

Chris M. Bromley, ISB # 6530
Candice M. McHugh, ISB # 5908
McHugh Bromley, PLLC
380 S. 4th St., Ste. 103
Boise, ID 83702
(208) 287-0991
(208) 287-0864 (facsimile)

RECEIVED
APR 28 2014
DEPARTMENT OF
WATER RESOURCES

Attorneys for Bruce and Glenda McConnell

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

In Re SRBA

Case No. 39576

Subcase Nos. 74-361, -362, -363, -364, -
365, -367, -368

**MOTION TO SET ASIDE AND
MEMORANDUM IN SUPPORT**

MOTION TO SET ASIDE

COME NOW Bruce and Glenda McConnell ("McConnells"), by and through their counsel of record, Chris M. Bromley, McHugh Bromley, PLLC, pursuant to Idaho Rule of Civil Procedure 60(b), and hereby move the Court to set aside its *Order Closing Claims Taking Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78 and 79 and Disallowal of Unclaimed Water Rights*, SRBA subcase no. 00-92099 (April 25, 2012) as to water right nos. 74-361, -362, -363, -364, -365, -367, and -368. The *Motion* is supported by the *Memorandum*, below, and the *Affidavit of Chris M. Bromley* filed contemporaneously herewith.¹

¹ McConnells are also filing contemporaneously *Motions for Late Claim* and a supporting *Memorandum* for the above-captioned water rights. McConnells hereby incorporate by reference the *Motions for Late Claim* and the

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE

I. INTRODUCTION

Only specifically to its effect on water right nos. 74-361, -362, -363, -364, -365, -367, and -368, McConnells seek to set aside this Court's *Order Closing Claims Taking Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78 and 79 and Disallowal of Unclaimed Water Rights*, SRBA subcase no. 00-92099 (April 25, 2012) ("April 25, 2012 Judgment"). McConnells make this claim based on the fact that the *April 25, 2012 Judgment* is void as to the above-captioned water rights because McConnells did not receive second round service. I.R.C.P. 60(b)(4). Additionally, McConnells contend other reasons justify relief from the operation of the judgment. I.R.C.P. 60(b)(6). Lastly, McConnells pray that this Court, sitting in equity, relieve them from the *April 25, 2012 Judgment* by setting aside its order of disallowance and allowing McConnells to pursue their late claims as they were decreed in the Lemhi Adjudication.

II. FACTUAL BACKGROUND

McConnells hold the following water rights, totaling 15.2 cfs, which were previously decreed in the Lemhi Adjudication, for use on their property:

Basin	Sequence	Basis	Priority	Div. Rate	Source	Tributary	Purpose of Use
74	364	Decreed	6/1/1900	1.3	LEE CREEK	LEMHI RIVER	IRRIGATION
74	362	Decreed	5/1/1906	4.1	LEE CREEK	LEMHI RIVER	IRRIGATION
74	368	Decreed	11/5/1909	5.8	LEE CREEK	LEMHI RIVER	IRRIGATION
74	361	Decreed	5/12/1883	1.2	LEE CREEK	LEMHI RIVER	IRRIGATION
74	363	Decreed	5/12/1883	1	LEE CREEK	LEMHI RIVER	IRRIGATION
74	365	Decreed	5/12/1883	1.2	LEE CREEK	LEMHI RIVER	IRRIGATION
74	367	Decreed	5/12/1883	0.6	LEE CREEK	LEMHI RIVER	IRRIGATION

supporting *Memorandum*. Additionally, all filings in these subcases are being made on an expedited basis, and with actual notice to users on Lee Creek.

Even though McConnells are the senior users on Lee Creek, a decreed separate source in Basin 74, they hold no other water rights. *Affidavit of Glenda McConnell* at 3. Because the Lemhi basin is considered closed by the Idaho Department of Water Resources (“IDWR”), McConnells cannot obtain new water rights. Since 1993, after moving from Montana, McConnells have owned their property in the Lemhi Basin. *Id.* at 1. Since 1993, McConnells have continuously used their water rights for flood irrigating pasture and hay meadows to sustain their cattle operation. *Id.* at 2. McConnells are good stewards of the land and neighbors. *Id.* at 3, *Exhibit C*.

On April 17, 2014, McConnells were informed, for the first time, that their water use was not associated with any valid water rights. *Id.* at 2-3. Since that day, McConnells have acted swiftly to investigate their claims, hire an attorney, work with IDWR, prepare their late claims, and provide actual notice to all water users on Lee Creek of this action. Until April 17, 2014, McConnells had never been told that they were required to file claims in the SRBA. *Id.* at 3. Until April 17, 2014, McConnells had no knowledge that if they did not claim their water rights in the SRBA, their water use would be lost. *Id.*

III. LEGAL STANDARDS FOR SETTING ASIDE A PARTIAL DECREE

A motion to set aside a partial decree in the SRBA “is treated the same as a motion to set aside a default judgment and determined in accordance with the criteria set forth in Idaho Rule of Civil Procedure 60(b). A.O.1 § 14d (“Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)”).” *Order Denying Motion to File Late Notice of Claim*, SRBA subcase no. 21-13176, p. 4 (January 9, 2014). Civil Rule 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;
- 3) fraud, misrepresentation or other misconduct of an adverse party;
- 4) the judgment is void;
- 5) the judgment has been satisfied, released or discharged; and
- 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). In cases dealing with water rights, public policy weighs against forfeiture: “The courts abhor forfeiture and where no public interest is favored thereby, equity leans against declaring a forfeiture. *Hurst v. Idaho Iowa Lateral & Res. Co.*, 42 Idaho 436, 246 P. 23 (1926) and *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938).” *Special Master Report*, SRBA subcase no. 45-167A, p. 8 (March 20, 2007).

If a movant shows “unique and compelling circumstances justifying relief” the Court has not abused its discretion in granting relief under Rule 60(b). *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). Determining whether to set aside a default judgment requires that the court “apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of genuine doubt.” *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 733, 662 P.2d 1171, 1177 (Ct. App. 1983). Thus, the Court must weigh each case in light of its unique facts. *Id.* at 732. 662 P.2d at 1176 (citing *Orange Transportation Co., Inc. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951)).

In addition to requiring a party to state a reason justifying relief from operation of the judgment, Idaho courts require more. A party must first show that he or she has acted in good faith and exercised due diligence in the protection of his or her rights, such as an ordinarily prudent person would exercise under similar conditions. *Council Improvement Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909) and *Kovachy v. DeLeusomme*, 122 Idaho 973, 842 P.2d 309 (Ct. App. 1992).

Not only must a movant satisfy one of the criteria set forth in I.R.C.P. 60(b), the movant must also allege facts, which if established, would constitute a meritorious defense. The meritorious defense standard requires that a movant:

- 1) allege facts;
- 2) which if established;
- 3) would constitute a defense to the action; and
- 4) the facts supporting the defense must be detailed.

See *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979); *Thomas v. Stevens*, 78 Idaho 266, 300 P.2d 811 (1956). The detailed factual requirement is more than the mere general notice requirement that would ordinarily be sufficient if pled prior to default. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981).

The standards for setting aside a default judgment take into account the preference for having a case decided on its merits. *Order On Permissive Review Granting Motion To Set Aside Partial Decrees And Order Of Recommitment To Special Master*, SRBA subcase no. 79-02063 *et al.*, p. 6 (June 10, 2010). In making the determination, the Court must take into consideration that judgments by default are not favored and that the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits and that procedural rules other than those which are jurisdictional should be applied to promote disposition on the merits.

Reeves at 272, 629 P.2d at 668. This is a factual determination and is discretionary with the Court. *Johnson* at 732, 662 P.2d at 1176.

Rule 60(b) also requires that a motion to set aside be made within a reasonable time and, for Rule 60(b)(1), (2) and (3), not more than six months after the judgment, order, or decree. Because the *April 25, 2012 Judgment* was entered more than 6 months ago, only the fourth, fifth and sixth justifications are applicable. In this case, and as will be explained below, McConnells believe I.R.C.P. 60(b)(4), (5), and (6) provide them avenues to obtain relief from the *April 25, 2012 Judgment*.

A. The *April 25, 2012 Judgment* is Void as to its Disallowance of McConnells' Water Rights, I.R.C.P. 60(b)(4)

As will be discussed below, it is undisputed McConnells did not receive second round service; therefore, the Court's *April 25, 2012 Judgment* disallowing water right nos. 74-361, -362, -363, -364, -365, -367, -368 is void only as to those water rights and should be set aside to allow McConnells the opportunity to claim their water rights as they were decreed in the Lemhi Adjudication.

In order for a judgment to be void, there must generally be some jurisdictional defect in the court's authority to enter the judgment, either because the court lacks personal jurisdiction or because it lacks jurisdiction over the subject matter of the suit. *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983). A judgment may also be void for insufficient procedural due process, whether for lack of notice or denial of opportunity to be heard. *McGrew v. McGrew*, 139 Idaho 551, 558, 82 P.3d 833, 840 (2003). "The private interest at stake is great. The right to water is a permanent concern to farmers, ranchers and other users. The importance of the government's interest is great, as the steward of a finite resource that is the lifeblood for much of the state's

economy and quality of life.” *LU Ranching Co. v. United States*, 138 Idaho 606, 608 (2003) (discussing notice and due process in the SRBA).

Due process and notice were a primary concern when the SRBA was commenced. In order to ensure water users were apprised of commencement, the Director of IDWR was required to serve notice of the adjudication. Idaho Code § 42-1408(1)-(3). This initial notice has been referred to in the SRBA as “first round service.” After commencement, the legislature required additional service, which has been referred to in the SRBA as “second round service.” Idaho Code § 42-1408(4). “Upon expiration of the period for filing notices of claims, the director shall conduct a second round of service in conformance with this subsection. The director shall compare the notices of claims with department records and any other information reasonably available to determine whether there are any rights to water from the water system for which no notice of claim was filed. . . . The director shall prepare a second round notice of order.” Idaho Code § 42-1408(4). “The director shall file with the district court such proof of service as may be required to demonstrate compliance with the above requirements.” Idaho Code § 42-1408(5).

On January 14, 2000, Judge Wood entered an order approving IDWR’s proposed method of second round service in the SRBA. *Second Amended Second Round Service Order*, SRBA subcase no. 39576 (January 14, 2000). This order was to be followed by IDWR for basins, like Basin 74, that had not yet received second round service.² The *Second Amended Second Round Service Order* required IDWR to identify unclaimed water rights by: (1) comparison of IDWR’s water right data base with claims already filed in the SRBA; GIS evaluation of the SRBA claim

² Lemhi County/Basin 74 was the last area in the SRBA to receive first round service, occurring between February to May 1990. Second round service in Lemhi County/Basin 74 was made in late 2003; therefore, the second round service requirements that were to be followed are contained in the Court’s *Second Amended Second Round Service Order*.

layer with 1987 photography to reveal those irrigated acres where a claim has not been filed; and (3) discovery of unclaimed water rights during investigation of claims.

On December 26, 2003, IDWR filed the *Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice Not Necessary for Basin 74 (No Unclaimed Water Rights Discovered)*, SRBA subcase no. 39576 (December 26, 2003) (“Basin 74 Second Round Service Affidavit”). In the affidavit, it was stated that IDWR followed the *Second Amended Second Round Service Order*:

Using the procedures identified in the Service Order in part III. A. (Water Right Data Base), B. (GIS Evaluation and Second Round Service), and C. (Potentially Unclaimed Water Rights Discovered During the Investigation of Claims) it was determined there were no unclaimed water rights in Basin 74 that required Second Round Service. Beneficial use claims superseded by the Lemhi Decree were not subject to second round service. All other potentially unclaimed water rights were investigated and found to be small domestic or stock water rights, rights established after November 19, 1987 (date of commencement of the SRBA), or rights claimed by owners of other water rights already claimed in the SRBA. These rights were not subject to second round service.

Basin 74 Second Round Service Affidavit at 2 (underline in original removed) (emphasis added).

Based on the plain language of the *Basin 74 Second Round Service Affidavit*, it is apparent McConnells did not receive second round service, because no second round service was sent to anyone in Basin 74. Second round service should have been sent because McConnells owned the property and appurtenant water rights since 1993. *Affidavit of Glenda McConnell* at 1 and *Exhibit A*. Based on when the *Basin 74 Affidavit of Second Round Service* was filed, second round service was not investigated by IDWR until a decade after McConnells purchased their property and appurtenant water rights. Review of Lemhi County records would have shown not only that McConnells owned the property, but also that Lemhi County had recognized McConnells as owners of water right nos. 74-361, -362, -363, -364, -365, -367, and -368. *Affidavit of Glenda McConnell* at 3 and *Exhibit D* (pen and ink changes on file with Lemhi

County). Review of IDWR's water right database would have shown McConnells did not file on any water rights in the SRBA, and that no overlapping rights existed on the property. Because 1987 infrared aerial photography was not available for Lemhi County, the standard aerial imagery used by IDWR in Basin 74 was early 1993-94 true color photography, obtained from the USDI-Bureau of Land Management. *Affidavit of Roxanne Brown* at 2. A review of that imagery with IDWR's "claim layer"³ would have shown McConnells' place of use was decreed in the Lemhi Adjudication with seven appurtenant water rights, that the place of use was irrigated, and that the water rights were not claimed in the SRBA. *Affidavit of Roxanne Brown* at 2 ("place of use appears irrigated") and *Exhibit A* (depicting how the McConnell shapefile would have appeared). Review of watermaster records would have shown that water was continuously delivered to the property. *Affidavit of Timothy J. Luke* at 1-2. Therefore, the property, and its appurtenant water rights, should have been identified as needing second round service; yet none was sent.

Since at least the Lemhi Decree, and before second round service was sent in 2003, the validity of water right nos. 74-361, -362, -363, -364, -365, -367, and -368 were consistently recognized as valid.⁴ The watermaster reports for Water District No. 74-Z show for each year from 1983 to 2003 that water was continuously delivered to McConnells' property, in-priority, under valid water rights. *Affidavit of Timothy J. Luke* at 1-2. In 1998 and again in 2000,

³ *Second Amended Second Round Service Order* at 4 ("The first step of IDWR's investigation of water rights in a reporting area ordinarily will be to digitize the water right claims. This claim layer will be overlaid in the GIS with digital National Aerial Photography Program (NAPP) photography generally taken in 1987. A visual comparison of the digitized claim layer and the NAPP photography will reveal those irrigated acres where a claim has not been filed and second round service should be conducted. For counties where IDWR has a digital parcel layer, ownership information may be collected from the GIS.").

⁴ In order to avoid redundant statement of facts, only a brief recitation of facts will be discussed here on this point. A more thorough discussion of these facts is contained in the sections below addressing application of I.R.C.P. 60(b)(6) and the meritorious defense standard.

McConnells obtained relief from IDWR when requesting enforcement of their senior-priority water rights against a later-in-time stockwater permit. *Affidavit of Glenda McConnell* at 2 and *Exhibit B*. In the summer of 2000, IDWR inventoried all valid water rights on Lee Creek. *Affidavit of Timothy J. Luke* at 2 and *Exhibit A*. In that inventory, McConnells' water rights were identified as valid. *Id.* Even after interim administration was ordered by the Court in 2006—authorizing delivery to the Basin 74 Director's Report and partial decrees to “protect senior water rights,” *Order Granting State of Idaho's Motion for Order of Interim Administration of Water Rights in Basin 74*, SRBA subcase no. 92-00021-74, p. 2 (May 1, 2006)—watermaster reports show McConnells continued to be delivered their senior-priority water rights from Lee Creek. *Affidavit of Timothy J. Luke* at 2. It was not until April 17, 2014 that McConnells were ever aware that their water rights were not recorded in the SRBA. *Affidavit of Glenda McConnell* 3.

On January 31, 2012, the Court issued its *Order Establishing Deadline for Late Claim Filings in Basins 21, 22, 29, 32, 33, 65, 67, 69, 71, 72, 73, 74, 75, 77, 78, and 79*, SRBA subcase no. 00-92099, p. 1 (January 31, 2012) (“*January 31, 2012 Notice Establishing Deadlines*”). The *January 31, 2012 Notice Establishing Deadlines* warned claimants of the need to file claims before March 30, 2012. *Id.* at 4. Shortly after the March 30, 2012 deadline, the Court issued its *April 25, 2012 Judgment* disallowing McConnells' water rights. In the *April 25, 2012 Judgment*, the Court specifically found, “Claimants in . . . [B]asin[] 74 previously received extensive first-round and second-round *Notice of Filing Requirements* in the SRBA. *See* Idaho Code § 42-1408. These notice procedures meet constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003).” *Id.* at 1-2.

While most claimants in the closed basins undoubtedly received first and second round service, it is undisputed McConnells did not receive second round service.⁵ *Basin 74 Second Round Service Affidavit*. The error in second round service can easily be repaired by allowing McConnells to set aside only that portion of the *April 25, 2012 Judgment* that disallowed their unclaimed water rights, thereby allowing McConnells the opportunity to pursue their late claims as their rights were decreed in the Lemhi Adjudication.

For McConnells to obtain relief under I.R.C.P. 60(b)(4) they “must bring a motion for relief within a reasonable time. Where judgment is entered without the party’s knowledge, what constitutes reasonable time is judged from the time that the party learned of the judgment.” *McGrew* at 559, 82 P.3d at 841. Here, McConnells meet the timeliness requirement.

McConnells were notified on April 17, 2014 by IDWR that their water rights were invalid. *Affidavit of Glenda McConnell* 2-3. That same day, McConnells contacted counsel to represent them in this matter. *Id.* at 3. McConnells have expended considerable time and money to prepare this matter to be heard in a very short period of time. Rather than rely on standard docket sheet procedure, McConnells elected to have this matter heard on an expedited basis, by providing service to the expedited service list, as well as providing actual notice to all water users on Lee Creek. *Affidavit of Chris M. Bromley* at 3. By taking action the same day they learned of the invalidity of their water rights, McConnells have brought their motion “within a reasonable time” and should be granted relief.

Lastly, in order to satisfy any claim for relief under I.R.C.P. 60(b), McConnells must also allege facts, which if established, would constitute a meritorious defense. *See McFarland*, 123 Idaho 931, 854 P.2d 274; *Hearst Corp.*, 100 Idaho 10, 592 P.2d 66; *Thomas v. Stevens*, 78 Idaho

⁵ Counsel has been diligently working with IDWR to review first round service for Lemhi County/Basin 74. To date, first round service records are still in the process of being located.

266, 300 P.2d 811. Because the meritorious defense standard is applicable to McConnells' assertion that I.R.C.P. 60(b)(4) and (6) apply, McConnells will address the meritorious defense standard below in Section III.C, following discussion of I.R.C.P. 60(b)(6).

B. Unique and Compelling Circumstances Support McConnells' Request for Relief, IRCP 60(b)(6)

Under Rule 60(b)(6), a court may relieve a party from a final judgment, order, or proceeding for "any . . . reason justifying relief from the operation of the judgment." I.R.C.P. 60(b)(6). Although the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b)(6) 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). Whether a Rule 60(b) motion is supported by unique and compelling circumstances is a determination that must be made on a case-by-case basis. *Order Denying Motion to File Late Notice of Claim*, SRBA subcase no. 21-13176, p. 3 (January 9, 2014). As recently noted by this Court, "appellate courts of this state have infrequently granted relief under Rule 60(b)(6)." *Id.* A review of the facts in this case reveal circumstances particular to McConnells that are both unique and compelling.

McConnells moved to Idaho from Montana in 1993. *Affidavit of Glenda McConnell* at 1-2. As new residents and landowners in the area, McConnells were unaware they did not have valid water rights to their property, and were unaware of the need to file claims in the SRBA. *Id.* at 3. Like any prudent and reasonable landowner, McConnells met with the local IDWR agent in Salmon, Bob Foster, about their water rights and whether ownership needed to be changed. *Id.* at 2. Mr. Foster informed McConnells that the water rights stay and run with the land. *Id.* McConnells were left with the belief that no action on their part was required. *Id.* McConnells

were never informed that the water rights for their property had not been claimed and that they must be claimed in the SRBA to remain valid. *Id.*

To the contrary, McConnells and their predecessors-in-interest have continuously been told their water rights were valid. On December 8, 1989, a water user on Lee Creek filed a stockwater application for permit with IDWR. *Affidavit of Chris M. Bromley* at 2 and *Exhibit E*. On January 16, 1990, following publication of the application, and after commencement of the SRBA, a predecessor-in-interest filed a protest, on the basis that the proposed use would adversely affect his senior-priority water rights from Lee Creek. *Id.* A pre-hearing conference was held on September 14, 1990 to discuss the protest. *Id.* On November 19, 1990, IDWR issued a Proposed Memorandum & Decision, which recognized McConnells' predecessor "has rights 74-00361 through 74-00368 decreed in his name . . . from Lee Creek . . . which extend from March 15 to November 15 of each irrigation season." *Id.* On January 16, 1991, IDWR approved the stockwater application for permit during the non-irrigation season so as not to interfere with the senior irrigation water rights. *Id.* Stockwater permit no. 74-7274 has not been licensed by IDWR. In 1998 and again in 2000, McConnells contacted Mr. Foster to ensure that the junior-priority stockwater permit would not interfere with their senior irrigation water rights. *Affidavit of Glenda McConnell* at 2 and *Exhibit B*. On both occasions, non-interference was ensured. *Id.* If McConnells did not have valid water rights, the stockwater permit should have been delivered ahead of McConnells' rights.

Since the 1994 irrigation season, Bruce McConnell has served as the chairman of Water District No. 74-Z. *Id.* At no time during the period they have owned the property, including Mr. McConnell's lengthy tenure with Water District No. 74-Z, have McConnells been informed or could otherwise infer their water rights were invalid. *Id.*

Indeed, in the summer of 2000, the Department inventoried all valid water rights on Lee Creek. *Affidavit of Timothy J. Luke* at 2 and *Exhibit A*. McConnells' water rights were identified as valid. *Id.* Moreover, priority delivery of McConnells water rights has also occurred every year since the Court entered its 2006 *Order Granting State of Idaho's Motion for Order of Interim Administration of Water Rights in Basin 74*, SRBA subcase no., 92-00021-74 (May 2, 2006); *Affidavit of Timothy J. Luke* at 1-2. With interim administration in Basin 74, and because their water rights had not been claimed, McConnells should not have received delivery of their water rights. If McConnells' had been notified even six years after interim administration that they were diverting water without having filed claims, they could have easily moved the Court for leave to file late claims (without having to set aside the *April 25, 2012 Judgment*) in accordance with standard SRBA procedure.

During the 2012 and 2013 irrigation seasons, which occurred after entry of the Court's *April 25, 2012 Judgment* disallowing McConnells' unclaimed water rights, McConnells took delivery of water, in-priority, ahead of other water users on Lee Creek. *Affidavit of Timothy J. Luke* at 2. Had McConnells been told during the 2012 irrigation season that they were illegally diverting water, they could have filed an I.R.C.P. 60(b)(1) to set aside the *April 25, 2012 Judgment* on the basis of mistake and pursued their late claims. *See Order Granting Motion to File Late Notice of Claim*, SRBA subcase no. 37-7293 (October 16, 2013) (allowing claimant—who was notified by the watermaster during the 2013 irrigation season that she was diverting water illegally because her prior license had not been claimed during the SRBA—to set aside the Court's 2013 order closing Basin 37 only as it related to unclaimed water right no. 37-7293).

Based on the above, McConnells present unique and compelling circumstances that warrant relief from operation of the *April 25, 2012 Judgment* for the limited scope as to its effect on water right nos. 74-361, -362, -363, -364, -365, -367, -368.

C. Meritorious Defense

McConnells meet the meritorious defense standard associated with I.R.C.P. 60(b) because their water use has historically been administered and granting this *Motion to Set Aside* will not result in prejudice to water users on Lee Creek, a separate stream. McConnells' water rights date back to as early as May 12, 1883. In 1912, McConnells' predecessor-in-interest obtained a decree to water right nos. 74-361, -362, -363, -364, -365, -366 (disallowed in the Lemhi Adjudication) -367, and -368. *Affidavit of Chris M. Bromley* at 1 and *Exhibit A*. McConnells' predecessor-in-interest claimed this water use in the Lemhi Adjudication, *Affidavit of Chris M. Bromley* at 2 and *Exhibit B*, and were later decreed those water rights by the court in the Lemhi Adjudication, *Affidavit of Chris M. Bromley* at 2 and *Exhibit C, Exhibit D*. Because it was decreed a separate source in the Lemhi Adjudication, Lee Creek was decreed a separate source in the SRBA. *Partial Decree Pursuant to I.R.C.P. 54(b) for General Provisions in Basin 74*, SRBA subcase no. 39576, p. 1 (April 3, 2012). Since at least the December 30, 1982 entry of the Lemhi decree, *see Order Adopting Special Master's Recommendation in Part and Rejecting in Part*, SRBA subcase no. 65-22481, p. 3 (February 27, 2013), McConnells' and their predecessors-in-interest have continuously diverted these water rights, in-priority, against all other users on Lee Creek. *Affidavit of Timothy J. Luke* at 1-2. Even though McConnells' unclaimed water rights were disallowed by the *April 25, 2012 Judgment*, they were still delivered their full water rights, in-priority, during the 2012 and 2013 irrigation seasons. *Id.* at 2.

The late claims filed by McConnells contemporaneously in these subcases claim water rights as they were decreed in 1912, as they were decreed in the Lemhi Adjudication, and consistent with how they have been delivered every year since.⁶ McConnells are not seeking accomplished transfers or enlargements of the water rights. McConnells are claiming the use to water as it was decreed in the Lemhi Adjudication and has been historically delivered. As such, there will be no prejudice to other water users who are accustomed to McConnells receiving water, and have been administered as such without objection or protest.⁷ Little investigation will be required of IDWR because McConnells have claimed the rights as they were decreed in the Lemhi Adjudication and delivered since that time.

In order to ensure no prejudice or surprise, McConnells have given all water right holders on Lee Creek actual notice of these proceedings. IDWR's water right database identifies the following active water rights on Lee Creek, to which McConnells have given actual notice:

Basin	Sequence	Basis	Priority Date	Div. Rate (cfs)	Water Use	Owner
74	10554	Decreed	6/1/1876	0.02	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH
74	1831	Decreed	6/28/1912	0.24	IRRIGATION	RUGGLES, AL; RUGGLES, JAMIN K
74	949	Decreed	12/5/1918	0.04	IRRIGATION, STOCKWATER	RUGGLES, AL; RUGGLES, JAMIN K
74	14451	Decreed	6/28/1934	0.02	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH
74	2261	Decreed	12/21/1941	2	IRRIGATION, IRRIGATION FROM STORAGE, IRRIGATION STORAGE	ANDERSON, BOBBIE E; ANDERSON, DORIS

⁶ Because stockwater was generally considered incidental to irrigation rights in the Lemhi Adjudication, and because stockwater is critical to McConnells' water use, McConnells are claiming stockwater as a purpose of use in their late claim for water right no. 74-361.

⁷ In this sense, McConnells' requested relief is distinctly different from other water users that have appeared in this Court seeking beneficial use water rights that would disrupt the system of administration. Unlike in those subcases where other users on the system could be surprised, no user on Lee Creek, which is a separate source, will be surprised because McConnells water rights are derived from two prior decrees and have been historically administered, in-priority.

74	2339	Decreed	12/21/1941	2	IRRIGATION, IRRIGATION FROM STORAGE, IRRIGATION STORAGE	ANDERSON, BOBBIE E; ANDERSON, DORIS
74	7274	Permit	12/8/1989	0.07	STOCKWATER	PETERSON, EDDIE R
74	15200	License	5/8/1990	0.26	IRRIGATION	PETERSON, HARVEY E
74	15201	License	5/8/1990	0.34	IRRIGATION	PETERSON, JANETTE S; PETERSON, KENNETH J

Affidavit of Chris M. Bromley at 3.

While there will be no prejudice to other water users, the prejudice to McConnells will be profound and devastating to their ranch. McConnells will be denied the water rights that they purchased with their property, and will be left with no ability to irrigate their land, greatly reducing the land's value and making them unable to operate their ranch. Furthermore, there is no opportunity for McConnells to claim water rights in Basin 74 as IDWR has placed a hold on new water right applications in that Basin.

By setting aside the *April 25, 2012 Judgment* only as to its impact on water right nos. 74-361, -362, -363, -364, -365, -367, and -368, McConnells will be provided with the just result that other water right holders and their neighbors have received from the SRBA: namely, decrees for valid water rights that are beneficially used. Granting McConnells the ability to claim these water rights is in keeping with State Policy to provide claimants a full and fair opportunity to receive notice, be heard, use and appropriate water for beneficial purposes, and provides a fair and equitable result to all of the water users on Lee Creek by maintaining the status quo.

IV. EQUITABLE RELIEF

If neither I.R.C.P. 60(b)(4) or (6) provide relief, McConnells pray upon this Court, sitting in equity, to relieve them from the *April 25, 2012 Judgment* as to the disallowance of their water rights. Idaho courts are allowed to provide equitable relief if the conduct has been "inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet*,

140 Idaho 242, 251, 92 P.3d 492, 501 (2004). “[H]e who comes into equity must come with clean hands.” *Gilbert v. Nampa School Dist. No. 131*, 104 Idaho 137, 145, 657 P.2d 1, 9 (1983).

As stated above, McConnells were unaware that their water rights were in jeopardy. Had McConnells known that claims were required, or had any idea that their water rights were not secure, they would have fixed the problem. McConnells water rights will be forfeited if the *April 25, 2012 Judgment* is not set aside. “The court abhor forfeiture and where no public policy is favored thereby, equity leans against declaring a forfeiture.” *Special Master Report*, SRBA subcase no. 45-167A, p. 8 (March 20, 2007) (emphasis added) citing *Hurst v. Idaho Iowa Lateral & Res. Co.*, 42 Idaho 436, 246 P. 23 (1926) and *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938). Given that Idaho courts do not favor forfeiture of water rights and that no public interest is served by forfeiture of McConnells’ water rights, equity compels against declaring a forfeiture in these unique circumstances. In light of the facts, McConnells come with clean hands and pray upon this Court for sympathy.

V. CONCLUSION

Counsel for McConnells is acutely aware of the Court’s desire to sign the Final Unified Decree and complete the SRBA. Therefore, McConnells have gone to extraordinary length and expense to provide notice to all water users on Lee Creek, to provide notice to those on the SRBA expedited service list, have reached out and conferred with IDWR and the United States Bureau of Land Management. The late claims filed herewith mirror the decrees from the Lemhi Adjudication, with no claim of accomplished transfer or enlargement. McConnells’ goal is simply to have their previously decreed water rights that have been continuously used and accounted for validated by the SRBA.

By not receiving second round service, McConnells meet the requirements of I.R.C.P. 60(b)(4). By their unique and compelling circumstances, McConnells meet the requirements of I.R.C.P. 60(b)(6). McConnells have presented a meritorious defense and by bringing this action when they did, have pursued their cause of action within a reasonable amount of time. McConnells also come in equity, with clean hands, seeking just relief from forfeiture of their water rights. As such, McConnells respectfully request the Court set aside its *April 25, 2012 Judgment* only as to water right nos. 74-361, -362, -363, -364, -365, -367, and -368. McConnells respectfully request they be allowed to pursue their late claims, as they were decreed in the Lemhi Adjudication, and obtain valid SRBA partial decrees that reflect their historic water use from Lee Creek. Because McConnells are pursuing their water use in Basin 74 as it was decreed in the Lemhi Adjudication, and has been administered every year since the Lemhi decree was signed in 1982, no prejudice will result to any water users.

DATED this 28th day of April, 2014.

MCHUGH BROMLEY, PLLC



CHRIS M. BROMLEY

Attorneys for Bruce and Glenda McConnell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April 2014, I caused the foregoing document to be filed with the Court and true and correct copies served by the methods indicated:

1. Original to:

CLERK OF THE DISTRICT COURT SNAKE RIVER BASIN ADJUDICATION 253 THIRD AVENUE NORTH PO BOX 2707 TWIN FALLS, ID 83303-2707	☒ U.S. Mail, postage prepaid
---	--

2. Paper copies to:

IDWR DOCUMENT DEPOSITORY P.O. BOX 83720 BOISE, ID 83720-0098	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery
CHIEF NATURAL RESOURCES DIV. OFFICE OF THE ATTORNEY GENERAL STATE OF IDAHO P.O. BOX 44449 BOISE, ID 83711-0449	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery
UNITED STATES DEPT. OF JUSTICE ENVIRONMENT & NATURAL RESOURCE 550 WEST FORT STREET, MSC 033 BOISE, ID 83724-0101	☒ U.S. Mail, Postage Prepaid ☐ Hand Delivery

3. Paper copies to water users on Lee Creek:

AL RUGGLES JAMIN K. RUGGLES 1019 LEE CREEK RD. LEADORE, ID 83464	☒ U.S. Mail, Postage Prepaid
BOBBIE ANDERSON DORIS ANDERSON P.O. BOX 53 LEADORE, ID 83464	☒ U.S. Mail, Postage Prepaid
EDDIE R. PETERSON P.O. BOX 85 LEADORE, ID 83464	☒ U.S. Mail, Postage Prepaid
HARVEY E. PETERSON JANETTE S. PETERSON KENNETH J. PETERSON P.O. BOX 58 LEADORE, ID 83464	☒ U.S. Mail, Postage Prepaid

4. Transmittal letter with an attached DVD containing all documents filed in this matter to the SRBA Expedited Service List:

C. THOMAS ARKOOSH ARKOOSH LAW OFFICES PO BOX 2900 BOISE, ID 83701	☒ U.S. Mail, Postage Prepaid
ALBERT B. BARKER JOHN K SIMPSON SHELLEY M. DAVIS BARKER ROSHOLT & SIMPSON LLP PO BOX 2139 BOISE, ID 83701-2139	☒ U.S. Mail, Postage Prepaid
PAUL L. ARRINGTON TRAVIS L. THOMPSON BARKER ROSHOLT & SIMPSON LLP 195 RIVER VISTA PL. STE. 204 TWIN FALLS, ID 83301-3029	☒ U.S. Mail, Postage Prepaid
W. KENT FLETCHER FLETCHER LAW OFFICE PO BOX 248 BURLEY, ID 83318-0248	☒ U.S. Mail, Postage Prepaid
BERT L. OSBORN BERT L. OSBORN CHARTERED PO BOX 158 PAYETTE, ID 83661-0158	☒ U.S. Mail, Postage Prepaid
ADAM T. DEVOE DAVID G. SCOTT BROWNSTEIN HYATT & FARBER PC 410 17 TH ST., 22 ND FL DENVER, CO 80202-4437	☒ U.S. Mail, Postage Prepaid
RON KERL COOPER & LARSEN CHARTERED PO BOX 4229 POCATELLO, ID 83205-4229	☒ U.S. Mail, Postage Prepaid
TERRY G. HOGUE HOGUE & DUNLAP LLP PO BOX 460 HAILEY, ID 83333-0460	☒ U.S. Mail, Postage Prepaid

CHRISTOPHER H. MEYER JEFFREY C. FEREDAY MICHAEL C. CREAMER MICHAEL P. LAWRENCE GIVENS PURSLEY LLP PO BOX 2720 BOISE, ID 83701-2720	☒ U.S. Mail, Postage Prepaid
DAVID HEIDA PO BOX 969 KUNA, ID 83634-0900	☒ U.S. Mail, Postage Prepaid
DAVID F. SHIRLEY WILLIAM A. PARSONS PARSONS SMITH STONE LOVELAND & SHIRLEY LLP PO BOX 910 BURLEY, ID 83318-0910	☒ U.S. Mail, Postage Prepaid
DANIEL V. STEENSON SAWTOOTH LAW OFFICES PLLC RINGERT LAW CHARTERED LAWYERS PO BOX 7985 BOISE, ID 83707	☒ U.S. Mail, Postage Prepaid
BRANDELLE G. WHITWORTH WILLIAM F. BACON SHOSHONE-BANNOCK TRIBES TRIBAL COUNSEL OFFICE PO BOX 306 FORT HALL, ID 83206-0306	☒ U.S. Mail, Postage Prepaid
DOUGLAS B L ENDRESON REID PEYTON CHAMBERS SONOSKY CHAMBERS SACHSE ENDRESON & PERRY LLC 1425 K ST NW STE 600 WASHINGTON, DC 20005-3498	☒ U.S. Mail, Postage Prepaid
CLIFF S BENTZ YTURRI ROSE LLP 89 SW 3RD AVE ONTARIO, OR 97914-0058	☒ U.S. Mail, Postage Prepaid
ANGELO L ROSA 1155 EAST 2100 SOUTH, APT 649 SALT LAKE CITY, UT 84106-2863	☒ U.S. Mail, Postage Prepaid
B. J. DRISCOLL SMITH DRISCOLL & ASSOC., PLLC PO BOX 50731 IDAHO FALLS, ID 83405-0731	☒ U.S. Mail, Postage Prepaid
WILLIAM G. MYERS III HOLLAND & HART LLP PO BOX 2527 BOISE, ID 83701-2527	☒ U.S. Mail, Postage Prepaid

CHARLES L. HONSINGER HONSINGER LAW PLLC PO BOX 517 BOISE, ID 83701-0517	☒ U.S. Mail, Postage Prepaid
C. TIMOTHY HOPKINS JOHN D. HANSEN HOPKINS RODEN CROCKETT HANSEN & HOOPES PLLC PO BOX 51219 IDAHO FALLS, ID 83405-1219	☒ U.S. Mail, Postage Prepaid
JAMES C. TUCKER IDAHO POWER CO. PO BOX 70 BOISE, ID 83707-0070	☒ U.S. Mail, Postage Prepaid
DYLAN B. LAWRENCE SCOTT L. CAMPBELL MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD PO BOX 829 BOISE, ID 83701-0829	☒ U.S. Mail, Postage Prepaid
BRUCE M. SMITH MOORE SMITH BUXTON & TURCKE, CHTD 950 W. BANNOCK ST. STE. 520 BOISE, ID 83702-6118	☒ U.S. Mail, Postage Prepaid
ERIKA E. MALMEN PERKINS COIE LLP PO BOX 737 BOISE, ID 83701-0737	☒ U.S. Mail, Postage Prepaid
RICHARD A. CUMMINGS PO BOX 1545 BOISE, ID 83701-1545	☒ U.S. Mail, Postage Prepaid
CRAIG A. PRIDGEN CRAIG A. PRIDGEN ATTYS AT LAW 305 W. LAKE BLVD. TAHOE CITY, CA 96145	☒ U.S. Mail, Postage Prepaid
ELIZABETH P. EWENS ELLISON SCHNEIDER & HARRIS LLP 2600 CAPITOL AVE. STE 400 SACRAMENTO, CA 95816-5931	☒ U.S. Mail, Postage Prepaid
BLAIR J. GROVER BEARD ST. CLAIR GAFFNEY PA 2105 CORONADO ST. IDAHO FALLS, ID 83404-7495	☒ U.S. Mail, Postage Prepaid
JOSEPHINE P. BEEMAN BEEMAN & ASSOCIATES PC 409 W. JEFFERSON ST. BOISE, ID 83702-6049	☒ U.S. Mail, Postage Prepaid

RICHARD L. HARRIS HARRIS LAW OFFICE PO BOX 1438 CALDWELL, ID 83606-1438	☒ U.S. Mail, Postage Prepaid
MICHAEL B. WHITE HECLA MINING COMPANY 6500 N. MINERAL DR. STE. 200 COEUR D'ALENE, ID 83815-9408	☒ U.S. Mail, Postage Prepaid
CRAIG D. HOBDEY HOBDEY LAW OFFICE PLLC PO BOX 176 GOODING, ID 83330-0176	☒ U.S. Mail, Postage Prepaid
GRAY A. YOUNG TERRY T. UHLING J.R. SIMPLOT COMPANY PO BOX 27 BOISE, ID 83707-0027	☒ U.S. Mail, Postage Prepaid
JOHN M. MARSHALL JOHN M. MARSHALL LAW PLLC 575 W. BANNOCK ST. STE. B BOISE, ID 83702-5917	☒ U.S. Mail, Postage Prepaid
LARY C. WALKER LARY C. WALKER LAW OFFICE PO BOX 838 WEISER, ID 83672-0828	☒ U.S. Mail, Postage Prepaid
EDWARD A. LAWSON LAWSON LASKI CLARK & POGUE PLLC PO BOX 3319 KETCHUM, ID 83340-3310	☒ U.S. Mail, Postage Prepaid
ROGER D. LING LING LAW OFFICE PO BOX 623 RUPERT, ID 83350-0623	☒ U.S. Mail, Postage Prepaid
J. JUSTIN MAY MAY BROWNING & MAY PLLC 1419 W. WASHINGTON BOISE, ID 83702	☒ U.S. Mail, Postage Prepaid
CHARLES F McDEVITT McDEVITT & MILLER LLP PO BOX 2564 BOISE, ID 83701-2564	☒ U.S. Mail, Postage Prepaid
PATRICK D. BROWN PATRICK D. BROWN PC 335 BLUE LAKES BLVD. N. TWIN FALLS, ID 83301-4828	☒ U.S. Mail, Postage Prepaid

JAMES A. PENDLEBURY PENDLEBURY LAW OFFICE PA 101 S. PARK AVE. STE. 5 IDAHO FALLS, ID 83402-3601	☒ U.S. Mail, Postage Prepaid
JULIE K. FISCHER MORROW & FISCHER PLLC 332 N. BROADMORE WAY STE. 102 NAMPA, ID 83687-5123	☒ U.S. Mail, Postage Prepaid
DON B. MILLER NATIVE AMERICAN RIGHTS FUND 1509 BROADWAY ST. BOULDER, CO 80302-6217	☒ U.S. Mail, Postage Prepaid
DAVID J. CUMMINGS NEZ PERCE TRIBAL EXEC COMM. PO BOX 305 LAPWAI, ID 83540	☒ U.S. Mail, Postage Prepaid
RANDALL C. BUDGE RACINE OLSON NYE BUDGE & BAILEY CHTD. PO BOX 1391 POCATELLO, ID 83204-1391	☒ U.S. Mail, Postage Prepaid
JERRY R. RIGBY RAY W. RIGBY RIGBY ANDRUS & RIGBY CHTD PO BOX 250 REXBURG, ID 83449-0250	☒ U.S. Mail, Postage Prepaid
JAMES ANNEST PO BOX 686 BURLEY, ID 83318-0686	☒ U.S. Mail, Postage Prepaid
DANA L. HOFSTETTER 608 W. FRANKLIN ST. BOISE, ID 83702-5509	☒ U.S. Mail, Postage Prepaid
CHARLES J. OLSON 8813 OLD HIGHWAY 30 MOUNTAIN HOME, ID 83647-6017	☒ U.S. Mail, Postage Prepaid
JAMES P SPECK SPECK & AANESTAD A PROFESSIONAL CORPORATION 120 EAST AVENUE PO BOX 987 KETCHUM, ID 83340-0987	☒ U.S. Mail, Postage Prepaid
JAMES W GIVENS 1026 F ST PO BOX 875 LEWISTON, ID 83501-0875	☒ U.S. Mail, Postage Prepaid

KENT W. FOSTER ROBERT L. HARRIS HOLDEN KIDWELL HAHN & CRAPO PLLC PO BOX 50130 IDAHO FALLS, ID 83405	☒ U.S. Mail, Postage Prepaid
NORMAN M. SEMANKO IDAHO WATER USERS ASSOCIATION 1010 W. JEFFERSON ST. STE 101 BOISE, ID 83702-5453	☒ U.S. Mail, Postage Prepaid


 CHRIS M. BROMLEY
 MCHUGH BROMLEY, PLLC