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Attorneys for Greene Tree, Inc.

Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384

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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 No. 39576

Subcase No. 63-07891

**MEMORANDUM IN SUPPORT OF MOTION
FOR RELIEF FROM PARTIAL DECREE**

Greene Tree, Inc. respectfully submits this memorandum in support of its Motion for Relief from Partial Decree, pursuant to SRBA Rules of Procedure 1(a), 6(f), and 14(d) and Idaho Rules of Procedure 7(b)(3), 60(a), and 60(b)(6).

I. INTRODUCTION

Greene Tree, Inc. respectfully requests relief from the Partial Decree for water right 63-7891, for the narrow purpose of correcting an error in the identified source. While the Partial Decree correctly identifies the point of diversion, it incorrectly identifies the source as Chattanooga Hot Spring. The Partial Decree should identify the source as an unnamed "Spring." Chattanooga Hot Spring is located within the same quarter section as the point of diversion, but within a different 10-acre tract.

This is an error of geography that justifies relief as a clerical error under Rule 60(a). The Partial Decree identifies a source that does not match the point of diversion. Therefore, there is an inherent error within the “four corners” of the Partial Decree itself. This distinguishes this case from the Court’s recent *Telford Lands* decision, in which the alleged clerical error was the claimant’s failure to claim all of its points of diversion.

While Greene Tree failed to object to the recommendation for 63-7891, this oversight should be excused because IDWR itself had previously issued a document stating that the unnamed spring that is the actual source is “also known as Chattanooga Hot Spring.” And, even if the Court disagrees that this is a clerical error justifying relief under Rule 60(a), surely this situation presents “unique and compelling circumstances” justifying relief under Rule 60(b)(6).

Counsel for Greene Tree has discussed this issue at length with representatives of IDWR. IDWR does not oppose this motion.

II. STATEMENT OF FACTS

A. Statements of Fact Regarding Greene Tree and its Principals

1. Greene Tree is a Nevada corporation duly authorized to conduct business in Idaho. (Lawrence aff., Ex. A (Idaho Secretary of State materials).)
2. Mr. Alva Greene was one of the original incorporators of Greene Tree in 1966. (Lawrence aff., Ex. B (Articles of Incorporation).)
3. Mr. Greene was the President of Greene Tree as recently as 2009. (Lawrence aff., Ex. A (annual report).)
4. During his time as President of Greene Tree, Mr. Greene was the primary decision-maker for Greene Tree. (Inama aff., ¶ 6.)

5. However, Mr. Greene passed away in September 2009. (Inama aff., ¶ 6.)

B. Statements of Fact Regarding the SRBA Proceedings

6. On February 4 and 24, 2002, IDWR issued preliminary recommendations for water right 63-7891 in Greene Tree's name. (Lawrence aff., Ex. C (preliminary recommendations).)

7. Both preliminary recommendations identified the source as an unnamed "Spring" and identified the point of diversion as within the SESWSE of Section 35, Township 6 North, Range 11 East. (*Id.*)

8. These preliminary recommendations also both stated that the "source is also known as Chattanooga Hot Spring." (*Id.*)

9. On or about July 29, 2003, this Court issued an amended Partial Decree for water right 63-7891, in the name of Greene Tree. (Lawrence aff., Ex. D (Partial Decree).)

10. The Partial Decree for 63-7891 identifies the source as "Chattanooga Hot Spring" and the point of diversion as within the SESWSE of Section 35, Township 6 North, Range 11 East. (*Id.*)

11. There were no other parties to SRBA subcase 63-7891. (Lawrence aff., Ex. E (SRBA subcase summary report).)

C. Statements of Fact Demonstrating the Error in Source

12. The USGS quadrangle map for Atlanta East, Idaho identifies a Chattanooga Hot Spring within the NWSE of Section 35, rather than within the SWSE. (Lawrence aff., Ex. F (USGS quadrangle map).)

13. The USGS quadrangle map identifies a separate, unnamed spring within the SWSE of Section 35, near Benchmark 5434. (Lawrence aff., Ex. F (USGS quadrangle map).)

14. This unnamed spring near Benchmark 5434 is the spring from which Greene Tree has diverted its heating water since the 1980s. (Inama aff., ¶¶ 4, 5.)

15. This is consistent with the license that IDWR issued for water right 63-7891 in 1990, which identified the source as “spring” and the point of diversion as within the SESWSE of Section 35. (Lawrence aff., Ex. G (water right license).)

16. This is also consistent with the Partial Decree that this Court issued for water right 63-9683, which identifies its source as “spring” and its point of diversion as within the SESWSE of Section 35. (Lawrence aff., Ex. H (Partial Decree).)

17. Water rights 63-7891 and 63-9683 have always utilized the same diversion and conveyance system. (Lawrence aff., Ex. I (Beneficial Use Field Reports noting that water right 63-9683 was an “expansion” of the “same” system utilized for 63-7891, and identifying the spring near Benchmark 5434 as the “P.D.”).

D. Statements of Fact Regarding Discovery of the Error and IDWR’s Non-Opposition

18. Moe Inama helps to manage and oversee the Greene Tree property in the Atlanta area, and has done so since 1981. (Inama aff., ¶ 2.)

19. In September 2011, Mr. Inama was reviewing water right documentation in preparation for a meeting and site visit with representatives of the U.S. Forest Service. (Inama aff., ¶ 3.)

20. During this document review, Mr. Inama first became aware of the erroneous designation of Chattanooga Hot Spring as the source for water right 63-7891. (Inama aff., ¶ 3.)

21. Counsel for Greene Tree has discussed this situation in detail with representatives of IDWR. (Lawrence aff., ¶ 11.)

22. IDWR does not oppose Greene Tree's efforts to correct the "source" element identified in the Partial Decree for 63-7891. (Lawrence aff., Ex. J (e-mail communication from Deputy Attorney General Andrea Courtney).)

III. LEGAL ANALYSIS

A. Discussion of Applicable Rules and Standards Generally

The rules and decisions of this Court indicate that the only legal options available for addressing the error in the Partial Decree are Rules 60(a) and 60(b). "Parties seeking to modify a partial decree *shall comply with I.R.C.P. 60(a) or 60(b)*. Partial decrees are final judgments and cannot be modified by an administrative proceeding except as provided in I.C. § 42-222." SRBA RULE OF PROCEDURE 14(d) (emphasis added). In addition:

In subcases for which *partial decrees have not been entered*, the legal standard for filing a late objection to a water right claim in the SRBA has been historically determined pursuant to the standard set forth in AO1 for filing late claims since AO1 does not expressly provide a standard for reviewing late objections. A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default.

In re SRBA, Order on Motion to Set Aside Partial Decrees and File Late Objections, pp. 6-7 (Case No. 39576, Subcase Nos. 65-07267, *et al.*, Jan. 31, 2001) (Burdick, P.J.) (hereinafter, the "*A.L. Cattle*" opinion).

Out of an abundance of caution, counsel for Greene Tree was initially inclined to also request leave to file an amended notice of claim or a late objection to address the error raised by Greene Tree's Motion pursuant to Rule 55(c). However, this Court's Rule 14 and *A.L. Cattle* opinion indicate that Rule 55(c) is not available because a partial decree has already been issued in this subcase. Therefore, Greene Tree moves pursuant to Rules 60(a) and 60(b).

B. Discussion of Standards Governing Motion to Amend Partial Decree Pursuant to Rule 60(a)

Rule 60(a) provides in pertinent part:

Clerical 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(a).

This Court recently summarized the standards that govern Rule 60(a):

The Idaho Supreme Court has directed that Rule 60(a) applies to those errors in which the type of mistake or omission is "mechanical in nature which is apparent in the record." *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004). The Court has further directed that clerical errors "include those where what is written or recorded is not what the court intended to write or record," and where "the error can be corrected whether it is made by a clerk or by the judge." *Id.* at 412, 95 P.3d at 30 (quoting *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987)). Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b), as "Rule 60(a) is not a vehicle for relitigating matters that already have been litigated and decided, nor to change what has been deliberately done." *Dursteler v. Dursteler*, 112 Idaho 594, 597-98, 733 P.2d 815, 818-19 (Ct. App. 1987).

In Re SRBA, Mem. Decision and Order on Permissive Review, at pp. 6-7 (Case No. 39576, Subcase Nos. 34-2459, *et al.*, March 7, 2012) (Wildman, P.J.) (hereinafter, the "*Telford Lands*" opinion).

Greene Tree believes this situation qualifies as a clerical error that may be corrected pursuant to Rule 60(a). Here, the Partial Decree for 63-7891 identifies the source as Chattanooga Hot Spring, and the point of diversion as within the SESWSE of Section 35. (Statement of Facts, *supra*, (“SOF”) ¶¶ 9, 10.) However, according to the USGS quadrangle map for this area, Chattanooga Hot Spring is located within the NWSE of Section 35, not the SWSE. (SOF, ¶¶ 12, 13.) Since the 1980s, Greene Tree has withdrawn its heating water from the unnamed spring in the SESWSE of Section 35, and not from the Chattanooga Hot Spring identified in the USGS quadrangle map. (SOF, ¶ 14.) In other words, the Partial Decree itself is geographically in error, because it identifies a source that does not match the point of diversion. This conclusion is supported by the license for 63-7891, the Partial Decree for 63-9683, and the Beneficial Use Field Reports for both of those water rights. (SOF, ¶¶ 15-18.)

This is a different situation than the one this Court addressed in *Telford Lands*, in which the Court recently denied a Rule 60(a) motion. In that case, the claimant originally claimed two points of diversion. *Telford Lands*, pp. 2-3. Accordingly, the Partial Decree issued by the Court in 1997 for the claimed water right identified only two points of diversion. *Id.*, p. 3. In 2008, the claimant’s successor-in-interest filed its motion to set aside the partial decree, arguing that its predecessor’s failure to claim additional points of diversion was a clerical error justifying relief from the partial decree. *Id.*, pp. 3-4.

In other words, the movant in *Telford Lands* was not really arguing that there was a clerical error within the “four corners” of the Partial Decree itself; it was arguing that there was a “clerical” error in the notices of claim. This is different than the current situation, in which the Partial Decree inherently contains an error of geography, because the point of diversion element does not match the source element.

Admittedly, the Court's opinion in *Telford Lands* states:

In essence, two errors occurred in this case. The first was the alleged clerical error in the claims and the second and more problematic error was the failure of the Claimant to timely object to the recommendations in the *Director's Report*, which by very nature of the process can vary from the claims. In this case, whether or not Rule 60(a) provides grounds for correcting the alleged error in the claims, ***it does not provide relief for the failure to timely object to the Director's Report.***

Telford Lands, p. 8 (emphasis added).

If failure to object truly requires denial of a Rule 60(a) motion in all cases, then there is little Greene Tree can say or do to distinguish the above language, given that Greene Tree did not object to the recommendation for this water right. However, Greene Tree believes there is a compelling reason excusing its failure to object in this particular case. This explanation begins with the reminder that IDWR acts as the “independent expert and technical assistant to *assure* that claims to water rights acquired under state law are *accurately reported*.” IDAHO CODE § 42-1401B(1).

In this regard, it is notable that this general area north of Atlanta contains many springs and spring complexes—some of them named, some of them unnamed. (*See* Lawrence aff., Ex. F (USGS quadrangle).) Even IDWR, the statutorily-appointed expert, was apparently confused by this geography of springs. More specifically, IDWR's preliminary recommendations from 2002 correctly identify the point of diversion for water right 63-7891 as within the SESWSE, and identify the source as an unnamed “spring,” but then they include the following remark in the explanatory material: “Source is *also known as Chattanooga Hot Spring*.” (SOF, ¶¶ 6-8 (emphasis added).)

In other words, IDWR itself had issued a document specifically stating that the unnamed spring from which Greene Tree's heating water is withdrawn “is also known as

Chattanooga Hot Spring.”¹ Under these circumstances, Greene Tree’s failure to object to the recommended source of Chattanooga Hot Spring should be excused.

C. Discussion of Standards Governing Motion to Amend Partial Decree Pursuant to Rule 60(b)(6)

Rule 60(b)(6) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b)(6).

A moving party under Rule 60(b) must show that there are “‘unique and compelling circumstances’ justifying relief.” *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009) (citations omitted). The appellate courts review a trial court’s decision on a Rule 60(b) motion based upon an “abuse of discretion” standard:

The power of a trial court to grant or deny relief under Rule 60(b) is discretionary. *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992). Absent clear abuse of that discretion, we will not overturn the trial court’s decision. *Id.* The abuse of discretion standard involves the following inquiry: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. *Sun Valley Shopping Ctr. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

Hopkins v. Troutner, 134 Idaho 445, 447, 4 P.3d 557, 559 (2000).

¹ Greene Tree does not make this point in order to blame IDWR. Instead, Greene Tree offers this information in order to explain why Greene Tree may not have objected to the recommended source. Because Greene Tree’s primary decision maker at that time has passed away (SOF ¶¶ 2-5), it is impossible to know if that was the basis for Greene Tree’s non-objection.

According to the Idaho Supreme Court, subsection (6) of Rule 60(b) “obviously gives wide latitude to the trial court in determining those circumstances under which to relieve a party from the effects of an order.” *Id.*

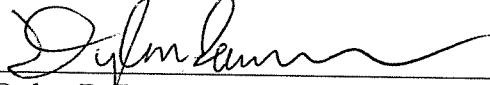
Even if the Court is unwilling to grant relief under Rule 60(a), surely this sequence of events presents “unique and compelling circumstances” justifying relief under Rule 60(b)(6). Here, the Partial Decree correctly identifies the point of diversion, but misidentifies the source. This is an error of geography about which even IDWR, the statutorily appointed expert, was confused. Notably, there were no other parties to subcase 63-7891 prior to the issuance of the Partial Decree, and IDWR does not oppose this motion. (SOF, ¶¶ 11, 22.)

IV. CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing, Greene Tree respectfully requests relief from the Partial Decree for water right 63-7891, for the narrow purpose of correcting the error in the source element by changing the source from “Chattanooga Hot Spring” to an unnamed “Spring.”

DATED this th5 day of June, 2012.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Dylan B. Lawrence – Of the Firm
Attorneys for Greene Tree, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of June, 2012, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM PARTIAL DECREE** to be served by the method indicated below, and addressed to the following:

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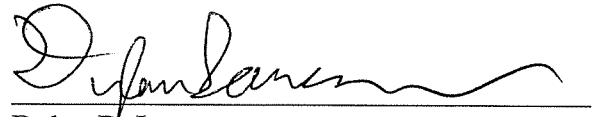
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Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

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

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Dylan B. Lawrence