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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

In Re SRBA

Case No. 39576

Subcases: 36-11060 and 36-15462

SECOND ORDER ON SUMMARY
JUDGMENT REGARDING PRIORITY
DATE

I. PROCEDURAL BACKGROUND

Water rights 36-00046, 36-11060 and 36-15462 were recommended in the *Director's Report* to claimant Billingsley Creek Ranch (Billingsley Creek). John W. Jones, Jr. filed *Objections* to all three rights, and Billingsley Creek filed *Objections* to two of the rights, 36-15462 and 36-11060. The United States objected to 36-00046. Subsequently, the parties settled and submitted a *Standard Form 5*. The Idaho Department of Water Resources (IDWR) declined to sign the agreement. The parties filed a *Motion for Summary Judgment (Motion)* to resolve these cases. The court issued an *Order Granting Summary Judgment in Part* (Dec. 31, 1996) resolving the issues of quantity during the nonirrigation season for all three water rights and priority for 36-00046.¹ This decision addresses the additional issue of whether the decreed priority date of February 17, 1896 applies to water rights 36-11060 and 36-15462 for which a change in purpose of use began in 1971.

¹ An *Amended Order Granting Summary Judgment, in Part* (Feb. 19, 1997) was issued correcting an error in the original order regarding the priority date for 36-00046. The *Amended Order* lists the priority date as February 17, 1896 for 36-00046.

It is undisputed that these rights were previously decreed in *New International Mortgage Bank v. Idaho Power Co.*, In Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*New International Mortgage*) with a priority date of February 17, 1896.

Billingsley Creek and Jones assert there are no genuine issues of material fact as to priority for these two rights. IDWR declined to sign the *Standard Form 5* because it disagreed the priority date should be 1896 priority. *Amended Report Re: Review of Standard Form 5* at 2-4. IDWR recommended 36-11060 with a March 1, 1971 priority date and 36-15462 with a June 1, 1977 priority date. *Director's Report for Reporting Area 3*.

It is undisputed that these two rights changed from irrigation to other uses in 1971. Although IDWR concluded that the fish propagation which began in 1971 for water right 36-15462 was "transferred" or expanded in 1977, nothing in the record supports this contention. *Amended Order Granting Summary Judgment, in Part* (Feb. 19, 1997). There are no genuine issues of material fact which remain to be tried. The legal question which remains is whether the change in purpose of use which occurred in 1971 results in a 1971 priority date, or whether these rights retain the original priority date of February 17, 1896.

II. STANDARD OF REVIEW

A. GENERAL STANDARD FOR SUMMARY JUDGMENT

I.R.C.P. 56(c) provides for summary judgment where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on file, together with the affidavits, if any . . ." to determine whether the moving party is entitled to summary judgment. I.R.C.P. 56(c). The facts are usually liberally construed in favor of the nonmoving party who is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991). The burden of proving the absence of genuine issues of material fact rests on the moving party. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). If the moving party properly supports the motion for summary judgment, the nonmoving party must then present opposing evidence.

The opposing party's case must consist of more than speculation because a mere scintilla of evidence is not enough to create a genuine issue of fact. *G & M Farms v. Funk Irrigation*, 119

Idaho at 517. The burden of proving the absence of material fact rests upon the moving party. If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, summary judgment must be denied. *Id.* Credibility determinations, weighing of evidence, and drawing of legitimate inferences from the facts are functions to be performed at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

B. CASES WITHOUT A NONMOVING PARTY

This summary judgment motion is unique in that it does not involve opposing parties. These subcases involve two parties: the claimant, Billingsley Creek Ranch, and the objector, John W. Jones, Jr. The parties stipulated these rights should have a priority date one day later than the priority date in the prior decree. There is no party opposing the *Motion*. The only dispute is between the *Director's Report* recommendation and the position advocated by the parties. IDWR is not a party. I.C. § 42-1401B(3) (1994); *In re SRBA Case No. 39576*, 128 Idaho 246, 912 P.2d 614, 624-625 (1995). Nevertheless, this court is charged with determining water rights where each party to the subcase has reached an agreement, but where IDWR disagrees.

III. ANALYSIS

This court previously ruled the following facts were uncontested:

1. **Water rights 36-15462 and 36-11060** were adjudicated in the *New International Mortgage* decree each with a priority date of February 17, 1896. (*New International Mortgage Decree*, unpaginated document at twelfth page listing predecessors J. Eugene and Marvel Farmer.)
2. **Water rights 36-15462 and 36-11060** were adjudicated in the *New International Mortgage* decree which provided these rights were for irrigation and "domestic and other purposes." (*New International Mortgage Decree*, unpaginated document at sixth page.)
3. **Water right 36-15462** was first used for fish propagation in 1971. (*Affidavit of Donnie McFadden* at 2.)
4. **Water right 36-11060** was first used for recreation purposes in 1971. (*Affidavit of Donnie McFadden* at 2.)

The issue before this court is whether the decreed priority date of February 17, 1896 was forfeited after changes in purpose of use occurred in 1971 for water rights 36-11060 and 36-15462.

A. *RES JUDICATA*

Billingsley Creek argues the change in purpose of use has no legal effect because *New International Mortgage* previously decreed purpose of use as irrigation and other purposes. Thus, the recommendations of 1971 and 1977 priority dates are barred by the doctrine of *res judicata*, since purpose of use was previously adjudicated. Billingsley Creek argues the change from irrigation to fish propagation and recreation in 1971 could have no effect since the prior decree allowed other purposes.

The doctrine of *res judicata* generally precludes relitigation of matters previously adjudicated. *Res judicata* is used to refer to both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). *Powder Basin Psychiatric v. Ullrich*, ___ Idaho ___, 931 P.2d 652, 654 (Ct. App. 1996.) Under the doctrine of *res judicata*, or "claim preclusion," a final adjudication precludes the parties to the first action, and their privies, from later relitigating against the same parties not only the same claim or demand, but all claims arising out of the transaction which was the subject matter of the litigation and which could have been made in the first action. *Diamond v. Farmers Group*, 119 Idaho 146, 804 P.2d 319 (1990); *Aldape v. Akins*, 105 Idaho 254, 668 P.2d 130 (Ct. App. 1983). The Idaho Court of Appeals explained:

"[C]laim preclusion," or true *res judicata* . . . treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." * * * When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar."

Powder Basin Psychiatric v. Ullrich, ___ Idaho ___, 931 P.2d 652, 654-655 (Ct. App. 1996) quoting *Roselle v. Heirs and Devisees of Grover*, 117 Idaho 530, 532-33, 789 P.2d 526, 528-29 (Ct. App. 1990); *Aldape*, 105 Idaho at 256-57, 668 P.2d at 132-33.

Res judicata does not resolve the issue in these two subcases because there is no assertion that Billingsley Creek's predecessor should have brought a "claim" in *New International*

Mortgage which is now precluded. Similarly, there is no assertion that IDWR should have brought a "claim" in *New International Mortgage* which is now precluded. These subcases are more properly considered under collateral estoppel or "issue preclusion."

B. COLLATERAL ESTOPPEL

Unlike the doctrine of *res judicata*, collateral estoppel, or "issue preclusion," binds the parties in later litigation with outsiders as well as with parties to the first suit. The Idaho Supreme Court has established a five-factor test to determine whether collateral estoppel will act as a bar: 1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; 2) the issue decided in the prior litigation was identical to the issue presented in the present action; 3) the issue sought to be precluded was actually decided in the prior litigation; 4) there was a final judgment on the merits in the prior litigation; and 5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation. *Western Industrial and Environmental Services, Inc., v. Kaldveer Associates, Inc.*, 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994); *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1987).

Collateral estoppel does not prevent this court from considering the change of purpose of use. *New International Mortgage* fails to bar litigation of the change in purpose under factors 2 and 3. The issue decided in *New International Mortgage* is not identical to the issue presented here. The issue decided in *New International Mortgage* was simply what were the priority and purpose elements for these water rights in 1932. The issue presented here is whether a change in purpose of use which occurred after *New International Mortgage* affects the priority date. Clearly, the issue in the prior litigation is not identical to the issue here. The issue sought to be precluded - whether the change in purpose effected the priority date - could not have been actually decided in *New International Mortgage*. No change from irrigation to fish propagation had yet occurred, so fish propagation could not have been decreed as a purpose of use, nor could the issue of the change in purpose have been actually litigated.

C. INTERPRETATION OF THE DECREE

The rules of construction of contracts generally apply to the interpretation of court orders and decrees. *Toyama v. Toyama*, 129 Idaho 142, 922 P.2d 1068, 1070 (1996); *Suchan v. Suchan*, 113 Idaho 102, 106, 741 P.2d 1289 (1986); *Evans v. City of American Falls*, 52 Idaho 7, 18, 11

P.2d 363 (1932). If the language of a decree is clear and unambiguous, determination of its meaning and legal effect is a question of law. *Id.* If, however, the language of the decree is reasonably susceptible to conflicting interpretations, it is ambiguous and the determination of its meaning is a question of fact. *Id.*

The court looks first to the provision in *New International Mortgage* which adjudicated purpose of use to determine whether it is ambiguous. It is clear that the "other purposes" language did not mean to decree uses which did not exist at the time of the decree. That would mean that water rights decreed in *New International Mortgage* could be changed at any time without regard to injury. There is no authority upholding such an interpretation of any old decree. The "other purposes" language merely recognized the flexibility inherent in all water rights. For example, an irrigation right with "other purposes" language recognizes that the water user not only has the right to provide water to nourish plant roots, but also to use water in ways necessary to maximize crop growth, such as for prepping fields or frost water protection. *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wash.2d 232, 238, 814 P.2d 199, 202 (1991). In addition, this special master agrees with Special Master Haemmerle's conclusion in *Second Amended Order on Summary Judgment* (Sept. 13, 1996, 36-00003A, *et al.*). That decision construed the "other purposes" language in *New International Mortgage*:

Under the "other purposes" section, the *New International Mortgage Decree* could recognize only those other purposes of use for which water had been applied to a beneficial use. The court could not recognize prospective uses or uses that did not exist at the time the Decree was entered.

Second Amended Order on Summary Judgment (Sept. 13, 1996, 36-00003A, *et al.*).

This decision agrees with the analysis of Special Master Haemmerle that the *New International Mortgage* court lacked authority to decree purposes of use which, admittedly, did not exist at the time. Although the term "other purposes" may be ambiguous, the term cannot mean what Billingsley Creek asserts.

D. RIGHT TO CHANGE IN PURPOSE OF USE

The Idaho Constitution is silent as to changes in water rights. The Idaho Constitution protects the right to divert and appropriate, but does not address changes in purpose of use. IDAHO CONST. art. 15, § 3.

Idaho statutes currently permit a water user to change the point of diversion, place of use, and purpose of use, provided such changes do not injure other water users. I.C. § 42-108; I.C. § 42-222. Such changes must now be approved by the IDWR. Previous versions of I.C. § 42-108 have been in effect since at least 1899. In 1899, the legislature passed a statute which permitted changes in place of diversion. The Revised Statutes, § 3157; 1899, p.380, § 11 (emphasis added); reenacted Revised Codes § 3247; 1908; also found at Compiled Laws §3247; 1918; Compiled Statutes § 5563; 1919; and finally at Idaho Code Annotated § 42-108; 1932. (The statutory language remained identical during these recompilations.) Notably, there was no statutory recognition of a right to change the purpose of use. Idaho Code § 42-108 was amended in 1943, recognizing changes in place of use, in addition to changes in point of diversion. The 1943 statute did not recognize changes in purpose of use. The statute was again amended in 1947, without recognizing changes in purpose of use. Idaho Session Laws, 1947, ch. 80, § 1, p. 130. The statute was amended in 1969 requiring approval by the Department of Reclamation for changes in point of diversion or place of use, but did not recognize change in purpose of use. Idaho Session Laws, 1969, ch. 303, § 1, p. 905-906. This version of I.C. § 42-108 was in effect when the changes in purpose occurred in 1971. Thus, there was no statutory right to change purpose of use in 1971.

The Idaho Supreme Court has not decided whether a common law right to change purpose of use exists. *Beker Industries, Inc. v. Georgetown Irr. Dist.*, 101 Idaho 187, 610 P.2d 546 (1980), considered whether IDWR had authority to approve application of change in purpose. *Id.* at 190. The Supreme Court held IDWR did not have authority to approve such changes because the version of I.C. §§ 42-108 which was then in effect did not recognize changes in purpose of use. *Id.* at 191. However, the Court emphasized it had **not decided** whether there was a common law right to change purpose of use:

Other prior appropriation jurisdictions have recognized a common law right to change the nature of use of water without losing one's appropriation date. This court has never had to consider this issue, nor is such an issue presented in this case. Herein we address only the issue of whether the DOWR has the authority to grant the requested change in nature of use.

Beker at 190, n.2 (citations omitted).

Although the Idaho Supreme Court has not decided the issue, ~~this~~ decision recommends a common law right to change purpose be recognized. Many other jurisdictions have recognized a common law right to change purpose of use. For example, in *Gallagher v. Montecito Valley Water Co.*, 35 P. 770, 772 (Cal. 1894), the Supreme Court of California recognized a right to change purpose of use as long as the change did not cause injury.

In *Seven Lakes Reservoir Co. v. New Loveland and Greeley Irrig. and Land Co.*, 93 P. 485 (Colo. 1907), the Colorado Supreme Court recognized a common law right to change purpose of use. The court based its reasoning on a policy of promoting progress.

It would be unfortunate indeed if the law were such that it could not be adapted to changed conditions resulting from the character of crops grown by those engaged in agricultural pursuits. If water for direct irrigation can only be utilized for that purpose, the result would be to retard agricultural progress, and limit the growth of agricultural products to those which can be matured by means of direct irrigation in the early season. . . . Such a rule would make the right to the use of water dependent upon the character of crops grown instead of upon the right to utilize it in any manner which does not injuriously affect the vested rights of others.

Id at 486.

The Washington Supreme Court recognizes a common law right to change purpose of use based on similar policies of promoting progress and economic incentive.

"The appropriator of water is not limited in its application to that use for which he made the appropriation. On the contrary, he may apply the water to any beneficial use that he chooses and in changing from one use to another he does not in any way lessen his rights or forfeit his priority as an appropriator. If this were not true a change of circumstances by which the use of water for a purpose first contemplated would no longer be profitable, would result in a practical destruction of the appropriator's interest therein and in a loss by him of all the water and of all the appliances by which it has been conveyed, however valuable, as where the chief and perhaps the only purpose at first contemplated was the use of water for mining and the mines for which it was used have proved unprofitable or become exhausted."

In re Water Rights in Alpowa Creek, 129 Wash. 9, 224 P. 29 (1924) (citation omitted).

The court should recognize a common law right to change purpose of use. Many supreme courts throughout the west have recognized a common law right to change purpose on the basis

of important policies such as promoting progress. It is likely the Idaho Supreme Court would recognize a common right to change the purpose of use given its recognition of progress and economic incentives in other contexts. Recognition of a common law right to change purpose of use should, therefore, apply to these subcases. The original priority date of February 17, 1896 applies to 36-11060 and 36-15462. The change in purpose of use which occurred in 1971 would not effect the priority date unless a claim of injury was made. Here, there is no assertion of injury since the only party to these subcases, other than the claimant, stipulated to this priority date.

IV. CONCLUSION

Water rights 36-11060 and 36-15462 are entitled, as a matter of law, to a priority date of February 17, 1896. The *New International Mortgage* decree does not bar a later date, and there was no statutory right to change of purpose of use in 1971. Nevertheless, this decision recommends that a common law right to change purpose of use be recognized. Since no injury is asserted, these two rights are entitled to the original priority of February 17, 1896. The parties have stipulated to a date one day later, February 18, 1896. There are no genuine issues of material fact with respect to this issue. Therefore, the *Motion for Summary Judgment* is granted as to the priority date for these two rights. The priority date for 36-11060 and 36-15462 is February 18, 1896.

DATED April 11, 1997.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

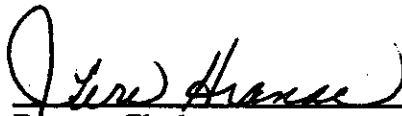
CERTIFICATE OF MAILING

I certify that a true and correct copy of the SECOND ORDER ON SUMMARY JUDGMENT REGARDING PRIORITY DATE (OTHER PURPOSES) was mailed on April 11, 1997, with sufficient first-class postage to the following:

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