Estates HOA. Article 3 of the CC&Rs provides as follows:

3.1 Common Area. As described in the Definitions above, the Common Area for the first Phase of the Project shall consist of: (a) the Private Entry Area to the Project; (b) the Greenbelt Areas; and (c) *the Irrigation System (to be used solely for irrigation, and not for domestic purposes)*, the operation, repair, maintenance, and replacement easements for which are hereby reserved to the Association and all Owners of Lots in the Project, and all of which shall be operated and maintained for the benefit of the Owners of all Lots. Common Area for any future Phase shall be identified as such in the Declaration of Annexation. *The Common Area shall also include any other property or property rights conveyed to or held by the Association for the benefit of all Lots within the Project.*

The membership of the Association shall have the exclusive right to the use and benefit of all parts of the Common Area in accordance with the purposes for which it is intended, subject to such restrictions as may be imposed by the Board from time to time.

(emphasis added).

B. Water right is owned by the Big Sky Estates HOA.

In this case, the CC&R's express the clear intent to convey the water right from the Developers to the Big Sky HOA. The CC&R's dedicated particular real property rights to the Big Sky HOA. The definitions section of the Big Sky Estates' CC&Rs provides that:

"Common Area" shall mean the easements, areas, and facilities owned, operated, and/or maintained by the Association for the benefit of all Lots and their Owners. The Common Area within the first Phase of the Project shall include the Private Entry Area, the Greenbelt Areas, and *the Irrigation System*, rights to which are described in the easements reserved in this Declaration, together with any additional property or property rights obtained by the Association, all of which areas shall be operated and maintained for the benefit of the Owners of all Lots.

(emphasis added). The irrigation system, which is part of the Common Area pursuant to the above-mentioned definition, is defined in the CC&Rs as follows:

"Irrigation System" shall mean the private community water system, consisting of *a water well on Lot 8, Block 1, together with all pumping, storage, and delivery systems*, up to, but excluding, the stub connection for each Lot in the Project. The Irrigation System is part of the Common Area.

The Big Sky HOA is the owner of the Common Area. The Common Area includes the "water well on Lot 8, Block 1, together with *all* pumping, storage, and delivery systems...." This provision of the CC&R's granted the Big Sky HOA ownership of the well, and all equipment necessary to obtain water from the ground. What was the purpose of granting the Big

Sky HOA ownership of the well, pump equipment, storage, and delivery systems if it did not have the legal right to the use of the water for beneficial purposes? It is clear from the totality of the circumstances and a reading of the CC&R's as a whole that water right is now held by the Big Sky HOA.

III.

In sum, the Big Sky HOA is the owner of the water right. This conclusion is supported by the definition of Common Area and Irrigation System in the CC&R's. The Big Sky HOA was given the responsibility of management and maintenance of the well, pump equipment, storage apparatus, and delivery systems, which reasonably included the right to put the water in the well to beneficial use.