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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 84698 IN THE
NAME OF MARION OGLE**

**OGLE'S RESPONSE TO SALUBRIA'S
MOTION TO DISMISS APPLICATION**

COMES NOW, the Applicant, Marion Ogle ("Ogle or "Applicant"), by and through her counsel of record, Hawley Troxell Ennis & Hawley LLP, and hereby respectfully submits this Response to the Motion to Dismiss filed by Protestant Salubria Holdings LLC ("Salubria" or "Protestant") on January 11, 2022. This Response is supported by the contemporaneously filed Declaration of Amy M. J. Knight.

MEMORANDUM

I. INTRODUCTION

The Ogle application seeks to transfer the place(s) of use of Rush Creek Water Right Nos. 67-250 and 67-301 ("Application"). The Application is noncontroversial: the new place of use is near the previous place(s) of use, the water diversion and delivery system will remain the same, the nature of the use (irrigation) will remain unchanged, and the subject water rights have been relatively recently decreed (less than 15 years ago). The purpose of the instant matter is to comply with the provision of Idaho Code governing the procedures regarding the transfer of a water right, and any summary dismissal of the application prior to a determination on the merits would be premature and unjustified.

Protestant's Motion to Dismiss seeks a dismissal of the Application essentially on the basis that the former owner, Debbie Dibble, and now the Applicant Marion Ogle does not hold title to water right no. 67-250. However, as described below, Debbie Dibble was decreed both water rights that are the subject of the Application in the Snake River Basin Adjudication ("SRBA"), in 2008 and that, therefore, she had title to the rights when she conveyed them to the Applicant.

II. STATEMENT OF FACTS

This case is part of a series of matters involving the Hubbard Ditch that have come before the Department in recent years, and the Department's own records reflect many of the following facts.

Debbie Dibble claimed as was decreed water rights nos. 67-250 and 67-301 (the "water rights") in the SRBA on October 20, 2008: water right no. 67-250, having a place of use acreage

of 20.8 total; and water right no. 67-301, having a place of use acreage of 29.3 total. *See* Declaration of Amy M. J. Knight, Exhibit C.

As of January 26, 2006, Debra Dibble owned all of the land described as the places of use of the water rights; on that date, Debra Dibble deeded a portion of the land which was the described place of use for water right no. 67-250 to her brother and his wife, Lloyd C. Dibble and Angela K. Dibble. *See* Declaration of Amy M. J. Knight, Exhibit A, page 6. Over a period of years, Lloyd and Angela Dibble subsequently further conveyed their land as grantors in portions to third parties grantees Lynda L. Momberg (2006) (*Id.*), Logan L. and Lisa M. Hobdey (2007) (*Id.*), Harold Dean Brumbaugh (2009) (*Id.*), and Rocky D. and Andrea E. Farrens (2009) (*Id.* at pages 6 and 7); some of those third party grantees further conveyed portions of the land to additional third parties Matthew B. Summers and Michael B. and Angel K. Summers (2014) (*Id.* at page 7), Lori Farrens (2015) (*Id.*), and Perry L. and Melody D. Goodman (2019) (*Id.*) (all of the foregoing third parties, collectively referred to herein as the “Other Land Owners”). Meanwhile, Debbie Dibble remained the sole claimant of the water rights in the SRBA and in 2008 the water rights were decreed solely to her. *See* Declaration of Amy M. J. Knight, Exhibit C.

In 2020, the Applicant inherited her interest in the Legg land which is the proposed new place of use from her mother and, on July 10, 2020, Applicant purchased decreed water right nos. 67-250 and 67-301 from Debra Dibble, with the intent to transfer the places of use for both water rights to the Legg land. Applicant appropriately filed a Notice of Change in Water Right Ownership, which was acknowledged by the Department by letter dated October 8, 2020. On February 8, 2021, Applicant filed the subject Application for Transfer No. 84698 with the Department.

III. ARGUMENT.

A. Applicant Holds Clear Title to Both Water Rights.

Protestant has moved the Hearing Officer to dismiss the Application based on the allegation that Applicant does not hold clear title to water right no. 67-250. Applicant disputes that allegation for the reason set forth below, but at the outset, argues that even if that allegation were true, the Application should not be dismissed as to water right no. 67-301, when no such allegation has been made with respect to that water right, or to that portion of the land which she continues to own and is affiliated as the place of use with water right no. 67-250.

As described above, Applicant rightfully obtained water rights 67-250 and 67-301 by purchase and transfer of the same from Debra Dibble in 2021. Protestant's contention that Applicant fails to hold clear title apparently is that Debra Dibble did not own all the place of use for 67-250 any later than 2006, and therefore, did not own that water right. But, 67-250 was decreed in the SRBA on October 10, 2008, to Debra Dibble, and a dismissal of the Application based on a finding that the SRBA's partial decree on title was incorrect would offend the principles of res judicata by failing to place appropriate weight on the SRBA proceeding and the water right decrees entered therein.

i. The Department has already determined that no land deed transferred water right no. 67-250 away from Debra Dibble.

The deed which Debra Dibble used to convey the land to Lloyd and Angela Dibble (the "2006 Deed") did not reference water rights generally or water right no. 67-250, although it uses the phrase "[t]o have and hold the said premises, with their appurtenances unto the said Grantees, their heirs and assigns forever." *See* Declaration of Amy M. J. Knight, Exhibit A. It was

understood between Debra Dibble and Lloyd and Angela Dibble that the referenced appurtenances would not include the title to any water rights associated with the land as the place of use. *See* Applicant's Exhibit 20, also produced in discovery as APP000368-378. The Department reviewed the 2006 Deed and corresponded with the Applicant and Debra Dibble about the issue when processing Applicant's Notice of Change in Water Right Ownership for the water rights. *See id.* In that email correspondence, the Department, through Office Specialist II Lynne Evans, queried to the Applicant:

It looks like water right no. 67-250 is registered as owned by Debra Dibble, but the property it relates to is not. We need to know whether Debra does own the water right separately from the property, or if the water right and the property go together and have just never been updated as they changed hands.

We're hoping you or Debra could clarify for us if she owned that property at the time the water right was decreed to her in 2008. If she did not own the property, and the water right was decreed to her separately from the land, then we're good to go and we can complete the change in ownership to Marion Ogle. However, if she did own the property, we'll need to see if she retained the water right from any sales transferring the property to the new owners.

(Emphasis added; *see* Declaration of Amy M. J. Knight, Exhibit E.)

As the Department supposed in this email exchange, as of the 2008 decree, Debra Dibble did, in fact, own the water right separately from the land, which she confirmed in the same email chain:

I have attached the quit claim deed dated 2006 in which the home place was divided with my brother Lloyd Dibble. I later applied for the water right on the understanding that we would share the water, but that it would remain in my name and I would pay the fees for said water right as I would be using the majority of it. Lloyd eventually sold his portion of the land and a transfer of the water right was never discussed. I have remainder the sole owner of this water right, 67-250.

(Emphasis added; *see* Declaration of Amy M. J. Knight, Exhibit E.)

None of the Other Land Owners have claimed any ownership interest in water right no. 67-250, despite having ample opportunity to do so in the SRBA, and the obligation under Idaho Code § 42-248 to notify the Department of a change in ownership, if such a change had occurred. The current vesting deeds for the parcels of land related to the place of use for water right no. 67-250 which Dibble apparently does not own are dated from 2007, 2014, 2015 and 2020, and the 120-day period for notice to be provided to the Department has long since elapsed with none of the current Other Land Owners having made any claim to the title of that water right. *See* Declaration of Amy M. J. Knight, Exhibit A. Furthermore, none of the Other Land Owners have appeared as protestants in the instant matter. Salubria's allegations that some of the Other Land Owners may hold title to water right no. 67-250 is a red herring.

ii. The SRBA Partial Decree entered in 2008 settled title on the water rights and disturbing them would offend the principles of res judicata.

The SRBA was a general adjudication commenced on November 19, 1987, and required all water users within the adjudication boundary to file claims for existing water rights. Debra Dibble appropriately filed claims in the SRBA for water rights nos. 67-250 and 67-301. The SRBA file shows that Dibble's claims to those water rights were uncontested. In the SRBA and the Director recommended that they be adjudged as belonging to her. *See* Declaration of Amy M. J. Knight, Exhibit C. The time for any party to appear and contest the Director's recommendations expired, and the SRBA court followed the Director's recommendations by entering the Partial Decrees. *See id.* Had any party, including the Other Land Owners, timely taken any of the actions

required of them to claim water right no. 67-250, the Director would have taken those adverse claims into account when making his ownership recommendation to the SRBA Court.

The Partial Decrees vested ownership in the water rights and were certified under Rule 54(b) as final judgments subject to appeal. The time for an appeal to be brought has passed, with no appeal being brought by any party. On August 26, 2014, the SRBA Court entered the Final Unified Decree, which, except for certain exceptions that are not applicable to this case, completed the adjudication.

“The doctrine of red judicata covers both claim preclusion and issue preclusion.” *Hindmarch v. Mock*, 138 Idaho 92, 94 (2002), as cited in the Order Granting Respondent’s Motion for Reconsideration entered on October 13, 2017, in *Cash v. Cash*, Case No. CV-2016-02, in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Camas (“Cash Order”). See Declaration of Amy M. J. Knight, Exhibit D. “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 (1993), as cited in the Cash Order. Like the water rights contested in *Cash v. Cash*, water right no. 67-250 was claimed, adjudicated and decreed in the SRBA, and the Partial Decree was entered and followed by the Final Unified Decree in 2014 which closed the general adjudication proceeding

Like the Petitioner in *Cash*, the Protestant’s position is that the SRBA Court’s decision on the ownership of the contested water right can be ignored. The Court in *Cash* explains precisely why the Partial Decree must be upheld: “Under Idaho law, water rights are defined by elements. *City of Blackfoot v. Spackman*, 162 Idaho 302, 397 (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.... 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).” As in the *Cash* case, “the precise question of ownership of these water rights was finally resolved in the SRBA” when the SRBA Court entered its Partial Decree.

As the *Cash* court explained, citing *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124 (2007), “[r]es judicata serves three fundamental principles: (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 litigations; and (3) it advances the private interest in repose from the harassment of repetitive claims.” To ignore the Partial Decree which affirmed that title to the water right was in Debbie Dibble as of 2008 would “make the Partial Decrees entered in the SRBA, as well as the proceeding itself, worthless.” *Cash* Order, p. 7 in Declaration of Amy M. J. Knight, Exhibit D.

The Supreme Court has barred collateral attacks on decreed water rights such as the Protestant is now alleging against water right no. 67-250, because of the uncertainty they create in undermining water adjudications, and for the reason that “finality in water rights is essential” and “[e]fficient administration and finality of decisions are crucial to ‘the proper planning for the future use of the state’s water resources.’” *McInturff v. Shippy*, 65 Idaho 489, 495 (2019). The Hearing

Officer should not dismiss this action based on the collateral attack brought by Salubria based on that precedent.

IV. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Hearing Officer enters an order denying Protestant's Motion to Dismiss.

Dated: January 25, 2022

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Dana L. Hofstetter, ISB No. 3867
Attorneys for Marion Ogle

CERTIFICATE OF SERVICE

I hereby certify that on this 25TH day of January, 2022, I caused to be served the foregoing OGLE'S RESPONSE TO SALUBRIA'S MOTION TO DISMISS APPLICATION by the pre-paid method (s) indicated below, and addressed to each of the following:

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