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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

Subcase No. 61-4029

**STATE OF IDAHO'S RESPONSE TO
MOTION TO SET ASIDE, REOPEN
AND/OR MOTION TO ALTER OR
AMEND PARTIAL DECREE FOR
WATER RIGHT NO. 61-4029**

The State of Idaho ("State"), by and through its attorneys of record, hereby responds to the *Motion to Set Aside, Reopen and/or Motion to Alter or Amend Partial Decree for Water Right No. 61-04029* (Oct. 1, 2018) ("*Motion*") filed by Elizabeth Ann and Nick Nettleton ("the Nettletons").

I. BACKGROUND

On December 5, 1989, the Nettletons' predecessors in interest, William and Margaret Walker ("the Walkers"), filed a notice of claim for water right no. 61-4029 with the Idaho

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Department of Water Resources (“IDWR”). *Affidavit of Dave Shaw in Support of Motion to Set Aside, Reopen and/or Motion to Alter or Amend Partial Decree for Water Right No. 61-4029* (Oct. 1, 2018) (“*Shaw Aff.*”), Ex. B. The notice of claim asserted a right to divert 6 cubic feet per second (“cfs”) of water from Ryegrass Creek to irrigate 262 acres in Elmore County, Idaho, and .14 cfs of water from Ryegrass Creek for stockwatering. *Id.* The claim was stated to be based on a statutory beneficial use claim. *Id.*

On November 20, 1998, the Walkers were mailed the preliminary director’s report for water right no. 61-4029 along with a notice of error reply form. *Shaw Aff.*, Ex. D; *Affidavit of Shantel M. Chapple Knowlton* (“*Knowlton Aff.*”), Ex. 1.¹ The notice of error reply form informed the Walkers that they should return the reply form “if [they] want to change [their] recommendation or [they] want to let IDWR know that [they] agree with its recommendation.” *Shaw Aff.*, Ex. D. The preliminary director’s report recommended that water right no. 61-4029 be decreed with a quantity of 5.14 cfs and 6.7 acre feet per year (“afy”). *Knowlton Aff.*, Ex. 1. The recommended quantity also included the standard *de minimis* stockwater remarks stating: “The quantity of water under this right for stockwater use shall not exceed 13,000 gallons per day,” and “[t]he quantity of water decreed for this water right for stockwater use is not a determination of historical beneficial use.” *Id.* The purpose and period of use provided that 5.02 cfs may be diverted from March 15 to November 15 each year for irrigation and .12 cfs may be diverted year round for stockwatering. *Id.* The Walkers signed and returned the notice of error reply form to IDWR on December 10, 1998, stating that they agreed with the proposed recommendation and that no changes need to be made. *Shaw Aff.*, Ex. D.

¹ The Affidavit of Shantel M. Chapple Knowlton was filed concurrently with the State’s Response. A copy of the preliminary recommendation was also attached as Exhibit 1 to the *Notice of Errata/Correction to Motion to Set Aside Reopen and/or Motion to Alter or Amend Partial Decree for Water Right No. 61-4029* (“*Notice of Errata*”) filed by the Nettletons on December 3, 2018.

On February 16, 1999, IDWR issued the *Director's Report for Irrigation and Other Uses for Reporting Area 6, Basin 61* ("*Director's Report*"), including the recommendation for water right no. 61-4029. *Knowlton Aff.*, Ex. 2, Ex. 3, at 2. The recommendation for water right no. 61-4029 was substantially the same as the preliminary director's report, including the 6.7 afy limit. *Knowlton Aff.*, Ex. 2. The recommendation for water right no. 61-4029 was mailed to the Walkers on February 18, 1999, along with the *Notice of Director's Report for IDWR Reporting Area 6, Basin 61 for Irrigation and Other Water Rights* ("*Notice of Director's Report*"). *Knowlton Aff.*, Ex. 3, at 2, 5, 12. As required by Idaho Code § 42-1411(6), the *Notice of Director's Report* provided: "If you disagree with any element of the recommendation for your water right or anyone else's water right and want to be heard in court, file an objection with the SRBA Court." *Id.* at 6. The *Notice of Director's Report* also provided that objections "must be received by the SRBA Court on or before **June 15, 1999.**" *Id.* (emphasis in original).

The Walkers did not file an objection to the *Director's Report*, and the partial decree was issued for water right no. 61-4029 on October 26, 2000. *Knowlton Aff.*, Ex. 4. The partial decree matched the *Director's Report*, except that it did not include the *de minimis* stockwater remarks. *Id.*

On May 9, 2001, Charter Mountain Ranch, Inc. and Ark Properties, LLC moved the SRBA Court to have IDWR file amended director's reports to amend the period of use for irrigation claims on Cold Springs Creek and its tributaries. *Knowlton Aff.*, Ex. 5, at 1. Water right no. 61-4029 was among the water rights requested to be amended. *Id.* at 4. The motion was granted, and IDWR issued amended director's reports on September 19, 2001, including an amended director's report for water right no. 61-4029. *Knowlton Aff.*, Ex. 6. No objections were filed to the amended director's report, and a Special Master's Report and Recommendation was

issued, recommending that water right no. 61-4029 be decreed with the changed period of use. *Knowlton Aff.*, Ex. 7. The Special Master's Report and Recommendation for Water Right no. 61-4029 included the 6.7 afy limit and the *de minimis* stockwater remarks. *Id.* No challenges were filed to the Special Master's Report and Recommendation, and on March 4, 2003, the SRBA Court issued an amended partial decree adopting the Special Master's recommendation. *Knowlton Aff.*, Ex. 8.

On August 26, 2014, this Court issued the *Final Unified Decree*, SRBA Case No. 39576, concluding the SRBA. *Knowlton Aff.*, Ex. 9. Unless expressly exempted, the "Final Unified Decree is conclusive as to the nature and extent of all water rights within the Snake River Basin within the State of Idaho with a priority date prior to November 19, 1987." *Id.* at 9. All partial decrees issued by the Court were incorporated into the *Final Unified Decree*, including the amended partial decree for water right no. 61-4029. *Id.* at 10, 17.

Based on the information provided in support of the *Motion*, it appears that the Nettletons interpreted the 6.7 afy limit to only apply to the stockwater portion of water right no. 61-4029. *Shaw Aff.* ¶ 3. The *Motion* indicates that the Nettletons have not had an issue with the partial decree for water right no. 61-4029 until after they filed a transfer application with IDWR to add an additional point of diversion. *Id.* ¶ 4. There is no indication that IDWR has issued a final order on the transfer application or made any final decision regarding whether the 6.7 afy limit applies to the irrigation portion of water right no. 61-4029.

On October 1, 2018, the Nettletons filed the *Motion* asking the SRBA Court to "correct/clarify" the partial decree for water right no. 61-4029. *Motion* at 1. As stated in the *Motion*, the Nettletons "seek[] the correction/clarification that the volume limitation provided in the Partial Decree is applicable only to the stockwater purpose of use in the Partial Decree and is

not a volume limitation as to the irrigation purpose of use in the Partial Decree.” *Id.* The Nettletons ask that the partial decree for water right no. 61-4029 be set aside and amended under I.R.C.P. 60(a) and/or 60(b)(6). *Id.* at 2-5.

II. LEGAL STANDARDS

“Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b).” *SRBA Admin. Order 1 (“AOI”)* § 14(d). I.R.C.P. 60(a) provides that “[t]he 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.” I.R.C.P. 60(a) applies where the “type of mistake or omission [is] mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment by an attorney.” *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004) (quoting *Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.2d 815, 818 (Ct. App. 1987)). “Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b).” *Id.* (quoting *Dursteler*, 112 Idaho at 597, 733 P.2d at 818).

I.R.C.P. 60(b)(6) provides that “the court may relieve a party or its legal representatives from a final judgment, order, or proceeding” for “any other reason that justifies relief.” As the Idaho Supreme Court recently reiterated, although the Court has discretion to grant or deny a motion under 60(b)(6), “its discretion is limited and may be granted only on a showing of unique and compelling circumstances justifying relief.” *Eden v. State*, ___ Idaho ___, 429 P.3d 129, 140 (2018) (quoting *Miller v. Haller*, 129 Idaho 345, 348, 924 P.2d 607, 610 (1996)). Accordingly, Idaho Courts have infrequently granted relief under Rule 60(b)(6). *Id.*

III. ARGUMENT

The State has an interest in maintaining the finality of the *Final Unified Decree*. As the Idaho Supreme Court recently stated, “[f]inality is for good reason, especially in water law;

otherwise, the approximate \$94 million the State expended in judicial and administrative costs during the SRBA would be jeopardized as mere wasteful expenditures.” *United States v. Black Canyon Irrigation Dist.*, 163 Idaho 54, 64, 408 P.3d 52, 62 (2017). Because decrees are conclusive and final, Idaho Courts have been “reluctan[t] to allow already-decreed water rights to be relitigated.” *Id.*

Rule 60 should be applied to set aside the *Final Unified Decree* only in the most remarkable of circumstances. Otherwise, the central purpose of the SRBA—to provide for a conclusive schedule of water rights in the Snake River Basin—would be severely undermined. The State filed this response because it is concerned about the Nettletons’ allegation that relief is warranted under I.R.C.P. 60(a) and 60(b)(6) because the volume limitation at issue was not included in the claim and because the Walkers did not receive sufficient notice of the inclusion of the volume limitation.² *See Motion* at 2-4. The State is also concerned about the Nettletons’ request that this Court “clarify” the application of the 6.7 afy volume limitation because the interpretation of a partial decree is an issue of administration that should be brought before IDWR. *See id.* at 1, 6. The State however, takes no position on the Nettletons’ argument that relief is warranted because the application of the volume limitation to the entire right would render the water right meaningless. *See id.* at 5. Whether relief is warranted on that basis is a discretionary decision for this Court.

A. The Nettletons’ Predecessors in Interest Had the Same Opportunity as Every Other Claimant in the SRBA to File an Objection to the *Director’s Report*.

² In the *Notice of Errata*, the Nettletons corrected statements in the *Motion* that the volume limit at issue was not included in the preliminary recommendation for water right no. 61-4029. *Notice of Errata* at 1. The *Notice of Errata*, however, is unclear as to whether due to this change in factual allegations the Nettletons are abandoning the argument that relief is warranted under Rule 60 because the Walkers were not on notice of the inclusion of the 6.7 afy limit.

The Nettletons appear to argue that the Director of IDWR erred in including the 6.7 afy limitation in the recommendation for water right no. 61-4029 and that their predecessors in interest, the Walkers, did not receive sufficient notice of the volume limitation. *Motion* at 3. As the record shows, however, the Walkers had ample notice of the 6.7 afy limit and had several opportunities to raise an objection during the pendency of the SRBA.

Idaho Code § 42-1411 requires the Director of IDWR to issue a director's report that determines the elements of claimed water rights. "The director shall file the director's report with the district court," and the director's report "shall constitute prima facie evidence of the nature and extent of the water rights acquired under state law." Idaho Code § 42-1411(4). "The director shall also serve on each claimant or the claimant's attorney whose water right is listed in the director's report a notice of filing of the director's report." Idaho Code § 42-1411(6). The notice must include "a copy of that portion of the report setting forth the claimant's water right," a statement that "any claimant may file objections to any portion of the director's report with the district court," and the deadline for filing objections. Idaho Code § 42-1411(6)(b), (e)-(f).

"Each claimant of a water right acquired under state law has the ultimate burden of persuasion for each element of a water right." Idaho Code § 42-1411(5). "A claimant of a water right acquired under state law has the burden of going forward with evidence to establish any element of a water right which is in addition to or inconsistent with the description in a director's report." *Id.*

The Walkers received the *Notice of Director's Report* along with the recommendation for water right no. 61-4029 on February 18, 1999. *Knowlton Aff.*, Ex. 3, at 2, 12. The recommendation for water right no. 61-4029 included the 6.7 afy volume limitation at issue. *Knowlton Aff.*, Ex. 2. As required by Idaho Code § 42-1411(6), the *Notice of Director's Report*

informed the Walkers that if they disagreed with the director's recommendation they should "file an objection with the SRBA Court." *Knowlton Aff.*, Ex. 3, at 6. The *Notice of Director's Report* also provided that any "objection must be received by the SRBA Court on or before June 15, 1999." *Id.* The Walkers received the statutorily required notice and had the same opportunity to file an objection to the *Director's Report* as every other claimant in the SRBA. The Walkers did not file an objection, and water right no. 61-4029 was decreed with the 6.7 afy limitation as recommended. *Knowlton Aff.*, Ex. 4.

In addition to the statutorily required notice, the Walkers were given several other opportunities to object to the inclusion of the 6.7 afy limitation. The record shows that the Walkers received a preliminary director's report before the *Director's Report* was filed. *Shaw Aff.*, Ex. D; *Knowlton Aff.*, Ex. 1. Title 42, Chapter 14, Idaho Code does not require IDWR to issue a preliminary director's report. Rather, IDWR issues the preliminary recommendations as a courtesy to water users. The preliminary director's report for water right no. 61-4029 included the 6.7 afy limit. *Knowlton Aff.*, Ex. 1. Upon receiving the preliminary director's report, the Walkers returned the notice of error reply form stating that they agreed with the proposed recommendation and no changes needed to be made. *Shaw Aff.*, Ex. D.

The Walkers were also given an opportunity to raise an objection to the 6.7 afy limitation when an amended director's report was issued for water right no. 61-4029 in 2001. *See Knowlton Aff.*, Ex. 6. The Walkers thereafter had an opportunity to file a challenge to the Special Master's Report and Recommendation for the Amended Partial Decree for water right no. 61-4029 that also included the 6.7 afy limitation. *See Knowlton Aff.*, Ex. 7; *AOI* § 13(a). The Walkers did not raise any objection to the inclusion of the 6.7 afy limitation in the amended partial decree for water right no. 61-4029, and an amended partial decree including the 6.7 afy limitation was

issued in 2003. *Knowlton Aff.*, Ex. 8. The record shows that the Walkers were put on notice and had a sufficient opportunity to object to the 6.7 afy limitation.

The *Motion* does not provide any reason for why the inclusion of the 6.7 afy limit is a clear error that can be corrected under Rule 60(a), except for allegations that it “was an internal error of [IDWR] and was not presented to the claimant during the error correction process.” *Motion* at 3. The volume limitation, however, was in the preliminary recommendation that was sent to the Walkers and was included in the *Director’s Report*. *Knowlton Aff.*, Exs. 1-2. The Nettletons’ argument on this issue is essentially a late challenge to the *Director’s Report* for water right no. 61-4029. The *Motion* was filed almost twenty (20) years after the *Director’s Report* was issued and over four (4) years after the amended partial decree for water right no. 61-4029 was incorporated into the *Final Unified Decree*. As this Court has previously held, I.R.C.P. 60(a) “does not provide relief for the failure to timely object to the *Director’s Report*.” *Memorandum Decision and Order on Permissive Review*, SRBA Subcase No. 34-2459 *et al.* at 8 (March 7, 2012).

The Nettletons also argue that relief is warranted under I.R.C.P. 60(b)(6) because the inclusion of the volume limitation in the partial decree was inconsistent with the claim filed by the Walkers. *Motion* at 4 (citing *Eden*, 429 P.3d at 140; *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380-81, 234 P.3d 699, 704-05 (2010)). However, this case does not present the same circumstances as *Dawson*. There, the Idaho Supreme Court held that relief was warranted under Rule 60(b)(6) because the district court’s judgment granted a property interest beyond the one-fourth interest sought in the complaint and supported by the evidence. *Dawson*, 149 Idaho at 380-81, 234 P.3d 704-05. In this case, the *Director’s Report* deviated from the claim in that it recommended a more limited right—not a right that extended beyond what was claimed. As this

Court has previously recognized, the recommendations in the Director's Report "by [the] very nature of the process can vary from the claims." *Memorandum Decision and Order on Permissive Review*, SRBA Subcase No. 34-2459 *et al.* at 8 (March 7, 2012). Such a variance is not unique and compelling.

The inclusion of the 6.7 afy limit in the partial decree was based on its inclusion in the *Directors' Report*, which constitutes "prima facie evidence of the nature and extent of the water rights acquired under state law." Idaho Code § 42-1411(4). It is unknown why the Walkers did not object to the inclusion of the 6.7 afy limitation. Some evidence in the record indicates that the Walkers agreed with the inclusion of that volume limitation. *Shaw Aff.*, Ex. D. However, even assuming that the Walkers' failure to object to the *Director's Report* was in error, such an error is not a basis to grant relief under I.R.C.P. 60(b)(6). A motion to set aside a final judgment based upon a claim of mistake, inadvertence, surprise, or excusable neglect must be made under I.R.C.P. 60(b)(1) and within six months of the final judgment being entered. I.R.C.P. 60(c); *Eden*, 429 P.3d at 140. Rule "60(b)(1) and 60(b)(6) are mutually exclusive provisions, such that a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6)." *Id.* (quoting *Eby v. State*, 148 Idaho 731, 736, 228 P.3d 998, 1003 (2010)).

B. A Request for "Clarification" of a Partial Decree is an Issue of Administration That Must be Brought Before IDWR.

The *Motion* is unclear as to the relief being sought. The Nettletons "seek the correction/clarification that the volume limitation provided in the Partial Decree is applicable only to the stockwater purpose of use in the Partial Decree and is not a volume limitation as to the irrigation purpose of use in the Partial Decree." *Motion* at 1. There is no indication of what specific changes the Nettletons are asking this Court to make to the partial decree. Rather, the *Motion* appears to ask this Court to judicially determine that the 6.7 afy limit as currently

provided in the partial decree is only applicable to the stockwater portion of water right no. 61-4029. *See id.* at 1-2, 6.

The documents filed in support of the *Motion* also appear to indicate that the Nettletons' issue is not the inclusion of the 6.7 afy limit in the partial decree for water right no. 61-4029 but is with comments from IDWR staff that the volume limit may be interpreted to apply to the irrigation portion of the water right. *Shaw Aff.* ¶¶ 3-4. It appears that Nettletons filed the *Motion* in order to challenge an unfavorable interpretation of the partial decree made by IDWR staff. However, there has been no final decision by the Director of IDWR determining whether the 6.7 afy limit in the partial decree applies to the irrigation portion of the water right.

The State objects to the *Motion* in so far as it seeks an interpretation of the 6.7 afy limitation in the partial decree. Questions of interpretation are issues of administration. IDWR is primarily responsible for the administration of water rights, and requests for interpretations should first be brought before IDWR. *See In re SRBA*, 157 Idaho 385, 393-94, 336 P.3d 792, 800-01 (2014). The Idaho Administrative Procedure Act ("APA") provides the procedures for challenging the Director's interpretation of a water rights decree. *See id.* at 394, 336 P.3d at 801. If the Nettletons disagree with the Director's interpretation, they would have an opportunity to ask this Court to review the Director's decision once a final order has been issued.

C. The State Takes No Position on the Nettleton's Argument that Relief is Warranted Because Applying the Volume Limit to the Irrigation Portion of the Water Right Would Render the Water Right Meaningless.

The Nettletons state that relief under Rule 60 is warranted because "the volume limitation if applied to the irrigation purpose of use essential renders the water right meaningless." *Motion* at 5. The Nettletons do not provide any further argument or reasons as to why this would provide a basis for relief under Rule 60(a) or 60(b)(6). Given the lack of supporting argument and lack of any decisive legal precedent that the State is aware of that would govern the result of

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this issue, the State does not take any position on this argument. The State believes that such a determination is a discretionary decision for this Court, should the court determine that this *Motion* is properly before it.

The State respectfully requests that should the Court grant the relief requested on this basis, that it issue a written decision setting forth the basis for relief and the specific facts that the Court considered in making its determination. Specifically, the State would ask that the Court make specific findings as to the unique and compelling circumstances that warrant relief under I.R.C.P. 60(b)(6) or why the inclusion of the 6.7 afy limit in the partial decree could be considered a clerical error under I.R.C.P. 60(a).³ As this Court is aware, under what circumstances a partial decree may be amended after the issuance of the *Final Unified Decree* is an ongoing issue in the SRBA, and one with little guiding legal precedent. A written decision by this Court would provide guidance to parties in the SRBA on this likely reoccurring issue and be helpful to the State and other parties in distinguishing the facts of this case from future motions seeking to amend partial decrees in the SRBA.

IV. CONCLUSION

The State agrees with the Nettletons that *AOI* § 14(d) allows for the modification of a partial decree where the requirements of I.R.C.P. 60(a) or (b) are satisfied. *See Motion* at 5. The State, however, does not believe that such relief is warranted on the bases that the Walkers did not receive sufficient notice of the 6.7 afy limit or because the Director's recommendation for water right no. 61-4029 varied from the claim. Should the Court conclude that this *Motion* is

³ If this Court grants relief under I.R.C.P. 60(a), the State requests that the Court address the application of Rule 60(a) to correct errors included in a *Director's Report* and why this case would be distinguishable from the Court's decision in *Memorandum Decision and Order on Permissive Review*, SRBA Subcase No. 34-2459 *et al.* (March 7, 2012).

properly before the Court and that relief is warranted under I.R.C.P. 60(a) or 60(b) on other bases, the State respectfully requests that this Court issue a written decision setting forth the specific bases that warrant relief and the facts the Court considered in rendering its decision.

Respectfully submitted this 13th day of December, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2018, I caused to be served a true and correct copy of the foregoing document by the methods indicated:

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