

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

**IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 75-15015 IN THE)
NAME OF ALAN B GLASSBURN)
AND GRACE P A GLASSBURN)**

**PRELIMINARY ORDER
DISMISSING PROTEST AND
GRANTING PERMIT**

On April 12, 2021, Alan B. Glassburn and Grace P. A. Glassburn ("Glassburn") filed Application for Permit No. 75-15015 ("Application 75-15015") with the Idaho Department of Water Resources ("Department"), seeking a permit to divert 0.04 cfs from Jesse Creek tributary to the Salmon River for domestic use. The Department published notice of Application 75-15015 on May 20 and 27, 2021. A protest was filed by Robert L. Blackadar ("Blackadar"). The Blackadar protest states:

I hereby protest the application of Alan Glassburn (75-15015) to divert water from the source stated in the application. The reason for protest is that that source is not Jesse Creek, it's Pollard Canyon (aka Pollard Creek or Pollard Canyon Creek).

During the Snake River Basin adjudication IDWR added the word Creek to Pollard Canyon saying that they could not divert water from a canyon, it had to be a creek. IDWR was successful in the SRBA in calling Pollard Canyon Jesse Creek below the confluence of Jesse Creek and Pollard Canyon (Creek.) However it is not shown to be that way on USGS maps and Google Maps. In order to change the name of Pollard Canyon to Jesse Creek, there is a detailed procedure thru USGS and the State of Idaho Historical Society and that procedure has yet to be enacted. Therefore, it's still Pollard Canyon and not Jesse Creek and the applicant can only divert from Pollard Canyon and not Jesse Creek.

In 2009, Blackadar raised a similar argument in a number of consolidated subcases in the Snake River Basin Adjudication ("SRBA"). *Special Master Report and Recommendation*, In Re SRBA Case No. 39576, Subcases 75-14 et al. (September 22, 2009) ("SMRR"). Blackadar's argument about erroneous source names was rejected by the SRBA Special Master. *SMRR* at 8.

On August 2, 2021, the presiding officer for the Department issued a *Request for Briefs*, inviting the parties to file argument briefs addressing the following questions:

**Does the doctrine of collateral estoppel (also known as issue preclusion) prevent Mr. Blackadar from pursuing the arguments set forth in his protest?
If so, should the protest filed by Mr. Blackadar be dismissed?**

In conjunction with the *Request for Briefs* and pursuant to Rule 602 of the Department's Rules of Procedure (IDAPA 37.01.01), the presiding officer took official notice of three documents in the Department's records:

1. Special Master Report and Recommendation – Jesse Creek Subcases (9/22/2009)
2. Memorandum prepared by Monica Van Bussum (11/28/2008)
3. Supplemental Director's Report – Jesse Creek Subcases (2/27/2009)

The Applicant, Glassburn, did not participate in briefing the legal question presented by the presiding officer. On September 2, 2021, Blackadar sent an email to the presiding officer stating:

With regard to the doctrine of collateral estoppel, I suspect it is similar to the principle of double jeopardy and may not be exercised in this case, although a review of the evidence presented to the Court of the Snake River Basin Adjudication would be informative and appropriate. Therefore I encourage you to do so. With regard to dismissing the protest, I encourage you not to do so until the US Board on Geographic Names (USBGN) verifies the name of Jesse Creek as the source of Mr. Glassburn's application.

RELEVANT LEGAL PROVISIONS

The Idaho Supreme Court has described the purpose and effect of the doctrine of *res judicata*, which includes collateral estoppel:

The doctrine of *res judicata* covers both claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). 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." Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. Separate tests are used to determine whether claim preclusion or issue preclusion applies. *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. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007) (citations omitted).

The Idaho Supreme Court has also established factors that must be considered by a court or a hearing officer when determining if a party is barred from relitigating an issue that was decided in a previous proceeding:

[F]ive factors must be evident in order for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding: (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.

Rodriguez v. Dep't of Correction, 136 Idaho 90, 93, 29 P.3d 401, 404 (2001) (citations omitted).

Idaho Code § 42-203A(5) sets forth the elements of review for applications for permit:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho . . . the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

ANALYSIS

Before evaluating whether Glassburn has satisfied the elements of review under Idaho Code § 42-203A(5) for Application 75-15015, the presiding officer must first determine whether the arguments raised in the Blackadar protest are barred under the doctrine of collateral estoppel and, if the arguments are barred, whether the protest filed by Blackadar should be dismissed.

Collateral Estoppel (Issue Preclusion)

On October 15 and 16, 2007, Blackadar filed objections in multiple subcases in the SRBA. This order refers to these cases as the “Jesse Creek subcases.” On February 27, 2009, the Department filed a *Supplemental Director’s Report* (“SDR”) for the Jesse Creek subcases with the SRBA Court. The *SDR* summarized Blackadar’s objections to the recommended water rights. The Department had recommended the source and points of diversion for the contested water rights “consistent with the Jesse Creek channel flowing eastward through [the City of Salmon] after its confluence with Pollard Canyon Creek.” *SDR* at 2. Blackadar disagreed with the way the source and the points of diversion were described by the Department. *Id.* at 3. “Blackadar assert[ed] that Farmer’s Ditch is actually the historical [channel] of Jesse Creek and

the channel running eastward through [the City of Salmon] is Pollard Canyon Creek.” *Id.* Ultimately, the Department concluded that there was “significant evidence Pollard Canyon Creek is a natural tributary of Jesse Creek” and that Jesse Creek continued eastward through the City of Salmon. *Id.* at 9.

Terrance Dolan, a special master for the SRBA Court conducted a trial on Blackadar’s objections on July 16 and 17, 2009. *SMRR* at 4. Blackadar represented himself in the SRBA proceeding. *Id.* Blackadar provided documentary and testimonial evidence into the record, including 21 plats and maps of the Jesse Creek drainage. *Id.* at 5. On July 17, Special Master Dolan, accompanied by the parties, conducted a field exam and “visited the area above and below the confluence of Pollard Canyon Creek and Jesse Creek . . .” *Id.* at 7.

On September 22, 2009, Special Master Dolan issued the *SMRR*. Special Master Dolan concluded that “[t]he weight of evidence is that IDWR correctly recommended the sources and points of diversion for the claims.” *SMRR* at 7. The claimants in the SRBA subcases were “entitled to partial decrees for water rights as recommended by [the Department] at trial . . .” *Id.* at 8. According to the *SMRR*, the name of the stream running west to east through the City of Salmon is Jesse Creek. Application 75-15015, which proposes to divert water from this stream, identifies the source as Jesse Creek.

All of the factors for collateral estoppel are present in this contested case. Blackadar was a party to the prior proceeding. He had a full and fair opportunity to litigate the question of the proper name of the source of the stream flowing eastward through the City of Salmon. Blackadar presented multiple documents and extensive testimony during the SRBA proceeding. The issue presented in the SRBA proceeding is identical to the issue presented in this contested case: the source name of the stream flowing eastward through the City of Salmon. The issue raised in the SRBA proceeding was decided by Special Master Dolan. There was a final judgment on the merits in the SRBA proceeding. Partial decrees were issued by the SRBA Court for the Jesse Creek subcases, consistent with the source names recommended by the Department.

The Department is bound by the elements described in the partial decrees for the Jesse Creek subcases. *See In re: SRBA Case No. 39576 Subcase Nos. 65-23531 & 65-23532*, 163 Idaho 144, 155, 408 P.3d 899, 910 (2018 (“decrees are conclusive and final”). One of the purposes of the SRBA was to create a “uniform description for surface water rights.” Idaho Code § 42-1427(1)(a). If the proposed permit were issued with the source as Pollard Canyon Creek, the proposed permit would be inconsistent with existing decreed rights, diminishing the finality and legitimacy of the SRBA decreed rights.

The issues raised in the Blackadar protest are barred by the doctrine of collateral estoppel. Blackadar did not identify any other issues of protest in this contested case. During a pre-hearing conference conducted on July 30, 2021, Blackadar confirmed that the question of source name was his only issue of protest. Rule 304 of the Department’s Rules of Procedure (IDAPA 37.01.01) states that “[d]eeffective, insufficient or late pleadings may be returned or dismissed.” The Blackadar protest is insufficient because it does not identify a viable issue of protest. Therefore, the Blackadar protest should be dismissed.

Reduction to Existing Water Rights

Rule 45.01.a of the Department's Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria used for determining whether a proposed use of water will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

...

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

IDAPA 37.03.08.045.01.a.

The proposed irrigation system has been in place since at least 1971. The watermaster for Water District 75A (Jesse Creek) did not oppose the application or raise any concerns about injury to other water rights. Water rights within Water District 75A are administered based on priority date. The permit holder should be required to install a lockable controlling works to allow the watermaster to curtail the diversion if needed to provide water to senior right holders.

Sufficiency of Water Supply

Rule 45.01.b of the Department's Water Appropriation Rules sets forth the criteria for determining whether the water supply is sufficient for a proposed project: "The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible" IDAPA 37.03.08.45.01.b.

The irrigation system described in Application 75-15015 has been in place and used since at least 1971. The historical irrigation from Jesse Creek is evidence that the water supply is sufficient to accomplish the proposed use.

Lack of Good Faith / Speculation

Rule 45.01.c of the Department's Water Appropriation Rules sets forth the criteria for determining whether an application is filed in good faith and not for speculative purposes. An

applicant must have “legal access to the property necessary to construct and operate the proposed project.” IDAPA 37.03.08.45.01.c.i. An applicant must also demonstrate that it is “in the process of obtaining other permits needed to construct and operate the project” and that there are no obvious legal impediments to prevent successful completion of the project. IDAPA 37.03.08.45.01.c.ii-iii.

The proposed point of diversion and place of use are located on property owned by Glassburn. Glassburn has demonstrated that Application 75-15015 was filed in good faith and not for delay or speculative purposes.

Sufficient Financial Resources

Rule 45.01.d of the Department’s Water Appropriation Rules sets forth the criteria for determining whether an applicant has sufficient financial resources to complete a project. “An applicant will be found to have sufficient financial resources upon a showing that it is reasonably probable that funding is or will be available for project construction or upon a financial commitment letter acceptable to the Director.” IDAPA 37.03.08.45.01.d.ii. The irrigation system is already constructed. Glassburn has demonstrated that they have sufficient financial resources to complete the project.

Local Public Interest

The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). Local public interest is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” Idaho Code § 42-202B(3).

The upper Salmon River drainage is open for new appropriation. Irrigation of lawns and gardens with untreated surface water rather than with treated, drinking water from the City of Salmon municipal system is in the local public interest. By Glassburn using Jesse Creek water for irrigation, the city is able preserve treated, drinking water for other municipal uses.

Conservation of Water Resources

Glassburn proposes to irrigate with sprinklers, a conservative method of irrigation.

CONCLUSIONS OF LAW

The sole issue raised in the Blackadar protest is barred by the doctrine of collateral estoppel. Therefore, the Blackadar protest should be dismissed.

Glassburn has demonstrated that the proposed project will not injure existing water rights, that the water supply is sufficient to accomplish the proposed project, that the application was made in good faith, that they have sufficient financial resources to complete the project, that

the project is in the local public interest, and that the proposed water use is consistent with the conservation of water resources within the state of Idaho. Therefore, Application 75-15015 should be approved.

ORDER

IT IS HEREBY ORDERED that the protest filed by Robert Blackadar is DISMISSED.

IT IS FURTHER ORDERED that Application for Permit 75-15015 filed by Alan B. and Grace P. A. Glassburn is APPROVED with the following elements and conditions:

Current Owner: Alan B. Glassburn and/or Grace P. A. Glassburn

Priority Date: April 12, 2021

Source: Jesse Creek tributary to Salmon River

Beneficial Use: Domestic

Season of Use: April 1 – October 31

Diversion Rate: 0.04 cfs

Point of Diversion: SWNE, Section 1, T21N, R21E

Place of Use: NWNE, SWNE, Section 1, T21N, R21E

Conditions of Approval:

1. Proof of application of water to beneficial use shall be submitted on or before October 01, 2022.
2. Subject to all prior water rights.
3. Use of water under this right may be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 75A.
4. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.
5. Domestic use is for external use for 1 home.
6. The irrigation occurring under this domestic use shall not exceed 1/2 acre.
7. The quantity of water under this right shall not exceed 13,000 gallons per day.

Dated this 9th day of September, 2021.



James Cefalo
Presiding Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September 2021, true and correct copies of the documents described below were served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed to the following:

Documents Served: Preliminary Order Dismissing Protest and Granting Permit

ALAN GLASSBURN
GRACE GLASSBURN
1418 ROOSEVELT AVE
SALMON, ID 83467

ROBERT BLACKADAR
10 N CHEROKEE RD
SALMON, ID 83467



Christina Henman
Administrative Assistant