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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

Subcase No.: 74-14981

**BRIEF IN SUPPORT OF MOTION FOR
RELIEF UNDER I.R.C.P., RULE 60(a)**

Claimants in the above entitled subcase, Glenn and Cathy Seaberg, hereby submit this brief in support of their Motion for Relief under Rule 60(a) of the Idaho Rules of Civil Procedure.

PROCEDURAL STATUS

In connection with the processing of the Snake River Basin Adjudication proceeding (SRBA) for Basin 74 (the Lemhi Basin) Mr. and Mrs. Glenn and Cathy Seaberg filed a Notice of Claim to a Water Right on June 13, 2000, which was assigned number 74-14981. They claimed 0.24 cfs of the waters of Lemhi River with a priority of June 9, 1875, for irrigation of an approximately eight (8) acre parcel of land they own in the NE corner of the NENW, Section 15, T21N., R22E. IDWR subsequently recommended to the SRBA Court that the claim be disallowed. The specific words of the "Preliminary Recommendation" (dated March 25, 2004) were as follows:

"RIGHT NOT CLAIMED IN PRIOR ADJUDICATION: This is included for a claim that is PROPOSED to be disallowed because rights to water from the source claimed were determined in a prior general adjudication, the right was not decreed in the prior adjudication, and the claim cannot be recommended based upon beneficial use.

RIGHT NOT CLAIMED IN PRIOR ADJUDICATION."

Upon receipt of the final recommendation of IDWR, Seabergs caused a Standard Form 1 Objection to be filed herein. An initial hearing was held at the Lemhi County Courthouse on May 9, 2007, and the matter has now been set for a status conference on February 7, 2008, at 9:00 a.m., before Special Master Terrance A. Dolan.

STATEMENT OF FACTS

The District Court of the Sixth Judicial District for the County of Lemhi, by C.J. Taylor, District Judge, entered a "Decree", dated June 19, 1931, in the case of *Steve Demich, et al., v. James G. Sims, et al.*, which included, as Paragraph IX thereof, the following:

IX.

That the heirs of Alice McDonald, deceased, whose names are not now known, are the owners, in possession and entitled to the possession, of the following described land, situated in said County, to wit:

All of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 10; N $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 15, Township 21 North, Range 22 East of the Boise Meridian, together with all tenements, hereditaments, and appurtenances thereunto belonging or appertaining thereto.

That the heirs of said Alice McDonald, deceased, are entitled to have and are hereby awarded the right to the use of five cubic [feet] per second of time of the waters of said River, to be taken out of that part of said irrigation system described as the "ANDREW'S DITCH", for the irrigation of their said land, with a priority of appropriation dating from June 9, 1875.

John A. Goodman and Minnie Z. Goodman conveyed approximately 80 acres of the above described real property to Clarence C. Miller and Myra E. Miller in August of 1956 by Warranty Deed recorded September 4, 1956, as Instrument No. 85276 of the Records of Lemhi County, Idaho, which contains the following paragraph:

Together with all water, water rights, ditch and ditch rights appertaining thereto or used in connection therewith, including three cubic feet per second of time of the waters of the Lemhi River

through the Andrew's Ditch, decreed June 20, 1931, and recorded in Book "D" of Judgments at pages 59 to 63 inclusive of the records of Lemhi County, Idaho.

The approximately 80 acres acquired by the Millers included slightly over 40 acres of land in the N $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Section 15, T21N., R22E., lying north of the northerly right of way of Idaho Highway 28.

After the passing of her husband, Clarence C. Miller, in September of 1990, Mrs. Myra E. Miller conveyed approximately 8 acres of this land in the NE corner of the NENW of said Section 15 to Glenn and Cathy Seaberg by Warranty Deed, dated December 2, 1994, and recorded December 16, 1994, as Instrument No. 224902 of the records of Lemhi County, Idaho.

Most of the land acquired by Millers in 1956, including the eight acre parcel sold to Seabergs in 1994, was being irrigated with water from Lemhi River through the Andrew's Ditch when Millers bought it. Irrigation of such land continued, without interruption, every irrigation season thereafter. The Seaberg parcel has been irrigated every year since they obtained it from the Millers.

In 1971, the Millers received a notice from IDWR that the Lemhi Adjudication proceeding had been commenced and that they needed to file a formal claim. Because Mr. Miller was unavailable on the day the claim was to be filed, Mrs. Miller went to the courthouse on August 10, 1971, and Mr. L. Glen Saxton of IDWR filled out a "Notice of Claim to a Water Right" on which the claim number, "74-0447", was typed. Mrs. Miller signed the claim and her signature was acknowledged by Mr. Saxton on that date.

Prior to this date, the Millers had sold several pieces of their property, but on August 10, 1971, they still held title to 5.3 acres in the NWNW, Section 15, and to 13.3 acres in the NENW of said Section. The 13.3 acres listed in the Notice of Claim form within the NENW of Section 15 specifically included the eight acre parcel in the NE corner of said quarter-quarter now owned by Seabergs.

After the filing of the claim by Mrs. Miller, and without her knowledge, someone lined through the number "74-0047", and wrote above it in longhand, the number 74-0321C, presumably Mr. Saxton or another IDWR employee. Some months or years later, Millers received a "book" with IDWR recommendations for the claimed water rights and Mr. Miller became aware that no water right had been recommended for the eight acre parcel now owned by Seabergs. Although Mrs. Miller did not accompany her husband in most of his visits and efforts, she knew that Mr. Miller

made a number of contacts with Mr. Saxton and visits to his office, and perhaps other officials, in an attempt to correct the mistake. During much of this time Mr. Miller was quite ill, but at some point he communicated to Mrs. Miller that he felt he had accomplished his objective of correcting the mistake. Since Mrs. Miller had gained this understanding from her husband, she took no further action. Irrigation of the eight acres continued as it always had and she did not become aware that the decree entered in the Lemhi Adjudication proceeding omitted any water right for the eight acre parcel until the Seabergs informed her of the problem during the more recent SRBA processing.

ISSUE

The question presented by this Motion is whether, under these circumstances, a water right for the eight acre parcel of the Seabergs should be decreed in the SRBA proceeding.

ARGUMENT

An order authorizing IDWR to proceed with an adjudication that has come to be known as the "Lemhi Adjudication" was entered August 13, 1970. An Order dated June 17, 1971, made some 457 landowners parties to the proceedings. Clarence C. & Myra E. Miller were included among those 457 landowners made party to the proceedings and received the notice which resulted in the filing of the claim, No. 74-0447, later changed to 74-0321C. The Decree in the Lemhi Adjudication proceeding appears to have become final on December 30, 1982, and contained the following language:

5. This recommended decree includes all of the existing rights to the waters of the Lemhi River and its tributaries and upon its adoption supercedes all prior judgments of the court. Any water users who heretofore diverted water from the Lemhi River or its tributaries or who own lands to which previously established rights were appurtenant and who, upon being joined in this action, failed to claim such water rights has forfeited such rights as provided in Section 42-1411, Idaho Code, subject to the provisions of 42-1405, Idaho Code.

The language of Section 42-1411, referred to in the above quoted language from the Decree, at that time, stated:

42-1411. **Decree – Forfeiture of right.** – The Decree shall be conclusive as to the rights of all existing claimants upon the water system which shall lawfully embrace any determination. When a Decree has been entered, any water user who has been joined and who failed to appear and submit proof of his claim as provided in this act shall be barred and estopped from subsequently asserting any right theretofore acquired upon the waters included within the proceedings, and shall have been held to have forfeited all rights to any water theretofore claimed.

This code section was enacted, as part of the statute governing general water rights adjudication proceedings, in 1969.

It is clear that Millers were water users who, prior to the entry of the Decree in the Lemhi Adjudication, diverted water from the Lemhi River and owned land to which previously established rights were appurtenant. They were also joined in the action we referred to as the Lemhi Adjudication proceeding. But they did not fail to claim a water right or to appear and submit proof of such claim.

For reasons that no one, including IDWR, has been able to explain, the portion of the Miller's claim which included the eight acre parcel of land now owned by Seabergs, was omitted from the Decree. There is no evidence available, of which we are aware, that a determination was ever made by IDWR of reasons to deny a water right for this eight acres. There is, for example, no evidence of forfeiture of such portion of the water right.

Nor does the omission appear to have resulted from lack of attention or effort on the part of the Millers. Indeed, Millers became aware of the mistake before the entry of the Lemhi Decree, and Mr. Miller took action to correct it and thought he had been successful in doing so.

At this point, there appears to be no better explanation for the omission than that it was an oversight or clerical error on the part of IDWR, or left out by mistake.

The motion in support of which this brief is written is brought pursuant to Rule 60(a) of the *Idaho Rules of Civil Procedure*, which provides:

Rule 60(a). Relief from judgment or order – Clerical mistakes.

Clerical mistakes and judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the supreme court or the district

court, as the case may be, and thereafter while the appeal is pending may be so corrected.

We have found no Idaho case with quite the same factual background as this particular situation. There is some discussion of Rule 60(a) by the Idaho Supreme Court in the case of *Dursteller v. Dursteller*, 112 Idaho 594, 733 P.2d 815 (Idaho Court of Appeals, 1987). But that case was a breach of contract matter and the issue dealt with the correction of a judgment by the District Court to add post-judgment interest. While the Supreme Court makes it clear that Rule 60(a) cannot be used by a court to change its mind or revise a decision already made, it is to be used to correct an obvious error or include an item omitted by mistake as a result of clerical type errors.

The only evidence available appears to be that the eight acres was continuously irrigated from the Andrew's Ditch prior to the commencement of the Lemhi Adjudication proceeding, and has continued to be ever since, regardless of the entry of the Lemhi Decree in about 1982, which includes no mention of a water right for this particular eight acres.

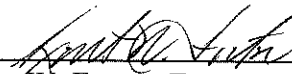
The 1931 decree mentioned in the statement of facts awarded 5.0 cfs for the irrigation of all or some portion of a possible total of 160 acres of land. We often speak of measuring a water right in terms of "inches" or "miner's inches", which we understand to be the equivalent of 0.02 cfs. Idaho Code § 42-202(3) and (6) establish a presumption in Idaho that it takes 1 cfs to irrigate 50 acres, or 0.02 cfs (1 miner's inch) per acre. In the initial establishment of the water right, this amount can only be exceeded upon a showing that more is required. In the case of this decreed right, the Court apparently concluded that a greater rate was necessary. Assuming every one of the 160 acres was irrigated, 5.0 cfs provides 0.03125 cfs per acre which is the same as 1.5625 miner's inches per acre. When Millers acquired their approximately 80 acres, the Deed specifically included 3.0 cfs of the 1875 priority water right. This is 0.0375 cfs per acre or 1.875 miner's inches per acre.

But, in the Lemhi Adjudication, both the acreage and the amount under the 1875 priority right were substantially reduced. Pursuant to IDWR recommendation, the Court awarded only a total of 2.98 cfs for 74.04 acres under this right. Now, in the SRBA proceeding, the recommendations for portions of this right have been further reduced to some 2.058 of the original 5.0 cfs and some 53.7 of the original 160 acres.

We only point this out to emphasize that, while depriving Seabergs of any irrigation right for their eight acres would be devastating to them and the use and value of their land, there would be

no negative impact to any other water users in the community, or the state as a whole, or to IDWR if the mistake were corrected and Seabergs were awarded the portion of the 1875 right that belongs to their eight acres of land. No one would perceive any change in the status quo because the parcel has been continuously irrigated from the Andrew's Ditch, apparently for 132 years. No one has complained about the continued irrigation of the eight acres since the entry of the Lemhi Decree. A Decree for an additional eight acres and 0.24 cfs is minuscule in comparison to the total of the water rights on the Lemhi River. And the award of such a Decree will not establish some dangerous precedent because there are few, if any, other pending matters with similar circumstances. In this case, the equities and justice demand that the mistake be corrected and that a water right be decreed to the Seaberg parcel.

RESPECTFULLY SUBMITTED this 31st day of December, 2007.



Kent W. Foster, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF MAILING

I hereby certify that on the 31st day of December, 2007, I mailed the original and copies of this brief, including all attachments, to the following persons:

1. Original to:

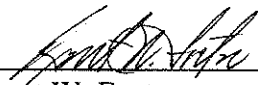
Clerk of the District Court
Snake River Basin Adjudication
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Twin Falls, ID 83303-2707

2. Copies to:

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P.O. Box 83720
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