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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - CSRBA Fifth Judicial District County of Twin Falls - State of Idaho
MAR 23 2017
By _____ Clerk Deputy Clerk

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re CSRBA

) Water Right 91-7094

Case No. 49576

) ORDER ON MOTION TO ALTER OR AMEND

I. PROCEDURAL BACKGROUND

This is a subcase where two claimants asserted ownership of a water right to grow wild rice. The right is based on a license. The land where the water right is used is owned by Cedar Creek, LLC, which is connected to claimant Jeffrey Shippy. Mr. Shippy's claim to the water right is based on ownership of the land and transfers of title to that land.

The competing claimants are Doug and Darcy McInturff. The McInturffs claimed ownership of the water right as successors to the license holder. The permit and license were issued to St. Maries Wild Rice Growers. A trial on this water right was held in August 2016. Both Mr. Shippy and the McInturffs represented themselves *pro se* during the trial. A *Special Master's Report and Recommendation* was issued for this water right October 6, 2016.

Subsequently, Jeffrey Shippy filed a *Motion to Alter or Amend* and was represented by counsel. A hearing was held on the *Motion to Alter or Amend*. The *Motion to Alter or Amend* asked the court to reconsider the determination of ownership of this water right. The ownership element was the only element disputed at trial.

Water right 91-7094 is based on a license. The right was claimed by Doug and Darcy McInturff, and the original *Director's Report* recommended the McInturffs as owners. After the *Director's Report* was filed, Mr. Shippy filed an *Objection* and competing late claim numbered 91-7893. IDWR investigated the competing claims and was unable to determine that either the McInturffs or Mr. Shippy had exclusive ownership of the water right. IDWR disallowed 91-7893 (the competing claim) and filed an *Amended Director's Report* for 91-7094. The *Amended Director's Report* recommended the McInturffs and Mr. Shippy as co-owners of the water right.

A water permit was filed by St. Maries Wild Rice Growers in 1983. IDWR issued the license in 1991 to St. Maries Wild Rice Growers, an unincorporated entity. Ten years later, in 2001, the McInturffs purchased a wild rice business from Alexander and Judith Bruner. The contract between the McInturffs and the Bruners included terms for purchasing equipment, leases, water rights, and other items. The Idaho Department of Water Resources processed a Change of Ownership in 2005 filed by the McInturffs. The Change of Ownership asked IDWR to recognize an ownership change from St. Maries Wild Rice Growers to the McInturffs. IDWR processed the Change of Ownership in favor of the McInturffs. The 2005 contract and Change of Ownership are the basis of the McInturffs' claim to the water right.

The place of use described in the license is not owned by the McInturffs. It is undisputed that the place of use was never owned by the licensee St. Maries Wild Rice Growers. At the time of the application for permit and licensing, the land was owned by Aaron and Jeanne Robinson. The land is currently owned by Cedar Creek Ranch, LLC. The principal of Cedar Creek Ranch, LLC, is Jeffrey Shippy. No claim was filed on behalf of Cedar Creek Ranch, LLC. Mr. Shippy asserted his ownership interest by filing a competing late claim, an *Objection*, and a *Response* to the *Amended Director's Report*. His theory is that the license was appurtenant to the place of use, that the Robinsons were the correct owners of the license, and that ownership of the license transferred with the deeds.

II. STANDARD OF REVIEW

A. Director's Report

Director's reports of water claims are *prima facie* evidence of the nature and extent of a water right. I.C. § 42-1411 (4); *Clear Springs Foods, Inc. v. Clear Lakes Trout Co.*, 136 Idaho 761, 764, 40 P.3d 119, 122 (2002). The objecting party has the "burden of going forward" with evidence to establish any element which is in addition to or inconsistent with the description in the director's report. "Any party filing an objection to any portion of the director's report shall have the burden of going forward with the evidence to rebut the director's report as to all issues raised by the objection." *State v. Hagerman Water Right Owners*, 130 Idaho 736, 742 (1997).

Therefore, the *Director's Report* is *prima facie* evidence of the nature and extent of this water right until the presumption afforded the *Director's Report* is rebutted. The burden of going forward with evidence to rebut the *Director's Report* is placed on the Objectors to provide evidence as to why the elements of the water right are not accurate.

B. Collateral Attack on Licenses

The District Court has long held that licenses duly issued by the Idaho Department of Water Resources cannot be collaterally attacked. “If a party is aggrieved by any aspect of a license, that party’s remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 76-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. See e.g., *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984)” *Supplemental Findings of Fact and Conclusions of Law* (Facility Volume) (Subcases 36-2048 *et.al.*) (July 31, 1998) at 11 – 12.

In the Facility Volume case, the Special Master ruled that the Claimant was bound by the licenses for the rights at issue because the Claimant did not appeal the remarks during the licensing proceedings. The Court said that once a license is issued by IDWR, “any attempt to redefine a license would be tantamount to altering a real property right.” *Id.* at 11. Idaho Code § 42-220. In other words, if a licensee fails to appeal the condition of a license when the license is issued, the licensee has no judicial remedy. *Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation* (Subcase 36-8099) (Aug. 20, 1999) at 3.

Based on long-established case law, if an Objector disputes an element of a water right that was decided in a license, he would ordinarily have no remedy. The reason is that disputes about the elements of a water right are required to be brought during the licensing proceedings.

C. Dissolution of a Corporation

A corporation may be dissolved in Idaho, but follows legal constraints established by statute. When dissolution of a corporation occurs, the dissolved entity continues to exist and may take steps to wind up and liquidate its affairs. Idaho Code § 30-1-1405 (1997) established that a dissolved corporation may, among other things, a) collect its assets, b) dispose of its properties that will not be distributed to its shareholders, c) discharge its liabilities, and d) distribute its remaining property among its shareholders according to their interests.

D. Exhaustion of Administrative Remedies

Idaho Code § 42-1701A governs processes before the Director of IDWR. Subsection (1) governs when the Director is required to hold a hearing, prior to taking action. Subsection (2)

allows the Director to appoint a hearing officer to conduct such hearings and to make a complete record of the evidence. Subsection (3) governs situations where the Director takes action without a hearing. Subsection (3) governs the situation implicated in this subcase. Subsection (3) provides that “any person aggrieved by an action of the director . . . who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.” I.C. § 42-1701A(3). In such instances, the statute establishes that the aggrieved person “*shall* file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing.” *Id.* (emphasis added). This procedural step is required. *Twin Falls County v. Idaho Com’n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012). The Director then holds an administrative hearing on the matter. Finally, subsection (3) instructs that “[j]udicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.” *Id.* Subsection (4) provides a right of judicial review in accordance with the standards set forth in IDAPA. I.C. § 42-1701A(4).

III. ISSUES

IDWR recommended this water right to the McInturffs and Mr. Shippy as co-owners. The parties dispute the recommendation.

During litigation of this subcase, it became apparent that the factual basis for ownership was complicated. In addition, the evidence connecting ownership of the license with any of the Claimants had gaps. Evidence of final ownership was strongly disputed. Consequently, the Court ordered the parties to attend a Settlement Conference. ***Trial Scheduling Order*** (Dec. 17, 2015). A Mandatory Settlement Conference scheduled for the parties for April 28, 2016, did not take place. Prior to the date for the Mandatory Settlement Conference, an *Amended Director’s Report* was issued to which there were no *Objections*. Consequently, the Court issued a ***Special Master’s Report and Recommendation*** consistent with the *Amended Director’s Report*. Because the ***Special Master’s Report and Recommendation*** had apparently resolved the issues, the Mandatory Settlement Conference was vacated. Subsequently, a *Motion to Alter or Amend* was filed to the original ***Special Master’s Report and Recommendation***, which was unopposed. The Court granted the *Motion to Alter or Amend* and allowed the parties to go to trial.

The trial resulted in a decision in the second *Special Master's Report and Recommendation*. That decision resulted in a determination that the owners were Doug and Darcy McInturff. A *Motion to Alter or Amend* was filed by Mr. Shippy. The sole question brought at trial, and the question raised by the *Motion to Alter or Amend*, is who owns this water right?

To answer the ownership question, the primary issues are those identified in the *Special Master's Report and Recommendation* in combination with issues emphasized by the *Motion to Alter or Amend*.

- 1) Is there evidence that the claimants shared ownership of the license or water right?
- 2) Does ownership of the place of use determine ownership of the license?
- 3) What is the significance of License 91-7094 and its determination of ownership?
- 4) What is the significance of the Change of Ownership?

IV. ANALYSIS

A. Duplicate Claims

IDWR received two claims for this water use, both based on License 91-7094. The water right was first claimed by Darcy and Douglas McInturff. (IDWR Ex. 17) The first *Director's Report* accordingly recommended it as claimed by the McInturffs. Mr. Shippy filed an *Objection* to the original *Director's Report* for 91-7094. Mr. Shippy also filed a late claim (91-7893) for the same water use. The competing claim by Mr. Shippy was recommended disallowed, and both claims were considered under 91-7094.

B. The Amended Director's Report

IDWR issued a *Director's Report*, then an *Amended Director's Report*, and a *Supplemental Director's Report*. (IDWR Ex. 1, Ex. 2, Ex. 3) The *Amended Director's Report* and the *Supplemental Director's Report* included both Mr. Shippy and the McInturffs as co-owners. IDWR reviewed documents provided by the Claimants showing their connection to the water right. (Testimony of Chad Goodwin) The Claimants provided documents to IDWR in support of their respective theories of ownership. IDWR had difficulty, however, determining which owners had the superior legal basis. Ultimately, IDWR could not determine which of the claims was valid. (IDWR Ex. 3); (Testimony of Chad Goodwin) Therefore, IDWR determined that there was a conflict in evidence concerning ownership. It was unable to determine which claim should prevail. "Because IDWR was not able to determine which, if either, of the

claimants had exclusive ownership of the water right, both Claimants were listed as owners in the Amended Director's Report." (IDWR Ex. 3 at 4) The *Amended Director's Report* determination of ownership is afforded *prima facie* weight until rebutted.

C. Ownership and Appurtenance

Mr. Shippy's theory is that the ownership of this license was the owner of the place of use. He cites *Joyce Livestock Co. v. United States*, 144 Idaho 1 (2007), for the proposition that water rights appurtenant to land pass with the property even though not mentioned in the deed. 144 Idaho at 13 – 14. "Unless they are expressly reserved in the deed or it is clearly shown that the grantor intended to reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances.'" *Id.* at 14.

Courts have recognized that the owner of a water right may be someone other than the landowner of the place of use. *First Security Bank of Blackfoot v. State*, 49 Idaho 740 (1930), held that a water right "is not necessarily appurtenant to the land on which it was used." *Id.* at 746. Shippy argued that *First Security Bank of Blackfoot* does not apply to this subcase. The argument is that the license states that the water right is appurtenant to the place of use. On the other hand, the license clearly and unambiguously states the owner of the water right was St. Maries Wild Rice Growers, not the landowners.

Certainly, it is established that water rights appurtenant to land are conveyed with deeds even when the deed does not specifically mention water rights. *See, e.g., Bagley v. Thomason*, 149 Idaho 799, 803 (2010)(holding that if water rights are not expressly reserved in the deed, appurtenant water rights pass with the land even when not mentioned in the deed); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984)(holding that decreed water right passes with land to which it is appurtenant unless the water right has been transferred to another property, abandoned or forfeited); *Mullinix v. Killgore's Salmon River Fruit Co.*, 158 Idaho 269, 277 (2015)(reiterating that decreed water rights are generally appurtenant to land and transfer with the conveyance of the land). These cases stand for the notion that when there is unity of ownership of the land and the water right, rights appurtenant to the land are usually conveyed when the land is conveyed. Critically, none of these cases holds that a license issued to one who does not own the place of use changes ownership from the licensee to the landholder upon the transfer of the land.

This Court understands water licenses in Idaho as valid administrative determinations of the elements of each license. To allow the transfer of land by a non-owner of the license to retroactively alter the ownership of a license would undermine the licensing process. In effect, such an impact would allow non-owners of the license to do what no one else is allowed. It would allow non-owners to collaterally attack a licensing decision without an administrative or court process. Such a conclusion cannot be sustained.

D. Business Status

This water right began as a permit initiated in 1983 by an unincorporated business called St. Maries Wild Rice Growers. That entity filed an Application of Permit. (IDWR Ex. 4); (Testimony of Chad Goodwin). The business was later incorporated with the State of Idaho. (IDWR Ex. 6); (Testimony of Chad Goodwin) Jeffrey P. Baker and Steven W. Bruner incorporated St. Maries Wild Rice, Inc. on February 13, 1984. (Testimony of Chad Goodwin); (IDWR Ex. 6)

The 1987 Annual Report for St. Maries Wild Rice, Inc. listed Al W. Bruner as the registered agent in place of Steven Bruner. (IDWR Ex. 6, Ex. 12) The 1987 Annual Report also listed Jeffrey Baker as President and Al W. Bruner as Secretary. (IDWR Ex. 12)

IDWR had no documents in the licensing file for 91-7094 to show that St. Maries Rice Growers became St. Maries Wild Rice, Inc. IDWR also had no documents in the licensing file which showed that St. Maries Wild Rice, Inc. assumed the assets of St. Maries Wild Rice Growers.

Additionally, there was no assignment to St. Maries Wild Rice, Inc. of permit 91-7094, nor was there a Change of Ownership filed for 91-7094 to change the name on the license from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc. (IDWR Ex. 3 at 3)

IDWR knew of the corporate changes for St. Maries Wild Rice, Inc. based on its familiarity with related water right 92-7090. IDWR considered the assignment of permit for related water right 92-7090. IDWR knew that the address listed for St. Maries Wild Rice Growers during the field exam for 91-7094 (IDWR Ex. 11) was identical to the address for St. Maries Wild Rice, Inc. in the annual report. (IDWR Ex. 12) In addition, IDWR knew that the Idaho Secretary of State's website showed that St. Maries Wild Rice, Inc. was administratively dissolved on February 6, 1998.

E. Effect of License

The licensing process for this water right began with the Application for Permit for 91-7094. The Application was filed by St. Maries Wild Rice Growers and was received by IDWR on October 4, 1983. (IDWR Ex. 4); (Testimony of Chad Goodwin) The Application identified St. Maries Wild Rice Growers as the owners. The Application showed the owner of the place of use as Aaron Robinson. The basis for the water use was listed as a long-term lease with the landowner. The Application was advertised for two weeks as required. (IDWR Ex. 190); (Testimony of Chad Goodwin)

The permit for 91-7094 was approved by IDWR on November 22, 1983. (IDWR Ex. 4); (Testimony of Chad Goodwin) The permit was in the name of St. Maries Wild Rice Growers. St. Maries Wild Rice Growers was incorporated in 1984 after the Application for Permit was filed and approved. (IDWR Ex. 6, Ex. 7); (Testimony of Chad Goodwin)

In August 1984, IDWR received a Proof of Beneficial Use signed by Al Bruner for St. Maries Wild Rice Growers. (IDWR Ex. 5) IDWR received an Examination Fee Information sheet from St. Maries Wild Rice Growers in September 1986. (IDWR Ex. 9). A field examination was conducted on July 8, 1987. (IDWR Ex. 11) Al Bruner accompanied the field examiner. (IDWR Ex. 3, Ex. 11) The license for 91-7094 was issued in the name of St. Maries Wild Rice Growers on November 21, 1991. (IDWR Ex. 13)

IDWR lacked information about the incorporation of St. Maries Wild Rice Growers in the license file for right 91-7094. However, IDWR was aware of the corporate changes from its related file on 92-7090. IDWR knew that St. Maries Wild Rice, Inc. was incorporated in February 1984. IDWR was aware that the Secretary of State's records later showed that St. Maries Wild Rice, Inc. was administratively dissolved in February 1998. (IDWR Ex. 3 at 4)

Permit 91-7094 was not assigned to St. Maries Wild Rice, Inc. and there was no Change of Ownership filed to change the name on the license to St. Maries Wild Rice, Inc. (IDWR Ex. 3); (Testimony of Chad Goodwin)

The facts showed that the license remained in the name of St. Maries Wild Rice Growers from the time it was issued in 1991 until a Change of Ownership was filed in August 17, 2005. (IDWR Ex. 13, Ex. 15) The Change of Ownership form listed the former owner as Alexander Bruner and the name of the new owner as Douglas McInturff. (IDWR Ex. 15) IDWR notified the McInturffs by letter that IDWR had processed the Change of Ownership in favor of the

McInturffs. The recorded prior owner, St. Maries Wild Rice Growers, and the prior owner listed on the form, Mr. Bruner, did not challenge the change. However, as counsel for Mr. Shippy argued, no notice of the Change of Ownership was sent to St. Maries Wild Rice Growers, Mr. Bruner, or to the Robinsons (owners of the place of use). Nevertheless, the Change of Ownership was processed in due course by IDWR, and the change from St. Maries Wild Rice Growers to the McInturffs was made.

F. Collateral Attack on License

Mr. Shippy argues that his claim of ownership (which derives from Aaron and Jeanne Robinson) does not amount to a collateral attack of the license. Mr. Shippy recognizes that the license was issued to St. Maries Wild Rice Growers as the owners. However, he argues that the license was based on a long-term lease which he alleges did not exist.

Mr. Shippy's theory of the case is that despite the fact the license determined St. Maries Wild Rice Growers as the owner, the true owners of the license were the landowners. Mr. Shippy acquired an ownership interest when the property passed to him by a series of deeds from Aaron and Jeanne Robinson. The problem with this theory is that it conflicts with the determination of ownership contained in the license. The license shows the owner as St. Maries Wild Rice Growers.

Mr. Shippy's argument would require this Court to change the determination of ownership made in the licensing process. The argument is based in part on Mr. Shippy's theory that IDWR made a mistake in the license by relying on a long-term lease between St. Maries Wild Rice Growers and the landowners which he says did not exist. That argument is a collateral attack on the licensing decision.

This Court has long held that licenses duly issued by IDWR cannot be collaterally attacked. "If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 76-5270; *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946. If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. *See e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984)" ***Supplemental Findings of Fact and Conclusions of Law*** (Facility Volume) (Subcases 36-2048 *et.al.*) (July 31, 1998) at 11 – 12.

In the Facility Volume case, the Special Master ruled that the Claimant was bound by the licenses because the Claimant did not appeal the remarks during the licensing proceedings. In short, when a licensee fails to appeal a determination in a license when the license is issued, the licensee has no judicial remedy. *Order Granting Motion to Alter or Amend; Amended Findings of Fact and Conclusions of Law and Recommendation* (Subcase 36-8099) (Aug. 20, 1999) at 3.

The analysis also applies to Objectors. If an Objector disputes an element of a water right previously decided in a license, he ordinarily has no remedy. Disputes about elements of a license are required to be brought during the licensing process. That rule must be applied to this subcase.

When IDWR issued the license for this water right, it decided that St. Maries Wild Rice Growers was the owner. It also determined the place of use was on land owned by the Robinsons. Arguments that the ownership element of the license is not what was decided amount to a collateral attack on the license. The legal remedy for someone who disputed the ownership determination contained in the license would have been to request an administrative review and then a judicial review of the license. I.C. §§ 42-1701 and 76-5270. There was no showing that an administrative or judicial review of the licensing decision occurred. Therefore, the determination of ownership contained in the license should not be revisited now. The only question that remains is the significance of the change in ownership from St. Maries Wild Rice Growers to the McInturffs. The McInturffs relied on a Sales Agreement as evidence of that transfer. The Sales Agreement was provided to IDWR when it processed the Change of Ownership application.

G. Change of Ownership

A Change of Ownership form was submitted to IDWR for water right 91-7094 in August 2005. (IDWR Ex. 15) The Change of Ownership form was submitted to IDWR together with the 2001 contract between the McInturffs and the Bruners. (IDWR Ex. 14) The Notice of Change in Water Right Ownership requested a change in ownership from Alexander Bruner to Douglas McInturff. (IDWR Ex. 15)

IDWR acknowledged the Change of Ownership for water right 91-7094 in a letter to the McInturffs dated December 5, 2006. (IDWR Ex. 16) The letter has a reference line which indicates "Change of Ownership for Water Right Nos. 91-7094 & 92-7090." *Id.* The letter

indicates that IDWR processed the Change of Ownership. “The department acknowledges receipt of correspondence changing ownership of the above referenced water rights to you.” *Id.* The question at issue in the *Motion to Alter or Amend* is what legal effect the Change of Ownership has. Did the administrative processing of a Change of Ownership from Alexander Bruner to Douglas McInturff affect a change of ownership to McInturff? The *Special Master’s Report and Recommendation* held that it did change ownership.

The change of ownership process is established in I.C. § 42-248. That statute grants the Director the authority to change the ownership of a water right upon the application of “persons owning or claiming ownership” of the right. I.C. § 42-248. Such an application must be accompanied by “evidence showing the basis for the change in ownership.” I.C. § 42-248(5). Once an application is received, there is no requirement that the Director hold an administrative hearing prior to effectuating a change of ownership to a water right.

Here, Mr. Shippy attacks the propriety of the Director’s 2005 change of ownership to the McInturffs.¹ In effect, he asks this Court to disregard or overrule this administrative action. However, the CSRBA is not the forum to attack administrative actions of the Director. I.C. § 42-1401D. As this Special Master has held, such arguments constitute an impermissible collateral attack. *See, e.g., Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984)” *Supplemental Findings of Fact and Conclusions of Law* (Facility Volume) (Subcases 36-2048 *et.al.*) (July 31, 1998) at 11 – 12.

If a person is aggrieved by an action taken by the Director without a hearing, the remedies available to that person are set forth in Idaho Code § 42-1701A(3). That statute provides that “any person aggrieved by any action of the director, including any decision, determination, order or other action . . . who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action.” I.C. § 42-1701A(3). The legislature instructs that such an aggrieved person “*shall* file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing.” *Id.* (Emphasis added) This procedural step is

¹ Among other things, Mr. Shippy asserts that certain statutory requirements, including certain notice requirements, were not met when the Director effectuated the change of ownership to McInturff. However, for the reasons set forth herein, Mr. Shippy’s remedy is not to raise such issues for the first time in this adjudication. Rather, his remedies are set forth in Idaho Code § 42-1701A(3).

mandatory. *See, e.g., Twin Falls County v. Idaho Com'n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (the term “shall” when used in a statute is mandatory). The Director will then hold an administrative hearing on the matter in accordance with the procedures set forth in IDAPA. I.C. § 42-1701A(3) Finally, the statute instructs that “[j]udicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.” *Id.* Subsection (4) provides for the right of judicial review in accordance with the standards set forth in IDAPA. I.C. §§ 42-1701A(4).

In this case, the Director effectuated a change of ownership of the above-captioned water right in 2005 vesting ownership in the McInturffs. It is undisputed this action was taken without a hearing. As such, the remedies available to aggrieved parties such as Mr. Shippy and his predecessors are set forth in Idaho Code § 42-1701A(3). There was no evidence that those remedies have been sought or exhausted, and Mr. Shippy cannot now raise issues regarding the propriety of the change of ownership in this proceeding. I.C. §§ 42-1401D & 42-1701A(3).

V. FINDINGS

The *Amended Director's Report* included both the McInturffs and Mr. Shippy as co-owners of this water right. The testimony at trial indicates that this conclusion was based on confusion about which Claimant should be the owner. IDWR's determination was, perhaps, an elegant solution to the confused record involved in this subcase. That solution could have survived had the parties settled on that basis. They did not. Once a matter goes to trial, the Court is compelled to follow the evidence, apply the law, and follow the appropriate conclusions, even where those conclusions are difficult.

This Court reviewed the testimony at trial, the file of record, and the exhibits admitted. There appeared to be no evidence supporting a finding of co-ownership of this water right. This Court continues to conclude that the McInturffs and Mr. Shippy are not co-owners of this water right.

Mr. Shippy's claim relies on his legal theory that the ownership of the place of use determines the owner of the license and thus the water right. Mr. Shippy and his counsel gave a well-reasoned argument relating to ownership of land and water rights which are appurtenant to the place of use. This Court concludes, however, that the better-reasoned argument is that land ownership does not always determine the ownership of a license or water right used on the place of use. The notion that a place of use and a water right may have different owners is well

established. *First Security Bank of Blackfoot v. State*, 49 Idaho 740 (1930). Based on the reasoning of *First Security Bank of Blackfoot*, it follows that the ownership of the place of use does not control the question of who owns the water right. That is especially evident where, as here, ownership originated in a license and was determined not to be the owner of the place of use. Consequently, the Court concludes that neither Mr. Shippy nor Cedar Creek, LLC owns this water right based on ownership of the place of use.

This right is based on a license for 91-7094. The license was issued by IDWR after an Application for Permit, Publication Notice, Proof of Beneficial Use, and a field exam. The license was issued to St. Maries Wild Rice Growers. St. Maries Wild Rice Growers did not actually transfer the license to St. Maries Wild Rice, Inc. In fact, tracing ownership from St. Maries Wild Rice Growers to the corporate entity, to Al Bruner and then to Mr. McInturff underscores the gaps in proof. It would have been helpful to have evidence of what happened to the assets of St. Maries Wild Rice Growers. Nevertheless, it is undisputed that IDWR processed a Change of Ownership for the license in favor of the McInturffs. However tempting it is for this Court to revise that determination in light of the gaps in proof, statutory parameters seem to prohibit it.

Under Idaho law, pursuing the remedies established in I.C. § 42-1701A seems to be a condition precedent to judicial review. In addition, the doctrine of exhaustion requires that a case be allowed to follow administrative proceedings before judicial relief is considered. Furthermore, in water adjudications, the Court must consider I.C. § 42-1401D and its requirement that judicial review of IDWR agency action “shall not be heard in any water rights adjudication proceeding commenced under this chapter.” The policy considerations on which the doctrine of exhaustion and Idaho Code § 42-1401 are based require that IDWR be given the opportunity to address the issues raised by the Change of Ownership determination prior to judicial review. Since there has been no administrative hearing or proceeding before IDWR to challenge the change, the Court is unable to entertain a collateral attack on the Change of Ownership. Accordingly, the *Motion to Alter or Amend* is **denied**.

DATED: March 23, 2017.


BRIGETTE BILYEU
Special Master
Coeur d’Alene-Spokane River Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER ON MOTION TO ALTER OR AMEND was mailed on March 23, 2017, with sufficient first-class postage to the following:

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