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DEPARTMENT OF
WATER RESOURCES

**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

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) SUBCASE NO: 67-4310
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**MEMORANDUM IN SUPPORT MOTION
TO SET-ASIDE PARTIAL DECREE**

COMES NOW, John L. Goff, Claimant, by and through his counsel of record, Shelley M. Davis of the law firm Barker Rosholt & Simpson, LLP, and hereby submits this Memorandum in Support of John L. Goff's Motion to Set Aside Partial Decree in sub-case number 67-4310 pursuant to Id. R. Civ. P. 60(b)

I.

INTRODUCTION

Mr. Goff filed a Notice or Error Reply form on or about December 8, 2006, in response to the proposed water right recommendation for water right no. 67-4310. It appears that the Notice of Error Reply was not processed and the water right was partially decreed and the Partial Decree was entered for the right on or about October 20, 2008. The failure to correct the preliminary recommendation was not noticed until litigation was instituted concerning an

MEMORANDUM IN SUPPORT MOTION TO SET-ASIDE PARTIAL DECREE

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easement affecting the one of the points of diversion that was requested to be added in the error reply form. Mr. Goff's failure to detect the mistake constitutes excusable neglect pursuant to Id. R. Civ. P. 60(b)(1), and Mr. Goff hereby requests that this court set aside the Partial Decree for water right 67-4310 and enter a corrected decree incorporating those matter that were not corrected subsequent to the Department's receipt of the Notice of Error Reply form.

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

A notice of claim to a water right, assigned number 67-4310 was filed on or about February 20, 1980, in the name of Geo Solar Growers, Inc. Affidavit of Shelley M. Davis in Support of Motion to Aside Partial Decree (“Davis Aff.”), Ex. 1. The property on which the Geo Solar Growers water right is appurtenant was acquired by Mr. Goff’s company, Dallas Drilling, through a sheriff’s sale on or about April 12, 1988. Davis Aff., Ex. 2. On November 1, 1989, Mr. Goff filed a Notice of Claim in the Snake River Basin Adjudication for water right no. 67-4310. Davis Aff., Ex. 3. The notice of claim identified a number of groundwater wells that would be used for a variety of purposes on the place of use. *Id.*

On the same date that Mr. Goff filed the Notice of Claim for water rights no. 67-4310, he also filed notices of claim for water right nos. 67-2114 and 67-11202. Davis Aff. Ex. 4. Both of these claims sought a surface water diversion from Warm Springs Creek at the same point of diversion, for the same purpose of use, and on the same place of use, under the identical priority date. *Id.* The Department determined that the claims were duplicative and recommended that water right no. 67-11202 be disallowed. Davis Aff., Ex. 5.

During the examination of water right claim no. 67-4310 the watermaster for water district 67A, who served as the claim examiner, provided a memo to the Department, outlining the wells located within the place of use for water right no. 67-4310. Davis Aff., Ex. 6. The well

that Mr. Goff attempted to have added to the water right recommendation through the Notice of Error is identified as well no. 9 in the memo, and there is a notation indicating “W/R# 67-11202.” *Id.* It is unclear why the examiner included that notation as water right no. 67-11202 never included a groundwater source, but rather was limited to the historic surface water source that was partially decreed as water right no. 67-2114. *See* Davis Aff., Exs. 4 and 6. One of several GIS maps found in the backfile for water right no. 67-4310 also contains a handwritten notation that well no. 9 is associated with water right no. 67-11202. Davis Aff., Ex. 7. There is nothing in the backfile for water right no. 67-11202 or water right no. 67-4310 that would explain the attribution of well no. 9 to water right no. 67-11202.

When the preliminary recommendation was issued in October 2006, only eight points of diversion were recommended, one of the wells listed in the explanatory materials included an incorrect temperature listing, and the overall place of use encompassing only 46.5 acres needed to be corrected. Davis Aff., Ex. 8. On December 8, 2006, Mr. Goff submitted his Notice of Error Reply for requesting that three wells be added as points of diversion, the place of use be amended to encompass the entire property on which the water has historically been used, and to amend the temperature in well no. A0016730 from 150 degrees to 115 degrees. Davis Aff., Ex. 9. Twelve points of diversion had been listed on all of the maps included in the backfile for water right no. 67-4310. Davis Aff., Ex. 10. The backfile does not disclose any evidence that the Notice of Error was ever processed. Affidavit of Carter Fritschle, p. 2. In similar circumstances it would have been the practice of the Department to recommend and prepare an Amended Claim, however, there is no evidence that the Department ever responded to Mr. Goff’s Notice of Error. *Id.* On October 20, 2008, a partial decree for the right was entered which did not contain the requested correction that Mr. Goff had included in his Notice of Error reply. Davis Aff., Ex. 11.

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. Here, it is evident that the claimant took the necessary steps to correct the improper description of the points of diversion, place of use, and well temperature, and that his efforts to notify the Department were overlooked.

“[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 failure to process or respond to Mr. Goff’s Notice of Error form constitutes such a mistake is certainly compelling.

Mr. Goff took the steps necessary to correct the mistakes that had been in the initial recommendation, and relied upon the Department’s expertise to process and correct the errors. In similar circumstances it is customary for the Department to respond to the Notice of Error and recommend the preparation of an Amended Claim. Fritschle Aff. That did not occur in this instance. *Id.* Further, there appeared to be some confusion about the water right under which well no. 9 was claimed, with the claims examiner apparently attributing that well to water right no. 67-11202. Davis Aff., Ex. 6. It is clear that the well was not intended to be claimed under water right no. 67-11202, as that right sought only a surface water diversion. Davis Aff., Ex. 4.

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, Mr. Goff attempted to correct the recommendation so that it would be consistent with the historical and beneficial use of water on the property, and the Notice of Error was not properly processed. *See Fritschle Affidavit*. Such failure constitutes unique and compelling circumstances justifying the setting aside of the partial decree for correction.

V.

CONCLUSION

Based upon the foregoing argument, Mr. Goff hereby requests that the partial decree for water right no. 67-4310 be set-aside and that this Court request the Department to prepare an amended recommendation in conformance with the historic use of the water right, including the additional points of diversion, the expanded place of use and the corrected well temperature.

DATED this 3rd day of March, 2014.

BARKER ROSHOLT & SIMPSON LLP


Shelley M. Davis
Attorneys for Claimant Goff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2014, I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO SET-ASIDE PARTIAL DECREE** by the method indicated below, and addressed to each of the following:

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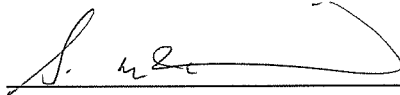
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