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DEPARTMENT OF
WATER RESOURCES

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

In Re SRBA

Case No. 37576

Subcase No. 21-12901

**MEMORANDUM IN SUPPORT OF
MOTION FOR CORRECTION OF OR
RELIEF FROM PARTIAL DECREE**

Petitioners, R T Kandler LLC; Clen Atchley; Squirrel Creek Irrigation & Canal Company, Limited; and Conant Creek Canal Company (collectively the "Petitioners"), by and through their counsel of record Holden, Kidwell, Hahn & Crapo, P.L.L.C., and pursuant to Idaho Rules of Civil Procedure 60(a) and 60(b)(6), submit this *Memorandum in Support of Motion for Correction of or Relief from Partial Decree*.

This motion concerns an error made by the Director of the Idaho Department of Water Resources ("the Director"). During the Snake River Basin Adjudication ("SRBA"), the Director was an "independent expert and technical assistant" to the Court. Idaho Code § 42-1401. The record of Water Right No. 21-12901 (hereinafter simply "21-12901") shows that in 1984, when 21-12901 was moved from the Snake River near Shelley to a new diversion on Conant Creek (a tributary of Fall River, which is tributary to the Henry's Fork, which is tributary to the Snake

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River), a stipulated condition was imposed to effectively subordinate 21-12901 to the already-existing water rights on Conant Creek and its tributaries. During the adjudication of 21-12901, the Director's report/recommendation erroneously omitted this condition. The Petitioners either (1) own water rights that divert from Conant Creek and/or its tributaries that are currently junior in priority to 21-12901, or (2) divert Fremont-Madison storage water on Conant Creek.¹ The Petitioners' motion seeks a correction of an error, under either Rule 60(a) or Rule 60(b)(6).

I. BACKGROUND

On April 6, 1967, the Idaho Department of Water Resources ("IDWR") approved a transfer of 21-12901 (as the water right would come to be known, though prior to the Snake River Basin Adjudication, it was denoted 01-0169), allowing 21-12901 "to be diverted from the Snake River through the Reservation Canal and injected into the Blackfoot River in exchange for water diverted from the Blackfoot River for the irrigation of approximately 393 acres of land located" in the area of Shelley, Idaho. *Proposed Memorandum Decision and Order*, p. 1 (dated Oct. 18, 1984) (available at: http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/4szc01_.PDF, and attached as Exhibit A to the *Declaration of Robert L. Harris in Support of Motion for Correction of or Relief from Partial Decree*) (the "1984 Memorandum Decision"). 21-12901 had a priority date of February 21, 1890, but because of the exchange occurring as described above, the priority date was reduced to December 14, 1891, which is the priority date of the Reservation Canal. *1984 Memorandum Decision*, p. 1.

¹ Clen Atchley is the petitioner that diverts FMID storage water from Conant Creek. Delivery of storage water on tributaries in the Upper Snake River Basin has been accomplished for decades provided certain criteria are met. This practice and the relevant criteria are described in a document entitled *Concepts, Practices, and Procedures Used to Distribute Water Within Water District #1, Upper Snake River Basin, Idaho*, at pages 74-75. This document is available at <http://www.waterdistrict1.com/water%20accounting%20manual.pdf>, which also discusses delivery of storage water from downstream reservoirs to upstream reservoirs.

On June 6, 1983, the owner of 21-12901, Lynn Loosli ("Loosli"), applied to IWDR to transfer 21-12901 from the area of Shelley, Idaho, "to pumps on Conant Creek for the irrigation of 393 acres located in Sec. 16, Twp. 8N, Rge. 43E," northwest of Drummond, Idaho. *1984 Memorandum Decision*, p. 1. This transfer was protested by "the Fremont-Madison Irrigation District, Squirrel Creek Irrigation and Canal Company, Don Harshbarger, Conant Creek Canal Company, Boom Creek Canal Company, and by Finlandia Ranch, Inc." (collectively, the "Transfer Protestants").² *1984 Memorandum Decision*, p. 1. Generally, the Transfer Protestants were "very concerned that the transfer of [an] older water right to the bottom end of Conant Creek would interfere with all of [their] later rights upstream." *1984 Memorandum Decision*, p. 4.

On January 25, 1984, Loosli and the Transfer Protestants (except for Don Harshbarger) met to negotiate a settlement of the protests to allow the transfer to proceed. *1984 Memorandum Decision*, p. 2. At that meeting:

Fremont-Madison Irrigation District agreed to withdraw their [sic] protest under the conditions that 1) the transfer be restricted to prevent interference with Fremont-Madison Irrigation District's ability to deliver stored water in Conant Creek; and 2) the transfer will not be allowed to require water from upstream diversions. The applicant [Loosli] subsequently agreed to these conditions and, therefore, the protest of Fremont-Madison Irrigation District has been resolved.

1984 Memorandum Decision, p. 2.

After considering the remaining protests and issues, IDWR concluded that the "water supply available to fill this right will be reduced by the proposed transfer. The change will not result in a reduction of the water available to fill other water rights on Conant Creek if the transfer application is properly conditioned." *1984 Memorandum Decision*, p. 3 (Conclusion of Law No. 3). As a result, IDWR approved the transfer, but included the following condition:

² There is overlap between the Transfer Protestants and the Petitioners—specifically, Squirrel Creek Irrigation & Canal Company, Limited, and Conant Creek Canal Company belong to both groups.

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The priority of this water right cannot be exercised against, or water demanded from any upstream water users on Conant Creek who divert water with a priority earlier than ... June 6, 1983.

1984 Memorandum Decision, pp. 3-4 (Order No. 2, emphasis added) (the “Subordination Condition”).³ Thus, the Subordination Condition was meant to prevent 21-12901 from “demand[ing] water from the upstream [water] users that were in place at the time the application for transfer was filed.” 1984 Memorandum Decision, p. 4.

After the SRBA commenced, Loosli filed a claim for 21-12901. As required by Idaho Code § 42-1411, the Director filed his report. *SRBA Directors Report 21-12901* (available at: <http://164.165.134.61/D2112901XX.HTM>, and attached as Exhibit B to the *Declaration of Robert L. Harris in Support of Motion for Correction of or Relief from Partial Decree* (the “Harris Declaration”). That report provides the amended priority date (of December 14, 1891), but does not show the Subordination Condition. *SRBA Directors Report 21-12901*. This oversight was noted by Tony Olenichak, who wrote a memo regarding the Director’s report on 21-12901 and **specifically mentioned the erroneous omission of the Subordination Condition.** *Inter-Department Memo* (dated Sept. 13, 1991) (available at: http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/4szd01_.PDF, and attached as Exhibit C to the *Harris Declaration*). However, despite knowing of the error, the Director and IDWR did not alter the recommendation. Further compounding this error, none of the Transfer Protestants were ever directly informed of the proceedings on 21-12901; the mailing list of 21-12901 only included the Director and Loosli. *SRBA Subcase Mailing List 21-12901* (available at: <http://164.165.134.61/M2112901XX.HTM>, and attached as Exhibit D to the *Harris Declaration*).

³ It is also worth mentioning at this point of outset that Petitioners—or some of them who were also Transfer Protestants—have an independent, contractual basis to enforce the Subordination Agreement is a separate action against Loosli, which is a right Petitioners reserve and of which Petitioners may yet avail themselves. However, the Petitioners believe the first forum to seek relief is this court before pursuing other options, if necessary.

Thereafter, Loosli agreed with the Director's report and the recommended water right conditions for 21-12901. *Notice of Error Reply* (dated Sept. 17, 2005) (available at: http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/6nkq01_.PDF, and attached as Exhibit E to the *Harris Declaration*).

On February 2, 2007, based on the Director's report and Loosli's agreement, the SRBA Court decreed 21-12901 without the Subordination Condition (the "*Partial Decree*"). *Partial Decree Pursuant to I.R.C.P. 54(b) for Water Right 21-12901* (available at: http://www.idwr.idaho.gov/apps/ExtSearch/DocsImages/9y1z01_.PDF, and attached as Exhibit F to the *Harris Declaration*). As IDWR speculated in 1984: "In general, however, as long as there is water flowing from Conant Creek into Fall River, [21-12901] should have no more effect on the Conant Creek water rights than it did at its previous location near Shelley, Idaho." 1984 *Memorandum Decision*, p. 4. The problem only arises when "the water supply on Conant Creek is inadequate to supply all of the demands on the creek." 1984 *Memorandum Decision*, p. 4. That is the present situation; where during 2016's low water conditions when the owner of 21-12901⁴ asserted it in order to curtail Petitioners' junior water rights which divert upstream on Conant Creek and its tributaries. See *Harris Declaration* at Exhibits H and I.

II. ARGUMENT

The erroneous omission of the Subordination Condition is now prejudicing Petitioners in the administration of water rights on Conant Creek and its tributaries. While the SRBA Court has "reserved" the ability to create an Error Correction Procedure, SRBA Administrative Order 1,

⁴ The listed owner on the decree for 21-12901 is S. Lynn Loosli. However, it is our understanding that he has passed away, and a review of Fremont County tax parcels reveals that the property associated with the place of use for 21-12901 is titled in the name of Loosco, Inc., with Brian Loosi (Lynn Loosli's son) as the president. It appears that the current owner of 21-12901 is therefore likely Loosco, Inc., but the ownership record for 21-12901 has not been updated by Loosco, Inc. with the filing of a *Notice of Change of Water Right Ownership*. Loosco, Inc. has been provided a copy of this memorandum and its associated documents as noted on the Certificate of Service.

Rules of Procedure (cited as “SRBA Rule”), Rule 8, only the Idaho Rules of Civil Procedure currently provide Petitioners only redress. Accordingly, Petitioners request that this Court either (A) correct this clerical transcription error, under Rule 60(a), by adding the Subordination Condition or, in the alternative, (B) relieve Petitioners from the operation of the Partial Decree due to the unique error intentionally caused by the Court’s expert, pursuant to Rule 60(b)(6), and add the Subordination Condition after hearing the parties on the matter.

A. The omission of the Subordination Condition was clerical mistake that this Court ought to correct pursuant to Rule 60(a).

This Court “may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record.” Idaho Rule of Civil Procedure 60(a). This rule allows the correction of errors where the “mistake or omission is mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment.” *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004) (brackets and citation omitted). If the mistake is not apparent from the record, then Rule 60(b)(1) likely provides the remedy. *Id.* (citation omitted). Likewise, if the error involves a legal decision or judgment—*i.e.*, it is “of a more substantial nature”—then Rule 59(e) or 60(b) must be resorted to. *Id.* (citation omitted). Thus, the Idaho Supreme Court has adopted the explanation that:

The basic distinction between “clerical mistakes” and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of “blunders in execution” whereas the latter consist of instances where the court *changes its mind*, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Id. at 412, 95 P.3d at 30 (emphasis in original) (quoting *Blanton v. Anzalone*, 813 F.2d 1574, 1577, n. 2 (9th Cir. 1987)). Finally, it is important to keep in mind that “Rule 60(a) is not a vehicle for relitigating matters that already have been litigated and decided, nor to change what has been

deliberately done.” *Dursteler v. Dursteler*, 112 Idaho 594, 597-98, 733 P.2d 815, 818-19 (Ct. App. 1987) (quoting 11 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2854, at 154 (1973)).

Here, this Court should correct the *Partial Decree* by adding the Subordination Condition because (1) the error is apparent from the Court’s record; (2) the error is mechanical in nature and not deliberately done; and (3) such correction would not require any relitigation of 21-12901.

1. *It is apparent from the Court’s record that the Subordination Condition was erroneously omitted from the Partial Decree of 21-12901.*

The record of 21-12901 includes the *1984 Memorandum Decision*. It is beyond dispute that the *1984 Memorandum Decision*, which approved the transfer of 21-12901 to Conant Creek, imposed the Subordination Condition on 21-12901 in consequence of the transfer. *See 1984 Memorandum Decision*, pp. 3-4 (Order No. 2).

The Director, while not “a party to an adjudication,” had a specific role in the SRBA. Idaho Code § 42-1401B(3). The Director functioned “as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code.” Idaho Code § 42-1401B(1). For most SRBA claims, the Director made a report or recommendation, a “statement[] by the Director, as set out in a Director’s Report, as to elements of a water right claim.” SRBA Rule 2(t); *see also* Idaho Code § 42-1411. The Director’s report was required to determine the elements of the claimed water right, to define and administer the water right. Idaho Code § 42-1411(2). Specifically, the Director’s report and recommendation had to include all of the “**conditions on the exercise of any water right included in any ... approved transfer application.**” Idaho Code § 42-1411(2)(i) (emphasis added).

Here, the *SRBA Directors Report 21-12901*—in violation of the mandate of Idaho Code § 42-1411(2)(i)—**does not include** the Subordination Condition (a condition on the exercise of 21-12901) imposed by the *1984 Memorandum Decision* (the approval of Loosli’s transfer application). *See SRBA Directors Report 21-12901*. Thus, the record of 21-12901 demonstrates the Director’s erroneous omission of the Subordination Condition. This error is apparent and the *Partial Decree* may be corrected under Rule 60(a). Idaho Rule of Civil Procedure 60(a).

This Court, in considering a prior motion made pursuant to Rule 60(a), has noted that he movant “had the opportunity and duty to review the [Director’s] recommendations and timely file objections to any perceived errors contained therein.” SBRA Subcase Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 24-10925, *Memorandum Decision and Order on Permissive Review*, p. 8 (dated March 7, 2012, and attached as Exhibit G to the *Harris Declaration*) (citing Idaho Code § 42-1412). There, the fact that the movant “failed to timely” make such an objection to the Director’s recommendation—while not necessarily dispositive—affected this Court’s denial of that motion. *See id.* In this case, the same fact should not affect this Court’s analysis for two reasons.

First, it could be argued that every error should be timely objected to before a judgment issues. However, Rule 60(a) exists because that does not always happen. To hold a lack of timeliness against a party 60(a) seeking relief is to allow the general rule to abrogate the specific exception. In contrast to Rule 60(b), there is no timeliness requirement for a motion under Rule 60(a). *See* Idaho Rule of Civil Procedure 60(c) (regarding timing). This is in part because **any error appropriate for correction under Rule 60(a) should be corrected, regardless of when the error is discovered**. Rule 60(a) exists because errors happen—as this case demonstrates—that are not always corrected before a judgment (or, in this case, the *Partial Decree*) issues.

Second, Petitioners had no notice of the error in the *SRBA Directors Report 21-12901* and no opportunity to object. Idaho Code § 42-1411 requires that the Director's report be correct. In contrast to the 1984 transfer proceeding (where Petitioners had their concerns resolved), Petitioners were not parties, objectors, or respondents to the SRBA proceedings for 21-12901. Only the Director and Loosli were included on the SRBA mailing list for 21-12901. Petitioners were not expected to monitor all of the thousands of claims in the SRBA for possible impacts to their water rights. The Docket Sheet Procedure was "established to give notice of proceedings on **nonsubcase matters** to SRBA claimants and parties." SRBA Rule 2(h) (emphasis added); *see also* SRBA Rule 6 (outlining the Docket Sheet Procedure), Rule 10(h) (specifying that, generally, "[s]ervice of documents in a subcase need be made only on parties to the subcase and IDWR"). A review of the subcase summary report for 21-12901 reveals that no objections or other documents were filed concerning this water right that would have placed it on the Docket Sheet. Thus, without notice—actual, constructive, or otherwise—Petitioners did not have an opportunity to object to the Director's erroneous report and recommendation for 21-12901.

2. The omission of the Subordination Condition is a clerical mistake capable of being corrected under Rule 60(a).

By its terms, Rule 60(a) applies only to "a clerical mistake or a mistake arising from oversight or omission." Idaho Rule of Civil Procedure 60(a); *see also Silsby*, 140 Idaho at 412, 95 P.3d at 30. Rule 60(a) cannot change "a deliberate, intentional decision" of the court that issued the judgment. *De Geus v. De Geus*, 154 Idaho 253, 256, 296 P.3d 1100, 1103 (Ct. App. 2013). In other words, while Rule 60(a) cannot change the "substance" of a judgment, it is the correct means of correcting an error in the "draftsmanship" of the judgment. *Vierstra v. Vierstra*, 153 Idaho 873, 879, 292 P.3d 264, 270 (2012). Thus, an error in "transposing" information from one document to another "is simply a clerical oversight" that "can be corrected pursuant to Idaho Rule of Civil

Procedure 60(a).” *Wurzburg v. Kootenai Cnty.*, 155 Idaho 236, 246, 308 P.3d 936, 946 (Ct. App. 2013). Similarly, “[i]f the court’s decree is unambiguous, but mistaken, with respect to merger, the parties have an inherent safeguard in the form of Idaho Rule of Civil Procedure 60(a).” *Borley v. Smith*, 149 Idaho 171, 177, 233 P.3d 102, 108 (2010).

The Director’s report was required to include all of the “conditions on the exercise of any water right included in any ... approved transfer application.” Idaho Code § 42-1411(2)(i) (emphasis added). Without any dissimulation, the *SRBA Directors Report 21-12901* failed in this regard. The *SRBA Directors Report 21-12901* did not include the Subordination Condition, although it should have. This erroneous omission was a transposition error; it was a blunder in execution and a failure to incorporate the previously-ordered Subordination Condition. It was **not** a legal determination by the Director or IDWR—since neither is authorized to make any such legal determination at that stage. See Idaho Code § 42-1411. This Court had no chance to make a deliberate or intentional decision with regard to the Subordination Condition. This is not a substantive decision, but is a clerical error that this Court can correct under Rule 60(a).

3. Correcting the Partial Decree of 21-12901 by adding the Subordination Condition does not create a contestable issue requiring further proceedings.

This Court has been hesitant to correct a mistake when doing so would “require relitigation” through “further proceedings.” SBRA Subcase Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 24-10925, *Memorandum Decision and Order on Permissive Review*, p. 7 (dated March 7, 2012, and attached as Exhibit G to the *Harris Declaration*); see also *Dursteler*, 112 Idaho at 597-98, 733 P.2d at 818-19. Here, that concern is not an issue. Correcting the erroneous omission of the Subordination Condition will not cause any further proceedings because neither Loosli nor IDWR will have a reasonable basis to contest the correction.

The facts and legal consequences surrounding the Subordination Condition are incontrovertible. The Subordination Condition was imposed on 21-12901 in 1984. *See 1984 Memorandum Decision*, pp. 3-4 (Order No. 2). It should have been included in the Director's report or recommendation relating to 21-12901. *See Idaho Code* § 42-1411. Nevertheless, the Director erroneously omitted the Subordination Condition. *See SRBA Directors Report 21-12901*. There was—and could be—no binding or legal determination in the *SRBA Directors Report 21-12901* that could remove the Subordination Condition. As a result, the Director, IDWR, and Loosli cannot contradict the applicability of the Subordination Condition to 21-12901. Consequently, correcting the Director's erroneous omission will not lead to any relitigation of the issues resolved in the Partial Decree because there is no basis to relitigate the Subordination Condition.

B. In the alternative, this Court should relieve Petitioners from the Partial Decree of 21-12901 and include the Subordination Condition because the error of the IDWR, the SRBA Court's expert, in omitting this condition is an "other reason that justifies relief" under Rule 60(b)(6).

In the event that this Court concludes that Petitioners are not entitled to relief under Rule 60(a), Petitioners also believe that Rule 60(b)(6) provides a basis for remedying the Director's erroneous omission of the Subordination Condition from 21-12901. "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for" any one of several reasons. Idaho Rule of Civil Procedure 60(b). The specific bases for Rule 60(b) relief include "mistake, inadvertence, surprise, or excusable neglect;" "newly discovered evidence;" "fraud ... misrepresentation, or misconduct by an opposing party;" "the judgment is void;" and "the judgment has been satisfied, released, or discharged." Idaho Rule of Civil Procedure 60(b)(1)–(5). Finally, the rule allows relief for "any other reason that justifies relief." Idaho Rule of Civil Procedure 60(b)(6). In any event, a Rule 60(b)(6) motion "must be made within a reasonable time." Idaho Rule of Civil Procedure 60(c)(1).

While ruling on a Rule 60(b)(6) motion is left to the district court's discretion, *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996), relief under Rule 60(b)(6) is limited to those circumstances where "the party making the Rule 60(b)(6) motion demonstrate[s] unique and compelling circumstances justifying relief." *Golub v. Kirk-Scott, Ltd.*, 157 Idaho 966, 342 P.3d 893, 899 (2015) (citation and internal quotation marks omitted, brackets in original). Petitioners recognize that "courts of this state have infrequently granted relief under Rule 60(b)(6)." *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009). However, the Idaho Supreme Court has "recognized that relief under Rule 60(b)(6) may be appropriate where the district court granted relief that is inconsistent with the pleadings and evidence in the case or is beyond what was sought in the complaint." *Profits Plus Capital Mgmt., LLC v. Podesta*, 156 Idaho 873, 886, 332 P.3d 785, 798 (2014) (citations omitted).

Here, this Court should relieve Petitioners from the Partial Decree because (1) this motion has been brought within a reasonable time; and (2) the erroneous omission of the Subordination Condition by the Director—an independent expert and technical assistant for the SRBA—is a unique and compelling circumstance justifying relief under Rule 60(b)(6).

1. *Petitioners' request for relief under Rule 60(b)(6) is timely.*

A Rule 60(b)(6) motion "must be made within a reasonable time." Idaho Rule of Civil Procedure 60(c)(1). "Whether a motion under Rule 60(b) is timely is an issue of fact for the district court." *Meyers v. Hansen*, 148 Idaho 283, 291, 221 P.3d 81, 89 (2009) (citation omitted). "Where judgment is entered without the party's knowledge, what constitutes a reasonable time is judged from the time that the party learned of the judgment." *McGrew v. McGrew*, 139 Idaho 551, 559, 82 P.3d 833, 841 (2003); *see also Meyers*, 148 Idaho at 291, 221 P.3d at 89 (even where a party knew of the entry of judgment, "examin[ing] the length of time between the moment the judgment [or its inequity] becomes apparent to the defendant and the date the Rule 60(b) motion is filed")

under Rules 60(b)(4) and –(5), which, like Rule 60(b)(6), must be brought in an undefined “reasonable time”).

Thus, while the delay in this case may seem substantial (and unreasonable), this Court must first resolve and determine when Petitioners learned of the *Partial Decree*’s mistake. The *Partial Decree* was entered February 2, 2007. *See Partial Decree*. This motion is brought a little over ten years later. However, the key inquiry is, first, whether Petitioners knew about the entry of the *Partial Decree*. If so, then this Court must determine when Petitioners learned of the *Partial Decree*. If not, then this Court must determine the closely-related matter of when the *Partial Decree* became apparent to the Petitioners.

As discussed above, Petitioners were not on the SRBA mailing list for 21-12901. SRBA Subcase Mailing List 21-12901 (available at: <http://164.165.134.61/M2112901XX.HTM>). Petitioners were not a party, respondent, or objector in the SRBA proceedings for 21-12901. Thus, the *Partial Decree* was entered without Petitioners’ knowledge. Because Petitioners did not know about the *Partial Decree*’s entry, the starting point of the relevant timeframe commenced when Petitioners learned about the *Partial Decree*.⁵ Petitioners learned of the problem with the *Partial Decree* in July of 2016, when Loosli requested priority administration of the rights on Conant Creek and since that time have undertaken research actions to determine how the error with the Subordination Condition had occurred.

⁵ Alternatively, if this Court, for any reasons, determines that Petitioners did, in fact, have knowledge of the entry of the *Partial Decree*—then, this Court must determine when the *Partial Decree*’s error became apparent to Petitioners. This, Petitioners contend, is the same as when they learned of the *Partial Decree*, as described herein, and for that reason, Petitioners provide no separate discussion regarding this eventuality.

2. *The error of the expert for the SRBA Court provides a circumstance not contemplated in Rule 60(b)(1) through –(5) that is unique and compelling.*

The unique circumstances of the SRBA and especially of the Director's role in the SRBA provide the grounds for Petitioners' relief under Rule 60(b)(6). The Director was "an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported" within the SRBA. Idaho Code § 42-1401B(1). The failure of the independent expert and technical assistant to accurately report the undisputed and previously imposed conditions on 21-12901, by omitting the Subordination Condition (*see* Idaho Code § 42-1411(2)(i)), is not contemplated by any of the more specific grounds for relief listed in Rule 60(b)(1) through –(5).

This is not a mistake, surprise, or excusable neglect, which are items "not apparent in the record." *See* Idaho Rule of Civil Procedure 60(b)(1); *PHH Mortg. v. Nickerson*, 160 Idaho 388, 397, 374 P.3d 551, 560 (2016), *reh'g denied* (July 19, 2016). The Director's erroneous omission of the Subordination Condition is apparent from the record, in the *1984 Memorandum Decision*. *See* Section II.A.1., *supra*. For the same reason, the basis for this motion is not "new evidence." *See* Idaho Rule of Civil Procedure 60(b)(2). Rule 60(b)(3) applies only to actions of "an opposing party." *See* Idaho Rule of Civil Procedure 60(b)(3). Here, the relevant errors and actions were made by the Director and/or IDWR—who are specifically "not ... a party to [the] adjudication." Idaho Code § 42-1401B(3). Petitioners are not asserting that any portion of the Partial Decree is void, meaning Rule 60(b)(4) is not at issue. Likewise, Petitioners have not placed Rule 60(b)(5) at issue, as the Partial Decree remains in effect, is not based on unsound precedent, and Petitioners contend that any application of the Partial Decree (prospectively or retroactively) is incorrect.

Thus, only Rule 60(b)(6) provides a basis for the relief sought by Petitioners. The circumstances of this case—*i.e.*, the Director’s wrongful, erroneous omission of the Subordination Condition—are both unique and compelling, which justifies the application of Rule 60(b)(6).

During the SRBA, the Director played the unique role of being an “independent expert and technical assistant” (and specifically not a party to the adjudication) to assist the SRBA Court in “assur[ing] that claims to water rights ... are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code.” Idaho Code § 42-1401. On one hand, this statute is void “[t]o the extent [it] constitutes a legislative determination as to the Director’s status as an expert.” *In re SRBA Case No. 39576*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). However, on the other hand, the Idaho Supreme Court has accepted that this statute altered the Director’s role from “that of a ‘party’ to that of an ‘independent expert.’” *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 742, 947 P.2d 409, 415 (1997). The Director provided a report/recommendation for 21-12901, which was required to determine the elements of the claimed water right, to define and administer the water right. Idaho Code § 42-1411(2). Specifically, the Director’s report and recommendation had to include all of the “**conditions on the exercise of any water right included in any ... approved transfer application.**” Idaho Code § 42-1411(2)(i) (emphasis added).

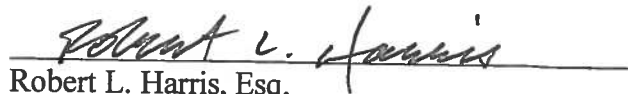
However, here, the *SRBA Directors Report 21-12901*—in violation of the mandate of Idaho Code § 42-1411(2)(i)—does not include the Subordination Condition (a condition on the exercise of 21-12901) imposed by the *1984 Memorandum Decision* (the approval of Loosli’s transfer application). (See <http://164.165.134.61/D2112901XX.HTM>). This error is compounded by the Director’s disregard for at least one attempt to correct it. Tony Olenichak wrote a memo, which is now included in the record of 21-12901, that **specifically mentioned the erroneous omission of the Subordination Condition** from the Director’s report. *Inter-Department Memo* (dated

September 13, 1991). Despite this memorandum, written in 1991, the Director and IDWR did nothing to correct its error. The violation of Idaho Code § 42-1411 by the Director and IDWR is unique (as the Director and IDWR generally does an admirable job following the statutory mandates) and compelling (as any violation of the statutory process by the SRBA's independent expert and technical assistant, aggravated here by the willful disregard of the Olenichak memorandum detailing this very error, must be considered). Thus, the Court should grant Petitioners relief pursuant to Rule 60(b)(6).

III. CONCLUSION

This entire situation was precipitated by the Director's error. The Director should have included the Subordination Condition in the *SRBA Directors Report 21-12901*. The Director was required to do so by Idaho Code § 42-1411(2)(i). In 1991, Tony Olenichak wrote a memo to IDWR explaining the error. However, the Director and IDWR disregarded that memo. For the reasons described above, this Court may correct the Director's erroneous omission under either Rule 60(a) or Rule 60(b)(6).

Dated this 26th day of May 2017.


Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May, 2017, I served a true and correct copy of the document listed below on the persons listed below by the method indicated.

Document Served:

MEMORANDUM IN SUPPORT OF MOTION FOR
CORRECTION OF OR RELIEF FROM PARTIAL DECREE

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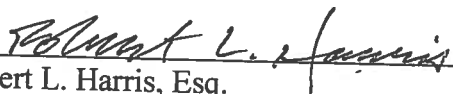
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