

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

JUN 27 2014

DEPARTMENT OF
WATER RESOURCES

Attorneys for Shanna Foster and Jennifer Ayers

**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. 74-1615 and 74-2351

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

MOTION TO SET ASIDE

COME NOW Shanna Foster and Jennifer Ayers (“Shanna and Jennifer”), 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. 74-1615 and 74-2315. The *Motion* is supported by the *Memorandum*, below, the *Affidavit of Chris M. Bromley*, *Affidavit of Shanna Foster*, *Affidavit of Thomas C. Udy*, *Affidavit of Carter Fritschle*, and *Affidavit of Roxanne Brown*, filed contemporaneously herewith.¹

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

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE

I. INTRODUCTION

Only specifically to its effect on water right nos. 74-1615 and 74-2351, Shanna and Jennifer 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"). Shanna and Jennifer make this claim based on the fact that the *April 25, 2012 Judgment* should be set aside in accordance with Idaho Rule of Civil Procedure 60(b) because their predecessor-in-interest did not receive second round service and contend other "unique and compelling" reasons justify relief from the operation of the judgment. Lastly, Shanna and Jennifer pray that this Court, sitting in equity, relieve them from the *April 25, 2012 Judgment* by setting aside its order of disallowance, allowing Shanna and Jennifer to pursue their late claims as they were decreed in the Lemhi Adjudication.

II. FACTUAL BACKGROUND

Shanna and Jennifer hold the following water rights, 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	1615	Decreed	4/1/1919	2.45	EVERSON CREEK	LEE CREEK	IRRIGATION
74	2351	Decreed	1/9/1963	0.55	EVERSON CREEK	LEE CREEK	IRRIGATION

Notices of Claims, Motions for Late Claim, and the supporting Memorandum. Additionally, all filings in these subcases are being made on an expedited basis, and with actual notice to users on Everson Creek, Lee Creek, and Stroud Creek. Lee Creek and its tributaries (Everson Creek and Stroud Creek) were decreed a separate source in the Lemhi Adjudication and in the SRBA.

Other than the water rights listed in the table, above, Shanna and Jennifer hold no other water rights with which to irrigate their property. *Affidavit of Thomas C. Udy* at 2. As shown in the table, above, Everson Creek is tributary to Lee Creek. “Lee Creek and tributaries” were decreed a separate source in the Lemhi Adjudication and 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). Shanna and Jennifer have owned the property to which the water rights are appurtenant since 2010. *Affidavit of Shanna Foster* at 2. The property to which the water rights are appurtenant has been in family ownership since the time it was first developed in 1916. *Id.* at 1. Like their relatives before them, Shanna and Jennifer have continuously used their water rights for irrigation and raising livestock. *Id.* at 2.

Shanna and Jennifer were only recently alerted by their neighbors that their water use might not be associated with any valid water rights. *Id.* at 3. Upon looking into their water rights, and learning that the rights were not valid, Shanna and Jennifer acted swiftly to investigate their water rights by hiring an attorney, working with IDWR, preparing their late claims, and providing actual notice to all water users on Lee Creek and its tributaries (Everson Creek and Stroud Creek) of this action.

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 I.R.C.P. 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). 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, Shanna and Jennifer believe I.R.C.P. 60(b)(4) and (6) provide them avenues to obtain relief from the *April 25, 2012 Judgment*.

A. The *April 25, 2012 Judgment* is Void Only as to its Disallowance of Water Right Nos. 74-1615 and 74-2351, I.R.C.P. 60(b)(4)²

As will be discussed below, it is undisputed that Shanna and Jennifer's predecessors did not receive second round service; therefore, the Court's *April 25, 2012 Judgment* disallowing water right nos. 74-1615 and 74-2351 is void only as to its impact on those water rights and should be set aside to allow Shanna and Jennifer 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

² Shanna and Jennifer plead I.R.C.P. 60(b)(4) in the alternative that the Court does not find that relief can be granted under I.R.C.P. 60(b)(6).

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).

1. First Round Service was sent to Albert Peterson in February 1990, seven years after his death

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). First round service occurred in Basin 74/Lemhi County between February to May 1990. *Affidavit of Carter Fritschle* at 2. Lemhi County was the last county in the SRBA to receive first round service. *Id.* Timely taking of claims in Basin 74 ended in May 1990. *Id.*

Shanna and Jennifer acknowledge that first round service was sent to Albert Peterson in February 1990, *Affidavit of Chris M. Bromley* at 2 (Exhibit D); however, Albert had been deceased since 1983, *Affidavit of Shanna Foster* at 2. This means Albert was deceased well before the 1987 commencement of the SRBA. Because Albert was deceased before commencement of the Adjudication, and since there is no address listed in the first round service affidavit of mailing, *Affidavit of Chris M. Bromley* at 2, it is not known whether first round service was perfected upon Albert.

2. Second Round Service was not served

While it is not known if first round service was perfected upon Albert Peterson, it definitively known that second round service was not made. *Affidavit of Carter Fritschle* at 3. According to Idaho Code § 42-1408:

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.

. . . .

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(4) – (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. *See Order Granting Late Notice of Claim; Order for Expedited Late Claim Director’s Report*, SRBA subcase nos. 65-2324 *et al.* (May 21, 2014); *Order Setting Aside Disallowal of Unclaimed Water Rights; Order Granting Late Notice of Claim; Order for Expedited Late Claim Director’s Report and Setting Forth Procedures and Deadlines for Expedited Process*, SRBA subcase case nos. 74-361 *et al.* (May 21, 2014). 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; (2) GIS evaluation of the SRBA claim 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 *Second Amended Second Round Service Order*, second round service should have been made as to water right nos. 74-1615 and 74-2351. As to the first criteria—comparison of IDWR’s water right database with claims already filed in the SRBA—it is known that Albert Peterson was deceased before 1987, *Affidavit of Shanna Foster 2*, therefore Albert was unaware of commencement and could not have filed any claims in the SRBA. Because both water right nos. 74-1615 and 74-2351 were decreed as valid water rights in the Lemhi Adjudication, they were on record with IDWR and would have appeared as valid water rights in IDWR’s water right database.

As to the second criteria—GIS evaluation of the SRBA claim layer with 1987 photography to reveal those irrigated acres where a claim has not been filed—aerial imagery,³ combined with the claim layer, would have shown that the acres to which water right nos. 74-1615 and 74-2351 are appurtenant appeared irrigated and shapes could have been prepared. *Affidavit of Roxanne Brown* at 2. Review of watermaster records from Water District 74-Z

³ 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.

would have shown that water, when it was available for diversion, was delivered to the property. *Affidavit of Thomas C. Udy* at 2. Therefore, the property, and its appurtenant water rights, should have been identified as needing second round service; yet none was sent.

As to the third criteria—discovery of unclaimed water rights during investigation of claims—IDWR determined, despite the above-information, “there were no unclaimed water rights in Basin 74 that required Second Round Service.” *Basin 74 Second Round Service Affidavit* at 2. Under any criteria, second round service should have been made as to water right nos. 74-1615 and 74-2315.

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 Shanna and Jennifer’s 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, there is “no conflicting evidence” that Shanna and Jennifer’s predecessors did not receive second round service. *Order Setting Aside Disallowal of Unclaimed Water Rights; Order Granting Motions to File Late Notice of Claim; Order for Expedited Late Claim Director’s Report and Setting Forth Procedures and Deadlines for Expedited Process*, SRBA

subcase nos. 65-2324 *et al.*, p. 3 (May 21, 2014); *see also Affidavit of Carter Fritschle* at 3 (“Based on my review of the *Affidavit of Second Round Service* and the records of IDWR, second round service was not given as to the above-captioned water rights.”). The error in second round service can easily be repaired by allowing Shanna and Jennifer to set aside only that portion of the *April 25, 2012 Judgment* that disallowed their unclaimed water rights; thereby allowing Shanna and Jennifer the opportunity to pursue their late claims as their rights were decreed in the Lemhi Adjudication.

For Shanna and Jennifer 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, Jennifer and Shanna meet the timeliness requirement.

Jennifer and Shanna were only recently notified that their water rights could be invalid and should be investigated. *Affidavit of Shanna Foster* at 3. Within a few days of understanding that their water rights were invalid, Shanna and Jennifer contacted counsel to represent them in this matter. *Id.* Shanna and Jennifer have expended considerable time and money to prepare this matter to be heard in a short period of time. Rather than rely on standard docket sheet procedure, Shanna and Jennifer 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 and tributaries (Everson Creek and Stroud Creek). *Affidavit of Chris M. Bromley* at 2-4. By taking action within days after learning of the invalidity of their water rights, Shanna and Jennifer 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), Shanna and Jennifer 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 266, 300 P.2d 811. Because the meritorious defense standard is applicable to Shanna and Jennifer's assertion that I.R.C.P. 60(b)(4) and (6) apply, Shanna and Jennifer 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 Shanna and Jennifer's 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 Shanna and Jennifer that are both unique and compelling.

The property to which water right nos. 74-1615 and 74-2351 are appurtenant has been in family ownership since it was homesteaded in 1916 by Lars Peterson. *Affidavit of Shanna Foster* at 1. Water right no. 74-1615 was claimed by Albert Peterson in the Lemhi Adjudication, based on beneficial use. *Affidavit of Chris M. Bromley* at 1-2 (Exhibit A). Water right no. 74-2351

was claimed by Albert Peterson in the Lemhi Adjudication, based on a prior license issued by IDWR. *Id.* at 2 (Exhibit A). Both claims were recommended by IDWR in the Lemhi Adjudication. *Id.* at 2 (Exhibit B). Both recommendations were accepted by the court in the Lemhi Adjudication and decreed. *Id.* at 2 (Exhibit C). Every year since the December 30, 1982 completion of the Lemhi Adjudication, *see Order Adopting Special Master's Recommendation in Part and Rejecting in Part*, SRBA subcase no. 65-22481, p. 3 (February 27, 2013), and to the extent that water has been available for diversion, water has been delivered to the property for beneficial use. *Affidavit of Shanna Foster* at 2; *Affidavit of Thomas C. Udy* at 2. From 1983 – 2010, the property to which the water rights are appurtenant was owned by Grady Smith. *Affidavit of Shanna Foster* at 2 (Exhibit B). From 2010 – present, the property has been owned by Shanna and Jennifer. During this entire time, assessments have been made by the watermaster for Water District 74-Z and paid each year since 1983. *Affidavit of Thomas C. Udy* at 2.

In the summer of 2000, IDWR inventoried all valid diversions in Water District 74-Z. *Affidavit of Chris M. Bromley* at 2 (Exhibit E). At the time of the inventory, Shanna and Jennifer's father, Grady Smith, was the owner of water right nos. 74-1615 and 74-2351. *Affidavit of Shanna Foster* at 2. In the 2000 inventory, Grady Smith's diversion was recognized both on a map attached to the inventory, and in text: "Tomchak-Smith diversion had two good broad crested weirs where the ditch splits." *Affidavit of Chris M. Bromley* at 2 (Exhibit E, page 4). While the Tomchak water rights from Everson Creek were claimed in the SRBA at the time of the 2000 inventory,⁴ Grady Smith's water rights from Everson Creek were unclaimed, yet recognized as valid, with no issue taken by IDWR.

⁴ Water right nos. 74-2295A, 74-2261A, and 74-2339A were claimed in the SRBA by David R. Tomchak and Mari Tomchak. Those claims were recommended by IDWR and were partially decreed by the Court on July 9, 2007.

In 2006, the Court entered its *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. 3 (May 2, 2006), which authorized distribution of water rights in accordance with the Basin 74 “*Director's Reports* and the *Partial Decrees* that supersede the *Director's Reports* in IDWR Basin 74.” Since 2006, priority delivery and administration of Shanna and Jennifer’s water rights has occurred. *Affidavit of Thomas C. Udy* at 2. With interim administration in Basin 74, and because their water rights had not been claimed, let alone recommended, Shanna and Jennifer should not have received delivery of their water rights. If Shanna and Jennifer 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 in accordance with standard SRBA procedure, without having to set aside the *April 25, 2012 Judgment*.

During the 2012 and 2013 irrigation seasons, which occurred after entry of the Court’s *April 25, 2012 Judgment* disallowing Shanna and Jennifer’s unclaimed water rights, Shanna and Jennifer took delivery of water. *Affidavit of Thomas C. Udy* at 2. Had Shanna and Jennifer 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, and by not receiving second round service, Shanna and Jennifer 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. 74-1615 and 74-2351.

See Order Setting Aside Disallowal of Unclaimed Water Rights; Order Granting Motions to File Late Notice of Claim; Order for Expedited Late Claim Director's Report and Setting Forth Procedures and Deadlines for Expedited Process, SRBA subcase nos. 65-2324 *et al.* (May 21, 2014); *Order Setting Aside Disallowal of Unclaimed Water Rights; Order Granting Motions to File Late Notice of Claim; Order for Expedited Late Claim Director's Report and Setting Forth Procedures and Deadlines for Expedited Process*, SRBA subcase nos. 74-361 *et al.* (May 21, 2014).

C. Meritorious Defense

Shanna and Jennifer meet the meritorious defense standard associated with I.R.C.P. 60(b) because their predecessor-in-interest did not receive second round service, their water use has historically been administered, and granting this *Motion to Set Aside* will not result in prejudice to water users on Everson Creek, which is a tributary to Lee Creek, a separate source. As stated above, Shanna and Jennifer hold two water rights from Everson Creek with priority dates of April 1, 1919 and January 9, 1963. Both rights were claimed and decreed in the Lemhi Adjudication. *Affidavit of Chris M. Bromley* at 1-2. "Lee Creek and tributaries" were decreed separate sources in the Lemhi Adjudication and again 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). Everson Creek is a tributary to Lee Creek. Since at least the December 30, 1982 entry of the Lemhi decree, Shanna and Jennifer and their predecessors-in-interest, when water has been available, have diverted the water rights. *Affidavit of Thomas C. Udy* at 2. Even though Shanna and Jennifer's unclaimed water rights were disallowed by the *April 25, 2012 Judgment*, they

were still delivered water during the 2012 and 2013 irrigation seasons. *Affidavit of Thomas C. Udy* at 2.

Other than adding stockwater as a purpose of use to 74-1615, the late claims filed by Shanna and Jennifer contemporaneously in these subcases claim water as the rights were decreed in the Lemhi Adjudication.⁵ Because Shanna and Jennifer are claiming their water use as it was decreed in the Lemhi Adjudication, there will be no prejudice to other water users who are accustomed to Shanna and Jennifer receiving water, and have been administered as such without objection or protest.⁶ Little investigation will be required of IDWR because Shanna and Jennifer 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, Shanna and Jennifer have given all water right holders on Lee Creek and tributaries (Everson Creek and Stroud Creek) actual notice of these proceedings. IDWR's water right database identifies the following active water rights and recommendations on Everson Creek, Lee Creek, and Stroud Creek to which Shanna and Jennifer have given actual notice:

⁵ Because stockwater was generally considered incidental to irrigation rights in the Lemhi Adjudication, and because stockwater is critical to Shanna and Jennifer's water use, they are claiming stockwater as a purpose of use in their late claim for water right no. 74-1615. Counsel has conferred with IDWR on structuring the claim for water right no. 74-1615, so as to reduce the place of use by 1 acre to allow for 0.02 cfs of stockwater as a purpose of use.

⁶ In this sense, Shanna and Jennifer's 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 Everson Creek, Lee Creek and Stroud Creek will be surprised because Shanna and Jennifer's water rights are derived from the Lemhi Adjudication and have been historically administered since entry of the Lemhi decree and since interim administration was ordered by this Court in 2006.

Water rights from Everson Creek:

Basin	Sequence	Basis	Priority Date	Div. Rate (cfs)	Water Use	Owner
74	10551	Decreed	6/1/1876	0.02	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH
74	2195A	Decreed	12/11/1915	1.40	IRRIGATION	TOMCHAK, DAVID R; TOMCHAK MARI
74	14448	Decreed	6/28/1934	0.02	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH
74	2261A	Decreed	12/21/1941	1.00	IRRIGATION, IRRIGATION FROM STORAGE, IRRIGATION STORAGE	TOMCHAK, DAVID R; TOMCHAK MARI
74	2339A	Decreed	12/21/1941	1.00	IRRIGATION, IRRIGATION FROM STORAGE, IRRIGATION STORAGE	TOMCHAK, DAVID R; TOMCHAK MARI

Affidavit of Chris M. Bromley at 2.

Water rights and recommendations from Lee Creek:

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	361	Rec'd	5/12/1883	1.2	IRRIGATION, STOCKWATER	MCCONNELL, BRUCE; MCCONNELL, GLENDA
74	363	Rec'd	5/12/1883	1.0	IRRIGATION	MCCONNELL, BRUCE; MCCONNELL, GLENDA
74	365	Rec'd	5/12/1883	1.2	IRRIGATION	MCCONNELL, BRUCE; MCCONNELL, GLENDA
74	367	Rec'd	5/12/1883	0.6	IRRIGATION	MCCONNELL, BRUCE; MCCONNELL, GLENDA
74	364	Rec'd	6/1/1900	1.3	IRRIGATION	MCCONNELL, BRUCE; MCCONNELL, GLENDA
74	362	Rec'd	5/1/1906	4.1	IRRIGATION	MCCONNELL, BRUCE; MCCONNELL, GLENDA
74	368	Rec'd	11/5/1909	5.8	IRRIGATION	MCCONNELL, BRUCE; MCCONNELL, GLENDA
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

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.

Water rights from Stroud Creek:

Basin	Sequence	Basis	Priority Date	Div. Rate (cfs)	Water Use	Owner
74	14449	Decreed	6/28/1934	0.02	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH
74	1057	Decreed	4/1/1957	0.02	DOMESTIC	TOMCHAK, DAVID R; TOMCHAK MARI
74	1855	Decreed	6/28/1912	2	IRRIGATION	WHITTAKER, CALVIN J; WHITTAKER CAROL L
74	10552	Decreed	6/1/1876	0.02	STOCKWATER	UNITED STATES OF AMERICA ACTING THROUGH
74	15788	Decreed	12/31/1982	1.97	IRRIGATION	WHITTAKER, F JAMES; WHITTAKER, PAULA J

Affidavit of Chris M. Bromley at 4.

While there will be no prejudice to other water users, the prejudice to Shanna and Jennifer will be profound and devastating to their ranch. Shanna and Jennifer will be denied water that their family has historically irrigated with since 1916, and will be left with no ability to irrigate their land, greatly reducing the land's value and making them unable to operate or lease their property.

By setting aside the *April 25, 2012 Judgment* only as to its effect on water right nos. 74-1615 and 74-2351, Shanna and Jennifer 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 Shanna and Jennifer 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 and tributaries (Everson Creek and Stroud Creek) by maintaining the status quo.

IV. EQUITABLE RELIEF

If neither I.R.C.P. 60(b)(4) or (6) provide relief, Shanna and Jennifer 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, Shanna and Jennifer were unaware that their water rights were in jeopardy. Had Shanna and Jennifer known that claims were required, or had any idea that their water rights were not secure, they would have fixed the problem. Shanna and Jennifer’s water rights will be forfeited if the *April 25, 2012 Judgment* is not set aside. “The courts 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 Shanna and Jennifer’s water rights, equity compels against declaring a forfeiture in these unique circumstances. In light of the facts, Shanna and Jennifer come with clean hands and pray upon this Court for sympathy.

V. CONCLUSION

Counsel for Shanna and Jennifer is acutely aware of the Court's desire to sign the Final Unified Decree and complete the SRBA. Therefore, Shanna and Jennifer have gone to extraordinary length and expense to provide notice to all water users on Everson Creek, Lee Creek, and Stroud 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. Shanna and Jennifer's 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 and their unique and compelling circumstances, Shanna and Jennifer meet the requirements of I.R.C.P. 60(b). Shanna and Jennifer 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. Shanna and Jennifer also come in equity, with clean hands, seeking just relief from forfeiture of their water rights. As such, Shanna and Jennifer respectfully request the Court set aside its *April 25, 2012 Judgment* only as to water right nos. 74-1615 and 74-2351. Shanna and Jennifer 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 Everson Creek. Because Shanna and Jennifer 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 26th day of June, 2014.



CHRIS M. BROMLEY

Attorneys for Shanna Foster and Jennifer Ayers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 2014, I caused the following documents to be filed with the Court: *Notice of Service*, *Notice of Hearing*; *Motion to Set Aside and Memorandum in Support*; *Affidavit of Chris M. Bromley*; *Affidavit of Shanna Foster*; *Affidavit of Thomas C. Udy*; *Affidavit of Carter Fritschle*; *Affidavit of Roxanne Brown*; *Motions for Late Claims*; *Memorandum in Support of Motions for Late Claim*; *Notices of Claim*. As attested to in the *Notice of Service*, the foregoing documents were filed with the Court and true and correct copies served on the SRBA's Expedited Mailing List and water users on Everson Creek, Lee Creek, and Stroud Creek.



CHRIS M. BROMLEY

Attorneys for Shanna Foster and Jennifer Ayers