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DEPARTMENT OF
WATER RESOURCES

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90-6-2-63c

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December 28, 2004

via FedEx Mail

Diana R. Delaney, Chief Deputy Clerk
Snake River Basin Adjudication
DISTRICT COURT
253 Third Ave., North
Twin Falls, Idaho 83303-2707

Re: SRBA Case No. 39576
Subcase Nos. 22-12906, *et al.* (see attached Exhibit A)

Dear Ms. Delaney:

Enclosed for filing are the original and 51 copies of the following document in the above mentioned subcases:

1. **MOTION TO SET ASIDE AND REISSUE PARTIAL DECREES**

Thank you for your time and attention in this matter.

Sincerely,

David A. Jarvis
Paralegal

Enclosures

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DEPARTMENT OF
WATER RESOURCES

Names of Parties Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

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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	)	Subcase Nos.: 22-12906, <i>et al.</i> (see attached
	)	Exhibit A)
Case No. 39576	)	
	)	MOTION TO SET ASIDE AND REISSUE
	)	PARTIAL DECREES
	)	

I. Introduction

The water rights referenced on the attached Exhibit A were decreed by the Court earlier this year. The claims were filed on behalf of the U.S. Bureau of Land Management for small amounts of stockwater under a "dual basis" pursuant to federal law of reserved rights and state law of beneficial use. The presiding Special Master recommended that the Court deny the

federal reserved rights basis of the claims and, instead, decree these water rights under state law. The Court accepted the Special Master's recommendations and decreed the water rights under state law with a beneficial use priority date of June 28, 1934.¹

The federal reserved basis of the claim is based on the executive order, Public Water Reserve No. 107 (hereinafter "PWR 107"). The Special Master held, in five separate reports encompassing these claims, that the United States was not entitled to PWR 107 water rights due to the existence of an application to homestead pending at the time of the federal withdrawal and reservation on April 17, 1926.² In all of these decisions the Special Master cites to his previous ruling in consolidated subcases 25-13635, 25-13637, 25-13653, 65-9960 and 65-19962, *see* Special Master's Report and Recommendation, dated December 18, 2002, and declares "that a pending homestead application defeated a reservation under PWR 107."³ In two of these Reports, the Special Master expressly states that his denial of the federal reserved right basis of the claims is "based on the forgoing and this Special Master's ruling in Subcases 25-13635, 25-13637, 25-13653, 65-9960 and 65-19962" Special Master's Report, subcases 22-12906, 22-12920, at p. 2; Special Master's Report, subcases 24-10235, et al., at p. 2.

¹See Partial Decrees for water rights 22-12906, 22-12920, dated June 1, 2004; Partial Decrees for 24-10235, et al., dated June 1, 2004; Partial Decrees for water rights 55-10460, et al., dated June 17, 2004; Partial Decrees for water rights 61-10949, et al., dated June 18, 2004; Partial Decrees for water rights 65-19742, et al., dated June 7, 2004.

²See Special Master's Report, subcases 22-12906, 22-12920, dated April 15, 2004; Special Master's Report, subcases 24-10235, et al., dated April 15, 2004; Special Master's Report and Recommendation, subcases 55-10935, et al., dated April 22, 2004; Special Master's Report and Recommendation, subcases 61-10953, et al., dated April 27, 2004; Special Master's Report and Recommendation, subcases 65-19886, dated April 27, 2004.

³Special Master's Report, subcases 22-12906, 22-12920, at p. 1; Special Master's Report, subcases 24-10235, et al., at p. 1; Special Master's Reports, subcases 55-10935, et al., at p. 3; Special Master's Reports, subcases 61-10953, et al., at p. 3; Special Master's Reports, subcases 65-19886, et al., at p. 3.

Prior to the issuance of the Special Master's Reports, however, on January 27, 2003, the United States filed a motion to alter and amend the Special Master's earlier decision in consolidated subcases 25-13635, 25-13637, 25-13653, 65-9960 and 65-19962. *See* Motion to Alter or Amend, subcases 25-13635, et al., dated January 27, 2003. This motion to alter or amend was subsequently amended on May 2, 2003. Approximately one year later, on May 24, 2004, the Special Master issued an order denying the motion to amend and declining to decree these rights under federal law. The United States filed a Challenge Notice on June 21, 2004. On October 4, 2004, the Court reversed the Special Master and ruled that a homestead entry does not defeat the federal reservation, but suspends the withdrawal until entry fails. When entry fails, the withdrawal attached without subsequent order. *See* Memorandum Decision and Order on Challenge; Order on Partial Decrees, subcases 25-13635, 25-13637, 25-13653, 65-9960 and 65-19962 (October 4, 2004), at p. 8.

Consequently, the basis for the Special Master's denial of federal reserved water rights in these subcases (the prior judgment in subcases 25-13635, et al.) was incorrect as a matter of law. Therefore, the United States seeks relief from the decrees based upon this earlier erroneous judgment.

II. Argument

1. Under Rule 60(b)(5), these partial decrees may be set aside and reissued as water rights based upon PWR 107.

I.R.C.P. Rule 60(b)(5) permits the Court to relieve a party from a final judgment where "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The Idaho Supreme Court

established a two-part test for relief from a final judgment under Rule 60(b)(5) in *Rudd v. Rudd*, 105 Idaho 112, 118-119, 666 P.2d 639, 645-646 (1983). First, a movant must show “that the judgment is prospective in nature.” *Id.* The prospective relief does not have to be in nature of an injunction, “it is only necessary that the judgment have prospective application.” *Id.* Second, the movant must show “that it is no longer equitable to enforce the judgment as written.” *Id.*

Here, both criteria are met. The nature of a water right is prospective. It establishes a priority to the use of water. Senior water rights are more valuable than junior water rights. Idaho Constitution, art. 15, § 3 (stating in relevant part, “Priority of appropriation shall give the better right as between those using the water.”); *Brose v. Board of Directors of Nampa & Meridian Irr. Dist.*, 118 P. 504 (Idaho 1911). An April 17, 1926 priority date is more valuable than a June 28, 1934 priority date. *See e.g., Silverstein v. Carlson*, 797 P.2d 856 (Idaho 1990)(suit over the determination of priority); *Navajo Development Co., Inc. v. Sanderson*, 655 P.2d 1374, 1380 (Colo. 1982)(“The value of a water right is its priority and the expectations which that right provides”). In the future, should a dispute arise involving conflicting claims to use of the groundwater that sources the springs claimed in these subcases, the 1926 priority would have greater prospective value than the 1934 priority. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976)(“a reserved right in unappropriated water vests on the date of the reservation and is superior to the rights of future appropriators”).

In addition, a water right based on federal law has prospective application that does not exist in a state law based water right. The federal reserved water right cannot be abandoned or forfeited. *U.S. v. Orr Water Ditch Co.*, 309 F.Supp.2d 1245, 1252 (D. Nev. 2004) (“[state law doctrines of forfeiture, abandonment, or lack of perfection] do not apply to [] federal reserved

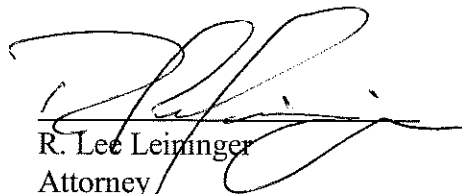
water rights”). A state law based water right, on the other hand, may be lost if not used for a statutorily defined period. *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 396, 744 P.2d 121, 124 (Id. App. 1987) (“all rights to water are lost where the appropriator fails to make ‘beneficial use’ of the water for a continuous five- year period”). The prospective application of the judgment decreeing these water rights, therefore, satisfies the first test.

In evaluating the second part of the Rule 60(b)(5) test, the equities weigh in favor of relieving the United States from the partial decrees. There are no competing claims to the use of water at these particular spring sites. Therefore, no party would be prejudiced by setting aside the state law based partial decrees and reissuing these water rights based on PWR 107. Further, there is no question that the present partial decrees are based on an erroneous construction of law in a prior judgment. The Special Master specifically cited to his previous decision in subcases 25-13635 *et al.* in rendering his decisions in these subcases (see discussion, *supra*). “Generally, where a judgment is based upon a prior judgment, when the judgment from the first case is reversed, eliminating the basis for the judgment on the subsequent case, then the appellate court should reverse the second judgment.” *Fahlen v. Mounsey*, 46 Wash.App 45, 47, 728 P.2d 1097, 199 (1986). Setting aside the partial decrees is particularly apt when, as here, the prior judgment is used in the sense of claim or issue preclusion and is subsequently reversed. *See* 11 C. Wright and A. Miller, *FED. PRAC. & PROC. CIV.2D* § 2863.

III. Conclusion

Relief from the partial decrees for the above referenced water rights is appropriate under I.R.C.P. Rule 60(b)(5). Therefore, the United States respectfully requests the Court set aside the partial decrees and re-issue the water rights based upon the executive order PWR 107.

Respectfully submitted this 28th day of December, 2004.


R. Lee Leininger
Attorney
U.S. Department of Justice

CERTIFICATE OF MAILING

I certify that on 12/28, 2004, a true and correct copy of the United States' **MOTION TO SET ASIDE AND REISSUE PARTIAL DECREES, RE: SUBCASES 22-12906, et al.** was served via first class U.S. mail to the following persons:

By FedEx mail:

DISTRICT COURT (Original and 51 copies)
253 Third Ave. North
Twin Falls, Idaho 83301

By first class U.S. mail:

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Exhibit A

22-12906	65-19746
22-12920	65-20017
24-10235	65-20019
24-10237	65-20021
24-10259	65-20023
24-10261	65-20025
24-10265	65-20027
24-10279	65-20029
24-10351	65-20031
24-10357	65-20065
24-10541	65-20067
24-10542	65-20119
24-10544	
29-13042	
55-10460	
55-10462	
55-10464	
55-10719	
55-10721	
55-11735	
55-11886	
55-12133	
55-12287	
55-12560	
55-12568	
55-12570	
55-12576	
55-12629	
55-12707	
55-12713	
55-12821	
61-10949	
61-10953	
61-11010	
61-11012	
61-11312	
61-11425	
61-11479	
61-11533	
65-19742	