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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

Case No. 39576

Subcase Nos. 61-248 and 61-10419

**MHID'S MEMORANDUM IN
SUPPORT OF MOTION TO STRIKE
PORTIONS OF THE AFFIDAVITS OF
TIMOTHY M. HEALY, DANIEL P.
WEITZ, AND EXHIBIT 1 TO
MEMORANDUM IN SUPPORT OF
WEITZ'S MOTION FOR SUMMARY
JUDGMENT**

COMES NOW Mountain Home Irrigation District ("MHID"), through its counsel of record McHugh Bromley, PLLC, and files this Memorandum in Support of its Motion to Strike portions of the Affidavit of Timothy M. Healy ("Healy Affidavit"), the Affidavit of Daniel P. Weitz ("Weitz Affidavit"), and the entirety of Exhibit 1 to the *Memorandum in Support of Weitz's Motion for Summary Judgment* ("Weitz Memo").

I. INTRODUCTION

The Healy Affidavit and Weitz Affidavit submitted by Weitz & Company, Inc. ("Weitz") contain several paragraphs that should not be considered by the Court on summary judgment.

Paragraph 6 to the Healy Affidavit and paragraphs 5, 6, 7, and 8 to the Weitz Affidavit contain inadmissible hearsay and legal analysis couched as factual knowledge. Exhibit 1 to the *Memorandum in Support of Weitz's Motion for Summary Judgment* is an Idaho Department of Water Resources ("IDWR") *Memorandum*, dated April 13, 2009 ("AJ Memo"), that purports to explain how IDWR processes splits of water rights. The AJ Memo is dated 9 years after the Court issued the *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 61-10419*. The Court should strike the above-referenced paragraphs of the Healy Affidavit, the Weitz Affidavit, and the entirety the AJ Memo.

II. LEGAL STANDARD

Only admissible evidence may be considered in ruling on a motion for summary judgment. *Taft v. Jumbo Foods, Inc.*, 155 Idaho 511, 314 P.3d 193, 197 (2013). Admissibility of evidence within depositions and affidavits in support or in opposition to a motion for summary judgment is a threshold question to be addressed before a court can determine the outcome of the summary judgment. *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 837-38, 153 P.3d 1180, 1183-84 (2007). The question of admissibility of testimony offered in connection with a motion for summary judgment is committed to this Court's sound discretion. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007) (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)).

Rule 56(e) states that affidavits filed in support or opposing summary judgment must be made on "personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

I.R.C.P. 56(e). Only material contained in affidavits or depositions that is based upon personal knowledge and that is admissible at trial should be considered by this Court. *Gem State* at 14,

175 P.3d at 176. Statements by a fact witness that are nothing more than legal analysis are not statements of fact made on personal knowledge. *See Taft* at 515, 314 P.3d at 197.

Additionally, IRCP 56(c)(1)(A) requires a party to support its factual positions by: “citing to particular parts or materials in the record, including...affidavits or declarations” Here, Weitz’s *Motion* and *Memorandum* make no mention of the Weitz or Healy Affidavits, much less any “particular part.” Consequently, as specified in IRCP 56(c)(3), “The Court need consider only the cited materials, but it may consider other materials in the record.”

“When a ‘trial court is being asked to admit or to strike evidence, the initial question . . . [is]: Is the evidence relevant?’ *State v. Hocker*, 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct.App. 1989). ‘Evidence that tends to prove the existence of a fact of consequence in the action, and has any tendency to make the existence of a fact more probable than it would be without the evidence, is relevant.’ *Id.* ; I.R.E 401. ‘All relevant evidence is admissible . . . [e]vidence which is not relevant is not admissible.’ I.R.E. 402. Relevant evidence can be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . waste of time, or needless presentation of cumulative evidence.’ I.R.E. 403.” *Elliott v. Murdock*, 161 Idaho 281, 287, 385 P.3d 459, 465 (2016).

III. ARGUMENT

A. Paragraph 6 To The Healy Affidavit Should Be Stricken

Paragraph 6 to the Healy Affidavit and paragraphs 5, 6, and 7 to the Weitz Affidavit contain statements that run afoul of what should be considered admissible evidence on summary judgment.

Mr. Healy states in Paragraph 6: “Water delivered to the Bennett Ranch by the Mountain Home Irrigation District is allocated under Water Right No. 61-248 and District-issued water

shares owned by Weitz & Company, Inc., or its predecessors in interest.” *Healy Affidavit* at 2. As a fact witness, Mr. Healy cannot make the assertion that water is allocated under 61-248 when the right itself was not partially decreed by the Court in the SRBA, with the very existence of the right squarely before the Court on summary judgment, and Weitz admitting in its *Memorandum in Support of Weitz’s Motion for Summary Judgment* (“Memorandum”) that “61-248 is no longer a right of use independently recognized by the State.” *Memorandum* at 4 (emphasis added). See IRE 701(c).

The statement, “61-248 is no longer a right of use independently recognized by the State,” constitutes a judicial admission by Weitz. A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact. *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 618-19, 930 P.2d 1361, 1363 (Ct. App. 1997) (citing *McLean v. City of Spirit Lake*, 91 Idaho 779, 783, 430 P.2d 670, 674 (1967); 29A AM. JUR.2d Evidence § 770 (1994); BLACK’S LAW DICTIONARY 48 (6th ed. 1990)); *Sun Valley Potato Growers, Inc. v. Tex. Refinery Corp.*, 139 Idaho 761, 765, 86 P.3d 475, 479 (2004). “To be a judicial admission a statement must be a deliberate, clear, and unequivocal statement of a party about a concrete fact within that party’s knowledge.” *Strouse* at 619, 930 P.2d at 1364. “The party making a judicial admission is bound by the statement and may not controvert the statement on trial or appeal.” *Id.*

Such an assertion by Mr. Healy regarding the existence of 61-248 contradicts Weitz’s previously made judicial admission that no such right exists, is a legal conclusion, lacks personal knowledge, and is hearsay in violation of IRE 802 as Mr. Healy failed to state or demonstrate in any way that he has any personal knowledge of MHID’s internal management.

B. Paragraphs 5, 6, and 7 To The Weitz Affidavit Should Be Stricken

Mr. Weitz states in Paragraph 5: “In acquiring Bennett Ranch, Weitz & Company, Inc. became the successors in interest in appurtenant beneficial water use historically recognized as Water Right No. 61-248.” This statement, like the one made by Mr. Healy described above, is rooted in a legal conclusion, which Mr. Weitz is unqualified to render, as to what water is and is not appurtenant to the property Weitz acquired in 2006. *Weitz Affidavit* at 1, ¶ 3 (“In 2006, Weitz & Company, Inc., acquired . . . real property located within Elmore County . . . historically known as Bennett Ranch.”). Moreover, as will be discussed in MHID’s response to Weitz’s Motion for Summary Judgment, the statement is legally inaccurate. The Idaho Supreme Court’s recent decision in *Eagle Creek Irrigation Company v. AC&CE Investments, Inc.*, 165 Idaho 467, 447 P.3d 915 (2019) reaffirmed that water within an irrigation district is not appurtenant to a specific piece of property within the place of use; rather, water is appurtenant to the whole of the district.

Mr. Weitz states in Paragraph 6: “Water Right No. 61-248 has historically been, and continues to be, exercised for the purpose of irrigation upon Bennett Ranch.” *Weitz Affidavit* at 2. As stated above in relation to Mr. Healy pursuant to IRE 701(c), Mr. Weitz, as a fact witness, cannot make this statement due to it being a legal conclusion, and hearsay in violation of IRE 802. Mr. Weitz’s personal knowledge of the property dates from 2006; thus, he has not laid the requisite foundation to demonstrate his personal knowledge of the historic beneficial use of 61-248 in violation of IRE 602. Furthermore, Weitz has already admitted 61-248 does not exist.

Mr. Weitz states in Paragraph 7: “Irrigation of Bennett Ranch under Water Right No. 61-248 has been exercised without interruption since it was acquired by Weitz & Company, Inc.” As stated previously, Weitz admits 61-248 does not exist; does not have the requisite personal

knowledge nor expertise, therefore, Mr. Weitz cannot state as a matter of fact that 61-248 has been exercised.

C. Exhibit 1 To The Weitz Memo Should Be Stricken

In the Weitz Memo, the AJ Memo was included as Exhibit 1 to support a statement made on page 6, line 7, purportedly to explain how IDWR processes water right splits. “Whether rights are split or combined, new numbers are issued in place of the old ones, which are archived as parent rights in the data entry pedigree. *See Adjudication Memorandum #26*, attached hereto as Exhibit 1.” *Weitz Memo* at 6. The AJ Memo is dated April 13, 2009. How IDWR may have viewed water right splits in 2009 is irrelevant to the matter at hand, one that involves questions surrounding an SRBA partial decree issued on October 26, 2000 for water right no. 61-10419. Because the AJ Memo post-dates the SRBA partial decree for 61-10419 by nine years, it cannot be relevant for any purpose. *Murdock* at 287, 385 P.3d at 465.

IV. CONCLUSION

For the foregoing reasons, the Court should grant MHID’s *Motion to Strike* paragraph 6 of the *Healy Affidavit*, paragraphs 5, 6, and 7 of the *Weitz Affidavit*, and *Adjudication Memorandum #26*, included as Exhibit 1 to *Memorandum in Support of Weitz’s Motion for Summary Judgment*.

DATED this 25th day of February, 2021.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY
Attorneys for MHID

CERTIFICATE OF SERVICE

I certify that on this 25th day of February, 2021, I caused to be served a true and correct copy of the foregoing upon the following persons by U.S. Mail:

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