



supported by the *Memorandum* below, and the contemporaneously filed *Affidavit of Dana L. Hofstetter*, *Affidavit of Gary Eden*, *Affidavit of Glenna Eden*, and *Expedited Motion to File Late Claim* and, also, other matters of record.<sup>1</sup>

## **MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE**

### **I. INTRODUCTION**

Only specifically with regard to its effect on Water Right No. 37-864, the Edens seek to set aside this Court's SRBA *Final Unified Decree* (August 25, 2014) and *Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, and Disallowal of Unclaimed Water Rights*, SRBA Subcase No. 00-92099 (February 13, 2013) (hereinafter collectively the "*Judgment*"). The Edens request that the *Judgment* be set aside in accordance with Idaho Rule of Civil Procedure 60(b) due to "unique and compelling" reasons that justify relief from the operation of the *Judgment* including that the Edens attempted to make a claim on Water Right No. 37-864, but the Idaho Department of Water Resources ("IDWR") failed to direct correspondence relating to this claim to the Edens' correct address. The Edens also pray that this Court, sitting in equity, relieve them from the *Judgment* by setting aside its disallowance of 37-864, allowing the Edens to pursue their late claim. Claimants also file this *Memorandum* in

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<sup>1</sup> The Edens are also contemporaneously filing a *Standard Form 4: Expedited Motion to File Late Notice of Claim* and lodging the *Notice of Claim* for the above-captioned water right. The Edens hereby incorporate by reference the *Expedited Motion to File Late Notice of Claim* and the *Notice of Claim*. Additionally, all filings in this subcase are being made on an expedited basis.

support of the contemporaneously submitted *Expedited Motion to File Late Claim* for the same water right.

## II. FACTUAL BACKGROUND

The Edens hold Water Right No. 37-864 from the Big Wood River and have used it for irrigation of their property in the SW1/4SW1/4 of Section 9, Township 05S, Range 16E, Boise Meridian, Lincoln County, Idaho. *See Standard Form 4: Expedited Motion to File Late Notice of Claim, Exhibits; Affidavit of Gary Eden.* Typically, water right no. 37-864 is delivered during the first part of the irrigation season. Then, supplemental storage water from American Falls Reservoir District #2 is delivered. *Affidavit of Dana L. Hofstetter.* Other than Water Right No. 37-864 and the storage water from American Falls Reservoir District #2, the Edens hold no other water rights with which to irrigate the subject property. *Affidavit of Gary Eden.*

On or about April 28, 2005, IDWR sent the Edens a letter stating that IDWR received notification that the Edens' address had changed from a Gooding address to a Shoshone address and asked the Edens to confirm the address change by signing and returning the letter. *Affidavit of Dana L. Hofstetter.* In early May 2005, the letter was signed and returned to IDWR by Glenna Eden, confirming the new Shoshone address. *Id.*

Around this same time, in early May 2005, the Edens received the *SRBA Second Round Service Notice*, likely due to their ownership of the place of use associated with unclaimed Water Right No. 37-864. *Id.* Along with returning the signed April 28, 2005, address change letter to IDWR, and apparently in response to the recently received *Second Round Service Notice*, the Edens also enclosed documentation attempting to claim Water Right No. 37-864 in the SRBA.

*Id.* IDWR then sent a response letter, dated May 19, 2005, to the Edens confirming receipt of the signed address change letter along with the enclosures indicating “you would like to file a claim on 37-864.” *Id.* While the May 19, 2005, IDWR letter enclosed a Notice of Claim form to use for Water Right No. 37-864, it apparently was sent to the Edens’ old Gooding address, rather than the correct Shoshone address that the Edens had just confirmed. *Id.* The Edens never received this incorrectly addressed letter from IDWR. As, if they had, they would have responded accordingly. *Affidavit of Gary Eden; Affidavit of Glenna Eden.* Having received no response from IDWR, the Edens believed they had adequately claimed 37-864 in the SRBA. *Id.*

The issue of the deliverability of 37-864 and the associated American Falls Reservoir District #2 storage water was raised by the Big Wood Canal Company during one of the 2016 irrigation season Board of Directors meetings. *Affidavit of Gary Eden.* Shortly thereafter, Mr. Eden contacted this law firm seeking assistance with this matter. *Id.*

### **III. LEGAL STANDARDS FOR SETTING ASIDE A PARTIAL DECREE**

A motion to set aside a partial decree in the SRBA “is treated the same as a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P. 60(b). A.O.1 § 14d (“Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)”).” *Order Denying Motion to File Late Notice of Claim, SRBA Subcase No. 21-13176, p. 4 (January 9, 2014).* Rule 60(b) permits a court to relieve a party from a final judgment, order, or proceeding for the following reasons:

- 1) mistake, inadvertence, surprise, or excusable neglect;
- 2) newly discovered evidence 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; and
- 6) any other reason justifying relief.

I.R.C.P. 60(b).

The decision to grant or deny a Rule 60(b) motion for relief from a final judgment rests in the sound discretion of the trial court. *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979). Where the trial court “applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court will be deemed to have acted within its discretion.” *Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010). In cases dealing with water rights, public policy weighs against forfeiture: “The courts abhor forfeiture and where no public interest is favored thereby, equity leans against declaring a forfeiture. *Hurst v. Idaho Iowa Lateral & Res. Co.*, 42 Idaho 436, 246 P. 23 (1926) and *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938).” *Special Master Report*, SRBA Subcase No. 45-167A, p. 8 (March 20, 2007).

The Court does not abuse its discretion when it grants relief under Rule 60(b) to a movant who shows “unique and compelling circumstances justifying relief[.]” *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). Determining whether to set aside a default judgment requires that the Court “apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of genuine doubt.” *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 733, 662 P.2d 1171, 1177 (Ct. App. 1983). Thus, the Court must weigh

each case in light of its unique facts. *Id.* at 732, 662 P.2d at 1176 (citing *Orange Transportation Co., Inc. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951)).

In addition to stating a reason justifying relief from operation of the judgment, a party must also show that he or she has acted in good faith and exercised due diligence in the protection of his or her rights, such as an ordinarily prudent person would exercise under similar conditions. *Council Improvement Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909) and *Kovachy v. DeLeusomme*, 122 Idaho 973, 842 P.2d 309 (Ct. App. 1992).

Not only must a movant satisfy one of the criteria set forth in I.R.C.P. 60(b), the movant must also allege facts, which if established, would constitute a meritorious defense. The meritorious defense standard requires that a movant:

- 1) allege facts;
- 2) which if established;
- 3) would constitute a defense to the action; and
- 4) the facts supporting the defense must be detailed.

*See McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979); *Thomas v. Stevens*, 78 Idaho 266, 300 P.2d 811 (1956). The detailed factual requirement is more than the mere general notice requirement that would ordinarily be sufficient if pled prior to default. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981).

The standards for setting aside a default judgment take into account the preference for having a case decided on its merits. *Order On Permissive Review Granting Motion To Set Aside Partial Decrees and Order of Recommitment to Special Master*, SRBA Subcase No. 79-02063 *et al.*, p. 6 (June 10, 2010). In making the determination, the Court must take into consideration that judgments by default are not favored and that the general rule in doubtful cases is to grant relief

from the default in order to reach a judgment on the merits and that procedural rules other than those which are jurisdictional should be applied to promote disposition on the merits. *Reeves* at 272, 629 P.2d at 668. This is a factual determination and is discretionary with the Court.

*Johnson* at 732, 662 P.2d at 1176.

Rule 60(b) also requires that a motion to set aside be made within a reasonable time and, for Rule 60(b)(1), (2) and (3), not more than six months after the judgment, order, or decree. Because the *Judgment* was entered more than 6 months ago, only the fourth, fifth and sixth justifications are applicable. In this case, and as will be explained below, the Edens believe I.R.C.P. 60(b)(4) and (6) provide them avenues to obtain relief.

**A. The *Judgment is Void as to its Disallowance of Water Right No. 37-864* under I.R.C.P. 60(b)(4)**

In order for a judgment to be void, there must generally be some jurisdictional defect in the court's authority to enter the judgment, either because the court lacks personal jurisdiction or because it lacks jurisdiction over the subject matter of the suit. *Puphal v. Puphal*, 105 Idaho 302, 669 P.2d 191 (1983). A judgment may also be void for insufficient procedural due process, whether for lack of notice or denial of opportunity to be heard. *McGrew v. McGrew*, 139 Idaho 551, 558, 82 P.3d 833, 840 (2003). "The private interest at stake is great. The right to water is a permanent concern to farmers, ranchers and other users. The importance of the government's interest is great, as the steward of a finite resource that is the lifeblood for much of the state's economy and quality of life." *LU Ranching Co. v. United States*, 138 Idaho 606, 608 (2003) (discussing notice and due process in the SRBA).

Here, the Edens, through no fault of their own, never received IDWR's May 19, 2005, letter enclosing the Notice of Claim form. Although, in writing, the Edens recently had confirmed their correct, current address in Shoshone, IDWR inadvertently continued to use the Edens' incorrect, former address in Gooding for the May 19, 2005, letter. *Id.* Because the Edens never received this letter, they did not receive or file IDWR's enclosed Notice of Claim form for Water Right No. 37-864. The record reflects that the Edens attempted to file a claim with IDWR for 37-864 along with their early May 2005, address change correspondence to IDWR. Without a response, the Edens believed IDWR had accepted their submission and that it was adequate. *Affidavit of Gary Eden; Affidavit of Glenna Eden.* This belief was reasonable in view of their receipt of the *Second Round Service Notice*, stating that, "Assistance in filing Notices of Claims filed in this adjudication may be obtained at all offices of IDWR" and that "Notices of Claims must be filed on forms prepared by IDWR or a reasonable facsimile." *Affidavit of Dana Hofstetter, Exhibit 2, at Exhibit B, p. 3 (emphasis added).* Having received *Second Round Service* and then complying by contacting IDWR to claim 37-864, the Edens effectively were denied their due process notice and hearing opportunities with respect to 37-864 when IDWR used the incorrect address for the May 19, 2005 response letter. Without receiving a response from IDWR, the Edens believed IDWR had accepted their submission as an SRBA claim for 37-864. *Affidavit of Gary Eden; Affidavit of Glenna Eden.*

To obtain relief under I.R.C.P. 60(b)(4), the motion for relief must be brought within a reasonable time. *McGrew*, 139 Idaho at 559, 82 P.3d at 841. "Where judgment is entered without the party's knowledge, what constitutes reasonable time is judged from the time that the party learned of the judgment." *Id.* Shortly after the 2016 Board of Directors meeting of the Big Wood

Canal Company at which the topic came up, the Edens initiated these steps to correct the matter. *Affidavit of Gary Eden*. The Edens have expended considerable time and money to prepare this matter to be heard in a short period of time. Rather than rely on standard docket sheet procedure, they elected to have this matter heard on an expedited basis, by providing service to the expedited service list. *See Expedited Motion to File Late Claim*. Additionally, there should be no prejudice to other parties as a result of granting the requested relief. This water right, decreed in 1918 with an 1896 priority, has been in existence for quite awhile. The IDWR moratorium on new water rights in the Big Wood River Drainage also would effectively preclude any affected relatively recent intervening new water rights, thereby avoiding prejudice to other parties. In any event, under equitable principles, other parties should not benefit from IDWR's use of an incorrect address and the resulting disallowal of 37-864.

**B. Unique and Compelling Circumstances Support the Edens' Request for Relief under IRCP 60(b)(6)**

Under Rule 60(b)(6), a court may relieve a party from a final judgment, order, or proceeding for "any . . . reason justifying relief." I.R.C.P. 60(b)(6). Although the court is vested with broad discretion in determining whether to grant or deny a Rule 60(b)(6) motion, its discretion is limited and the motion may be granted only on a showing of "unique and compelling circumstances" justifying relief. *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). Whether a Rule 60(b) motion is supported by unique and compelling circumstances is a determination that must be made on a case-by-case basis. *Order Denying Motion to File Late Notice of Claim*, SRBA Subcase No. 21-13176, p. 3 (January 9, 2014). A review of the

facts in this case reveals circumstances particular to the Edens that are both unique and compelling.

Based on the above, the Edens' present unique and compelling circumstances warrant relief from operation of the *Judgment* for the limited scope as to its effect on Water Right No. 37-864. *See Order Setting Aside Disallowal of Unclaimed Water Rights; Order Granting Motions to File Late Notice of Claim; Order for Expedited Late Claim Director's Report and Setting Forth Procedures and Deadlines for Expedited Process*, SRBA Subcase Nos. 65-2324 *et al.* (May 21, 2014); *Order Setting Aside Disallowal of Unclaimed Water Rights; Order Granting Motions to File Late Notice of Claim; Order for Expedited Late Claim Director's Report and Setting Forth Procedures and Deadlines for Expedited Process*, SRBA Subcase Nos. 74-361 *et al.* (May 21, 2014).

**C. Meritorious Defense**

The Edens meet the meritorious defense standard associated with I.R.C.P. 60(b) because their water right was previously decreed, their water use has historically been administered and granting this Motion will not result in prejudice to other water users.

Water Right No. 37-864 has a priority date of September 28, 1896 and was decreed in 1918. The Edens and their predecessors-in-interest have diverted and used water under water right no. 37-864 when this water has been historically available. The late claim filed by the Edens contemporaneously in this subcase claims the water right as the right was decreed in 1918. Because the Edens are claiming their water use as it was decreed in 1918, there will be no prejudice to other water users who are accustomed to the Edens receiving water - the water has been historically administered without objection or protest. Little investigation will be required

of IDWR because the Edens have claimed the right as it was decreed in 1918 and subsequently delivered.

While there will be no prejudice to other water users, the prejudice to the Edens will be profound and devastating. The Edens will be denied water that has historically irrigated the land, and could be left with no ability to irrigate their land, greatly reducing the land's value and making them unable to farm or lease their property.

By setting aside the judgment only as to its effect on Water Right No. 37-864, the Edens will be provided with the just result that other water right holders and their neighbors have received from the SRBA: namely, decrees for valid water rights that are beneficially used. Granting the Edens the ability to claim this water right is in keeping with State policy to provide claimants a full and fair opportunity to receive notice, be heard, use and appropriate water for beneficial purposes, and provides a fair and equitable result to all water users on the impacted water sources by maintaining the *status quo*.

#### **IV. EQUITABLE RELIEF**

If neither I.R.C.P. 60(b)(4) or (6) provide relief, the Edens pray upon this Court, sitting in equity, to relieve them from the *Judgment* as to the disallowance of their water right. Idaho courts are allowed to provide equitable relief if the conduct has been "inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy at issue." *Sword v. Sweet*, 140 Idaho 242, 251, 92 P.3d 492, 501 (2004). "[H]e who comes into equity must come with clean hands." *Gilbert v. Nampa School Dist. No. 131*, 104 Idaho 137, 145, 657 P.2d 1, 9 (1983).

As stated above, the Edens were unaware that their water right was in jeopardy. If the Edens had known that their water right was not secure, they would have fixed the problem. The

Edens' water right will be effectively forfeited, and, possibly, the associated storage right, if the *Judgment* is not set aside. "The courts abhor forfeiture and where no public policy is favored thereby, equity leans against declaring a forfeiture." *Special Master Report*, SRBA Subcase No. 45-167A, p. 8 (March 20, 2007), citing *Hurst v. Idaho Iowa Lateral & Res. Co.*, 42 Idaho 436, 246 P. 23 (1926) and *Idaho Farms Co. v. North Side Canal Co.*, 24 F. Supp. 189 (D. Idaho 1938). Given that Idaho courts do not favor forfeiture of water rights and that no public interest is served by forfeiture of the Edens' water right, equity compels against declaring a forfeiture in these unique circumstances. In light of the facts, the Edens come with clean hands and pray upon this Court for sympathy.

## V. CONCLUSION

By not receiving the May 19, 2005, letter from IDWR and their unique and compelling circumstances, the Edens meet the requirements of I.R.C.P. 60(b)(4) and (6). The Edens have presented a meritorious defense of a decreed water right and by bringing this action when they did, have pursued their cause of action within a reasonable amount of time. The Edens also come in equity, with clean hands, seeking just relief from forfeiture of their water rights. As such, the Edens respectfully request the Court set aside its *Judgment* only as to water right no. 37-864. The Edens respectfully request they be allowed to pursue their late claim, as it was decreed in 1918, and obtain a valid SRBA partial decree that reflects historic water use from the Big Wood River. Because the Edens are pursuing their water right in Basin 37 as it was decreed in 1918, and has been used historically, no prejudice should result to any other water users.

DATED THIS 29<sup>th</sup> day of September, 2016.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By   
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29<sup>th</sup> day of September, 2016, I caused to be served a true copy of the foregoing MOTION TO SET ASIDE AND MEMORANDUM IN SUPPORT by U.S. Mail postage pre-paid to:

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