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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

Case No. 39576

Subcase No. 37-12388

**MEMORANDUM IN SUPPORT OF RULE 60(b)
MOTION FOR RELIEF FROM JUDGMENT**

**I.
BACKGROUND**

Dr. Gary Hoffman seeks relief from this Court's Final Order Disallowing Water Right Claims ("Order"), filed October 12, 2010. *See* Affidavit of Andrew J. Waldera ("Waldera Aff."), Ex. A. Among others, the Court's Order decreed as "disallowed" water right claim no. 37-12388 (the "Right"), a beneficial use-based water right authorizing the diversion of groundwater for domestic and irrigation purposes at the Sun Tree Hollow Mobile Home Park (the "Park") in Ketchum, Idaho. *Id.*, Exs. A and B (claim file).

Dr. Hoffman seeks relief from the Court's Order under Administrative Order 1, Section 14(d), and Idaho Rule of Civil Procedure 60(b)(6) because: (1) the Idaho Department of Water Resources' ("Department" or "IDWR") claim investigation largely verified the existence of the right as claimed; (2) the Department would have recommended the right as claimed provided claimant-supplied evidence of priority/beneficial use predating the mandatory statutory application and permit requirement; and (3) the Right has been used continually for domestic and irrigation purposes at the Park since at least 1959. While Dr. Hoffman cannot speak to the apparent neglect of his predecessor-in-interest in supplying the requisite proof of priority and beneficial use, Dr. Hoffman presents that evidence today shortly after having learned of this situation.

Dr. Hoffman purchased the Park in 1996 from its prior owner, Larry M. Cooper. *See* Affidavit of Gary Hoffman ("Hoffman Aff."), ¶ 4. When Dr. Hoffman purchased the Park, it was his understanding that he was purchasing all of the Park's appurtenances, including its groundwater (well)-based domestic and irrigation water supply system. *Id.* At the time of purchase, Dr. Hoffman understood that the well system water rights documentation was intact and up to date, not the subject of a still-pending claim in the Snake River Basin Adjudication ("Adjudication"). *Id.*, ¶ 8. Having moved to the area from out of state, Dr. Hoffman was not familiar with the Adjudication and its requirements at the time. *Id.*, ¶¶ 2 and 8.

During the summer of 2012, Dr. Hoffman became aware of the Right's decreed disallowance while investigating the status of a similar water right (37-07086) serving another mobile home park property he owned. Hoffman Aff., ¶ 9. Recordkeeping concerning both of his mobile home parks suffered and had to be unraveled after Dr. Hoffman's bookkeeper died unexpectedly in 2009. *Id.*, ¶ 11. After resolving matters concerning the other water

right (37-07086), Dr. Hoffman investigated the status of the Right with the assistance of Department personnel. *Id.*, ¶¶ 9-12.

During his investigation of the Right, Dr. Hoffman located the pertinent Well Log and Report to the State Reclamation Engineer of Idaho through use of the well's IDEQ-based public water supply permit. Hoffman Aff., ¶ 6. The Well Log and Report disclosed that the underlying well serving the Right was drilled in July 1955. *Id.*, ¶¶ 6 - 7.

To Dr. Hoffman's surprise and disappointment, Department personnel informed him that the Right was decreed disallowed in October 2010. Hoffman Aff., ¶ 9. Upon learning of the Court's decreed disallowance of the Right, Dr. Hoffman promptly contacted legal counsel seeking to remedy the Right's status. *Id.*, ¶ 10. Reinstatement of the Right is particularly important because the Right and its corresponding well are the sole source of water supply for the Park. *Id.*, ¶¶ 5 and 12. This, in turn, is additionally important because the Park is one of few low-income housing opportunities available in the local community. *Id.*, ¶ 12.

With the aid of legal counsel, Dr. Hoffman gathered and reviewed pertinent Department records, property tax records, property conveyance records, and he located and interviewed past residents of the Park regarding the Park's historic water use and its water supply system. Hoffman Aff., ¶¶ 10 and 12. Review of pertinent Department records revealed that the Right was claimed in the Adjudication by Larry M. Cooper on October 28, 1988, and that IDWR successfully located and investigated the Right in or before 2005. Waldera Aff., Ex. B. The Department's investigation of the claimed Right found development and use of the Right for domestic and irrigation purposes in connection with the Park more or less as claimed. *Id.* However, Department staff determined that proof of the claimed 1955 priority date was necessary to: (1) substantiate the beneficial use-based claim; and (2) confirm that the claim

predated (was exempt from) the mandatory application for permit process enacted by the Legislature in 1963. *Id.* Said differently, the Right was recommended (and subsequently decreed) disallowed due to a lack of sufficient priority date evidence, not because the Department's investigation failed to locate the well or water use at the Park as claimed. *Id.*, *see also*, Hoffman Aff., ¶ 12.

In an effort to secure the requisite priority proof it needed, the Department sent correspondence to Larry M. Cooper in April 2005. Waldera Aff., Ex. B. It also sent Mr. Cooper a copy of its recommended disallowance of the Right in November 2006. *Id.* Unfortunately, however, the Department's communications were returned to it as undeliverable and its request for proof of priority went unanswered as a consequence. *Id.*

Because the Right was ultimately decreed disallowed due to lack of sufficient proof of priority, Dr. Hoffman focused his efforts on locating such evidence. Dr. Hoffman was able to locate and secure an affidavit from Marla Mink, a resident of the Park from 1959 through 1963. *See* Hoffman Aff., ¶ 12; *see also*, Affidavit of Marla Mink ("Mink Aff."), *generally*.

According to Ms. Mink, the water for the Park domiciles and its common areas was supplied by a well located on the Park's property. Mink Aff., ¶ 5. The well was the sole source of the Park's water supply during her residence at the Park between 1959 and 1963. *Id.*, ¶¶ 3 and 5. Fees for the Park's domestic water supply were included in the residents' monthly mobile home space rental payments, while gas, electricity, and other utilities billed the Park residents separately for those services. *Id.*, ¶ 5. During Ms. Mink's period of residence (1959-1963), the Park was known as the Jana Motel and Trailer Court, and the Park and its well preexisted her residence in 1959. *Id.*, ¶¶ 3, 4, and 5.

II. LEGAL STANDARDS

Rule 60(b) provides, in relevant 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: (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.

IDAHO RULE CIV. P. 60(b) (emphasis added).

“Rule 60 provides the only avenue of relief from final civil judgments other than by appeal or independent action.” *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 648 (1972). The Rule “requires a showing of good cause and specifies particular grounds upon which relief may be afforded.” *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). Whether to grant relief under Rule 60(b) rests in the sound discretion of the trial court. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979). “[A] Rule 60(b) motion to vacate is not a substitute for an appeal.” *Dustin v. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982); *De Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977) (citing *Ackermann v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 211 (1950)).

“I.R.C.P. 60(b)(6), which is the catchall for the rule, was not intended to allow a court to reconsider the legal basis for its original decision.” *First Bank & Trust of Idaho v.*

Parker Bros., Inc., 112 Idaho 30, 32 (1986). A party making a Rule 60(b)(6) motion must demonstrate unique and compelling circumstances justifying relief. *Matter of Estate of Bagley*, 117 Idaho 1091, 1094 (Ct. App. 1990) (citing *Puphal v. Puphal*, 105 Idaho 302 (1983)).

Dr. Hoffman respectfully submits that this case presents sufficient good cause justifying relief from the Court's decreed disallowance of water right no. 37-12388.

III. ARGUMENT

A. Dr. Hoffman Has Addressed This Matter As Diligently And Expeditiously As Possible Upon Learning Of The Decreed Disallowance Of The Right

When Dr. Hoffman purchased the Park, it was his understanding that the Park's water rights and water supply system were adequately documented and settled. For example, the Park came complete with a public drinking water supply permit from the Idaho Department of Environmental Quality (which enabled Dr. Hoffman to research and locate the well's drilling log and report of construction), and the Park's water supply well had a documented identification tag. Being from out of state, Dr. Hoffman was unfamiliar with the SRBA process, and never suspected the need to inquire regarding whether the Right had been properly decreed by the Court. Surely, he figured, a well in continuous operation since at least 1959 (according to Marla Mink) or, perhaps, 1955 (according to the Well Log and Report to the State Reclamation Engineer of the State of Idaho, dated September 15, 1955) with a DEQ public water supply permit was sufficiently documented and permitted.

Complicating matters was Dr. Hoffman's bookkeeper's sudden and unexpected death in 2009. Her death adversely affected the Park's record-keeping, and left Dr. Hoffman sifting through what turned out to be a disorganized mess of records concerning the Park.

Upon learning of the Right's decreed disallowance during the summer of 2012, Dr. Hoffman immediately contacted legal counsel to assist him with reinstating the Right. Since that time, Dr. Hoffman also worked diligently with IDWR staff to determine how and why the Right came to be decreed disallowed, and how to best restore the Right. Dr. Hoffman sifted through various records from various sources and spent a significant amount of time trying to track down former residents of the Park who could speak to the its historic water use and water supply system. In short, Dr. Hoffman has taken this matter very seriously because the well serving the Right is the sole source of water for the Park, and because the Park is one of few low-income housing opportunities in the Ketchum, Idaho area.

Unfortunately, and unbeknownst to Dr. Hoffman, Larry M. Cooper failed to provide sufficient priority evidence supporting his October 1988 claim. To the Department's credit, it tried twice to reach Mr. Cooper (in 2005 and 2006) to advise him of this evidentiary shortcoming, but those efforts were returned as "undeliverable" at Mr. Cooper's address of record. Dr. Hoffman remedied this priority evidence deficiency as quickly as he could through his location and interview of former Park resident Marla Mink.

B. The Department Would Have Recommended The Right Provided Sufficient Evidence Of Priority Use

When the Department investigated the Right's underlying claim, it found that the Right was developed and used more or less as claimed. The Park and the well existed. The Right was, in fact, being used for domestic and irrigation purposes within the Park. And, the Right's adjudication claim form was properly and timely filled out and executed, and the requisite filing fees were paid.

According to the Department's claim investigation memorandum and claims correspondence the only thing precluding recommendation of the Right nearly as claimed was a

lack of evidence substantiating the claimed priority date of May 31, 1955.¹ The Department needed sufficient evidence of the Right's claimed priority date to determine whether the beneficial use, groundwater-based Right was developed prior to the mandatory application and permit process enacted by the Legislature in 1963. *See* IDAHO CODE § 42-229.

While Mr. Cooper failed to provide sufficient evidence of the Right's pre-1963 priority, Dr. Hoffman does so now in the forms of: (1) the September 15, 1955 Well Log and Report to the State Reclamation Engineer of the State of Idaho; and (2) the Affidavit of Marla Mink. *See* Hoffman Aff., Ex. A and Mink Aff., respectively. The Well Log and Report establishes that the well was drilled in 1955, and the Affidavit of Marla Mink establishes that the well was supplying the Park's domestic and irrigation water since at least 1959. Both of these pieces of evidence, particularly when taken together, establish that Mr. Cooper's October 1988 Adjudication claim was a valid beneficial use-based claim exempt from the mandatory application and permit process enacted in 1963 via Idaho Code Section 42-229. Consequently, the Department's and the Court's disallowance of the Right was based more upon a procedural defect than it was a substantive lack of water right development and beneficial use. This is troubling because the abandonment and forfeiture of water rights is disfavored under the law. *See, e.g., Sagewillow v. Idaho Dept. of Water Res.*, 138 Idaho 831, 836 (2003).

To be clear, Dr. Hoffman does not criticize the disallowance of the Right in 2010 based upon the prevailing circumstances at that time. However, Dr. Hoffman respectfully

¹ The Right appeared ready for recommendation "nearly" as claimed because the Department's investigation revealed only 0.3 acres of irrigation, rather than the 0.5 acres claimed, and because the Right's Place of Use was located in Township 04N of Section 30, rather than Township 05N as claimed. (In fact, the claim for water right no. 37-12388 does claim a Place of Use in Township 04N; consequently, it appears the Department's investigation note citing Township 05N was in error).

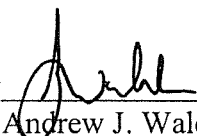
submits that the equities favor reinstatement of the Right based upon the newly-proffered evidence of priority and the continuous, decades-long beneficial use of the water in question. The Park and its residents depend upon the Right, and have done so since at least 1959. The current “disallowed” status of the Right threatens the continued existence of the Park, threatens to displace the Park’s current residents, and threatens to shutter one of the few low-income housing opportunities located in the Ketchum area. Unfortunately, the current “disallowed” status of the Right has much broader implications than merely inconveniencing its current owner.

IV. CONCLUSION

For the foregoing, Dr. Hoffman respectfully requests that this Court set aside its prior partial decree disallowing water right no. 37-12388. It appears from the Department’s records that the Right would have been recommended but for Mr. Cooper’s failure to submit sufficient evidence of priority and use. Dr. Hoffman has acted diligently, in good faith, and at significant expense to correct this evidentiary shortcoming as soon as he was able, and shortly after learning of the decreed disallowance of the Right. Reinstatement of the Right is particularly important given its public water supply nature, and its support of one of the few low-income residential opportunities available in the area.

DATED this 21st day of February, 2013.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

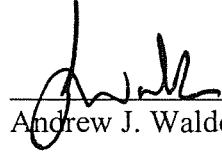
Andrew J. Waldera – Of the Firm
Attorneys for Gary Hoffman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 2013, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT** to be served by the method indicated below, and addressed to the following:

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