

ADMINISTRATOR'S MEMORANDUM

To: Water Management Division
From: Norman C. Young *NCY*
RE: PROOF SUBMITTAL
Date: December 1, 1988

PERMIT PROCESSING NO. 10

A question has arisen whether the department should only accept information such as proof of beneficial use or licensing amendments from the permit holder of record and not from third parties.

Many changes in land ownership occur without an assignment of a water right permit that is associated with the land. If water has been diverted and beneficially used, but not yet licensed, experience has shown that in most cases the seller of the property probably intended to convey the permit with the land. If the department refuses to accept submittals because the person submitting the information is not the permit holder of record, we likely are frustrating the intentions of both the former and present landowners with the net result of protecting or benefitting no one.

Section 42-218a, Idaho Code, states that the "permit holder" seeking reinstatement of a permit must submit sufficient evidence to clearly establish the extent of beneficial use during the development period.

The procedure described below in connection with proof submittal is different than administered by the department in the past and is partially based on the April 9, 1986 holding of the district court in a case entitled Glaser Land & Livestock, Inc. v. Daniel C. Skeem (Twin Falls County Case No. 37669). While the case dealt with the ability of one party to foreclose on water right permits in the name of another party and is not interpreted by the department to provide irrefutable guidance, the case does suggest different treatment of permits.

The court essentially held that since the water under the permits had been diverted and beneficially used, the permits vested in the permit holder and thus became appurtenant to the property to which the water had been beneficially used. The vested rights were considered in the case to be within the

definition of real property and subject to foreclosure action.

The department will interpret "permit holder" as used in Section 42-218a, Idaho Code, to mean the most likely person from whom the information should be received. This interpretation will allow persons other than the permit holder of record to submit the proof of beneficial use and/or necessary evidence to prevent a permit from becoming of no force nor effect. The interpretation will also allow the reinstatement of a permit lapsed for a long period of time where the original permit holder can not be found or is estranged from the interested party. Before accepting a proof submittal from a party other than the permit holder, the department will attempt to contact the permit holder of record.

In order for a proof submittal from a third party to be acceptable, the third party is required to show his interest in the property and permit and that the permit holder of record can not be reached. The department will attempt to contact the permit holder of record before accepting the proof. Upon objection by the permit holder to the acceptance of proof from a third party, the department will schedule an administrative hearing if needed.

Conditions on existing permits which limit or control future assignments of the permit, however, such as permits for hydropower production must be complied with by the permit holder of record.

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Department of Water Resources

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

GLASER LAND & LIVESTOCK,)
INC., a Nevada)
corporation,)
)
Plaintiff,)
)
vs.)
)
DANIEL C. SKEEM and DARLENE)
SKEEM, husband and wife; and)
WAYNE B. SKEEM, ARLENE SKEEM,)
and DANIEL C. SKEEM dba)
S & S LIMITED PARTNERSHIP,)
and ZIONS LEASING CORPORATION,)
a Utah corporation,)
)
Defendants.)

Case No. 37669

MEMORANDUM OPINION GRANT-
ING IN PART AND DENYING
IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

Glaser Land & Livestock, Inc. has moved this court for summary judgment against Zions Leasing Company. Zions survives as the only remaining defendant inasmuch as default judgments and a decree quieting title in the plaintiff has been granted against all other defendants.

Glaser's motion for summary judgment is one for the right to foreclose on approximately 158 acres of land. Said property is the subject of an installment land sale contract, including amendments, entered into between plaintiff and defendants Daniel and Darlene Skeem. The

Skeems have defaulted on the contract. Plaintiff wants to foreclose on the underlying real property, as well as water permits, a power sale agreement, a FERC exception, as well as equipment and improvements.

Zions contend they are able to compel plaintiff to sell them that property, within the 158 acres, in which they claim they had a "secured interest." Said interest arises by virtue of having financed the construction and operation of a hydroelectric plant.

DISCUSSION OF LEGAL ISSUES

Basic contract principles must be considered by the court in determining the merits of both parties' contentions.

There is no doubt the underlying land sale contract is enforceable. The contract between Glaser and Skeems was complete and definite in all its material terms and, therefore, is enforceable. Wood v. Simonsen, 108 Idaho 699, 701 P.2d 317 (Ct. App. 1985). A land sale contract whereunder prospective vendors agree to sell the land in question and prospective purchasers obligated themselves to pay by a down payment and an agreement to pay the remaining balance, together with interest, in annual installments meets the requirement for "mutuality of obligation." McCandless v. Schick, 85 Idaho 509, 380 P.2d 893 (1963). In order to ascertain the intent of the parties to a contract, the contract as a whole must be construed. Wing v. Martin,

107 Idaho 267, 688 P.2d 1172 (1984). Whether a contract is ambiguous is a question of law. Wood v. Simonsen, supra, at 701. The Glaser-Skeem contract is not ambiguous. The interpretation and legal effect of an unambiguous contract are questions of law to be resolved by the court. Luzar v. Western Sur. Co., 107 Idaho 693, 692 P.2d 337 (1984).

In order to be able to compel performance under a contract, one must be in "privity." Privity refers to those who exchange contractual promissory words or those to whom promissory words are directed. Wing v. Martin, supra at 272. Zions is not a party to the contract entered into between Glaser and Skeem. Zions is not in privity with the vendor and, therefore, cannot sue to enforce performance pursuant to the terms of the underlying contract.

A party must look to the person with whom he is in a direct contractual relationship for relief, in the event his expectations under the contract are not met. Id.

Therefore, Glaser cannot compel Zions performance to be substituted for Skeems. Nor can Zions compel Glaser to perform under the terms of the contract. Zions cannot compel Glaser to sell Zions that portion of the total 158-acre parcel in which Zions claims an interest.

Further, Zions cannot be construed as a third-party beneficiary to the Glaser-Skeem contract. Obviously, the land sale contract was not entered into to directly benefit Zions. I.C. Sec. 29-102.

Absent fraud or overreaching, a court cannot modify express terms of an agreement lawfully entered into by two competent persons. Knoke v. Charlebois, 107 Idaho 427, 690 P.2d 392 (Ct. App. 1984).

The court is without jurisdiction to make a contract between Glaser and Zions. Minidoka County For Use and Benefit of Detweiler Bros., Inc. v. Krieger, 88 Idaho 395, 399 P.2d 962 (1964).

While a party to a contract may agree to accept the performance different in form from that recited in the contract, there is not evidence to support a finding by this court that the Glasers agreed to accept Zions' performance of the land sale contract.

Glaser's only remedy is against the defaulting buyers. Glasers cannot insist Zions pay the full balance due and owing under the contract, nor can Zions, not a party or a third-party beneficiary of the contract, insist on Glaser's performance under the partial release provisions of the contract.

In concluding the discussion as to the land itself, there is no doubt Glasers validly asked this court to treat the installment land sale contract as a mortgage and allow the vendors to foreclose.¹

¹By asking the court to treat this contract as a
(Footnote Continued)

Given that the Glasers can proceed to foreclose on the real property, the next question for this court concerns Zions' asserted rights, via assignment by Skeems, in the water rights, a power contract and a FERC permit exemption.

A. Water Rights.

The Skeems applied for and obtained water permits no. 47-7700, 47-7702 and 47-7705.

The Skeems have until various dates in 1987 to submit proof of application of the water to a beneficial use to the Department of Water Resources. There is evidence to support a finding by this court that the water has, in fact, been put to beneficial use.

In regard to water permit 47-7700, Skeems had until on or before February 1, 1987, to submit proof of application of beneficial use. Water permit 47-7702, Skeems had until on or before May 1, 1987, to submit proof. Water permit 47-7705, Skeems had until on or before May 1, 1987, to submit proof. This "outside" time frame does not preclude the Skeems from submitting proof earlier. Nor does it preclude the Department of Water Resources itself from being requested by Glaser to make such a finding.

These water rights are not adjudicated, licensed or unadjudicated "constitutional" rights. Nor is this mere

(Footnote Continued)
mortgage, the Skeems obviously have a statutory right to redeem. I.C. Sec. 11-402.

initiation of the statutory process by the filing of an application for an appropriation permit. See Matter of Hidden Springs Trout Ranch, Inc. v. Allred, 102 Idaho 623, 636 P.2d 745 (1981). Skeems have already procured water appropriation permits. The defendants cite Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45 (1921), as precedent for characterizing Skeems' permits as inchoate rights and, therefore, not real property. However, Big Wood Canal Co. also stands for the proposition that substantial compliance with the statutory conditions in regard to proof of application to beneficial use will suffice.

"The purpose and object for requiring proof of completion of works is to ascertain whether or not they conform to the terms of the application and permit, and are capable of diverting the amount of water intended. Substantial conformity with such application and permit is all that is required." Big Wood Canal Co. v. Chapman, supra at 394-395.

It appears from the record that Skeem has diverted and put the water to beneficial use. This court finds Skeem has substantially complied with the statutory mandates and, therefore, the water rights must be considered as having vested in the Skeems. Case law indicates that this court has jurisdiction to make such a finding by considering the entire record. See Glendale Ranches, Inc. v. Schaub, 94 Idaho 585, 494 P.2d 1029 (1972). By virtue of the rights

having vested, the rights are appurtenant to the property to which the water has been beneficially applied. Clearly, water rights are within the definition of real property. I.C. Sec. 55-101 and cases cited under "Ditches and Water Rights".

Therefore, Glaser can proceed to foreclose upon the water permits.

B. The FERC Exemption and the Idaho Power Contract.

The FERC exemption is federal authorization to operate the "Mud Creek Project." The "project" involves some parcels of land not subject to, nor which can ever be subject to Glaser's foreclosure action. The exemption is appurtenant to the entire three parcels of land on which the project is located.

An essential element of a license or a license coupled with an interest is the right to use land in the possession of another. Shultz v. Atkins, 97 Idaho 770, 554 P.2d (1976). The FERC exemption is analogous to a license. The court agrees with Zions that the exemption should be characterized as a general intangible. Glaser cannot foreclose on the FERC exemption.

The Idaho Power contract is an agreement to sell power produced from the Mud Creek Project. The rights under the contract have been validly assigned to Zions. Contract

rights are also general intangibles and, therefore, Glaser cannot foreclose on the power sales contract.

C. Other Improvements, Etc.

The record is insufficient as to other improvements, related equipment, structures, etc. for this court to make a determination of whether any of the aforementioned are subject to foreclosure. Therefore, summary judgment is denied, pending augmentation of the record so as to put enough evidence before this court with which to make a competent decision.

EMINENT DOMAIN

The question of whether Zions can succeed with an action for eminent domain is not before this court. However, the court notes that it agrees with Zions' position that Zions does not have to have an ownership interest in the water rights, which supply the source of energy for the Mud Creek Project, prior to being able to go forward with an action for eminent domain. Bassett v. Swenson, 51 Idaho 256, 5 P.2d 722 (1931).

Therefore, summary judgment will be granted to plaintiff as to the underlying real property and the water permits.

Summary judgment is denied as to the FERC exemption and the Idaho Power contract.

Summary judgment is denied as to the related equipment, improvements, etc. pending augmentation of the record.

Counsel for plaintiff is asked to prepare an order of partial summary judgment.

DATED this 9th day of April, 1986.



DANIEL B. MEEHL
District Judge

CERTIFICATE OF MAILING

The undersigned certifies that on the 9 day of April, 1986, she caused to be mailed a copy of the foregoing memorandum opinion to:

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