

2016

**Salt Lake City Corporation, Plaintiff/Appellee, v. Mark C. Haik,
Defendant/Appellant**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

SALT LAKE CITY CORPORATION,)	
)	
Plaintiff/ Appellee,)	Case No. 201600019-SC
)	
v.)	District Court Case No. 140900915
)	
MARK C. HAIK,)	
)	
Defendant/ Appellant.)	

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court, Salt Lake County, Utah
Honorable Andrew Stone, Presiding

Paul R. Haik
KRESBACH AND HAIK, LTD.
100 South Fifth Street
Suite 1900
Minneapolis, MN 55402
Telephone: (612) 333-7400

Attorneys for Appellant

Shawn E. Draney
Scott H. Martin
Dani N. Cepernich
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, UT 84145-500
Telephone: (801) 521-9000

Attorneys for Appellee

COMPLETE LIST OF PARTIES

Since Defendant-Appellant Mark Haik filed his Brief, the following parties, who are not parties to this appeal, have been dismissed from the remaining proceedings in the district court:

Friends of Alta

Judith Maack

Kevin Tolton

Sandy City

Kent Jones, Utah State Engineer

The only remaining parties are:

Salt Lake City Corporation

Metropolitan Water District of Salt Lake & Sandy

Mark Haik

The Pearl Raty Trust, Pearl B. Raty as Trustee (successor in interest to former-Defendant Butler Management Group)

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JURISDICTION

This appeal is from the district court's September 30, 2015, Order dismissing Defendant-Appellant Mark Haik's counterclaims, which the district court certified as final under [Utah R. Civ. P. 54\(b\)](#) on January 7, 2016. This Court has jurisdiction pursuant to [Utah Code § 78A-3-102\(j\)](#).¹

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that Mr. Haik was barred by res judicata from relitigating the counterclaims? Whether a claim is barred by res judicata is a question of law the Court reviews for correctness. [Gillmor v. Family Link, LLC](#), 2012 UT 38, ¶ 9, 284 P.3d 622. Federal common law applies "when deciding if a federal court's decision has preclusive effect on a subsequent state court proceeding." [Oman v. Davis Sch. Dist.](#) 2008 UT 70, ¶ 28, n.5, 194 P.3d 956. This issue was preserved in Salt Lake City Corporation's motion to dismiss the counterclaims. (R. 3008-43).

¹ Mr. Haik cites [Utah Code § 78A-3-102\(3\)\(e\)\(v\)](#), which confers jurisdiction in this Court over "final orders and decrees in formal adjudicative proceedings originating with . . . the state engineer." That section is inapplicable. The order dismissing the counterclaims is not a "final order and decree in formal adjudicative proceedings." Even if the order had been on the First Cause of Action—the only judicial review in this case—the correct section would be 102(3)(f), as the state engineer proceedings were informal, not formal.

2. Does this Court lack jurisdiction to consider Mr. Haik's arguments regarding the district court's non-final denial of his motion to dismiss the Amended Petition for Judicial Review and Complaint? "This court is the exclusive judge of its own jurisdiction." *Powell v. Cannon*, 2008 UT 19, ¶ 9, 179 P.3d 799 (internal quotation marks omitted). "The question of whether an order is final and appealable is a question of law." *Id.*

STATEMENT OF THE CASE

This is an appeal from the district court's dismissal of Mr. Haik's counterclaims, which seek to force Salt Lake City to provide water for development of Mr. Haik's dry lots in Albion Basin. The district court dismissed the claims on the basis that they were or could have been litigated in two previous cases,² and therefore were barred by res judicata.

SLC filed this case against Mr. Haik and others seeking judicial review of the State Engineer's approval of two water right change applications. The Second Cause of Action sought adjudication of the validity, nature, and priority of Mr. Haik's (and others') claimed water rights.³ The district court's

² Copies of the U.S. District Court and Tenth Circuit decisions in these two cases are included in the Addendum.

³ Those water rights derive from mother right 57-7800. In *Haik v. Sandy City*, 2011 UT 26, 254 P.3d 171, this Court upheld a district court's decision holding Mr.

proceedings on the Second Cause of Action are ongoing and no appealable final order has been entered on the claim.

Mr. Haik asserted five counterclaims. Mr. Haik's counterclaims request the following:

1. A declaration under [Article XI, § 6 of the Utah Constitution](#) that he is entitled "to water supply as authorized by Water Rights 57-10013 (a16844) or 57-10015 (a16846) to serve homes in Albion Basin Subdivision." (R. 2779, ¶ 122.)
2. A declaration that SLC's refusal to provide water to his lots treats him differently from other nearby landowners and therefore violates equal protection under [Article I, § 24 of the Utah Constitution](#). (R. 2779-80, ¶¶ 124-25.)
3. A declaration that SLC's refusal to supply water to his lots violates his due process rights under [Article I, § 7 of the Utah Constitution](#). (R. 2780, ¶¶ 127.)
4. A declaration "determining the validity of appropriation by the City as expressed in Water Right 57-10015 (a16846) or Water Right 57-

Haik and others have a superior claim to title to their respective portions of water right 57-7800 as against Sandy City.

10013 (a16844) due to an expressed intent not (1) to apply the appropriated water to the stated beneficial use; and (2) refusal and failure to supply appropriated water within a reasonable time to the stated beneficial use.” (R. at 2781, ¶ 129.)

5. A declaration that SLC’s service of water outside of its municipal boundaries is subject to public regulation, presumably by the Public Service Commission. (R. 2781, ¶ 132.)

The counterclaims represent the latest chapter in what has been described by the Tenth Circuit as “an ongoing saga” between Mr. Haik, his father, and their predecessor in interest, Marvin Melville, and SLC. *Haik v. Salt Lake City Corp.*, 567 F. App’x 621, 623 (10th Cir. 2014) (*Haik II*). Forty years ago, Mr. Melville sued Salt Lake County challenging his inability to obtain a building permit for his property in the Albion Basin, located within the present day boundaries of the Town of Alta in Little Cottonwood Canyon, based on the Salt Lake County Board of Health’s requirement of 400 gallons of water per day, per domestic unit. *Melville v. Salt Lake County*, 570 P. 2d 687 (Utah 1977). Mr. Melville lost when this Court held that he had “at most” a contract right to 50 gallons per day (gpd), far less than the required 400 gpd. *Id.* at 689.

In 1994, Mr. Haik and his father purchased four undeveloped lots from Mr. Melville. [Haik v. Town of Alta, No. 97-4202, 1999 WL 190717, at *1 \(10th Cir. Apr. 5, 1999\)](#) (*Haik I*). Since that time, the Haiks have attempted to develop their lots, but have been unable to do so in part because of the inadequate water supply. As a result of this inability, the Haiks sued the Town of Alta and SLC in 1996, seeking, among other things, an order requiring SLC to provide water to their lots. [Haik I, 1999 WL 190717](#). Their efforts failed. *Id.* The U.S. District Court for the District of Utah (Judge Jenkins) and the Tenth Circuit both recognized that SLC has no obligation to serve water (or to allow service of water) to the Haiks' lots, and that its refusal to do so is a rational decision guided by ordinance and protection of critical watershed. [Haik v. Town of Alta, No. 2:96-cv-723J, Memorandum Opinion & Order at 20-21 \(D. Utah Oct. 31, 1997\), aff'd, Haik I, 1999 WL 190717, at *3-5](#). That case and the resulting decisions will be referred to throughout as *Haik I*.

Undeterred, the Haiks again sued the Town of Alta and Salt Lake City in 2012 seeking, among other things, the same relief—a mandate that SLC supply water to their Albion Basin lots. [Haik II, 567 F. App'x 621](#). The U.S. District Court (Judge Stewart) and the Tenth Circuit again refused to grant the Haiks' requested relief, holding that neither the provisions of the Utah or United States

Constitutions, relevant statutes and case law, nor approved change applications on SLC water rights obligate SLC to supply water to the Haiks' lots. *Haik II*, No. 2:12-CV-997 TS, 2013 WL 968141, at *9 (D. Utah Mar. 12, 2013), *aff'd*, 567 F. App'x 621 (10th Cir. 2014). That case and the resulting decisions will be referred to throughout as *Haik II*.

In the interim years, the Haiks continued to challenge SLC's refusal to supply water to their lots through repeated interactions with SLC, Salt Lake County, Town of Alta, and Salt Lake County Board of Health, among others. Those challenges include a 2013 suit Mr. Haik brought against the Salt Lake County Board of Health alleging that it violated his state and federal due process rights in denying his renewed applications for the necessary septic permits. *Haik v. Salt Lake County Bd. of Health*, 604 F. App'x 659 (10th Cir. 2015). The Salt Lake County Board of Health removed the case to federal court, and the U.S. District Court (Judge Stewart) summarily dismissed Mr. Haik's claims. *Id.* at 662. On appeal, Mr. Haik argued that the district court lacked jurisdiction because the removal was improper given that his complaint raised issues primarily of state law. *Id.* The Tenth Circuit disagreed, noting that "his complaint plainly seeks to raise issues of federal law." *Id.* It held that removal was nevertheless improper "because none of his claims present a *substantial* question of federal law" given

that the Tenth Circuit had “twice already affirmed district court rulings that Mr. Haik does not have a protected property interest in those permits so as to support his due process claims.” *Id.* (emphasis in original). The Tenth Circuit thus remanded with instructions to the district court to remand to the state court for lack of subject matter jurisdiction.⁴ *Id.* at 663.

As with *Haik I* and *Haik II*, the counterclaims in this case center on Mr. Haik’s contention that SLC has an obligation to provide him water for his Albion Basin lots. (R. 2756-83.) During the hearing on SLC’s motion to dismiss, counsel for Mr. Haik conceded that the First through Third Counterclaims were raised in either or both *Haik I* and *Haik II*. (R. 6204-05.) Specifically, with respect to the First Counterclaim, he stated, “in the first Stewart decision [*Haik II*], yes, the judge ruled against us on our interpretation of [Article XI, Section 6](#).” (R. 6186.) When questioned as to whether the equal protection claim “under the state constitution [was] raised in [*Haik I*],” counsel for Mr. Haik responded, “yes, there were equal protection, disparate treatment. And these were the same facts that

⁴ Mr. Haik implies that that the Tenth Circuit reversed a determination that his claims were barred by res judicata. (Appellant’s Br. at 39.) Mr. Haik made this argument to the district court. (R. 3474.) As discussed above, the Tenth Circuit reversed and remanded precisely *because* Mr. Haik’s federal claims were barred by res judicata, thereby leaving no substantial issue of federal law that would support removal—it did not, as Mr. Haik implies, hold that his claims were *not* barred by res judicata.

were at issue.” (R. 6192.) Counsel for Mr. Haik then described what Mr. Haik is seeking on “the first three counts”: “we’re seeking simply declaration of how do our rights and circumstances exist in this circumstance, was the Tenth Circuit right, was the Tenth Circuit wrong in what’s its interpretations of these state constitutional interests were as they apply to the facts.” (R. 6194-95.)

Following this exchange, the Court granted SLC’s motion to dismiss Mr. Haik’s counterclaims. It explained:

While I appreciate the clarification and, frankly, Mr. Haik, the candor of what we’re really looking at, at least as to counts 1 through 3, is did the Tenth Circuit get it right. I appreciate that the Utah Supreme Court has reserved the right to make its interpretations of state constructional law. It’s certainly not bound by that. But as to parties, parties are bound by the resolutions they bring to finality, whether they take the federal track or the state track.

So it may well be that your proposition as a legal proposition is that the Tenth Circuit got it wrong. That may well be true, but that’s really something that res judicata assumes is that we’re not going to get into that analysis because it’s been litigated fully.

So with respect to counts 1, 2, 3, there’s a concession here that those specific issues were raised in the earlier federal action – in the Stewart action, that is the first Stewart action – and on that basis, I’m going to grant the motion as to those claims. (R. 6204-05.)

The district court further granted the motion as to the Fourth and Fifth Counterclaims, explaining that, while they “may well not have been raised specifically, . . . they could have been raised. They come out of the same factual

circumstances. And this is a case not just for issue preclusion, but claim preclusion.” (R. 6205.) As the district court put it, “There has to be an end.” (R. 6205.)

SUMMARY OF ARGUMENT

I.

The district court properly held that Mr. Haik is barred by res judicata from relitigating his counterclaims.

Issue preclusion prevents Mr. Haik from relitigating his First through Fourth Counterclaims. The issues central to each of those respective counterclaims were decided in either *Haik I* or *Haik II* or both. In addition, the issue of whether two approved SLC change applications impose an obligation upon SLC under [Article XI, § 6](#) to serve water to Mr. Haik’s Albion Basin lots – an issue that, by Mr. Haik’s own description, underlies the First through Fourth Counterclaims – was explicitly decided in SLC’s favor in *Haik II*.

Claim preclusion further applies to bar the relitigation of the counterclaims because the First, Second, and Third Counterclaims were admittedly asserted in either or both *Haik I* and *Haik II*, which involved the same parties and resulted in final judgments on the merits. While the Fourth and Fifth Counterclaims were not previously raised as such, they arise out of the same transactions that gave

rise to the two prior federal cases. Nothing has changed since 2012 that would bring the counterclaims outside the realm of claim preclusion. SLC's assertion of the Second Cause of Action in this case, based on an injury to its long-held water rights in Little Cottonwood Creek, does not constitute a "new fact," nor are the counterclaims "new and independent claims" based on this "new fact."

Mr. Haik's contention that the final federal court decisions in *Haik I* and *Haik II* can never have claim preclusive effect because they involve state law or state constitutional claims, is frivolous. State law claims that either were or could have been raised in a prior federal case cannot be litigated in a subsequent state court case because of claim preclusion. Issues that were previously decided by a federal court applying state law standards likewise cannot be litigated in a subsequent state court case because of issue preclusion.

II.

To the extent Mr. Haik seeks review of the district court's denial of his motion to dismiss the Amended Petition for Judicial Review and Complaint, the Court lacks jurisdiction. The district court has allowed SLC and the District to continue to prosecute their Second Cause of Action. The interlocutory order denying the motion to dismiss is not a final appealable order because it did not

resolve all claims against all parties, and does not fall within any of the exceptions to the final judgment rule.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT MR. HAIK IS BARRED BY RES JUDICATA FROM RELITIGATING HIS COUNTERCLAIMS.

In the words of the Tenth Circuit, Mr. Haik's assertion of the counterclaims in this case is the latest in the "ongoing saga" between him, his father, and their predecessor in interest and SLC. Mr. Haik has used this case, which involves the question of the validity, nature, and priority of his claimed Little Cottonwood Creek water right, as his next forum to advance the same arguments he has been advancing for decades: that SLC has an obligation to serve water to his undeveloped lots in the Albion Basin, and its refusal to do so violates Mr. Haik's rights. This is an issue wholly separate from the question of what, if anything, Mr. Haik acquired through the purported conveyance of 1/6 of mother water right 57-7800—the issue raised by SLC in the Second Cause of Action. It is further an issue that has been repeatedly decided against Mr. Haik. In light of this fact, the district court was correct in dismissing Mr. Haik's counterclaims as barred by res judicata.

The doctrine of res judicata “encompasses two distinct barriers to repeat litigation: claim preclusion and issue preclusion.” *Park Lake Res. Ltd. Liab. v. U.S. Dep’t of Agr.*, 378 F.3d 1132, 1135 (10th Cir. 2004).⁵ “[I]ssue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim.” *Id.* at 1136 (internal quotation marks omitted). “Under [claim preclusion], a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Id.* Both apply here to bar Mr. Haik from relitigating his counterclaims.

A. *The counterclaims raise the same issues that were decided against Mr. Haik in the prior federal cases.*

“[I]ssue preclusion bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim.” *Park Lake*, 378 F.3d at

1136. Issue preclusion applies when four requirements are satisfied:

(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior

⁵ Federal common law applies “when deciding if a federal court’s decision has preclusive effect on a subsequent state court proceeding.” *Oman v. Davis Sch. Dist.* 2008 UT 70, ¶ 28, n.5, 194 P.3d 956.

adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Id. (internal quotation marks omitted).

Mr. Haik does not dispute that he was a party to both *Haik I* and *Haik II*. Nor does he dispute that those cases resulted in judgments on the merits or that he had a full and fair opportunity to litigate the issues raised in those cases. Rather, Mr. Haik argues that the issues raised in the counterclaims are different than those raised in *Haik I* and *Haik II* (Appellant's Br. at 48-49). This is inaccurate.

The five issues raised in the counterclaims that were identical to those raised in either or both *Haik I* and *Haik II* are: (a) whether [Utah Const. Article XI, § 6](#) obligates SLC to supply water outside of its municipal boundary, but within its service area; (b) whether SLC's refusal to supply water to Mr. Haik's Albion Basin lots violates his right to equal protection; (c) whether Mr. Haik has a protectable property interest in receiving water from SLC; (d) whether SLC's approved change applications obligate it to put the water to beneficial use in the manner identified in the change applications; and (e) whether SLC's change applications impose a constitutional obligation on SLC to supply water to Mr. Haik's Albion Basin lots. Each of these issues was decided in *Haik I* or *Haik II* or

both. Issues (a) through (d) are necessary to Mr. Haik's First through Fourth Counterclaims, respectively.⁶ Issue (e) is the overarching issue Mr. Haik seeks to litigate through his counterclaims.

1. Issues (a) through (d), which are necessary to Mr. Haik's First through Fourth Counterclaims, were previously decided against Mr. Haik.

In his First Counterclaim, Mr. Haik requests a declaration under [Article XI, § 6](#) as to his "entitlement to water supply as authorized by Water Rights 57-10013 (a16844) or 57-10015 (a16846) to serve homes in Albion Basin Subdivision." (R. 2777, ¶ 122.) This issue was decided in *Haik II*. The district court rejected the Haiks' argument that [Article XI, § 6, County Water System, Inc. v. Salt Lake City](#), and *Platt v. Town of Torrey*, when read together, "require[e] the city to provide water to them, especially in light of the change applications which, if perfected, would allow the city to do so." [Haik v. Salt Lake City Corp., No. 2:12-CV-997 TS](#),

⁶ Mr. Haik argues that the issue raised in the Fifth Counterclaim (declaratory relief that SLC is subject to public regulation) is not identical to any previously-litigated issue. (Appellant's Br. at 48-49.) SLC has never claimed that it is. Rather, the Fifth Counterclaim is barred by claim preclusion. Further, if Mr. Haik is barred by issue preclusion from relitigating the issue of whether he is entitled to receive water from SLC, he likely lacks standing to assert his Fifth Counterclaim. Any alleged injury to him caused by the non-regulation of SLC's service of water outside of its municipal boundaries necessarily requires that Mr. Haik have some right to receive water from SLC. Without that right, Mr. Haik has no personal stake in the issue.

2013 WL 968141, at *9 (D. Utah Mar. 12, 2013) (unpublished), *aff'd*, 567 F. App'x 621 (10th Cir. 2014). It explained, "When read together, these statements do not require the city to provide water to Plaintiffs, they merely permit the city to do so and, if the city so chooses, a reasonableness requirement is imposed. Nor do these provisions stand for the proposition that the city cannot have legitimate reasons (such as the protection of the watershed) to decline to supply water to nonresidents." *Id.*

On appeal, the Tenth Circuit affirmed, holding,

Even assuming the lots are now within the city's service area, this fact doesn't entitle the Haiks to more water. To be sure, [Article XI, Section 6 of the Utah Constitution](#) mandates that a municipality supply water owned by it to its *inhabitants* at reasonable charges. But [Article XI, Section 6](#) says nothing of "others beyond the limits of the city," and just because the Haiks' lots now fall within Salt Lake City's service area, it does not follow that the Haiks are now Salt Lake City inhabitants as well.

Consistent with the Utah Constitution, Utah courts do not impose a duty on municipalities like Salt Lake City to supply water to nonresidents like the Haiks.

[Haik II](#), 567 F. App'x at 629-30 (internal citations omitted). The Tenth Circuit further stated that it was "not persuaded that even th[e] reasonableness requirement [the plaintiffs advocated] applies." *Id.* at 630. There was no authority "require[ing] a municipality to have a reasonable basis for refusing to supply water to nonresidents in the first place." *Id.*

Mr. Haik's Second Counterclaim raises the issue of whether SLC's refusal to supply water to his Albion Basin lots violates his right to equal protection. This issue was decided in *Haik I*, and in *Haik II* in the specific context of the post-*Haik I* facts Mr. Haik again relies on.

In *Haik I*, the Haiks argued that "Salt Lake City's refusal to consent to water service violates the Haik's right to equal protection under the law because it irrationally treats them differently from other similarly situated property owners." *Haik II*, Memorandum Opinion & Order at 20-21. The district court rejected this argument, explaining:

Salt Lake City has no legal duty to furnish water to users outside its own city limits, be they "similarly situated" or not. As an owner of water rights, Salt Lake City's role in this instance is proprietary rather than administrative. The equal protection yardstick is simply not available to measure Salt Lake City's exercise of its contractual power to consent pursuant to Paragraph 8 of the Water Supply Agreement.

Id. at 21-22. The Tenth Circuit affirmed under both the United States and Utah Constitution equal protection provisions, holding "Salt Lake City's actions were reasonable." [Haik I, 1999 WL 190717 at *3-5](#). It explained, "Line-drawing inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the lines. That the line might

have been drawn differently at some points is not a matter for judicial consideration.” *Id.* at *5 (internal quotation marks omitted).

The Haiks again raised an equal protection argument in *Haik II*. However, because they alleged “new facts” in support of this claim, the Tenth Circuit held that it was not barred by res judicata. [Haik 2012, 567 F. App’x at 632](#) (“Hypothetically at least, the Haiks’ new allegations could make out an equal-protection violation where none had occurred before.”). Nevertheless, it rejected the claim on its merits:

[T]he Haiks have not alleged differential treatment that states a class-of-one equal-protection claim. We have little forgiveness for this since we expressly considered several things unique about the Haiks’ situation in *Haik I*—including the location of their property, their desired use, and their limited contractual rights. The current complaint does not even attempt to allege facts that might lead us to believe that the new water recipients are similar to them in any of these respects.

[Id. at 632-33.](#)

Mr. Haik’s Third Counterclaim, seeking a declaration of his due process rights, turns on the existence of a protectable property interest. Whether Mr. Haik has such a property interest was decided in *Haik I* and again in *Haik II*. Indeed, in *Haik II*, the Tenth Circuit held Mr. Haik’s due process claims were barred by issue preclusion because the protectable property interest issue had been decided in the previous case. [Haik II, 567 F. App’x at 628-31.](#)

In *Haik I*, the Tenth Circuit held that the Haiks' taking claim, asserted under both the Utah Constitution and the United States Constitution, failed because "they did not have a protectable interest in property that was taken or damaged by Alta's denial of a building permit." [1999 WL 190717 at *7](#). Specifically, the Tenth Circuit held that "mere expectation of municipal water service in the future is not a legal right that constitutes property subject to taking." *Id.*

In *Haik II*, the Tenth Circuit held that its prior holding on the taking claim was sufficient to bar the Haiks' due process claims under the doctrine of issue preclusion. [567 F. App'x at 628-31](#). It nevertheless went on to consider whether the approval of SLC's change applications conferred upon the Haiks a protectable property interest not yet in existence at the time of the first decision. [Id. at 629-31](#). The Tenth Circuit held that it did not: "The change applications did not alter anyone's obligations and they certainly did not give the Haiks a protected property interest or 'legitimate claim of entitlement' to more water." [Id. at 630](#). Mr. Haik's citation to Utah's Municipal Land Use, Development, and Management Act (R. 2780, ¶ 127), has no effect on this determination, as it does not even purport to create protectable property interests.

In his Fourth Counterclaim, Mr. Haik seeks a declaration that SLC's water rights a16846 (57-10015) and a16844 (57-10013) are invalid in light of SLC's failure to put the water to the full beneficial use identified in the change applications—namely, its failure to provide water to the Albion Basin. Although the precise authority for such a claim is unclear,⁷ the issue raised in the Fourth Counterclaim was decided in Haik II. There, the Tenth Circuit held that “[n]othing about [the change application] process requires the successful applicant to perfect or to use the water in the manner approved.” [567 F. App'x at 629](#).

Each of Mr. Haik's First through Fourth Counterclaims turns on issues that have previously been litigated and decided against him, in some instances twice. They are therefore barred by issue preclusion. (The Fifth Counterclaim, as will be discussed below, is barred by claim preclusion.)

⁷ The Fourth Counterclaim appears to be a collateral attack on the State Engineer's approval of the change applications. The only avenue to raise such a challenge to the approval of SLC's change applications is a judicial review action pursuant to [Utah Code Section 73-3-14](#) and Utah's Administrative Procedures Act.

2. **Issue (e), the overarching issue Mr. Haik seeks to litigate through the counterclaims, was decided against Mr. Haik in *Haik II*.**

In addition to the above-identified issues, which are specific to the First through Fourth individual counterclaims, there is a common issue underlying Mr. Haik's counterclaims: "whether Utah Constitution XI, §6 [sic], is properly interpreted to give property owners a constitutionally protected right to water when a change application is approved designating their subdivision as a permissible place of use of water." (R. 2757-58, ¶ 9.) The change applications to which Mr. Haik refers are SLC's change applications a16844 and a16846. This issue is the overarching issue that Mr. Haik seeks to relitigate in this case. While not tied to a specific counterclaim, Mr. Haik is barred from doing so because it is the precise issue that was decided against him in *Haik II*.

In that case, the Haiks "argue[d] that the change applications," a16844 and a16846, "show that water is available and should be provided to them." *Haik II*, 2013 WL 968141 at *6. They further argued "that, by failing to disclose or intentionally withholding information about the change applications, Defendants engaged in all sorts of malfeasance." *Id.* The district court explained, "in order for any of Plaintiffs' claims to succeed, Plaintiffs must show that they are entitled to water and that Defendants have refused to provide water to which they are

entitled.” *Id.* In other words, the Haiks had to show that SLC had “an obligation” “to supply water” to their Albion Basin lots—the same thing they argue in the present case. (*See* R. 2758, ¶ 14.)

In its Memorandum Order and Decision on the defendants’ motion to dismiss in *Haik II*, the District of Utah explained,

Unfortunately for Plaintiffs, they cannot make [the required] showing [that they are entitled to water]. . . . The city . . . declined to provide water based on the 1963 Agreement and to further its interest in the protection of the watershed.

Plaintiffs point to the change applications to rebut the reasons put forth by . . . Salt Lake City, but Plaintiffs have failed to provide any allegations that the change applications entitle them to water. *While the change applications may show some future ability for Salt Lake City to provide water to the Albion Basin Subdivision, there is no obligation to do so. . . .*

Based on this simple fact, all of Plaintiffs’ claims fail

Haik II, 2013 WL 968141 at *6 (emphasis added).

On appeal, the Tenth Circuit affirmed. In doing so, it held that “the change applications did not require Salt Lake City to supply water to the Haiks.”

Haik II, 567 F. App’x at 636. “[A]t most, the approved change applications empowered Salt Lake City to supply water to the Haiks’ lots.” *Id.* at 629 (internal quotation marks omitted, emphasis added). “The city’s ability to supply water” does not “amount[] to an obligation to do so.” *Id.*

Because Mr. Haik has previously litigated the issue of whether SLC's change applications, which would allow SLC to serve water to his lots, impose a constitutional obligation on it to do so, he is barred from relitigating that issue—which is the overarching issue in this case—here.

B. *Claim preclusion bars the relitigation of Mr. Haik's counterclaims because each of those claims was raised or could have been raised in the two prior federal cases.*

Claim preclusion applies when three requirements are satisfied: “(1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits.” *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 (10th Cir. 1999). Mr. Haik does not dispute the first two elements—that the two prior cases resulted in judgments on the merits and that both he and SLC were parties to both prior cases. Rather, he argues that SLC's filing of the present suit constitutes a change in circumstance that prevents application of claim preclusion (Appellant's Br. at 40-43). This argument is without merit.

The Tenth Circuit “has adopted the transactional approach of the Restatement (Second) of Judgments in determining what constitutes identity of the causes of action.” *Yapp*, 186 F.3d at 1227. Under this approach, “a claim arising out of the same transaction, or series of connected transactions as a

previous suit, which concluded in a valid and final judgment, will be precluded.” *Id.* (internal quotation marks omitted). “What constitutes the same transaction or series of transactions is to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.” *Id.* (internal quotation marks omitted).

In the district court, Mr. Haik conceded that his First, Second, and Third Counterclaims had been raised in one or more of the two prior federal cases. (R. 6186-95, 6204-05.) His Fourth and Fifth Counterclaims, seeking declarations that water rights a168558 (57-10015) and a16844 (57-10013) are invalid because SLC has not put the water to the beneficial use identified in the change applications and that SLC is subject to some public regulation, while not asserted as separate claims in the prior cases,⁸ arose out of the same transaction or set of facts. This is illustrated by the Tenth Circuit’s decision in *Haik II*.

⁸ While the Fourth Counterclaim was not previously asserted as a claim for declaratory relief, the argument underlying it—that SLC’s water rights are invalid because SLC has not put the water to the full beneficial use identified in its change applications—was previously litigated in *Haik II*, as discussed below.

The Tenth Circuit began its decision by noting, “This appeal marks just one chapter in an ongoing saga over the municipal supply of water to property owned by Mark and Raymond Haik in Alta, Utah.” *Haik II*, 567 F. App’x at 623. It then briefly explained the facts giving rise to *Haik I*: the Haiks had “purchased four undeveloped lots in the Albion Basin Subdivision, located at the top of the Little Cottonwood Canyon” and “wanted to develop their lots but were unable to do so because of inadequate water supply.” *Id.* When the Haiks “contacted Alta to arrange for water service, [they] learned that Alta has no independent rights to the water at issue.” *Id.* at 624. Because the “Albion Basin Subdivision falls outside the 1976 [Town of Alta] limits, . . . Salt Lake City’s pre-approval for water service” is required. *Id.* “Yet when the Haiks inquired, Salt Lake City declined to consent to the extension of water service to their lots.” *Id.* This led the Haiks to sue the Town of Alta and SLC, “asserting equal-protection claims against both municipalities” and challenging “Salt Lake City’s refusal to consent” to the Town of Alta serving the Albion Basin lots. *Id.* “The district court rejected the Haiks’ claims on summary judgment,” and the Tenth Circuit affirmed. *Id.* at 624-25.

The Tenth Circuit then addressed the “new” facts giving rise to *Haik II*: First, the Haiks based their claims on SLC change applications, which they

alleged “resulted in two things: (1) Salt Lake City could provide more than 400 gallons of water per day to each of the Haiks’ lots; and (2) the Albion Basin became part of Salt Lake City’s water ‘service area.’” *Id.* at 625. Second, the Haiks relied on a second round of permit denials that occurred after the change applications were approved and, specifically, a letter from “Jeffrey Niermeyer, the Director of Salt Lake City’s Department of Public Utilities, [which] told permitting authorities that the Haiks were entitled to only 50 gallons of water per day under the Little Cottonwood contract.” *Id.* Third, the Haiks relied on their alleged post-*Haik I* discovery “that Salt Lake City has been billing a number of homes in the Albion Basin Subdivision for water in unmetered amounts,” which “shows that Salt Lake City is treating them differently from others within the Albion Basin Subdivision without reason.” *Id.* Finally, the Haiks relied on their allegation “that Salt Lake City has repeatedly consented to supply water to similarly situated people in the surrounding watershed canyons,” some of which predated *Haik 1996* and some that did not. *Id.*

The same operative facts from *Haik I* and *Haik II* form the basis of Mr. Haik’s counterclaims. There is nothing new. The counterclaims stem from Mr. Haik’s decades-long inability to receive water for his Albion Basin lots. (R. 2760, ¶ 21; 2766, ¶¶ 64-65.) Mr. Haik argues that SLC’s refusal to supply water to his

Albion Basin lots is wrongful, just as he did in *Haik I*. And, as in *Haik II*, he relies on (1) SLC's change applications a16844 and a16846 (R. 2756, ¶¶ 10-12; 2799, ¶ 122; 2781, ¶¶ 129, 130); (2) the 50 gpd letter from Mr. Niermeyer (R. 2765, ¶¶ 55-57); (3) unmetered water sales to other lots in the Albion Basin Subdivision (R. 2764, ¶ 49; 2766, ¶ 63); and (4) SLC's alleged new water supply agreements with others outside the municipal boundaries (R. 2767-68, ¶¶ 67, 69-72). A review of Mr. Haik's 132 factual allegations pled in support of his counterclaims reveals only a retread of prior facts and claims and, importantly, no facts that post-date the Haiks' 2012 Complaint or the Tenth Circuit's 2014 decision in *Haik II*. Nothing has changed that would enable Mr. Haik to assert new claims based on the same operative facts he has now been litigating for twenty years.

Mr. Haik nevertheless argues that there has been a change in circumstances that would justify allowing him to relitigate his First, Second, and Third Counterclaims and to assert his Fourth and Fifth Counterclaims. In doing so, he relies on SLC's assertion of the Second Cause of Action in this case, claiming that SLC's allegation "of injury to [its] water rights" is a "new event" "that takes the counterclaims out of any preclusion." (Appellant's Br. at 41.) SLC's assertion of the Second Cause of Action in this case is not a "new fact" that would enable Mr. Haik to litigate the counterclaims.

Under federal res judicata law, “a new action will be permitted only where it raises *new and independent* claims, not part of the previous transaction, based on . . . new facts.” *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150 (10th Cir. 2006) (emphasis in original). Here, there are no “new facts.” SLC’s assertion of a claim for the adjudication of the nature, validity, and priority of Mr. Haik’s claimed water right is not a “new fact.” Nor does SLC’s assertion of that claim turn on any new facts. SLC’s identified injury—interference with its various Little Cottonwood Creek water rights—is based on facts that existed at the time of *Haik I* and *Haik II*, namely, SLC’s long-held water rights. Indeed, two of those water rights, a16844 (57-10013) and a16846 (57-10015), were the explicit basis of Mr. Haik’s assertion of claims in *Haik II*. *Haik II*, 567 F. App’x at 625-26. SLC’s assertion of the Second Cause of Action in this case merely provided Mr. Haik with a new forum to assert his counterclaims—it does not give rise to a new transaction or “new and independent claims” that previously did not exist.

Even if SLC’s assertion of the Second Cause of Action could be considered a “new fact,” the counterclaims are nevertheless barred by claim preclusion because they fall within “one of several exceptions to the rule that only claims related to the existing transaction are precluded.” *Hatch*, 471 F.3d at 1150. Applicable here is the exception of “where . . . the object of the first proceeding

was to establish the legality of the continuing conduct into the future.” *Id.* at 1151 (internal quotation marks omitted). Through both *Haik I* and *Haik II*, Mr. Haik sought a declaration that SLC has an obligation to serve water to his Albion Basin lots and that its refusal to do so violates various of his constitutional rights. He unquestionably sought to establish the legality, or illegality, of SLC’s “continuing conduct into the future.” As this exception recognizes, allowing Mr. Haik to assert claims designed to obtain this same prospective relief every time SLC claims impairment of its long-held Little Cottonwood Creek water rights is antithetical to the principles of finality underlying the doctrine of res judicata.

Because Mr. Haik’s counterclaims either admittedly were raised in one or both of the two prior cases or arise out of the same transaction and thus could have been raised, each of the elements of claim preclusion is satisfied.

C. *Mr. Haik’s argument that decisions of the federal courts can never have preclusive effect if the issue decided turns on state law is without merit.*

Mr. Haik additionally argues that neither issue preclusion nor claim preclusion can bar the relitigation of his counterclaims because res judicata does not apply to cases involving state law and state constitutional claims where the prior decision was a federal decision. (Appellant’s Br. at 43-47, 47-48, 49-50.) He frames the question as whether “Federal courts [can] foreclose Utah State Court

review of Federal interpretations of . . . the Utah Constitution.” (Appellant’s Br. at 43.) He also attempts to frame the same argument as a “lack of finality.” (Appellant’s Br. at 49.)

In support of this argument, Mr. Haik relies upon the principle that “[t]his court, not the United States Supreme Court, has the authority and obligation to interpret Utah’s constitutional guarantees, including the scope of due process, and we owe federal law no more deference in that regard than we do sister state interpretation of identical state language.” [State v. Tiedemann, 2007 UT 49, ¶ 33, 162 P.3d 1106.](#)

While a federal court’s interpretation of a provision of the United States Constitution does not bind this Court in interpreting an identical provision of the Utah Constitution, that is not what is at issue here. Rather, the question here is whether a final judgment in a federal court bars the *parties to that case* from relitigating claims or issues that were or could have been raised and decided in that case, whether they be Utah constitutional claims or otherwise. The answer to that question is yes.

Utah courts have repeatedly held that claim preclusion bars the relitigation of state law claims that have been previously litigated in federal court. *See, e.g.,* [McCarthy v. State, 1 Utah 2d 205, 265 P.2d 387, 389 \(1953\)](#) (“The [state law] issue

having been squarely presented and determined [in the federal court proceeding], it is res judicata as between these parties.”); *Pride Stables v. Homestead Golf Club*, 2003 UT App 411, ¶ 18, 82 P.3d 198 (holding claim preclusion applied where “the parties fully litigated in the bankruptcy proceeding the issue of whether an express contract existed,” a matter of Utah law).

Mr. Haik offers no authority to support his position that a different rule applies to claims under the Utah Constitution. This Court has, on at least two occasions, considered whether a federal court decision on claims under the Utah Constitution has claim preclusive effect. *Nu-Med USA, Inc. v. 4Life Research, L.C.*, 2008 UT 50, ¶ 8, 190 P.3d 1264; *Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 36, 73 P.3d 325. Although in both cases there was no preclusive effect, this was because neither federal court decision was a final decision on the merits – not because, as Mr. Haik contends, there is a categorical exclusion of such cases from the doctrine of claim preclusion. *Nu-Med*, 2008 UT 50, ¶ 8 (holding claim preclusion did not apply because “the federal district court’s voluntary dismissal was without prejudice”); *Snyder*, 2003 UT 13, ¶¶ 36-37 (holding claim preclusion did not apply because the federal court declined to exercise supplemental

jurisdiction over the state constitutional claims and dismissed them without prejudice).

This Court has further held that where “plaintiffs failed to assert their state claim [in a prior federal proceeding] when the federal court had the power to adjudicate it with their federal claim, they are barred under the doctrine of res judicata from litigating the issues in the instant action.” *Belliston v. Texaco, Inc.*, 521 P.2d 397, 382 (Utah 1974). Applying this principle, the Utah Court of Appeals has routinely affirmed the dismissal of state claims where those claims could and should have been litigated in a prior federal proceeding.⁹ Thus, even though Mr. Haik did not previously assert his Fourth or Fifth Counterclaim, he is barred by claim preclusion from doing so here.

⁹ See, e.g., *Bishop v. Inwest Title Servs., Inc.*, 2014 UT App 189, ¶ 13, 336 P.3d 578 (“Bishop could and should have asserted his claimed superior right under the Warranty Deed—and his claims for damages flowing from that superior right—in conjunction with his quiet title claim against BANA and Boyce in the federal action. Because he failed to do so, his present claims against BANA and Boyce are barred by the doctrine of claim preclusion.”); *Hansen v. Bank of N.Y. Mellon*, 2013 UT App 132, ¶ 15, 303 P.3d 1025 (“Because we conclude that . . . Hansen’s [state law] claims in this case could have been brought in the federal action, we hold that the district court correctly dismissed Hansen’s claims as being barred by res judicata.”); *Massey v. Bd. of Trustees of Ogden Area Community Action Comm., Inc.*, 2004 UT App 27, ¶ 12, 86 P.3d 120 (“Because Massey’s wrongful termination claim under state law stems from the same claim as the section 1983 claim, Massey could and should have brought his state claims in the prior [federal] suit.” (internal quotation marks and brackets omitted)).

Mr. Haik also relies on *Jensen v. Cunningham*, 2011 UT 17, 250 P.3d 465. But *Jensen* does not extend as far as Mr. Haik would have it reach—to hold that a federal court’s decision on a state law issue can *never* give rise to issue preclusion.

In *Jensen*, this Court held that the U.S. District Court’s grant of summary judgment to the defendants on federal constitutional claims under 42 U.S.C. § 1983 did not collaterally estop the plaintiffs from asserting state constitutional claims based on the same facts in a state court proceeding. 2011 UT 17, ¶ 49. There, the U.S. District Court had expressly declined to exercise supplemental jurisdiction over the plaintiffs’ state constitutional claims and dismissed them without making any findings with regard to those claims.¹⁰ *Id.* ¶ 39. The grant of summary judgment was thus limited to analysis of the plaintiffs’ federal constitutional claims, applying the federal framework for qualified immunity. This Court held that type of “federal court determination that the material undisputed facts do not give rise to a federal constitutional violation does not preclude a state court from deciding whether those same facts will give rise to a state constitutional violation.” *Id.* ¶ 49. That holding does not somehow establish that a federal court’s decision on a *state* constitutional claim (or state

¹⁰ This is presumably the reason that claim preclusion was not raised in *Jensen*.

common law claim) is deprived of issue preclusive effect. Indeed, in *Jensen*, this Court acknowledged that where “an issue had been decided by the federal court using the same standard that would be applied in state court, the plaintiff [i]s precluded from relitigating that issue in state court.” *Id.* ¶ 42.

Thus, while it is clear that Utah courts need not defer to a federal court’s interpretation of the Utah Constitution or Utah law, there is no authority to support Mr. Haik’s position that a federal court’s ruling against a particular party on a state law issue has no preclusive effect *as to that party*. To the contrary, this Court has held that a federal court’s decision on an issue of state law, applying state law, does, in fact, have issue preclusive effect. *Jensen v. Redevelopment Agency of Sandy City*, 951 P.2d 735, 737 (Utah 1997) (“The Tenth Circuit held that under Utah law plaintiffs did not have a property interest in the information it supplied to the City. . . . The Tenth Circuit’s ruling that plaintiffs did not have any property interest in the information it disclosed to the City and RDA is res judicata of that issue in this action.”). *Haik I* and *Haik II* involve precisely such decisions.

Mr. Haik’s argument that the federal court decisions in *Haik I* and *Haik II* cannot give rise to res judicata is frivolous. To the extent it can be read as a request that this Court adopt a new rule exempting from the doctrine of res

judicata federal court decisions in cases involving state law claims and issues, the Court should refuse to do so. Such a rule would erode the very purposes of the doctrine of res judicata – “to protect litigants from the burden of relitigating an identical issue with the same party or his [or her] privy and to promote judicial economy by preventing needless litigation,” *State ex rel. S.D.C.*, 2001 UT App 353, ¶ 12, 36 P.3d 540.

II. THE COURT LACKS JURISDICTION OVER ANY APPEAL OF THE DISTRICT COURT’S DENIAL OF MR. HAIK’S MOTION TO DISMISS.

Although not included in his Statement of Issues, Mr. Haik has argued that the district court “clearly erred in failing to dismiss the suit” in response to Mr. Haik’s motion to dismiss. (Appellant’s Br. at 51.) He has further included in his Statement of Facts a discussion of SLC’s and the District’s asserted injury in support of the Second Cause of Action, concluding that the “Amended Petition ‘does not expressly allege a reasonable probability of future injury.’” (*Id.* at 15-19.) While less than clear, it appears that through this appeal, Mr. Haik seeks review of the district court’s denial of his motion to dismiss. To the extent he does, the Court lacks jurisdiction to consider that decision.

This Court “does not have jurisdiction over an appeal unless it is taken from a final judgment, *Utah R. App. P. 3(a)*, or qualifies for an exception to the

final judgment rule.” *Loffredo v. Holt*, 2001 UT 97, ¶ 10, 37 P.3d 1070. The district court’s denial of Mr. Haik’s motion to dismiss is not a final judgment – it did not “end the controversy between the litigants,” *id.* ¶ 12, but rather allowed SLC and the District to continue to pursue their Second Cause of Action.

The district court’s denial of Mr. Haik’s motion to dismiss further does not satisfy any of the exceptions to the final judgment rule. “[O]rders and judgments that are not final can be appealed if such appeals are statutorily permissible, if the appellate court grants permission under [rule 5 of the Utah Rules of Appellate Procedure](#), or if the trial court expressly certifies them as final for purposes of appeal under [rule 54\(b\) of the Utah Rules of Civil Procedure](#).” *Bradbury v. Valencia*, 2000 UT 50, ¶ 12, 5 P.3d 649. None of those circumstances applies here.

To the extent Mr. Haik has sought review of the district court’s denial of his motion to dismiss, the Court lacks jurisdiction. The Court must dismiss any such portion of Mr. Haik’s appeal and refuse to consider his arguments on SLC’s and the District’s standing to assert the Second Cause of Action and the merits of the claims asserted therein.

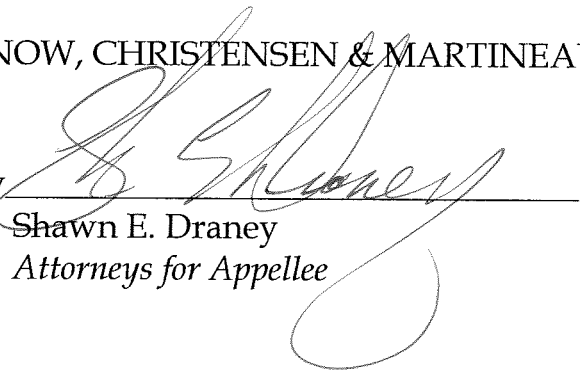
CONCLUSION

For the foregoing reasons, SLC requests that this Court affirm the district court’s dismissal of Mr. Haik’s counterclaims.

DATED this 7th day of October, 2016.

SNOW, CHRISTENSEN & MARTINEAU

By


Shawn E. Draney

Attorneys for Appellee

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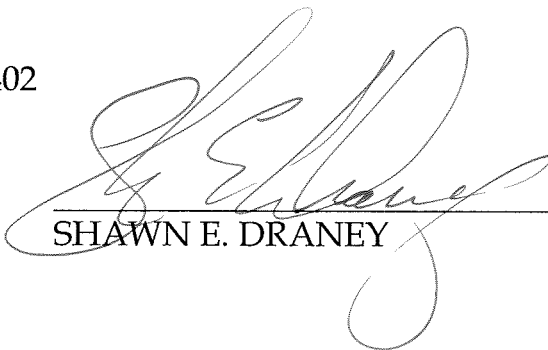
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SHAWN E. DRANEY

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I hereby certify that two true and correct copies of the foregoing **BRIEF OF APPELLEE** were served by U.S. mail, postage prepaid, on October 7, 2016 as follows:

Paul R. Haik
KRESBACH AND HAIK, LTD.
100 South Fifth Street
Suite 1900
Minneapolis, MN 55402



SHAWN E. DRANEY

ADDENDUM

- A. *Haik v. Town of Alta*, No. 2:96-cv-723J, Memorandum Opinion & Order at 20-21 (D. Utah Oct. 31, 1997)
- B. *Haik v. Town of Alta*, No. 97-4202, 1999 WL 190717 (10th Cir. April 5, 1999)
- C. *Haik v. Salt Lake City Corp.*, No. 2:12-CV-997 TS, 2013 WL 968141 (D. Utah Mar. 12, 2013)
- D. *Haik v. Salt Lake City Corp.*, 567 F. App'x 621 (10th Cir. 2014)

4814-4426-7066, v. 1