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DEPARTMENT OF
WATER RESOURCES

Attorneys for Hill Real Estate, LLC

**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.: 63-32253
	)	
Case No. 39576	)	HILL REAL ESTATE, LLC'S
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO SET-ASIDE AND ENTER
	)	CORRECTED PARTIAL DECREE

COMES NOW, HILL REAL ESTATE, LLC, by and through its attorneys of record
Barker Rosholt & Simpson, LLC, and hereby submits this Memorandum in support of its Motion
to Set Aside and Enter Corrected Partial Decree for the above referenced water right no. 63-
52253 pursuant to Idaho Rule of Civil Procedure 60(b).

I
INTRODUCTION

The partial decree for water right no. 63-32253 was entered January 14, 2009. The new
owner of a 41.09 acre portion of the right discovered a discrepancy in the decreed right while
investigating the water right prior to a sale of property. Upon inquiring with the Idaho
Department of Water Resources about the legal status of the right, they were informed that
instead of the 40 acres that are actually irrigated, and have been historically since beneficial use
was demonstrated on the property in 1975, only 29 acres were recorded on the partial decree. A
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review of the history of the right by employees of the Idaho Department of Water Resources (“the Department”) disclosed that at some point between the licensing of the right and the partial decree being entered, the acres in the SE1/4SW1/4 were transposed with the acres in the SW1/4SE1/4. Hill Real Estate, Inc. (“Hill”), therefore requests that this Court set aside its partial decree and enter a decree consistent with the license issued for the right in 1975.

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

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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

Richard and Judith Brock’s predecessors in interest, Pat Cayler, filed an application for a water right permit on January 8, 1973. Affidavit of Shelley M. Davis in Support of Motion to Set Aside Partial Decree (“Davis Aff.”), Ex. 1. A beneficial use examination was conducted by the Department on May 29, 1975, recommending 124 acres be licensed as the place of use for the right. Davis. Aff., Ex. 2. It is important to note that in that examination the Department found 40 acres irrigated in the SE1/4SW1/4 and 29 acres irrigated in the SW1/4SE1/4. *Id.* On October 28, 1975 the Director of the Department issued a license for the right that mirrored the examiners recommendations. Davis Aff., Ex. 3.

The Brocks filed a Notice of Claim for the water right on January 22, 1990 in the SRBA court. Davis Aff., Ex. 4. The claim also listed 40 acres irrigated in the SE1/4SW1/4 and 15 acres irrigated in the SW1/4SE1/4. *Id.* On August 23, 2006, the Department issued its preliminary recommendation for the right to the SRBA court. Davis Aff., Ex. 5. While the attached recommendation report lists 40 acres irrigated in the SE1/4SW1/4, the recommendation form itself transposes those irrigated acres with the SW1/4SE1/4. *Id.* That mistake carried forward to February 21, 2007, when the Department filed with the court a Notice of Completed Administrative Proceeding notifying the court of a change of address for the Brocks. Davis Aff., Ex. 6. Neither the Department, Claimant or the court noticed the accidental transposition, and

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when this Court entered the partial decree for water right no. 63-52253 the decree included the mistaken transposition. Davis Aff., Ex. 7.

Hill Real Estate, LLC, purchased 41.09 acres encompassing the 40 irrigated acres within the SE1/4SW1/4 from the Brocks on April 17, 2006. Davis Aff., Ex. 8. Hill failed to file a Notice of Change of Ownership until August 6, 2013. The Department is currently processing the Notice, which will require a split of water right 63-32253.

IV

ARGUMENT

Idaho Rule of Civil Procedure 60(b)(1) provides the authority for this Court to set aside the Partial Decree for water right no. 63-32253 in cases where “mistake, inadvertence or excusable neglect” justify such an act. In this case it is clear that 40 acres have historically been irrigated in the SE1/4SW1/4, but that a mistake was made by the Department when it created its Recommendation to the SRBA court for the right, and that the mistake was not detected until after the right went to partial decree. It is appropriate that this court to enter a corrected partial decree correcting the mistake made in 2006, and that reflects the true irrigation conditions for the land to which water right no. 63-32253 is appurtenant.

“[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. The mistake made in the

Department's recommendation is certainly unique to this matter, and correcting such a mistake is certainly compelling.

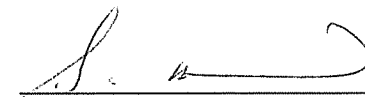
V

CONCLUSION

For the foregoing reasons, Hill Real Estate, LLC, requests that this Court grant its Motion to Set Aside and Enter Corrected Partial Decree.

DATED this 8th day of August, 2013.

BARKER ROSHOLT & SIMPSON LLP



Shelley M. Davis
Attorneys for Hill Real Estate, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of August, 2013, I caused to be served a true and correct copy of the foregoing **HILL REAL ESTATE, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO SET-ASIDE AND ENTER CORRECTED PARTIAL DECREE** by the method indicated below, and addressed to each of the following:

Original filed via U.S. Mail with:

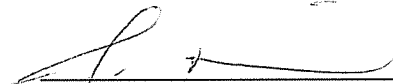
Clerk of the District Court
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Shelley M. Davis