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Thomas J. Budge, ISB No. 7465
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
201 E. Center Street
Post Office Box 1391
Pocatello, Idaho 83204-1391
208-232-6101 - Telephone
208-232-6109 – Facsimile

RECEIVED

AUG 19 2010

DEPARTMENT OF
WATER RESOURCES

Attorneys for the Movant, Rowlands, Inc.

**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 Nos. 29-11278, 29-4443A

**MOTION TO SET ASIDE PARTIAL
DECREES, FILE LATE OBJECTION,
AND AMEND CLAIM**

Rowlands, Inc. (the “Movant”) respectfully moves the Court pursuant to 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 and allowing a late objection to SRBA Claim No. 29-4443A, and setting aside the Partial Decree and allowing amendment of SRBA Claim No. 29-11278. It would be fair, just and reasonable to set aside both Partial Decrees and to allow an objection to Claim No. 29-4443A and amendment of Claim No. 29-11278, as explained below.

LEGAL STANDARD FOR MOTIONS TO SET ASIDE PARTIAL DECREES

“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(s) is entered. I.R.C.P. 60(b). The Partial Decrees

for SRBA Claim Number 29-4443A and 29-11278 were uncontested, resulting in default judgments without any presentation of evidence and without scrutiny by the court.. However, since the judgments were entered more than six months ago, only the fourth, fifth and sixth justifications for setting aside the partial decrees 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 to justify setting aside the Partial Decrees.

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).

ARGUMENT

SRBA claim number 29-11278 was prepared by the Movant who was not represented by counsel at the time. SRBA claim number 29-4443A was filed by a prior owner of a portion of the Movant's property. Last year the Movant discovered a need to file additional SRBA claims in order to obtain water rights for the all of the water uses on the Movant's property (including domestic, irrigation, and industrial use). Therefore, the Movant, acting *pro se*, filed a motion to

file late claim nos. 29-4443, 29-4444 and 29-4445, which was granted. After filing these late claims, the Movant hired counsel to assist it. The late claims also triggered further investigation by the Movant's counsel and by the IDWR into the historical use of water by the Movant. After substantial further investigation, it has become known that the water use on the Movant's property began over a century ago and increased in stages. It has also become clear that the Partial Decree for water right nos. 29-11278 and 29-4443A do not accurately reflect the staged development of Movant's water rights.

Movant's property contains a water system that provides industrial water use for a milk plant, irrigation water for yard area, and domestic water use for four residential structure—one of which is a triplex and one of which is a duplex. Water right number 29-11278 was claimed in the SRBA for domestic use for seven homes and the milk processing plant with a total quantity of 0.3 cfs and a 1949 priority date. Water right no. 29-4443A was claimed for one of the units within the triplex that is served by claimed under 29-11278. Water right no. 29-4443A should not exist because it duplicates a portion of water right no. 29-11278. Toward that end, the Movant asks the court to set aside the Partial Decree for water right no. 29-4443A and allow the filing of the late objection attached hereto as Exhibit A.

The Partial Decree for water right no. 29-11278 should also be set aside for three reasons: First, although the water right was claimed for seven homes, it was decreed for only four homes: While there are only four residential structures on the Movant's property, the Movant must have sufficient water to supply all seven residential units contained in those structures. Second, while the right was claimed for 0.30 cfs, it was recommended for 0.15 cfs in what appears to have been an error that carried over into the Partial Decree. Third, the four residential structures were constructed at different times, with the first building constructed as early as 1905. Water use in the milk plant also increased over time as demand and capabilities increased. The second problem with the Partial Decree for water right no. 29-11278 is that it does not reflect the staged development of water use at the Movant's property. Therefore, the Movant asks the court to set aside the Partial Decree for water right no. 29-11278 and allow the filing of the amended claim attached hereto as Exhibit B.

The Movant is committed to having its water rights accurately decreed to reflect the staged development of its milk plant and residential structures. Part of that requires setting aside the Partial Decree for water right nos. 29-4443A and 29-11278, having 29-4442A disallowed,

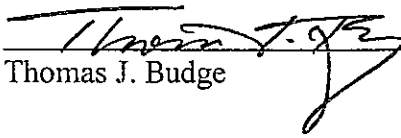
and amending 29-11278. The other part is filing additional claims to reflect the other stages of industrial, domestic, and irrigation development at the Movant's property. The Movant has acted accordingly, having already been granted a motion to file late claim nos. 29-4443, 29-4444 and 29-4445, and having pending before the court a motion to file late claim nos. 29-13955, 29-13956, 29-13957 and 29-13958.

CONCLUSION

The Movant has worked closely with the Idaho Department of Water Resources (IDWR) to investigate the historical development of water use on its property, and to determine how the Movant's water rights need to be claimed to accurately reflect the staged development. It is evident to the Movant and the IDWR agent with whom the Movant has worked that in order to accurately report and decree all of the rights owned by the Movant, the Partial Decrees for water right nos. 29-4443A and 29-11278 must be set aside, an objection must be filed for disallowance of SRBA claim no. 29-4443A, and SRBA claim no. 29-11278 must be amended. It is in the best interest of justice and in the interest of proper administration of Idaho's water resources to have these actions take place.

RESPECTFULLY SUBMITTED this 16th day of August, 2010.

RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED


Thomas J. Budge

CERTIFICATE OF MAILING

I certify that on this 17th day of August, 2010, 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:

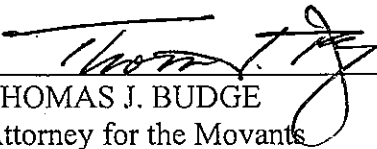
Rowland's Inc.
1141 Rowland Lane
Pocatello, Idaho 83204

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

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

(Insert water right number)

STANDARD FORM 1 OBJECTION

B. NAME AND ADDRESS OF PERSON OBJECTING

Address: 1141 Rowland Road, Pocatello, Idaho 83204

Daytime Phone: (208) 238-1259

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

Address: P.O. Box 858, Ketchum, Idaho 83340

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:
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:

10. **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 Motion to Set Aside
Partial Decree, File Late Objection, and Amend Claim.

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)

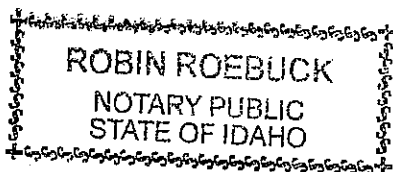
That I am the party/claimant filing this objection as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

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

Subscribed and sworn to before me on this 17th day of August, 2010.

Robin Roebuck
Notary Public for Idaho
Residing at Pocatello.
My Commission Expires: 8/18/2012



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 August 17th, 2010, 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:

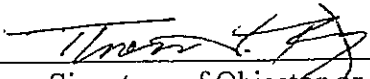
Name: Roberta Rowland
Address: P.O. Box 858
Ketchum, Idaho 83440

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

EXHIBIT "B"

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

**IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM**

CIVIL CASE NUMBER: 39576

Ident. Number 29-11278

Date Received: _____

Receipt No: _____

Received By: _____

**NOTICE OF CLAIM
TO A WATER RIGHT
ACQUIRED UNDER STATE LAW**

Please type or print clearly

1. Name of Claimant (s) Rowlands Inc. Phone (208) 238-1259

Mailing Address 1141 Rowland Rd Pocatello ID ZIP 83204-7416

2. Date of Priority (Only one (1) per claim) 1 / 1 / 1905
Month Day Year (YYYY)

3. Source of water supply (Check one) Ground Water (✓) or Other () (a) _____
which is tributary to (b) _____

4. a. Location of Point of Diversion is: Township 6S, Range 34E, Section 7,
NW, 1/4 of NW, 1/4 Govt. Lot _____, BM., County of Power

Parcel (PIN) no. _____

Additional points of diversion if any: _____

If available, GPS Coordinates _____

b. If instream flow, beginning point of claimed instream flow is:

Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4

Govt. Lot _____, BM., County of _____

ending point is: Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4

Govt. Lot _____, BM., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well. 160' deep; 10" casing; 25 hp sub pump

6. Water is claimed for the following purposes:

(both dates are inclusive MM-DD)

(cfs)

(acre feet)

For Domestic purposes from 1/1 to 12/31 amount .06 or

For Commercial purposes from 1/1 to 12/31 amount .30 or

For purposes from to amount or

For purposes from to amount or

7. Total quantity claimed (a) .30 (cfs) and/or (b) (acre feet)

8. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock, Etc.) Domestic for 2 households; commercial use is a milk plant

9. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

Twn	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
6S	34E	7		D/C															

Parcel (PIN) no(s).

Total number of acres irrigated n/a

10. In which county (ies) are lands listed above as place of use located? Power

11. Do you own the property listed above as place of use? Yes (✓) No ()

If your answer is No, describe in Remarks below the authority you have to claim this water right.

12. Describe any other water rights used at the same place and for the same purposes as described above.

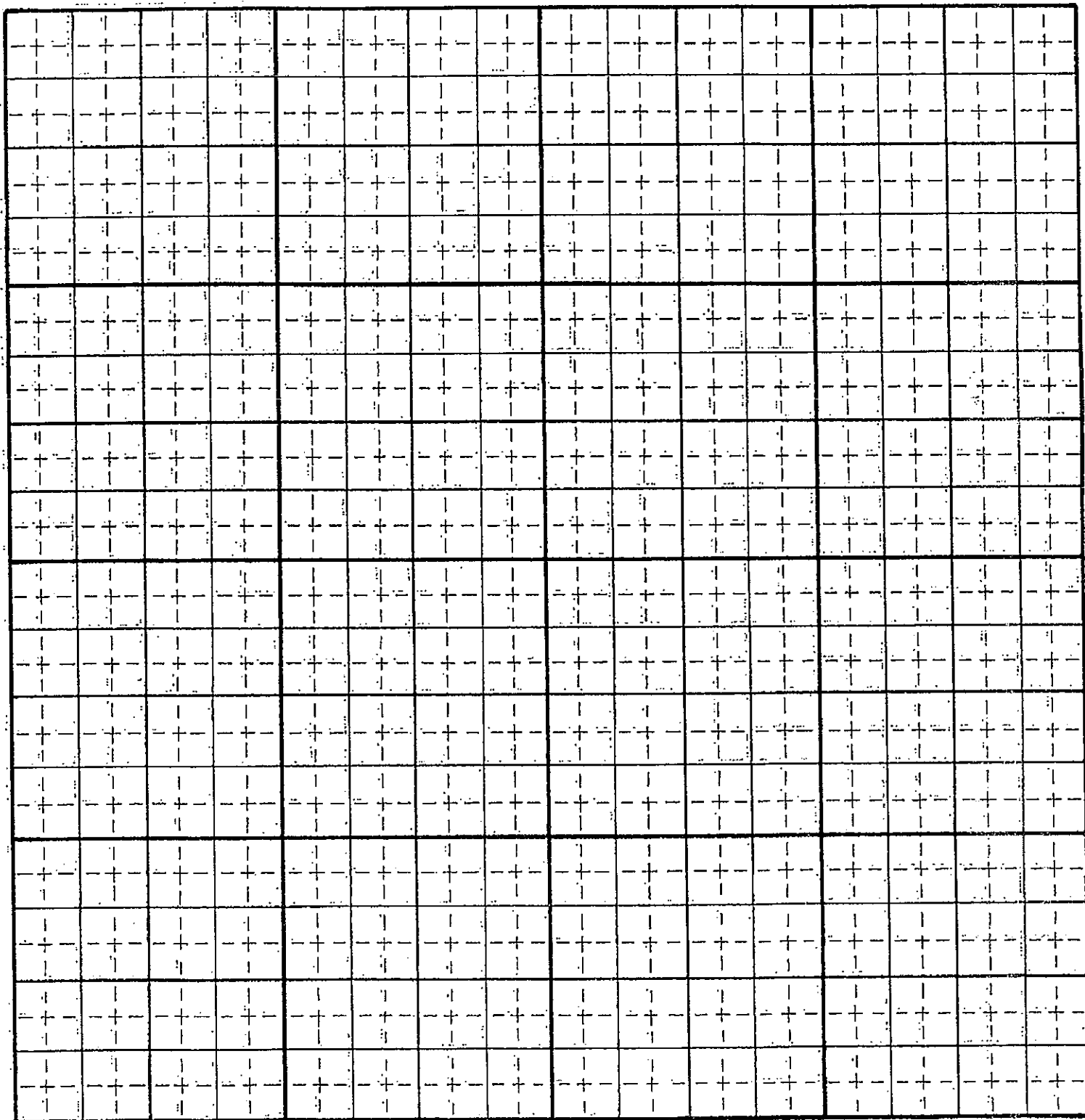
29-4445 or None ()

13. Remarks:

Last Name Identification No.

Map of Project: Attach aerial photograph or topographic map showing clearly the point of diversion, place of use, section number, township, and range number, unless unavailable. Otherwise sketch the elements above on the grid below.

Scale: 2 Inches equals 1 mile



Last Name _____ Identification No. _____

14. Basis of Claim (Check One) Beneficial Use (☒) Posted Notice (☐) License (☐) Permit (☐) Decree (☐)

Court _____ Decree Date _____ Plaintiff v. Defendant _____

If applicable provide IDWR Water Right Number 29-11278

15. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notices in the Snake River Basin Adjudication." (b.) I/We do (☐) do not (☐) wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals: I/We do solemnly swear or affirm under penalty of perjury that the statements contained in the foregoing document are true and correct.

Signature of Claimant (s) _____ Date: _____

_____ Date: _____

For Organizations: I do solemnly swear or affirm under penalty of perjury that I am

_____ of _____
Title Organization

that I have signed the foregoing document in the space below as

_____ of _____
Title Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent Thomas J. Budge Date 8-16-10

Title and Organization Attorney for Claimant

16. Notice of Appearance:

Notice is hereby given that I, Thomas J. Budge, will be acting as attorney at law of behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature Thomas J. Budge Date 8-16-10

Address 201 East Center St., PO Box 1391

Pocatello, ID 83204-1921

Last Name _____ Identification No. _____