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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	)	Subcase: 21-13193
	)	
	)	BRIEF AND MEMORANDUM IN
Case 39576	)	SUPPORT OF MOTION 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 (APRIL25,2012)
	)	
	)	

I. INTRODUCTION

North Fork Reservoir Company (hereinafter "NFRC") files this Brief and Memorandum in Support of its Motion 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 (April25,2012) ("April 25, 2012 Judgment") only specifically to its effect on NFRC's storage water rights being claimed. NFRC also files this brief and memorandum in support of the collective expedited motions to file late claims for the same claimed water rights. NFRC makes this motion based on the fact that the April 25, 2012

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Judgment should be set aside in accordance with Idaho Rule of Civil Procedure 60(b) because it contends "unique and compelling" reasons justify relief from the operation of the judgment. NFRC prays that this Court, sitting in equity, relieve it from the April 25, 2012 Judgment by setting aside its order of disallowance, allowing NFRC to pursue its late claim.

II. FACTUAL BACKGROUND

NFRC holds the following storage water rights, which have been either recommended or partially decreed in the Snake River Basin Adjudication:

21-2161, 21-2154, 21-110, 21-111, 21-112, and 21-12946

As to the background for the need of this late claim, please see NFRC's Motion to File Late Claim and the affidavit of Jerry R. Rigby filed simultaneously herewith. The NFRC claimed water rights have always been diverted whenever space in the reservoir is available and there was adequate flows over and above other priority water right diversions. There was no purposeful delay in filing the late claim, and due to the fact that no other parties will be injured by this late claim, and due to the fact that all parties even potentially impacted will receive notice through mailed copies of the claimed water rights in the expedited mailing lists, the Motion to File a Late Claim should be granted.

The claim NFRC seeks to file is a direct result of the "refill" controversy described above and formally touched off late in the SRBA process and still pending. Notwithstanding the above, the parties have been diligently negotiating a resolution to the refill issue with numerous meetings and negotiations. However, recent analysis undertaken in the context of the ongoing

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settlement negotiations demonstrated to NFRC that Henry's Lake Reservoir is similarly situated to the several other reservoirs for which parties have previously filed late claims and should receive the same benefit from a supplemental storage water right as all other similarly situated reservoirs. Furthermore, and most recently, the decision of the Supreme Court has just this week issued its decision in *In re SRBA*, Case No. 39576, Subcase 00-91017, Docket No. 20974/40975, August 4, 2014. Because it does not completely answer the questions raised, it is evident that either a settlement among the parties take place or a pursuance of this beneficial use claim occur. Thus, NFRC is not seeking to file late claims due to its culpably in failing to file earlier, although it believes it meets the criteria for such relief. Rather, the late Notice of Claim is a product of recent judicial proceedings and related negotiations.

Therefore, to insure that a "placeholder" is filed "prior" to the Final SRBA Decree, it is deemed important and perhaps necessary to file this late claim in order to protect NFRC's rights of a beneficial use claim for refill. The reasons for failing to file this claim in the first place are similar to all other late claims which have been filed by other "beneficial use refill claim holders" in the adjudication for which the above entitled Court has ruled sufficient grounds to allow the late claims to be filed and pursued in the SRBA.

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.0.1 § 14d ("Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a)

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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*,

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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; 4) and 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, NFRC believes I.R.C.P. 60(b)(4) and (6) provide it avenues to obtain relief from the April 25, 2012 Judgment.

A. Reasonable Time and Meritorious Defense.

For NFRC to obtain relief under I.R.C.P. 60(b)(4) it "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, NFRC meets the timeliness requirement. NFRC, as all

other storage holder clients represented by the Rigby, Andrus & Rigby Law, PLLC firm, was represented through all of the proceedings dealing with the “refill” or “2nd fill” issues, including Basin-Wide Issue 17 and its subsequent appeal to the Idaho Supreme Court. As described in the Motion to File Late Claim, the Rigby firm represents many clients who own storage rights. Therefore, it has been the practice throughout the SRBA, to only name certain “representative clients” in the actual individual cases, although it has always been represented that they “represent” all of the similarly situated clients of the Rigby law firm. NFRC is clearly one which was and is represented.

As argued before the above entitled Court as well as the Idaho Supreme Court, the position of virtually all parties concerned, agreed that all presumed a refill right exists as a result of the original storage right itself. The only major disagreement was as to its priority, if any. See details contained in NFRC’s Motion to File Late Claim and Affidavit of Jerry R. Rigby.

Since the oral arguments before the Supreme Court as described in NFRC’s Motion to File Late Claim, all storage right holders have been in intense negotiations to resolve the refill claims. Due to this week’s decision from the Supreme Court as to refill, no final settlement from the negotiations, coupled with the above entitled Court’s decision to sign a Final Decree in the SRBA that it is now necessary to file this late claim in order to “preserve” NFRC’s rights as to refill. It is also important to note that Basin 21 was already closed before the SRBA Court entered its decision on refill in its March 20, 2013 *Memorandum Decision*.

NFRC, along with the other storage right holders has expended considerable time and

money to pursue its claims in the refill litigation and negotiations. Furthermore, in preparing for the filing of this late claim, rather than rely on standard docket sheet procedure, it has elected to have this matter heard on an expedited basis, by providing service to the expedited service list. See Motion to File Late Claim and Affidavit of Jerry R. Rigby. By all accounts, NFRC believes that it has brought this 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), NFRC must also allege facts, which if established, would constitute a meritorious defense. See *McFarland*, 123 Idaho 931, 854 P.2d 274; *HearstCorp.*, 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 NFRC's assertion that I.R.C.P. 60(b)(4) and (6) apply, NFRC 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 NFRC's Request
for Relief, I.R.C.P. 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 Rule60(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 Rule60(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 NFRC that are both unique and compelling. The storage rights claimed herein have always been diverted when space is available and when the flows exceed priority water right diversions. See Motion To File Late Claim and Affidavit of Jerry R. Rigby. Had the most recent Supreme Court clearly decided that the refill right WAS included in the original storage right right, NFRC would not have been required to file this claim. As described above, due to this week's decision of the Supreme Court and the pending signing of the Final Decree in the SRBA, NFRC believes that it is now incumbent upon it to file a beneficial use claim for refill to preserve its rights.

Based on the above, NFRC's 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 the claimed water rights. 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).

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C. Meritorious Defense

As described above, NFRC meets the meritorious defense standard associated with I.R.C.P. 60(b). Furthermore, the storage water use has historically been administered, and granting this Motion to Set Aside will not result in prejudice to any water users of the Snake River. See Motion to File Late Claim and Affidavit of Jerry R. Rigby. As further described above, in the pending litigation which was addressed in this week's Supreme Court decision, it has been the position of NFRC and other storage right holders that their presently existing partial decrees allow for the right of refill.

While there will be no prejudice to other water users, the prejudice to NFRC will be profound and devastating to its storage capabilities in times of high flows. NFRC will be denied storage water that will not only impact its shareholder's water rights but also the Water District 01 storage capabilities due to the practice of keeping water high in the system - which means that other down stream storage rights are often held higher in the system in order to maximize the storage capabilities of the entire 01 storage facilities for the benefit of all storage users.

By setting aside the April 25, 2012 Judgment only as to its effect on NFRC's late claim, NFRC will be provided with the just result that other storage water right holders should also receive from the SRBA. Granting NFRC the ability to claim this water right 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 storage water users by maintaining the status quo.

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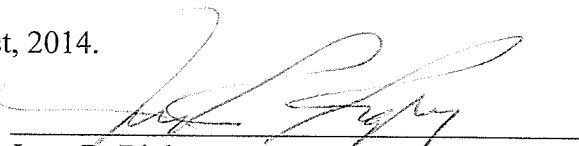
IV. EQUITABLE RELIEF

If neither I.R.C.P. 60(b)(4) or (6) provide relief, NFRC prays upon this Court, sitting in equity, to relieve it from the April 25, 2012 Judgment as to the disallowance of the claimed 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 in to 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, the closing of Basin 21 occurred prior to the initial decision of the SRBA Court as to refill. Furthermore, until the decision of the Supreme Court was rendered this week, NFRC continued to be uncertain if this claim was necessary. However, in order to avoid the effects of the signing of the Final Decree might have on its ability to later file a claim, NFRC's should be granted the right to file this late claim in order to preserve its rights. "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 NFRC's water rights, equity compels against declaring a forfeiture in these unique circumstances. In light of the facts, NFRC comes with clean hands and prays upon this Court for sympathy.

V. CONCLUSION

Counsel for NFRC is acutely aware of the Court's desire to sign the Final Unified Decree and complete the SRBA. Therefore, NFRC has gone to extraordinary length and expense to provide notice to those on the SRBA expedited service list. NFRC's goal is simply to preserve its rights to storage rights continuously used and accounted for validated by the SRBA. By these unique and compelling circumstances, NFRC meets the requirements of I.R.C.P. 60(b). NFRC has presented a meritorious defense and by being involved with the refill litigation and negotiations and bringing this action prior to the signing of the Final Decree, has pursued its cause of action within a reasonable amount of time. NFRC also comes in equity, with clean hands, seeking just relief from forfeiture of its water rights. As such, NFRC respectfully requests the Court set aside its April 25, 2012 Judgment to pursue the late claim and obtain a valid SRBA partial decree that reflect its historic beneficial use of storage as contained in NFRC's present late claim. Because NFRC is pursuing the water use in Basin 21 as it has been administered every year it is available, no prejudice will result to any water users.

Respectfully submitted this 6th day of August, 2014.


Jerry R. Rigby