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DEPARTMENT OF
WATER RESOURCES

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF AND FOR IDAHO, IN THE COUNTY OF TWIN FALLS**

In Re CSRBA	)	SUBCASE NO. 91-7094
	)	
Case No. 49576	)	
	)	
	)	
	)	

SHIPPY'S OPENING BRIEF ON NOTICE OF CHALLENGE

Honorable Eric J. Wildman, Presiding Judge

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COMES NOW, the Claimant/Objector, Jeffrey Shippy and Cedar Creek Ranch, LLC, (“Shippy”), by and through their attorneys of record, Barker Rosholt & Simpson LLP, and hereby submits Shippy’s Opening Brief on Notice of Challenge, in conformance with CSRBA Administrative Order #1 (“AO1”) 18.c. For the reasons set forth below, Shippy challenges the Special Master’s October 6, 2016, *Special Master’s Report and Recommendation; Findings of Fact and Conclusions of Law* and the March 23, 2017, *Order on Motion to Alter or Amend* because the conclusions are not supported by the record or by Idaho law. This Court should order that water right 91-7094 be decreed in the name of Shippy.

I. INTRODUCTION

This Appeal, or Challenge, involves the question of ownership of the water right to grow wild rice on Shippy’s property. A license was issued to St. Maries Wild Rice Growers, an unincorporated association, to grow rice on the land owned by Shippy’s parents. A specific condition of the water right permit and license is that that water right was appurtenant to the land owned by Shippy’s parents. *See* License Condition No. 2. The undisputed evidence at trial was that the right was intended to be appurtenant to, and remain with the land. Hence, the special condition on the license. Unfortunately that condition was not carried forward for the proposed partial decree.

The competing claimants for water right number 91-7094 are Shippy and Douglas and Darcy McInturff (“McInturff”). The Department investigated the competing claims and concluded that it lacked sufficient information to determine who owned the water right, so the Director recommended that the right be decreed in the name of both McInturff and Shippy. McInturff’s claim to this water right was based on the license issued to St. Maries Wild Rice Growers and an agreement between McInturff and Al Bruner to buy his wild rice business. It is

undisputed that the record fails to show a chain of title from the licensee, St. Maries Wild Rice Growers, to Mr. Bruner or to McInturff. On the other hand, the deeds from Shippy's parents to Shippy transferred the land with all appurtenances, which includes water rights. Based on this record, it was error to recommend ownership of the right to McInturff and error to recommend that Shippy's ownership be disallowed.

II. PROCEDURAL HISTORY

McInturff filed a claim to water right 91-7094 in 2015, based upon a license issued to St. Maries Wild Rice Growers. The Director's Report was filed recommending McInturff as the owner. Shippy objected in March 2015, asserting that he should be recognized as the owner. At the same time, he filed a late claim, which was given water right no. 91-7893, for the same property. IDWR investigated the claims, but was unable to determine who owned the water right. Accordingly, in December of 2015, the Director issued an Amended Director's Report recommending both McInturff and Shippy be shown as co-owners of water right 91-7094. The Director also recommended that 91-7893 be disallowed on the grounds that it had recommended Shippy as co-owner of water right 91-7094. No objections were filed, and the Special Master issued new recommendations listing both McInturff and Shippy as owners of 91-7094 and disallowing 91-7893. McInturff then filed a letter denominated as a *Motion to Alter or Amend* the Special Master's recommendation in 91-7094, asserting that they were sole owners. The Special Master granted the *Motion to Alter or Amend* and set deadlines for responding. Shippy filed a timely response and objection.

A trial was held before the Special Master on August 3, 2016, at which both parties appeared *pro se*. Testifying at the trial were: Chad Goodwin (IDWR), Jeffrey Shippy, Douglas McInturff and Jeffrey Baker. Mr. Baker formerly was a member of St. Maries Wild Rice

Growers and was a member when the Association applied for the permit that became water right 91-7094.

The Special Master issued a new *Report and Recommendation* on October 6, 2016. The Special Master recommended that the water right be decreed in the name of McInturff, and that Shippy would not be recognized either as an owner or co-owner of the water right. The Special Master stated that there was sufficient evidence in the record for the Department to infer that the water right passed from St. Maries Wild Rice, Inc. to McInturff. The Special Master concluded that it was “reasonable to assume” that the license was transferred, ultimately, from St. Maries Wild Rice Growers, an unincorporated association, to St. Maries Wild Rice Growers, Inc., to Al Bruner and ultimately to McInturff. The Special Master held that Shippy’s ownership of the place of use was not sufficient to recognize Shippy as an owner of the water right.

Upon issuance of the Special Master’s *Report and Recommendation*, Shippy retained counsel and filed a *Motion to Alter or Amend Special Master’s Report and Recommendation*. In the *Motion to Alter or Amend*, Shippy demonstrated that there were no writings transferring the permit or license for water right 91-7094 from the Association to the Corporation, or from the Corporation to Al Bruner. Shippy also demonstrated that the property he now owns was deeded to him together with all appurtenances, and that the water right license specifically made the water right appurtenant to the land he now owns. McInturff did not respond. A hearing was held before the Special Master on the *Motion to Alter or Amend* on February 1, 2017. McInturff did not appear.

On March 23, 2017, the Special Master issued an *Order on Motion to Alter or Amend*. In this *Order*, the Special Master concluded that the deeds transferring ownership of the land did not transfer the water right even though the right was appurtenant to the land and the deeds

transferred ownership of the land together with all appurtenances. The Special Master then concluded that there was no proof of transfer of ownership from St. Maries Wild Rice Growers to the incorporated entity, then to Al Bruner and then to McInturff. However, because IDWR processed a change of ownership for the license from Al Bruner to McInturff, the Special Master declined to examine whether that Notice effectively transferred ownership to McInturff. The Special Master viewed Shippy's claim to be a collateral attack on the change of ownership proceeding. However, as the original *Report and Recommendation* recognized, "[t]here is no evidence that notice of the Change of Ownership was mailed to the owner of record, St. Maries Wild Rice Growers, or St. Maries Wild Rice, Inc. In addition, there is no evidence that the Notice of Change of Ownership was mailed to Alexander Bruner." *Report and Recommendation*, p. 9 (October 6, 2016).

Shippy timely filed a *Notice of Challenge* on April 6, 2017. Shippy requested a transcript of the trial. That transcript was lodged with the Court on May 26, 2017. Hearing is scheduled on the *Notice of Challenge* on July 18, 2017.

III. STATEMENT OF FACTS

St. Maries Wild Rice Growers was an unincorporated association formed by Al Bruner and Jeffrey Baker. Tr., p. 127, ll. 23-24. In 1983, this association filed Application for Permit No. 91-7094 to divert water onto property owned by Aaron and Jeanne Robinson to grow wild rice. Tr., p. 17, ll. 5-22. The Application asserted that St. Maries Wild Rice Growers held a long-term lease with the landowner. Tr., p. 17, ll. 23-p. 18, l. 1. However, there was no such lease. No lease was submitted with the Application or produced at trial. Tr., p. 18, ll. 2-13. In fact, the evidence at trial demonstrated that several efforts were made by St. Maries Wild Rice Growers to induce the owners of the land (Robinsons) into signing a long-term lease. However, no such

lease was ever executed. Tr., pp. 128-33. Nothing in the Department's record indicates that a copy of the long-term lease was ever requested by the Department. Tr., p. 18, ll. 2-5. On November 22, 1983, the Department approved the Application and gave written notice to St. Maries Wild Rice Growers that the Application for Permit had been approved. Tr., p. 19, ll. 13-22. No separate permit was issued. Tr., p. 19, ll. 9-12. The approval contained specified conditions, including that it did not grant a right-of-way across the lands of others. Tr., p. 20, ll. 1-1. Proof of beneficial use was submitted on January 10, 1984. Tr., p. 22. The Department conducted its field examination in 1991. Tr., p. 39. In 1991, the water right license was issued to St. Maries Wild Rice Growers for 1.4 cfs. The place of use was described as ten (10) acres in T 46 N, R 01 W, Section 7, and sixty (60) acres in T 46 N, R 01 W, Section 18. This land was owned by Robinson and now owned by Shippy. Tr., p. 11, ll. 5-9; Ex. 19. The license specifically stated "this water right is appurtenant to the described place of use." Tr., p. 62, ll. 13-20. This condition was included in addition to the above description of the place of use. Condition No. 6 of the license also provided that the permit does not grant any right-of-way or easement across the land of another.

In 1984, St. Maries Wild Rice, Inc. was incorporated. Tr., p. 23. A second water permit, Permit No. 92-7090, had been obtained by St. Maries Wild Rice Growers in 1983. That permit was assigned by a written assignment to St. Maries Wild Rice, Inc. There was no written assignment or transfer of Permit No. 91-7094 to the company. St. Maries Wild Rice, Inc. was administratively dissolved in 1988 and never reinstated. *Order*, p. 7.

Jeffrey Baker testified at trial. He was a partner with Al Bruner in St. Maries Wild Rice Growers and later, President of St. Maries Wild Rice, Inc. Tr., pp. 127-28. Mr. Baker testified that St. Maries Wild Rice Growers attempted, on several occasions, to obtain a lease agreement

with Aaron Robinson for the land, but were never able to obtain one. Tr., p. 128. They had an attorney draft lease agreements to use but were unable to obtain the Robinsons' signatures because "[h]e didn't want to sign a long-term lease." Tr., p. 130, ll. 23-24; Exs. S2, S3 and S4. Mr. Baker said that it was clear to him that Mr. Robinson would insist on ownership of the water right on his land. Tr., p. 137. When the water right license came out with Condition No. 2 clearly recognizing the right as appurtenant to the Robinson's land, Mr. Baker believed that the license validated his understanding – that the ownership of the water right would remain with the land, and Robinson who owned the land. Tr., pp. 137-38.

As the Special Master found, there is no written record in the licensing file showing that St. Maries Wild Rice Growers became St. Maries Wild Rice, Inc., nor was there ever an assignment of permit or change of ownership from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc. *Order*, p. 7. The Department has no knowledge of any relationship between St. Maries Wild Rice Growers and St. Maries Wild Rice, Inc. Tr., p. 24, ll. 7-13. In 2001, Al Bruner ("Bruner") entered into a contract with McInturff to sell his wild rice business to McInturff. In 2001, there was a sales agreement from Al Bruner to McInturff entitled a "Wild Rice Harvesting Business Agreement." Tr., pp. 40-42. It was unclear to IDWR if this agreement actually served to transfer an interest in the water right. At this time the license for the water right was not in the name of Bruner but in the name of St. Maries Wild Rice Growers. Tr., p. 42, ll. 1-15. Once again, there is no evidence in the record that there was ever any transfer of the permit or license from St. Maries Wild Rice Growers or St. Maries Wild Rice, Inc., to Mr. Bruner. During trial McInturff offered no proof of transfer of ownership of the permit to Bruner from anyone.

In 1993, Aaron and Jeanne Robinson deeded an undivided one-fourth (1/4th) interest in the real property, which is the place of use of the water right, to their son, Jeffrey Shippy. In

1994, the Robinsons deeded another one-fourth (1/4th) interest in the property to Jeffrey Shippy. In 1998, another undivided one-fourth (1/4th) interest in the property was deeded to Jeffrey Shippy. Then in 1999, the last one-fourth (1/4th) interest was deeded over to Jeffrey Shippy. In 2010, Jeffrey Shippy deeded all the interest in the property to a LLC, of which he was the managing member, Cedar Creek Ranch, LLC¹. Thus, the current owner of the property to which this water right is appurtenant is Cedar Creek Ranch, LLC. Tr., p. 14.

In 2005, McInturff submitted a Notice of Change in Water Right Ownership for Water Rights 92-7090 and 91-7094. Tr., p. 43, ll. 23-24. Attached to the Notice of Change of Ownership was this 2001 agreement between Bruner and McInturff, but nothing showing transfer to Bruner from the licensee. Tr., p. 44, ll. 6-17. McInturff did not notify Robinsons or Shippy of his Notice. Based on the Notice of Change of Ownership, the Department sent a letter to McInturff notifying McInturff that the Department modified its records to show the change of ownership. Idaho Code § 42-248 requires the Department to provide notice of any change of ownership. The Special Master correctly determined that there was no evidence that the Notice of Change of Ownership was provided to the prior owners as required by the statute. *Order*, p. 9.

IV. STANDARD OF REVIEW

A Special Master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (1993). This permits a district court to adopt the Special Master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a district court's standard of review of a Special Master's conclusions of law is one of free review. *Id.*

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¹ These recorded deeds are a matter of public record of which the Court can take judicial notice. They are attached to Shippy's *Motion to Alter or Amend* as Exhibits A-E.

V. ARGUMENT

Initially, there are no disputed issues of material fact. Shippy is not challenging factual findings made by the Special Master. Rather, this challenge is to the legal conclusions that the Special Master drew from the evidence.

A. There is No Written Evidence Establishing that the License was Transferred from St. Maries Wild Rice Growers to McInturff.

The Special Master's *Report and Recommendation* following trial concluded that Permit No. 91-7094 was not assigned to St. Maries Wild Rice, Inc. by St. Maries Wild Rice Growers, and there was no change of ownership to document any change in the name. *Report & Recommendation*, p. 6. There was a written assignment in 1986, for a different water right, water right 92-7090, changing ownership of that right from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc. *Id.*, p. 7. The Special Master concluded that there were a number of connections between Al Bruner and St. Maries Wild Rice, Inc. *Id.*, p. 10. But she also found that "[t]here were no intervening events such as a Transfer which transferred ownership of the license to another person or entity." *Id.* The Special Master then concluded that it was "reasonable to assume" that Mr. Bruner acquired assets of the business under the corporate dissolution statute. *Id.*, p. 10-11. Based on that assumption, the Special Master concluded that the water right license must have been transferred from St. Maries Wild Rice Growers to St. Maries Wild Rice, Inc. and thence to Bruner and thence to McInturff.

This conclusion is not supported by the law of the State of Idaho. It is essentially a speculative guess of what might have happened, and that is not sufficient to transfer a water right. Under Idaho Code § 55-601, there must be a writing to transfer a property right, and as the Special Master found, there is no such writing. Thus, there is no evidence that water right 91-7094 ever passed from St. Maries Wild Rice Growers in writing to Mr. Bruner. The *Report and*

Recommendation referred to the corporate dissolution statute, Idaho Code § 30-1-1405, for the proposition that a dissolved corporation may wind up its affairs. However, the Court overlooked Idaho Code § 30-1-1405(2)(a), which specifically provides that dissolution alone does not transfer title of the corporation's property. Since there is no writing to transfer the property to Mr. Bruner and the corporate dissolution alone does not do so, Bruner had no authority to transfer any property of either St. Maries Wild Rice Growers or St. Maries Wild Rice, Inc. to McInturff.

B. McInturff's Unilateral Notice of Change of Ownership to the Department was Not Sufficient to Transfer Ownership of the Water Right to Himself.

In the *Order on Motion to Alter or Amend*, the Special Master does not rely upon the assumption that the water right was somehow transferred to Mr. Bruner and thence to Mr. McInturff. Instead, the Special Master's decision rests upon the idea that McInturff's Notice of Change of Ownership was sufficient to transfer title to the property interest in the water right to himself, or at least that his unilateral transfer cannot be challenged. *Order*, pp. 10-13. The Special Master acknowledged that:

St. Maries Wild Rice Growers did not actually transfer the license to St. Maries Wild Rice, Inc. In fact, tracing ownership from St. Maries Wild Rice Growers to the corporate entity, to Al Bruner and then to Mr. McInturff underscores the gaps in proof. It would have been helpful to have evidence of what happened to the assets of St. Maries Wild Rice Growers.

Id., p. 13. Nevertheless, the Special Master concluded that the Court is bound by this transfer of ownership because it was an administrative action by the Department which could only be challenged under the Administrative Procedure Act. Presumably, twelve (12) years after the Department processed Mr. McInturff's Notice of Change of Ownership to himself, it would be too late to initiate a review of that agency action.

Importantly however, the Special Master also recognized that there was no notice to anyone of this change of ownership. Notice was not provided to the purported prior owner, Mr. Bruner. Nor was notice provided to the owner of record, St. Maries Wild Rice Growers. Nor was notice provided to the Corporation. Notice of this Change of Ownership was not provided to Shippy or Robinson. Notice of Change of Ownership was not published in any local newspaper.

The Special Master relied upon Idaho Code § 42-248 regarding the effect of notification in change of ownership. The notification statute simply provides a process for people to provide the Department with notice of change of ownership. It does not provide that the acknowledgement of the notice of change of ownership is a final agency action, nor indeed an order by the Director. Importantly, in addition the statute provides as follows:

The director of the department of water resources will be deemed to have provided notice concerning any action by the director affecting a water right or claim if a notice of the action is mailed to the address and owner of the water right shown in the records of the department of water resources at the time of mailing the notice.

Idaho Code § 42-248(3). The evidence here is undisputed that the Department did not provide notice of any action as required by law because the Department did not provide notice to the owner of the water right as shown in the records of the Department.

The Special Master's conclusion that the acceptance of the Notice of Change of Ownership, particularly when no notice was provided to anyone, is somehow binding on the world is not supported by the law of the State of Idaho.

The Special Master relied on this Court's SRBA decision in the *Facilities Volume* case for that conclusion. The *Facilities Volume* decision did not address the effect of a transfer. Rather it dealt with the effect of a license. There are enormous differences in the procedures for issuing a permit and license compared to a Notice of Transfer. There are far greater opportunities

for notice and public involvement in the licensing process. *See* Idaho Code § 42-202 through § 42-219. In particular, Idaho Code § 42-203A contains extensive notice requirements and opportunity for participation. Those requirements are lacking in the Notice of Transfer process, which is simply a paper-work exercise. Idaho Code § 42-248. Idaho Code § 42-220 states that the license is “binding upon the state.” There is no similar legislative directive regarding the effect of a transfer.

Moreover, the Department of Water Resources was certainly aware of the Notice of Change of Ownership, but the Department itself did not ever contend that McInturff’s unilateral change of ownership notice through the Department’s simple administrative process transferred ownership of that water right to McInturff. Otherwise, the Department would not have been confused about ownership and recommended that ownership be listed both in the name of McInturff and Shippy. Tr., p. 42, ll. 8-15. In addition, the Attorney General’s office has stated that the Department does not have the legal authority to quiet title a water right, or even to determine ownership. Rather, the Department simply maintains Notices of Change of Ownership submitted to it. Ex. A, email from Garrick Baxter (April 7, 2016); and Ex. B, email from John Homan (March 29, 2016).

Finally, if the Special Master’s conclusion that a single party and the Department can transfer ownership of a water right to another person without notice and an opportunity to be heard, that action would violate Idaho Code § 55-601 and Idaho Code § 9-503, which require there to be a writing signed by the party to be charged with the transfer. Such a holding would also violate the due process clause of the Idaho and United States Constitutions. It is a fundamental requirement of due process that a person affected by an action must be given a notice and opportunity to be heard. “Procedural due process requires that ‘there must be some

process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions.” *Aberdeen-Springfield Canal Company v. Peiper*, 133 Idaho 82, 92 P.2d 917, (1999). Due process requires that there be an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Castaneda v. Brighton Corp.*, 130 Idaho 923, 927, 950 P.2d 1262, 1266 (1998). Thus the Notice must provide the party whose right is to be deprived with an opportunity to be heard in a meaningful time and meaningful manner in order to satisfy the due process requirements. *Friends of Minidoka v. Jerome County*, 153 Idaho 296, 311, 281 P.3d 1076, 1089 (2012), *citing Peiper, supra*.

Not only was there no notice of any kind, there was no opportunity to be heard and certainly no opportunity to be heard in a meaningful time or meaningful manner. On the other hand, the SRBA does provide a mechanism for claims to be made and objections to be raised concerning ownership of the water right. *See* Idaho Code 42-1409(6). That is the meaningful opportunity to be heard. Concluding that McInturff’s stealth Notice of Change of Ownership process deprived Shippy of the right to raise any claim associated with the water right that was licensed to be appurtenant to his land would, if the Special Master’s decision were upheld, violate Shippy’s due process rights.

C. **Shippy’s Claim of Ownership of the Water Right is Not a Collateral Attack on the License.**

This license was issued to St. Maries Wild Rice Growers. Not to McInturff. As shown herein, and at trial, there was no transfer of ownership from St. Maries Wild Rice Growers to McInturff or anyone else. If Shippy’s claim of ownership constitutes a collateral attack on the license, so too is McInturff’s since he hasn’t proven that the license was transferred to him. What we have here is a question of ownership of water right that was licensed to an entity that no longer exists and which never transferred the right to any other entity or person. That license did,

however, require the right to be appurtenant to the property, and not just by way of a description of the place of use. There was an express requirement in this license that the right be appurtenant.

Certainly, the application for a permit was at best stretching the facts by claiming that the right to use the Robinson property was under a “long-term lease.” Even so, Mr. Baker’s testimony made it clear that it the applicant, St. Maries Wild Rice Growers, intended that the water would be and would remain, appurtenant to the Robinson property. That is what the license provides. Now that St. Maries Wild Rice Growers no longer exists, the water right remains appurtenant to the property and as an appurtenance could only be transferred under the ownership of the land.

D. The Remarks from the License Must be Included in the Partial Decrees.

As noted, the permit and license both contained a condition requiring that the right be appurtenant to the real property described in the license. License Condition No. 2. Yet, the proposed Partial Decree omits that and the other conditions.

The law of the SRBA is clear that the remark must remain on the license. *Order on Challenge of “Facility Volume Issue,”* Consolidated Subcase No. 36-02708, p. 17 (Dec. 29, 1999). Changing a licensed condition would be tantamount to redefining the real property. *Id.* p. 15. Thus, the State is bound to include the licensed conditions. *Id.*

It is important that the right be decreed with this condition, particularly because the Special Master indicated that the right is “not necessarily” appurtenant to the property. Such a conclusion cannot stand in light of the condition on the license for this right.

E. Ownership of the Land and the Appurtenant Water Right Passed from Robinson to Shippy.

In *Joyce Livestock v. United States*, 144 Idaho 1 (2007), the Supreme Court held that stockwater rights on public lands were appurtenant to the ranchers' home property and patented ground even though the beneficial use occurred on other land owned by the federal government. The important part of that case for this proceeding is that the Court reaffirmed the principle that the water right passes with the property to which it is appurtenant even though the deed does not expressly mention the water right. As the Court stated:

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention 'appurtenances.'

Id., at p. 14; *Mullinix v. Kilgore Salmon River Fruit Company*, 158 Idaho 269, 277 (2015); *Crow v. Carlson*, 107 Idaho 461 (1984). Idaho Code § 42-220 also provides that when a license is issued by the State, "all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of the use is granted."

The Special Master relied on the decision of *First Security Bank of Blackfoot v. State*, 49 Idaho 740, 746 (1930), which held that a water right is "not necessarily appurtenant to the land on which it is used." Therefore, the Special Master concluded that this water right is not necessarily appurtenant to the land on which it was used. However, that conclusion is either a collateral attack on the license or a misconstruction of the license because the license specifically requires the water right to be appurtenant to the land.

The Special Master then states that the cases recognizing that an appurtenant water right transfers with the deed to the underlying property only apply when there is a unity of ownership

of the land and the water right. The Special Master's conclusion that the *Mullinix* case is one such case is actually not factually correct. In that case, the original water right was held in the name of James Killgore under a license. The case involved a very complex series of property transactions among various parties that were not necessarily reflected in the license.

Nevertheless, the Court agreed in *Mullinix* that the water right appurtenant to the land transfers with the conveyance of the land.

In this case it is not necessary to go to the length to decide, whether, as an abstract matter, what the outcome would be if the original licensee and the owner of the land were in a dispute. That is not the case here, as the Special Master's findings made clear. The original licensee does not exist and never transferred its interest in the water to anyone else. As a result, because the water right was appurtenant to the land, the only possible owner of the water right is the owner of the land.

The *First Security Bank* case, relied upon by the Special Master, did not involve a dispute between a person who was not the licensee and the landowner to which the water right was appurtenant. The dispute arose when the bank filed an application to transfer the point of diversion and place of use of the water right to land that the bank owned. In that case there was a clear chain of title from the original licensee and the bank, which acquired title to the water right as a result of a security interest. Those links in the chain of title present in *First Security Bank* are completely lacking here. So McInturff cannot rely on the *First Security Bank* case because he is not in the same legal position as the bank was in that case.

F. McInturff has Waived Any Claim to Water Right 91-7094.

Shippy's *Motion to Alter or Amend* was filed and served on McInturff in November 2016. The Court also provided Docket Notice of the *Motion to Alter or Amend*. After that Docket

Notice, the Court issued a scheduling order setting a hearing for the *Motion to Alter or Amend* and setting a briefing schedule. That notice was served on McInturff. McInturff's opposition to the *Motion to Alter or Amend* was due January 18, 2017. McInturff filed nothing. At the hearing before the Special Master on the *Motion to Alter or Amend*, McInturff once again failed to appear. The Court asked staff to try and contact McInturff and they did so, but he still failed to appear. McInturff provided no facts, no basis, no analysis or any other reason that the *Motion to Alter or Amend* should not be granted.

Even if McInturff is proceeding *pro se* there is no excuse for his refusal to respond to the Order of the Court and to follow the procedures required by the Scheduling Order. *Sammis v. Mhenetek, Inc.*, 130 Idaho 372, 346, 941 P.2d 314, 318 (1997) (*pro se* litigants are not excused from adhering to procedural rules). Perhaps McInturff realized that they had not carried their burden of proving ownership of the water right. Whatever the reason, "*pro se* litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules." *Greenfield v. Smith*, Docket No. 43831 (June 6, 2017). McInturff has been an active participant in the CSRBA proceedings involving this water right and therefore cannot claim ignorance. *See Greenfield, supra*. At the very least, McInturff should be precluded from raising any issues not included in his trial testimony and precluded from arguing that he acquired title from St. Maries Wild Rice Growers.

VI. CONCLUSION

The Special Master's determination that McInturff has an interest in the water right is clearly not supported by the law or the facts. There is no writing or other documentation transferring the water right from the original licensee, St. Maries Wild Rice Growers, to McInturff or through any chain of title to him. That much everyone agrees on, including the

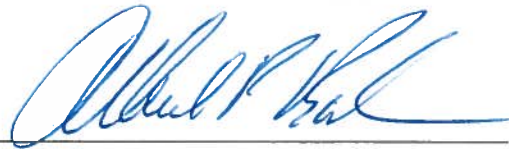
Special Master. McInturff's attempt to transfer title to himself without notice to the prior owner as required by law, or to the landowner to whose property the right is appurtenant is not sufficient to transfer title to himself. IDWR and the Attorney General's office agree. Preventing Shippy from demonstrating that McInturff acquired no interest in the water right by this paper-work exercise would violate fundamental principles of due process.

On the other hand, this water right was expressly made appurtenant to Robinson's land. Shippy is now the owner of Robinson's land. Title passed to him by deed and all appurtenant water rights passed to him by deed. No one has standing or the right to challenge his interest in the water right, including McInturff, who have not proven that they hold any interest in the water right.

Under the circumstances of this case, the partial decree should be issued in the name of Shippy. McInturff should not be listed as a co-owner or an owner in any capacity. The partial decree should also include conditions 2 and 6 from the permit and license, affirming that the right is appurtenant to the land and that the right itself is not a grant of the right to use another's land.

DATED this 16th day of June, 2017.

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker

Attorneys for Jeffrey C. Shippy

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 16th day of June, 2017, I served true and correct copies of the foregoing **SHIPPY'S OPENING BRIEF ON NOTICE OF CHALLENGE** upon the following by the method indicated:

SRBA District Court
253 3rd Ave. North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

☒ U.S. Mail, Postage Prepaid
☒ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Darcy and Douglas McInturff
17786 E. Canary Creek Rd.
Cataldo, ID 83810

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email

Director of IDWR
P.O. Box 83720
Boise, ID 83720-0098

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile
☐ Email



Albert P. Barker

EXHIBIT A

From: Baxter, Garrick [<mailto:Garrick.Baxter@idwr.idaho.gov>]

Sent: Thursday, April 07, 2016 2:29 PM

To: Chris Bromley <cbromley@mchughbromley.com>; Paul Arrington <pla@idahowaters.com>; Jones, Doug <Doug.Jones@idwr.idaho.gov>

Cc: Fawcett, Trish <Trish.Fawcett@idwr.idaho.gov>; Albert Barker <abb@idahowaters.com>

Subject: RE: Belle Ranch & First Security Corporation Water Rights originally decreed as South County Estates LLC

Chris and Paul,

Thank you for your letters and emails. As John indicated in his previous email, the Department does not have the authority to determine ownership of water rights. The Department only maintains notices of change of ownership submitted to it. The appropriate forum to resolve a dispute over ownership is a district court. Your letters and emails make it clear that the ownership of the 7.5/289th portion the water rights is in dispute. The Department takes no position as to this dispute. I have recommended to the Department that it update its files to include the recent letters and emails regarding the ownership dispute. I have also recommended that the Department's database refer to the files if someone queries information regarding ownership. Should this ownership dispute be resolved by a district court, please provide the Department with a copy of the judgment and the Department will gladly update the records to reflect the finding of the court.

Garrick Baxter
Deputy Attorney General
Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098
garrick.baxter@idwr.idaho.gov
Phone: (208) 287-4811
Fax: (208) 287-6700

EXHIBIT B

From: Homan, John [mailto:John.Homan@idwr.idaho.gov]

Sent: Tuesday, March 29, 2016 3:44 PM

To: Paul Arrington <pla@idahowaters.com>

Cc: Chris Bromley <cbromley@mchughbromley.com>; Baxter, Garrick <Garrick.Baxter@idwr.idaho.gov>; Jones, Doug <Doug.Jones@idwr.idaho.gov>; Fawcett, Trish <Trish.Fawcett@idwr.idaho.gov>

Subject: Belle Ranch & First Security Corporation Water Rights originally decreed as South County Estates LLC

Paul,

Trish Fawcett forwarded your letter dated March 17, 2016 to the legal staff at the State Office for review and reconsideration. I told her I would review the materials you submitted and materials previously submitted with the change in ownership in 2015. I have completed my review and have advised Idaho Department of Water Resources ("Department" or "IDWR") to change its records for the 7.5/289th portion of the water rights into the name of South County LLC., the name listed on the partial decree dated August 31, 2010.

As you are aware IDWR does not possess the legal authority to quiet title in ownership disputes. Disputes over title to real property can only be resolved by a quiet title action brought before a district court. Idaho Code § 6-401; *see also Rural Kootenai Organization, Inc. v. Board of Com'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999)(Kootenai County Board of Commissioners lacks jurisdiction to determine who owns title to submerged lands.); *see also Bonner Bldg. Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 685, 682 P.2d 635, 638 (Ct. App. 1984)(A district court has jurisdiction in action to quiet title.). IDWR only maintains and updates water right ownership records pursuant to Idaho Code Section 42-248. The Department elected to process the First Security Corporation's change in ownership based upon the materials submitted at the time with the application. Despite providing notice of the change to Belle Ranch on January 13, 2015, IDWR did not receive any communication from you expressing a concern with this change until your March 17, 2016 letter. Review of earlier materials and consideration of your recent arguments and submitted materials indicate there is a dispute over current ownership of the 7.5/289th portion of these water rights. Because ownership is disputed, I have advised IDWR to change its records for the 7.5/289th portion of the water rights into the name of South County LLC consistent with the partial decrees.^[1] Should you or anyone else disagree with the characterization of the ownership in the Department's records, you have the option to quiet title to the water right in district court. The Department will then alter its water right ownership records, should it become necessary, to comport with the district court judgment.