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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.: 63-32253
	)	
Case No. 39576	)	MEMORANDUM IN SUPPORT OF HILL
	)	REAL ESTATE, LLC'S AMENDED
	)	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 Amended Motion to Set-Aside and Enter Corrected Partial Decree for the above referenced water right no. 63-32253 pursuant to Idaho Rule of Civil Procedure 60(b). Hill Real Estate further requests that the Court reduce the number of acres currently covered by water right no. 63-32253, to reflect the changed conditions due to the Idaho Department of Water Resources acknowledging a change in water right ownership for a portion of that right. Lastly, Hill Real Estate requests that the Court enter a partial decree with the corrected place of use for water right no. 63-33837.

INTRODUCTION

Hill Real Estate here repeats the history concerning water right no. 63-32253. A partial decree for water right no. 63-32253 was entered January 14, 2009. The new owner of a 41.09

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acre portion of the right discovered a discrepancy in the decreed right while investigating the water right prior to another 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 in SE1/4 SW1/4 of the property. A 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 filed a Notice of Change of Water Right Ownership with the Department of Water Resources in early August, 2013. On August 9, 2013, the Department acknowledged the change in ownership and granted a new water right, no. 63-33837, to Hill Real Estate. The property that Hill Real Estate owns is in the SE1/4 SW1/4 and the description of the number of acres under irrigation in that section continues to carry through the mistaken transposition.

Hill Real Estate, Inc. ("Hill"), therefore requests that this Court set aside its partial decree and enter a decree correcting the property description for water right 63-32553, subtracting those acres now owned by Hill Real Estate. Further, Hill Real Estate requests that the Court enter a partial decree for water right no. 63-33837 correcting the number of acres under irrigation in the SE1/4 SW1/4 of that property.

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

Hill Real Estate herein incorporates, as if set forth in full, the Statement of Facts contained in its’ Memorandum in Support of Motion to Set-Aside and Enter Corrected Partial

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Decree, lodged with this Court on August 9, 2013. The following statement of facts explains the course of events since the filing of that Memorandum.

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. On August 9, 2013, the Department acknowledged the split of ownership and issued water right no. 63-33837 to Hill Real Estate. *See* Supplemental Affidavit of Shelley M. Davis in Support of Amended Motion to Set-Aside and Enter Corrected Partial Decrees, Aff., Ex. 9. Water Right no. 63-33837 includes the incorrect description of the irrigated acres in the SE1/4 SW1/4. *Id.*

Counsel for Hill Real Estate contacted Carter Fritschle, water rights adjudication section manager with the Idaho Department of Water Resources, subsequent to the issuance of the new right on August 9, 2013. He stated that due to the fact that the acres are already covered by a pre-existing water right, and no additional acres are being claimed, then a supplemental recommendation as a result of the split should be a sufficient process to adjudicate the right.

IV

SUPPLEMENTAL ARGUMENT

Hill Real Estate incorporate, as if set forth in full herein, its argument contained in its' Memorandum in Support of Motion to Set-Aside and Enter Corrected Partial Decree, lodged with this Court on August 9, 2013.

The changed circumstances since the issuance of the new right, no. 63-33837, on August 9, 2013, provides an additional reason for this Court to set-aside the partial decree for water right no. 63-32253. The issuance of the new right to Hill Real Estate split the acres that were originally decreed in 63-32253. While right no. 63-33837 shows only 29 acres in the SE1/4

SW1/4 granted to Hill Real Estate, that number should be 40 acres once the transposition is corrected. That will increase the place of use total acres to be decreed to water right no. 63-33837 to 43.9 acres, and decrease the place of use total acres on water right no. 63-32253 to 76.7. *See Davis Aff., Exs. 7 and 9.* Idaho Rule of Civil Procedure 60(b)(2) allows a judgment to be set aside where newly discovered evidence that could not have been discovered by the date of the trial supports such an action. Here, the new water right was not issued until August 9, 2013, nearly four years after the partial decree was entered.

A corrected partial decree for water right no. 63-32253 should be entered, reducing the place of use total acres, in order to accurately describe the right. Further, water right no. 63-33837 should be partially decreed by this Court with the correct number of irrigated acres in the SE1/4 SW1/4 in order to properly and accurately describe the historical beneficial place of use for the water decreed in water right no. 63-32253.

Hill Real Estate also respectfully requests that this Court vacate the hearing on the original motion set for November 12, 2013, at 10:00, and issue a new order with an expedited hearing on the Amended Motion. Hill Real Estate is currently advertising the property for sale and has at least one interested buyer. Having the corrected water right description, and a partial decree confirming the right will assist Hill Real Estate with the sale of the property.

V

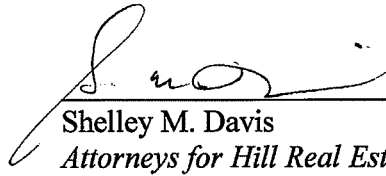
CONCLUSION

For the foregoing reasons, Hill Real Estate, LLC, requests that this Court grant its Motion to Set Aside and Enter Corrected Partial Decree for water right no. 63-32253, and enter a new partial decree for water right no. 63-33837 which accurately depicts the number of acres historically irrigated in the SE1/4 SW1/4 that were initially licensed under water right no. 63-

32263. Hill Real Estate also respectfully requests that this Court enter an order setting this Amended Motion for a hearing on an expedited basis.

DATED this 23rd 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 23rd 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 AMENDED MOTION TO SET-ASIDE AND ENTER CORRECTED PARTIAL DECREES** by the method indicated below, and addressed to each of the following:

Original filed via hand delivery with:

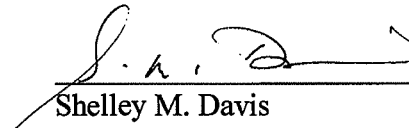
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