DISTRICT COURT, WATER DIVISION NO. 1, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631-1113 Mailing Address: P.O. Box 2038, Greeley, CO 80632-2038	
Plaintiffs: DRAYTON DUNWODY and VERA DUNWODY, **v.** **Defendants:** WILL-O-WISP METROPOLITAN DISTRICT, NORTH FORK ASSOCIATES, LLC and WOODSIDE, LTD.	**▲COURT USE ONLY▲** Case No.: 07 CW 45
ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT	

1. This matter comes before the court on Plaintiffs' Motion for Partial Summary Judgment. Having reviewed the responsive pleadings and being otherwise fully informed and advised, the court makes the following determinations.

I. Procedural History

2. Plaintiffs, Drayton and Vera Dunwoody, filed their Verified Complaint in this matter on March 15, 2007. A First Amended and Restated Verified Complaint was filed on April 6, 2007. This case, Case No. 07CW45, is also referred to below as "this matter."

3. The Answer, Affirmative Defenses and Counterclaim of Defendant Will-O-Wisp Metropolitan District ("Will-O-Wisp") was filed on April 19, 2007.

4. The other two Defendants are no longer involved in this matter. By order dated May 25, 2007, the court removed North Fork Associates, LLC as a Defendant. By order dated July 9, 2007, the court entered default judgment against Defendant Woodside, Ltd.

5. Plaintiffs' Motion for Partial Summary Judgment, With Authorities was filed on May 1, 2008. Will-O-Wisp responded on May 19, 2008. Plaintiffs replied on May 30, 2008.

II. Undisputed Facts

6. This matter concerns a dispute over the ownership of the Glasmann Ditch water right (also referred to as the "water right"). Plaintiffs assert ownership in the water right based on an alleged chain of title back to the original claimants. Will-O-Wisp asserts, among other affirmative defenses not discussed here, that Plaintiffs' claims are barred by the doctrines of *res judicata* (referred to as "claim preclusion") and *collateral estoppel* (referred to as "issue preclusion") based on the decree in Case No. 81CW144 and several subsequent decrees concerning the Glasmann Ditch water right.

A. Adjudication of Glasmann Ditch Water Right

7. The Glasmann Ditch water right was decreed in the District Court for the Eleventh Judicial District in Civil Action 1678 on May 22, 1913. This decree adjudicated the water right as Priority No. 319 in Water District 23 for one cubic foot per second ("cfs") from Elk Creek, a tributary to the North Fork of the South Platte River. This decree states that the water right was first used for agricultural irrigation on May 1, 1885. The original claimants of the Glasmann Ditch in Civil Action 1678 were Theodore E. Meana, Carrie L. Underwood, and Frances Roberts who stated in their statement of claim that the water right was used to irrigate parts of the NE 1/4 of the SE 1/4 and the SE 1/4 of the NE 1/4 of section 26, Township 6 South, Range 72 West of the 6th P.M. in Park County. A copy of relevant portions of this decree and the statement of claim of the original claimants of the Glasmann Ditch has been provided to the court and are not disputed.

B. Case No. 81CW144

8. The Glasmann Ditch water right was involved in Case No. 81CW144, which *inter alia*, changed the use of the water right and approved a plan for augmentation. Will-O-Wisp, North Fork Associates, and Mountain Mutual Reservoir Company were the applicants in that case.

9. The amended and second amended applications in Case No. 81CW144 included claims to change the Glasmann Ditch water right. These applications were filed pursuant to § 37-92-302(1)(a), C.R.S. Resume notice was provided in the Water Division No. 1 resumes for April 1981, August 1981, and February 1983. Plaintiffs did not file a statement of opposition or participate in Case No 81CW144.

10. Paragraph 2, page 1, of the decree in Case No. 81CW144 states that "[a]ll notices required by law of the filing of the Application in this matter have been fulfiled [sic], and the Water Court has jurisdiction over the subject matter of this proceeding and over all parties affected hereby, whether they have appeared or not."

11. Paragraph 22, page 10, of the decree in Case No. 81CW144 states, *inter alia*, that the applicants in that case "own the entire 1.0 cfs Glasman [sic] water right."

12. Paragraph 7, page 16, of the decree in Case No. 81CW144 states that "[e]ight acres of land lying under the Glasman [sic] Ditch, which has historically been irrigated with the 1.0 cfs of said right, shall be permanently removed from irrigation by water from the Glasman [sic] Ditch, its laterals or underflows." These eight acres are identified as being in the S1/2 of Section 26, Township 6 South, Range 72 West of the 6th P.M., a description which is somewhat inconsistent with the lands identified in the decree in Civil Action 1678. This paragraph further decrees the water rights as six acre feet of historic consumptive use to be used to offset evaporation losses from Woodside Reservoir.

C. Subsequent Decrees Referencing Decree in Case No. 81CW144

13. The Glasmann Ditch water right and the findings in the decree in Case No. 81CW144 are referenced in numerous augmentation plan in Water Division No. 1, including Case Nos. 83CW124, 85CW326, 87CW148, 88CW13, 89CW79, 91CW119, 92CW74, 93CW89, 94CW192, 95CW150, 96CW103, 96CW1048, 97CW375, and 98CW401. In these decrees, the consumptive use attributed to water right in Case No. 81CW144 is used offset the evaporative losses of Woodside Reservoir.

III. Issue

14. Plaintiffs move the court for partial summary judgment on two issues: (1) that the decree in Case No. 81CW144, which purports to determine ownership of the Glasmann Ditch water right is void against Plaintiffs and their predecessors in interest; and (2) that Plaintiffs' claim of ownership in the Glasmann Ditch water right is not barred by the doctrines claim or issue preclusion. Will-O-Wisp disputes the relief sought.

IV. Standard of Review

15. Partial summary judgment may be granted under C.R.C.P. 56(d). "The burden of establishing the lack of any genuine factual issue is on the moving party, but once this burden is met, the opposing party must then demonstrate that a controverted factual question exists. If the party opposing summary judgment fails to meet this burden, then the court may properly enter summary judgment on behalf of the moving party as long as the operative legal principles entitle it to such judgment." *Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist.*, 689 P.2d 594, 600-01 (Colo. 1984) (citations omitted).

16. The court must give the nonmoving party any favorable inferences that may reasonably be drawn from the facts, and all doubts must be resolved against the nonmoving party." *Friedland v. Travelers Indem. Co.*, 105 P.3d 639, 643 (Colo. 2005). A genuine issue of material fact cannot be raised solely by means of argument. *Sullivan v. Davis*, 172 Colo. 490, 495-96, 474 P.2d 218, 221 (1970). The party opposing a motion for summary judgment cannot rest upon the allegations or denials in its pleading, but must, rather produce specific facts showing there is a genuine issue of trial. *Fed. Land Bank of Wichita v. Deatherage,* 739 P.2d 905, 906 (Colo. App. 1987).

V. Analysis

17. There are no disputed issues of material fact concerning the issues set forth in the pending motion. *See* C.R.C.P. 56. The court therefore addresses Plaintiffs' request for partial summary judgment as described below.

A. Deficiency of Notice to Plaintiffs in Case No. 81CW144

18. Plaintiffs argue that the decree in Case No. 81CW144, which purports to determine the ownership of the Glasmann Ditch water right, is void against them and their predecessors in

interest due to deficient notice under constitutional standards and C.R.C.P. 4. Will-O-Wisp responds that the decree in Case No. 81CW144 was properly noticed pursuant to the Water Right Determination and Administration Act of 1969, §§ 37-92-101 to 602, C.R.S. (the "1969 Act") and is thus binding on Plaintiffs. As discussed below, the court agrees with Plaintiffs that notice of the previous proceedings was insufficient against them on the issue of ownership of the water right.

1. Notice Standards in Cases Concerning Water Rights

19. Proper notice is fundamental to the court's jurisdiction over parties because judgments or decrees without adequate notice are void and can be challenged at any time. *See, e.g., Bd. of County Comm'rs of Arapahoe v. Collard*, 827 P.2d 546, 552 (Colo. 1992) ("[W]ater rights decree issued without adequate resume notice is void and can be challenged at any time."); *Robinson v. Clauson*, 142 Colo. 434, 440, 351 P.2d 257, 261 (1960) (quiet title decree to a water right not enforced due to insufficient notice).

20. Analysis of the adequacy of notice must begin with the United States Supreme Court decision *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). *See Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 633 (Colo. 1987) ("*Closed Basin*").

21. In *Mullane*, the United States Supreme Court explained that constitutionally sufficient notice requires certain content and must be provided by certain means. 339 U.S. at 314-15. The content of constitutionally-sufficient notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 314 (citations omitted). The means by which constitutionally-sufficient notice is given

> must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315 (citations omitted). The Colorado Supreme Court added that a "court's inquiry must focus on the reasonableness of the notice, giving due regard to the subject with which the statute deals and the practicalities and peculiarities of the case." *Closed Basin*, 734 P.2d at 633.

22. Notice of certain actions concerning water rights are provided pursuant to the resume-notice provisions of the 1969 Act. The resume notice applies only to the specific actions listed in § 37-92-302(1)(a), C.R.S. *Gardner v. State*, 200 Colo. 221, 226, 614 P.2d 357, 360 (1980). Quiet title actions to water rights are not listed in this section.

23. Applications to change a water right are listed in § 37-92-302(1)(a), C.R.S. However, as discussed in greater detail below, the adjudication of a change of water right is distinct from a

determination of the ownership of a water right. *Farmers Highline Canal & Reservoir Co. v. City of Golden*, 129 Colo. 575, 578, 272 P.2d 629, 631 (1954) ("*Golden*"); *Humphrey v. Southwestern Dev. Co.*, 734 P.2d 637, 641 (Colo. 1987).

24. Notice pursuant to C.R.C.P. 4 applies to certain actions concerning water rights. "In contrast to these resume-notice procedures, C.R.C.P. 4 sets forth procedures for accomplishing service upon persons in actions affecting specific property or in any proceeding in rem." *Gardner*, 200 Colo. at 225, 614 P.2d at 360 (requiring notice under C.R.C.P. 4 for abandonment of water right proceeding).

2. Application of Notice Standards to This Matter

25. The undisputed evidence in this matter establishes that the proceedings and decree in Case No. 81CW144 were only noticed pursuant to the resume-notice provisions of the 1969 Act. *See* § 37-92-302, C.R.S. One of the claims made by the applicants in Case No. 81CW144 was a change of water right of the Glasmann Ditch water right. No claim to determine the ownership of the water right was made in that case. There is no evidence that additional attempts were made to provide personal or publication notice in Case No. 81CW144 or any of the subsequent cases that reference the findings in Case No. 81CW144. *See generally* C.R.C.P. 56(e).

26. The above-described procedures are inadequate to provide notice to Plaintiffs regarding a determination of the ownership of the Glasmann Ditch water right. The resume-notice provisions of the 1969 Act only provide adequate notice for the specific claims listed in § 37-92-302(1)(a), C.R.S. Although the applications in Case No. 81CW144 provided notice of a change of water right claim, which is listed in § 37-92-302(1)(a), C.R.S., such notice is inadequate for the purpose of determining ownership of the water right because the adjudication of a change of water right is distinction from a determination of ownership of a water right. *Golden*, 129 Colo. at 578, 272 P.2d at 631; *Humphrey*, 734 P.2d at 641.

27. The court notes that no notice beyond the resume-notice procedures of the 1969 Act was given in Case No. 81CW144 or any of the subsequent cases that reference the findings in Case No. 81CW144. There is no evidence that the applicants in those cases complied with C.R.C.P. 4 or made any attempts at notice other than resume notice under the 1969 Act. Although the use of resume notice could be considered reasonable to the extent that the applicants in those cases were unaware of a dispute regarding the ownership of the Glasmann Ditch water right, such lack of notice is not reasonable to the extent that it deprives Plaintiffs of a claim of ownership to the water right with having been subject to notice reasonably calculated to apprise them of the action. *See Mullane*, 339 U.S. at 314-15; *Closed Basin*, 734 P.2d at 633.

28. The court therefore cannot determine that, in the unique facts of this matter, notice to Plaintiffs of the determination of ownership of the Glasmann Ditch water right in Case No. 81CW144 and subsequent decrees was adequate.

B. Claim Preclusion

29. Plaintiffs argue that claim preclusion cannot bar their claim of ownership of the Glasmann Ditch water right because: the subject matter of Case No. 81CW144 and this matter are not the same; the claims for relief in Case No. 81CW144 and this matter are different; and Plaintiffs were not parties to Case No. 81CW144. Will-O-Wisp disagrees. As discussed, below, the court concurs with Plaintiffs.

30. Claim preclusion prevents relitigation of claims that were or could have been litigated in a prior proceeding. The doctrine of claim preclusion applies where four elements exist: (1) finality of the first judgment; (2) identity of subject matter; (3) identity of claims for relief; and (4) identity or privity between parties to the actions.

Gallegos v. Colo. Ground Water Comm'n, 147 P.3d 20, 32 (Colo. 2006).

1. First Element of Claim Preclusion

31. The first element of claim preclusion is the finality of the first judgment. *Id*. "A final judgment is 'one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding.'" *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 667 (Colo. 2006). In this matter, the decree Case No. 81CW44 is final and was not appealed. The first element of claim preclusion is thus satisfied.

2. Second Element of Claim Preclusion

32. The second element of claim preclusion is that there is an "identity of subject matter" between the previous and present case. *Gallegos*, 147 P.3d at 32. The "best and most accurate test as to whether a former judgment is a bar in subsequent proceedings . . . is whether the same evidence would sustain both, and if it would the two actions are the same, and this is true, although the two actions are different in form." *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 203 (Colo. 1999) (citation and quotations omitted).

33. The second element of claim preclusion is not satisfied in this matter. The fundamental inquiry in a change of water right adjudication is whether the change will injure vested water rights. § 37-92-305(3), C.R.S. By contrast, the inquiry in a quiet title action concerns which party has a superior claim to property. *See* C.R.C.P. 105; *Hinojos v. Lohmann*, 182 P.3d 692, 697 (Colo. App. 2008) ("The plaintiff in a quiet title action has the burden of establishing title superior to that claimed by the defendant."). Likewise, the evidence that would be used in a change of water right proceeding relates to historic use and whether a change in future use would injure other vested water rights. *See generally, High Plains A&M, LLC v. Southeastern Colo. Water Conservancy Dist.*, 120 P.3d 710, 719 (Colo. 2005). By contrast, the evidence that would be used in a quiet title action relates to deeds, contracts, and other documents affecting the chain of title. *See Humphrey*, 734 P.2d at 641. The second element of claim preclusion is thus not satisfied.

3. Third Element of Claim Preclusion

34. The third element of claim preclusion is that there is an "identity of claims for relief" between the previous and present case. *Gallegos*, 147 P.3d at 32. "Under the same claim for relief or same cause of action test, a court must look to the injury for which relief is demanded, not the legal theory on which the person asserting the claim relies." *State Engineer v. Smith Cattle, Inc.*, 780 P.2d 546, 549 (Colo. 1989).

35. The third element of claim preclusion is not satisfied in this matter. In Case No. 81CW144, the applicants sought to change the use of the Glasmann Ditch water right. Those applicants did not seek a determination of the ownership of the water right, which would have been a separate claim. *See Humphrey*, 734 P.2d at 641. Meanwhile, in this matter, Plaintiffs' claim concerns the ownership of the water right. The third element of claim preclusion is thus not satisfied.

4. Fourth Element of Claim Preclusion

36. The fourth element of claim preclusion is that there is an "identity or privity between parties to the actions." *Gallegos*, 147 P.3d at 32. "Privity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'" *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999) (citations omitted). "In analyzing privity for purposes of *res judicata,* a court should look to the underlying relationship of the parties." *Turkey Creek Ltd. Liab. Co. v. Anglo America Consol. Corp.*, 43 P.3d 701, 703 (Colo. App. 2001).

37. The fourth element of claim preclusion is not satisfied in this matter. There is no evidence that any of the parties opposing the decree in Case No. 81CW144 shared substantially identical interests to Plaintiffs or had a working or functional relationship with them. *See* C.R.C.P. 56(e). For example, there is no evidence that any of the parties opposing the decree in Case No. 81CW144 asserted an ownership interest in the Glasmann Ditch water right. The fourth element of issue preclusion is thus not satisfied.

C. Issue Preclusion

38. Plaintiffs argue that issue preclusion cannot bar their claim of ownership of the Glasmann Ditch water right because: ownership of the water right was not actually litigated in Case No. 81CW144; Plaintiffs were not parties or in privity with any parties in Case No. 81CW144; and Plaintiffs did not have a full and fair opportunity to litigate the issue of ownership of the water right in Case No. 81CW144. Will-O-Wisp disagrees. As discussed, below, the court concurs with Plaintiffs.

39. Issue preclusion bars relitigation of an issue where:

> (1) the issue sought to be precluded is identical to an issue actually and necessarily determined in a prior proceeding; (2) the party against whom estoppel is asserted was a

party to or is in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

In re Tonko, 154 P.3d 397, 405 (Colo. 2007) (citation omitted).

1. First Element of Issue Preclusion

40. The first element of issue preclusion is that "the issue sought to be precluded is identical to an issue actually and necessarily determined in a prior proceeding." *In re Tonko*, 154 P.3d at 405. "For an issue to be 'actually litigated,' the parties must have raised the issue in a prior action." *Elk Dance*, 139 P.3d 667 (citations omitted). "No issue is legally raised between parties unless one of them, by appropriate pleading, asserts a claim or cause of action against the other." *Michaelson v. Michaelson*, 884 P.2d 695, 701 (Colo. 1994). "An issue is 'necessarily adjudicated' when a determination on that issue was necessary to the judgment." *Elk Dance*, 139 P.3d 667 (citations omitted). "Fundamental to the 'actually litigated' element of collateral estoppel is the recognition that the doctrine is inapplicable to matters that could have been, but were not, litigated in a prior proceeding." *Bebo Const. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 85 (Colo. 1999). As discussed below, the first element of issue preclusion is not satisfied.

41. The issue of ownership of a water right is not actually or necessarily litigated in a change of water right adjudication. Change of water right applicants must make a *prima facie* showing of ownership of the water right sought to be changed. *See, e.g., Mannon v. Farmers' High Line Canal & Reservoir Co.*, 145 Colo. 379, 384-85, 360 P.2d 417, 420 (1961); *Matter of Applications for Water Rights of Upper Gunnison River Water Conservancy Dist.*, 838 P.2d 840, 855 (Colo. 1992). However, the adjudication of a change of water right is distinct from the determination of ownership of a water right. *Humphrey*, 734 P.2d at 641; *Golden*, 129 Colo. at 578, 272 P.2d at 631 (Change of water right proceedings "are not adaptable for the purpose of trying title.").

42. There is no evidence that the issue of the ownership of the Glasmann Ditch water right was actually or necessarily litigated in Case No. 81CW144 or any subsequent case. *See* C.R.C.P. 56(e). It does not appear from the record of Case No. 81CW144 that the issue of ownership of the water right was raised by any party in any pleading. *See Elk Dance*, 139 P.3d 667. Further, as discussed above, the issue of ownership did not have to be adjudicated and was not litigated. *See Bebo Const. Co.*, 990 P.2d at 85. The first element of issue preclusion is thus not satisfied.

2. Second Element of Issue Preclusion

43. The second element of issue preclusion is that "the party against whom estoppel is asserted was a party to or is in privity with a party to the prior proceeding." *In re Tonko*, 154 P.3d at 405. "Privity between a party and a nonparty requires both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Elk Dance*, 139 P.3d 667 (citing *Cruz*, 984 P.2d at 1176).

44. The second element of issue preclusion is not satisfied in this matter. As discussed above in section V.B.4 of this order, there is no privity between Plaintiffs and the parties opposing the application in Case No. 81CW144. The second element of issue preclusion is thus not satisfied.

3. Third Element of Issue Preclusion

45. The third element of issue preclusion is that "there was a final judgment on the merits in the prior proceeding." *In re Tonko*, 154 P.3d at 405. "A final judgment is 'one which ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding.'" *Elk Dance*, 139 P.3d 667 (citing ***E.O. v. People, El Paso County Dept. of Social Serv.,*** 854 P.2d 797, 800 (Colo. 1993)). In this matter, the decree Case No. 81CW44 is final and was not appealed. The third element of issue preclusion is satisfied.

4. Fourth Element of Issue Preclusion

46. The fourth element of issue preclusion is that "the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *In re Tonko*, 154 P.3d at 405. Colorado courts have

> held that factors determinative of whether a party has been given full and fair opportunity to litigate include whether the remedies and procedures in the first proceeding are substantially different from the proceeding in which collateral estoppel is asserted, whether the party in privity in the first proceeding has sufficient incentive to vigorously assert or defend the position of the party against which collateral estoppel is asserted, and the extent to which the issues are identical.

Elk Dance, 139 P.3d 667 (citing ***Bennett College v. United Bank of Denver, Nat. Ass'n,*** 799 P.2d 364, 369 (Colo.1990)).

47. The fourth element of issue preclusion is not satisfied in this matter. As discussed above, the remedies and procedures for the change of water right adjudication in Case No. 81CW144 is distinct from those of a quiet title action in this matter. *See id*. There is also no privity between Plaintiffs and parties to Case No. 81CW144 in this matter as discussed above. Finally, the issues regarding injury from a change in water right are distinct from those of competing claims to proper in a quiet title action. *See id*. The fourth element of issue preclusion is thus not satisfied.

VI. Order

48. Based on the foregoing, the court hereby orders that Plaintiffs' Motion for Partial Summary Judgment is granted:

1. The decree in Case No. 81CW144 is void against Plaintiffs and their predecessors in interest to the extent that it purports to determine ownership of the Glasmann Ditch water right.

2. Plaintiffs' claim of ownership in the Glasmann Ditch water right is not barred by the doctrines of claim or issue preclusion.

Dated: June 19, 2008.

By the court:

Roger A. Klein
Water Judge
Water Division No. 1

This document was filed pursuant to C.R.C.P. 121, § 1-26. A printable version of the electronically signed order is available in the Court's electronic file.