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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

**MOUNTAIN HOME IRRIGATION
 DISTRICT MEMORANDUM IN
 REPLY TO WEITZ'S RESPONSE TO
 MHID'S 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 Reply to Weitz Memorandum in Support Motion for Summary Judgment* ("Reply"), supported by the records of this Court and previously filed pleadings and declarations in this matter.

I. INTRODUCTION

On February 26, 2021, Weitz & Company, Inc. ("Weitz") filed a *Response to MHID's Motion for Summary Judgment* ("Weitz Response"). In the Response, it is argued that summary judgment should be granted in favor of Weitz. While Weitz again admits that 61-248 was not partially decreed by this Court, Weitz continues to argue that a specific portion of 61-10419 is

owned by Weitz. As will be explained, Weitz misapplies the standard of review for an SRBA partial decree, the *Final Unified Decree*, and the law as to ownership of an SRBA partial decree.

II. ARGUMENT

A. Weitz Admits 61-248 Is No Longer A Water Right

In Response, Weitz admits “there is some veracity” in MHID’s argument that 61-248 is not a valid water right. *Weitz Response* at 2 (emphasis added). This admission is consistent with what Weitz already stated in its opening brief on summary judgment: “61-248 is no longer a right of use independently recognized by the State.” *Memorandum in Support of Weitz’s Motion for Summary Judgment* at 4 (emphasis added). As prayed for by MHID, the Court should therefore grant MHID’s Motion for Summary Judgment that 61-248 is not a valid water right.

B. The Standard Of Review Precludes Weitz From Looking Behind 61-10419 And The Final Unified Decree

The Weitz Response again confuses the standard of review of an SRBA partial decree. Rather than starting with the plain language of 61-10419 and the *Final Unified Decree* to raise ambiguity, Weitz goes behind those documents to create an argument as to what is meant by 61-248 – a right Weitz admits was never decreed – and 61-10419: “It is indisputable the Notice of Claim MHID submitted in 1989 and eventually numbered 61-10419 was intended to be a ‘combination’ of six existing appropriations recognized as water rights in previous adjudications, among them 61-248.” *Weitz Response* at 3 (emphasis added).

As explained in MHID’s Response, Weitz must first start with the partial decree to assert ambiguity that could then allow review of an underlying document like a claim or recommendation to arrive at a conclusion that differs from the plain language of 61-10419: “It is well settled law when reviewing an SRBA partial decree: ‘this Court utilizes the same rules of interpretation applicable to contracts. If a decree’s terms are unambiguous, this Court will

determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words.’ *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (internal citations omitted).” *MHID Response* at 5. Neither in its opening brief nor in response does Weitz cite the standard of review or allege ambiguity in the partial decree that would then allow it or this Court to look backward. Rather, Weitz builds an argument from the opposite direction – claim to partial decree. Because no ambiguity has been pled or alleged, Weitz cannot ask the Court to look beyond the plain language of 61-10419, which contains no reference to 61-248. *Exhibit 9 to Verified Petition for Declaratory Judgment; Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 61-10419*.

As to 61-248, Weitz admits, and the record clearly shows, that 61-248 was not partially decreed in the SRBA. As such, the *Final Unified Decree*’s catch-all provision controls: “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].” *Final Unified Decree* at 10, ¶ 1 (emphasis added). Weitz, who is bound by the *Final Unified Decree* at 11, ¶ 8, has not asked the Court to construe the decree any differently than it was written; thus, its plain language should apply. *Sylte v. Idaho Dept. of Water Res.*, 165 Idaho 238, 243-44, 443 P.3d 252, 257-58 (2019) (affirming this Court’s decision to apply a plain language test to the unambiguous Twin Lakes-Rathdrum Creek Drainage Basin’s Final Decree). Nor has Weitz moved the Court to set aside the *Final Unified Decree* or the Court’s December 1, 2011 *Order Closing Claims Taking in Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86 and Disallowal of Unclaimed Water Rights* (“Basin 61 Closure Order”);¹ thus, Weitz has not moved for the type of relief that

¹ On December 1, 211, the Court entered its *Order Closing Claims Taking in Basins 23, 24, 25, 43, 51, 55, 57, 61, 81, 82, 83, 84, 85, and 86 and Disallowal of Unclaimed Water Rights* (Subcase No. 00-92099) (“Basin 61 Closure

could entitle it to raise additional issues. *Eden v. State*, 164 Idaho 241, 253, 129, 141 (2018) (affirming this Court’s decision to deny Eden’s attempt to set aside the *Final Unified Decree* and associated basin closure order due to “significant prejudice and potential undermining of over 158,600 water rights that were timely claimed, adjudicated and decreed”). By failing to assert ambiguity or to move the Court to set aside the *Final Unified Decree* and/or the Basin 61 Closure Order, Weitz, who is bound by the Court’s prior decisions, must accept the landscape as it was found.

C. Weitz Misapplies The Law As To Ownership Of An SRBA Partial Decree

Weitz clearly misstates Idaho law in asserting that “ownership” is not an “element” of an SRBA partial decree, and instead is a “contour” of a water right that can now be changed by the Court:

The one aspect 61-248 and 61-10419 clearly do not share is “title” or ownership, which is not considered a defining element of a water right under Idaho law. *A&B Irrigation District v. State (In re SRBA)*, 336 P.3d 792, 796, 157 Idaho 385, 391 (2014). . . . So while the *Final Unified Decree* is ‘conclusive as to the **nature and extent** of all water rights that fall within the parameters of the SRBA, Idaho Code 42-1420(1) (emphasis added), it does not indelibly establish the “title” or owner of those rights. In other words, “title” and ownership of water rights, even those confirmed by judicial decree can be changed.

Therefore, this Court is not precluded from considering the contours of the entitled ownership for 61-10419 – or, more precisely, title to the portion of 61-10419 that represents the use that can be attributed to 61-248, namely the 3.2 cfs diversion rate.

Weitz Response at 4 (bold in original) (emphasis added).

Order”). “Completion of claims taking in individual basins is an essential first step to completion of the SRBA. Without it, completion of the SRBA will not occur.” *Id.* at 2. As to the attached lists of unclaimed water rights: “The preparation of this list was undertaken as a courtesy to the water users, not as an additional due process requirement.” *Id.* at 3 (emphasis added). By coming into ownership of the property in 2006, *Affidavit of Daniel P. Weitz* at 1, ¶ 3, Weitz had notice of the contents of the SRBA before and after the Basin 61 Closure Order and the *Final Unified Decree*, with ample opportunity to assert interests.

Weitz is quite simply wrong. The argument advanced is directly at odds with the Supreme Court's recent decision in *First Security Corp. v. Belle Ranch, LLC*, 165 Idaho 733, 451 P.3d 446 (2019). There, the Court squarely addressed the issue of ownership of a water right partially decreed in the SRBA, unequivocally holding that the "name and address" element equals ownership:

Under Idaho law, "[w]ater rights are defined by elements." *City of Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017) (citing I.C. § 42-1411(2)). The elements are established in Idaho Code section 42-1411(2). Those elements are as follows:

- the name and address of the claimant;

[other elements listed in I.C. § 42-1411(2) removed for brevity]

....

The legislature directed that decrees issued in the SRBA "shall contain or incorporate a statement of each claimant of a water right." I.C. § 42-1412. When a court issues a decree in the name of a claimant, it is deciding whether that claimant's assertion of *ownership* is valid. Therefore, the issuance of the decree inextricably links a claimant with ownership of the water right. While it is true that being a "claimant" prior to a decree does not necessarily equal being an owner, once a decree is issued, "claimant" becomes inextricably linked with 'ownership' if the decree awards the right to the water to the claimant.

First Security at 742-43, 451 P.3d at 455-56 (italics in original) (emphasis added).

MHID was the claimant of 61-10419, *Exhibit 6* to *MHID Verified Petition for Declaratory Judgment*, and is listed in name and address element of the partial decree for 61-10419, *Exhibit 9* to *MHID Verified Petition for Declaratory Judgment*. This "inextricably" defines MHID as the owner of 61-10419. Had Weitz or its predecessors taken issue with MHID's ownership of 61-10419, they should have filed an objection to IDWR's director's report, I.C. § 42-1412(1), moved to set aside this Court's partial decree for 61-10419 in conformance with I.R.C.P. 60, or filed an appeal of the Court's decision consistent with the appellate rules.

Weitz and its predecessors had these opportunities during the SRBA yet did not avail themselves, with Weitz bound by the decisions of this Court.² Moreover, as a landowner who owns 70 shares within MHID, Weitz does “not hold individual water rights in connection with [its] service.” *Eagle Creek Irr. Co. v. A.C. & C.E. Investments, Inc.*, 165 Idaho 467, 475, 447 P.3d 915, 923 (2019).

D. Weitz Again Fails to Support All Statements of Fact with Citation to the Record

As happened in Weitz’s opening brief, statements of fact are asserted in response on pages 3-4, which includes footnotes 1 and 2, with no citation to admissible evidence in the record, as shown below in underline:

Not only did the claim reflect the collective appropriation of six rights, *id.*, ¶ 6, IDWR confirmed the aggregate diversion by illustrating the rate attributable – both in cubic feet per second and the antiquated miner’s inches – to each individual right. Adjudication Claim Verification Report, p. 7, attached hereto as Exhibit 1.

....

Accordingly, MHID’s contention that the other defining elements of 61-248 have not been decreed into another water right, *id.*, p. 8, is irrelevant. With the exception of the date of priority,¹ MHID is also incorrect[.]

....

The place of use identified for 61-248, Water Right Claims Proof Reading Report, attached hereto as Exhibit 2, falls within current MHID boundaries, which is the designated place of use for all of MHID’s water rights, including 61-10419, pursuant to Idaho Code 42-219(5). Exhibit 6 to *Petition*, ¶ 10. After 61-10419 was decreed, MHID’s boundaries were apparently expanded to include 125 acres that have been exclusively cultivated by Weitz or its successors in interest.²

¹ MHID’s Notice of Claim for 61-10419 designated May 1, 1886 to correspond with the latest dates of priority among the six rights that were combined under the single claim. The original priority date for 61-248 was April 8, 1885, as recognized in the 1914 Elmore County District Court case *Bennett v. Nourse*. See also Exhibit 1, p. 2.

² To the extent ownership can be changed following entry of the *Final Unified Decree*, there is a separate administrative process with IDWR to be followed. I.C. § 42-248.

² Based on Weitz's belief, and in the absence of information requested from MHID that might prove otherwise, Weitz is the only irrigator within the Northwest quarter of Section 26, T03S R06E receiving water from MIID.

Weitz Response at 3-4.

Summary judgment is proper only 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* at 740, 451 P.3d at 453. 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).

Weitz had every opportunity to include the documents that make up Exhibit 1 and Exhibit 2 for consideration by the Court through affidavit or declaration yet did not. There is no basis in Idaho's Rules of Civil Procedure or Rules of Evidence to attach exhibits to an unverified memorandum. Moreover, there are no statements made in the Weitz Response as to where the documents that make up Exhibit 1 and Exhibit 2 come from, when they were obtained, and whether they are in fact true and correct copies. Furthermore, the statements made by Weitz in footnote 2, page 4 are inadmissible hearsay that should have been established through affidavit or declaration based on personal knowledge and under penalty of perjury; as such, these unsupported factual assertions should be stricken. Thus, MHID filed with the Court on March 4, 2012 a *Motion to Strike Exhibit 1, Exhibit 2, and Footnote 2 to the Weitz Response to MHID's*

Motion for Summary Judgment and Memorandum in Support therewith to be heard on the same day and time as argument on summary judgment.

III. CONCLUSION

Based on the foregoing, Weitz's Motion for Summary Judgment should be denied. As admitted by Weitz and argued by MHID, 61-248 is not a valid water right due to it not being partially decreed. The plain language of 61-10419 shows it is owned by MHID and appurtenant to the district's service area for beneficial use by its shareholders. To argue otherwise requires reading an ambiguity into 61-10419, an ambiguity that does not exist, which would result in undermining the finality of the SRBA. Accordingly, Weitz's *Motion for Summary Judgment* should be denied, and MHID's *Motion for Summary Judgment* should be granted.

DATED this 12th day of March, 2021.


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CERTIFICATE OF SERVICE

I certify that on this 12th day of March, 2021, I caused to be served a true and correct copy of the foregoing was served as follows:

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