BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR TRANSFER NOS. 72515 AND 72516 IN THE NAME OF RICHARD J. MURGOITIO	)))))	**FINAL ORDER**

This matter having come before the Director of the Idaho Department of Water Resources (the "Director" or "Department") through Applicant Richard J. Murgoitio's ("Murgoitio") Exceptions to Preliminary Order and Request for Oral Argument and memorandum in support thereof (collectively, "Exceptions") relating to the issuance of a preliminary order rejecting Murgoitio's two applications for transfer of a water right, the Director makes the following Findings of Fact, Conclusions of Law, and Final Order denying Murgoitio's two applications for transfer as follows:

FINDINGS OF FACT

1. The Department issued water right license no. 63-11291 to Lou Murgoitio on February 25, 1993. The water right authorized the irrigation of 338.6 acres within Ada County with 4.4 cubic feet per second ("cfs") from a ground water source to supplement an existing surface water supply.

2. On February 14, 2005, Murgoitio executed a warranty deed conveying real property with appurtenances to Charter Pointe Development, LLC ("Charter Pointe"). According to Murgoitio, the real property conveyed was the land to which supplemental ground water right no. 63-11291 is appurtenant. The sale of the real property closed on February 17, 2005. Charter Pointe has since developed the land into a residential subdivision and has subsequently conveyed the land to individual lot owners ("Subsequent Owners"). On the face of the deed conveying the real property from Murgoitio to Charter Pointe, there is no explicit exception or reservation of water rights. The deed does not incorporate by reference any other documents contemporaneously executed. The deed does not indicate Charter Pointe purchased the real property on behalf of another entity.

3. Murgoitio filed an initial transfer application with the Department on February 15, 2005. Though Murgoitio's transfer was filed before the close of the sale of the real property, the transfer application is not referenced in the deed. On August 1, 2005, Murgoitio replaced the initial application for transfer with two amended transfer applications. The two amended transfer applications seek authorization to change the point of diversion and place of use for portions of water right no. 63-11291 to two new locations. The first application, designated application for transfer no. 72515, proposed to change 0.71 cfs from 40 acres to a 48-acre place of use. The second application,

designated application for transfer no. 72516, proposed to change 0.45 cfs from 30.8 acres to a 22.8-acre place of use. Application for transfer nos. 72515 and 72516 are collectively referred to hereinafter as the "Applications."

4. Murgoitio insists the parties to the sale did not intend a conveyance of water right no. 63-11291. After several exchanges between the Department and counsel for Murgoitio regarding evidence of that alleged mutual intent, Murgoitio provided the Affidavit of Providence Development Group, LLC ("Providence") signed by Justin Blackstock, a purported authorized representative thereof, dated February 7, 2006 ("Blackstock Affidavit"). According to the Blackstock Affidavit, Providence purchased the real property from Murgoitio and Rose Murgoitio. The Blackstock Affidavit also states that Providence "did not intend to obtain any interest whatsoever in the supplemental Water Right No. 63-11291." Attached to the Blackstock Affidavit is, as Murgoitio describes, an "acknowledgement of that fact" by a representative for Providence (Matthew Schultz) allegedly executed before "Providence's purchase" of the real property from Murgoitio (for the sake of convenience only, hereinafter referred to as the "Providence document"). Murgoitio suggests the Providence document proves the "parties agreed *at the time of the* [conveyance] *transaction* that the supplemental water right would not pass from Murgoitio to the buyer." (Emphasis in original.) Murgoitio states the Providence document demonstrates his "reservation" of the water right. The Providence document is not dated, is not signed by Murgoitio, is not notarized, is not referenced in the purportedly subsequently executed deed, and was not recorded. Murgoitio has also provided copies of certain annual report forms on file with the Idaho Secretary of State which show that as of July 11, 2006, Blackstock was a manager for Providence and that as of March 27, 2006, Providence and Blackstock were two of the five managers of Charter Pointe. The Providence document does not, in any way, however, indicate that Charter Pointe, the grantee named in the deed, purchased the land on behalf of Providence.

5. As additional evidence of the alleged mutual intent and of the relationship between Charter Pointe and Providence, Murgoitio submitted the Affidavit of E. Don Hubble ("Hubble Affidavit"). In it, Hubble states he is the president of Hubble Group, Inc. and is familiar with the corporate structure of Hubble Group, Inc. and the "various companies which are part of the structure." According to Hubble, he added Providence as a manager of Charter Pointe in March of 2005. He explains Murgoitio dealt with him through Providence for the sale of the real property, but that a decision was made to purchase the property in Charter Pointe's name rather than Providence. He also states the written statement by a representative of Providence, presumably the Providence document, "applies equally" to Charter Pointe in that neither entity acquired any interest in Murgoitio's supplemental water right no. 63-11291.

6. Both the Department and Murgoitio agree water rights can be conveyed separately from the land. It is undisputed, however, that the deed at issue does not reserve water right no. 63-11291 from the conveyance of all appurtenant rights to Charter Pointe. The deed simply states, without reservation, that Murgoitio conveyed to Charter Pointe "the said premises, with their appurtenances." The language of the deed is plain and unambiguous.

7. Beginning November 17, 2005, the Department corresponded with Murgoitio through his attorney asking for evidence of authority to change the water right and proof that the changes would be consistent with section 42-222 of the Idaho Code.

8. Beginning January 9, 2006, Murgoitio's counsel began responding by providing answers to the Department's questions and/or documents in support of the Applications.

9. On June 19, 2006, the Department issued a Preliminary Order rejecting the Applications for failure to provide evidence sufficient to find that granting the Applications would be consistent with section 42-222 of the Idaho Code. Specifically, the Department found Murgoitio had not addressed adequately the questions of current ownership of water right no. 63-11291 and authority to change the water right.

10. On June 30, 2006, Murgoitio filed a Petition for Reconsideration of Preliminary Order ("Petition").

11. On July 21, 2006, the Department granted Murgoitio's Petition for the purposes of evaluating the merits of the Petition and the supporting documentation Murgoitio provided.

12. On September 26, 2006, after a substantive review of the Petition and supporting documentation, the Department denied Murgoitio's Petition concluding that because the deed did not reserve appurtenant water right no. 63-11291 to Murgoitio that it could presume for purposes of the Applications that the water right passed to Charter Pointe who thereafter conveyed proportionate shares of the right to the Subsequent Owners. It is unclear whether the deeds to the Subsequent Owners reference the appurtenant ground water rights and who might hold those rights because, despite the Department's repeated requests, Murgoitio has not supplied samples of those deeds. The Department further concluded that Murgoitio's reliance on the alleged partial performance of Providence and himself as a defense to the statute of frauds was inapplicable because of the interests of the Subsequent Owners and that the Subsequent Owners had no notice of the Providence document or the Applications. The Department also found that without quitclaim deeds from the Subsequent Owners or a declaration from a civil court quieting title to water right no. 63-11291 in Murgoitio's favor, it could not fully consider the Applications.

13. On October 11, 2006, Murgoitio filed with the Department his Exceptions detailing contentions related to the Department's findings of fact as well as its conclusions of law. Specifically, Murgoitio argues the facts show: 1) Blackstock was an authorized representative of Providence; 2) Murgoitio has not waived his rights because throughout the application process Murgoitio's counsel responded to the Department including to a March 15, 2006 letter from the Department; and 3) that because Providence is a manager for Charter Pointe, the Blackstock Affidavit should "apply equally" to Providence and Charter Pointe such that neither entity claims any rights to water right no. 63-11291.

14. Murgoitio has had ample opportunity to and has provided evidence in support of his Applications.

CONCLUSIONS OF LAW

1. This Final Order is issued pursuant to Idaho Code sections 67-5245 and 67-5246.

2. Section 42-222 of the Idaho Code provides, in pertinent part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, ... [and] the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code... .

3. Section 42-220 of the Idaho Code states, "all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted." Here the deed is silent and when silent, Idaho law is clear—the water rights run with the land. Harris v. Chapman, 51 Idaho 283, 5 P.2d 733 (1931); Russell v. Irish, 20 Idaho 194, 198, 118 P. 501, 502 (1911) ("it is well established that a water right is an appurtenance to the land on which it has been and will pass by conveyance of the land"). Thus the general appurtenances clause in the deed at issue conveyed to Charter Pointe all of the water rights appurtenant to Murgoitio's real property pursuant to section 42-220 of the Idaho Code. See Johnson v. Gustafson, 49 Idaho 376, 381, 288 P. 427, 429 (1930) (emphasizing "[a] general grant of the 'appurtenances' is sufficient to carry an appurtenant water right not specifically described in the deed") (citing Russell, 20 Idaho at 194, 118 P. at 501).

4. As to the primary issues of ownership of the water right and authority to change it, the Department is not persuaded by the Providence document or Hubble's Affidavit. By deed, Murgoitio conveyed his interest in the real property to Charter Pointe Development, LLC, not one of Charter Pointe's managers. While a manager is authorized to execute contracts on behalf of and bind a limited liability company, there is no evidence that Murgoitio conveyed the real property to Providence. See Idaho Code § 53-616(2)(b). Moreover, annual reports of Providence and Charter Pointe listing their managers were not provided for the time period during which Murgoitio conveyed the real property to Charter Pointe, though the Hubble Affidavit indicates Providence first became a manager of Charter Pointe in March 2005, the month after the real property with all its appurtenances was conveyed by Murgoitio to Charter Pointe. Murgoitio has failed to show Charter Pointe acted on behalf of Providence in its purchase of real property from him. Thus, the Providence document is irrelevant to the intent and interests of the parties to the deed.

5. Murgoitio misconstrues the implication of the Applications, believing them to impact only himself and Charter Pointe (and Providence) whereas a grant of the requested transfers would potentially impact Charter Pointe (and perhaps Providence), him, and most notably the Subsequent Owners.

6. Murgoitio failed to demonstrate that the Subsequent Owners will not be unfairly prejudiced by his requested transfers. See generally Barron v. Idaho Dep't of Water Resources, 135 Idaho 414, 418, 420, 18 P.3d 219 (2001) (applicant bears burden of providing sufficient information to show non-injury to other water rights). Murgoitio's argument that the Subsequent Owners are not bona fide purchasers is unconvincing. Murgoitio has failed to show the Subsequent Owners have received notice, and indeed, paragraphs 12-13 of the Hubble Affidavit admit that neither Providence nor Charter Pointe advertised ground water rights nor did they disclose Murgoitio's "reservation" of the ground water rights to the Subsequent Owners. The deed does not state the right at issue was reserved. Neither the undated and unrecorded Providence document nor the Applications would put a third party purchaser on notice. See Bear Island Water Ass'n v. Brown, 125 Idaho 717, 725-26, 874 P.2d 528, 536-37 (1994); Fed. Land Bank of Spokane v. Union Cent. Life Ins. Co., 54 Idaho 161, 168, 29 P.2d 1009, 1011-12 (1934) (holding a subsequent purchaser can rely on the record title in the absence of actual or constructive notice).

7. According to section 55-812 of the Idaho Code, "[e]very conveyance of real property ... is void as against any subsequent purchaser ... of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Thus, the unrecorded Providence document is void against the Subsequent Owners.

8. The Idaho Statute of Frauds states that "[n]o estate or interest in real property ... can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." Idaho Code § 9-503. Further, certain agreements must be in writing, including an agreement for the sale of real property. Idaho Code § 9-505(4).

9. Murgoitio argues that the Providence document satisfies the Statute of Frauds, and even if it did not, then Murgoitio claims partial performance, an exception to the Statute of Frauds, citing "[b]oth parties have performed their side [sic] of the agreement by transferring the title to the property and by agreeing to the water right transfer moving this right to a different property." The Department is guided by a case Murgoitio cited earlier in this process. "What constitutes part performance must depend upon the particular facts of each case and the sufficiency of particular acts is a matter of law." Bear Island Water Ass'n, 125 Idaho at 722, 874 P.2d at 533 (noting affidavits of landowners' beliefs of ownership insufficient evidence of partial performance). Murgoitio has not demonstrated partial performance sufficient to overcome the requirement of the Statute of Frauds, and even if he could, he would only demonstrate partial performance between him and Providence, which was not the grantee named on the deed. Further, partial performance does not resolve the question of current ownership of water right no. 63-11291 as between Charter Pointe and the Subsequent Owners.

10. While the Department understands the difficult situation in which Murgoitio finds himself, on the evidence Murgoitio presented, the Department should deny the requested transfers. For the Department to do otherwise might constitute a

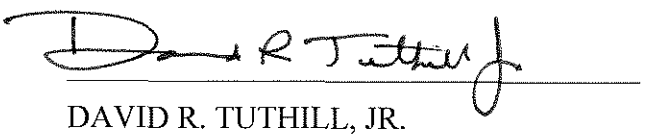
taking, completely destroying the economic value of the water rights of the Subsequent Owners in violation of section 42-222 of the Idaho Code.

11. After considering the Exceptions and all documents provided in support of the Applications, the Department remains unable to consider the Applications without quitclaim deeds from the Subsequent Owners or a declaration from a civil court quieting title to water right no. 63-11291 in the name of Murgoitio.

ORDER

IT IS THEREFORE HEREBY ORDERED that Murgoitio's applications to transfer nos. 72515 and 72516 and his request for oral argument are DENIED for the foregoing reasons.

Dated this 31st day of May, 2007.



DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May, 2007, a true and correct copy of the following document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) served: Final Order

Person(s) served:

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