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DEPARTMENT OF
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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 Nos.: 63-303, 63-3613, 63-3614,
and 63-3618**

**IRRIGATION ENTITIES' JOINT REPLY IN
SUPPORT OF MOTION TO ALTER OR
AMEND PARTIAL DECREES**

COME NOW, the Ditch Companies,¹ by and through undersigned counsel of record, and
the Boise Project Board of Control, by and through undersigned counsel of record (hereinafter

¹ The "Ditch Companies" is comprised of Ballentyne Ditch Company, Boise Valley Irrigation Ditch Company, Canyon County Water Company, Eureka Water Company, Farmers' Co-operative Ditch Company, Middleton Mill Ditch Company, Middleton Irrigation Association, Inc., Nampa & Meridian Irrigation District, New Dry Creek Ditch Company, Pioneer Ditch Company, Pioneer Irrigation District, Settlers Irrigation District, South Boise Water Company, and Thurman Mill Ditch Company.

collectively referred to as "Irrigation Entities"), and submit this *Reply in Support of Motion to Alter or Amend Partial Decrees* (Feb. 19, 2019), pursuant to *SRBA Administrative Order 1, Rules of Procedure* ("AO1"), Section 6(f), to the *Responses* filed by the City of Boise ("Boise"), City of Pocatello ("Pocatello") and the Coalition of Cities ("Coalition") and to the *Motion to Participate* filed by the City of Mountain Home ("Mountain Home").

I. THE MOTION FALLS UNDER MOTION PRACTICE UNDER SRBA ADMINISTRATIVE ORDER 1, RULES OF PROCEDURE AND THERE IS NO OPPOSITION

On February 19, 2019, the State of Idaho filed a *Motion to Alter or Amend Partial Decrees for Water Right Nos. 63-303, 63-3613, 63-3614 and 63-3618* (hereinafter "Motion" or "Motion to Alter or Amend"). The hearing on said Motion was initially set for May 21, 2019, but the Court subsequently vacated and reset the hearing for June 18, 2019, in which notice the Court reiterated the applicable motion practice by stating "responses to the Motion and replies to the responses shall be filed in accordance with the deadlines set forth in *SRBA Administrative Order 1, Rules of Procedure*, section 6.f." *Notice Vacating and Resetting Hearing* (Apr. 5, 2019).

As referenced by the Court, AO1 includes rules of procedure for "Motion practice under the Docket Sheet Procedure" for motions such as the pending Motion. *See* AO1 § 6(f). Section 6(f)(4)(b) of AO1 provides the procedure for "Responses to Motions" supporting or opposing a motion. Section 6(f)(4)(c) of AO1 then provides for the procedure for "Replies to Responses." There is no provision in AO1 for motions to participate or intervene under Section 6(f) but rather the motion practice-based rule specifically requires a response taking an affirmative position (*i.e.*, substantively supporting or opposing the motion), and then provides for replies to such responses. This is consistent with motion practice under the Idaho Rules of Civil

Procedure (“I.R.C.P.”), requiring that grounds for opposition or objection to a motion must be stated or the objection is waived. *See Nanney v. Linella, Inc.*, 130 Idaho 447, 943 P.2d 67 (Ct.App. 1997). In *Nanney v. Linnella*, the court, relying in part on motion practice under I.R.C.P. 7(b)(1), struck a motion to disallow attorney fees because the motion provided no basis or grounds for the objection and thus the court held that no such grounds were raised or preserved. *Id.* at 451-52, 943 P. at 71-72. Just as a movant is required to “state with particularity” its request for relief and the grounds therefor, those responding to such a motion must do the same.

In this matter, Boise filed a *Response* on March 13, 2019 and Pocatello and Coalition filed *Responses* on April 15, 2019. None of the responses oppose the Motion or take the position that the Motion does not meet the standards of I.R.C.P. 60(b)(6). Indeed, Boise specifically states the “City does not contest the Motion to Alter or Amend meets the standards of I.R.C.P. 60(b)(6)”; it simply states that its interest in the matter is to ensure the status quo is maintained. Boise Response, p. 3.

Pocatello and the Coalition are even more ambivalent towards the Motion as neither states a position regarding the standards of I.R.C.P. 60(b)(6), or the substantive terms and conditions sought to be amended by the Motion. *See Pocatello’s Response*, p. 2 (“Pocatello does not take a position on the substantive terms and conditions that are offered to amend the captioned sub-cases; its interest is solely in the legal or procedural arguments that may be advanced either in support of, or in opposition to, this Motion to Alter or Amend, and specifically the application of Rule 60”); and Coalition Response, pp. 2-3 (“The Coalition of 11 Cities does not contest whether the State’s Motion to Alter or Amend meets the standards of I.R.C.P. 60(b)(6). However, it is important to the Coalition of 11 Cities to participate in any legal issues

relating to the procedure of reopening previously decreed rights and adding quantity limitations or other provisions to effectuate the settlement of stakeholders”). At most, Pocatello and Coalition simply assert a desire to participate in this matter because of the legal issues and precedent it may set for unrelated subcases in which they are interested elsewhere.

It seems the various cities (with the exception of Mountain Home) would like to treat the Motion similar to one seeking to designate a Basin-Wide Issue, where mere notice of participation is sufficient under AO1 § 16, and where substantive positions on the matter are fleshed out later under formal briefing schedule. But that is not the procedure or posture of the pending Motion here, brought under AO1 § 6 and I.R.C.P. 60(b)(6). The time for taking and supporting a substantive position is now—there is no subsequent briefing schedule to come. Monitoring a proceeding from the sidelines is not an affirmative position “stated with particularity” supported by any grounds therefor. Consequently, the Motion is unopposed and should be treated as much insofar as the various cities (except Mountain Home) are concerned.

As for Mountain Home, it did not timely file a response as required under AO1 § 6 but rather filed a separate, and procedurally different *Motion to Participate* under AO1 § 10(k) and I.R.C.P. 24. Mountain Home’s *Motion to Participate* contends that it should be allowed participate or that it should be granted intervention but it makes no argument that the *pending* Motion does not meet the standards of I.R.C.P. 60(b)(6) or that it should not be granted for the reasons set forth in the Motion. This leaves the Irrigation Entities in the position of filing this Reply in support of the Motion even though there has been no actual response in opposition. Because Mountain Home did not timely file a response, there is no opposition to the Motion and the Court should grant the Motion for the reasons stated within it.

II. MOUNTAIN HOME'S "CONTENTIONS" ARE UNFOUNDED

Mountain Home's *Motion to Participate* is not a response to the pending *Motion to Alter or Amend* but rather is a stand-alone motion to participate/intervene in the matter. As discussed, *supra*, this is not a proper pleading or response under motion practice or under AO1 § 6(f). Notwithstanding the improper motion and filing by Mountain Home, it submits two exhibits attached to its *Motion to Participate* suggesting that the Court should dismiss the pending Motion.² In other words, the *Motion to Participate* does not raise contentions in opposition to the Motion, but the attached exhibits advance arguments that the Motion should be dismissed, so the Irrigation Entities in an abundance of caution reply here to Mountain Home's exhibits.

Mountain Home contends that the Court cannot grant the Motion because:

Once Decreed, the only way for the SRBA Court to address a decreed right under I.R.C.P. (sic) 60(a) or 60(b), or on transfer under Idaho Code Section 42-222. AO1.14.d; *see also*, I.C. [section] 42-1420 (sic). There are no motions before the Court under these Sections.

Mountain Home's Motion to Participate (Apr. 15, 2019), Ex. 2, p. 6. Either Mountain Home did not read the Motion, or it attempts to suggest the Motion should be denied because the caption of the Motion does not reference I.R.C.P. 60(b)(6). Either way, it is absolutely clear that the Motion is being filed pursuant to I.R.C.P. 60(b)(6), which is authorized and allowed pursuant to AO1.

Boise, Pocatello and the Coalition all were able to discern that the Motion was filed pursuant to I.R.C.P. 60(b)(6) as each referenced the Rule, but took no position regarding application of the rule. One must look no further than the Motion itself to determine the basis of

² Mountain Home's *Motion to Participate* also seeks to participate in the subcases which are part of the pending *Motions to Decree Water Right Nos. 63-33734A and 63-33734B* and Mountain Home's exhibits also suggest dismissal of the *Motions to Decree*. The Irrigation Entities filed concurrently herewith a response in opposition to Mountain Home's *Motion to Participate* in the *Motions to Decree Water Right Nos. 63-33734A and 63-33734B*.

the Motion is clearly being brought pursuant to I.R.C.P. 60(b)(6). *See* Motion, p. 1 (“The State of Idaho (“State”), by and through its attorneys of record, ***pursuant to Administrative Order 1 and Rule 60(b)(6) of the Idaho Rules of Civil Procedure . . .***”); Motion, p. 2 (“***Rule 60(b)(6) of the Idaho Rules of Civil Procedure authorizes*** this Court to alter or amend a partial decree for ‘***any other reason that justifies relief.***’ I.R.C.P. 60(b)(6). This provision is applicable to this motion because”); Motion, p. 5 (“the limited ***relief requested by this motion is authorized under Rule 60(b)(6).***”) (Emphasis added).

Finally, and to the extent any of the respondents to the pending Motion attempt to suggest otherwise, both this Court and the Idaho Supreme Court identify Rule 60 as an appropriate mechanism for re-opening existing water right decrees for purposes inserting additional administrative remarks. *See, e.g., Memorandum Decision and Order on Challenges; Final Order Disallowing Water Right Claims* (Subcase Nos. 65-23531 and 65-23532) (Oct. 7, 2016), p. 5, n. 3; and *United States v. Black Canyon Irr. Dist.*, 163 Idaho 54, 64, 408 P.3d 52, 62 (2017) (“Absent the United States undertaking appropriate proceedings to set aside a final judgment under Idaho Rule of Civil Procedure 60(b), we emphasize that the decrees are conclusive and final, which comports our general reluctance to allow already-decreed water rights to be relitigated.”). Whether to grant relief under Rule 60(b) is committed to the sound discretion of the Court. *See, e.g., Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

Despite the fact that Mountain Home did not properly file a response as required by the rules of procedure, its only argument in opposition to the pending Motion, as suggested in the Exhibits to its *Motion to Participate*, is based upon an incorrect assertion that the Motion is not

being brought under I.R.C.P. 60(b)(6).³ There simply is no basis for this assertion as the Motion is clearly being brought under Rule 60(b)(6) and this Court has the authority to grant the relief requested by the Motion. Once again, the substantive merits of the Motion are unopposed and the Court can and should grant the relief sought by the Motion.

III. THIS COURT SHOULD GRANT THE MOTION TO ALTER OR AMEND

Under I.R.C.P. 60(b)(6) this Court has the discretion to grant a motion to alter or amend a prior decree. The appropriate standard under this rule is when there is a showing of unique and compelling circumstances justifying the requested relief. *Dawson v Cheyovich Family Trust*, 149 Idaho 375, 380, 234 P.3d 699, 704 (2010); *Miller v Haller*, 129 Idaho 345, 349, 924 P.2d 611(1996).

The “unique and compelling circumstances” here are undeniable. The parties to the Stipulation and Motion have been litigating the issue of how to resolve the rights to account for the physical filling of the Boise River Reservoirs during flood control operations for years in multiple forums. It is almost astonishing that the parties were able to reach an agreement of this seemingly intractable dispute. As the Court is aware from the contested case proceedings, even the Boise River Watermasters (present and former) and the Director were on opposite sides of many of these issues. The result of the settlement agreement and Stipulation is a Motion to Alter or Amend what have been called the “base rights” for the reservoirs, water right nos.: 63-303, 63-3613, 63-3614, and 63-3618.

³ Mountain Home does cite to *In Re Rangen* for the proposition that placing additional administrative provisions into a decree constitutes a collateral attack but this argument is nothing more than an extension of the argument that the pending Motion is not brought under I.R.C.P. 60(b)(6). SRBA Administrative Rules clearly allow for motions under Rule 60(a) and 60(b), it is clear that the pending Motion has been brought pursuant to Rule 60(b)(6), and Mountain Home failed to address the merits of the Motion.

The amendment to these base rights is not a wholesale re-decreeing of a previously adjudicated right. Rather it is narrow and focused on two related issues. First, the Motion seeks judicial recognition that the base rights and the new right nos. 63-33734A and 63-33734B will be administered with combined use remarks, so that the water actually physically stored in the reservoirs is limited to reservoir capacity. This change is beneficial to all third parties who seek to appropriate additional, future rights from the Boise River system. The second is also a beneficial change that recognizes the practice of reset of the accounting shall continue consistent with the manner in which the Boise River accounting system works. Of course, this Court has already affirmed the Director's decision to confirm IDWR's accounting program.

The unique circumstance here is that the rights which are to be combined with the rights to be altered have not yet been finally decreed in the SRBA. The compelling reason is to further the resolution of this highly-charged and seemingly intractable dispute and to carry out the intent of the September 1, 2016 *Memorandum Decision and Order* of this Court in the appeal from the contested case proceeding to recognize beneficial use water rights for the fill of reservoirs to be used in conjunction with the base rights consistent with the Director's accounting program.

This case is nothing like *Eden v. State*, 164 Idaho 241, 429 P.3d 129 (2018), where this Court denied a 60(b)(6) motion when the State opposed the motion; and the Supreme Court affirmed. There the "Edens received the same notice as all other potential claimants in the SRBA. Despite having received first and second round notice, which instructed the Edens how to properly file a claim, they failed to follow the statutorily mandated process." *Id.*, 164 Idaho at 253, 429 P.3d at 140. The present Motion does not involve parties who sat on their rights for years while the adjudication went on around them. These parties have been actively involved in multiple forums over many years, back to the Basin-Wide Issue 17 proceedings, trying to resolve

these reservoir fill issues. The rights at issue are closely related to the rights that are now before this Court for a final decree. No such circumstance existed in *Eden*. Unlike in *Eden*, the State and Department *support* the 60(b)(6) motion. To recognize the hard work of the parties and to encourage settlement, this Court should grant the *Motion to Alter or Amend* that all parties to the Stipulation, including the State and the Department, agree should be granted.

DATED this 30th day of April, 2019.

SAWTOOTH LAW OFFICES, PLLC

By 
S. Bryce Farris
Attorneys for the Ditch Companies

DATED this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of April, 2019, I caused a true and correct copy of the foregoing **IRRIGATION ENTITIES' REPLY IN SUPPORT OF MOTION TO ALTER OR AMEND PARTIAL DECREES** to be served by the method indicated below, and addressed to the following:

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