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Rainbow Ranches, Inc., Trees, Inc., and Wally Rothgeb, Jr.*

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OCT 27 2009

DEPARTMENT OF
WATER RESOURCES

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 39576

Subcase No. 22-13211

MOTION TO SET ASIDE PARTIAL
DECREE AND ALLOW THE FILING
OF A LATE OBJECTION

Cedron Irrigation, LLC, Cedron Cemetery District, Teton Rainbow Ranch, Inc., Trees, Inc., and Wally Rothgeb, Jr. (collectively, the "Movants") respectfully move the Court pursuant rules 11 and 14(d) of SRBA Administrative Order 1 ("AO1") and rules 7(b)(1) and 60(b) of the Idaho Rules of Civil Procedure for an order setting aside the Partial Decree for SRBA Claim Number 22-13211, entered on November 24, 2008, and allowing a late filing of the objection attached hereto as **Exhibit A**. This Motion is made upon the grounds and for the reason that it would be fair, just and reasonable to set aside the Partial Decree and allow the filing of a late objection, as set forth more fully herein. This Motion is supported by the affidavit of Thomas J. Budge filed contemporaneous herewith.

LEGAL STANDARDS

A. Motion to Set Aside Partial Decree.

"In the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P.

60(b)." *Memo. Decision and Order on Mot. to Set Aside Partial Decree* at 7, SRBA Subcase No. 55-02373 et al. (May 1, 2001); *see also* Administrative Order 1 ("AO1") at 21. Rule 60(b) identifies six reasons that justify the setting aside of a Partial Decree, but the first three apply only within six months after the Partial Decree is entered. I.R.C.P. 60(b). The Partial Decree for SRBA Claim Number 22-13211 was entered over six months ago, on November 24, 2008, so only the fourth, fifth and sixth justifications are relevant to this motion. They are: "... (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; or (6) any other reason justifying relief from the operation of the judgment." *Id.* In this case, the Movants contend that there are other reasons justify setting aside the Partial Decree.

In addition to stating a reason that justifies setting aside a Partial Decree, the moving party must "allege facts which, if established, would constitute a meritorious defense." *Memo. Decision and Order on Mot. to Set Aside Partial Decree* at 8, SRBA Subcase No. 55-02373 et al. (May 1, 2001). The facts supporting the defense must be detailed "beyond the mere general notice requirement that would ordinarily be sufficient if pled prior to default." *Id.* (citing *Reeves v. Wisenor*, 102 Idaho 271 (1981)).

Determining whether to set aside a default judgment requires that the court "apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of genuine doubt." *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 733 (Ct. App. 1983). The court's decision must "take into account the overriding preference for having a case decided on its merits." *Order Conditionally Granting Mot. to Set Aside Partial Decrees* at 7, SRBA Subcase Nos. 37-07454 and 37-07602 (December 3, 2003) (citing *Reeves*, 102 Idaho at 272). In making that determination,

the Court must take into consideration that judgments by default are not favored, the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits, and procedural rules other than those which are jurisdictional should be applied to promote disposition on the merits.

Id. "This is a factual determination and is discretionary with the Court." *Id.* (citing *Johnson*, 104 Idaho at 732).

B. Motion to File Late Objection.

AO1 does not provide a standard for reviewing motions to file late objections. However, the SRBA Court has historically reviewed motions to file a late objection by the same standard as motions to file a late claim, which are reviewed according to the criteria for setting aside a

default judgment under Rule 55(c) of the Idaho Rules of Civil Procedure. *Order on Motion to Set Aside Partial Decrees and File Late Objections*, SRBA Subcases 65-7267 *et al.* (January 31, 2001); AO1 4(d) (late claims reviewed under I.R.C.P. 55(c) criteria).

Rule 55(c) allows a Court to set aside a default judgment for "good cause," which takes into account 1) whether the default was willful; 2) whether setting aside the judgment would prejudice the opponent; and 3) as with a Rule 60(b) motion, whether a meritorious position has been presented. *Memo. Decision and Order on Challenge; Order of Recommitment*, SRBA Subcases 47-16433 *et al.*, at 5 (March 22, 2005) (citing *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993)). As with motions to set aside partial decrees, there is a preference for having cases decided on the merits: "the general rule is to incline toward granting relief from the default and bring about a judgment on the merits." *Orange Transp. Co. v. Taylor*, 71 Idaho 275, 281 (citing *Cutler v. Haycock*, 32 Utah 354, 362, 90 P. 897).

ARGUMENT

SRBA claim number 22-13211 is claimed as an offspring of water right 22-405, which was decreed in the 1910 Rexburg Decree with a 1904 priority date. SRBA claim number 22-13211 has Paradise Springs as its source. The Movants irrigate lands near Paradise Springs using ground water rights¹ that divert from an aquifer that is alleged to be hydraulically connected to Paradise Springs. In fact, a neighboring water user, Michael Reid, has utilized a surface water right from Paradise Springs to make a delivery call against the Movants in an effort to have their ground water rights curtailed. Consequently, the Movants have a substantial interest in seeing that surface water rights from Paradise Springs, including claim number 22-13211, are properly defined in the SRBA. Otherwise, the Movants' water rights may be wrongly subjected to curtailment.

The Movants did not immediately object to claim number 22-13211 because the Movants believed the Claimant's property was in fact irrigated near the turn of the twentieth century consistent with the claimed priority date of June 1, 1904. However, the Movants did object to SRBA claim numbers 22-13503 and 22-13212, which are also claimed as offspring of Water Right Number 22-405, because the Movants believed that the claimed place of use of those rights was not first irrigated until 1969.

Since objecting to Claim Numbers 22-13502 and 22-13212, the Movants have engaged in

¹ Water Right Nos. 22-13135, 22-13961, 22-13963, 22-2280E, 22-2296B, 22-2296D and 22-13681.

a vigorous effort to obtain the evidence necessary to show that the claimed place of use was not first irrigated until 1969. The Movants have researched the records of the Idaho Department of Water Resources ("IDWR"), met with IDWR personnel to discuss claim numbers 22-13503 and 22-13212, obtained court records from the Rexburg Decree proceedings, researched records of the United States Department of Agriculture, and interviewed various individuals familiar with historic irrigation of the place of use claimed under claim numbers 22-13503 and 22-13212. The Movants recently completed trial on claim numbers 22-13503 and 22-13212 which disclosed additional information concerning the history of irrigation of the land claimed under water right 22-13211.

The information obtained from the Movants' research and from the trial of claim numbers 22-13503 and 22-13212 revealed that while a portion of the place of use of water right 22-13211 may have been irrigated as early as 1904, part of the claimed place of use clearly was not irrigated until 1969. The Claimant's predecessor in interest, LeRoy Miller, filed a notice of claim to a water right in the year 1983, claiming that only 8 acres had been irrigated in 1904. (*See* Aff. of Thomas J. Budge, Ex. A.) The remainder of the Claimant's property (which includes part of the land claimed with a 1904 priority date under water right 22-13211) was not irrigated until 1969, as evidenced by a second water right claim filed by LeRoy Miller in 1983. (*Id.* Ex. B.) In addition, the IDWR recently produced a topographic map showing that it would have been physically impossible to irrigate all of the land claimed under water right 22-13211 in the year 1904 because part of the land is located up-gradient from Paradise Springs and therefore is not capable of flood irrigation (the only means of irrigation available in 1904). (*Id.* Ex. C.) Thus, it is now clear that some of the land included within the place of use of water right 22-13211 was not irrigated until a pump and sprinklers were installed in 1969.

There are multiple reasons why the Movants did not initially realize that part of the place of use of claim number 22-13211 was not irrigated until 1969. First, only a part of the claimed place of use was not irrigated until 1969. Since much of the Claimant's property had in fact been irrigated since 1904, the recommended priority date of 1904 did not raise a red flag.

Second, water right 22-13211 is claimed as an offspring of water right 22-405 which was decreed in the Rexburg Decree. Since the Rexburg Decree did not define the precise number and location of acres irrigated under each right, it was not possible for the Claimant's to tell from the information contained on the face of water right number 22-405 whether all or part of the place

of use of Claim Number 22-13211 was entitled to a 1904 priority date. Further, many errors have been identified in the Rexburg Decree which has complicated the ability of the IDWR to correctly recommend water rights in the Teton River Basin, as well as the ability of water users to properly and fully scrutinize the Director's Report for the Teton River Basin. In fact, the decreed place of use of water right number 22-405—the alleged parent right of Claim Number 22-13211—does not include any of the Claimant's property, which may have been in error, and in any case compromised the Movants' ability to recognize that some of the Claimant's property was not first irrigated until after the Rexburg Decree was entered.

Third, identifying and understanding all of the SRBA Claims from Paradise Springs has been further complicated by various accomplished transfers of the three Paradise Springs water rights that were decreed in the 1910 Rexburg Decree (water rights 22-405, 22-587 and 22-575).² In addition, at least four statutory claims³ were filed that overlap the places of use of the three parent rights. As a result, there were many overlapping claims filed on Paradise Springs, some of which claimed the wrong parent right altogether.

At the end of the day, far more water was claimed as offspring of rights of Water Right Numbers 22-405, 22-587 and 22-575 than was decreed to those rights.⁴ For instance, water right 22-405 was decreed with a diversion rate of 2.0 cubic feet per second (cfs), yet more than 4 cfs was claimed as offspring rights. Moreover, the IDWR's pedigrees for the Paradise Springs rights that were decreed in the Rexburg Decree (22-405, 22-587 and 22-575) were not and are still not completely accurate. For example, one of the claimed offspring of Water Right 22-405 does not show up on its pedigree at all.⁵ Even more confusing is that the pedigrees for 22-405 and 22-587 show the same offspring rights. This only added to the already difficult task of understanding the bases for the various Paradise Springs water rights, including water right 22-13211.

In sum, some errors contained in SRBA claims and in the Director's Report are not patently apparent, and required a substantial amount of research and investigation to discover. The Movants have not sat idly by as the SRBA has proceeded through Basin 22 water right

² Water Right 22-405 was decreed to J.J. Miller (the "Miller right"), 22-587 was decreed to Caroline Withrick (the "Withrick right"), and 22-575 was decreed to George Walton (the "Walton right").

³ Statutory Claim Numbers 22-4141, 22-4142, 22-4104 and 22-4066.

⁴ Remarkably, the Rexburg Decree did not define a discrete rate of diversion for Water Right Number 22-587, but rather decreed it one-fourth (25%) of all flows from Paradise Springs.

⁵ The pedigree for water right 22-405 (Aff. of Thomas J. Budge, Ex. D) does not show Claim Number 22-13503 as an offspring right. However, the IDWR Recommended Right Report for Claim Number 22-13503 (Aff. of Thomas J. Budge, Ex. E) indicates that it is an offspring of 22-405.

claims. Rather, they have been actively engaged in filing their own claims while investigating questionably claims filed by neighboring water users. Through this process, they have found some claims to be in error. With respect to Claim Number 22-13211, it was not until the Claimants were able to review old USDA photographs and the IDWR backfile, interview some of the older residents of the neighborhood who recall the historic irrigation practices of the Claimant's property, and hear the evidence presented at trial on water rights 22-13503 and 22-13212 (which are sister rights to 22-13211) that the Movants were in a position to file an objection to Claim Number 22-13211 that is well-grounded in fact and warranted by a good faith argument as required by Rule 11(a)(1) of the Idaho Rules of Civil Procedure.

Ultimately, it is in the interest of justice to see that water rights be properly defined in the SRBA. In this subcase, there will be no substantial prejudice to the Claimant by setting aside the Partial Decree for SRBA claim number 22-13211, other than perhaps receiving the scrutiny that all water rights deserve in the SRBA and which his neighbors' and the Movants' rights have received. Indeed, counsel for the Movants understands that the SRBA Court normally would not have partially decreed water right 22-13211 until all of the objections to its sibling Paradise Springs water rights were resolved, which did not happen. Instead, water right 22-13211 was decreed without participation or scrutiny by other waters, resulting in what is effectively a default judgment. Although the Movants' have admittedly failed to meet the deadline to object to claim number 22-13211, it was not without good reason.

Where an affected water user fails to take reasonable action to protect his or her water right by seeking to identify and remedy errors in SRBA Claims or IDWR recommendations, there is a sound basis to leave them as decreed. However, this is not that case. The Movants have been actively engaged in protecting their water rights, have objected to other SRBA Claims where they had a factual and legal basis to do so, and have pursued the evidence necessary to support their positions. That an error was discovered late for claim number 22-13211 should not preclude an accurate definition of that right in the SRBA, especially since objections were filed against sibling rights of 22-13211.

The Movants' goal is simply to have the water right decree for 22-13211 reflect actual water use. For lands irrigated in 1904, a 1904 priority date should be granted and the Movants have no objection to it. But for lands not irrigated until 1969, the decree should reflect the appropriate priority date.

CONCLUSION

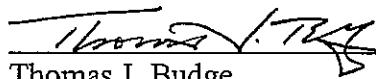
In the best interests of justice and in the interests of the proper administration of the water rights so established, the court should grant this Motion to Set Aside the Partial Decree for SRBA claim number 22-13211, and allow the filing of a late objection thereto. The partial decree for water right 22-13211 was entered as a default judgment, without any presentation of evidence and without scrutiny by the court. This was not a case where the Movants could have readily identified the error in the recommendation of water right 22-13211. An extraordinary amount of research into the convoluted history of irrigation from Paradise Springs was required in order to accurately evaluate the basis for water right 22-13211. That process was complicated by the failure of the Rexburg Decree to define the number and location of acres actually irrigated, the existence of multiple accomplished transfers of Paradise Springs water rights, the various 243 claims that overlap decreed water rights from Paradise Springs, the errors in IDWR pedigrees for Paradise Springs water rights, and the fact that part of the place of use of 22-13211 appears to have actually been irrigated in 1904.

The Movants have gone to great effort to understand their own and neighboring water rights. They should not be punished simply because the time required to complete necessary research did not fit within the standardized timelines for the entry of default judgments which in themselves are often ill-suited for the demands of a general water rights adjudication. Therefore, the Movants respectfully request that they be given the benefit of the doubt, and that the Partial Decree for water right 22-13211 be set aside and the Movants' be permitted to file a late objection in order that water right 22-13211 be decided on the merits and defined by the true history of water use by the Claimant and his predecessors in interest.

RESPECTFULLY SUBMITTED.

DATED this 23rd day of October, 2009.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED


Thomas J. Budge

CERTIFICATE OF MAILING

I certify that on this 23rd day of October, 2009, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

2. Copy to Claimant:

Don LeRoy Miller
1835 Teton View Drive
Rexburg, ID 83440

3. Copies to:

IDWR Document Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, Idaho 83724



THOMAS J. BUDGE
Attorney for the Movants

EXHIBIT A

**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

A. Subcase 22-13211

(Insert water right number)

**STANDARD FORM 1
OBJECTION**

Please **print or type** the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Cedron Irrigation, LLC

Address: 609 S. 450 W.

Victor, Idaho 83455

Daytime Phone: (208) 354-2506

Name: Cedron Cemetery District

Address: 609 S. 450 W.

Victor, Idaho 83455

Daytime Phone: 208-354-2506

Name: Teton Rainbow Ranches, Inc.

Address: 721 S. 450 W.

Victor, Idaho 83455

Daytime Phone:

Name: Trees, Inc.

Address: P.O. Box 396

Teton Village, Wyoming 83025

Daytime Phone: 307-733-6563

Name: Wally Rothgeb

Address: P.O. Box 4689

Ketchum, Idaho 83340

Daytime Phone: 208-726-2007

Name & Address of Attorney, if any:

Thomas J. Budge
Racine Olson Nye Budge & Bailey, Chtd
201 E. Center Street
P.O. Box 1391
Pocatello, ID 83204-1391
Telephone: 208-232-6101
Facsimile: 208-232-6109

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: **Don LeRoy Miller**

Address: **1835 Teton View Drive
Rexburg, Idaho 83440**

D. I object to the following elements as recommended in the Director's Report.
(Please check the appropriate box(es)).

1. ☐ **Name and Address**
Should be:
2. ☐ **Source**
Should be:
3. ☒ **Quantity**
Should be: **0.16 cfs**
4. ☐ **Priority Date**
Should be:
5. ☐ **Point(s) of Diversion**
Should be:
6. ☐ **Instream Flow Description**
Should be:
7. ☐ **Purpose(s) of Use**
Should be:
8. ☐ **Period of Year**
Should be:
9. ☒ **Place of Use**
Should be: **8 acres**
11. **I object because:**
 - ☐ This water right should not exist.
 - ☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S): See attached Motion to Set Aside Partial Decree and Allow the Filing of a Late Objection.

F. VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Bannock)

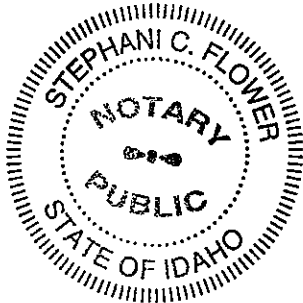
Thomas J. Budge _____, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

Thomas J. Budge
(Attorney signing in representative capacity)
Thomas J. Budge, Attorney

Subscribed and sworn to before me on this 23 day of October, 2009.



Stephani C. Flower
Notary Public for Idaho
Residing at: Pocatello
My Commission Expires: 3/24/14

INSTRUCTIONS FOR MAILING

You must mail the objection to the Clerk of the Court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on 23rd, 2009, I mailed the original and copies of this response, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

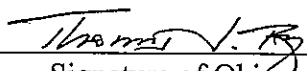
Name: Don LeRoy Miller
Address: 1835 Teton View Drive
Rexburg, Idaho 83440

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment & Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724



Signature of Objector or attorney
mailing on Objector's behalf

COPY

LAW OFFICES OF

**RACINE OLSON NYE BUDGE & BAILEY
CHARTERED**

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www.racinelaw.net

SENDER'S E-MAIL ADDRESS: tjb@racinelaw.net

RECEIVED

OCT 27 2009

DEPARTMENT OF
WATER RESOURCES

W. MARCUS W. NYE
RANDALL C. BUDGE
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JOSHUA D. JOHNSON
STEPHEN J. MUHONEN
BRENT L. WHITING
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477 SHOUP AVENUE
SUITE 107
POST OFFICE BOX 50698
IDAHO FALLS, ID 83405
TELEPHONE: (208) 528-6101
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COEUR D'ALENE OFFICE
250 NORTHWEST
BOULEVARD, SUITE 106A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 765-6888

ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL

October 23, 2009

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 88303-2707

Re: *SRBA Subcase No. 22-13211*
Motion to Set Aside Partial Decree and Allow Late Objection
Affidavit of Thomas J. Budge

Dear Clerk:

Please find enclosed the original and one copy of *Motion to Set Aside Partial Decree and Allow the Filing of a Late Objection, Affidavit of Thomas J. Budge* and a *Notice of Hearing*. Please file the originals in Subcase No. 22-13211, and conform stamp and return the copies thereof in the enclosed self-addressed and postage prepaid return envelope. Please call if you have any questions.

Sincerely,



THOMAS J. BUDGE

TJB:rr

Enclosures

cc: Don Miller, Claimant
IDWR Document Depository
Service List