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	)	**ORDER DENYING PETITION FOR RECONSIDERATION**

This matter having come before the Idaho Department of Water Resources (the "Department") through a petition to reconsider the issuance of a preliminary order rejecting two applications for transfer of a water right, the Department makes the following Findings of Fact, Conclusions of Law, and Order denying the petition for reconsideration:

FINDINGS OF FACT

1. The Department issued water right license no. 63-11291 to Lou L. 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, Richard J. Murgoitio (the "applicant") executed a warranty deed conveying real property with appurtenances to Charter Pointe Development, LLC (the "purchaser"). The real property conveyed was the land to which supplemental ground water right no. 63-11291 is appurtenant. The sale of the property closed on February 17, 2005. The purchaser acquired the land for the purpose of developing it into a residential subdivision. The developer subsequently conveyed the land to the individual lot owners

3. The applicant filed an initial transfer application with the Department on February 15, 2005. On August 1, 2005, the applicant 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 will be referred to hereafter as "the applications."

4. On November 17, 2005, the Department mailed a letter to the applicant's attorney, asking for evidence of authority to change the water right and that the changes would be consistent with the requirements of Idaho Code § 42-222. The letter stated that, if the applicant did not respond to the request within 30 days, the Department would reject the applications.

5. On January 9, 2006, the applicant's attorney submitted a letter with attachments addressing some of the questions identified in the Department's letter of November 17, 2005 The letter referred to an undated document, attached to the applications, that reads as follows:

> Providence Development Group LLC acknowledges that it has no interest in the supplemental water right number 63-11291 for any land in Section 2, Township 2 North, Range 1 East, and that Richard J. Murgoitio returns all right, title and interest in said water right

6. On January 10, 2006, the Department, having determined that the question of current ownership or authority to change the water right was not adequately addressed, mailed a letter to the applicant's attorney asking for additional documentation to support ownership or authority to change the water right.

7. On February 10, 2006, the applicant's attorney submitted a letter and an affidavit by Justin Blackstock to the Department. The affidavit asserted that Blackstock was an authorized representative of Providence Development Group LLC, and that Providence Development Group LLC purchased real property from Richard and Rose Murgoitio The affidavit stated the following:

> In the land purchase, Providence Development Group LLC did not intend to obtain any interest whatsoever in the supplemental Water Right No. 63-11291. The attached acknowledgment of that fact was signed on behalf of Providence Development Group LLC and executed prior to the purchase of the property from the Murgoitios.

The document attached to the applications, quoted above in finding of fact no. 5, was also attached to the affidavit.

8. The Department determined that the question of current ownership or authority to change the water right was not adequately addressed. On March 15, 2006, the Department mailed a letter to the applicant's attorney asking for additional documentation to support ownership or authority to change the water right. In the letter, the Department again stated that, if the applicant did not respond to the request within 30 days, the Department would reject the applications.

9. On June 19, 2006, the Department issued a preliminary order rejecting the applicant's applications for transfer pursuant to Idaho Code § 42-222.

10. On June 30, 2006, the applicant, through his attorney, filed a Petition for Reconsideration of Preliminary Order ("petition") noting that he had been in contact with the Department's attorney following the Department's letter of March 15, 2006. On July 21, 2006, the Department granted the petition for the limited purpose of providing the Department with the opportunity to evaluate the petition and the supporting documentation. In the petition, the applicant alleged that both he and the purchaser intended that the applicant would retain all right, title and interest in supplemental water right no. 63-11291.

11. "Exhibit A," attached to the petition, is the undated statement document quoted earlier in finding of fact no. 5. The document is signed by Matthew Schultz as a representative of Providence Development Group, LLC, in which Providence acknowledged, "it has no interest in the supplemental water right number 63-11291," and that the applicant "returns (sic) all right, title and interest in said water right."

12. The applicant asserts in the petition that the purchaser signed "Exhibit A" before the sale of the property closed on February 17, 2005. The applicant does not explain why Providence Development, LLC signed the document rather than the named purchaser, Charter Pointe Development, LLC. The document does not show that Providence signed the document on behalf of the named purchaser. In addition, the document does not explain by what authority Providence may have signed the document on behalf of the named purchaser. The applicant acknowledges in the petition that "Exhibit A" was not recorded with the warranty deed, nor does the deed mention the applicant's reservation of any appurtenant water rights.

13. The applicant also alleges in the petition that any subsequent purchaser of the property could not claim title to supplemental water right no. 63-11291 as a bona fide purchaser because the applicant's transfer application was filed with the Department on February 15, 2005, before the close of the sale of the property.

14. The petition further alleges that the statute of frauds did not prevent supplemental water right no. 63-11291 from being withheld from the conveyance due to the doctrine of partial performance.

CONCLUSIONS OF LAW

1. Section 67-5243(3), Idaho Code, provides in pertinent part as follows:

> Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the issuance of that order. The presiding officer shall render a written order disposing of the petition.

2. Section 42-222, Idaho Code, provides in pertinent part as follows:

> 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, the change does not constitute an enlargement in use of the original right, 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, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a

municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right.

3. Section 42-220, Idaho Code, provides in pertinent part as follows:

> [A]ll 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

4. The Idaho Supreme Court has confirmed that a water right is an appurtenance to the land on which it is used and will pass with a conveyance of the land unless reserved in the deed:

> [I]t is well established that a water right is an appurtenance to the land on which it has been used and will pass by conveyance of the land. A division of the land would divide the appurtenant water right in the same proportion as it divided the land In this case the twenty acres of land was deeded *together with the appurtenances* This conveyance would carry with it the water right appurtenant to the land at the time of the conveyance, unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed.

Silverstein v. Carlson, 118 Idaho 456, 460, 797 P.2d 856, 860 (1990) *quoting from Russell v Irish,* 20 Idaho 194, 198-99, 118 P 501, 502 (1911) (emphasis in original; citations omitted).

5. Absent actual knowledge or facts sufficient to place a party on inquiry notice, a third party purchaser is required to look no further than the record title to property with respect to real estate. *See Federal Land Bank of Spokane v. Union Cent Life Ins.*, 54 Idaho 161, 168, 29 P.2d 1009, 1011 (1934). In the present matter, neither the undated and unrecorded statement by Providence Development, LLC, nor the applicant's filing of a water right transfer application with the Department would reasonably have put a third party purchaser on notice that the applicant had intended to reserve ownership of the appurtenant supplemental ground water right in a previous conveyance of the property.

6. In order for an instrument found outside of the record title to provide a third party purchaser with constructive notice, the recorded deed must suggest that a more complete description of the property exists outside the deed of title. *See Kalange v. Rencher*, 136 Idaho 192, 195-96, 30 P.3d 970, 973-74 (2001). Nothing on the face of the February 14, 2005, deed from the applicant Murgoitio to Charter Pointe Development, LLC suggests that documents outside the record need be consulted to ascertain the intent of the grantor and the grantee with respect to the conveyance or reservation of appurtenant water rights. The only constructive notice provided by the deed is that the lands as described in an attached exhibit were conveyed "with their appurtenances," which in this case included licensed water right no. 63-11291.

7. The applicant's argument that the statute of frauds did not prevent supplemental water right no. 63-11291 from being withheld from the conveyance due to the doctrine of partial performance or the mutual agreement of the parties is inapplicable. Here, one may concede that the seller Murgoitio and the purchaser Charter Pointe Development, LLC intended that water right 63-11291 be reserved from the conveyance. If those were the only two parties involved, the matter could be resolved now through a quitclaim deed from the purchaser to Murgoitio. Unfortunately, other interests now exist represented by the subsequent purchasers of the residential subdivision lots who were not given notice through the recorded deed that the water right was intended to be reserved.

8. A suit to ascertain, determine, and decree the extent and priority of a water right and appropriation partakes of the nature of an action to quiet title to real estate. In order to prevail in an action to quiet title, the person bringing the action "must establish such claim by evidence that is clear, satisfactory and convincing." *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998). "[A] quiet-title action is principally *in rem*. Jurisdiction lies where the property is located." *Brown's Tie & Lumber Co. v. Kirk*, 109 Idaho 589, 590, 710 P.2d 18, 19 (Ct. App. 1985). An action to quiet title may only be heard by a district court. *Rural Kootenai Organization, Inc. v. Board of Com'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999); *Bonner Bldg. Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 685, 682 P.2d 635, 638 (Ct. App. 1984).

9. Because the land conveyance deed from Murgoitio to Charter Pointe Development, LLC did not reserve appurtenant water right no. 63-11291 to the grantor, the Department must presume for purposes of considering amended applications for transfer nos. 72515 and 72516 that the water right passed to the grantee under the deed and that a proportionate share of water right no. 63-11291 in turn passed by subsequent deed to the individual lot owners following development of the residential subdivision. The Department has not been furnished with a copy of the deed form provided to the individual lots owners.

10. The Department cannot fully consider the application for transfer without quitclaim deeds from the individual lot owners or a declaration from a civil court quieting title to water right no. 63-11291 in the name of the applicant.

ORDER

IT IS THEREFORE HEREBY ORDERED that the petition for reconsideration of the order denying Water Right Transfer Nos. 72515 and 72516 is DENIED pursuant to section 42-222, Idaho Code.

Dated this 26th day of September, 2006.

GARY SPACKMAN
Chief, Water Allocation Bureau