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DEPARTMENT OF
WATER RESOURCES

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

In re: SRBA Case No. 39576 Claim Nos. 45-2275, 45-4103 & 45-07478	MEMORANDUM IN SUPPORT OF RULE 60(B) MOTION
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COMES NOW, Darrell M. Funk, by and thorough his counsel of record, Theodore R. Larsen of the firm Williams, Meservy & Lothspeich, LLP, and hereby submits this Memorandum in Support of Rule 60(b) Motion as follows:

INTRODUCTION

This motion seeks relief from the Partial Decrees for Water Right No. 45-2275 ("2275") and Water Right No. 45-4103 ("4103"), each respectively partially decreed on May 4, 2005 and May 5, 2005. Relief is sought because each of the partial decrees includes a place of use limitation including Water Right License No. 45-07478 (the "License"). Prior to entry of the Partial Decrees, the License was used as though no place of use limitation existed. Since entrance of the Decrees in 2005, the License has been used as though no place of use limitation existed. The Department's recent efforts to enforce the place of use limitation causes severe hardship to the applicant and for this reason relief is sought from that portion of the partial decrees.

BACKGROUND

There is a lengthy and significant background in support of this Motion. In 1981, the applicant and his brother, David, operating as Double Eagle Inc., (collectively the "Funks") successfully bid to purchase 1,120 acres of agricultural property from the State Land Board in

Section 16, Township 11 South, Range 20 East. *Aff'd of Darrell Funk*, ¶8 (December 20, 2016)(this property will be referred to as the “State Land.”) The Funks aggressively pursued the bid based on representations by members of the Land Board that they would be able to drill to obtain water to irrigate the State Land and turn it into productive agricultural land. *Id.* at ¶¶9-11. Those representations turned out to be false and Funks were never able to drill on the State Land for irrigation water. *Id.* The lack of water for the State Land rendered the purchase of the land no longer feasible. A settlement was worked out that ended with the Funks leasing the land for the next several years into the present time. *Id.*

In order to irrigate the land, the Funks were able to drill a well on property about five miles away and pump said water to the State Land. The permit to drill such water became the License. The purpose of the License was always to irrigate the State Land. *Id.* The License was applied for in 1981 and finally obtained in 1995. *Id.* at 12. The License has been used to irrigate 480 acres of the State Land since 1981 to the present time. *Id.*

In early 2016, the Funks, through Brockway Engineering, PLLC of Twin Falls, Idaho began a water transfer proceeding to bring consistency to their water rights and the way the rights are actually used in the farming operations. *Id.* at 14-17. Based on the recommendation of Dr. Erick Powell with Brockway Engineering, the Funks began the process of transferring all rights East of the 4900 East Road in Twin Falls County to a single place of use. *Id.* at 16. The reasoning behind this transfer was that all of the rights east of the 4900 East road were part of the same system. Powell’s recommendation was that such a transfer would bring greater consistency to the rights and the way they were actually being used. *Id.*

The License is the only right, east of the 4900 East road, that was left out of the proposed transfer. *Id.* at 17. The License was not included in the proposed transfer for two reasons. First, it was originally licensed as supplemental surface water, not groundwater, on the State Land. Second, unlike all the other rights east of the 4900 East Road, it was not part of a larger system. On the contrary, that license had, since 1981, been used to irrigate the State Land and had not been used on other lands over the years. *Id.*

Upon reviewing the application to transfer the water rights east of the 4900 East Road, the Idaho Department of Water Resources (the “Department”) took the position that the License must be included in the transfer. The Department based its position on the place of use limitation in the Partial Decrees for 2275 and 4103, from which the Funks seek relief by this

action. The Department also has taken the position that it will seek to enforce the place of use limitation, causing a significant decrease in the value of the License. *Id.* at 18-19.

There is considerable evidence in the record that the joint place of use limitation in the partial decrees for 2275 and 4103 is a mistake. First, in the historical file there is a memorandum from Shelley Keen dated January 12, 1995. *Id.* at 20. This memorandum was generated to memorialize a meeting between Shelly W. Keen and the Funks. As the Department was finalizing the issuance of the License, the Department was initially wanting to describe the license as a “supplemental groundwater” right. The Funks, however, rejected that description. The compromise reached between the Funks and Shelly Keen was that the License would be described as appurtenant to 480 acres within the 1,454 acre place of use. This was acceptable because at that point it had been used to irrigate the State Land for approximately 14 years and such a description allowed that use to continue. *Id.* This is evidence the License was always intended to be a stand alone right, not limited by the use of 2275 and 4103. Moreover, the Funks would not have accepted any limitation on the License that tied it to 2275 and 4103 as such would render the lease of the State Land nearly valueless. *Id.*

Later, in 2002, as the Snake River Basin Adjudication worked through the rights belonging to the Funks, Ms. Vikie Hancock, of the Department, drafted a letter to the Funks discussing many different rights and their status in the adjudication process. *Id.* at 22. The License is addressed in that letter as follows:

License 45-7478 is also appurtenant to these acres but use under that right began after commencement of the Adjudication and will not be included in or superseded by SRBA decree. I believe that you also have TFCC shares that are considering a transfer to simplify water delivery on this farm.

Id. Ms. Hancock made no other mention of the License either as she discussed it individually or in the context of her discussion of 2275 or 4103, which were also discussed in the letter. *Id.*

On about February 19, 2003, a meeting between Ms. Hancock and the Funks is also documented in the file. *Id.* at 23. Nothing in the memorandum placed in the file indicates that the Funks and Ms. Hancock discussed any place of use limitations common to the License, 4103 and 2275. *Id.*

Thus, at no point prior to or during the Adjudication did the Funks have any reason to believe that a joint place of use limitation could be placed on 2275 or 4103 that would affect the acreage upon which the License could be used. When the draft partial decrees were issued, the place of use limitations were overlooked until the proposed transfer in early 2016. Thus, even though the partial decrees were entered in 2005, they have never been enforced.

Funks now bring this Motion to obtain relief from the place of use limitations so the License can continue to be used as it has been used continuously since 1981 to irrigate 480 acres of the State Land.

ARGUMENT

Relief under Idaho Rule of Civil Procedure 60(b) is granted under specific enumerated circumstances:

Rule 60. Relief from a judgment or order.

...

(b) Grounds for relief from a final judgment, order, or proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

(c) Timing and effect of the motion.

- (1) **Timing.** A motion under Rule 60(b) must be made within a reasonable time, and for reasons (1), (2), and (3) no more than 6 months after the entry of the judgment or order or the date of the proceeding.

...

I.R.C.P 60(b) – (c).

The present motion should be granted under either (5), because applying the Partial Decrees prospectively is no longer equitable or under (6) “for any other reasons that justifies

relief.” Due to the length of time since entry of the Partial Decrees involved in this case, (1) – (3) are inapplicable to the present case. There is no reason to consider the Partial Decrees void.

Relief under Rule 60(b)(6) is granted when there is a showing of “unique and compelling circumstances justifying relief.” *Berg v. Kendall*, 147 Idaho 571, 578 (2009). The fact there is a lack of factually similar cases supports the notion that the current facts before the Court constitute a unique and compelling circumstance. The Partial Decrees include an unexpected joint place of use limitation that went unnoticed by the Funks and was never enforced since entry of the Partial Decrees, more than eleven years ago. If the Department sought to enforce the limitation immediately after the Partial Decrees were entered, Funks surely would have brought this action within a six month time frame. Nevertheless, eleven years of water has proverbially passed under the bridge and the question this court must answer is whether the circumstances are compelling enough to justify relief.

In considering this Motion it is important to remember the decision is discretionary and requires finding a balance between finality and the desire to achieve justice:

Motions under Rule 60(b) involve a nice balance between the interest in finality and the desire to achieve justice, and that the district courts, therefore, are given a very large measure of discretion in passing on those motions. The appellate courts pay considerable deference to that discretion in the district court.

11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2872, p. 261 (1973); see also § 2875; *Sherwood & Roberts, Inc. v. Riplinger*, 103 Idaho 535, 650 P.2d 677 (1982); *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct. App. 1987).

Subparagraph 6 is “a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.” *Menier v. U.S.*, 405 F.2d 245 (5th Cir. 1968). “The broad language of (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice.” *Id.*

In this particular case, it is important to establish that Funks would have been entitled to the relief sought had this Motion or the underlying issue been raised prior to entry of the Partial Decrees. The relief sought is to not include the License in the joint place of use limitation with the Partial Decrees of 2275 and 4103. As the affidavit of Darrell Funk points out, the License bears no relation to the use of rights 2275 and 4103. The License was obtained specifically for the irrigation of the State Land. It has always been kept as a separate and stand-alone right. As

Mr. Funk points out, it makes no logical sense to lump it together with 2275 and 4103 as the Department has done. Thus, there is confidence that had the issue been raised prior to entry of the Partial Decrees, an amendment would have been likely to remove the License from the joint place of use limitation.

Next the Court should consider whether there are unique and compelling circumstances to justify granting the sought relief eleven years after the Partial Decrees were entered. Compelling circumstances have been found in cases where the delay was attributable in part to government inaction. *Menier*, 405 F.2d 245 (5th Cir. 1968). The *Menier* case involved an insolvent Defendant who did not obtain counsel and allowed the government to take default judgment against him when it sued on a note. The Debtor was also involved in a bankruptcy action. The government delayed significantly in entering the default judgment, waiting until after the Defendant obtained his discharge from the bankruptcy case. Later, more than a year after entry of the judgment, the Defendant moved to set aside the judgment under Rule 60(b)(6). The Court explained the following:

As in *Klapprott*, the uncontested contentions of the appellant are far more than mere allegations of excusable neglect by the movant. They show a combination of many factors – inaction by the government in not promptly obtaining a default judgment, which if promptly entered presumably would have been discharged in bankruptcy; at the same time action by the government in seeking and securing status as a priority claimant in bankruptcy on the same claim, presumptively a benefit; unusual delay by the court in deciding the contest over priorities; final action by the government in securing judgment, without notice to appellant and after his intervening discharge which it knew was at least presumptively a defense against entry of judgment, pursuant to consent given at a time that such defense was non-existent. Added to this are the facts that appellant was without counsel in the note suit and known to be hopelessly insolvent.

While recognizing the desirability of finality of judgments, we conclude that these particular circumstances draw on the reservoir of equitable power to accomplish justice, represented by Rule 60(b)(6), so as to entitle appellant to have the default judgment set aside.

Id. at 248.

The present case is similar to *Menier* in many respects. None of the discussions between the Funks and the Department involving the License and right nos. 2275 and 4103 gave the Funks any reason to believe that the License would or could be included in a joint

place of use limitation in the Partial Decrees. No such limitation has ever been enforced by the Department. Like *Menier*, Funk was not represented by counsel during the adjudication process. Funk does not impute ill intentions to the Department, just that inclusion of the License in the joint place of use limitations for 2275 and 4103 was a mistake and oversight. Moreover, like in *Menier*, inaction by the Government contributed to the length of time from entry of the Partial Decrees to the present time. Following entry of the Partial Decrees, the joint place of use limitation was not enforced. For eleven years, Funks had no reason to believe the limitation existed as it relates to the License. In fact, it wasn't until Funks brought it to the attention of the Department by initiating an application to transfer rights did the Department become aware of the joint place of use limitation as it related to the License. Thus, like *Menier* many factors contributed to the unique and compelling circumstances that exist in this case. While mistake and inadvertence on Funks' part is a factor, just like in *Menier*, it was not the only factor. Inaction by the Government also played a role. Thus, unique and compelling circumstances should be found.

Justice requires the relief sought because without it, Funks lose the production of more than 300 acres. As explained above, without the joint place of use limitation, the License is able to irrigate 480 acres of the State Land. If the joint place of use limitation is enforced and relief is not granted, that will be reduced to 175 acres. Justice requires relief because such limitation until now has never been enforced, and likely wouldn't have been had Funks themselves not brought it to the attention of the Department. Justice requires relief because had these issues been timely raised, absent the factors mentioned above, the License would likely have been removed from the joint place of use limitations in 2275 and 4103.

In addition to relief under (6), relief is also appropriate under (5) because it would not be equitable to apply the joint place of use limitation prospectively with the License included. Relief under this subparagraph requires a showing that the judgment is prospective, that it is no longer equitable to enforce the judgment as written, and that there has been a material change of circumstances. *Devine v. Cluff*, 111 Idaho 476 (Ct. App. 1986).

The material change of circumstances is that the Department has now, after eleven years, decided to enforce the joint place of use limitation. Thus, for the reasons discussed above, it would not be equitable for the Partial Decrees to continue to include the License in the joint place of use limitations for 2275 and 4103. The inequity to Funks is that they lose

over 300 acres of irrigated farm ground that they have been irrigating since 1981 under the understanding that the joint place of use limitation did not apply to the License. Thus, it is also appropriate for the Funks to be granted relief from the Partial Decrees under (5) of Rule 60(b).

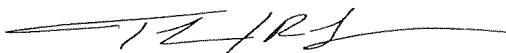
Lastly, it is worth mentioning that none of the arguments against granting a rule 60(b) motion are persuasive in these circumstances. Finality of judgments is the most frequently cited reasoning and issues of res judicata are also frequently cited. The truth is, no prejudice will be caused to the Department or any other person because Funks have been using the License to irrigate 480 acres of the State Land since 1981. Granting relief does not result in any actual change to how the License has been used. Moreover, the issues were not previously litigated. As described herein, the Funks overlooked the inclusion of the License in the joint place of use limitations for 2275 and 4103. Thus, the partial decrees were entered without any contest. Then, the Funks continued to use the License as they had since 1981 for the next eleven years to the present time. Thus, granting this relief does not result in any real threat to the finality of the Partial Decrees or to the principles of res judicata. For all of the foregoing reasons, it is appropriate for the Court to amend the Partial Decrees by removing the License from the joint place of use limitation in for water right numbers 2275 and 4103.

CONCLUSION

This Court is authorized under IRCP 60(b)(5)&(6) to amend the Partial Decrees for water right numbers 2275 and 4103 by removing the License from the joint place of use limitation in said decrees because it is no longer equitable for the judgment to apply prospectively if the Department is going to enforce the joint place of use limitation and because the foregoing circumstances constitute unique and compelling circumstances justifying the relief sought.

DATED this 9th day of January, 2017.

WILLIAMS, MESERVY & LOTHSPREICH, LLP

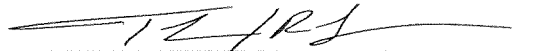


THEODORE R. LARSEN

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9th day of January, 2017, I caused to be served the foregoing document as follows:

Idaho Attorney General's Office Department of Water Resources Post Office Box 83720 Boise, Idaho 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile (208) 287-6700 ☐ Hand-Delivered - Court Folder ☐ Other _____
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THEODORE R. LARSEN