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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 39576

Subcases No. 61-248 and 61-10419

**REPLY TO MHID'S RESPONSE
TO WEITZ'S MOTION FOR
SUMMARY JUDGMENT**

Weitz & Company, Inc. ("Weitz"), by and through its attorneys Laura A. Schroeder and James Browitt of Schroeder Law Offices, P.C., hereby submits this Reply to Mountain Home Irrigation District's ("MHID" or "District") *Memorandum in Response to Weitz Memorandum in Support of Motion for Summary Judgment* ("MHID Response"). This Reply is supported by the records of this Court and briefing previously filed in this matter.

I. ARGUMENT

A. Weitz has maintained that 61-248 continues to exist within 61-10419; MHID cannot demonstrate otherwise

Weitz's position on the status of 61-248 has been consistent throughout this matter: The water right's most essential qualities, its diversion and beneficial use, have continued uninterrupted, although under a new label and as part of a different configuration. *See, e.g., Response to Verified Petition for Declaratory Judgment*, ¶¶ 53, 57; *Counterclaims to Verified*



1 *Petition for Declaratory Judgment* ("Counterclaim"), ¶ 19; and *Weitz's Response to MHID's*
2 *Motion for Summary Judgment* ("Weitz Response"), p. 2, ll. 14-25. As a result of the Snake
3 River Basin Adjudication ("SRBA"), the use perfected and applied, for 136 years by Weitz and
4 its predecessors in interest, is now contained within and applied under 61-10419. In other words,
5 Weitz has steadfastly maintained that the substance of 61-248 is still very much intact.

6 Consequently, for MHID to allege otherwise is absurd, as is the District's contention that
7 Weitz has admitted that 61-248 no longer exists. *MHID Response*, Sec. II.A. In support of this
8 specious allegation, MHID identifies fragments of statements made by Weitz in briefing and
9 asserts that they amount to a judicial admission, thereby removing any material issues of fact
10 precluding summary judgment in favor of MHID. *Id.* While the snippets cited by MHID do not
11 represent the "deliberate, clear, and unequivocal statement" that is required of a judicial
12 admission, *Strouse v. K-Tek, Inc.*, 129 Idaho 616, 619, 930 P.2d 1361, 1364 (Ct. App. 1997),
13 fuller portions indeed reveal the opposite of what MHID asserts Weitz has acknowledged.

14 With respect to how water rights are catalogued in Idaho and the nomenclature used
15 in the administration thereof, MHID is technically correct – 61-248 is no longer a
16 right of use independently recognized by the State. But while the label may have
17 been retired, the quantifiable elements established and exercised under 61-248 that
18 were necessary for MHID to claim and obtain Water Right No. 61-10419 have
19 endured, just under a different name. As decreed by the SRBA, 61-10419
20 incorporates, along with most of the descriptive elements of 61-248, the instant
diversion rate that was perfected by Weitz's predecessors in interest, and that
beneficial use has continued as authorized by the *Final Unified Decree*.
Accordingly, MHID's assertion that 61-248 has been unequivocally voided as a
consequence of the SRBA is fundamentally incorrect.

21 *Memorandum in Support of Weitz's Motion for Summary Judgment* ("Weitz SJ Memo"), p. 4, ll.
22 5-14 (footnote omitted) (wording cited by MHID underlined).

23 [W]hile not definitive evidence in light of language this Court included in the *Final*
24 *Unified Decree*, it is nonetheless telling that 61-248 is found neither in the list of
25 Disallowed Water Rights Claims nor the list of Unclaimed Water Rights Decreed
Disallowed attached to the Final Unified Decree.

26 *Id.*, p. 6, ll. 8-11 (footnote omitted) (wording cited by MHID underlined).



1 MHID's attempt to co-opt the latter statement into this erroneous narrative is especially
2 nonsensical. As the names of the aforementioned lists indicate, and as Weitz implies, *id.*, the
3 inclusion of 61-248 on either list would have explicitly identified it as an invalidated right.¹ Yet
4 MHID has interpreted Weitz's implication as further acknowledgment that 61-248 was not
5 recognized by this Court because it was included on neither list. *MHID Response*, Sec. II.A.

6 Again, Weitz acknowledges that, insofar as IDWR and this Court are concerned, 61-248
7 is no longer a stand-alone water right; by operation of the SRBA and the *Final Unified Decree*, it
8 has been integrated into a larger appropriation that is recognized as 61-10419. In essence, the
9 historic beneficial use that Weitz and its predecessors have exercised since 1885 has been
10 perpetuated, just in a different form. Weitz has been clear on this point, and consistently so.

11 Although MHID will presumably dispute that, it cannot honestly declare Weitz has
12 unambiguously affirmed at any juncture of this proceeding that the substance of 61-248 -- namely
13 its diversion and beneficial use -- no longer exists. Therefore, nothing Weitz has said in this
14 regard qualifies as a judicial admission. *Strouse*, 129 Idaho at 619, 930 P.2d at 1364 (*citing* 29A
15 AM. JUR. 2d Evidence Section 770 (1994)).

16 **B. "Nature and extent" of 61-10419 includes substantive elements of 61-248, while**
17 **issue of ownership does not affect finality of SRBA**

18 It is indisputable that 61-248 was substantively claimed in the SRBA. Regardless of the
19 admissibility of evidence that further underscores this point², MHID cannot deny that the historic
20 beneficial use appropriated, perfected and exercised under 61-248 by Weitz and its predecessors
21 in interest was incorporated into 61-10419 by way of the SRBA -- not when this occurred
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23 ¹ Weitz has acknowledged that, pursuant to the *Final Unified Decree* (p. 10), water rights not set forth therein were
24 also considered disallowed. *Weitz SJ Memo*, p. 6, fn. 3.

25 ² MHID has challenged evidence introduced by Weitz, and taken from IDWR's adjudication file for 61-10419,
26 <https://idwr.idaho.gov/apps/ExtSearch/RelatedDocs.asp?Basin=61&Sequence=10419&SplitSuffix=>, that shows
IDWR particularly factored the diversion rate of 61-248 into 61-10419. See *MHID's Memorandum in Support of*
Motion to Strike Exhibit 1, Exhibit 2 and Footnote 2 to Weitz's Response to MHID's Motion for Summary Judgment.
Weitz will address MHID's motion in a subsequent response.



1 pursuant to MHID's designs. Exhibit 6 to *Verified Petition for Declaratory Judgment*
2 ("Petition"), ¶ 14. Accordingly, the only outstanding issue before this Court is who holds
3 beneficial title to the right of use preserved within 61-10419 that had been established by Weitz's
4 predecessor in interest and recognized under 61-248. And being that ownership is not considered
5 a defining element of a water right, *A&B Irrigation Dist. v. State (In re SRBA)*, 336 P.3d 792,
6 796, 157 Idaho 385, 391 (2014), MHID's "collateral attack" argument, *Petition*, ¶ 49; *MHID*
7 *Response*, p. 7, is inapplicable to that analysis.

8 MHID rightfully emphasizes that, pursuant to Idaho Code 42-1420(1), the *Final Unified*
9 *Decree* is "conclusive as to the nature and extent of all water rights within" the SRBA
10 (emphasis added). However, the District's attempts to show that Weitz's position is incompatible
11 with the statute, *MHID Response*, Sec. II.B., fail to demonstrate anything of the sort.

12 First, MHID challenges Weitz's foundational assertion that 61-248 was substantively
13 incorporated into 61-10419 because the two water rights "bear no resemblance to one another,
14 other than sharing the same source," Canyon Creek. *Id.*, p. 4. However, the fact that they "bear
15 different 'measurable' and/or 'quantifiable elements,' " *id.*, p. 5, hardly disproves that 61-248 is
16 embodied within 61-10419. Again, it is indisputable that 61-248 was substantively claimed in the
17 SRBA. MHID submitted a Notice of Claim that combined the elements of "six water rights
18 numbers," among them 61-248, Exhibit 6 to *Petition*, ¶ 14, into an appropriation that was
19 decreed as 61-10419. Exhibit 9 to *Petition*.

20 Most notably, 61-10419 merged 61-248's 3.2 cfs diversion rate, archaically calculated as
21 160 miner's inches, Exhibit 1 to *Petition*, ¶ 1, with the diversions of five other so-called "parent"
22 rights to provide the aggregate diversion of 18.1 cfs. Exhibit 1 to *Weitz Response*, p. 8; *see also*
23 Exhibit 6 to *Petition*, ¶ 14. Further, 61-10419 integrates 61-248's historic place of use, the
24 Northwest Quarter of Section 26, Township 03 South, Range 06 East, Exhibit 1 to *Petition*, ¶ 1,
25 and its annual 500 acre-feet volume, which was established through historic beneficial use for
26



1 live-flow irrigation, irrigation storage and irrigation from storage. *See, generally*, Exhibit 2 to
2 *Petition*.

3 Considering the size disparity between 61-248 and 61-10419, a panoramic comparison of
4 the two is inapt. But to the extent that the substantive components of 61-248 were embedded into
5 61-10419 – and done so at MHID’s request – the connection is undeniable.

6 And second, MHID contends that since Weitz failed to allege any ambiguity within the
7 terms of 61-10419, this Court must determine the legal effect from the “plain and ordinary
8 meaning of [the] words” contained in its partial decree. *MHID Response*, p. 5 (citing *City of*
9 *Blackfoot v. Spackman*, 162 Idaho 302, 306, 396 P.3d 1184, 1188 (2017)). Weitz does not level
10 allegations of ambiguity for the simple reason that it does not detect any within the defining
11 elements delineated in 61-10419’s partial decree – its priority, amount, season of use, purpose of
12 use, point of diversion, and place of use. *A&B Irrigation Dist.*, 336 P.3d at 796, 157 Idaho at
13 391.³ Weitz exclusively takes issue with ownership of 61-10419 – namely the portion of 61-
14 10419 that had been historically put to beneficial use by Weitz and its predecessors under 61-
15 248, particularly the 3.2 cfs diversion rate. Further, if Weitz’s predecessors in interest had not
16 established beneficial use by way of 61-248, the SRBA could not have decreed 61-10419 in its
17 existing form because there would not have been a beneficial use to support the adjudication of
18 61-10419 to the extent it incorporated 61-248.

19 In response to MHID’s assertion that a statement made by Weitz regarding Conditions of
20 Approval for 61-10419, *Weitz SJ Memo*, pp. 5-6, was “patently false, and completely
21 contradicted,” *MHID Response*, p. 7, Weitz offers clarification: While the notation, “This right
22 is a combination of old right nos. 61-00248, 61-00249, 61-00259, 61-00265, 61-00267 & 61-
23 00268,” was not carried over from MHID’s Notice of Claim for 61-10419 to either the

24
25 ³ The case law cited by MHID (*MHID Response*, Sec. II.B.) regarding ambiguity in a decree, *City of Blackfoot and*
26 *Rangen Inc. v. Idaho Department of Water Resources*, 159 Idaho 798, 367 P.3d 193 (2016), related to issues with
purpose of use and point of diversion, respectively, both defining elements of a water right pursuant to *A&B*
Irrigation Dist.



1 recommendation or partial decree, Exhibit 6, 7 and 9 to *Petition*, it is included on IDWR's Water
2 Right Report as Condition of Approval No. 6.⁴

3 As has been stated repeatedly throughout the course of this matter, the *Final Unified*
4 *Decree* is "conclusive as to the nature and extent of all water rights" within the SRBA. Idaho
5 Code 42-1401A(5), 42-1420(1) (emphasis added). Moreover, finality as to that nature and extent
6 is essential, being that "A water right is tantamount to a real property right, and is legally
7 protected as such." *State v. Nelson (in Re SRBA Case No. 39576)*, 131 Idaho 12, 16, 951 P.2d
8 943, 947 (1998) (citing *Crow v. Carlson*, 107 Idaho 461, 465, 690 P.2d 916, 920 (1984)). But
9 that finality does not extend to ownership or title of a decreed water right, which can be
10 conveyed in the same manner as any real property. *Olson v. Idaho Dept. of Water Res.*, 105
11 Idaho 98 100-01, 666 P.2d 188, 190-91 (1983).

12 Accordingly, this Court is not precluded from weighing and determining the proprietary
13 interests in 61-10419. Although MHID has asserted ownership as a claimant, Idaho Code 42-
14 1401A(1), the District, as a public appropriator, has acquired at most "nominal legal title," of the
15 segment of water right established and recognized under 61-248. *United States v. Pioneer*
16 *Irrigation Dist. (In re SRBA Case No. 3957)*, 144 Idaho 106, 112, 157 P.3d 600, 607 (2007), But
17 the beneficial interest remains with Weitz, the owner of the land where the use is appurtenant,
18 and that "such person ... shall not, thereafter, without his consent, be deprived of the annual use
19 of the same." *Id.*, at 114, 157 P.3d at 608 (2007) (citing *Idaho Const. Art. XV, § 4*).

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26 ⁴The report is found in IDWR's database at <https://idwr.idaho.gov/apps/ExtSearch/RightReportAJ.asp?BasinNumber=61&SequenceNumber=10419&SplitSuffix=%20%20&TypeWaterRight=True>



1 **C. MHID's obligation to its shareholders does not require it to deprive Weitz of its**
2 **historical beneficial interest**

3 MHID argues that as a result of SRBA and the *Final Unified Decree*, it is released from
4 any obligation to deliver water to Weitz, other than that to which Weitz is entitled as a District
5 shareholder in good standing. *MHID Response*, Section II.C. MHID additionally maintains that
6 the water and beneficial use that corresponded with 61-248, which Weitz and its predecessors in
7 interest has exercised for 136 years, is now appurtenant to MHID's entire service area, and to the
8 irrigable 7556 acres situated therein. *Id.* Therefore, MHID says the only duty it currently owes to
9 Weitz is the seasonal delivery of 70 shares of water, or 210 acre feet, or whatever proportionate
10 amount thereof is available in times of drought. *Id.* Weitz asserts that water delivery under the
11 incorporated beneficial use claimed by MHID is a contract issue that will be addressed by the
12 Elmore District Court pursuant to bifurcation and is not one for the SRBA.

13 Nevertheless, MHID's position takes no account of the equitable title Weitz has in that
14 portion of 61-10419 that had been independently exercised under 61-248. Contrary to state law,
15 that would reduce Weitz's historic beneficial interest to a mere contractual expectancy." *Cf.*,
16 *Pioneer Irrigation Dist.*, 144 Idaho at 114, 157 P.3d at 608. As Weitz has previously asserted,
17 Weitz is not challenging the conclusions of this Court, but rather MHID's attempts to interpret
18 the *Final Unified Decree* in a manner that divests Weitz of a 136-year-old right of use.
19 *Counterclaim*, ¶ 2; *Weitz SJ Memo*, p. 8, ll. 13-15. Weitz's objective is to secure beneficial title
20 to the portion of 61-10419 that represents the use that can be attributed to 61-248, particularly
21 the 3.2 cfs diversion rate.

22 MHID's common response to this is that Weitz or its predecessors in interest should have
23 taken up this matter during the course of the SRBA, and wonders why, 21 years after the partial
24 decree for 61-10419 was issued, Exhibit 9 to *Petition*, Weitz is asserting ownership of the
25 beneficial use that was recognized by 61-248. *MHID Response*, Sec. I, II.C. Weitz's response is
26 simple: Because MHID waited 20 years before moving to enforce it.



1 The motivating factor was obvious: In 2019, MHID became aware that the City of
2 Mountain Home (“City”) was looking to access property owned by Weitz, *Petition*, ¶ 40, and
3 informed the City that MHID provided the only source of water on said property. *Id.*, Exhibit 10
4 to *Petition*. But that does not explain why MHID, which is now attempting to deprive Weitz of a
5 historic and valuable proprietary interest, *Counterclaim*, ¶¶ 13-14, made no effort to do so when
6 it purportedly acquired ownership in 2000, when 61-10419’s partial decree was issued, Exhibit 9
7 to *Petition*, or even in 2014, when the *Final Unified Decree* was entered.

8 MHID claims it is bound by a trust responsibility to its shareholders as described in Idaho
9 Code 43-316, *MHID Response*, Sec. II.C., and pursuant to that responsibility owes Weitz nothing
10 more than delivery of 70 shares of water annually. *Id.* MHID’s sudden decision to espouse that
11 duty by denying Weitz its historic entitlement of the beneficial use recognized under 61-248 and
12 now incorporated into 61-10419 seems arbitrary and perhaps vindictive.

13 **D. Weitz stands by its Statement of Facts.**

14 Weitz stands by its Statement of Facts, *Weitz SJ Memo*, Sec. II, including those with
15 which MHID has taken issue, *Weitz Response*, Sec. II.D., some of which have been made several
16 times in this proceeding and have not been previously challenged by either party. As for
17 Paragraph 9, “Neither Weitz nor its predecessors in interest authorized MHID to combine or take
18 legal title to Water Right No. 61-248 by way of an SRBA claim,” the statement is confirmed in
19 both the *Affidavit of Daniel P. Weitz*, ¶ 9, and the *Affidavit of Timothy M. Healy*, ¶ 8.

20 Weitz will timely respond to MHID’s Motions to Strike in subsequent briefings.

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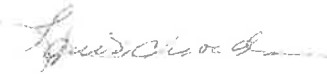
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II. CONCLUSION

As demonstrated above, MHID cannot show that Weitz's beneficial interest in 61-248 was not substantively claimed in the SRBA, that this Court is precluded from determining ownership of a decreed right or that the District's obligation to its shareholders necessitates depriving Weitz of its historic beneficial interest. Therefore, the portions of this matter relating to Weitz's perpetual right to beneficial use should be summarily resolved by this Court.

DATED this 10th day of March, 2021.

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CERTIFICATE OF MAILING

I hereby certify that on March 10, 2021, I caused a true and correct copy of the foregoing

WEITZ'S REPLY TO MHID'S RESPONSE TO WEITZ'S MOTION FOR SUMMARY

JUDGMENT to be mailed with sufficient first-class postage to the following:

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