

EXHIBIT

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KORRI BLODGETT
CLERK OF THE DISTRICT COURT
S. Weser

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

JUDY CASH, an unmarried woman,) Case No: CV-2016-02
)
) Petitioner,) **ORDER GRANTING RESPONDENTS'**
) **MOTION FOR RECONSIDERATION**
)
)
 vs.)
)
) PHILIP CASH and DEBRA CASH,)
) husband and wife, and Does 1-5,)
) unknown persons who may claim)
) interest,)
)
) Respondents.)
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I.

BACKGROUND

1. On January 26, 2017, Judge Elgee entered *Findings of Fact and Conclusions of Law* in this matter. The facts set forth in the *Findings of Fact* are incorporated herein by reference and will not be repeated. Among other things, Judge Elgee quieted title to all or portions of water right numbers 37-444, 37-2541, and 37-7636, in the Petitioner.¹

2. Then, on August 17, 2017, the case was reassigned to this Court following Judge Elgee's retirement.

3. On September 1, 2017, the Respondents filed a *Motion* asking the Court to reconsider Judge Elgee's determination regarding ownership of the water rights. The Petitioner opposes the *Motion*. A hearing on the *Motion* was held before the Court on September 29, 2017.

¹ On May 23, 2017, Judge Elgee entered *Amended Findings of Fact and Conclusions of Law Re: Ownership of Twin Lakes Reservoir & Irrigation Company Shares*. The *Amended Findings* do not change or address his decision with respect to water right numbers 37-444, 37-2541, and 37-7636.

II. ANALYSIS

This proceeding involves a dispute over the ownership of water right numbers 37-444, 37-2541, and 37-7636. These water rights were previously decreed in the Snake River Basin Adjudication ("SRBA") to Respondent Philip Cash. Notwithstanding, Judge Elgee subsequently quieted title in the rights to the Petitioner based on pre-decree considerations. In doing so, Judge Elgee offended principles of res judicata by failing to place appropriate weight on the SRBA proceeding and the water right decrees entered as a result of that proceeding.

A. SRBA proceeding.

The SRBA was a general adjudication commenced on November 19, 1987. All water users within the adjudication boundaries were required to file claims for existing water uses in the adjudication. In 1989, Philip Cash filed notices of claim for the three water rights at issue in the SRBA. He identified himself as the sole claimant of the rights in his claims. On December 5, 2006, the Director of the Idaho Department of Water Resources issued his recommendations for the claims. He recommended the claims be decreed in the name of Philip Cash as sole owner. The Petitioner did not object to the Director's recommendations, and the time for doing so has expired.

On September 24, 2010, the SRBA District Court entered *Partial Decrees* for the water rights consistent with the Director's recommendations. The *Partial Decrees* vest ownership of the water rights in Philip Cash as sole owner, and were Rule 54(b) certified as final judgments subject to appeal. The Petitioner did not appeal the issuance of the *Partial Decrees* and the time for doing so has passed. Additionally, the Petitioner has not sought relief from the *Partial Decrees* before the SRBA District Court at any time. On August 26, 2014, the Court entered the SRBA *Final Unified Decree* which, save certain exceptions not applicable here, completed the adjudication. Again the Petitioner has neither appealed, nor sought relief from, the *Final Unified Decree*.

B. Principles of res judicata preclude the Petitioner from asserting she is the owner of the water rights in this proceeding.

The doctrine of res judicata covers both claim preclusion and issue preclusion.

Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims “relating to the same cause of action . . . which might have been made.” *Id.* Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. *Rodriguez v. Dep’t. of Corr.*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001).

For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007). For issue preclusion to bar the relitigation of an issue determined in a prior proceeding there are five requirements: (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 litigation. *Id.* Whether res judicata bars the relitigation of issues adjudicated in prior litigation between the same parties is a question of law over which the Court exercises free review. *Lohman v. Flynn*, 139 Idaho 312, 319, 78 P.3d 379, 386 (2003). The Court finds the requirements res judicata to be met here.

i. Parties.

Philip Cash and Judy Cash were both parties to the SRBA. In a general adjudication, a party is defined as “any person who is a claimant or any person who is served or joined.” I.C. § 42-1401A(6). Philip Cash claimed and was decreed the water rights at issue here in the SRBA. Water right numbers 37-21701, 37-1692, 37-21683, 37-21674, and 37-2166 were claimed by and decreed to Judy Cash in the SRBA. Thus, both individuals filed water right claims in, and were decreed water rights as a result of, the adjudication.

ii. Claims, issues and final judgment.

This proceeding and the SRBA involve the same claims and issues. When the SRBA was commenced, the SRBA District Court obtained the exclusive jurisdiction “to resolve all of the water right claims within the scope of the general adjudication.” *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993). The water rights at issue here are located in Basin 37, which is part of the Snake River Basin water system. As a result, they fell within the exclusive jurisdiction of the SRBA District Court. The water rights were claimed, adjudicated, and decreed in the SRBA. This is undisputed. The *Partial Decrees* issued for the rights were certified as final judgments in 2010, and the SRBA proceeding itself was completed upon entry of the *Final Unified Decree* in 2014. Thus, both the subcases involving these individual water rights and the main adjudication proceeding were finalized prior to the commencement of the instant action.

Notwithstanding, it is the Petitioner’s position that the SRBA District Court did not address or adjudicate the issue of ownership of the many water rights claimed in the adjudication. The Court disagrees. Under Idaho law, water rights are defined by elements. *City of Blackfoot v. Spackman*, 162 Idaho 302, 397, 396 P.3d 1184, 1189 (2017). The name and address of the owner is one of those defining elements. I.C. §§ 42-1411(2)(a) & 42-1412(6). The legislature directed that a decree issued in the SRBA “shall contain or incorporate a statement of each element of a water right. . . .” I.C. § 42-1412 (emphasis added). This would of course include the owner of the right. The legislature has further directed that a decree entered in a general adjudication “shall be conclusive as to the nature and extent of all water rights in the adjudicated water system. . . .” I.C. § 42-1420(1).

Here, the precise question of ownership of these water rights was finally resolved in the SRBA. The water rights were claimed by Philip Cash as sole owner. The rights were then investigated by the Department, after which the Director recommended that the claims be decreed to Philip Cash as sole owner. Then, in 2010, the SRBA District Court entered a *Partial Decree* for each right identifying Philip Cash as sole owner. If the Petitioner believed she acquired ownership of these water rights in 2002, she failed to timely assert her alleged ownership interest as required by law. Idaho Code § 42-248(1) directs in part as follows:

All persons owning or claiming ownership of a right to use the water of this state, whether the right is represented by decree of the court, by claim to a water right filed with the department of water resources or by permit or license issued by the

director of the department of water resources, shall provide notice to the department of water resources of any change in ownership of any part of the water right or of any change in the owner's mailing address, either of which occurs after June 30, 2000. Notice shall be provided within one hundred twenty (120) days of any change using forms acceptable to the director.

Likewise, with respect to ownership changes taking place during a general adjudication, Idaho Code § 42-1409(6) directs:

Each purchaser of a water right from the water system shall inquire of the director whether a notice of claim has been filed, and if not, shall file a notice of claim in accordance with this section. All claimants and purchasers shall provide the director written notice of any change in ownership or of any change in mailing address during the pendency of a general adjudication. All purchasers shall submit some evidence of ownership along with the notice of change of ownership.

These statutes are mandatory. *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006).

Here, the Petitioner asserts she acquired the subject water rights via quit claim deed in 2002. Yet, at no time prior to commencing this action in 2016 did she assert ownership via the filing of a notice of change of ownership with the Department as required by Idaho Code § 42-248. Nor did she inquire of the Director whether notices of claim for these right had been filed in the SRBA, or otherwise comply with the requirements of Idaho Code § 42-1409(6) despite acquiring the rights during the pendency of the SRBA. Had the Petitioner timely taken either of these statutorily-required actions, the Director would have taken her ownership assertions into account when making his recommendation for these rights in the SRBA.

Further, it cannot be said that the Petitioner did not have the full and fair opportunity to raise the issue of ownership of these water rights in the SRBA. It must be noted that despite being a party to the SRBA, the Petitioner did not object to the Director's recommendations for these claims in 2006, when he recommended that they be decreed to Philip Cash as sole owner. If the Petitioner believed she was the rightful owner of the water rights at that time, she was required to file objections to the recommendations with the SRBA District Court "within the time specified in the notice of filing of the director's report." I.C. § 42-1412(1). She did not despite having the full and fair opportunity to do so. Nor did she seek reconsideration of, or appeal from, the Court's issuance of the *Partial Decrees* for these rights in 2010, though they identified Philip Cash as sole owner. Had the Petitioner timely taken any of these actions, the

issue of ownership would have been addressed in a timely manner and on a fresh record in the SRBA.

Instead, the Petitioner sat on her rights for approximately 15 years without action. During that time the pertinent record grew stale and the delay worked to the detriment of Philip Cash who properly asserted his ownership interests in the SRBA. It was not until 2016 that the Petitioner asserted her ownership interests by initiating this proceeding. However, by that time the rights had been decreed to Philip Cash in the SRBA. Her attempt to dispute the propriety of the *Partial Decrees* in this proceeding constitutes an impermissible collateral attack on the *Partial Decrees*.² See e.g., *Cuevas v. Barraza*, 152 Idaho 890, 894, 277 P.3d 337, 341 (2012) (stating generally, that “final judgments, whether right or wrong, are not subject to collateral attack”). The Court holds that the Petitioner sat on her rights for too long and failed to timely assert her ownership interests in the proper forum –the SRBA. As a result, principles of res judicata preclude the Petition from asserting she is the owner of the water rights in this proceeding based on pre-decree considerations.

iii. Judge Elgee’s decision and the Petitioner’s attempt to relitigate ownership of the water rights offend the fundamental purposes of the doctrine of res judicata.

In his decision, Judge Elgee recognized that the water rights placed at issue in this proceeding were adjudicated in the SRBA. *Findings of Fact and Conclusion of Law*, p.17. He also acknowledged that the rights were decreed to Philip Cash in that proceeding. *Id.* Notwithstanding, he placed no weight or significance on the *Partial Decrees* issued in the SRBA or on the SRBA proceeding itself. To the contrary, he allowed the parties to relitigate the issue of ownership based on pre-decree considerations. Such a result cannot stand.

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. *Ticor Title Co.*, 144 Idaho at 124, 157 P.3d at 618. Here all the policy rationales behind res judicata have been thwarted. Ownership of these water

² At no time did the Petitioner attempt to seek relief from the *Partial Decrees* in the SRBA District Court under Idaho Rule of Civil Procedure 60.

rights has now been litigated twice in two separate forums resulting in the unnecessary expenditure of resources by both the parties and the judiciary. The two litigations have resulted in inconsistent decisions, with the SRBA District Court decreeing the rights to Philip Cash, and a separate district court quieting title to the same rights in Judy Cash. Allowing Judge Elgee's decision to stand would set a dangerous precedent, whereby parties to the SRBA may simply go to an outside forum to relitigate basic elements of water rights decreed in the adjudication. Such a precedent would make the *Partial Decrees* entered in the SRBA, as well as the adjudication proceeding itself, worthless.³ Therefore, based on the foregoing, the Court will grant the Respondents' *Motion for Reconsideration* and find that the principles of res judicata preclude the Petitioner from asserting she is the owner of the water right numbers 37-444, 37-2541, and 37-7636.

C. Idaho Code § 42-1402.

Judge Elgee relied upon Idaho Code § 42-1402 in making his determination that the Petitioner is the owner of the subject water rights. That statute provides that a water right confirmed by a decree "shall be appurtenant to and shall become part of the land on which the water is used, and such right will pass with the conveyance of such land, and such decree shall describe the land to which such water shall become so appurtenant." I.C. § 42-1402. The Court holds that the proper time for the Petitioner to have presented her Idaho Code § 42-1402 argument was during the SRBA, not this proceeding. When the Director recommended that the subject water rights be decreed to Philip Cash as sole owner in the SRBA, the Petitioner was required to file a timely objection if she disagreed with the recommendations.⁴ I.C. § 42-1412(1). To support her objections, she could have properly cited Idaho Code § 42-1402 in support of her ownership claims at that time. However, the Petitioner sat on her rights, failed to object, and did not assert any ownership interest in the subject water rights until 2016. For the

³ The Court notes that changes to the elements of water rights adjudicated in the SRBA based on post-decree factors and considerations are properly processed through the Idaho Department of Water Resources under statutes that include but are not limited to Idaho Code §§ 42-248(1) and 42-222.

⁴ It must be remembered that had the Petitioner complied with the requirements of either Idaho Code §§ 42-248(1) and/or § 42-1409(6) when she acquired the subject property in 2002, it is likely the Director would have recommended the subject water rights in her name in the SRBA as opposed to Philip Cash, and this whole problem would have been avoided. But the Petitioner did not comply with those statutes when she acquired the property.

reasons stated above, principles of res judicata preclude her from now asserting ownership interests that were required to be previously raised and asserted in the SRBA.

The Court further notes that while the appurtenance of a water right to a particular piece of land may be relevant to determining the ownership of that water right in some circumstances, it is not in and of itself dispositive of the issue of ownership in all circumstances. It is true that very often the owner of a piece of land is also the owner of the water rights appurtenant to that land. However, it can be equally true that the owner of a piece of land is not the owner of the water rights appurtenant to that land. Indeed, it has long been held that "water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator." *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930). Thus, Idaho law recognizes there may be a bifurcation between ownership of the land and of the water right used on the land. *Id.* It follows that the term "appurtenance" signifies that the *use* of a water right is tied to a particular piece of land (i.e., place of use), and may not be used on another piece of land without first obtaining a transfer to do so. It does not signify, as argued by the Petitioner, that the owner of piece of land served by a water right is by operation of law the owner of that water right in all circumstances. Reading the term "appurtenance" in this fashion is contrary to Idaho's long recognition that there may be a bifurcation between ownership of the land and of the water right used on the land. Accordingly, the proper time to raise this issue was in the SRBA proceeding.

D. The Court need not reach the alternate legal theories advanced by the Respondents.

In addition to res judicata, the Respondents raise alternate theories of laches and statute of limitations in their *Motion*. Because the Court finds the Petitioner is clearly precluded from asserting ownership of water right numbers 37-444, 37-2541, and 37-7636 in this proceeding under principles of res judicata, it does not reach the alternate theories raised by the Respondents.

III.
ORDER

Therefore, IT IS ORDERED that the Respondents' *Motion for Reconsideration* is hereby granted.

IT IF FURTHER ORDERED that the Petitioner's claims asserting ownership of water right numbers 37-444, 37-2541, and 37-7636 are hereby dismissed with prejudice.

Dated October 13, 2017



ERIC J. WILDMAN
District Judge

Certificate of Service

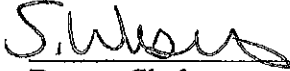
I HEREBY CERTIFY that on this 13th day of October, 2017, a true and correct copy of the foregoing ORDER GRANTING RESPONDENTS' MOTION FOR RECONSIDERATION was delivered to:

Travis L. Thompson
Baker Rosholt & Simpson
P.O. Box 63
Twin Falls, Idaho 83303-0063

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Daniel R. Beck
Fuller & Beck Law Offices
P.O. Box
Idaho Falls, Idaho 83405-0935

☐ U.S. Mail, Postage Prepaid
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Deputy Clerk