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Department of Water Resources

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Attorneys for Claimant

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

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) SUBCASE NUMBER 36-02659
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MEMORANDUM IN SUPPORT OF MOTION TO
REOPEN SUBCASE

COMES NOW, Claimant Clear Lakes Trout Company (hereinafter "Clear Lakes"), by and through its counsel of record Ringert Clark, Chartered, and hereby submits this Memorandum in Support of its Motion to Reopen Subcase on file herein. This Memorandum is supported by the Affidavit of Charles L. Honsinger in Support of Motion to Reopen Subcase, and by the record herein.

STANDARDS

§14 of SRBA Administrative Order No. 1 provides in relevant part that "[p]arties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." A motion made under I.R.C.P. 60(b) is evaluated by the trial court to determine whether good cause has been shown. *Thomas v. Thomas*, 119 Idaho 709, 711, 809 P.2d 1188, 1190 (Ct. App. 1991).

I.R.C.P. 60(b)(6) which provides for relief from a judgment for "any other reason justifying

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relief from the operation from a judgment,” is applied whenever “such action is appropriate to accomplish justice.” *First Security Bank of Idaho, N.A. v. Stauffer*, 112 Idaho 133, 142, 730 P.2d 1053, 1062 (Ct. App. 1986). The Idaho Court of Appeals in *Stauffer, supra*, determined that the defendants in that case were deprived of the protection afforded by a final decree when the trial court granted plaintiffs’ motion to amend judgment without a hearing on that motion. *Id.*, at 143. The Court cited the case of *Fleming v. Gulf Oil Corporation*, 547 F.2d 908 (1977), in which the Tenth Circuit held that an *ex parte* dismissal of the case was grounds for relief under Rule 6)(b)(6). The Idaho Court of Appeals noted that the Tenth Circuit “found the lack of a fair opportunity to be heard particularly unjust,” analogized *Fleming* to the case before it in *Stauffer*, and then remanded the case for a hearing on the motion to amend judgment. *Stauffer, supra*, at 143.

Similarly, it is clear in this case that Clear Lakes has had no opportunity to have the issue of the specific quantities of water right no. 36-02659 heard or determined, and that such an opportunity must be given under the holding in *Stauffer, supra*.

ARGUMENT

Water right no. 36-02659 was partially decreed by the SRBA District Court on April 22, 2002. The source decreed for water right no. 36-02659 was the same source as that for water right nos. 36-02708 and 36-07004. Of the three water rights, Clear Lakes’ water right no. 36-02659 is the most senior in priority.

As the Court is aware, and as was decreed, water right no. 36-02659 is diverted through “two adjacent spring-fed diversion pools.” See Partial Decree for water right no. 36-02659 (Apr. 22, 2002). During the period leading up to the issuance of the Partial Decree, Clear Lakes did not believe it was necessary that the Partial Decree list specific quantities of water right no. 36-02659 diverted

through each of its points of diversion. It is, and always has been, Clear Lakes' understanding that under existing Idaho law, a water right holder with alternative points of diversion (as is the case with Clear Lakes' water right no. 36-02659) has the right to determine how much of its water right it may divert through either point of diversion (subject to the limitations of the "no injury" rule). Neither Clear Lakes nor its attorneys are aware of any other subcase in the SRBA in which a determination was necessary to specifically identify the quantities of water that a water right holder is entitled to divert through his alternative points of diversion. Moreover, neither Clear Lakes nor its attorneys are aware of any case law, statutes, or indeed any precedent which would support a requirement of such a specification.

However, according to the watermaster instructions for the administration of these three water rights which were issued by the Director of the Idaho Department of Water Resources, when junior water right no. 36-02708 makes a call for water, Clear Lakes can be forced to divert a portion of its water right no. 36-02659 through certain diversion works because "there is no recognition in the decree that Clear Lakes has the right to determine how much water is diverted from each pool under right 36-02659." See Affidavit of Charles L. Honsinger in Support of Motion to Reopen Subcase, Exhibit A, p. 8. Clear Lakes is unaware of any law or any precedent by which a senior water right may be regulated in response to a call by a junior water right. Moreover, a decision by this Court supports Clear Lakes' position that its diversion of water right no. 36-02659 through either of its points of diversion is limited only by the "no injury" rule. See Order on Motion to Alter or Amend Judgment, In Re SRBA, Subcase Nos. 36-02708, 36-07201, 36-07218, pp. 7, 10 (Aug. 15, 2000).¹ Judge Wood also explains twice in his Order on Motion to Alter or Amend Judgment that

¹Judge Wood's August 15, 2000 decision addresses this very situation.

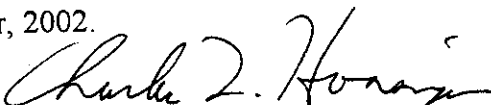
the issues regarding Clear Lakes' right to divert water right no. 36-02659 are to be determined administratively, and not in the SRBA. *Id.* Therefore, based upon its understanding of the law, as provided in part by the decisions of this Court, Clear Lakes did not raise in the SRBA the issue of the specific quantities of water right no. 36-02659 diverted through each of its respective diversion works. However, given the Watermaster Instructions affecting the distribution of water right no. 36-02659 which were issued by the Director of the Idaho Department of Water Resources, and subsequent statements by the Court in Gooding District County Court case no. CV- 02-00377, it is clear that the issue of the specific quantities of water right no. 36-02659 which are diverted through each of its respective points of diversion should have been addressed and determined in the SRBA.

Consequently, Clear Lakes has brought this Motion to Reopen Subcase for an opportunity to have a hearing on the issue of the specific quantities of water right no. 36-02659 which are to be delivered through the eastern and western pools - an issue on which Clear Lakes has never had an opportunity for a hearing. Clear Lakes is entitled to a hearing on this issue under §14 of SRBA Administrative Order No. 1 and pursuant to the standards applicable to I.R.C.P. 60(b) because of the statements in Judge Wood's prior decision on which it relied, and because of its understanding of the law which has now been refuted by IDWR and the Gooding County District Court

Just as the Court in *Stauffer, supra*, determined that the defendants therein had no opportunity to have a hearing on the plaintiffs' motion to amend judgment, Clear Lakes has likewise had no opportunity for a hearing on this obviously important issue. To deny Clear Lakes such an opportunity would be, in the words of the Idaho Court of Appeals "particularly unjust." Therefore, this Court should, just as did the Court of Appeals in *Stauffer*, order that a hearing be held on the issue of the specific quantities of water right no. 36-02659 that may be diverted through each of the points of

diversion for that water right. Accordingly, Clear Lakes respectfully requests that the District Court set this case for an evidentiary hearing on that issue.

Dated this 1st day of November, 2002.

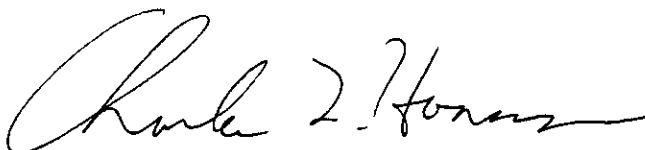

Charles L. Honsinger
RINGERT CLARK, CHARTERED

CERTIFICATE OF SERVICE

I certify that on November 1, 2002, I served copies of this document, including all attachments to the following:

1. By U.S. Mail

Director
Idaho Department of Water Resources
1301 N. Orchard
Boise, ID 83712


Person serving documents