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DEPARTMENT OF
WATER RESOURCES

Michael D. Allen (ISB No. 7727)
SANDERSON LAW OFFICE
P.O. Box 159
Afton, WY 83110
(307) 885-1776
(307) 885-1961 - FAX
Attorney for Claimants

**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	)	
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO SET ASIDE
	)	ORDERS FOR PARTIAL DECREE
	)	
Case No. 39576	)	Subcase No. 73-12037
	)	(Sullivan)
	)	

COME NOW Robert and Dawn Sullivan, by and through their undersigned attorney, and hereby submit their *Memorandum in Support of Motion to Set Aside Partial Decree* in the above-captioned subcase:

I. INTRODUCTION

A unique set of circumstances occurred when the Idaho Department of Water Resources (IDWR) made disparate water right recommendations for similarly situated claimants. IDWR represented that the claimants in water rights case no.'s 73-12037 and 73-12038 would be treated similarly. The claimants in water right case no. 73-12037 did not discover that, to their detriment, they were not treated similarly until after agreeing to a stipulation with IDWR and a partial decree had been entered. Where IDWR treated similarly situated claimants disparately, equity provides that the partial decree pertaining to the party harmed by the disparate treatment should not have prospective effect and should be set aside.

II. BACKGROUND

M. Linden Wring filed a Notice of Claim to a Water Right for water right no. A73-10014 dated Nov. 27, 1989. Allen Aff., Ex. 1. This was a combined claim based on a combination of water rights no. 73-00020, 73-00021, and 73-00024, totaling 9.6 cfs with a place of use identified by legal description to be 480 total acres. Allen Aff., Ex. 1.

Water right no. A73-10014 was split into water right no.'s 73-12037 and 73-12038. The Notice of Claim to a Water Right for 73-12037 dated Feb. 2, 2005 stated that the claimed appropriated amount was 6.4 cfs on 320 of the acres identified as the place of use for A73-10014. Allen Aff., Ex. 2. The Notice of Claim for 73-12038 dated Feb 2, 2005 stated that the claimed appropriated amount was 3.2 cfs on the remaining 160 acres identified in as the place of use for A73-10014. Allen Aff., Ex. 3.

IDWR's Preliminary Recommendation of Water Rights dated August 31, 2006, recommended 4.6 cfs to 73-12037. Allen Aff., Ex 4. Following questions from claimants Robert and Dawn Sullivan (the Sullivans), IDWR sent a letter dated December 6, 2006. Allen Aff., Ex. 5. In summary, this letter states that IDWR could not find evidence of a conveyance of water right no. 73-00024 to the property identified as the place of use for 73-12037 and 73-12038, and as such 4.6 cfs was recommended for 73-12037, 1.6 cfs was recommended for 73-12037 and the 3.4 cfs of 73-00024 was not recommended to either claim.

Standard Form 1 Objections were filed for both 73-12037 and 73-12038 on Dec. 6, 2007 and Dec. 19, 2007 respectively. Allen Aff., Ex. 6 and Ex. 7.

In March, 2009, IDWR entered a Standard Form 5, Stipulated Elements of a Water Right agreement with the claimants for water right no. 73-12038, stipulating that 73-12038 had 3.2 cfs, not 1.6 cfs Allen Aff., Ex. 8. This agreement was part of the Special Master Report dated June

25, 2009, and was the basis for the August 6, 2009 Order of Partial Decree, decreeing 3.2 cfs to water right no. 73-12038. Allen Aff., Ex. 9.

In a letter dated March 10, 2010, responding to another request from the Sullivans as to why IDWR would only support a diversion rate of 4.6 CFS for 73-12037 and not 6.4 cfs, IDWR referred back to the December 6, 2006. Allen Aff., Ex. 10. IDWR did not mention that it had stipulated to recommending an increased diversion rate of 3.2 cfs for 73-12038.

Based on IDWR's representations that sufficient evidence had not been presented to support an accomplished transfer of 73-00024 to the place of use for 73-12037 and 73-12038, and that it was not going to recommend more than 4.6 cfs for 73-12037, the Sullivans entered a stipulated agreement in May, 2010, and an Order of Partial Decree was entered on June 30, 2010. Allen Aff., Ex. 11.

Following entry of the Order of Partial Decree, the Sullivans filed a civil complaint in the Fifth Judicial District in and for Blaine County (Case No. CV-2010-889) against Robert P. Dreyer. Allen Aff., Exhibit 12. The Sullivans purchased the property identified as the place of use for 73-12037 from Mr. Dreyer. They alleged a mistake of fact and sought restitution based on the representation in their warranty deed that they had purchased rights to 320 inches (6.4 cfs) of water.

Mr. Dreyer is represented in CV-2010-889 by James P. Speck of Speck & Aanestad. Mr. Speck also represented the claimants in SRBA proceedings pertaining to water right no. 73-12038. During the discovery for CV-2010-889, Mr. Speck noted in December, 2011, that contrary to the statements of the December 6, 2006 letter from IDWR, 73-12038 did not ultimately receive 1.6 cfs, but instead received 3.2 cfs.

There have been several discussions over the last several month between the Sullivans, Dreyer's counsel, IDWR and representatives for the Bureau of Land Management (BLM) concerning the "additional" 1.6 cfs decreed to 73-12038. The BLM was involved in these discussions because it currently holds a portion of the property to which water right no. 73-00024 was ostensibly appurtenant in the past. Based on correspondence from IDWR and the BLM in April of this year it appeared that the additional 1.6 cfs decreed 73-12038 was an appurtenance and/or resulted from some type of accomplished transfer from 73-00024.

Discussions subsequent to April, 2012 to the present have done little to clarify matters. In general, IDWR's response to why it recommended 1.6 cfs from 73-00024 to 73-12038 but did not recommend the remaining 1.8 cfs from 73-00024 to 73-12037 is that claimants in 73-12037 provided insufficient evidence of an accomplished transfer. However, there was no evidence of an accomplished transfer in subcase 73-12038 that was not also readily apparent or offered by the claimants in subcase 73-12037. See generally the case files for each subcase.

III. STANDARD OF REVIEW

Idaho Rule of Civil Procedure Rule 60(b) provides for relief from an order for: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six

(6) months after the judgment, order, or proceeding was entered or taken.” Granting or denying relief under Rule 60(b) is left to the discretion of the Court and maybe granted upon a showing of unique and compelling circumstances. *Palmer v. Spain*, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003).

Idaho courts have inherent power to entertain an independent action for equitable relief from a judgment and this authority is not subject to I.R.C.P. 60(b) or its time restrictions. *Harper v. Harper*, 122 Idaho 535, 537, 835 P.2d 1346, 1348 (1992).

IV. DISCUSSION

I. IDWR’s Disparate Recommendations For The Similarly Situated Claimants In Subcase 73-12037 And Subcase 73-12038 Are Unique And Compelling Reasons To Set Aside The Order Of Partial Decree.

Idaho Code § 42-1401 provides that state laws needed to be modified to assure laws and procedures providing an efficient method for adjudication and a fair and impartial forum for all water right claimants. Idaho Code § 42-1401B provides that IDWR’s role in the efficient method for adjudication is as an independent expert and technical assistant to assure the accurate reporting of water rights, not as a party to adjudication. However, under Idaho Code § 42-1411, IDWR’s recommendations are prima facie evidence of the nature and extent of the water rights acquired under state law. Also, IDWR has the ability to amend and stipulate to modifications of its recommendation with claimants, thereby creating new “prima facie” evidence that, as a matter of course, becomes part of a decree pursuant to Idaho Code § 42-1411.

Under Idaho Code § 42-1411 the claimant has the ultimate burden of persuasion as to the elements of a water right. However the scope and magnitude of that burden is dictated by IDWR recommendations. IDWR is a government agency and its decisions and actions are subject to the Equal Protection provisions of Article I Section 2 of the Idaho Constitution and the 14th

Amendment of the U.S. Constitution. The Equal Protection clauses are meant to assure that similarly situated persons are treated similarly with respect to government action. *Aeschliman v. State*, 132 Idaho 397, 401, 973 P.2d 749, 753 (Ct. App. 1999)

Claimants here are not claiming that IDWR had a deliberate or intentional plan of discrimination based on an unjustifiable or arbitrary classification, such as race, sex, or religion. Claimants are in essence a "class of one" and need only show that they have intentionally been singled out and treated differently based on a distinction that fails the rational basis test, or in other words, show that the IDWR's recommendation was arbitrary and capricious, based upon different treatment of others in arguably indistinguishable situations. *Viking Construction, Inc. v. Hayden Lake Irrigation District*, 149 Idaho 187, 198-199, 233 P.3d 118, 129-130 (2010) *Terrazas v. Blaine County*, 147 Idaho 193, 205, 207 P.3d 169, 181 (2009).

The similarly situated persons treated differently then the Sullivans are the claimants in subcase 73-12038. IDWR acknowledged the similar circumstances of these claimants in its Dec. 6, 2006 letter. It cited to this letter to explain its stance toward 73-12037 in March 2010, relative to water right no. 73-00024, even after it had not kept the same stance toward 73-12038.

IDWR's insistence that the Sullivans provide evidence establishing an appurtenance and/or accomplished transfer over and above that provided by the claimants in subcase 73-12038 had no rational basis and was arbitrary and capricious. The Special Master's Recommendation and subsequent Order of Partial Decree in subcase 73-12037 was based on IDWR's recommendation that treated similarly situated claimants unequally. Equity provides that the Sullivans should have an opportunity to properly respond. These are unique and compelling circumstances that warrant setting aside the Order of Partial Decree.

II. Under I.R.C.P. Rule 60(b)(5) Or The Courts Independent Authority To Relieve The Claimants From The Decree, The Partial Decree Should be Set Aside.

More than 6 months have passed since the time the partial decree was entered in subcase 73-12037 on June 30, 2010. As such, the Sullivans are precluded from bringing this motion for reasons (1), (2), (3) and (6) of I.R.C.P. Rule 60(b).

It is technically accurate that the Sullivans could have discovered that 73-12038 was recommended and decreed 3.2 cfs and not 1.6 cfs prior to entering a stipulated agreement in May of 2010. The Sullivans could have checked the filings in subcase 73-12038 to verify that IDWR had recommended 1.6 cfs for 73-12038. This argument does not account for IDWR's unique participation in SRBA proceedings and its continued representations to the Sullivans that recommendations relative to 73-00024 were the same for both 73-12037 and 73-12038, even after such recommendations were different.

I.R.C.P. Rule 60(b) reason (5) is not subject to the 6-month time limit and provides that a party may be relieved of a judgment if it is no longer equitable that the judgment have prospective application. To rely on Rule 60(b)(5), a movant must show that the judgment is prospective and that it is no longer equitable to enforce the judgment as written. *Meyers v. Hansen*, 148 Idaho 283, 289, 221 P.3d 81, 87 (2009). If a decree includes an injunction it is prospective. *Id* at 290, 221 P.3d 88. *Devine v. Cluff*, 11 Idaho 476, 479, 725 P.2d 181, 184 (Idaho App. 1986). A partial decree of a water right is in essence an injunction. A claimant is decreed a right and enjoined from using more than the amount decreed.¹

A prospective decree can be altered under I.R.C.P. Rule 60(b)(5) if it is susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance.

¹ Subsequent rights may of course be obtained through the appropriation process, but these will ordinarily be junior rights.

Meyers v. Hansen, 148 Idaho 290, 221 P.3d 88. The circumstances and procedures of Snake River Basin Adjudication are themselves unique in that one adjudication or “case” is comprised of numerous subcases. This creates a situation in which evolutions in law or circumstance can occur within the same “case”. Such a change in law or circumstances apparently, absent other explanation, was the cause of IDWR’s disparate recommendations between 73-12037 and 73-12038 and affected the legal and equitable rights of the Sullivans.

IDWR represented that the circumstances of 73-12038 and 73-12037 were indistinguishable and that they would be treated similarly. This stopped the Sullivans from questioning whether changes in circumstance or law warranted the in fact disparate recommendations for the two claims before agreeing to a stipulation in May 2010. Now that the Sullivans are aware of the disparity, the partial decree should be set aside to allow them to address whether there were changes in law or circumstance warranting the inequitable treatment.

Further, because of the unique procedural and jurisdictional aspects of the Snake River Basin Adjudication, the Sullivans cannot bring an independent action seeking relief from the decree, as they may otherwise have been able to do. *Harper v. Harper*, 122 Idaho 537, 835 P.2d 1348. Given these circumstances and that claimants generally should be provided a full opportunity to support and defend their water rights in the SRBA, equity provides that the partial decree should be set aside and the Sullivans given opportunity to address their claims in light of the disparate recommendations made by IDWR for similarly situated claimants.

V. CONCLUSION

IDWR’s disparate recommendations for similarly situated claimants is a unique and compelling set of circumstances and the Sullivans should have a full opportunity to support and defend their claim now that the disparity is known. Where IDWR treated similarly situated

claimants disparately, equity provides that the partial decree stipulated to by the Sullivan should not have prospective effect and should be set aside.

DATED this 12th day of Decemer, 2012.



Michael D. Allen (ISB No. 7727)
SANDERSON LAW OFFICE
P.O. Box 159
Afton, WY 83110
(307) 885-1776
(307) 885-1961 - FAX
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 2012, I mailed the original and copies of this form, including all attachments, to the following via US Mail -1st Class, postage prepaid and addressed as follows:

(Original)

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

(Copies)

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

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

United States Department of Justice
Environment & Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Curt M. Thomsen
Thomsen Stephens Law Offices
PO Box 600
Challis, ID 83404



Michael D. Allen