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

In Re SRBA

Subcase Nos. 61-248 and 61-10419

Case No. 39576

**MOUNTAIN HOME IRRIGATION
 DISTRICT MEMORANDUM IN
 SUPPORT OF MOTION FOR
 SUMMARY JUDGMENT**

COMES NOW the Mountain Home Irrigation District ("MHID") by and through its counsel of record, McHugh Bromley, PLLC, and files this *Memorandum in Support of Mountain Home Irrigation District's Motion for Summary Judgment*, filed contemporaneously herewith. In addition, the Memorandum is supported by the Declaration of David Ascuena and the records of this Court.

I. SUMMARY OF THE ARGUMENT

In Idaho, a water right is required to be diverted and put to beneficial use. In the absence of a water right – and with limited exceptions such as for *deminimis* domestic and stockwater use – it is illegal to divert and put water to beneficial use. As to irrigation water rights with priority dates pre-dating the 1987 commencement of the Snake River Basin Adjudication ("SRBA"),

partial decrees were required to be issued in order for rights to remain valid. If an irrigation water right that pre-dated commencement of the SRBA was not partially decreed, the consequence was the right ceased to exist: “All [] water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed.” *Final Unified Decree* at 10, ¶ 1.

Here, Weitz and Company, Inc. (“Weitz”) is demanding MHID divert and deliver what was once known as water right no. 61-248 (“61-248”), bearing a priority date of April 8, 1885 with a diversion rate of 160 inches (3.2 cfs), through MHID’s system of reservoirs and canals for irrigation of Weitz’s property. The demand is made despite the fact that the records of the Court show no partial decree was ever issued for 61-248. Therefore, consistent with the Final Unified Decree, the Court should rule 61-248 is no longer a water right.

II. UNDISPUTED FACTUAL AND PROCEDURAL BACKGROUND

MHID is an irrigation district located in Elmore County, Idaho. *Declaration of David Ascuena* at 1, ¶ 1. MHID was partially decreed water rights in the SRBA in Basin 61 and Basin 63. *Id.* MHID owns and operates a diversion system within these basins through which it conveys irrigation water to the lands of its patrons in Elmore County. *Id.* A source of some of MHID’s water rights is Canyon Creek. *Verified Petition for Declaratory Judgment* at 3-4, ¶ 8; *see also Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right No. 61-00263* (October 26, 2000).

Weitz is a successor-in-interest to real property in Elmore County that at one time was owned and irrigated by Richard Bennett with water from Canyon Creek. *Verified Petition for Declaratory Judgment* (October 5, 2020), *Exhibit 11* at 1 (“The Idaho Department of Water Resources (IDWR) has previously identified the Bennett Ranch to have a water right identified as

Certificate No. 61-0248, and that right showed Richard Bennett as the Decreed owner . . . currently owned by Weitz & Co., Inc.”).

On July 30, 1914, the Elmore County district court in the case *Bennett v. Nourse* (“Canyon Creek Decree”) decreed some of “the waters of Canyon Creek in Elmore County, Idaho” *Verified Petition for Declaratory Judgment* (October 5, 2020), *Exhibit 1 (Canyon Creek Decree)* at 1. In the Canyon Creek Decree, Richard Bennett was decreed 61-248, a natural flow water right for 160 inches (3.2 cfs) with a priority date of April 8, 1885 for irrigation of some number of acres from an unknown point or points of diversion. *Id.*

As required by commencement of the SRBA, water rights with priority dates prior to November 19, 1987 had to be partially decreed to remain valid. *Final Unified Decree* at 10, ¶ 1. There exists no claim in the records of the Idaho Department of Water Resources (“IDWR”) for 61-248 filed by Richard Bennett or his successors-in-interest, *Verified Petition for Declaratory Judgment* (October 5, 2020), *Exhibit 8 (Affidavit of Craig L. Saxton)* at 2, ¶ 7, nor was a partial decree issued by the Court for 61-248. *Id.* at 3, ¶ 12.

On October 5, 2020, MHID filed a *Verified Petition for Declaratory Ruling* (“Petition”) with this Court. The Petition was filed because Weitz was demanding MHID divert and deliver natural flow and storage water under 61-248 through the MHID system for irrigation of Weitz’s property. *See Petition, Exhibit 11* at 4. Because 61-248 was not partially decreed in the SRBA, Count 1 of the Petition moved the Court to declare, “By operation of the *Final Unified Decree*, 61-248 was decreed disallowed and is no longer a valid water right.” *Petition* at 13.

On December 15, 2020, Weitz opposed the relief requested in Count 1. *Response to Verified Petition for Declaratory Judgment* (“Response”). Also on December 15, 2020, Weitz filed a *Motion to Dismiss or in the Alternative Motion to Change Venue and Memorandum in Support Thereof* (“Motion to Dismiss”).

On December 31, 2020, MHID filed a *Reply* to the Response.

On January 12, 2021, MHID filed a *Response* to Motion to Dismiss.

On January 22, 2021, in response to Weitz's *Motion to Dismiss* and argument thereon, the Court issued its *Order on Motion to Dismiss or in the Alternative Motion to Change Venue*, ruling that summary judgment may proceed on Court 1 of MHID's Petition.

III. STANDARD OF REVIEW

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). The party moving for summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 740, 451 P.3d 446, 453 (2019). The party moving for summary judgment may satisfy his or her initial burden by establishing, either by an affirmative showing with the moving party's own evidence or by reviewing the nonmoving party's evidence, that the nonmoving party will be unable to prove an element of a claim or defense at trial. *McCorkle v. Northwestern Mutual Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (2005).

Once the moving party does so, the nonmoving party must adduce sufficient admissible evidence to support a finding by the trier of fact in the nonmoving party's favor on such element or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Id.* The nonmoving party cannot rest upon mere speculation and must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Cantrell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact. *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). Summary judgment is appropriate where the

nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to the party's case. *Cantrell* at 133, 191 P.3d at 211. The fact that both parties move for summary judgment does not demonstrate there is no disputed material issue of fact. *Currie v. Walkinshaw*, 113 Idaho 586, 746 P.2d 1045 (Ct. App. 1987).

IV. ARGUMENT

It is blackletter law in Idaho: "No person shall use the public waters of the state of Idaho except in according with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without first having obtained a valid water right to do so" I.C. § 42-201(2). Because 61-248 was not partially decreed in the SRBA, it is not a valid water right that can be diverted by anyone, let alone by MHID or Weitz.

Prior to the mandatory permit statutes for ground water, I.C. § 42-229 (1963), and surface water, I.C. § 42-201 (1971), water users could rely on Idaho's "statutory method of appropriation and the constitutional method of appropriation" to establish their lawful right to diversion of water. *Fremont-Madison Irr. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). In addition to the statutory and constitutional methods, water users sometimes organized private adjudications in Idaho's district courts to decree the use of water. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997).

Against this patchwork quilt of appropriation methods, the SRBA was commenced on November 19, 1987, in part, to establish a comprehensive list of water rights within the boundaries of the Snake River Basin: "In response, the legislature enacted legislation to commence an adjudication of the rights of the Snake River basin. The legislation stated, 'Effective management in the public interest of the waters of the Snake River basin requires that a comprehensive determination of the nature, extent and priority of the rights of all users of

surface and ground water from the system be determined. On June 17, 1987, R. Keith Higginson, as Director of the Idaho Department of Water Resources (Department), filed a petition in the name of the State to begin the Snake River Basin Adjudication (SRBA), and on November 19, 1987, the court ordered that the adjudication was commenced.” *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 795, 252 P.3d 71, 76 (2011) (emphasis added) (internal citations omitted).

Upon commencement, and with limited exceptions that do not apply here, all uses of water within the Snake River Basin that pre-dated November 19, 1987 were required to be partially decreed to remain valid. *Black Canyon Irr. Dist. v. State*, 163 Idaho 144, 151, 408 P.3d 899, 906 (2018) (“A general adjudication . . . is conclusive as to the nature of all rights to the use of water in the adjudicated system”) (emphasis in original).

As the SRBA was winding up, the Court undertook the process to enter a Final Unified Decree. *Deadline for Filing Notice of Intent to Participate; Notice of Court’s Intent to Designate Basin-Wide Issue*, Subcase No. 00-92099 (In Re: Form and Content of Final Unified Decree) (May 18, 2011). *See also* I.C. § 42-1413. On August 26, 2014, the Final Unified Decree was issued by the Court. According to the Final Unified Decree’s enumerated paragraphs:

1. This Final Unified Decree is conclusive as to the nature and extent of all water rights with the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987

. . . .

All other water rights with a priority before November 19, 1987, not expressly set forth in this Final Unified Decree are hereby decreed as disallowed. [footnote omitted referencing subcases that were pending resolution, none of which included 61-248]

. . . .

8. This Final Unified Decree is binding against all persons including any persons that deferred filing of domestic and/or stock water claims

....

10. All water rights based on beneficial use, licenses, permits, posted notices, and statutory claims required to be claimed in this proceeding are superseded by this Final Unified Decree.

....

11. All prior water right decrees and general provisions within the Snake River Basin water system are superseded by this Final Unified Decree except as expressly provided otherwise by partial decree or general provisions of this Court.

Final Unified Decree at 9-12 (emphasis added).

Here, it is undisputed that 61-248, a natural flow water right with a priority date of April 8, 1885 for 160 inches (3.2 cfs) of surface water from Canyon Creek for irrigation of Richard Bennett's property in Elmore County, was required to be partially decreed in the SRBA to remain valid. *Final Unified Decree* at 9-10, ¶ 1. Because the terms of the Canyon Creek Decree were not carried forward into the SRBA, it was superseded by the Final Unified Decree. *Id.* at 12, ¶ 11. According to the records of IDWR and the SRBA, no claim was filed for 61-248 by Richard Bennett or his predecessors, including Weitz. *Petition, Exhibit 8 (Affidavit of Craig L. Saxton)* at 2, ¶ 7; *see also Larson v. State*, 91 Idaho 908, 909, 435 P.2d 248, 249 (1967) ("The district court may take judicial notice of its own records, in the case before it."). Moreover, those same records show no partial decree was issued by the Court for 61-248, *Petition, Exhibit 8 (Affidavit of Craig L. Saxton)* at 3, ¶ 12; *see also Larson* at 908, 435 P.2d at 249, meaning 61-248 was "expressly . . . decreed disallowed" by operation of the Final Unified Decree. *Final Unified Decree* at 10, ¶ 1 (emphasis added). Simply stated, there is no water right with a priority date of April 8, 1885 for 3.2 cfs from Canyon Creek for the irrigation of the Weitz property in the records of the SRBA, period. Because Weitz is a successor-in-interest to the property owned by

Richard Bennett, and by falling within the boundaries of the SRBA, Weitz is bound by the Final Unified Decree. *Final Unified Decree* at 11, ¶ 8; *see also United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 60, 408 P.3d 52, 58 (2017).

Based on the undisputed facts that no partial decree was issued for 61-248, together with the plain language of the Final Unified Decree, the Court should rule as a matter of law that 61-248 was decreed disallowed.

V. CONCLUSION

The undisputed facts show 61-248 with its priority date of April 8, 1885 for irrigation of property in Elmore County with a diversion rate of 160 inches (3.2 cfs) from Canyon Creek was required to be partially decreed in the SRBA to remain valid. Furthermore, the undisputed facts show no partial decree was ever issued by the Court for 61-248, nor were the same elements of water right 61-248 likewise decreed in another water right. Based on the plain language of the Court's Final Unified Decree, which is binding on Weitz, 61-248 was thereby decreed disallowed. Therefore, the Court should rule, as a matter of law, consistent with Count 1 of MHID's Petition that, by operation of the Final Unified Decree, 61-248 was decreed disallowed and is no longer a valid water right.

DATED this 16th day of February, 2021.


CHRIS M. BROMLEY
Attorneys for Mountain Home Irr. Dist.

CERTIFICATE OF SERVICE

I certify that on this 16th day of February, 2021, I caused to be served a true and correct copy of the foregoing was served as follows:

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