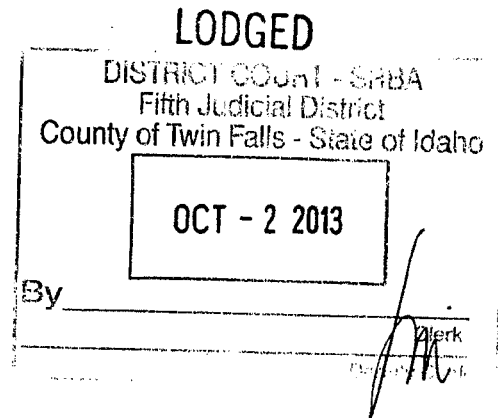


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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

IN RE: SRBA) SUBCASE NO. 65-3111X
CASE NO. 39576)
) MEMORANDUM IN SUPPORT
) OF RULE 60(b) MOTION FOR
) RELIEF FROM JUDGMENT
)

**I.
BACKGROUND**

E.K. Allen Ranch LLP ("Allen Ranch" or "Claimant") seeks relief from this Court's Final Order decreeing Water Right Claim No. 65-3111X ("Order"), filed October 31, 2000. *See* Affidavit of Bruce M. Smith, Exhibit "A". There were no objectors to the claim. *Id.* The Court's Order decreed Water Right Claim No. 65-3111X (the "Right") for irrigation purposes by diversion of water from an unnamed stream in Valley County, Idaho.¹ The ultimate relief sought by Allen Ranch is to have the decree acknowledge an additional point of diversion for the Right that was omitted in the Payette River Adjudication and inadvertently carried through to the SRBA. The omitted point of diversion dates back for decades when the Allen Ranch property was first homesteaded.

¹ The stream has subsequently been identified as Rock Creek.

Allen Ranch 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 evidence through sworn affidavits in support of this motion confirms the existence and use of the historical point of diversion; (2) Dr. David Tuthill, the IDWR supervisor in charge of the Payette Adjudication points out in his affidavit that the omitted point of diversion constitutes an error carried through to the Snake River Basin Adjudication from the Payette Adjudication and is "simply an error that can and should be rectified;" and (3) the point of diversion has been used by the Allen Ranch continuously from its development up to this year.

Mr. J.R. Allen is the general partner of Allen Ranch LLP in Valley County, Idaho. Allen Aff., ¶ 1. The ranch has been in his family dating back to his grandfather's homesteading the area in about 1913. *Id.* at ¶ 2-3. Allen Ranch Water Right No. 65-3111X was decreed in the SRBA for 2.7 cfs for irrigation of 83 acres on October 31, 2000. *Id.* at ¶ 4. The SRBA decree was based on a claim filed in the Payette Adjudication. *Id.* The Payette Adjudication claim was based on a 1930 decree in *Allen vs. Withers*. *Id.*

Because of the geography of the Allen Ranch, the north part of the ranch (referred to as the "Home Place") is irrigated from Little Rock Creek while the southern portion is irrigated from Rock Creek. *Id.* at ¶ 6. Mr. Allen's grandfather constructed an irrigation diversion and ditch which allowed water from Rock Creek to be conveyed to Little Rock Creek and then to the Home Place because water from Rock Creek could not be delivered to the Home Place due to a hill separating the Home Place from the southern portion of the ranch. *Id.* at ¶ 7. The diversion, referred to as the Upper Diversion, has been in

existence at least since 1915-1920. *Id.* For reasons unknown, this diversion which was identified in the *Allen vs. Withers* decree was omitted from the Payette Adjudication Claim, and was carried through to the SRBA decree. This error was discovered after the SRBA Final Order was issued. Years ago, some of the Allen land was sold to a developer who created lots which were sold to homeowners. *Id.* at ¶ 9. Some of the homeowners recently began to question Allen Ranch's historical diversion of water from Rock Creek to Little Rock Creek using the Upper Diversion. *Id.* Until this happened, no one realized the point of diversion had been omitted.

Mr. Allen's investigation has revealed the Upper Diversion was somehow left off the Payette Adjudication claim. *Id.* This omission was then carried forward into the SRBA and the SRBA partial decree that was issued October 31, 2000. *Id.* Notwithstanding the omission of the point of diversion from the Payette Adjudication and SRBA decree, the use of the diversion has been ongoing and continuous. *Id.* at ¶ 10.

Mr. Allen's investigation included locating the Court Decree in the matter of *Allen vs. Withers*. *Id.* at ¶ 11. This decree references the Upper Diversion as being in existence in 1931 and includes a map clearly depicting the Upper Diversion and associated ditch which connects Little Rock Creek to Rock Creek. *Id.*

Mr. Allen's investigation involved more than simply finding historical information included in the *Allen vs. Withers* decree. He has obtained affidavits of Mr. Bill Leslie and Mr. John Kwader, both old time residents of the area, which independently confirm the historical existence of the Upper Diversion.

In addition, Mr. Allen sought the help of Dr. David Tuthill to help explain the omission of the Upper Diversion from the Payette Adjudication and the SRBA. Dr.

Tuthill is not an ordinary witness. Dr. Tuthill is a former Director of the Idaho Department of Water Resources, and was in charge of the Payette Adjudication. Tuthill Aff. ¶ 4. Dr. Tuthill has provided a very detailed explanation of the process used in the Payette Adjudication to investigate and recommend water rights in the Payette and SRBA adjudications. *Id.* at ¶ 7-9. Dr. Tuthill also explains his own personal investigation into the omission of the Upper Diversion from Allen Ranch's water right. *Id.* at ¶ 10-11. Dr. Tuthill confirms the Upper Diversion as existing in 1932. *Id.* at ¶ 12. He also explains there are no clear records as to why the Upper Diversion was omitted in the Payette Adjudication. *Id.* However, Dr. Tuthill explains that this was simply an error whose origin and cause are not explainable, and therefore, fault should not be attributable to anyone. *Id.* Dr. Tuthill points out the omission was "simply an error that should be acknowledged and corrected." *Id.* Dr. Tuthill's expertise and unique position with regard to this issue should confirm for the Court that this is one of those rare situations that calls for the Court to also acknowledge that errors do occur and to rectify the problem.

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 of Civil Procedure 60(b) (emphasis added).

“Rule 60 provides the only avenue of relief from final civil judgments other than by appeal or independent action.” *Lubben vs. 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 vs. 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 vs. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979). “[A] Rule 60(b) motion to vacate is not a substitute for an appeal.” *Dustin vs. Beckstrand*, 103 Idaho 780, 654 P.2d 368 (1982); *De Filippis vs. United States*, 567 F.2d 341, 342 (7th Cir. 1977) (citing *Ackermann vs. United States*, 340 U.S. 193, 198, 72 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 vs. 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 vs. Puphal*, 105 Idaho 302 (1983)).

Allen Ranch submits that this case presents sufficient good cause justifying relief from the Court.

III. ARGUMENT

A. The evidence confirms the historical Upper Diversion.

Mr. Allen's affidavit and supporting documents, as well as the supporting affidavits of Bill Leslie and John Kwader, do two things: (1) they confirm the long term existence of the Upper Diversion, and (2) they establish the continuous use of the Upper Diversion since it was developed. Mr. Allen also explains the necessity of the Upper Diversion because the geography of the ranch is such that the Home Place, the northern portion of the ranch, cannot be irrigated without using the Upper Diversion. The Payette Adjudication claim, Exhibit "1" to Mr. Allen's affidavit, does not show a signature by Mr. Allen's father or grandfather, but rather initials of unidentified individuals. However, the claim has multiple notations on it that indicate the claim form was initialed at least three different times.

Mr. Allen explains in his affidavit that it was likely his father who submitted the claim in the Payette Adjudication. Mr. Allen's father would not have likely understood that the written legal description of the point of diversion did not coincide with the physical location. However, his father would have definitely understood the physical location since he actually helped construct it.

Dr. Tuthill also explains that "misunderstandings and the location of a diversion by a legal description is not an unheard of problem in some of the older adjudication proceedings." Tuthill Aff. ¶ 10. Similarly, in the Payette Adjudication, the IDWR staff attempted to create maps but sometimes points of diversion were inadvertently omitted from the maps. *Id.* Dr. Tuthill also points out the Upper Diversion is located in a

forested area and the IDWR hydrographic surveyor thus might have missed seeing it. *Id.* In addition, maps sometimes did not coincide with legal descriptions. *Id.* Further, it is possible the map for the *Allen vs. Withers* decree, which clearly depicts the Upper Diversion, might not have been available to the hydrographer. *Id.* Dr. Tuthill says he believes the Upper Diversion was simply overlooked in the initial hydrographic survey because the diversion is clearly shown on the *Allen vs. Withers* map. *Id.* Dr. Tuthill, who was in charge of the Payette Adjudication, points out there is no information as to how the point of diversion was omitted, but it was. *Id.* at ¶ 12. Importantly, Dr. Tuthill acknowledges this as an error that should be rectified. This Court can do so by setting aside the partial decree and allowing the Upper Diversion point to be added to Water Right No. 65-3111X.

Allen Ranch needs the Upper Diversion to irrigate and water livestock on the Home Place portion of the ranch. Allen Ranch is not seeking anything that has not been in place for decades as to the existence or operation of the diversion. Allen Ranch does not seek more water or any other changes to the decree issued on October 31, 2000, other than to add the historical point of diversion. Mr. Allen has gone to great lengths to diligently investigate and seek to uncover a complete explanation for the omission. Despite the absence of information as to why or how the omission occurred, Allen Ranch has procured affidavits of longtime residents who are personally aware of the existence of the diversion, the map of the diversion from the early *Allen vs. Withers* decree, and the help and opinion from Dr. Tuthill as to how the omission might have occurred both at the individual as well as the IDWR level. Allen Ranch believes this record clearly

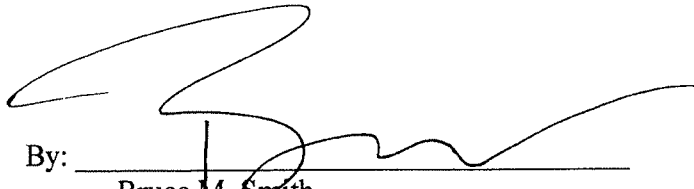
establishes the requisite good cause that would justify the Court setting aside the partial decree to allow the diversion point to be acknowledged.

**IV.
CONCLUSION**

Allen Ranch requests the Court exercise its discretion pursuant to IRCP 60(b)(6) in order to allow the addition of the Upper Diversion to the Water Right Claim No. 65-3111X.

Respectfully submitted this 30th day of September, 2013.

MOORE SMITH BUXTON & TURCKE, CHTD.


By: _____
Bruce M. Smith
Attorney for Allen Ranch LLP