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DEPARTMENT OF
WATER RESOURCES

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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 NOS.: 2-2033, 2-00083
	)	
Case No. 39576	)	INDIAN COVE IRRIGATION DISTRICT'S
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO SET-ASIDE PARTIAL
	)	DECREES

COMES NOW, INDIAN COVE IRRIGATION DISTRICT ("Indian Cove"), by and through its attorneys of record Barker Rosholt & Simpson, LLC, and hereby submits this Memorandum in support of its Motion to Set-Aside Partial Decrees for the above referenced subcases pursuant to Idaho Rules of Civil Procedure 60(b).

I
INTRODUCTION

The partial decrees for Indian Cove's water rights 02-2033 and 2-00083 were entered May 12, 2009, and inaccurately state the place of use and service area of Indian Cove Irrigation District, conditioning and inaccurately limiting the water rights to the irrigation of "a combined total of 1,149 acres." The correct place of use and combined total irrigable acres should be 1,275

acres within the service area of the Indian Cove Irrigation District as determined by the Idaho Department of Water Resources (“Department”).

Originally, in 1924, the State Engineer noted there were approximately 1,275 acres being cultivated. However, a number of discrepancies with licensing and the filing of the claims through the 1980’s, the use of a 1974 orthophotoquad map which only depicted 1028 acres, lost original claims or applications for permit, etc., all led to Indian Cove only filing claims for 1,149 at the urging of the Department, as opposed to the 1,275 acres.

Upon further review, and upon further discussion and urging of the Department, it appears that the correct service area should be the entire 1,275 acres. Rather than perpetuate this error, Indian Cove, the Department, and the court all have a compelling interest to facilitate the desirable legal objective of accurately decreeing these water rights in the SRBA, which will assist in avoiding future conflicts and with the overall administration of the water rights.

Accordingly, Indian Cove requests that the Court set-aside the partial decree and allow the amended claims to proceed in order to accurately reflect the true place of use and correct number of irrigable acres within Indian Cove’s service area.

II **STANDARD OF REVIEW**

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). *AOI § 14d* (“Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)”).

I.R.C.P. 60(b) permits a court to relieve a party from a final judgment, order, or proceeding for the following reasons:

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.

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

The decision to grant or deny a Rule 60(b) motion for relief from a final judgment rests in the sound discretion of the trial court. *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979). Where the trial court “applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion.” *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010). However a trial court’s discretion is limited in that a Rule 60(b) motion “may be granted only on a showing of unique and compelling circumstances justifying relief.” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996).

III

STATEMENT OF FACTS

Indian Cove is a small irrigation district in claiming water right nos. 02-00083 and 02-02033 dating back to 1919. Due to various circumstances, there has been confusion concerning the number of acres within Indian Cove’s service area.¹ Complicating matters, sometime in the early part of the 20th Century there was a fire in Indian Cove’s pump house. At that time, Indian

¹ Indian Cove Irrigation District used to contain more acres, however the eastwardly portion separated and formed what is known as West Indian Cove, which has a separate delivery system.

Cove's business records were kept in the pump house, and the fire destroyed Indian Cove's records and files.

Indian Cove's water right claims 02-00083 and 02-02033 were partially decreed on May 12, 2009. Pursuant to the decrees, the place of use for the service area of Indian Cove lists only 1,149 acres. The Amended Notice of Claims filed herewith state the correct number of acres—1,275.

Based upon the report of a State Engineer on November 1, 1924, there were "about 1275 acres" that were under cultivation. Affidavit of Shelley M. Davis in Support of Motion to Set Aside Partial Decree ("Davis Aff."), Ex. 3. A \$92.00 payment was never processed and so the license did not issue at that time. Davis Aff., Ex. 4 (correspondence discussing a field examination showing 2800 acres).

On or about November 19, 1981, Indian Cove filed a notice of claim stating that 1,495.15 were irrigated in the service area of Indian Cove. Davis Aff., Ex. 1. Correspondence from the department discussed the 1924 report of the engineer indicating that Indian Cove's service area included 1275 acres. *Id.*, also see Davis Aff., Ex. 3. That correspondence further discussed that the 1924 report of the engineer listed 1,275 acres under cultivation, but that the State Reclamation Engineer issued a license for 1,149 acres in 1945. *Id.*

To complicate matters, the Department also stated that the orthophotoquad map only showed 1,028 acres under irrigation in 1974. *Id.* Pursuant to the aforementioned information, the department forwarded to Sherl Chapman of Indian Cove claims 02-00083 and 02-02033 along with notices of claim and applications for permit for completion. Davis Aff., Ex. 1. It appears that based upon the correspondence, the Department was advising that the only option for Indian

Cove was to file for the 1,028 acres, and then an application for permit for an additional 121 acres. *Id.*

Indian Cove ended up filing claims and/or an application in 1989, however the originals were lost. Davis Aff., Ex. 2. The Department prepared new Notices of Claim on or about May 4, 1992, allegedly based upon Sherl Chapman's "drafts which were completed during the Owyhee County claims filing in 1989" and urged Indian Cove chairman Sigert Johnson to execute and submit the same, as the fees had already been paid. *Id.* On May 20, 1992, Indian Cove executed and returned the Notice of Claims, claiming 1,149 total acres, pursuant to the urging of the Department of Water Resources.

The partial decrees issued in 2009, recommending only 1,149 acres, and Indian Cove did not object at the time because the current Board of Indian Cove did not have a full grasp of the history and documents as a result of their loss in the fire. Indian Cove approached representatives of the Department earlier in 2012 with questions concerning their water rights. The Department informed Indian Cove that after further review, the Department's earlier work which led to 1,149 acres being recommended as the place of use and service area, as opposed to the 1,275 acres, was not accurate, and recommended that Indian Cove file this Motion to Set Aside the Partial Decree to correct the record concerning Indian Cove's water rights and to represent the correct service area for the District.

IV **ARGUMENT**

Under I.R.C.P. 60(b)(6), a court may relieve a party from a final judgment, order, or proceeding for "any ... reason justifying relief from the operation of the judgment." Idaho R. Civ. P. 60(b)(6). "[A]lthough the court is vested with broad discretion in determining whether to grant

or deny a Rule 60(b) motion, its discretion is limited and [the motion] may be granted only on a showing of 'unique and compelling circumstances' justifying relief.” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996), *quoting In re Estate of Bagley*, 117 Idaho 1091, 1093, 793 P.2d 1263, 1265 (Ct.App.1990). The court has broad discretion to determine what constitutes unique and compelling circumstances justifying the setting aside of a partial decree, which intuitively will be based upon case by case facts and circumstances.

In this case, Indian Cove has been applying water to beneficial use on at least 1,275 acres dating back to 1919 according to the State Engineer’s report in 1924. Davis Aff., Ex. 3. Indian Cove received a license for its water rights in 1949. It submitted Notice of Claims for the same water rights on more than one occasion. The Department indicated that they believed there was only 1,028 acres under cultivation, and that an application for permit for an additional 121 acres was going to be necessary for 1,149 acres, but then eventually asked Indian Cove to execute Notice of Claims for the 1,149 acres. Davis Aff., Ex. 1.

Indian Cove and the Department, after further review of the evidence presented to the Department over the last 30 years, submit that the correct service area for Indian Cove is 1,275 acres, and not 1149 acres. Rather than perpetuate this error, all parties, the Department and the court have an interest in accurately decreeing these water rights.

In this action, the Court should rely upon Id. R. of Civ. P. 60(b)(6) which provides the Court the authority to set-aside a judgment where “unique and compelling circumstances” justify the relief. *Maynard v. Nguyen*, 152 Idaho 724, 730, 274 P.3d 589, 594 (2011). In *Maynard* the Supreme discussed its holding in *Dawson v. Cheyovich Family Trust*, 146 Idaho 234, 237-8, 192 P.3d 1058, 1061-62 (2008), finding that “where a district court grants relief that is inconsistent with the pleadings and evidence in the case, such facts ‘may constitute unique and compelling

circumstances sufficient to justify relief under I.R.C.P. 60(b)(6).” *Maynard v. Nguyen*, 152 Idaho at 731, 274 P.3d 589, 596 (2011), *citing Dawson, supra*. Here, the evidence supporting the water right recommendation and decree demonstrates that Indian Cove has historically, and must continue to supply irrigation water to 1,275 acres of service area, not the 1,149 acres currently decreed.

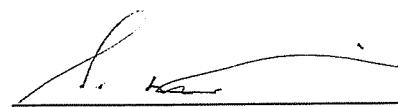
Also, importantly, no competing claims have been filed that would complicate the relief requested, and no objections were filed to Indian Cove’s initial claims. Based on this procedural history, it is unlikely that any party will be prejudiced in the event that the Court set aside the partial decrees. Amended claims have been lodged with the Motion for filing in the event the Court grants the relief requested.

V CONCLUSION

Based upon the foregoing argument, Indian Cove hereby requests that the partial decrees for water right nos. 02-0083 and 02-2033 be set-aside and that this Court allow the filing of the lodged Amended Notices of Claim correcting Indian Cove’s service area and irrigable acres to reflect 1,275 acres as deemed appropriate by the Department.

DATED this 10th day of January, 2013.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Attorneys for Indian Cove Irrigation District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2013, I caused to be served a true and correct copy of the foregoing **INDIAN COVE IRRIGATION DISTRICT'S MEMORANDUM IN SUPPORT OF MOTION TO SET-ASIDE PARTIAL DECREES** by the method indicated below, and addressed to each of the following:

Original filed via U.S. Mail with:

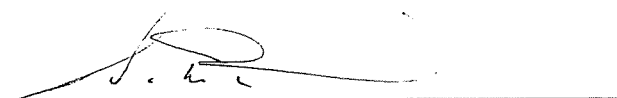
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