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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 NUMBERS 37-2545A, 37-2545B, 37-
	)	2688, 37-11950, 37-07072, 37-07600
	)	
	)	MEMORANDUM IN SUPPORT OF MOTION TO
	)	REOPEN SUBCASES
	)	
	)	

COMES NOW, Claimant Lava Lakes Land and Livestock, LLC (hereinafter "Lava Lakes"), by and through its counsel of record Ringert Clark, Chartered, and hereby submits this Memorandum in support of its Motion to Reopen Subcases filed concurrently herewith. This Memorandum is supported by the Affidavits of Charles Brockway, Jr., Leonard N. Purdy, and Kelly Christenson, and the Partial Decrees, Recommendations and claims to water rights already on file herein.

FACTS

Lava Lakes Land and Livestock, LLC (hereinafter "Lava Lakes") owns property in south central Idaho near the town of Carey. The land has historically been irrigated by water from four sources: water stored in Lava Lake (water right nos. 37-11950 and 37-2688 - Partial Decrees issued), Copper Creek and springs tributary thereto (water right nos. 37-2545A and 37-2545B - Partial

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Decrees issued), Payne Creek (water right nos. 37-11936 and 37-2715 - objections pending; and water right no. 37-1156 - claim pending), and groundwater (water right nos. 37-07600 and 37-07072 - Partial Decrees issued). A road running east to west splits the ranch into north and south portions. *Brockway Affidavit*, ¶4; *Purdy Affidavit*, ¶6. Until 1986, the Lava Lake source and the Payne Creek and groundwater sources were used exclusively on separate portions of the ranch. *Brockway Affidavit*, ¶5. Licensed right no. 78-2545 from Copper Creek and springs was used to irrigate both portions of the ranch. *Id.* The water rights were originally claimed and recommended in the SRBA in a manner that reflects the application of the water rights prior to 1986. *Id.*, at ¶6.

In 1986, Lava Lakes reconstructed its water distribution system to allow for the use of any of the four sources on any portion of the ranch, and began using water from all four sources in that manner. *Purdy Affidavit*, ¶ 6; *Brockway Affidavit*, ¶ 6. All of the water rights have been used in this manner since that time.

Some of the water rights that are the subject of this *Motion* also contain clerical errors. Those errors are as follows:

- A. Water Right No. 37-11950 contains language pertaining to “enlargement” rights claimed pursuant to I.C. §42-1426. This language should be removed, as 37-11950 was not claimed pursuant to I.C. §42-1426, and the language is therefore inappropriate. *Christensen Affidavit*, ¶5A.
- B. Water Right no. 37-2688 also contains language pertaining to “enlargement” rights claimed pursuant to I.C. §42-1426. This language should be removed, as 37-2688 was similarly not claimed pursuant to I.C. §42-1426. *Id.*, ¶5B.
- C. Water Right Nos. 37-2545A and 37-2545B were claimed and recommended

as two water rights. They should have both been recommended and decreed as part of the same water right: no. 37-2545. The diversion rate of 9.30 cfs for which water right no. 37-2545 was licensed was not claimed or recommended in the SRBA and instead the water rights have been decreed with a total diversion rate of 6.06 cfs - substantially less than is used by Lava Lake Land and Livestock, LLC. *Id.*, ¶5C.

- D. Water right no. 37-07600, along with the other water rights to which this memorandum is addressed (37-2545A, 37-2545B, 37-2688, 37-2715, 37-7600, 37-11950) and water right nos. 37-1156, 37-2715, 37-7072, 37-11936, 37-22116, and 37-22117 (claimed by Lava Lake Land and Livestock, LLC in the SRBA) are all used in a common distribution system within a “permissible place of use” and have been so used since at least 1986. *Id.*, ¶5D; *See also Purdy Affidavit*, ¶ 6; *Brockway Affidavit*, ¶ 6. If IDWR had been aware of this information, it would have recommended all of the water rights as being used within the permissible place of use. *Christensen Affidavit*, ¶5D.

Pursuant to I.C. §42-1425, all of the water rights are appurtenant to the entire irrigated acreage of the ranch (though each is limited to its original irrigated acreage). Lava Lakes’ *Motion to Reopen Subcases* is filed to address the previously issued Partial Decrees for all of the water rights referenced, in that they fail to specify that all water rights are appurtenant to the entire irrigated acreage upon the ranch, and in that other clerical errors are apparent in the current Partial Decrees.

ARGUMENT

I.R.C.P. 60(a) provides in relevant part that “[c]lerical mistakes in 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.” I.R.C.P. 60(b) provides in relevant part that “the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.”

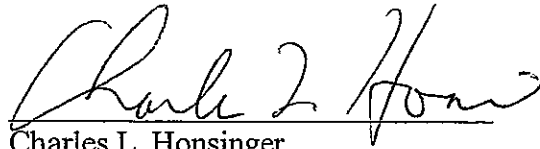
Once these subcases are reopened, it is Lava Lakes’ intent to file additional enlargement claims pursuant to I.C. §42-1426 to reflect the fact that water diverted pursuant to certain water rights addressed by this *Motion* has been used prior to 1986 on additional places of use although no additional quantities have been diverted. It is Lava Lakes’ understanding that it cannot file Motions to File Late Claims to address these I.C. §42-1426 until the “parent” claims to which this Motion are addressed are in fact reopened. Thus, Lava Lakes will file such Motions to File Late Claims upon the reopening of the partial decrees to which this Motion is addressed, and which have been issued with errors.

The types of errors described in the *Christensen Affidavit* are those to which I.R.C.P. 60(a) is intended to apply. *Dursteler v. Dursteler*, 112 Idaho 594, 598 (App. 1987) (The term “clerical mistake” does not mean that it must be made by a clerk. The phrase merely describes the type of error identified with mistake in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be handled by others). Accordingly, under this standard, the Partial Decrees referenced herein should be reopened for correction of errors.

The errors described herein can also be corrected according to I.R.C.P. 60(b)(6). Whether to grant a Motion made under Rule 60(b) is a discretionary decision of the trial court, requiring the Court to determine facts concerning the orders (Partial Decrees) issued and to apply I.R.C.P. 60(b) criteria to those facts. *Bull v. Leake*, 109 Idaho 1044, 1047 (App. 1986). Relief from a judgment under clause (6) of Rule 60(b) is appropriate “whenever ‘such action is appropriate to accomplish justice.’” *First Sec. Bank, N.A. v. Stauffer*, 112 Idaho 133, 142 (App. 1986). Here there are adequate facts and reasons for the Court to grant Lava Lakes’ *Motion to Reopen Subcases*. First, the IDWR Senior Water Rights Agent who has worked on these claims has submitted an Affidavit in support of this motion, indicating (at least impliedly), IDWR’s agreement that Lava Lakes’ Motion should be granted. Second, several errors are discussed in both the *Christensen Affidavit* and the *Brockway Affidavit*. Third, Chapter 14, Title 42, Idaho Code is replete with references indicating legislative intent that water rights claimed in an Adjudication be accurately recommended and decreed. (“The director’s role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported.” I.C. §42-1401B. “Each claimant shall sign and verify under oath that the statements contained in a notice of claim or amended notice of claim are true and correct.” I.C. §42-1409(3). *See also*, generally: I.C. §42-1411). Accordingly, it is important that for justice to be accomplished in this case, and have the water rights at issue herein be accurately decreed, the *Motion to Reopen Subcases* should be granted, and IDWR and Lava Lakes ordered to discuss and resolve the concerns that both have raised with respect to the rights.

Based upon the argument herein, Lava Lakes respectfully requests that the Court issue an *Order* granting its *Motion to Reopen Subcases*.

Dated this 9th day of September, 2008.

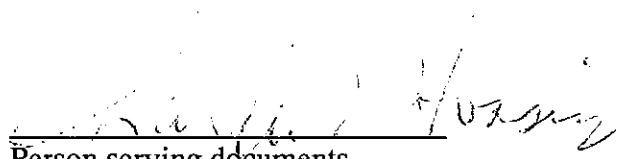
A handwritten signature in black ink, appearing to read "Charles L. Honsinger", written over a horizontal line.

Charles L. Honsinger
RINGERT LAW, CHARTERED

CERTIFICATE OF SERVICE

I certify that on September 10th, 2008, I served copies of this document, including all attachments by mailing a copy thereof, postage prepaid, to each of the parties listed below.

Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098



Person serving documents