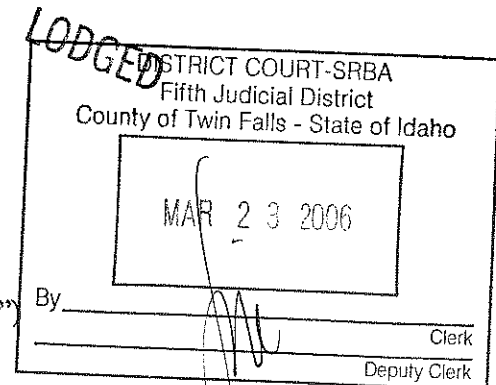


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 & Dempsey Irrigating Company (hereinafter "Movants")



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

)
) Subcase Nos.: Basin 29 Water Rights
) Signatories to Portneuf River Settlement
)
) MOVANTS LAVA IRRIGATION
) COMPANY, LIMITED and DEMPSEY
) IRRIGATING COMPANY'S MEMO IN
) SUPPORT OF THEIR MOTION TO
) ALTER OR AMEND ORDERS
) PARTIAL DECREES ON PORTNEUF
) RIVER

Movants, Lava Irrigation Company, Limited, an Idaho Corporation and Dempsey Irrigating Company ("Movants"), respectfully submit the following Memorandum in Support of their Motion to Alter or Amend Orders of Partial Decrees on Portneuf River in Basin 29:

Rule 14(d) of the SRBA Administrative Order 1, Rules of Procedure specifies that "[p]arties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." Rule 60(b) of the Idaho Rules of Civil Procedure provides in material part as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . and (6) any other reason

justifying relief from the operation of the judgment.

"The mistake, inadvertence, surprise or excusable neglect need not be that of the party making the motion." Sines v. Blaser, 98 Idaho 435, 438, 566 P.2d 758, 761 (1977).

Movents respectfully submit that at least one of the foregoing grounds for relief under Rule 60(b) are met in the present case and, indeed, that a mistake of fact and inadvertence resulted in the entry of a partial decree that is contrary to the intent of the parties in settling the matter – namely, that they would maintain and preserve their historic use. Moreover, newly discovered evidence provided by the Department's own expert further supports the conclusion that relief should be granted under Rule 60(b).

Idaho's appellate courts have specifically held that "I.R.C.P. 60(b) provides relief from a judgment on the basis of mistake" particularly "a mistake of fact" that would have been relied on by "a reasonably prudent person under similar circumstances." Thomas v. Thomas, 119 Idaho 709, 711, 809 P.2d 1188, 1190 (Ct. App. 1991). Applying this rule, the Court of Appeals in the Thomas case reversed denial of a Rule 60(b) motion in a circumstance with many similarities to the present case.

As in the present case, the decree at issue in the Thomas case was entered after the parties agreed to settlement. As in the present case, the settlement agreement and resulting decree in Thomas were based on a mistake of fact – namely, the understanding that estimated tax liability would be approximately \$30,000 instead of the \$11,000 in tax liability that actually resulted. This mistake resulted in an approximate \$19,000 deviation from an equal division in favor of the litigant who was to pay the taxes. In reversing denial of the Rule 60(b) Motion, the Court of Appeals accordingly reasoned and concluded:

Applying the proper standard to the findings, the logical legal conclusions are that there was an excusable mistake of fact regarding the tax estimate and that [the moving party] did act as a reasonably prudent person would have done in similar circumstances. The magistrate found that [the non-moving party] had given a reasonable estimate of the tax liability.

....

As a matter of law, the magistrate should have concluded that [the moving party] acted as a reasonably prudent person. The estimate of \$30,000 in tax liability was found to be a reasonable estimate. To say that [the moving party] acted

imprudently by accepting the inclusion of a reasonable estimate in the [Settlement] Agreement would be an abuse of discretion because it would not logically apply the legal standard of the reasonably prudent person to the facts found.

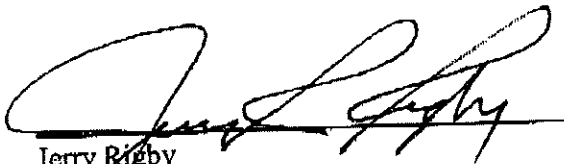
The magistrate should have found that there was an excusable mistake of fact which could support the grant of relief under Rule 60(b). . . . We hold as a matter of law that the parties made an excusable mistake of fact regarding the estimated amount of . . . tax liability. . . . Therefore, we remand this case to the magistrate with directions to make a substantially equal division of the approximately \$19,000 difference between actual and estimated . . . tax liability.

Thomas, 119 Idaho at 711-12, 809 P.2d at 1191-92.

If the facts of the Thomas case persuaded Rule 60(b) relief, those of the present case compel it. Reliance in the present case was not based upon an estimate produced by an adverse party as it was in Thomas. Rather, it was the mistaken factual determinations by the Department's own expert that resulted in the decree at issue in the present case — a decree which would, in light of the mistaken factual determination, be contrary to the intent of the parties in settling the matter that they would preserve and maintain their historical use. Moreover, the Department's own expert has recently provided new evidence correcting the previous mistake of fact and which would allow for entry of a decree that could effectuate the parties' intent by their settlement to preserve and maintain their historical use instead of a decree that contradicts such intent.

Rule 60(b) relief is plainly appropriate under the circumstances.

Dated this 22nd day of March, 2006.


Jerry Rigby
of RIGBY, THATCHER, ANDRUS,
RIGBY, KAM & MOELLER, Chartered

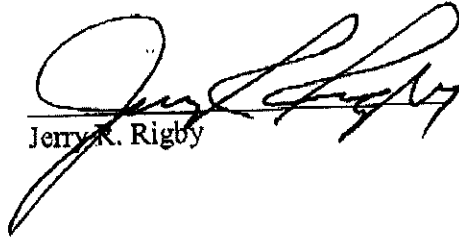
CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 23rd day of March, 2006, a true and accurate copy of the foregoing was sent by facsimile transmission and/or U.S. Mail, postage prepaid to the following:

See Attached List

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