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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

) **Subcase: 22-13739**

Case 39576

)
)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION TO SET ASIDE PARTIAL**
) **DECREE**
)
)

The Claimant, Canyon Creek Lateral Ditch Association, moves to set aside the Partial Decree for water right 22-13739 on the grounds that reasons exist to justify relief from the operation of the judgement (60(b)(6)).

BACKGROUND

Water Right 22-13739 was originally filed in the form of a late claim for an enlargement of acres for water right 22-7276. The original late claim for 22-13739 was filed on July 26, 2007. The claim was filed by virtue of the fact that one of the members of the Association used water which was pumped through the Canyon Creek Lateral System, then dumped into Canyon Creek Canal and diverted onto his land, which was not included in the originally prescribed place of use. He had done so since 04/21/1978. After filing the original enlargement late claim, the

claimant realized that they had missed an additional 17 acres which had been missed in the late claim. The claimant filed an amended late claim and an amended director's report was generated by Michael Holliday of the Idaho Department of Water Resources. Mr. Holliday sent the amended report to IDWR's Boise office. For an unknown reason, the ADR was not taken into account and the Director's Report for the original late claim was relied upon instead of the new ADR. This inadvertent mistake led to a partial decree issued on January 23, 2009 which allowed for 3650.9 acres and a diversion rate of 7.80 cfs. However, this partial decree is 17 acres short of the 3667.9 acres and .22 cfs short of the 8.02 cfs recommended by the Department in the ADR. The Claimant failed to catch the mistake assuming that the recommended right and subsequent partial decree now covered the additional 17 acres and .22 cfs.

APPLICATION

The Court has discretion to set aside a partial decree. It is allowed this discretion by the Idaho Rules of Civil Procedure 60(b)(6), and by prior case law.

I.R.C.P. 60(b)(6) gives the court the discretion to set aside a final judgment for "any other reason justifying relief from the operation of the judgment". Although the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b)[(6)] motion, its discretion is limited and may be granted only on a showing of 'unique and compelling circumstances' justifying relief." *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 Idaho, 2009. (quoting *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996)). In the *Berg* case, the plaintiff, (a minor) was allowed to set aside a judgment pursuant to IRCP 60(b)(6) due to the fact that circumstances out of her control prevented her from presenting an otherwise meritorious case to the Court. *Id.*

In the case before the Court, it is clear that “unique and compelling circumstances” exist which would warrant a decision by the Court setting aside the partial decree of 22-13739. Attached with this memorandum is a copy of the Amended Director’s Report provided by Michael Holliday of IDWR. Mr. Holliday is the IDWR water rights specialist responsible for performing or overseeing the investigation of water right claims, and on behalf of the Director recommended that the claim include the extra 17 acres and that the rate of diversion be 8.02 cfs. A Director’s Report is prima facie evidence of the elements of a water right. I.C. § 42-1411. As mentioned above, the reason for which the Amended Director’s Report was not relied upon is unclear. However, the simple fact is that it does exist, it is the latest Director’s Report pertaining to this water right, and it is therefore the prima facie evidence of the elements of the water right. The fact that it was not relied upon was clearly a mistake as there is no other answer as to why it would have been ignored. These actions were also out of the control of the claimant which believed it was resolved as had been agreed upon. Further, that the most recent prima facie evidence of the water right was mistakenly not relied upon in the formation of the partial decree presents a unique and compelling circumstance. Clearly the Court should rely upon the best evidence available, and the amended director’s report is the best evidence.

Recently, the SRBA Court set aside an order disallowing a claim for the claimant Bannock Jim Slough. Water Right Nos. 1-139 and 1-140. In that case, the Court had originally disallowed the water rights because the Claimants had simply not organized their irrigation company into a corporate form all the members could agree upon in a timely manner. While a disallowance is not exactly the same as a partial decree, it is for all intents and purposes the same in that it is an order by the Court which essentially decrees the elements of the water right, or

lack thereof. In that case, the Court set aside the order of disallowance and allowed the claimants to file a late objection, which resulted in the Claimants having the ability to divert the water they had historically diverted. The case currently before the Court is similar in that in the absence of the Court setting aside the partial decree of water right 22-13739, the Claimant in the current case will be forced to forego diverting the water which has been historically diverted.

The Claimant realizes that a fair amount of time has passed since the Partial Decree for 22-13739 was entered. Nevertheless, the claimant's believe that the Court should exercise its discretion and set aside the partial decree because the delay was not willful, only recently discovered, no parties will be prejudiced, the original mistake was out of the control of the Claimant, and the Claimant has a meritorious position.

In defining "willful" action, the Presiding Judge, relying upon Black's Law Dictionary, has noted the following:

"In civil actions the word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." Black's further defines the term as, "A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from act done carelessly, thoughtlessly, or inadvertently. A willful act differs essentially from a negligent act. The one positive and the other negative."

Order on Permissive Review and Order of Recommitment, (Bedke II) at 8.

The Claimant has not knowingly or purposefully delayed the filing of this motion. The additional amount of acres and additional cfs in question are small, and the Claimant simply overlooked the mistake. Had the Claimant realized the mistake earlier, it would have filed as soon as the mistake was noted. It is understandable that the claimant could have made this mistake in light of the fact that the water right is very large, went through several modifications

from its original claim, involves several individual landowners under one association and covers a large amount of ground. Despite the fact that the amount of acres at issue is only 17 acres, and the that the amount of cfs in question is only .22 cfs, the Claimants have historically used this amount of diverted water to irrigate the 17 acres, and should be allowed to continue to do so.

No parties to the SRBA will be prejudiced by a decision of the Court setting aside this partial decree. As mentioned above, the amount of additional acreage and cfs is small. More importantly, this water has been historically diverted since at least 1978. No down-stream water users are relying on this water because it has been historically diverted. This is evidenced and supported by the Amended Director's report. Finally, setting aside a partial decree does not automatically grant the additional acreage and cfs. Parties to the SRBA can still object to the Amended Director's report.

As mentioned above, the Claimant filed an amended late claim in a timely manner. An amended Director's Report was prepared, but then for an unknown reason was not relied upon by the Court in issuing the partial decree. This is a rare occasion in the sense that claimants in the SRBA have generally been able to rely upon IDWR and the SRBA Court in communicating and providing the proper documentation to each other. This event was out of the control of the Claimant and its members, and was unforeseeable. It was not Claimant or its member's fault that the amended director's report was not used.

Finally, the Claimant has a meritorious position. As described above, a Director's Report is prima facie evidence of the elements of a water right. It is clear that IDWR believed the amended later claim was valid since it recommended the additional acreage and the cfs necessary to irrigate the acreage. Similar to the *Berg* case cited above, the Claimant has a meritorious

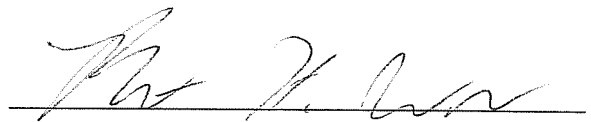
position, validated by years of historical use and an Amended Directors report which supports that position.

CONCLUSION

It is clear that the Court has the authority and discretion to set aside the Partial Decree of water right 22-13739. This authority and discretion is grounded in the Idaho Rules of Civil Procedure and precedent set by the Idaho Supreme Court and the Snake River Basin Adjudication District Court as well. If the Claimant is not allowed to set aside the Partial Decree, the Claimant will not be allowed to continue with the historic practice of diverting ground water for irrigation under water right 22-13739.

Therefore, the Claimant respectfully submits that the Court should set aside the Partial Decree on this claim so that Claimant and the Department may correct the mistake to allow the Special Master to modify her Recommendation for a Partial Decree consistent with the latest Amended Director's Report.

DATED this 2nd day of February, 2012.

A handwritten signature in black ink, appearing to read "Jerry R. Rigby", is written over a horizontal line.

for Jerry R. Rigby