

IN THE SUPREME COURT OF THE STATE OF IDAHO

FIRST SECURITY CORPORATION,

Plaintiff-Appellant,

v.

BELLE RANCH, LLC; JUSTIN FLOOD
STEVENSON; ELIZABETH BRETT
STEVENSON; and RABO
AGRIFINANCE, INC.,

Defendants-Respondents.

BELLE RANCH, LLC, an Idaho limited
liability company,

Plaintiff-Respondents,

v.

MOUNTAIN WEST BANK, a division of
Glacier Bank; GBCI OTHER REAL
ESTATE, LLC

Defendants-Respondents,

and

SOUTH COUNTY ESTATES, LLC, an
administratively dissolved Idaho limited
liability company; PENSCO TRUST
COMPANY F.B.O. RICHARD D.
FOSBURY, IRA #F01EC; PENSCO
TRUST COMPANY CUSTODIAN F.B.O.
CHARLES HOLT, IRA #H01NH;
PENSCO TRUST COMPANY
CUSTODIAN F.B.O, and DOES 1-5,
unknown persons who may claim an
interest in the subject water rights,

Defendants.

Idaho Supreme Court

Docket No. 46144-2018
46147-2018

Blaine County District Court

CV-2016-645 and CV -2016-683

OPENING BRIEF ON APPEAL

RICHARD D. FOSBURY, an individual,

Plaintiffs,

v.

BELLE RANCH, LLC, an Idaho limited liability company; JUSTIN FLOOD STEVENSON, an individual; ELIZABETH BRETT STEVENSON, an individual; and RABO AGRIFINANCE, INC., a Delaware corporation.

Defendants-Respondents.

OPENING BRIEF ON APPEAL

Appeal from the District Court of the Fifth Judicial District for Blaine County

the Honorable Jonathan Brody, District Judge, Presiding

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II. STATEMENT OF THE CASE

Pursuant to this Court's April 10, 2019 *Order Granting Uncontested Motion To Consolidate Appeals*, appellants First Security Corporation ("FSC") and Richard D. Fosbury ("Fosbury"), hereby file this opening brief on appeal.

A. Nature Of The Case¹

Docket nos. 46144-2018 and 46147-2018 involve actions by FSC and Fosbury, respectively, to quiet title to their individual ownership of irrigation water rights (hereinafter the "Water Rights"),² fully consistent with the deeds of record in Blaine County, Idaho, as against Belle Ranch, LLC, Justin Flood Stevenson, and Elizabeth Brett Stevenson (collectively referred to herein as "Belle Ranch"), Rabo Agrifinance, Inc. ("Rabo"), South County Estates, LLC ("South County"), Mountain West Bank ("MWB"),³ and GBCI Other Real Estate, LLC ("GBCI").⁴ Partial decrees for the Water Rights were issued by the Snake River Basin Adjudication ("SRBA") district court in the name of South County. FSC, through its predecessors-in-interest, owns 7.5/289th of the Water Rights. Fosbury, through his predecessors-in-interest, owns 7.8/289th of the Water Rights. The deeds upon which FSC and Fosbury rely

¹ On July 20, 2018, the Court issued its *Amended Order Consolidating Appeals for Purposes of Clerk's Record and Reporter's Transcript Only*: "IT IS HEREBY ORDERED that appeal No. 46144 . . . and No. 46147 . . . shall be consolidated for purposes of Clerk's Record and Reporter's Transcripts only, and the Clerk's Record and Reporter's Transcripts shall bear both document numbers." R. 2060. Two Clerk's records were prepared for these appeal. The primary record is 2,064 pages in length, and will be referenced as "R. ____." On December 27, 2018, after learning that the second record had not been served on counsel for FSC and Fosbury, and that a third record had not been served on the Court or the parties, counsel for FSC and Fosbury filed a *Motion to Suspend* pursuant to I.A.R. 13.2. On December 31, 2018, the Court issued its *Order Granting Motion to Suspend*. On December 31, 2018, the second record was served. The second record is 376 pages in length, and will be referenced as "R2. ____." On February 22, 2019, the third record was served. The third record is 311 pages in length, and will be referenced as "R3. ____." With minor exception, all references in this brief are to the 2,064-page record.

² The numbers of the Water Rights at issue in this proceeding are 37-481C, 37-577BT, 37-482H, 37-483C, and 37-2630.

³ MWB is a party to these consolidated proceedings, yet filed a disclaimer of "any interest in the water rights that are the subject of this action" R2. 349-51.

⁴ GBCI is a party to these proceedings, yet filed a disclaimer of "any interest in the water rights that are the subject of this action" R2. 349-51.

were properly recorded in Blaine County before any deeds were recorded purporting to convey any of the Water Rights to Belle Ranch. Based on the clear chain of title in the county records, the most Belle Ranch can own is 273.7/289th of the Water Rights. FSC and Fosbury therefore appeal the district court's decision that all 289/289th of the Water Rights are owned by Belle Ranch.

B. Course Of The Proceedings

The Water Rights at issue in this proceeding allow for the irrigation of 289 acres and were decreed by the SRBA district court on August 31, 2010 in the name of South County. Prior to issuance of the SRBA partial decrees, deeds were recorded in Blaine County dividing the Water Rights three ways: 7.5/289th to FSC's predecessors; 7.8/289th to Fosbury's predecessors; and 273.7/289th to Belle Ranch's predecessors. Said another way, when the SRBA partial decrees for the Water Rights were entered, South County owned none of the Water Rights, having deeded away its ownership.

Due to competing questions of ownership, complaints to quiet title were filed by FSC, Fosbury,⁵ and Belle Ranch. Through motions for summary judgment, and consistent with its deeds of record FSC moved to quiet title to 7.5/289th of the Water Rights; Fosbury, consistent with his deeds of record, moved to quiet title to 7.8/289th of the Water Rights; and Belle Ranch, inconsistent with its deeds of record, moved to quiet title to all 289/289ths of the Water Rights.

In its October 30, 2017 *Memorandum Decision* ("Memorandum Decision"), R. 1755, the district court determined it was not barred by the SRBA partial decrees in the name of South

⁵ The reference to "Fosbury" in the Course of Proceedings is short-hand for the plaintiffs, Big Stick, LLC, Fosbury, and Charles Holt who filed a *Verified Complaint for Quiet Title*. R3. 9. As will be explained later in the Statement of Facts, and pursuant to I.A.R. 7, prior counsel for Fosbury filed a *Notice of Substitution of Party* with this Court to assign the ownership of Big Stick and Holt to Fosbury. On September 24, 2018, the Court entered its *Order Granting Substitution of Party*.

County to quiet title to the Water Rights based on deeds of record in Blaine County. Rather than rely on recorded deeds within the chain of title as required by statute, the district court incorrectly held that various mortgages and a mortgage modification entered into between MWB and South County conveyed ownership rather than evidence of a lien of interest. This resulted in the district court determining it could quiet title to 286.2/289th of the Water Rights to Belle Ranch. The issue of the remaining 2.8/289th of the Water Rights, owned by Fosbury, was left open for trial based on unresolved issues of fact. FSC and Fosbury moved for reconsideration.

On April 23, 2018, the district court issued its *Memorandum Decision on Motions to Reconsider Cross Motions for Summary Judgment* (“Reconsideration Decision”). R. 1919. Therein, the district court determined its Memorandum Decision was incorrect in its analysis of the SRBA, holding FSC’s and Fosbury’s quiet title complaints were barred by *res judicata*, but despite that finding, the district court could quiet title to Belle Ranch. The district court determined ownership of the Water Rights was neither controlled by the SRBA partial decrees in the name of South County, nor by the deeds of record in Blaine County, but instead by a provision in the SRBA district court’s August 26, 2014 *Final Unified Decree* (amended June 25, 2015) (“Unified Decree”). Through its analysis of the Unified Decree, the district court concluded when Belle Ranch filed two forms with the Idaho Department of Water Resources (“IDWR”), it resulted in Belle Ranch taking complete ownership of the Water Rights, despite IDWR possessing no statutory authority to affect ownership.

The district court’s decision quieting title in the entire 289/289th of the Water Rights to Belle Ranch was in error due to the fact that ownership of these Water Rights was never determined in the SRBA, nor could it be according to statute; thus, *res judicata* did not apply. The district court’s decision should, therefore, be reversed and remanded with instructions for it

to quiet title consistent with the deeds of record in Blaine County, resulting in ownership as follows: 7.5/289th to FSC; 7.8/289th to Fosbury; and 273.7/289th to Belle Ranch. Alternatively, if ownership was conclusively determined by the SRBA partial decrees and *res judicata* does apply, the only owner of the Water Rights can be South County.

C. Statement Of Facts

This is a quiet title action that involves the Water Rights. As with any quiet title proceeding, it is critical to understand the chain of title. The following establishes how the Water Rights were claimed and partially decreed in the SRBA, how the Water Rights were conveyed to each of the parties, and the chain of title from the predecessors-in-interest to the parties here today, based on deeds recorded in Blaine County. The chain of title shows: (1) FSC owns 7.5/289th of the Water Rights; (2) Fosbury owns 7.8/289th of the Water Rights; and (3) the most Belle Ranch can own is 273.7/289th of the Water Rights.

1. The Water Rights Were Claimed In The SRBA And Partially Decreed In The Name Of South County

The Water Rights were originally claimed in the SRBA by G. Chapman Petersen and Associates (“Chapman”). R. 1922. In 2003, South County changed the name and address of the claimant of the Water Rights to South County from Chapman. R. at 970. In early 2007, the IDWR director issued his recommendations for the Water Rights to the SRBA district court, R. 959, reciting South County as the “name and address of the claimant” element of the Water Rights, I.C. § 42-1411(2)(a), R. 1143-47.

On August 31, 2010, the SRBA district court entered partial decrees, certified as I.R.C.P. 54(b) judgments, for each of the Water Rights. R. 1167-72. As required by I.C. § 42-1412(6),

“element[s]”⁶ were recited in the SRBA partial decrees. R. 1168-72. By way of the partial decrees, the Water Rights allowed for the irrigation of 289 acres. I.C. §§ 42-1411(2)(f) and 42-1411(2)(h). Pertinent elements of the Water Rights are summarized as follows:

Water Right No.	Name and Address of the Claimant⁷	Source⁸	Diversion Rate (cfs)⁹	Priority Date¹⁰
37-481C	South County	Big Wood River	3.014	8/1/1882
37-577BT	South County	Big Wood River	2.2	3/24/1883
37-482H	South County	Big Wood River	3.012	8/1/1884
37-483C	South County	Big Wood River	15.086	8/1/1902
37-2630	South County	Ground Water	3.75	2/2/1960

No objections¹¹ were filed in the SRBA against listing South County in the “name and address of the claimant” element to the Water Rights. R. 1167.

2. Upon Entry Of The Partial Decrees, The Water Rights Were Owned By The Predecessors-In-Interest To FSC, Fosbury, And Belle Ranch

Even though South County was listed in the “name and address of the claimant” element, I.C. § 42-1411(2)(a), the record conclusively shows the Water Rights were not owned by South County at the time the SRBA partial decrees were entered. Based on the chain of title, subject to the secured interests of record, and as will be explained below, the Water Rights were conveyed as follows: 7.5/289th to FSC’s predecessors; 7.8/289th to Fosbury’s predecessors; with the most Belle Ranch’s predecessors could have received being 273.7/289th.

⁶ Idaho Code § 42-1412(6) requires a recitation of water right “element[s]” described in I.C. § 42-1411(2).

⁷ Idaho Code § 42-1411(2)(a).

⁸ Idaho Code § 42-1411(2)(b).

⁹ Idaho Code § 42-1411(2)(c).

¹⁰ Idaho Code § 42-1411(2)(d).

¹¹ Idaho Code § 42-1412(1).

i. 2005 MWB Mortgage and Modification Thereto Encumbered The Entire 289/289th Of The Water Rights

On October 13, 2005, South County entered into a loan with MWB, which was secured by real property, including the Water Rights, with a mortgage recorded in Blaine County as Instrument No. 527439 (the “MWB Mortgage”). R. 606. On November 28, 2006, the MWB Mortgage was modified (“MWB Modification”), and recorded in Blaine County as Instrument No. 542378. R. 1027. The Mortgage and Modification thereto encumbered all 289/289th of the Water Rights.

ii. 2008 MWB Second Mortgage

On June 13, 2008, South County executed a second mortgage with MWB, which was secured by real property, including the Water Rights, with the same recorded in Blaine County as Instrument No. 558904 (“MWB Second Mortgage”). R. 1030.

iii. MWB Filed A Notice of Security Interest With IDWR Evidencing Its Encumbrance Of The Water Rights

On June 13, 2008, and due to its mortgage with South County, MWB, consistent with I.C. § 42-248(6), filed a *Notice of Security Interest in a Water Right* (“MWB Notice of Security Interest”) with IDWR. R. 612. The MWB Notice of Security Interest was acknowledged by IDWR on June 20, 2008. R. 629. The MWB Mortgage and MWB Modification were included with the MWB Notice of Security Interest filed by MWB with IDWR. R. 612-28.

iv. MWB’s Third Mortgage

On October 24, 2008, South County executed a third mortgage with MWB, which was secured by real property, including the Water Rights, with the same recorded in Blaine County as Instrument No. 562481 (“MWB Third Mortgage”). R. 1040.

v. MWB Affirmatively Releases Its Lien To 15.3/289th of the Water Rights, Made Up Today Of FSC's 7.5/289th and Fosbury's 7.8/289th

On June 25, 2009, MWB recorded in Blaine County as Instrument No. 568681 a Partial Release of Lien, wherein MWB specifically released the lien of the MWB Mortgage and MWB Modification to 7.5/289th of the South County Water Rights (the "7.5/289th MWB Partial Release"). R. 630. In the 7.5/289th MWB Partial Release, MWB specifically stated "the Notice of Security Interest in a Water Right filed with the Idaho Department of Water Resources be waived to the limited extent it relates to the Water Rights described above." *Id.* Thereafter, on October 14, 2009, Mountain West executed six Partial Releases of Lien, wherein it released the lien of the MWB Mortgage and MWB Modification to an additional 7.8/289th of the Water Rights, recorded in Blaine County as Instrument Nos.: 574996, R. 426; 574997, R. 429; 574998, R. 432; 574999, R. 435; 575000, R. 438; and, 575001, R. 441 (collectively referred to herein as the "7.8/289th MWB Partial Release"). In the 7.8/289th MWB Partial Release, MWB specifically stated "the Notice of Security Interest in a Water Right filed with the Idaho Department of Water Resources be waived to the limited extent it relates to the Water Rights described above." *Id.* Altogether, MWB released its lien to a combined total of 15.3/289th of the Water Rights. The 15.3/289th is made up today of FSC's 7.5/289th and Fosbury's 7.8/289th deeded ownership.

vi. Consistent With The MWB Partial Releases South County Conveyed 7.5/289th And 7.8/289th Of The Water Rights To FSC and Fosbury's Respective Predecessors-In-Interest

Between 2007 and 2009, and consistent with the 7.5/289th MWB Partial Release and the 7.8/289th MWB Partial Release, South County quitclaimed 15.3/289th of the Water Rights. Of the 15.3/289th, and as evidenced by the deeds of record in Blaine County, 7.5/289th was conveyed to FSC's predecessors-in-interest, and 7.8/289th was conveyed to Fosbury's predecessors-in-interest.

Each of the South County quitclaim deeds state the following, evidencing clear intent to reserve 15.3/289th of the Water Rights and convey them separately from the land:

For valuable consideration . . . South County . . . hereby bargains, sells, remises, releases, conveys and forever quitclaims to . . . [Grantee] . . . all [their/its] right, title and interest which [they/it] [have/has], if any, in the property in the State of Idaho, County of Blaine described as:

[]/289th portion of Water Right Nos. 37-482H, 37-481C, 37-483C, 37-577BT, and 37-2630 as identified on the records of the Idaho Department of Water Resources . . .

R. 444, 445, 452, 459, 466, 473, and 632.

Fosbury derives his 7.8/289th ownership of the Water Rights from conveyances made by South County to Big Stick, LLC (“Big Stick”), PENSICO Trust Company Custodian F.B.O. Richard D. Fosbury, IRA #F01EC (“Fosbury IRA”), the PENSO Trust Company Custodian F.B.O. Charles Holt, IRA #H01NH (“Holt IRA #H01NH”), and PENSICO Trust Company Custodian F.B.O. Charles Holt, IRA #H01NV (“Holt IRA #H01NV”). As to Big Stick, South County quitclaimed 2.8/289th of the Water Rights, recorded on December 14, 2007 in the records of Blaine County as Instrument No. 554098 (“Big Stick Quitclaim Deed”). R. 444. As to the Fosbury IRA, South County quitclaimed 1/289th of the Water Rights on March 17, 2008, recorded on March 1, 2010 as Instrument No. 575491, R. 445 (“Fosbury IRA Quitclaim Deed”), then quitclaimed another 1/289th of the Water Rights to the Fosbury IRA on September 18, 2008, record on March 1, 2010 as Instrument No. 575492, R. 452 (“Second Fosbury IRA Quitclaim Deed”). As to the Holt IRA #H01NH, South County quitclaimed 1/289th of the Water Rights on April 28, 2008, recorded in Blaine County on March 1, 2010 as Instrument No. 575488, R. 459 (“Holt IRA Quitclaim Deed”). As to the Holt IRA #H01NV, South County quitclaimed 1/289th of the Water Rights on August 8, 2008, recorded in Blaine County on March 1, 2010 as Instrument No. 575489, R. 466 (“Second Holt IRA Quitclaim Deed”), then on April 8, 2009,

South County quitclaimed another 1/289th of the Water Rights to the Holt IRA #H01NV, recorded in Blaine County, Idaho on March 1, 2010 as Instrument No. 575490, R. 473 (“Third Holt IRA Quitclaim Deed”). The Big Stick Quitclaim Deed, Fosbury IRA Quitclaim Deed, Second Fosbury Quitclaim Deed, Holt IRA Quitclaim Deed, Second Holt IRA Quitclaim Deed, and Third Holt IRA Quitclaim Deed will be collectively referred to herein as the “South County 7.8/289th Quitclaim Deeds.” These conveyances total 7.8/289th, and as will be explained below, Fosbury is the successor-in-interest.

As to FSC, on June 25, 2009, South County quitclaimed 7.5/289th of the Water Rights (the “South County 7.5/289th Quitclaim Deed”) to John Scherer and Charles Holt (“Scherer and Holt”), recorded in Blaine County on June 25, 2009 as Instrument No. 568680. R. 632. That same day, Scherer and Holt executed a mortgage in favor of the Idaho Independent Bank (“IIB”) as to “7.5/289th” of the South County Water Rights, and recorded it in Blaine County on June 25, 2009 as Instrument No. 568682 (the “IIB Mortgage”). R. 638. The IIB Mortgage encumbered the 7.5/289th: “For valuable consideration, [Scherer and Holt] mortgages . . . to [IIB] all of [Scherer and Holt’s] right, title, and interest in and to . . . [a]n undivided 7.5/289th or 2.595% of the water rights . . .” *Id.* As will be explained below, FSC is a successor-in-interest to IIB and Scherer and Holt.

vii. IIB Evidenced Its Encumbrance Of The 7.5/289th Of The Water Rights By Filing A Notice of Security Interest With IDWR And A UCC Financing Statement With The Idaho Secretary Of State

On July 24, 2009, and consistent with I.C. § 42-248(6), IIB filed a *Notice of Security Interest in a Water Right* with IDWR as to IIB’s security interest in the 7.5/289th (the “IIB Notice of Security Interest”). R. 646. The IIB Mortgage was attached with the IIB Notice of Security Interest. R. 647. The IIB Mortgage was acknowledged by IDWR on July 24, 2009. R. 656. On

July 26, 2009, IIB filed a UCC Financing Statement in the records of the Idaho Secretary of State (“IIB UCC Financing Statement”), evidencing its secured interest, and describing IIB’s undivided interest in the 7.5/289th of the Water Rights. R. 1500-01.

That IIB took these steps was specifically allowed through and in reliance upon a binding agreement with MWB and its successors, dated June 25, 2009 (“MWB Letter Agreement”), with MWB affirmatively releasing its security interest in the Water Rights:

This Letter Agreement sets forth the agreement between Idaho Independent Bank (“IIB”) and Mountain West Bank (“MWB”) regarding the Water Rights, more particularly described on Exhibit A attached hereto and incorporated herein.

Currently, MWB holds a first position security interest in the Water Rights and the real property to which the Water Rights are appurtenant. MWB agrees to release its security interest in the Water Rights. Further, MWB agrees to file with the Idaho Secretary of State and/or the Idaho Department of Water Resources (“IDWR”) any documentation necessary regarding the same. IIB agrees to provide any reasonable assistance requested by MWB to facilitate the release of the security interest in the Water Rights.

MWB acknowledges and agrees that IIB may record a Mortgage in the real property records of Blaine County, Idaho and may file a UCC-1 Financing Statement with the Idaho Secretary of State to evidence its first position security interest in the Water Rights. Additionally, MWB acknowledges and agrees that IIB may file with IDWR a Notice of Security Interest in a Water Right as to the Water Rights.

....

MWB and IIB represent and warrant to each other that each has full power, authority and legal right and has obtained all approvals and consents necessary, to execute, deliver and perform all actions required under this Letter Agreement. This Letter Agreement shall be binding upon MWB and IIB and their respective successors and assigns.

R. 1513-14 (emphasis added).

FSC, as a successor-in-interest to IIB.

viii. South County Conveyed 273.7/289th Of The Water Rights To MWB Through A Deed In Lieu Of Foreclosure

After quitclaiming the 15.3/289th of the Water Rights to FSC’s and Fosbury’s respective predecessors-in-interest, South County, by means of a *Deed in Lieu of Foreclosure* (the “MWB Deed in Lieu”), conveyed what remained of the Water Rights – 273.7/289th – to MWB: “For valuable received, South County . . . hereby . . . quitclaims to Mountain West . . . that certain real property, together with all appurtenances, located in Blaine County Included with the real property conveyed to [Mountain West] . . . all . . . water rights [T]hat such property is free from all encumbrances other than encumbrances of record as of this date” R. 657-58. The MWB Deed in Lieu was recorded in Blaine County on June 17, 2010 as Instrument No. 578331. R. 657. Critically, and as discussed above, the recording of the MWB Deed in Lieu was subsequent to all recorded quitclaim deeds from South County to FSC’s and Fosbury’s respective predecessors-in-interest, who were granted 7.5/289th of the Water Rights and 7.8/289th of the Water Rights, respectively. Therefore, due to the previously recorded deeds, the most South County could convey to MWB was 273.7/289th of the Water Rights. As will be explained below, MWB is a predecessor-in-interest to Belle Ranch.¹²

ix. MWB Quitclaimed The 273.7/289th Of The Water Rights To GBCI

On June 17, 2010, MWB conveyed its interest in the property described in the MWB Deed in Lieu to GBCI by *Deed*, recorded in Blaine County as Instrument No. 578364 (“GBCI

¹² Also on June 17, 2010, South County executed an *Estoppel Certificate*, recorded in Blaine County as Instrument No. 578332. R. 1049. The Estoppel Certificate explained the property was “free and clear of all . . . encumbrances and claims of every nature, kind and description whatsoever, excepting for those disclosed in the litigation guarantee issued by Stewart Title Guarantee Company, Order No. 1016761.” R. 1051 (emphasis added). The *Stewart Title Guarantee* referenced in the Estoppel Certificate applied only to “land” and excepted from coverage any guaranty concerning “water rights, claims or title to water whether or not the matters excluded by (1), (2) or (3) or shown by the public records.” R. 1504. The date of the Stewart Title Guarantee was May 3, 2010. R. 1506. The 7.5/289th Partial Release and the 7.8/289th Partial Releases were specifically listed under, “Defects, liens, encumbrances or other matters affecting title.” R. 1509 (emphasis added).

Deed”): “For value received, Mountain West . . . does hereby . . . convey unto GBCI . . . those certain real properties located in Blaine County [I]ncluded with the real property conveyed to GBCI . . . all . . . water rights” R. 660. The same as the MWB Deed in Lieu, the GBCI Deed was recorded subsequent to all recorded quitclaim deeds from South County to FSC’s and Fosbury’s respective predecessors-in-interest. In addition, the GBCI Deed acknowledged and excepted all of MWB’s partial releases of liens as to the 7.5/289th and 7.8/289th of the Water Rights: “[E]xcepting . . . Partial Release of Water Rights recorded as Instrument No’s 568681, 574996, 574997, 574998, 574999, 575000, 575001, records of Blaine County, Idaho.” R. 661 (emphasis added). Therefore, due to the previously recorded deeds, the most MWB could convey to GBCI was 273.7/289th of the Water Rights. As will be explained below, GBCI is a predecessor-in-interest to Belle Ranch.

x. The SRBA District Court Issues The Partial Decrees For The Water Rights

On August 31, 2010 – months after the conveyances of the Water Rights from South County to MWB and MWB to GBCI – the SRBA district court entered partial decrees for the Water Rights, R. 663, listing the “name and address of the claimant” as South County, R. 664-68. Therefore, when the SRBA partial decrees to the Water Rights were issued, the deeds of record in Blaine County conclusively showed ownership was split between the predecessors-in-interest to FSC (7.5/289th), Fosbury (7.8/289th), and Belle Ranch (273.7/289th).

3. Post-Partial Decree Conveyances Resulted In Ownership To FSC, Fosbury, and Belle Ranch With All Parties Reporting Their Ownership With IDWR

After issuance of the SRBA partial decrees in the name and address of South County, additional conveyances were made that solidified the respective ownership of the Water Rights to FSC, Fosbury, and Belle Ranch. Moreover, these parties or their predecessors took affirmative steps with IDWR to report their ownership.

i. Despite Owning Nothing, MWB Reported Its Ownership To IDWR Of 289/289th Of The Water Rights

On July 22, 2011 – approximately one-year after MWB conveyed its ownership of the 273.7/289th to GBCI through the GBCI Deed and approximately one-year after the SRBA partial decrees were entered – an attorney for MWB filed a *Notice of Change in Water Right Ownership*, pursuant to I.C. § 42-248(1), with IDWR for the Water Rights in the name of MWB. R. 671-72. The document attached the MWB Deed in Lieu as the basis for reporting the change in ownership. R. 676.¹³ The GBCI Deed was neither mentioned nor provided to IDWR. Despite MWB owning nothing – due to the GBCI deed – IDWR incorrectly reported an ownership change of all 289/289th in the name of MWB instead of the 273.7/289th it actually owned. *Id.* This marked the beginning of mistakes made by MWB and its successors-in-interest in reporting ownership with IDWR. As will be discussed, the creation of these mistakes by MWB – who owned nothing at the time – is what led the district court to incorrectly rely on a provision in the Unified Decree to quiet title to Belle Ranch.

ii. GBCI And MWB Convey 273.7/289th Of The Water Rights To Belle Ranch

As stated previously, the most GBCI could own of the Water Rights through GBCI Deed was 273.7/289th. On December 22, 2011, and by Special Warranty Deed, GBCI conveyed, “without Warranty, any and all water right appurtenances to the real property” This deed was recorded in Blaine County on December 22, 2011 as Instrument No. 593252 (“GBCI Special Warranty Deed”). R. 680. That same day, MWB quitclaimed any interest it had in the Water Rights to Belle Ranch, using similar language as the GBCI Special Warranty Deed, recorded in

¹³ An additional document filed by MWB with IDWR was an *Assignment and Deed*, recorded in Blaine County on June 17, 2010 as Instrument No. 578330. R. 673. The document demonstrates MWB’s knowledge of South County’s interests in the Water Rights and MWB’s attempt at consolidating those interests that had not been conveyed. As explained previously, the conveyances to the predecessors-in-interest of FSC and Fosbury took place prior to June 17, 2010.

Blaine County on December 22, 2011 as Instrument No. 593254 (“MWB Quitclaim Deed”). R. 683. Any ownership conveyed to Belle Ranch from MWB and GBCI was subject to the previously recorded deeds in Blaine County, and could not have included the 15.3/289th previously conveyed by South County. Therefore, the most Belle Ranch could have received from GBCI and MWB was 273.7/289th of the Water Rights.

iii. Belle Ranch Reports Its Ownership With IDWR As To The Entire 289/289th Of The Water Rights

On February 28, 2012, and pursuant to I.C. § 42-248(1), Belle Ranch filed a *Notice of Change in Water Right Ownership* with IDWR as to the entire 289/289th of the Water Rights (“Belle Ranch Change of Ownership”). R. 685. The conveyance documents submitted by Belle Ranch to IDWR were the GBCI Special Warranty Deed and the MWB Quitclaim Deed. R. 686, 691. Again, all GBCI and MWB could convey to Belle Ranch is what they received from South County through the MWB Deed in Lieu, which was 273.7/289th of the Water Rights. On March 7, 2012, IDWR processed Belle Ranch’s request. R. 692.

iv. Belle Ranch Files A Transfer With IDWR To Change Its Place Of Use

On April 23, 2012, and pursuant to I.C. § 42-222(1), Belle Ranch filed an *Application for Transfer of Water Rights* with IDWR to change the place of use (“POU”) for various water rights it owned, including its portion of the Water Rights (“Belle Ranch POU Transfer”). R. 717. The stated “Purpose” of the Belle Ranch POU Transfer was “to create a permissible place of use for the 380-acre parcel, known as Belle Ranch for the irrigation of 210 acres within that PPU.” *Id.* Therefore, the Belle Ranch POU Transfer asked IDWR to allow a change to the “place of use,” consistent with I.C. § 42-222(1). Notice of the Belle Ranch POU Transfer was published, explaining, consistent with the application, that the purpose was to alter the “place of use.” R. 747. IDWR approved the Belle Ranch POU Transfer on July 6, 2012. R. 1223-1225.

v. Rabo Reports Its Security Interest With IDWR

On August 31, 2012, and as a result of a mortgage executed by Belle Ranch, Rabo filed a *Notice of Security Interest in a Water Right* with IDWR (“Rabo Notice of Security Interest”). R. 693. Attached with the Rabo Notice of Security Interest was a *Mortgage Assignment of Rents and Security Agreement*, recorded in Blaine County on May 2, 2012, as Instrument No. 597154 (“Rabo Mortgage”). R. 694. On September 10, 2012, IDWR acknowledged Rabo’s security interest by letter, copying Belle Ranch. R. 710.

vi. Scherer And Holt Convey The 7.5/289th To IIB Through A Deed In Lieu Of Foreclosure

On September 2, 2014, Scherer and Holt executed a *Non-Merger Deed in Lieu of Foreclosure* conveying ownership of the 7.5/289th of the Water Rights to IIB (“IIB Deed in Lieu”). R. 711. In the IIB Deed in Lieu, Scherer and Holt conveyed “all of the water rights, described in Exhibit 1, attached hereto” *Id.* According to Exhibit 1 to the IIB Deed in Lieu, Scherer and Holt conveyed their “undivided 7.5/289th” of the South County Water Rights to IIB. R. 715. The IIB Deed in Lieu was recorded in Blaine County on October 20, 2014 as Instrument No. 622055. R. 711. IIB is the most immediate predecessor-in-interest to FSC.

vii. IIB Conveys The 7.5/289th To FSC

On September 2, 2014, IIB executed a Warranty Deed conveying the same “7.5/289th” of the South County Water Rights to FSC (“FSC Deed”), which was recorded in Blaine County as Instrument No. 622056. R. 753.

viii. FSC Reports Its Ownership With IDWR As To The 7.5/289th Of The Water Rights With IDWR “Splitting” Ownership Between FSC and Belle Ranch

On October 28, 2014, pursuant to I.C. § 42-248(1), and fewer than 120 days after execution of the FSC Deed, FSC filed a *Notice of Change in Water Right Ownership* with

IDWR, requesting a “split” of the Water Rights, so as to recognize FSC’s 7.5/289th ownership. R. 756. To evidence its ownership, FSC included the South County 7.5/289th Quitclaim Deed, R. 757, the IIB Deed in Lieu, R. 763, and the FSC Deed, R. 768.

On January 12, 2015, and consistent with the deeds before it, IDWR split ownership of the South County Water Rights by allocating 7.5/289th of the diversion rate to FSC, with the remainder to Belle Ranch. R. 774. To FSC’s interest, IDWR assigned specific water right numbers, as summarized below (“FSC Water Rights”). R. 775-84. To Belle Ranch’s interest, IDWR kept the original water right numbers that were assigned to South County by the SRBA (“Belle Ranch Water Rights”). R. 785. The FSC Water Rights and Belle Ranch Water Rights, as created by IDWR, are summarized below:

FSC Water Rights	Priority Date	Diversion Rate (cfs)
37-22915	8/1/1882	0.08
37-22918	3/24/1883	0.06
37-22916	8/1/1884	0.08
37-22917	8/1/1902	0.4
37-22919	2/2/1960	0.10

Belle Ranch Water Rights	Priority Date	Diversion Rate (cfs)
37-481C	8/1/1882	2.93
37-577BT	3/24/1883	2.14
37-482H	8/1/1884	2.93
37-483C	8/1/1902	14.69
37-2630	2/2/1960	3.65

On January 13, 2015, IDWR sent a letter to Belle Ranch, and copied to Rabo, notifying them of the split in ownership of the Water Rights to FSC and Belle Ranch. R. 785.

ix. More Than A Year Later Belle Ranch Contests IDWR’s “Split” Of The Water Rights In The Name Of FSC

On March 21, 2016 – more than a year after ownership of the Water Rights was split between FSC and Belle Ranch – IDWR received a letter from Belle Ranch’s attorney, demanding IDWR undo the split, and restore ownership of the entire Water Rights to Belle Ranch: “This change in ownership was in error and should be reversed. . . . Accordingly,

please correct the Department's records of ownership of the above water rights to reflect Belle Ranch's ownership of the entire water rights." R. 786, 789 (emphasis added).

After documents back and forth from counsel for FSC and Belle Ranch, IDWR reviewed the correspondence, with a deputy attorney general assigned to IDWR stating that a quiet title action in district court would be necessary to resolve ownership of the Water Rights:

As you are aware IDWR does not possess the legal authority to quiet title in ownership disputes. Disputes over title to real property can only be resolved by a quiet title action brought before a district court. Idaho Code § 6-401. . . . IDWR only maintains and updates water right ownership records pursuant to Idaho Code Section 42-248. The Department elected to process the First Security Corporation's change in ownership based on the materials submitted at the time with the application. Despite providing notice of the change to Belle Ranch on January 13, 2015, IDWR did not receive any communication from [Belle Ranch] expressing a concern with this change until your March 17, 2016 letter. Review of earlier materials and consideration of your recent arguments and submitted materials indicate there is a dispute over current ownership of the 7.5/289th portion of these water rights.

R. 843 (emphasis added); *see also* R. 37 ("IDWR does not have the legal authority to determine ownership of a water right"); R. 837 ("the Department does not have the authority to determine ownership of water rights. The Department only maintains notices of changes of ownership submitted to it. The appropriate forum to resolve a dispute over ownership is a district court.").

x. Big Stick, the Fosbury IRA, and the Holt IRAs Reports Their Ownership With IDWR As To The 7.8/289th Of The Water Rights

On June 3, 2016, and pursuant to I.C. § 42-248(1), Big Stick, the Fosbury IRA, and the Holt IRAs sent *Notices of Change in Water Right Ownership* to IDWR, requesting a "split" of the Water Rights, so as to recognize Big Stick's 2.8/289th ownership, the Fosbury IRA's 2/289th ownership, the Holt IRA #H01NH's 1/289th ownership, and the Holt IRA #H01NV's 2/289th ownership and included the deeds recorded in Blaine County to demonstrate the same. R. 480. Ownership of the of the Water Rights was requested of IDWR as follows:

Parent Water Right No.	Total Parent Div. Rate	Big Stick Div. Rate	Fosbury Div. Rate	Holt IRA #1 Div. Rate	Holt IRA #2 Div. Rate	Belle Ranch Div. Rate and Water Right No.
37-481C	3.014	0.03	0.02	0.01	0.02	2.854 37-481C
37-577BT	2.2	0.02	0.02	0.01	0.02	2.07 37-577BT
37-482H	3.012	0.03	0.02	0.01	0.02	2.852 37-482H
37-483C	15.086	0.15	0.11	0.05	0.11	14.266 37-483C
37-2630	3.75	0.04	0.03	0.01	0.03	3.56 37-2630

R. 481.

Due to the controversy surrounding the Water Rights, IDWR affirmatively told Big Stick, the Fosbury IRA, and the Holt IRAs that IDWR would not address the requests. R. 577.

xi. The Fosbury IRA Quitclaims 2/289th To Fosbury

On November 7, 2016, the Fosbury IRA conveyed to Fosbury, by two quitclaim deeds, its ownership of 2/289th of the Water Rights, as recorded in Blaine County as Instrument Nos. 639648 and 639647, specifically stating the Fosbury IRA’s 2/289th ownership of “Water Right Nos. 37-482H, 37-481C, 37-483C, 37-577BT, and 37-2630” was “remise[d], release[d], quitclaim[ed], grant[ed] and convey[ed] unto Richard D Fosbury.” R. 578, 582.

xii. The Holt IRAs Quitclaims 3/289th To Holt

On November 28, 2016, the Holt IRAs conveyed to Holt, by three quitclaim deeds, its ownership of 3/289th of the Water Rights, as recorded in Blaine County as Instrument Nos. 640058, 640059 and 640107, specifically stating the Holt IRAs 3.289th ownership of “Water Right Nos. 37-482H, 37-481C, 37-483C, 37-577BT, and 37-2630” was “remise[d], release[d], quitclaim[ed], grant[ed] and convey[ed] unto Charles Holt.” R. 586, 590, 594.

xiii. Fosbury Substitutes As Party For Big Stick and Holt

On September 6, 2018, and pursuant to I.A.R. 7, prior counsel for Fosbury filed a *Notice of Substitution of Party* with this Court to assign the ownership of Big Stick and Holt to Fosbury. On September 24, 2018, the Court entered its *Order Granting Substitution of Party*.

Based on the chain of title, and with all parties deriving their ownership as successors-in-interest to South County, the record plainly shows that: FSC owns 7.5/289th of the Water Rights; Fosbury owns 7.8/289th of the Water Rights; and the most Belle Ranch can own is 273.7/289th of the Water Rights.

4. FSC And Fosbury Move The District Court To Quiet Title To The Water Rights In Their Respective Ownership: 7.5/289th and 7.8/289th

With a controversy over IDWR's record of reported ownership of the Water Rights, complaints to quiet title were filed by FSC, Big Stick, Fosbury, Holt,¹⁴ and Belle Ranch in Blaine County district court, with each party moving for summary judgment.

In summary judgment, FSC and Fosbury moved the district court to quiet title to their respective 7.5/289th and 7.8/289th ownership. R. 376, 384. In so doing, FSC and Fosbury asked the district court to give effect to the recorded conveyances that unequivocally put everyone on notice, including MWB, GBCI, Belle Ranch, and Rabo, that the 7.5/289th and 7.8/289th could only be owned by FSC and Fosbury, respectively.

In its *Memorandum Decision on Cross-Motions for Summary Judgment* ("Memorandum Decision") the district court determined the SRBA partial decrees in the name and address of South County did not foreclose it from considering the cross-motions to quiet title. "The Court concludes that this is not a collateral attack on the 2010 SRBA adjudication [of the Water

¹⁴ For purposes of convenience, and consistent with the Court's *Order Granting Substitution of Party*, the brief will now refer only to Fosbury.

Rights]. That adjudication merely confirmed that 289/289th had been awarded to South County. It is with the assumption that South County owned and was able to convey all 289/289th with which the Court begins its analysis.” R. at 1758. While the SRBA did not serve as a bar, and with the exception of 2.8/289th of the Water Rights that was left open for trial, the district court held the MWB Mortgage, MWB Modification, MWB Second Mortgage, and MWB Third Mortgage prevented South County from conveying the Water Rights to FSC’s and Fosbury’s predecessors, due to those conveyances happening after the MWB secured interests. R. at 1760-63 (discussing timing of conveyances after MWB mortgage and modifications). Moreover, the district court determined the MWB Deed In Lieu operated as an actual foreclosure against the Water Rights: “Thus, when the second and third mortgages were foreclosed, the 7.5/289th, which were security for the MWB second and third mortgages, were foreclosed.” R. 1762-63 (emphasis added). Based on timing of the MWB Mortgage, MWB Modification, MWB Second Mortgage, MWB Third Mortgage, and MWB Deed in Lieu, the district court quieted title to Belle Ranch in all but 2.8/289th of the Water Rights. R. 1764.

FSC and Fosbury moved for reconsideration, R. 1767, 1781, arguing the presence of MWB’s secured interests did not alter the ability to convey the Water Rights, and that the MWB Deed in Lieu did not operate as actual an foreclosure, R. 1772, 1784-85.

On reconsideration, the district court did not address the issues raised by FSC and Fosbury. Instead, the district court chose to alter its analysis of the SRBA in order to reach a conclusion, based on the doctrine of *res judicata*, that it could quiet title in the entire 289/289th to Belle Ranch. To recognize Belle Ranch as the owner of all 289/289th of the Water Rights, the district court relied upon the fact that the Belle Ranch Change of Ownership was filed with IDWR prior to entry of the SRBA district court’s Unified Decree:

These claims were adjudicated in the partial decree dated August 31, 2010 [in the name of South County]. MWB transferred the water rights to GBCI on June 17, 2010. On July 22, 2011 MWB filed a change in ownership with IDWR. MWB and GBCI transferred the water rights to Belle Ranch on December 22, 2011. Belle Ranch then filed the appropriate notice of change of ownership with IDWR on February 28, 2012. The Unified Final Decree was then issued. Subsequent to the final adjudication, a conflict arose between the parties at Idaho Department of Water Resources and this suit was brought to determine ownership of the water rights. However, the water court already decreed the water rights to South County in the Rule 54(b) certified partial decree and the Unified Final Decree gave effect to the transfers made to the adjudicated rights via the administrative changes.

R. 1929 (emphasis added).

The ruling of the district court was in error and should be reversed on appeal to give effect to the conveyances of record in Blaine County, resulting in FSC's ownership of 7.5/289th of the Water Rights and Fosbury's 7.8/289th ownership of the Water Rights.

III. ISSUES PRESENTED ON APPEAL

A. Issues Presented By FSC And Fosbury

FSC and Fosbury present the following issues on appeal:

1. Did the district court err in determining that *res judicata* barred FSC and Fosbury from moving the district court to quiet title in their respective ownership of the Water Rights?
2. Did the district court err in its analysis of the SRBA district court's *Final Unified Decree* in determining that forms filed by Belle Ranch with IDWR prevented the district court from quieting title to FSC and Fosbury, but allowed it to quiet title to Belle Ranch?
3. If *res judicata* does apply, did the district court err in determining it could quiet title to anyone contrary to the SRBA partial decrees listing the name and address of South County?

4. Did the district court err in determining that mortgages operated to defeat conveyance of the Water Rights to FSC and Fosbury?
5. Did the district court err in determining that a deed in lieu of foreclosure operated as an actual foreclosure?
6. Did the district court err in its judgment by making a determination of Rabo's secured interests adverse to other secured creditors?

IV. ARGUMENT

A. Standard Of Review

On appeal of summary judgment and motions for reconsideration, this Court employs a *de novo* standard of review:

“When reviewing a grant of summary judgment, this Court employs the same standard as the district court.” *Idaho Youth Ranch, Inc. v. Ada Cty. Bd. of Equalization*, 157 Idaho 180, 182, 335 P.3d 25, 27 (2014). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). “Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party.” *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). “However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact.” *Intermountain Real Props., LLC v. Draw, LLC*, 155 Idaho 313, 316-17, 311 P.3d 734, 737-38 (2013) (quoting *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012)).

“[W]hen reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). “This means the Court reviews the district court’s denial of a motion for reconsideration *de novo*.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014).

Taylor v. Taylor, 163 Idaho 910, 915-16, 422 P.3d 1116, 1121-22 (2018).

A party “seeking to quiet title against another must succeed on the strength of his own title, and may not rely merely upon the weakness of his adversary.” *Eagle Equity Fund, LLC v. TitleOne Corp.*, 161 Idaho 355, 362, 386 P.3d 496, 503 (2016) (emphasis added).

B. FSC And Fosbury Are Not Barred By *Res Judicata* In Moving The District Court To Quiet Title To Their Ownership Of The Water Rights

On reconsideration of the cross-motions for summary judgment, the district court concluded *res judicata* barred it from quieting title to FSC and Fosbury, but allowed it to quiet title to Belle Ranch. R. 1927-32. “Having reconsidered the matter, the motion for summary judgment is hereby GRANTED in favor of Belle Ranch, et al[.], and quiets title to all 289/289ths in Belle Ranch et al. by virtue of the rights adjudicated in the SRBA and in the administrative proceedings that occurred between the partial decree and the Final Unified Decree. This does not negatively impact RABO’s security interest.” R. 1933. The district court erred in applying *res judicata* because the ownership of these Water Rights was never litigated in the SRBA.

The doctrine of *res judicata* was recently examined by this Court as it applied in the SRBA to late claims filed by the United States for storage water from the Payette River. *Black Canyon Irrigation District v. State*, 163 Idaho 144, 408 P.3d 899 (2018). According to the Court:

Whether *res judicata* applies is a question of law over which this Court exercises free review. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 122, 157 P.3d 613, 616 (2007). *Res judicata* consists of claim 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.’” Under this doctrine, a claim is also precluded if it could have been brought in the previous action, regardless of whether it was actually brought, where: (1) the original action ended in final judgment on the merits, (2) the present claim involves the same parties as the original action, and (3) the present claim arises out of the same transaction or series of transactions as the original action. *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 81, 278 P.3d 943, 951 (2012) (citations omitted).

Id. at 150, 408 P.3d at 905.

There, and due to the fact that the United States had already been issued SRBA partial decrees for storage water from the Payette River, the Court concluded *res judicata* barred the United States' pursuit for additional storage water. In this case, no one is claiming new water rights, filing late claims associated with previously decreed water rights, or attempting to alter any of the elements of the Water Rights that were issued by the SRBA district court in the "name and address" of South County, I.C. § 42-1411(2)(a); thus, *res judicata* does not bar this proceeding.¹⁵

Here, FSC was recognized by IDWR as the owner of the 7.5/289th of the Water Rights for more than a year, until Belle Ranch sent a letter to IDWR contesting the same. Fosbury, similar to FSC, notified IDWR of his ownership, yet IDWR would not process Fosbury's ownership change due to the cloud on title created by Belle Ranch. At IDWR's direction, the parties to this proceeding were told to move the district court, pursuant to I.C. § 6-401, to quiet title to ownership. R. 37, 837, 843. This is because IDWR has no authority to determine ownership. *Id.* Despite being moved to quiet title, the district court never analyzed, applied, or reconciled I.C. § 6-401 with its holding. Had the district court done so, it would have concluded *res judicata* does not bar FSC and Fosbury because the issue of ownership as to these Water Rights was never litigated in the SRBA and was not required to be litigated in the SRBA.¹⁶

¹⁵ In *Black Canyon* and in the Court's other recent decision in *Eden v. State*, 164 Idaho 241, 429 P.3d 129 (2018), the State of Idaho litigated against the parties who were taking positions against the SRBA and the Unified Decree. It is notable that the State is not involved in this action to quiet title, as this case only involves issues of recorded ownership that have no bearing on administration of water rights or their decreed elements.

¹⁶ FSC and Fosbury acknowledge the SRBA district court did, at times, make decisions about water right ownership when the question was put directly to it. See *United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007). However, in those cases the SRBA district court was not acting pursuant to the adjudication statutes, because the adjudication statutes specifically do not authorize water right ownership as part of adjudication. I.C. § 42-1401 *et seq.* Thus, the SRBA district court, as a water rights adjudication court, does not determine ownership.

In Idaho, water rights are real property rights, I.C. § 55-101(1), and may be conveyed separately from land, *Joyce Livestock Co. v. United States*, 144 Idaho 1, 14, 156 P.3d 502, 515 (2007); *Fed. Land Bank of Spokane v. Union Cent. Life Ins. Co.*, 54 Idaho 161, ___, 29 P.2d 1009, 1011 (1934); *Koon v. Empey*, 40 Idaho 6, 10-11, 231 P. 1097, 1098-99 (1924). If ownership of property is contested, parties resolve the dispute through an action to quiet title:

An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim, provided that all actions to adjudicate water rights and obtain a decree as to water source, quantity, point of diversion, place of use, nature of use, period of use, and priority as against other water users shall be brought under the provisions of chapter 14, title 42, Idaho Code.

I.C. § 6-401 (emphasis added).¹⁷

Chapter 14, Title 42, Idaho Code governs adjudication of water rights. I.C. §§ 42-1401 *et seq.* The SRBA is a general stream adjudication commenced consistent with Idaho’s adjudication statutes. *In re SRBA Case No. 39576*, 128 Idaho 246, 251, 912 P.2d 614, 619 (1995). Upon commencement of the SRBA, the director of IDWR was authorized to determine beneficial use by “commenc[ing] an examination of the water system, the canals and ditches and other works, and the uses being made of the water diverted from the water system for water rights acquired under state law.” I.C. § 42-1410(1) (emphasis added). The IDWR director is then tasked with issuing a report to the SRBA district court of his examination of the water system. I.C. § 42-1411(2). The seven terms listed in I.C. § 6-401 are the traditional elements of

Here, and as to these Water Rights, the issue of ownership was never raised in the SRBA; thus, it was not actually litigated or determined, with the parties now availing themselves of I.C. § 6-401.

¹⁷ Idaho Code § 6-401 was amended in 1981 to add language directing persons who claim the use of water to quiet title to that use through Idaho’s water adjudication statutes in Title 42, Chapter 14. Idaho Sess. Laws 1981, ch. 265, sec. 1, p. 561. At the same time, on the same page, and in the same chapter, amendments were made to Idaho’s water adjudication statutes, Idaho Sess. Laws 1981, ch. 265, sec. 2, p. 562, evidencing the legislature’s understanding that ownership, and the remedies surrounding those disputes, were separate from the resolution of adjudicated water right elements (“water source, quantity, point of diversion, place of use, nature of use, period of use, and priority as against other water users”).

an Idaho water right that encompass beneficial use of water, were examined by IDWR, and put squarely before the SRBA district court for partial decree. *Compare* I.C. § 6-401 *with* I.C. § 42-1411(2). *See also* *Rangen, Inc. v. Idaho Dept. of Water Resources*, 160 Idaho 119, 127, 369 P.3d 897, 905 (2016) (“the SRBA court determines the water sources, quantity, priority date, point of diversion, place, period and purpose of use”) (emphasis added).

While I.C. § 42-1411(2)(a) requires the recitation of the “name and address of the claimant,” I.C. § 6-401 does not list ownership as an element of the water right nor does it list the “name and address of the claimant.” The “name and address of the claimant” is not synonymous with record ownership. “A cardinal rule of statutory construction is that where a statute is plain, clear and unambiguous, courts are constrained to follow that plain meaning, and neither add to the statute nor take away by judicial construction.” *Kemmer v. Newman*, 161 Idaho 463, 467-68, 387 P.3d 131, 135-36 (2016).

Idaho Code § 42-1401A(1) defines “claimant” as “any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to use of water is asserted.” Emphasis added. The word “assert” is defined as: “To state as true; declare; maintain.” *Black Law Dictionary* (6th ed. 1996). Assertion of ownership does not mean the claimant is, in fact, the owner of record in the county when the water rights are partially decreed by the adjudication court. Indeed, it was not unusual in the SRBA for claims to be filed in the early 1990s with IDWR’s investigation occurring years or a decade later, and the SRBA partial decrees being issued thereafter. *See e.g. Eden* at 243-46, 429 P.3d at 132-35 (discussing timing of SRBA related to reports of IDWR). Here, South County was the “claimant” when the IDWR director examined the system and issued his recommendation to the SRBA district court that the Water Rights list South County in the “name and address of the claimant” element, and

that South County did own the Water Rights for most of the time the claims were pending before the SRBA district court. The record conclusively shows, however, that South County did not own the Water Rights at the time the SRBA partial decrees were issued, despite the partial decrees listing South County's name and address. It is precisely this type of situation that was being guarded against by the legislature when it omitted ownership, "name and address of the claimant," or any semblance of those words from I.C. § 6-401 when, in 1981, that statute and Idaho's water adjudication statutes in Title 42, Chapter 14 were amended.¹⁸ Idaho Sess. Laws 1981, ch. 265, sec. 1, p. 561; Idaho Sess. Laws 1981, ch. 265, sec. 2, p. 562. That amendments were made to these statutes during the same legislative session, in the same chapter, and on the same page is significant: "The rule that statutes *in pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the Legislature." *Peavy v. McCombs*, 26 Idaho 143, 149, 140 P. 965, 967 (1914) (emphasis added).

That the legislature omitted these words from I.C. § 6-401 is consistent with Idaho law, due to the fact that ownership of real property is controlled by conveyance. I.C. § 55-601. Once a conveyance is made, the grantee must record his or her interest to protect him or her from other persons. *Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 866, 853 P.2d 607, 611 (Ct. App. 1993). "Idaho is a race-notice recording state: 'Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for valuable consideration, whose conveyance is first duly recorded.' I.C. § 55-812." *Insight LLC v. Gunter*, 154 Idaho 779, 783, 302 P.3d 1052, 1056 (2013). "An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the recorder's office with the proper officer for record." I.C. § 55-809. Even when a

¹⁸ Idaho Code § 6-401 has remained unchanged since 1981, despite other changes to Title 42, Chapter 14, most notably in 1986 and 1994.

recording official improperly records the instrument under an incorrect name, the instrument is deemed recorded. *Miller v. Simonson*, 140 Idaho 287, 92 P.3d 537 (2004). “Every conveyance of real property . . . recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgages [mortgagees].” I.C. § 55-811. Since Idaho is a race-notice jurisdiction, recorded interests in real property are effective against unrecorded interests “when the recorded interest is taken for valuable consideration and in good [sic] faith, i.e., without knowledge, either actual or constructive.” *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974); I.C. § 55-812. When competing claims over ownership of real property arise, quiet title is the vehicle by which those disputes are reconciled: “Our Supreme Court has held that every estate or interest known to the law in real property, whether legal or equitable, may be determined in an action to quiet title. *Lewiston Lime Co. v. Barney*, 87 Idaho 462, 394 P.2d 323 (1964).” *Aldape v. Akins*, 105 Idaho 254, 260, 668 P.2d 130, 136 (Ct. App. 1983) (emphasis added).

If binding ownership decisions forever more were based only on the IDWR director listing the “name and address of the claimant” in his recommendation, I.C. § 42-1411(2)(a), with the SRBA district court merely reciting the same in its partial decrees, I.C. § 42-1412(7), when the “name and address of the claimant” much less ownership or chain of title was never examined, it would result in: (1) giving IDWR actual authority to determine ownership, contrary to its statutory authority, R. 37, 837, 843; and (2) unraveling Idaho’s conveyance and recording system, I.C. §§ 55-601, 55-809- 55-811, 55-812, making IDWR’s decision the only thing necessary when it comes to water right ownership.

Here, parties to this proceeding moved the district court to determine their competing claims to ownership. No party asked the district court to alter the “name and address of the

claimant” or any other of the Water Right elements that were partially decreed by the SRBA district court. Indeed, the SRBA partial decrees do not have to be altered to recognize deeded ownership, as ownership is controlled by Idaho’s conveyance and recording system. Therefore, the district court erred in holding *res judicata* barred FSC and Fosbury from determining ownership of the Water Rights consistent with I.C. § 6-401.

If a party were to bring a quiet title action to contest a beneficial use element of a water right listed in I.C. § 6-401(“water source, quantity, point of diversion, place of use, nature of use, period of use, and priority”), the action would be barred by *res judicata* and/or constitute a collateral attack on the SRBA partial decree. *State v. Wolfe*, 158 Idaho 55, 63, 343 P.3d 497, 505 (2015) (“Res judicata precludes re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants.”); *City of Blackfoot v. Spackman*, 162 Idaho 302, 306-08, 396 P.3d 1184, 1188-90 (2017) (discussing collateral attack on the elements of an SRBA partial decree). This is because *res judicata* applies when the issue could have been brought and was litigated between the parties. *Black Canyon* at 150, 408 P.3d at 905. Water right elements that make up beneficial use were required to be litigated in the SRBA, and if they were not, would become a subsequent bar to parties or their successors. *Rangen* at 127, 369 P.3d at 905. The SRBA district court was never asked to examine ownership of these Water Rights. If it had, the partial decrees would not have been issued to South County because before the partial decrees were entered by the SRBA district court on August 31, 2010, ownership of the Water Rights had been conveyed from South County to FSC’s, Fosbury’s, and Belle Ranch’s predecessors.

With *res judicata* not serving as a barrier, the chain of title unambiguously shows South County conveyed 7.5/289th of the Water Rights, separate from the land, to FSC’s predecessors

when it executed the South County 7.5/289th Quitclaim Deed, which was recorded in Blaine County on June 25, 2009. South County also unambiguously conveyed 7.8/289th of the Water Rights, separate from the land, to Fosbury's predecessors when it executed the South County 7.8/289th Quitclaim Deeds, which were all recorded in Blaine County by March 1, 2010. The wording of these deeds, which referenced specific portions of the Water Rights, unambiguously shows the Water Rights were reserved and conveyed separately from the land, making them lawful. *Joyce Livestock* at 14, 156 P.3d 515; *Fed. Land Bank* at ____, 29 P.2d at 1011; *Koon* at 10-11, 231 P. 1098-99. Finally, having already conveyed 15.3/289th of the Water Rights to FSC's and Fosbury's predecessors, South County conveyed what remained of them – at most 273.7/289th – to Belle Ranch's predecessor when it executed the MWB Deed in Lieu, which was recorded in Blaine County on June 17, 2010. The prior recordings in Blaine County definitively prove superior ownership to FSC in 7.5/289th of the Water Rights and to Fosbury in 7.8/289th of the Water Rights. Consequently, the matter should be remanded to the district court to quiet title in the Water Rights consistent with the deeds of record in Blaine County as follows: 7.5/289th to FSC; 7.8/289th to Fosbury; and 273.7/289th to Belle Ranch.

C. The District Court Misconstrued The SRBA District Court's *Final Unified Decree In Determining That Forms Filed By Belle Ranch With IDWR Prevented The District Court From Quietening Title To FSC And Fosbury, But Allowed It To Quiet Title To Belle Ranch*

While agreeing that the Water Rights were partially decreed in the name and address of South County, the district court incorrectly concluded that even though *res judicata* barred it from quieting title to FSC and Fosbury, it could quiet title to Belle Ranch. The district court arrived at this conclusion based on the fact that Belle Ranch filed two forms with IDWR, pursuant to Chapter 2, Title 42, Idaho Code, and before entry of the SRBA district court's Unified Decree. It must be emphasized that no documents were filed by anyone with the SRBA

district court as to the Water Rights after they were partially decreed; therefore, the only documents the district court analyzed were the forms Belle Ranch filed with IDWR.

The first form relied upon by the district court to support its decision was the Belle Ranch Change of Ownership, filed with IDWR on February 28, 2012, pursuant to I.C. § 42-248(1):

These claims were adjudicated in the partial decrees dated August 31, 2010. . . . Belle Ranch then filed the appropriate notice of change of ownership with IDWR on February 28, 2012. The Unified Final Decree was then issued. . . . [T]he Unified Final Decree gave effect to the transfers made to the adjudicated rights via the administrative changes.

Memo Rec. at 11 emphasis added.

The second form relied upon by district court to support its decision was the Belle Ranch POU Transfer, filed with IDWR on April 22, 2012, pursuant to I.C. § 42-222(1):

Belle Ranch made changes to the use of water, which again required notice via publication and makes the determination binding on all parties. No party objected to the change and the change was again entered. The final decree cemented into place those administrative changes.

Memo Rec. at 13-14 (emphasis added).

Based on those two forms – and ignoring that FSC and Fosbury, as well as their predecessors, also filed forms with IDWR to support their respective ownership and security interest – the district court then turned to the Unified Decree to support its conclusion to quiet title to Belle Ranch: “In order to transfer the property between the time that the partial decree is entered and the final decree is entered two things are required: a legal transfer of the property and filing with IDWR. *Final Unified Decree of the SRBA.*” R. 1929. While the Unified Decree was addressed by the parties in briefing to the district court on summary judgment and on reconsideration, the district court failed to analyze any portion of the Unified Decree in support of this conclusion. Analysis of Issue No. 4 to Basin-Wide Issue 16 (“BWI 16”) supports a

conclusion that the forms filed with IDWR by Belle Ranch had no bearing on the outcome of this matter.

A final decree is required to complete an adjudication. I.C. § 42-1412(8). In order to arrive at the Unified Decree, BWI 16 was designated by the SRBA district court. Ann Y. Vonde *et al.*, *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, 204 (2016).¹⁹

“Because a hallmark of the SRBA was cooperation, the Court formed a steering committee (“Committee”) to address the issues posed in Basin Wide Issue 16.” *Id.* The Committee was charged with a number of duties, one of which included “the form and content of the final unified decree.” *Id.* at 205. Over the summer and fall of 2011, the Committee met to discuss the Unified Decree’s form and content, with a proposed Unified Decree submitted to the SRBA district court on November 30, 2011 for its consideration. *Id.* at 205-06. On January 30, 2012, the SRBA district court “entered its Order Re: Proposed Final Unified Decree and Adopting Proposed Procedures and Deadlines. The SRBA Court’s Proposed Final Unified Decree was served on the parties and became subject to challenge.” *Id.* at 206. Notices of challenge were received as to eight issues. Four of the issues were uncontested, including Issue No. 4 – “Subsequent Licenses and Transfers are not Altered” (emphasis added):²⁰

The Final Unified Decree states as follows: “Any water rights with a priority date subsequent to November 18, 1987, were not required to be claimed in the SRBA, but to the extent any such water right were claimed in the SRBA and a partial decree issued, the partial decree is not conclusive as to the nature and extent of the right.” While this provision was not challenged, and remains in the Final Unified Decree, parties to BWI 16 were concerned that the sentence could be construed to impact partial decrees that were based on permits, and partial decrees that were subsequently altered by a valid transfer. Language was added to the Proposed Final Unified Decree to address these occurrences.

¹⁹ The *Understanding of the Snake River Basin Adjudication* has been cited favorably by the Court. *Eden* at 244, 429 P.3d at 133; *Black Canyon* at 155, 408 P.3d at 910.

²⁰ This proceeding does not involve a “license” issued by IDWR for a water right, I.C. § 42-219; therefore, the “subsequent licenses” provision of Issue No. 4 does not apply.

....

Many water users, after receiving a partial decree, filed transfers with IDWR to change an element of the decreed water right. A concern in BWI 16 was whether the partial decree or the subsequent administrative transfer, which was approved before entry of the Final Unified Decree, would control. To address this potential discrepancy, the Court held as follows: “the Final Unified Decree does not supersede the results of water right transfers initiated and completed after the entry of a partial decree but prior to entry of the Final Unified Decree.”

Id. at 208-09 (emphasis added).

A water right “transfer” is a term of art. In order to change an element of a water right in Idaho, an “Application for Transfer of Water Right” must be filed pursuant to I.C. § 42-222(1). *See City of Blackfoot* at 308, 396 P.3d at 1190 (discussing IDWR water right transfers). A water right transfer filed pursuant to I.C. § 42-222(1) allows IDWR to change four (4) elements of an SRBA partial decree: “point of diversion, place of use, period of use or nature of use . . .” I.C. § 42-222(1). Said differently, IDWR is statutorily precluded from changing four (4) other water right elements of an SRBA partial decree: “name and address of the claimant,” “the source of water,” “the quantity of water,” and “the date of priority.” I.C. § 42-1411(2)(a) – (d). An administrative transfer proceeding can result in a change to only the four elements of an Idaho water right that are before IDWR in the transfer, I.C. § 42-222(1), and cannot be confused with other ministerial administrative actions performed by IDWR, such as updating the agency’s record when notified of a change in water right ownership, I.C. § 42-248(1), or a security interest, I.C. § 42-248(6). It was because I.C. § 42-222(1) can administratively alter certain elements of an SRBA partial decree, with the possible confusion that could have resulted from issuance of the Unified Decree and its possible impact as to IDWR transfers approved after SRBA partial decrees but prior to the Unified Decree, that Issue No. 4 to BWI 16 was raised and decided.

Under no construction of I.C. § 42-222(1) can the words owner, ownership, “name and address of the claimant,” or any semblance of those words be imputed. The statute must be given its “plain, clear and unambiguous” meaning. *Kemmer* at 467, 387 P.3d at 135. By its plain meaning, IDWR had no statutory authority to determine ownership or to alter the name and address element of the Water Rights when it approved the Belle Ranch POU Transfer. In fact, IDWR does not have any rules or regulations that gives it such authority. R. 37, 837, 843.²¹ Thus, when the district court concluded “[t]he final decree cemented into place those administrative changes[,]” R. 1932, there was no authority, either through statute or any administrative interpretation of statute that allowed IDWR to determine ownership at all, let alone in direct contradiction to I.C. § 42-222. Indeed, IDWR has specifically stated it has no authority to determine ownership and directed the parties to quiet title in a district court. R. 37, 837, 843.

Because the Unified Decree is not implicated, and because ownership is controlled by deeds of record, I.C. §§ 55-101, 55-601, 55-809, 55-811, 55-812, there can be no “collateral attack” upon the Unified Decree. R. at 1930 citing *Eden*.

As to the Belle Ranch Change of Ownership, and as established above, the Unified Decree only discussed “transfers” filed with IDWR pursuant to I.C. § 42-222(1), and never discussed documents filed with IDWR pursuant to anything else, including but not limited to I.C. § 42-248(1).²² Again, these are two distinct actions that cannot be conflated. As to documents

²¹ IDWR’s plain meaning understanding of the limits of its statutory authority, which do not allow the agency to determine ownership, is entitled to deference. *A & B Irr. Dist. v. Idaho Dept. of Water Res.*, 154 Idaho 652, 653-54, 301 P.3d 1270, 1271-72 (2012).

²² Issue No. 4 to the Unified Decree was raised by attorneys for water users in BWI 16, leaving no room for interpretation that anything other than I.C. § 42-222(1) transfers were at issue: “To the extent that the Steering Committee and the Court intended as much, the Challengers disagree that the forthcoming Final Unified Decree can or should be used to supersede valid administrative water right modifications (*e.g.*, water right transfer under Idaho Code Section 42-222) duly initiated and completed after the issuance of a partial decree but before filing of the Court’s Final Unified Decree. . . . Depending upon the nature and scope of any given administrative water right

filed pursuant to I.C. § 42-248(1), they simply serve as “notice . . . [of] persons owning or claiming ownership of a right to use water of this state . . .” I.C. § 42-248(1) (emphasis added).

Never addressed by the district court is an affidavit from IDWR unambiguously explaining the agency has no authority to determine ownership or alter deeds of record:

When a Notice is filed, IDWR verifies that the form has been filled out correctly, that the appropriate filing fee has been paid, and that the conveyance document(s) accompanying the Notice appear proper. Based on the information submitted, IDWR then decides whether to “process” the Notice, to request additional information from the filer of the Notice, or to return the Notice because it is incomplete or the supporting documentation is inadequate.

. . . .

In the event of disputed ownership, IDWR directs the parties to quiet title in a district court because IDWR does not have the legal authority to determine ownership of a water right.

R. 36-37 (emphasis added). *See also* R. 837 (“the Department does not have the authority to determine ownership of water right. The Department only maintains notices of changes of ownership submitted to it. The appropriate forum to resolve a dispute over ownership is a district court.”); R. 843 (“IDWR does not possess the legal authority to quiet title in ownership disputes. Disputes over title to real property can only be resolved by a quiet title action brought before a district court. Idaho Code § 6-401. . . . IDWR only maintains and updates water right ownership records pursuant to Idaho Code Section 42-248.”).

Therefore, neither I.C. §§ 42-222(1), 42-248(1), the Belle Ranch Change of Ownership, the Belle Ranch Transfer, nor the Unified Decree can alter the “name and address of the

modification, including corresponding changes in land use or purposes of water use, reverting back to water right elements as originally partially decreed may be impossible.” *Opening Brief in Support of Notice of Challenge*, p. 3, SRBA Subcase No. 00-92099 (April 3, 2012) (emphasis added). This portion of the *Opening Brief in Support of Notice of Challenge* was put before the district court and discussed in the record at 1580. The *Opening Brief in Support of Notice of Challenge* is available on the SRBA’s website, www.srba.state.id.us/SREPT.HTM, under subcase no. 00-92099 (last visited 4/2/2019). No party to BWI 16, including the State of Idaho, opposed this issue, with the SRBA district court entering the same in the Unified Decree. It was fundamental error for the district court to conclude Issue No. 4 to BWI 16 applied to the I.C. § 42-248(1) change of ownership filed by Belle Ranch.

claimant” element of the Water Rights. Based on the foregoing, the district court erred in concluding the Unified Decree allowed an avenue for it to quiet title to Belle Ranch while *res judicata* preventing it from quieting title to FSC and Fosbury.

D. If *Res Judicata* Does Apply, The Only Outcome Is Maintaining South County In The Name And Address Element Of The Water Rights

If the district court was correct in concluding that *res judicata* applied to foreclose ownership in FSC and Fosbury, it erred in its application, as the only outcome that can exist is ownership in South County. Here, the only water right element at issue is “name and address of the claimant.” I.C. § 42-1411(2)(a). A “claimant” is “any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted.” I.C. § 42-1401A(1). Based on the claim, IDWR recommended the Water Rights be issued in the name and address of South County. Based on IDWR’s recommendation, I.C. § 42-1411(2), the Water Rights were partially decreed in the name and address of South County, I.C. § 42-1412, with the SRBA district court certifying the partial decrees as final judgments pursuant to I.R.C.P. 54(b). All parties to this proceeding are successors-in-interest to South County, deriving their ownership in the Water Rights from conveyances that pre-dated issuance of the SRBA partial decrees. *See* South County 7.5/289th Quitclaim Deed; South County 7.8/289th Quitclaim Deeds; and MWB Deed in Lieu. The record is clear that no documents were filed by FSC, Fosbury, or Belle Ranch with the SRBA district court as to these Water Rights, and that their predecessors-in-interest filed no documents in the SRBA contesting the name and address of the Water Rights. With no appeal taken to this Court within 42 days after the SRBA partial decrees were issued, I.A.R. 14, and no motion filed in the SRBA to “set aside” the partial decrees pursuant to I.R.C.P. 60, *Eden* at 248, 429 P.3d at 136, then, the partial decrees stand unaltered. Thus, if *res judicata* does apply, as the district court held, the only

outcome is the name and address element of the Water Rights is binding and must rest with South County.

E. The District Court Erred In Concluding That Mortgages Operated To Defeat Conveyance Of The Water Rights To FSC And Fosbury

In its Memorandum Decision, the district court concluded that the MWB Mortgage, MWB Modification, MWB Second Mortgage, and MWB Third Mortgage operated to conveyances of the Water Rights to FSC and Fosbury.²³ This conclusion of the district court was in error and should be reversed.

Idaho Code states that a mortgage places “a lien upon everything that would pass by a grant or conveyance of the property.” I.C. § 45-906 (emphasis added). “This court has uniformly held, and still holds, that a mortgage does not pass title to the mortgaged property. If duly recorded, [a mortgage] creates a lien and incumbrance on the property, so as to impair the mortgagor’s title to the extent of the mortgage indebtedness.” *In Re: On Rehearing*, 57 Idaho 213, 217, ___ P. ___, ___ (1937) (emphasis added); *see also John Hancock Mut. Life Ins. Co. v. Girard*, 57 Idaho 198, 217, 64 P.2d 254, ___ (1936) (“a mortgage does not pass title to the mortgaged property.”) (emphasis added). Mortgages may therefore encumber real property, with subsequent purchasers possibly taking subject to the mortgages. *Adams v. George*, 119 Idaho 973, 976-77, 812 P.2d 280, 283-84 (1991) (“The purchaser is not personally liable to pay an obligation secured by an existing encumbrance unless the assumption is proved by clear and convincing evidence.”). “[A] mortgage recorded first in time has priority against all other

²³ In the Memorandum Decision, the district court did leave open for trial ownership of 2.8/289th now owned by Fosbury. R. at 1764. On reconsideration, the district court held *res judicata* prevented any conveyance to FSC or Fosbury. R. 1933. If the Court determines *res judicata* does not apply, then the district court’s analysis of the mortgages and modifications must be addressed.

subsequent mortgagees.” *U.S. Bank N.A. v. CitiMortgage, Inc.*, 157 Idaho 446, 452, 337 P.3d 605, 611 (2014) (emphasis added).

Here, there is no dispute that South County entered into three mortgages with MWB. MWB then partially released its interest in the Water Rights through the 7.5/289th MWB Partial Release and the 7.8/289th MWB Partial Release. With whatever secured interests that remained, South County executed the South County 7.5/289th Quitclaim Deed, the South County 7.8/289th Quitclaim Deed, and the 2010 MWB Deed in Lieu. These conveyances and all subsequent conveyances were subject to the secured interests of record, if any, but the presence of the secured interests, did not operate to defeat conveyance of the Water Rights to anyone. The district court’s conclusion that mortgages defeated conveyance of the Water Rights should be reversed.

F. The District Court Erred In Determining That Deeds In Lieu Of Foreclosure Operated As Actual Foreclosures

In the Memorandum Decision, and with no facts to support it, the district court concluded there was a foreclosure that operated to defeat conveyance of the Water Rights: “[W]hen the second and third mortgages were foreclosed, the 7.5/289th, which were security for the MWB second and third mortgages, were foreclosed.” R. 1762 (emphasis added).

Based on the context in which the sentence appears, the district court appears to have been referring to the MWB Deed In Lieu. In no way, however, can the MWB Deed in Lieu be construed as a foreclosure. First, by its title the MWB Deed in Lieu was entered into “in lieu of foreclosure.” R. 657 (emphasis added). Second, by its terms, the 2010 MWB Deed in Lieu was a “quitclaim[]” deed. *Id.* (emphasis added). Third, foreclosures are creatures of statute, with procedures that must be followed. I.C. § 45-1501 *et. seq.* With no evidence in the record to

support a conclusion that a foreclosure took place, the district court's decision on this issue should be reversed.

G. The District Court Erred In Its Judgment By Making A Determination Of Rabo's Secured Interests Adverse To Other Secured Creditors

In its Judgment, the district court made a determination of the security interests of Rabo: "Belle Ranch, LLC, an Idaho limited liability company, is the sole owner of the title to the following water rights: 37-481C, 37-482H, 37-483C, 37-577BT, and 37-2630, subject to the security interests of Rabo Agrifinance, Inc." R. at 1936 (emphasis added). In making this statement, and with no analysis in either its Memorandum Decision or Memorandum Decision on Reconsideration, the Judgment ignored the record establishing IIB's secured interests in the 7.5/289th of the Water Rights. *See* MWB Letter Agreement (R. 1513-14); IIB Mortgage (R. 638); IIB UCC Financing Statement (R. 1500-01). FSC is a successor-in-interest to the MWB Letter Agreement. The secured interests of IIB predate the secured interests of Rabo. By predating Rabo, the secured interests of IIB take priority. *U.S. Bank* at 452, 337 P.3d at 611. Because secured interests were not analyzed, and if the Court affirms the district court, the Judgment should be amended to omit any reference to the secured interests of any creditor.

V. CONCLUSION

Based on the foregoing, the clear chain of title shows: (1) FSC owns 7.5/289th of the Water Rights; (2) Fosbury owns 7.8/289th of the Water Rights; and (3) the most Belle Ranch can own is 273.7/289th of the Water Rights. Because *res judicata* did not bar this action, FSC and Fosbury respectfully request that this Court reverse and remand this matter to the district court to quiet title based on the deeds of record in Blaine County. Alternatively, if *res judicata* does apply, this matter should be remanded to the district court to conclude that the only owner of record is South County, the entity in which the SRBA partial decrees were issued. Lastly, under

any outcome, the matter should be remanded to the district court to correct its Judgment to omit any reference to the secured interests of creditors.

RESPECTFULLY SUBMITTED THIS 11th of April, 2019.

MCHUGH BROMLEY, PLLC

/s/ Chris M. Bromley
Chris M. Bromley
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th of April 2019, I served a true and correct copy of the foregoing document upon the following persons via the method indicated below:

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Chris M. Bromley