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Idaho Supreme Court
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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

REPLY 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.

REPLY 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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TABLE OF CONTENTS

I. TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

II. STATEMENT OF THE CASE

Appellants First Security Corporation ("FSC") and Richard D. Fosbury ("Fosbury"), hereby file this reply brief on appeal.

A. Statement Of Facts

FSC and Fosbury are unclear what Belle Ranch, LLC ("Belle Ranch") and Rabo AgriFinance, LLC ("RABO")[1] means when it says "Appellants' Statement of Facts omits important material and undisputed facts." *Resp. Br.* at 5. FSC and Fosbury have reviewed their Statement of Facts in comparison with Belle Ranch's Statement of Facts and find no material differences. All recorded documents are discussed, chaining title in 7.5/289th of water right nos. 37-481C, 37-482H, 37-483C, 37-577BT, and 37-2630 ("Water Rights") to FSC and 7.8/289th of the Water Rights to Fosbury. As expected on appeal, the parties differ in their opinion as to the relevance and importance of certain documents in relation to their ownership of the Water Rights in this quiet title action.

III. ARGUMENT

While wanting to paint itself differently, Belle Ranch stands in the "same shoes" as FSC and Fosbury. *Resp. Br.* at 20. Seeing Belle Ranch differently is where the district court erred. FSC, Fosbury, and Belle Ranch are all successors-in-interest to South County, deriving their respective ownership in the 289/289th of the Water Rights through conveyances made by South County prior to issuance of the SRBA partial decrees in South County's name. Through those conveyances, the chain of title shows FSC owns 7.5/289th of the Water Rights, Fosbury owns 7.8/289th of the Water Rights, and Belle Ranch owns 273.7/289th of the Water Rights. Belle Ranch's entire response rests on painting itself differently from FSC and Fosbury because of a

[1] As stated by Belle Ranch and RABO, "For purposes of this appeal, and where appropriate, the phrase "Belle Ranch" should be construed to mean both Belle Ranch and its secured lender, RABO." *Resp. Br.* at 3, fn. 2.

"window of opportunity" it claims existed after issuance of the SRBA partial decrees in the name of South County and before entry of the SRBA district court's Final Unified Decree. *Resp. Br.* at 15. During this window, Belle Ranch points to administrative form documents it filed with IDWR – not the SRBA district court – to support its ownership of the 7.5/289th owned by FSC and the 7.8/289th owned by Fosbury. This "window of opportunity" was explained in the Opening Brief (pages 30-36), and as a matter of law did nothing to affect ownership of the Water Rights to the benefit or detriment of the parties before the Court. The district court erred in determining that ownership is defined, not by deeds of record, but instead by administrative form documents filed with IDWR after issuance of the SRBA partial decrees and before issuance of the SRBA Final Unified Decree.

A. Belle Ranch Does Not Rebut Key Arguments Presented By FSC And Fosbury

It is important to first highlight arguments FSC and Fosbury made in the Opening Brief that are unrebutted by Belle Ranch, demonstrating FSC's and Fosbury's respective ownership of the 15.3/289th of the Water Rights. First, Belle Ranch does not disagree that water rights are real property that may be lawfully conveyed separately from land. *Opening Br.* at 25 *citing Joyce Livestock Co. v. United States*, 144 Idaho 1, 156 P.3d 502 (2007). Here, South County followed the law when it reserved the 15.3/289th of the Water Rights and conveyed 7.5/289th to FSC's predecessors-in-interest and the and 7.8/289th to Fosbury's predecessors-in-interest.

Second, Belle Ranch does not disagree that Idaho is a "race-notice recording state . . . ." *Opening Br.* at 27-28 *citing Insight LLC v. Gunter*, 154 Idaho 779, 783, 302 P.3d 1052, 1056 (2013). Here, the deeds that control ownership of the 15.3/289th were recorded prior to any deeds conveying the remaining 273.7/289th to Belle Ranch's predecessors-in-interest. *See Resp. Br., Ex. A.* (showing the 15.3/289th was released, conveyed, and recorded by South County as of

March 1, 2010, which is prior to South County's June 17, 2010 conveyance of the remaining 273.7/289th to MWB).

Third, Belle Ranch does not disagree that mortgages place "a lien upon everything that would pass by a grant or conveyance of the property," I.C. § 45-906, and that "a mortgage does not pass title to the mortgaged property," *In Re: On Rehearing*, 57 Idaho 213, 217, ___ P. ___, ___ (1937), but rather subsequent purchasers may take their title subject to a previously recorded mortgage, *Adams v. George*, 119 Idaho 973, 976-77, 812 P.2d 280, 283-84 (1991). Here, even if MWB[2] had previously recorded secured interests that were not released, those secured interests do not defeat South County's conveyances of the 15.3/289th to FSC and Fosbury's predecessors-in-interest. As raised by Belle Ranch, *Resp. Br.* at 34, and as will be discussed in Section F, below, the mortgages did not "void" FSC and Fosbury's ownership.

Fourth, Belle Ranch does disagree that "every estate or interest known to the law in real property . . . 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). *Opening Br.* at 28. With only one passing reference to I.C. § 6-401 in relation to a statute of limitations argument, *Resp. Br.* at 37, Belle Ranch does not disagree with that statute's plain language – which the district court never examined, applied, or reconciled with Idaho's water adjudication statutes in Chapter 14, Title 42, Idaho Code – that actions to quiet title to water right elements of "source, quantity, point of diversion, place of use, nature of use, period of use, and priority against other water users shall be brought under the provisions of chapter 14,

[2] MWB and GBCI Other Real Estate, LLC ("GBCI") expressly disclaimed any interest in these proceedings. R2. 349-51. Pursuant to an express written agreement with Idaho Independent Bank with regard to the 7.5/289th of the Water Rights owned by FSC, MWB released all of its interest in the 7.5/289th owned by FSC and the 7.8/289th owned by Fosbury, then entered into a deed in lieu to obtain the land and the rest of the water, which was later deeded to GBCI and eventually to Belle Ranch. *Opening Br.* at 7-10. MWB and GBCI have chosen not to file any responsive briefing. *Order Re: Respondents' Brief – Docket No. 46144-2018/46147-2018* (May 13, 2019).

title 42, Idaho Code." I.C. § 6-401. Idaho's quiet title statute does not mention ownership, "name and address of the claimant," I.C. § 42-1409(1)(a), or any semblance of those words. "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) (emphasis added). Here, the parties to this appeal agree that the presiding judge of the SRBA, sitting in his capacity as a district court judge, could make decisions as to ownership, *see United States v. Pioneer Irr. Dist.*, 144 Idaho 106, 157 P.3d 600 (2007); *Cash v. Cash*, Case No. CV-2016-02 (Camas County),[3] yet can point to nothing in the record that the district court exercised its jurisdiction to quiet title to anything other than the traditional elements of an Idaho water right, as expressed in I.C. § 6-401. Therefore, the question of ownership of these Water Rights was never raised, addressed, or established through the SRBA. If ownership was decided, the only outcome is the Water Rights are owned by South County. This is because South County is listed in the "name and address" field of the Water Rights. *See Opening Br.* at 36-37.

Fifth, Belle Ranch does not contest the affirmative statements made by IDWR in this record through an affidavit of staff and correspondence from its deputy attorneys general that the Department does not possess the legal authority to determine ownership: "IDWR only maintains and updates water right ownership records pursuant to Idaho Code Section 42-248. . . . . The appropriate forum to resolve a dispute over ownership is a district court." *Opening Br.* at 17 *citing* R. 837 and 843. IDWR's understanding of its statutory authority 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). Therefore, documents filed with IDWR asserting ownership can do nothing more than

[3] The district court decision in *Cash v. Cash* was appended to Belle Ranch's brief in response and will be discussed below in Section D.

update a record and cannot operate to unravel Idaho's well established and recognized conveyance and recording system, I.C. §§ 55-601, 55-809, 55-810, and 55-811, 55-812. The district court never addressed or reconciled IDWR's statements with Idaho's adjudication, quiet title, and recording statutes.

B. There Was No Window Of Opportunity For Belle Ranch To Take Away The 15.3/289th From FSC And Fosbury

Citing I.C. § 42-1409, Belle Ranch criticizes FSC and Fosbury's for not filing "a notice of claim" in the SRBA, *Resp. Br.* at 23, 26 *citing* I.C. § 42-1409; yet, neither did Belle Ranch. The only action Belle Ranch can hang its hat on to differentiate itself from FSC and Fosbury is a "window of opportunity" Belle Ranch says existed in the SRBA that allowed Belle Ranch, and only Belle Ranch, to take ownership of the entire 289/289th in direct contravention of the deeds of record and their having no less than constructive notice of FSC's and Fosbury's respective interests. *Resp. Br.* at 15. As discussed in the Opening Brief (pages 30-36), the opportunity Belle Ranch claims it availed itself of was filing form documents with IDWR, after the SRBA partial decrees were issued on August 31, 2010, and before the Final Unified Decree was issued on August 26, 2014.

Because of this, Belle Ranch's citation to the Final Unified Decree's sanctioning of "administrative changes to the elements of a water right after entry of a partial decree, but prior to the entry of this Final Unified Decree," *Resp. Br.* at 32 *citing Final Unified Decree* (emphasis added), goes directly to what IDWR is statutorily authorized to do, and not do. As discussed, IDWR has no authority to and therefore cannot alter deeded ownership of water rights. IDWR is statutorily authorized to change only the "point of diversion, place of use, period of use or nature of use," I.C. § 42-222(1), of an SRBA partial decree. IDWR can do nothing more. "An administrative agency is a creature of statute, limited to the power and authority granted to it by

the Legislature . . . ." *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996) (emphasis added). Due to an express lack of authority, no documents filed with IDWR after issuance of the SRBA partial decrees and before entry of the SRBA Final Unified Decree establish title against the deeds of record in Blaine County. Belle Ranch is asking this Court to overturn established law that the only way to bifurcate ownership of the underlying real property and the water right is to specifically reserve the water right in the conveyance document. *Joyce Livestock.* The SRBA Final Unified Decree does not strip the water right from the property.

C. IDWR Has No Statutory Authority To Alter Deeds Of Record

In its *Memorandum Decision on Motion for Reconsideration of Summary Judgment*, the district court incorrectly held that a change of ownership with IDWR could be effectuated through I.C. § 42-222. R. 1931. Belle Ranch attempts to support the district court's incorrect understanding of IDWR's authority by stating: "A water right transfer i[s] a permanent or long-term change to a water right's point of diversion or a change to the place of use, period of use, and/or nature of use and ownership. I.C. § 42-222; R. 1196. . . . . Contrary to Appellants' assertions, I.C. § 42-248(4) specifically provides that change of ownership can be accomplished under a Section 42-222 transfer proceeding. The law could not be more clear." *Resp. Br.* at 29 (emphasis added).

Again, IDWR, by its own admission, possesses no statutory authority to alter deeded ownership: "IDWR maintains and updates water right ownership records pursuant to Idaho Code § 42-248. . . . . IDWR does not have the legal authority to determine ownership of a water right." R. 36-37 (emphasis added). Therefore, even though IDWR updates its records through filings made pursuant to I.C. § 42-248, that statute gives IDWR no authority to alter deeded ownership.

By its plain language, a water right transfer filed pursuant to I.C. § 42-222(1) allows IDWR to change only 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). The plain meaning of the statute controls, *State v. Owens*, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015), with IDWR being limited, as a "creature of statute . . . to the power and authority granted to it by the Legislature . . . ." *Welch* at 514, 915 P.2d at 1372. An administrative transfer proceeding can result in a change to the only four elements of an SRBA partial decree that are before IDWR in the transfer, I.C. § 42-222(1), and cannot be confused with other actions performed by IDWR, such as updating the agency's record through I.C. § 42-248. 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). Due to IDWR's limited statutory authority, that Belle Ranch filed documents with IDWR pursuant to I.C. § 42-222 and I.C. § 42-248, does nothing to defeat FSC and Fosbury's previously recorded, deeded ownership in the 15.3/289th of the Water Rights.

D. Judge Wildman's Decision In *Cash v. Cash* Foreshadowed This Case Where Title To Water And Land Is Bifurcated

Belle Ranch attempts to support the district court through citation to the Honorable Eric J. Wildman's decision in Camas County in *Cash v. Cash*, which Belle Ranch attaches to its Response Brief as *Exhibit C*.[4] Based on the facts before him, Judge Wildman held ownership of water right nos. 37-444, 37-2541 and 37-7636 was determined in the SRBA. There, in 1989, Philip Cash "filed notices of claim for the three water rights at issue in the SRBA. He identified himself as the sole claimant of the rights in his claims. On December 5, 2006, the Director of

[4] Belle Ranch and RABO attach Exhibit A, Exhibit B, and Exhibit C to their Joint Response Brief. The contents of Exhibit A and Exhibit B are generally accurate, but do omit some key documents.

[IDWR] issued his recommendations for the claims. He recommended the claims be decreed in the name of Philip Cash as sole owner." *Cash* at 2. "These water rights were previously decreed in the Snake River Basin Adjudication ("SRBA") to Respondent Philip Cash. Notwithstanding, Judge Elgee subsequently quieted title in the rights to the Petitioner based on pre-decree considerations. In doing so, Judge Elgee offended principles of res judicata by failing to place appropriate weight on the SRBA proceeding and the water right decrees entered as a result of that proceeding." *Cash* at 2. Unlike the record in this case, Philip Cash owned the water rights before, during, and after the SRBA. If the plain reading is correct, then the only outcome this Court can follow is that the SRBA was the last word on ownership; meaning, South County continues to own the entire 289/289th of the Water Rights. *See Opening Br.* at 36-37.

Belle Ranch attempts to distinguish the plain reading of *Cash* by directing the Court to the "window of opportunity" that existed after the SRBA partial decrees were issued in the name of South County and before entry of the Final Unified Decree. *Resp. Br.* at 15. As previously addressed, the Final Unified Decree simply recognized the validity of IDWR administrative actions that could affect the four elements of an SRBA partial decrees that were statutorily capable of being altered by IDWR. *Opening Br.* at 32-36. As a creature of statute, IDWR had no authority to determine, alter, or change ownership; therefore, no actions Belle Ranch took with IDWR before entry of the Final Unified Decree could affect ownership. Had Belle Ranch filed documents with the SRBA district court, which it did not, the outcome could be different.

According to Belle Ranch, I.C. § 42-1411(2) and I.C. § 42-1412(6) "unequivocally link[] the *claimant* to ownership of the water right." *Resp. Br*. at 24. While this may be true when unity of title exists between land and water, it is equally true that when ownership of water has been reserved from land as allowed for by law, *Joyce Livestock*, the presumption may not stand.

Not referenced by Belle Ranch is Judge Wildman's observation – seemingly anticipating this case – that in the absence of unity of title, the name and address element of an SRBA partial decree may not be dispositive:

> The Court further notes that while the appurtenance of a water right to a particular piece of land may be relevant to determining ownership of that water right in some circumstances, it is not in and of itself dispositive of the issue of ownership in all circumstances. It is true that very often the owner of a piece of land is also the owner of the water rights appurtenant to that land. However, it can be equally true that the owner of a piece of land is not the owner of the water rights appurtenant to that land. Indeed, is has long been held that "water may be appropriated for beneficial use on land not owned by the appropriator, and this water right becomes the property of the appropriator." *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 291 P. 1064 (1930). Thus, Idaho law recognizes there may be a bifurcation between ownership of the land and of the water right used on the land.

Cash at 8 (emphasis added).

Here, Judge Wildman's observation is directly applicable to the case at hand and should be recognized when, as here, ownership of the water has been "bifurcated" from land. Consistent with the chain of events documented in *Exhibit A* to the Response Brief, and by March 1, 2010, the 15.3/289th was bifurcated, conveyed, and recorded in Blaine County. By June 17, 2010, the remaining 273.7/289th was conveyed from South County to MWB through a Deed in Lieu of Foreclosure ("MWB Deed in Lieu"). R. 657;[5] *Resp. Br.* at 7. These events happened before the "June 28, 2010 . . . Special Master's Report and Recommendation for each of the Water Rights, . . . the July 9, 2010 . . . Amended Special Master's Report and Recommendation, . . . [and the] August 31, 2010 . . . Order of Partial Decrees." *Resp. Br.* at 13. Thus, before the SRBA district court began issuing reports of the special master and partial decrees, South County owned no amount of the Water Rights. Without unity of title, the rationale of Judge Wildman leads to reversing the district court, recognizing the deeds of record

[5] By its express terms the MWB *Deed in Lieu of Foreclosure* was a "quitclaim" deed. R. 657.

in Blaine County control FSC's and Fosbury's respective ownership of the 15.3/289th of the Water Rights, and quieting title thereto.

E. FSC's And Fosbury's Claims Are Not Void Due To Mountain West Bank's Second And Third Mortgages

Belle Ranch argues any conveyances that were recorded after MWB's second and third mortgages were "void" pursuant to I.C. § 55-812. *Resp. Br.* at 34. Idaho Code § 55-812 states: "Every conveyance of real property other than a lease for a term not exceeding one (1) year is void 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. "A duly recorded interest is effective against prior unrecorded interests only where the recorded interest is taken for a valuable consideration and in good faith, i.e., 'without knowledge, either actual or constructive, that the unrecorded interests exist.'" *Langroise v. Becker*, 96 Idaho 218, 220, 526 P.2d 178, 180 (1974).

First, a mortgage is an encumbrance on real property and does not operate to defeat a later conveyance of title. *In Re: Rehearing* at 217, P. at ___; *John Hancock Mutual Life Ins. Co. v. Girard*, 57 Idaho 198, 217, 64 P.2d 254, ___ (1936). Even if MWB's previously recorded secured interests were not released, those secured interests do not defeat South County's conveyances of the 15.3/289th to FSC's and Fosbury's predecessors-in-interest.

Second, Belle Ranch's argument does not apply because the record shows MWB had actual knowledge of the release of its security interests in the entire 15.3/289th due to the MWB Letter Agreement, R. 1513, and the MWB Partial Releases.[6] A *Deed in Lieu of Foreclosure Agreement* ("DIL Agreement") was also executed between MWB and South County, Charles

[6] The term "MWB Partial Releases" refers to the seven *Partial Release[s] of Lien* that were executed and recorded by MWB. *See Resp. Br., Ex. A* and *Opening Br.* at 7.

Holt, and John Scherer. R. 1615. The DIL Agreement "clarif[ied] that the water rights were not included in the conveyance to MWB, MWB added an Addendum to the Deed in Lieu of Foreclosure Agreement ('Addendum') which expressly recognized the Partial Releases." R. 1596. *See also* R. 1513-14 (MWB Letter Agreement); R. 1509 (recognizing the MWB Partial Releases as "defects . . . affecting title . . . .").

F. Payment Of Water District Assessments And Use Of Water Is Not An Issue In This Proceeding

This is an action for quiet title, with all parties to the proceeding moving the district court to quiet title to their ownership. Belle Ranch adds for this Court's consideration that it has been the one "using the water . . . ." *Resp. Br.* at 46. The question for the Court to decide in this quiet title appeal is ownership. Use, non-use, or defenses thereto of the Water Rights is a separate proceeding. *See Sagewillow, Inc. v. Idaho Dept. of Water Res.*, 138 Idaho 831, 70 P.3d 669 (2003) (discussion of the laws of forfeiture and defenses thereto).

G. Belle Ranch Cannot Claim Adverse Possession In Water District No. 37

Referencing Water District No. 37 delivery records and citing this Court's prior decision in *Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 57 Idaho 403, 66 P.2d 115 (1937), Belle Ranch argues it is entitled to the 15.3/289th through a theory of adverse possession or forfeiture. "This Court held that Hillcrest had used the water after the transfer and that title to the water should be quieted in Hillcrest's name. *Id.* at 412. In *Hillcrest* the adverse use of the water following the transfer was twenty years. Here the adverse use has been since the 2011 irrigation season and then the 2012 transfer. Appellants do not explain why five irrigation seasons adverse use following a transfer where they sat idly on their rights, is not sufficient. Compare I.C. § 42-222(2) (all rights are lost or forfeited for five years of non-use)." *Resp. Br.* at 31 (emphasis added).

First, the Water Rights are located in a water district, which in this case is Water District No. 37. The law specifically forbids adverse possession in a water district. I.C. § 42-607 ("So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such district can adversely possess the right of any other water user.") (emphasis added). Therefore, Belle Ranch cannot claim ownership of the 15.3/289th through adverse possession.

Second, and as stated above, this is an action to quiet title, not a legal proceeding to determine use, non-use, or defenses against forfeiture. If there were a finding of forfeiture, which there cannot because the question was not before the district court, and if no defenses to forfeiture could be established, I.C. § 42-223 (enumerating defenses against forfeiture), then "rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223, Idaho Code." I.C. § 42-222(2) (emphasis added). Reversion of rights to the State does not vest ownership in Belle Ranch.

H. The Appeal Is Not Barred By I.C. § 5-224 And This Court's Decision In *Brown v. Greenheart*

Belle Ranch raises an independent issue on appeal that the district court should be affirmed due to the expiration of a four-year statute of limitation. *Resp. Br.* at 36. In support of its argument, Belle Ranch cites I.C. § 5-224 and this Court's decision in *Brown v. Greenheart*, 157 Idaho 156, 335 P.3d 1 (2014). No statute of limitations should apply to divest FSC and Fosbury of their respective ownership in the 15.3/289th of the Water Rights. Alternatively, if a statute of limitations were to apply, it cannot begin working against any party to this appeal until an adverse claim was learned of.

First, no statute of limitations applies against FSC and Fosbury because MWB never had title to the 15.3/289th to convey to Belle Ranch, due to the MWB Partial Releases, the MWB Deed in Lieu, and the Estoppel Certificate, R. 1049. Because MWB never had title to any part of the 15.3/289th, no interest could have conveyed to GBCI or on to Belle Ranch. Without title, there can be no application of I.C. § 5-224 and, by extension, the Court's decision in *Brown*.

Second, the district court never made a decision as to passage of any statute of limitations; therefore, the issue is not in front of this Court. R. 1820 ("Respondents raise alternate theories of laches and statute of limitations in their *Motion*. [T]he Court . . . does not reach the alternate theories raised by Respondents.") (emphasis added); R. 1932 ("It appears that the statute of limitations has run . . . . However, this issue is not necessary to this decision.") (emphasis added).

Third, even assuming for the sake of argument that a four-year statute of limitations does apply, it did not begin to accrue until January 13, 2015 or thereafter. In *Brown*, a question raised was when does a "cause of action for quiet title accrue where another person claims an interest in property 'adverse to' another." *Brown* at 162, 335 P. 3d at 8. There, the Court looked at the chain of events, determining accrual of the claim began when the Browns "learned" of Greenheart's action to change IDWR's water right records:

> On February 17, 2012, allegedly without notice to the Browns, Greenheart filed a notice of change of ownership with the Idaho Department of Water Resources ("IDWR"). On March 22, 2012, the IDWR revised its records to indicate that Greenheart was the current owner of a portion of the water rights held by Browns and reduced the quantity of rights held by the Browns.
>
> . . . .
>
> It was not until the Browns learned from an attorney that there might be a mistake in the deed, and only after Greenheart apparently perceived an opportunity to take advantage of the Browns, that for the first time Greenheart claimed an interest in

> the Browns' water rights by filing a notice with the IDWR. At no time before 2012 was there any action by Greenheart adverse to the Browns' water rights.

Id. at 160-162; 335 P.3d at 5-7 (emphasis added) (internal citations omitted).

Therefore, the test from *Brown* as to the accrual of the four-year statute of limitations is when did anyone "learn[]" – like the Browns as to Greenheart – of an adverse interest? In *Brown*, and as to actions in front of IDWR, Greenheart's adverse interest became known because actual notice was given to the Browns by IDWR. R. 1587; R. 1534-35. The mailing of actual notice by IDWR to the Browns allowed IDWR to meet its mandatory notice requirement in I.C. § 42-248(3) ("The director of the department of water resources will be deemed to have provided notice concerning any action by the director affecting a water right or claim if a notice of the action is mailed to the address and owner of the water right shown in the records of the department of water resources at the time of mailing the notice.") (emphasis added). The notice started the clock running on the statute of limitations.

Here, there was no compliance with the notice requirement in I.C. § 42-248(3) until January 13, 2015, or thereafter. When ownership was "changed" from South County to MWB on or around September 30, 2011, South County was entitled to notice from IDWR, yet received none. R. 679, 1597. Ownership was changed to MWB on or around that date despite MWB owning nothing at the time as it had deeded away its ownership to GBCI on June 17, 2010. When IDWR purportedly changed ownership from MWB (who again owned nothing due to its prior conveyance to GBCI) to Belle Ranch, no notice was provided to anyone. R. 692, R. 1597.[7] Despite Idaho Independent Bank's ("IIB") notice of security interest on file with IDWR, R. 656,

[7] While Belle Ranch claims that the "transfer" it filed with IDWR constituted notice, *Resp. Br.* at 39, the transfer could accomplish no more than what Belle Ranch asked IDWR to do, which was to simply alter the legal description for its place of use. *Opening Br.* at 14. Moreover, as discussed in this reply, ownership cannot be changed by IDWR because it lacks the statutory authority to do so. *See also Opening Br.* at 33-36.

which entitled it to notice "of any proposed or final action to amend, transfer or otherwise modify that water right," I.C. § 42-248(6) (emphasis added), no notice was provided. By failing to provide notice, this meant the requirements of I.C. § 42-248(3) were unfulfilled, making it impossible for anyone to learn of what actions were being taken.

In stark contrast, on January 13, 2015, and exactly as was done in *Brown*, IDWR provided actual notice to Belle Ranch, copied to Rabo, of its decision to change ownership in the 7.5/289th to FSC. R. 785. Fifteen months later, on March 21, 2016, Belle Ranch eventually challenged IDWR's decision as to FSC's ownership. R. 786.[8] IDWR later responded it did not have the legal authority to resolve the dispute, directing the parties to quiet title. R. 843; *see also* R. 37 and R. 837. Thereafter, on June 3, 2016, IDWR informed Fosbury that his change of ownership documents filed with IDWR could not be addressed. R. 577. Following the legal advice of IDWR, complaints to quiet title were filed by the parties with the district court in December 2016, R. 14; R3. 9, well within four years of learning of the adverse interest. Consistent with *Brown*, the first time the mandatory requirements of I.C. § 42-248(3) were met as to FSC was January 13, 2015. As to Fosbury, the earliest he could have learned of Belle Ranch's adverse interest, through notification by IDWR, was June 3, 2016, the date IDWR declined to process his change of ownership request. Under both dates, the four-year statute of limitations has not expired.

[8] Did Belle Ranch and Rabo intentionally chose to sit on their position for 15 months in order to bolster their claim that the four-year statute of limitations had run? By waiting 15 months, Belle Ranch now creates an argument that the four-year statute of limitations ran.

I. FSC's And Fosbury's Ownership Of The 15.3/289th Of The Water Rights Should Not Be Denied Under Theories Of Equitable Estoppel, Quasi-Estoppel, And/Or Waiver

As independent issue on appeal, Belle Ranch argues the appeal should be denied based on the theories of equitable estoppel, quasi-estoppel, and/or waiver. The basis of the argument is the Estoppel Certificate, executed by "John Scherer, the managing member of South County . . . ." *Resp. Br.* at 41. Belle Ranch cannot establish the elements to meet these defenses.

i. Equitable Estoppel

To prevail under the doctrine of equitable estoppel, it must be shown:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth; (2) that the party asserting estoppel did not know or could not discover the truth; (3) that the false representation or concealment was made with the intent that it be relied upon; and (4) that the person to whom the representation was made, or from where the facts were concealed, relied and acted upon the representation or concealment to his prejudice.

J.R. Simplot Co. v. Chemetics Intern, Inc., 126 Idaho 532, 534, 887 P.2d 1039, 1041 (1994).

Belle Ranch cannot prevail under this theory because it cannot satisfy the first element. Belle Ranch has not identified what alleged "false representation" was made "with actual or constructive knowledge." Throughout, FSC and Fosbury have maintained they own the 15.3/289th of the Water Rights and have never made any representation to the contrary. *Herrmann v. Woodwell*, 107 Idaho 916, 922, 693 P.2d 1118, 1124 (Ct. App. 1985) ("For equitable estoppel to apply, the Herrmanns must have made a false representation or concealment of a material fact with actual or constructive knowledge of the truth.").

ii. Quasi-Estoppel

Turning to the theory of quasi-estoppel, it "prevents a party from successfully asserting a position inconsistent with a previously-taken position, with knowledge of the facts and of its rights, to the detriment of the person seeking to invoke it." *Birdwood Subdivision Homeowners'*

Assoc., Inc. v. Bulotti Const., Inc., 145 Idaho 17, 22, 175 P.3d 179, 184 (2007). "Furthermore, for quasi-estoppel to apply, it must be unconscionable to allow the party to be estopped to maintain an inconsistent position." *Id.* (emphasis added). "Quasi-estoppel is essentially a last-gasp theory under which a defendant who can point to no specific detrimental reliance due to plaintiffs' conduct may still assert that plaintiffs are estopped from asserting allegedly contrary positions where it would be unconscionable for them to do so." *Schoonover v. Bonner County*, 113 Idaho 916, 919, 750 P.2d 95, 99 (1988) (emphasis added).

First, and as just stated, FSC and Fosbury have never changed positions regarding their ownership of the 15.3/289th. Instead, FSC and Fosbury have maintained their interest stems from the MWB Partial Releases and subsequent deeds from South County. Contrary to the argument of Belle Ranch, this ownership is supported by the Estoppel Certificate, which expressly references the MWB Partial Releases and the Litigation Guarantee. R. 1049. Belle Ranch's attempt to twist the language of the Estoppel Certificate to "include[]" instead of exclude the 15.3/289th is non-sensical. *Resp. Br.* at 42. The Estoppel Certificate confirms that the 15.3/289th was not conveyed by South County to MWB, due to the fact that the MWB Partial Releases were not included in the extensive list of conveyed items. R. 1050. Instead, they were simply referenced in a separate sentence at the end of the paragraph. If FSC's and Fosbury's predecessor had intended for the conveyance to include the 15.3/289th, then it would have executed quitclaim deeds conveying the interest to MWB. However, it did not. The fact that the MWB Partial Releases were not included as a conveyance to MWB is further evidenced by paragraph 12 of the Estoppel Certificate, which states that the property is "free and clear of all liens . . . encumbrances and claims" except those in the "litigation guarantee." R. 1051. The plain language of the Litigation Guarantee specifically identified the MWB Partial Releases as

"defects, liens, encumbrances or other matters affecting title . . . ." R. 1509. "The reference to the Partial Releases in the Estoppel Certificate were included to clarify that MWB no longer had any interest in those portions of South County's water rights." R. 1596.

Second, there can be no finding of quasi-estoppel because there is no unconscionable result arising from any purported change in position. This is because MWB never had any interest in the 15.3/289th to convey to GBCI and by extension to Belle Ranch. Therefore, Belle Ranch has never been entitled to the 15.3/289th and cannot sustain an unconscionable result.

iii. Waiver

Last, Belle Ranch advances a theory of waiver to defeat FSC's and Fosbury's title to the 15.3/289th of the Water Rights. Waiver "is a voluntary, intentional relinquishment of a known right or advantage." *Frontier Fed. Sav. And Loan Ass'n. v. Douglass*, 123 Idaho 808, 812, 853 P.2d 553, 557 (1992) (internal citations omitted). It is a question of intent which will not be inferred by instead requires the party asserting waiver to show "a clear and unequivocal act manifesting an intent to waive." *Knipe Land Co. v. Robertson*, 151 Idaho 449, 457, 259 P.3d 595, 603 (2011). Silence is not sufficient to establish waiver. *Id.* Additionally, the party asserting waiver must "show that he acted in reasonable reliance upon [the waiver] and that he thereby has altered his position to his detriment." *Id.*

Here, FSC and Fosbury never intended to relinquish any portion of their rights to the 15.3/289th. As stated above, Belle Ranch's reliance on the reference to the MWB Partial Releases in the Estoppel Certificate is simply an attempt to create confusion, falling short when the Estoppel Certificate and Litigation Guarantee are read as a whole, particularly when considering the facts and circumstances regarding execution of the Estoppel Certificate. R. 1596. Even if Belle Ranch could somehow establish equitable estoppel, quasi-estoppel, or

waiver, it would still not receive title to the 15.3/289th; instead, title to the Water Rights would remain with South County, pursuant to the plain language of the SRBA partial decrees.

J. The District Court's Judgment Should Omit Reference To Secured Interests Of Creditors

According to RABO, "[T]his Court should affirm not only that Belle Ranch owns the entirety of the Water Rights, but that the entirety of the Water Rights are encumbered by RABO's properly perfected security interest." *Resp. Br.* at 44. RABO is incorrect. First, the issue of secured interests was not addressed by the district court until it entered its Judgment. *Opening Br.* at 39. There was no citation by the district court to a document that supports what RABO's secured interest is or is not. Belle Ranch and RABO have similarly not identified a document in their Joint Response Brief.

Second, RABO ignores that MWB affirmatively released its secured interest in favor of IIB, R. 1513, allowing IIB to record a mortgage ("IIB Mortgage") on June 25, 2009, R. 638, which was superior to the secured interest of MWB. FSC is a successor to IIB. Additionally, IIB filed a UCC Financing Statement with the Idaho Secretary of State on June 26, 2009, R. 1500, perfecting its security interest in the collateral. *Keybank Nat'l Ass'n v. PAL I, LLC*, 155 Idaho 287, 290, 311 P.3d 299, 302 (2013). The IIB Mortgage and UCC Financing Statement were filed well before RABO "loaned money to Belle Ranch . . . ." *Resp. Br.* at 43 (without citation to a mortgage between RABO and Belle Ranch).[9] Therefore, the previously recorded IIB Mortgage and UCC Financing Statement, to which FSC is a successor, is superior, *U.S. Bank N.A. v. CitiMortgage, Inc.*, 157 Idaho 446, 452, 337 P.3d 605, 611 (2014) ("a mortgage recorded

[9] Belle Ranch acquired the land and the 273.7/289th of the Water Rights on or around December 20, 2011, the date when GBCI and MWB executed deeds conveying the property to Belle Ranch. *See Ex. A to Resp. Br.* Exhibit A does not list a RABO mortgage or other security interest.

first in time has priority against all other subsequent mortgages"), with no evidence in the record showing the secured interest was released or foreclosed.

Third, whatever argument RABO is making appears as if it wants to stand in the shoes of MWB, despite MWB disclaiming any interest in this appeal and filing no responsive briefing. For these reasons, the district court's Judgment should be corrected to omit reference to the secured interests of any creditor.

IV. BELLE RANCH SHOULD NOT BE ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS IN THIS CASE OF FIRST IMPRESSION

Belle Ranch moves this Court for an award of costs and attorneys' fees pursuant to I.C. § 12-121, I.A.R. 35, 40, and 41. "The Court will award fees to a prevailing part under Idaho Code section 12-121 when the Court believes that the action was pursued, defended, or brought frivolously, unreasonably, or without foundation." *Resp. Br*. at 44 *citing Thornton v. Pandrea*, 161 Idaho 301, 320, 385 P.3d 856, 875 (2016). "Appellants have done just that. Appellants have pursued this lawsuit and appeal without a sound legal or factual theory in the face of overwhelming legal precedent and clear statutory requirements." *Resp. Br.* at 44.

This could not be further from the truth. This is a novel case of first impression that has been fairly pursued by all parties. The Court has never been asked to address the interaction between I.C. § 6-401, I.C. § 42-222, I.C. § 42-248, Idaho's water adjudication statutes, Idaho's conveyance and recording statutes, and Paragraph 13(1) of the Final Unified Decree. Regardless of how the Court rules, its decision will establish how owners of water rights and holders of secured interests in river basins that have undergone, or will undergo, a general stream adjudication must perfect their rights. This includes not only the entire Snake River Basin, but also other areas of the State where general stream adjudications have been authorized. I.C. § 42-1406B (statutory authorization for the "Northern Idaho water rights adjudications" in the "Coeur

d'Alene-Spokane river basin, the Palouse river basin, and the Clark-Fork Pend Oreille river basins").[10] As a case of first impression with far-ranging implications, it is inappropriate to award costs and fees pursuant to I.C. § 12-121. *Doe v. Doe*, 160 Idaho 311, 317, 372 P.3d 366, 372 (2016) ("Because we have not previously addressed whether a court could appoint part-time co-guardians, we will not award attorney fees under Idaho Code section 12-121"); *Hoagland v. Ada County*, 154 Idaho 900, 916, 303 P.3d 587, 603 (2013) ("Attorneys fees are not warranted where a novel legal question is presented."); *Trunnell v. Fergel*, 153 Idaho 68, 72, 278 P.3d 938, 942 (2012) ("A party is not entitled to attorney's fees if the issue is one of first impression in Idaho.").

V. CONCLUSION

Based on the foregoing, this matter is not barred by *res judicata*, allowing ownership of 7.5/289th of the Water Rights to be quieted to FSC and ownership of 7.8/289th of the Water Rights to be quieted to Fosbury. The "window in time" relied upon by the district court and Belle Ranch to allow administrative documents filed with IDWR before entry of the Final Unified Decree to alter the deeds of record in Blaine County is incorrect, due to the fact that IDWR, by its own admission, has no statutory authority to alter ownership. If this action is barred by *res judicata*, the only outcome is the Water Rights are owned in their entirety by South County. Under any outcome, and with the issue not squarely before it, the district court's Judgment should be corrected to omit any reference to the secured interests of creditors. Lastly,

[10] The Coeur d'Alene-Spokane River Basin Adjudication has been commenced with issues beginning to come to this Court. *See* Docket No. 45381-2017 (federal reserved claims filed by the Coeur d'Alene Tribe). The Palouse River Basin Adjudication was commenced on March 1, 2017, *In Re: The General Adjudication of Rights to the Use of Water from the Palouse River Basin Water System*, Case No. 59576 (Twin Falls County), and is starting the process of accepting claims.

as a case of first impression, the Court should deny Belle Ranch's motion for attorneys' fees and costs.

RESPECTFULLY SUBMITTED THIS 25th day of May, 2019.

MCHUGH BROMLEY, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May, 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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