

Trial, p. 2 ¶ 5. The warranty deed transferring title to Dean Primmer “included the water rights to the spring and the right to lay pipe from the spring and reservoir site across the land upon which the springs were situated.” Complaint, p. 2 ¶ 8. The springs were developed for domestic and irrigation water use and the pipeline was laid prior to Dean Primmer’s purchase of the property. *Id.* at p. 2 ¶ 9. The Grantor’s property, where the spring is located, is now, and at all times relevant to this action, owned by the Finmans. *Id.*, p. 2 ¶ 10.

On October 8, 2009, Dean Primmer filed a claim with the Idaho Department of Water Resources, claiming a water right in the springs. *Id.* at p. 3 ¶ 13. The Idaho Department of Water Resources assigned this claim water right permit number 95-11360. *Id.* On January 14, 2010, Paul Finman disputed Dean Primmer’s water right under permit number 95-11360. *Id.* at p. 3 ¶ 14. On February 4, 2010, Dean Primmer then filed an Application for Permit for irrigation and stock water use under the springs under permit number 95-11887. *Id.* at p. 2 ¶ 15. On July 30, 2010, Dean Primmer was granted permit approval under permit number 95-11887, authorizing him to appropriate water from the springs for irrigation and stock water. *Id.*, p. 4 ¶ 18.

In Spring and Summer 2010, Dean Primmer was denied access to the Finman property. *Id.*, p. 4 ¶ 20. According to Primmers, in September 2010, Dean Primmer contacted Paul Finman to let him know he would be inspecting the springs regarding changes to the water volume and quality. *Id.*, p. 4 ¶¶ 21, 23. Upon inspection, the Primmers allege:

...the aluminum cover to the [lower] springs [was] missing and the holding tank stuffed full of branches and rotted tree trunks. There were pot holes dug into the ground above the spring. The upper spring was completely destroyed. The aluminum culvert holding tank was missing and the cavity filled with dirt. It also appeared some of the piping had been dug up.

Id., p. 4 ¶ 23. This is disputed by the defendants. Answer to Complaint, Affirmative Defenses, and Demand for Jury Trial, p. 3 ¶ 13. “On October 15, 2011, Dean Primmer was found drowned in the culvert at the springs” located on the Finman property. Complaint, p. 8 ¶ 54. According to the Primmers, Dean Primmer was at the springs attempting to repair the damage described above. *Id.*, p. 8 ¶ 55.

The Primmer property also has a driveway which accesses State Highway 41. *Id.*, p. 7 ¶ 43. This driveway crosses a portion of the Finman property. *Id.*, p. 7 ¶ 45. Before Dean Primmer died, on February 11, 2011, a “No Trespassing” sign was posted at the end of the Primmers’ driveway and, according to Primmers, Paul Finman contacted Dean Primmer notifying that the plaintiffs could no longer utilize the portion of their driveway which crosses the Finman property. *Id.*, p. 7 ¶ 45. Primmers claim they and their predecessors have used the driveway for over fifty years. *Id.*, p. 7 ¶ 47.

Primmers filed their Complaint on October 13, 2013, alleging six causes of action: (1) quiet title to the water rights in the springs, (2) a determination that they have a right under Kootenai County Instrument No. 660151 to enter upon the defendants’ property to reclaim the springs and pipelines that provide potable water to their residence, and such entry is not trespass; (3) an injunction preventing the defendants from interfering with the plaintiffs’ water rights; (4) a prescriptive easement over the Finman property for use of their driveway; (5) negligent infliction of emotional distress; and (6) wrongful death. *Id.*, pp. 5-9. Finmans moved to dismiss Primmers’ Complaint pursuant to I.R.C.P. 12(b)(1), 12(b)(6) and 42(a). Motion to Dismiss, p. 1.

For the reasons set forth below, the Court grants Finmans’ motion to dismiss in part and denies the motion in part.

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II. STANDARD OF REVIEW.

In considering a motion to dismiss under Idaho Rule of Civil Procedure 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). “[T]he court has no right to take judicial notice of anything, with the possible exception of *facts of common knowledge* which controvert averments of the complaint.” *Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010) (emphasis in original).

III. ANALYSIS.

A. Pursuant to I.R.C.P. 12(b)(1), and Under I.C. § 43-1401 et seq. the Court Lacks Subject Matter Jurisdiction Over the Third Cause of Action (Injunctive Relief) in Primmers’ Complaint, and Certain Portions of the First and Second Causes of Action.

Finmans seek dismissal of the Complaint in its entirety under I.R.C.P. 12(b)(1), arguing this Court lacks subject matter jurisdiction because adjudication of all of the Primmers’ claims are dependent upon a determination of a water right. Memorandum in Support of Motion to Dismiss, p. 2. In response, Primmers concede their Complaint, in part, inappropriately requests the determination of a water right under the first cause of action, request for quiet title, but maintains the remainder of the claims are based on a real property right, and are thus within the subject matter jurisdiction of this Court. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, pp. 1-2.

Subject matter jurisdiction is “the power to determine cases over a general type or class of dispute.” *Bach v. Miller*, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007). The Idaho Constitution grants Idaho district courts original jurisdiction over all matters at law and in equity. Idaho Const. art. V, § 20. “[S]ubject matter jurisdiction can never be waived or consented to, and a court has a *sua sponte* duty to ensure that it has subject

matter jurisdiction over a case.” *State v. Urrabazo*, 150 Idaho 158, 163, 244 P.3d 1244, 1249 (2010) (*overruled on other grounds, Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3d 502 (2011)). If this Court lacks subject matter jurisdiction, it must dismiss this case. I.R.C.P. 12(g)(4). The Idaho Supreme Court has cautioned the consequences of rendering a decision where a court does not have subject matter jurisdiction: “[J]udgments and orders made without subject matter jurisdiction are void and ‘are subject to collateral attack, and are not entitled to recognition in other states under the full faith and credit clause of the United States Constitution.’” *Urrabazo*, 150 Idaho at 163, 244 P.3d at 1249 (citing *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 626-27, 586 P.2d 1068, 1070-71 (1978)). Moreover, whether a district court has subject matter jurisdiction is not dependent upon the merits of the action. *Bagley v. Thomason*, 155 Idaho 193, 307 P.3d 1219, 1222 (2013).

Idaho Code § 42-1406B(1) authorizes the Director of the Department of Water Resources to “petition the district court to commence adjudications within the terms of the McCarran amendment, 43 U.S.C. section 666, of the water rights from surface water and ground water sources in northern Idaho”, which includes the Coeur d’Alene-Spokane River Basin water system. I.C. § 42-1406B(1). Idaho Code § 42-1406B(2) specifies the petition may be filed:

...in any district court in which any part of the water source is located or before a court of special jurisdiction for water adjudications. Unless otherwise ordered by the supreme court , special jurisdiction for the water rights general adjudication . . . reside[s] in the Snake River Basin Adjudication district court of the fifth judicial district court of the state of Idaho, in and for the county of Twin Falls.

I.C. § 42-1406B(2).

On July 8, 2008, the State of Idaho filed a petition to commence adjudication of the Coeur d’Alene-Spokane River Basin water system, pursuant to the McCarran

Amendment. On August 8, 2008, the Idaho Supreme Court issued a “provisional Order Re: Appointment of District Judge, Confirmation of Special Jurisdiction and Determination of Venue for the General Adjudications of the Coeur d’Alene-Spokane River Basin, the Palouse River Basin and the Clark Fork-Pend Oreille River Basins”, which designated the Snake River Basin Adjudication (SRBA) District Court of the Fifth Judicial District of the State of Idaho as the county and court of venue for the general adjudication proceedings. As such, once the Coeur d’Alene-Spokane River Basin Adjudication was commenced, “jurisdiction to resolve all water right claims within the scope of the general adjudication is in the SRBA district court only.” *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 81, 856 P.2d 868, 871 (1993).

“I.C. § 42-1404(1) prevents claimants from filing private actions to adjudicate water rights which are within the scope of general adjudication that has already been commenced.” *Bear Island Water Ass’n, Inc. v. Brown*, 125 Idaho 717, 724, 874 P.2d 528, 535 (1994) (citing *Walker*, 124 Idaho at 81, 856 P.2d at 871). A claimant is defined as “any person asserting ownership of rights to the use of water within the state of Idaho” I.C. § 42-1401A(1). Private adjudication is defined as “an action . . . for the judicial determination of both the extent and priority of the rights of named persons to the use of water from any water system within the state of Idaho, for which a general adjudication has not been commenced or completed, that binds only those persons joined in the action and for the administration of such rights.” I.C. § 42-1401A(8).

In this case, for the purposes of resolving Primmers’ claims for quiet title, trespass and injunctive relief, Primmers are claimants seeking a private adjudication of a water right. Complaint, pp. 5-6, ¶¶ 28-31. The First Cause of Action in Primmers’ Complaint seeks quiet title to water rights. Paragraph 31 of the Complaint reads:

31. Plaintiff therefore seek a declaration that the title to the water rights in the springs is vested in Plaintiff alone and that the defendant herein be declared to have no estate, right, title or interest in the water rights and that said defendants and each of them be forever enjoined from asserting any estate, right, title or interest in the water rights in the springs adverse to Plaintiff herein.

Idaho Code § 6-401 governs actions to quiet title. It specifically provides “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.” As stated above, the Idaho Supreme Court granted the SRBA District Court of the Fifth Judicial District of the State of Idaho, in Twin Falls County, as the county and court of venue for the general adjudication proceedings for disputes arising under chapter 14, title 42, Idaho Code. Part of the dispute in this case surrounds a water right in the Coeur d’Alene-Spokane River Basin, which falls within the jurisdiction of the SRBA District Court. Moreover, Primmers agree this Court must dismiss their quiet title claim because it requires the adjudication of a water right. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, p. 7. As such, the court must dismiss the claim for quiet title of any water right due to lack of subject matter jurisdiction. Specifically, paragraphs 28-31 are dismissed as they pertain specifically to the alleged water right.

However, under the quiet title action, paragraphs 32 and 33 pertain to easement rights. Those paragraphs read:

32. Plaintiff further seeks a declaration that Plaintiff has a right to maintain, replace, repair and reconstruct the pipeline that conveys the water from the springs to Plaintiff’s parcel

33. Plaintiff further seeks a declaration that Plaintiff has the right to ingress and egress on Defendants’ property to maintain the springs and the water pipeline.

As mentioned above, the warranty deed transferring title to Dean Primmer “included the water rights to the spring and the right to lay pipe from the spring and reservoir site across the land upon which the springs were situated.” Complaint, p. 2 ¶ 8. This Court lacks jurisdiction to determine water rights, but this Court has jurisdiction to determine Primmers’ “...right to lay pipe from the spring and reservoir site across the land upon which the springs were situated.”

Under the Second Cause of Action (Trespass) in Primmers’ Complaint, Primmers seek a determination that Primmers have a right under Kootenai County Instrument No. 660151 to enter upon the Finmans’ property to reclaim the springs and pipelines that provide potable water to Primmers’ residence, and a determination that such entry is not trespass. Complaint, p. 6 ¶¶ 34-39; Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss, p. 10. Under the trespass cause of action, there are paragraphs of Primmers’ Complaint which must be dismissed, and paragraphs which must remain. Paragraph 35, which reads as follows, is dismissed:

35. The effect of Defendants’ conduct, as described in the Common Allegations, has substantially interfered with Plaintiffs’ water rights, and caused them to have no potable water for use in their residence.

Complaint, p. 6, ¶ 35. The first sentence of paragraph 37 must be dismissed: “Plaintiff advised Defendants on or about September 5, 2010 that Defendants’ actions had interrupted and interfered with their use of water from the springs.” *Id.*, ¶ 37. The rest of paragraph 37 must remain. Paragraph 39, which reads as follows, must be dismissed: “As a result of Defendants’ conduct, as alleged in this Complaint, Plaintiffs have been deprived of the use of their water right since August 2010, to date.” *Id.*, ¶ 39. All other portions of the second cause of action must remain. Concerning trespass, those claims relate to the easement to lay and maintain pipe, not the water right.

Under Primmers' Third Cause of Action (Injunctive Relief), Primmers seek an injunction preventing Finmans from interfering with the Primmers' water rights. Paragraph 41, the only substantive paragraph in the Primmers' third cause of action for injunctive relief, reads: "Unless restrained by this court, defendants will continue to interfere with Plaintiff's water rights and Plaintiff will be irreparably damaged by such actions." *Id.*, p. 7, ¶ 41. Resolution of Primmers' Third Cause of Action would solely require this Court to make a determination about a dispute concerning the right to the use of water. Adjudication of that right falls exclusively within the scope of the Coeur d'Alene-Spokane River Basin Adjudication. As such, the Court must dismiss Primmer's Third Cause of Action for Injunctive Relief. Primmers may refile the dismissed paragraphs and causes of action in their Complaint with the court of proper jurisdiction.

The remaining claims in Primmers Complaint require no determination of any essential element of a water right, and thus, fall within the subject matter jurisdiction of this Court. "The right to appropriate water is a real property right separate and apart from the property rights in the land from which the water has been diverted." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 724, 874 P.2d 528, 535 (1994).

Idaho Code § 5-401 governs causes of action over real property disputes, and provides:

Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest and for injuries to real property.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

I.C. § 5-401. Similarly, Idaho Code section 5-514(c) requires that any person who owns, uses or possesses real property situated within this state submit himself "to the

jurisdiction of the courts of this state as to any cause of action arising from” said ownership, use or possession. I.C. § 5-514(c).

The properties that are the underlying basis of this dispute are located in Kootenai County, Idaho. Complaint, pp. 2, 7-8 ¶¶ 8, 42-48. [The exact location of the property within Kootenai County is unknown, as the Complaint filed by Primmers does not have attached to it Exhibit A, which is referenced in the Complaint, p. 2, ¶ 7] Under the Fourth Cause of Action (Prescriptive Easement) in Primmers’ Complaint, Primmers seek a determination that they have a prescriptive easement over a portion of the defendants’ property. As stated above, I.C. §§ 5-401 and 5-514 grant district courts of the county where real property is situated the power to adjudicate disputes over said property. Accordingly, this Court has subject matter jurisdiction over the Fourth Cause of Action of Primmers’ Complaint.

“In all other cases the action must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action.” I.C. § 5-404. The Fifth Cause of Action (Negligent Infliction of Emotional Distress) and the Sixth Cause of Action (Wrongful Death) in Primmers’ Complaint, are both causes of action unrelated to water rights. As the defendants reside in Kootenai County, Idaho, this Court has subject matter jurisdiction over the Fifth and Sixth Cause of Action in Primmers’ Complaint.

B. Because the Court Lacks Subject Matter Jurisdiction over Primmers’ Third Cause of Action and Portions of the First and Second Cause of Action in Primmers’ Complaint, the Court Lacks Jurisdiction to Determine Whether Primmers are Entitled to Offer Evidence to Support its Claims Against Finmans on Those Dismissed Causes of Action.

Finmans also contend Primmers’ claims for quiet title, trespass and injunctive relief should be dismissed with prejudice because Primmers have failed to state a claim upon which relief can be granted and, as such, should not be entitled to offer evidence

in support of its claims. Memorandum in Support of Motion to Dismiss, p. 7. Finmans do not address whether the remaining claims should be dismissed under I.R.C.P. 12(b)(6). As stated above, this Court does not have subject matter jurisdiction over the water rights issues. As such, the Court lacks jurisdiction to consider the defendants' contentions that the claims for quiet title, trespass and injunctive relief should be dismissed pursuant to Idaho Rule of Civil Procedure 12(b)(6).

C. Idaho Rule of Civil Procedure 42(a) Does Not Provide for the Dismissal of a Cause of Action.

Finmans seeks to have the remaining causes of action seeking a prescriptive easement over the Finman property for continued use of the Primmers' driveway, negligent infliction of emotional distress, and wrongful death **dismissed** pursuant to I.R.C.P. 42(a) so they can be litigated in one cause of action before the SRBA District Court at the same time as the water rights claims. Memorandum in Support of Motion to Dismiss, p. 13. Finmans claim "an order dismissing solely the water rights claims under I.R.C.P. 12(b)(1), or anything less than the entire matter, would force the parties to litigate two concurrent actions involving the same facts in the Adjudication Court and in this court." *Id.* In response, Primmers maintain I.R.C.P. 42(a) does not provide authority for dismissal, and dismissal of the negligent infliction of emotional distress and wrongful death claims would result in an untimely refile. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, p. 13.

Idaho Rule of Civil Procedure 42(a) allows the district court to consider **consolidating** separate actions under the following circumstances:

When actions involving a common question of law or fact are pending before the court, it **may order a joint hearing or trial** of any or all the matters in issue in the actions; it **may order all the actions consolidated**; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

I.R.C.P. 42(a) (emphasis added). “It is the policy of the law to limit the number of trials as far as possible. When claims arise out of the same accident and one trial is sufficient to determine all the facts, separate trials would be a waste of time and expense.” *Harrison v. Taylor*, 115 Idaho 588, 597, 768 P.2d 1321, 1330 (1989) (internal citations omitted).

Here, Finmans have not made a motion to consolidate the remaining causes of action with any other pending case, but rather seek to use I.R.C.P. 42(a) to dismiss Primmers’ claims for prescriptive easement, intentional infliction of emotional distress, and wrongful death. The language of I.R.C.P. 42(a) does not provide a mechanism for dismissal of cases, rather it merely allows a court to consolidate cases with common questions of law or fact when a court deems appropriate. Primmers have yet to file a case before the SRBA District Court. Even if they had, this Court could not order this case to be consolidated with a pending action before the SRBA District Court. This Court does not have the authority to consolidate cases that are not before it. Rule 2 of the Rules of the District Court and Magistrate Division for the First Judicial District provides: “Each District Judge shall control and set his own schedule for civil and criminal trials and for law and motion matters, subject to the authority of the Administrative District Judge pursuant to §1-907.” Rules of the District Court and Magistrate Division for the First Judicial District, Rule 2. This Court cannot merely reassign portions of this case to Judge Wildman, the SRBA District Judge.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court grants Finmans’ motion to dismiss in part due to lack of subject matter jurisdiction, and denies the motion to dismiss in part as set forth above.

IT IS HEREBY ORDERED based on the reasons stated above, defendant Finmans' Motion to Dismiss is GRANTED as to Paragraph 28, 29, 30, 31, 35, and 39, and as to the first sentence of Paragraph 37, and all of the Third Cause of Action, of Primmers' Complaint.

IT IS FURTHER ORDERED as to all other issues defendant Finmans' Motion to Dismiss is DENIED.

Entered this 13th day of May, 2014.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
Susan P. Weeks	664-1684	Todd R. Startzel	509-624-2081
Norman M. Semanko	208-385-5384		

Jeanne Clausen, Deputy Clerk