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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE SRBA, CASE NO. 39576 SUBCASE NO.: 37-00864	Supreme Court Case No: 44716-2016
GARY AND GLENNA EDEN, Appellants, v. STATE OF IDAHO, Respondent.	

APPELLANTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County
Honorable Eric J. Wildman, Snake River Basin Adjudication, Presiding

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I.
STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a decision of the Snake River Basin Adjudication ("SRBA") District Court denying the Edens' I.R.C.P. 60(b) motion to vacate a default judgment disallowing their Water Right No. 37-864 and their motion for leave to file a late notice of claim.

B. Course of Proceedings Below.

On February 13, 2013, the SRBA Court entered a Partial Decree of disallowal in default for Water Right No. 37-864 based on the lack of a claim.[1] R Vol. I, pp. 113 and 150. On August 26, 2014, the SRBA Court incorporated this Partial Decree of disallowal by reference in the SRBA Final Unified Decree. R Vol. I, pp. 943 and 956. On September 30, 2016, pursuant to I.R.C.P. 60(b)(4) and 60(b)(6), the Edens filed with the SRBA Court a motion to set aside the Partial Decree of disallowal for Water Right No. 37-864. R Vol. I, pp. 259-274. Also on September 30, 2016, the Edens filed a motion to file late notice of claim for Water Right No. 37-864 with the SRBA Court. R Vol. I, pp. 245-258.

On November 8, 2016, after hearing, the SRBA District Court entered its Order Denying Motion to Set Aside; Order Denying Motion to File Late Claim with respect to the Edens' Motions. R Vol. I, pp. 375-384. This Appeal followed.

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[1] "Partial Decree" refers to an individual water right decree in the SRBA.

C. Statement of Facts.[2]

Gary and Glenna Eden purchased the subject property and the appurtenant water rights in 1992. R Vol. I, pp. 230-237, 256-258. Two water rights were appurtenant to an approximately 40 acre portion of this property, Water Right No. 37-864 which had been decreed in the 1918 *Gomes v. Devaney* decree, and also a supplemental storage right from American Falls Reservoir District No. 2. R Vol. I, pp. 230-237, 254-255. As decreed in 1918, Water Right No. 37-864 was a right from the Big Wood River for the irrigation of 40 acres with a priority date of September 28, 1896. R Vol. I, pp. 254-255. Typically, Water Right No. 37-864 is no longer deliverable after July, at which time the supplemental storage water from the American Falls Reservoir District No. 2 is delivered to the 40 acre parcel. R Vol. I, p. 281.

1. The Edens' Attempt to Claim 37-864 Thwarted by IDWR's Incorrectly Addressed Response

On or about April 28, 2005, the Idaho Department of Water Resources (IDWR) sent the Edens a letter referencing "SRBA Notices of Claim to a Water Right #37-365, 37-366 and 37-367B and Decrees #37-10322 and 37-10953," requesting confirmation of their correct mailing address. R Vol. I, p. 214. By referencing these SRBA water right claims and decrees in its April 28, 2005, letter to the Edens, IDWR recognized these water rights belonged to the Edens and, in fact, that Water Right No. 37-10953 was among the rights that already had been partially decreed in the SRBA to the Edens. R Vol. I, p. 709. Shortly thereafter, in early May 2005, the Edens signed and returned the April 28, 2005, letter to IDWR, as requested, confirming

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[2] A Timeline of Key Dates is included in the Addenda to this Brief.

their new Shoshone address. R Vol. I, p. 214. This letter confirming the Edens' new address in Shoshone was received at IDWR on, or before, May 17, 2005, because the Edens' signed and returned copy in IDWR records bears the notation "records previously modified," along with what appears to be the IDWR agent's initials and the date "5-17-05." R Vol. I, p. 214. (emphasis in original).

Shortly thereafter, the IDWR agent prepared a response letter, dated May 19, 2005, to the Edens with the following subject line: "Re: Snake River Basin Adjudication (SRBA) Notice of Claim to a Water Right #37-864." R Vol. I, p. 229. In this letter, the IDWR agent thanked the Edens for "signing and returning my address change letter so promptly" and, significantly for purposes of this Appeal, also confirmed receipt of the Edens' enclosures attempting to claim Water Right No. 37-864 with the statement that, "I gathered from the enclosures you sent me that you would like to file a claim on 37-864." R Vol. I, p. 229. The May 19, 2005, IDWR letter also referred to an enclosed claim form and instructions for the Edens to use for claiming Water Right No. 37-864 and the applicable filing fees. However, although the Edens had just confirmed their correct address in Shoshone, the May 19, 2005, IDWR response letter was addressed to the Edens at an incorrect address in Gooding. R Vol. I, p. 229. The Edens never received this incorrectly addressed letter from IDWR or the enclosed claim form and instructions. R Vol. I, pp. 231, 238-239. If they had received the May 19, 2005, letter, they would have followed its instructions and responded accordingly. R Vol. I, pp. 231, 238-239. The Edens, receiving no response from IDWR to the claim they submitted for 37-864, rightly considered the matter adequately taken care of to IDWR's satisfaction. R Vol. I, pp. 231 and 239.

2. Fatally Defective Proof of Second Round Service

Around this same period of time, early May 2005, IDWR claims to have served the Edens with the "Second Round Service Notice" for Water Right No. 37-864, statutorily required for unclaimed water rights in the SRBA under Idaho Code § 42-1408(4). R Vol. I, pp. 924-932. However, the proof of service of this Second Round Service Notice on the Edens for 37-864 that IDWR filed with the SRBA Court on June 1, 2005 - the Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1 ("Second Round Service Affidavit") – is fatally defective with respect to its Exhibits A and B. R Vol. I, pp. 924-932. This Second Round Service Affidavit references an attached Exhibit A, which is supposed to be a copy of the Second Round Service Notice, but it actually has no Exhibit A attached. R Vol. I, p. 925. During the March 28, 2017, hearing before the District Court on objections to the Clerk's record, the absence of this critical Exhibit A from the proof of Second Round Service was acknowledged by the State:

> MS. KNOWLTON: ... I want to make some comments concerning the Affidavit of Danni Smith that was at issue here. We agree with the appellants that the Affidavit of Danni Smith included in the record as Exhibit 9, on pages 903 to 911, appears to be missing Exhibit A. Exhibit A is referred to in the affidavit as a Second Round Service of Commencement Notice for Basin 37 Part 1....
>
> I will represent that I did contact the court clerk about this, and it appears that is what is on the record with this Court. That particular affidavit on the record is missing Exhibit A....

Tr Vol. II, p. 6, LL. 5-18. Also, at the same hearing, District Judge acknowledged that this Exhibit A is missing from the proof of Second Round Service, the Affidavit of Danni Smith, filed with the SRBA Court:

> MS. HOFSTETTER: ... And then also there is the matter of the exhibits to the Affidavit of Danni Smith, and my sense is that that's the way the record appears and so that's what the Court record reflects.
>
> THE COURT: That's correct.
>
> MS. HOFSTETTER: Thank you.

Tr Vol. II, p. 5, LL. 2-7. Additionally, while the Second Round Service Affidavit of Danni Smith refers to a Second Round Service Notice mailing list attached as Exhibit B, there is no attached marked Exhibit B. R Vol. I, pp. 924-932. Thus, the filed Second Round Service Affidavit in the Court's record from 2005 does not provide the contents of the Second Round Service Notice that IDWR purportedly served or even definitively establish who received such Notice, although the filing of proof of Second Round Service, adequate to demonstrate compliance with both the substantive and procedural Second Round Service requirements is statutorily mandated under Idaho Code § 42-1408(5).

The Second Round Service Notice that IDWR now purports should have been attached to the Second Round Service Affidavit, states that "Assistance in filing Notices of Claims filed in this adjudication may be obtained at all offices of IDWR." R Vol. I, p. 221. It also states that SRBA water right claims could be submitted on IDWR forms "or a reasonable facsimile." R Vol. I, p. 221. Although due to the defects in the Second Round Service Affidavit's Exhibits A and B, the SRBA Court record does not establish whether the Edens received this purported Second

Round Service Notice, it appears that their actions, attempting to submit a claim and seeking the assistance of IDWR, were consistent with its terms nevertheless. They submitted a claim for 37-864 to IDWR in sufficient form that the IDWR agent acknowledged in the misaddressed May 19, 2005, letter the Edens never received, "I gathered from the enclosures you sent me that you would like to file a claim on 37-864." R Vol. I, p. 229. However, the Edens never received the misaddressed IDWR response with the follow-up claim instructions. Having just confirmed their mailing address for IDWR, and receiving nothing further from IDWR on the subject, the Edens considered the matter addressed. R Vol. I, pp. 231 and 239.

3. Partial Decree of Disallowal Entered without Notice to the Edens

On October 12, 2012, pursuant to the State's recommendation, the SRBA Court set a deadline of January 31, 2013, for closing claims taking in a number of basins, including Basin 37, where Water Right No. 37-864 was located. R Vol. I, p. 8. This "Deadline Order" found *inter alia* that, "Claimants in each of these basins previously received extensive first round and second-round *Notice of Filing Requirements* in the SRBA. *See* Idaho Code § 42-1408. These notice procedures meet constitutional due process requirements. *LU Ranching Co. v. U.S.*, 138 Idaho 606 (2003). " R Vol. I., pp. 6-7. Apparently, the SRBA Court did not realize at the time that the Second Round Service Affidavit did not effectively establish service of this statutorily (and Constitutionally) required Notice on the Edens or on the other holders of unclaimed water rights in Basin 37, Part 1. The certificate of mailing attached to the Deadline Order indicates it was mailed to a list of major SRBA stakeholders and their representatives, but not to the Edens although they would have been identified as unclaimed water right holders

through the Idaho Code 42-1408 Second Round Service process. R Vol. I, pp. 9-13. While the Deadline Order would have been listed on the monthly SRBA Docket Sheet, the SRBA Court record does not include mailing lists or certificates of service for confirming service of such Docket Sheets and the Edens claim they did not receive any SRBA Docket Sheets. *See* Affidavit of Dana L. Hofstetter Pursuant to Order Denying Motion to Reconsider Order (June 19, 2017). Thus, it is uncontroverted that the Edens did not receive personal service of the Deadline Order or notice that default with respect to Water Right No. 37-864 was imminent.

Then, on February 13, 2013, the SRBA Court issued an Order Closing Claims Taking Basins #01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63 and Disallowal of Unclaimed Water Rights ("Partial Decree of Disallowal"), decreeing 37-864 along with the other unclaimed water rights listed on its Exhibit 1 as disallowed. R Vol. I, pp. 113 and 150. Apparently still unaware of the defect in the Second Round Service Affidavit, the SRBA Court in the Partial Decree of Disallowal, as in the Deadline Order, found that, "Claimants in each of these basins previously received extensive first round and second-round *Notice of Filing Requirements* in the SRBA. *See* Idaho Code § 42-1408. These notice procedures meet constitutional due process requirements. *LU Ranching Co. v. U.S.,* 138 Idaho 606 (2003)." R Vol. I, p. 111. And, again, the attached certificate of mailing for the Partial Decree of Disallowal did not include the Edens or others who IDWR would have identified as holders of the subject unclaimed water rights through the Idaho Code 42-1408(4) process. R Vol. I, pp. 114-118. Further, again, there is nothing in the record indicating that the Edens personally received the Docket Sheet for the month the Partial Decree of Disallowal was issued and the Edens claim they did not personally receive any SRBA

Docket Sheets. *See* Affidavit of Dana L. Hofstetter Pursuant to Order Denying Motion to Reconsider Order (June 19, 2017). Thus, the Edens also did not receive personal service of notice that default had been entered for the failure to claim Water Right No. 37-864.

On August 26, 2014, the SRBA Court entered the Final Unified Decree, which referenced the Partial Decree of Disallowal for Water Right No. 37-864. R Vol. I, pp. 943 and 956. The voluminous Final Unified Decree, according to its terms, was not served on individual parties like the Edens but was ordered to be maintained in IDWR files and recorded at the Counties. R Vol. I., pp. 946-947. And, again, there is nothing in the record to indicate the Edens were served personally with the SRBA Docket Sheet for this month and they were not. *See* Affidavit of Dana L. Hofstetter Pursuant to Order Denying Motion to Reconsider Order (June 19, 2017).

It was not until 2015/2016 that the Edens first received word that Water Right No. 37-864 had been decreed disallowed in default in 2013 for the failure to claim it. R Vol. I, pp. 231 and 356. In 2015, over two years after issuance of the default judgment for 37-864, the Edens received a letter from Water District 37 indicating that Water Right No. 37-864 no longer would be delivered, but reserving for further discussion whether the American Falls Reservoir District No. 2 supplemental water would remain deliverable by the Big Wood Canal Company to the subject 40 acres. R Vol. I, p. 356. The issue of the deliverability of Water Right No. 37-864 and the associated American Falls Reservoir District No. 2 storage came up at one of the Big Wood Canal Company's 2016 irrigation season Board of Directors meetings. R Vol. I, p. 231. Shortly thereafter, a Big Wood Canal Company board member contacted Mr. Eden informing him that the Big Wood Canal Company had been advised by its legal counsel that the storage water also

could not be delivered since Water Right No. 37-864 was no longer valid and advised him to hire a water attorney to address the matter. R Vol. I, p. 231.

The Edens promptly engaged counsel and shortly thereafter, the Edens' Motion to Set Aside Final Unified Decree 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, ("Motion to Set Aside Partial Decree"), was filed with the SRBA Court, along with the Edens' Expedited Motion to File Late Notice of Claim for Water Right No. 37-864 (collectively "Motions"). R Vol. I, pp. 245-258, 259-274. These two Motions sought only the setting aside of the SRBA Partial Decree of Disallowal for Water Right No. 37-864 and its associated incorporation by reference in the Final Unified Decree, and referral of the SRBA Claim for 37-864 to IDWR for processing, leaving the remainder of the SRBA Final Unified Decree and all the other Orders and Partial Decrees of the SRBA Court intact and unaltered in other respects. R Vol. I, p. 270. This was consistent with precedent, including in recent months, for individual SRBA water right Partial Decrees to be periodically opened for correction or amendment, without impacting other aspects of the SRBA Final Unified Decree. *See e.g.,* R Vol. I, pp. 1191, 1204, 1206 and 1212.

Although the Edens' Motions were served on the entire SRBA Court Certificate of Mailing for Expedited Hearings and thereby sent by mail to the major SRBA parties or their representatives, such as the United States Department of Justice, Idaho Power Company, J.R. Simplot Company, Nez Perce Tribe, Shoshone-Bannock Tribes, Idaho Ground Water Appropriators, Northside and Twin Falls Canal Companies, and the Big Wood Canal Company, only the State of Idaho came forward in opposition to the Edens' Motions. R Vol. I, pp. 250 and

271-274. In fact, the water user community, including the Big Wood Canal Company whose Director notified the Edens of the need to address this matter through the SRBA Court, and even the Basin 37 Watermaster, supported the Edens in their efforts to have Water Right No. 37-864 reinstated so that it could continue to be delivered. R Vol. I, pp. 231 and 282.

II.
ISSUES PRESENTED ON APPEAL

A. Whether the District Court improperly ruled that the Partial Decree of Disallowal for 37-864, entered in default, would not be set aside under I.R.C.P. 60(b)(4), when the record does not support the District Court's finding that IDWR served the Edens the Idaho Code 42-1408 required Second Round Service Notice because IDWR's filed Second Round Service Affidavit omits Exhibit A, the Notice itself, and Exhibit B, the mailing list, is not marked?

B. Whether the District Court improperly ruled that the Partial Decree of Disallowal for 37-864, entered in default, would not be set aside under I.R.C.P. 60(b)(4), although the Edens were not personally served with notice of default pursuant to I.R.C.P. 55?

C. Whether the District Court improperly ruled that the Partial Decree of Disallowal for 37-864, entered in default, would not be set aside under I.R.C.P. 60(b)(4), because the statutorily required Second Round Service Notice purportedly sent to the Edens, pursuant to Idaho Code § 42-1408, was defective, under the facts of this case, since the Edens sought the assistance of IDWR in filing the claim for 37-864, and IDWR responded to the Edens at an incorrect address, different from the correct address the Edens had confirmed to IDWR, and the Edens never received that IDWR response?

D. Whether the District Court improperly ruled that the Partial Decree of Disallowal for 37 864, entered in default, would not be set aside under I.R.C.P. 60(b)(6), when there were "unique and compelling circumstances" involving the Edens' confirming in writing their correct mailing address, and IDWR nevertheless then using an incorrect mailing address to provide the Edens information that their SRBA claim for 37-864 had been rejected?

E. Whether the District Court improperly denied the Edens' Motion to File Late Notice of Claim on the basis their Motion to Set Aside the Partial Decree of Disallowal had been denied?

III.
ARGUMENT

A. Standard of Review.

"The Court exercises free review over questions of law and matters of statutory interpretation." *Guzman v. Piercy*, 155 Idaho 928, 934, 318 P.3d 918, 924 (2014). "The question of compliance with the rules of procedure and evidence is one of law.... This Court freely reviews conclusions of law." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997). However, findings of fact will be set aside if "clearly erroneous." *Sun Valley Shamrock Res., Inc. v. Travelers Leasing Corp.*, 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990) "To decide whether findings of fact are clearly erroneous, this Court must determine whether the findings are supported by substantial, competent evidence." *Lovitt v. Robideaux*, 139 Idaho 322, 325, 78 P.3d 389, 392 (2003). "Evidence is substantial if a reasonable trier of fact would accept it and rely on it." *Aspiazu v. Mortimer*, 139 Idaho 548, 550, 82 P.3d 830, 832 (2003).

"[R]elief from a void judgment pursuant to Rule 60(b)(4) is nondiscretionary and is subject to free review on appeal." *Fisher Sys. Leasing, Inc. v. J & J Gunsmithing & Weaponry Design, Inc.*, 135 Idaho 624, 627, 21 P.3d 946, 949 (Ct. App. 2001). "[A] trial court's dismissal of a Rule 60(b)(6) motion for relief" is reviewed "for abuse of discretion." *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009). When reviewing an exercise of discretion on appeal, this Court conducts a multi-tiered inquiry to determine:

> (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer bounds of such discretion and consistently with legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason.

Brinkmeyer v. Brinkmeyer, 135 Idaho 596, 599, 21 P.3d 918, 921 (2001).

Determining whether to set aside a default judgment required that the District 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). In default cases, it is required that the lower 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 making the determination, the deciding court also 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. *Reeves v. Wisenor,* 102 Idaho 271, 272, 629 P.2d 667, 668 (1981); *Nickels v. Durbano*, 118 Idaho 198, 201, 795 P.2d 903, 906 (Ct. App. 1990). 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 particularly 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); *Idaho Farms Co. v. North Side Canal Co.,* 24 F.Supp. 189 (D. Idaho 1938), *decree rev'd on other grounds by North Side Canal Co. v. Idaho Farms Co.*, C.C.A.9 (Idaho), Nov. 22, 1939.

B. Introduction.

Political philosophers, extending from Hobbes to Locke and Rousseau and to more contemporary theorists, have characterized the relationship between government and individual citizens as contractual, in many ways similar to a partnership. In its most fundamental form, this partnership involves government recognizing certain individual rights, offering protection and providing justice in exchange for the citizen supporting the government and observing the government's laws. Ultimately, where the relationship works well, the citizen enjoys life, liberty and the pursuit of happiness, and, as its citizens flourish, government, in turn, is thereby legitimized and respected.

The relationship between individuals and government, particularly State government, is front and center in this case. As detailed further below in this Brief, the Edens attempted to submit an SRBA claim for Water Right No. 37-864; but, it was the government (IDWR) that dropped the ball on the Edens' SRBA claim by using an incorrect mailing address, different from the address IDWR had acknowledged and the Edens has just confirmed, to respond to the Edens.

Then, once the Edens discovered the SRBA Partial Decree of water right disallowal for 37-864, entered in default, the Edens promptly took the appropriate legal steps to address it: an I.R.C.P. 60(b) motion to set aside the judgment and a motion to file late notice of claim. As part of this process, the Edens mailed their Motions to representatives and/or legal counsel for the major SRBA stakeholders, including the United States Department of Justice, Idaho Power Company, J.R. Simplot Company, Nez Perce Tribe, Shoshone-Bannock Tribes, Idaho Ground Water Appropriators, Northside and Twin Falls Canal Companies, and the Big Wood Canal Company; but only one stakeholder - their own State of Idaho - came forward to oppose them.

The relief the Edens seek, the setting aside of a partial decree of disallowal of their water right, is available only in certain circumstances under I.R.C.P. 60(b). But more than one of those grounds are satisfied in this case, including the following three non-discretionary grounds under I.R.C.P. 60(b)(4): (1) The absence in SRBA Court records of sufficient proof of service of the statutorily required Second Round Service Notice; (2) The absence of personal service of notice of default to the Edens, required by I.R.C.P. 55; and (3) The defective instructions in the purported Second Round Service Notice which directs that IDWR assistance in filing claims is available, but because IDWR used an incorrect mailing address to respond to the Edens' attempted claim for 37-864, the Edens never received IDWR assistance. Additionally, since IDWR used an incorrect mailing address to respond to the Edens' claim, different from the address the Edens had just recently confirmed with IDWR, there also are "unique and compelling" circumstances warranting relief under I.R.C.P. 60(b)(6).

There are no material contested facts here. The State acknowledges that: (1) In May 2005, the Edens' attempted to claim Water Right No. 37-864 in the SRBA with IDWR; (2) Simultaneously, in May 2005, the Edens confirmed their correct new mailing address with IDWR and, then, nevertheless, IDWR used an incorrect mailing address to correspond with the Edens about their SRBA claim, resulting in the critical correspondence never being received by the Edens; (3) the absence in the SRBA Court record of valid proof of service of the statutorily required Second Round Service Notice; and, also, (4) that the Edens never received personal service of notice of the impending or issued default judgment, although their ownership of 37-864 was known.

The question arises why is the State opposing hard-working salt of the earth farmers like the Edens, people who are the very backbone of the State? Why is the State apparently breaking its side of the social contract by opposing correction of a matter caused in significant measure by governmental failings? The State speaks of judicial finality and deterring others from improperly seeking to claim water rights. But this position ignores the Edens' meritorious grounds, under these particular facts, for setting aside the Partial Decree entered in default, and, also, applicable law offering exactly this relief in these circumstances. The State wants absolute finality here, regardless of the merits; but, Rule 60(b) dictates otherwise. Further, the State's concern for other parties' unjustified water right claims is not a legitimate basis for denying the Edens' relief because it fails to recognize that the law has ample mechanisms for deterring and addressing possible frivolous claims should they arise. Under the circumstances presented here, the State's opposition to the Edens cannot be reconciled to the facts or applicable law.

On the other hand, the Edens have upheld their side of the social contract with the State by confirming their correct mailing address with IDWR, as requested, and attempting to claim Water Right No. 37-864 in the SRBA with IDWR. Through no fault of their own, the Edens never received the misaddressed May 19, 2005, IDWR response letter with critical claim information; the SRBA Court record omits valid proof of IDWR's service of the statutorily required Second Round Service Notice; and no personal service of notice of default, as required under I.R.C.P. 55, was provided. In this instance, the record reflects there are several different available independent bases under I.R.C.P. 60(b)(4) and 60(b)(6) for the Edens to be granted the relief they seek, and, indeed, should receive.

C. The District Court Improperly Ruled that the Partial Decree of Disallowal Entered in Default Would Not Be Set Aside under I.R.C.P. 60(b)(4), Because the Record Does Not Support the District Court's finding that the Statutorily Required Second Round Service Notice Was Served on the Edens.

The Edens should have been granted relief under Rule 60(b)(4) from the Partial Decree of Disallowal that was entered in default because the record does not support the District Court's finding that the Edens were served with the statutorily required Second Round Service Notice. In its Order Denying Motion to Set Aside; Order Denying Motion to File Late Claim, the District Court, referencing the (defective) Second Round Service Affidavit (Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1), specifically found, albeit erroneously, that the Idaho Code 42-1408 service requirements had been satisfied:

> All publication and mailing requirements set forth in Idaho Code § 42-1408 were met in this case. Affidavit of Service of Commencement Notice - Lincoln County, Twin Falls County Case No. 39676 (Sept. 20, 2988); Affidavit of Danni M. Smith Re:

> Second Round Service of Commencement Notice for Basin 37, Part 1, Twin Falls County Case No. 39576 (June 1, 2005); Hofstetter Aff., Ex. 3.

R Vol. I, p. 378, n. 3. However, the Second Round Service Affidavit in the Court's records that was relied on here in the SRBA Court's finding of adequate service, actually was missing Exhibit A, the copy of the Second Round Service Notice, and had no mailing list marked as Exhibit B attached.[3] R Vol. I, pp. 924-932. Thus, the District Judge's reference here to the Second Round Service Affidavit in the SRBA Court's file actually does not evidentially establish proof of service of the Second Round Service Notice on the Edens. Also, the Court's reference here to Exhibit 3, of the Hofstetter Affidavit, a copy of a U.S. Mail return receipt signed by Ms. Eden, cannot substitute evidentially for the missing competent proof of service of the Second Round Service Notice. *See* R Vol. I, p. 228; Idaho Code § 42-1408(5).

The Affidavit of Dana Hofstetter, submitted in the proceedings below, also expressly attached an IDWR supplied copy of the Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1 as Exhibit 2. R Vol. I, p. 207. The version of the Second Round Service Affidavit of Danni M. Smith, attached to the Hofstetter Affidavit as Exhibit 2, and expressly stated in the Hofstetter Affidavit to have been provided by IDWR to counsel in 2016, also cannot serve as competent substitute proof of adequate Second Round Service. R Vol. I, p. 207. The version of the Second Round Service Affidavit provided by

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[3] These defects in the Second Round Service Affidavit (Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1) that IDWR had filed with the SRBA Court, were discovered by counsel when the SRBA Court Clerk served the record in this Appeal.

IDWR in 2016 and attached to the Hofstetter Affidavit, differs from the version IDWR actually filed with the SRBA Court in 2005, and being of different substance and provenance cannot serve as a substitute evidentiary proof of service in place of what IDWR actually filed with the Court.[4] Further, the version of the Second Round Service Affidavit attached to the Hofstetter Affidavit has its own evidentiary defects. Although the version IDWR provided counsel which is attached to the Hofstetter Affidavit includes what appears to be a Second Round Service Notice, neither it nor the mailing list are marked as Exhibits A and B, although respectively referenced as such. Thus, neither the Second Round Service Notice IDWR filed with the SRBA Court in 2005, nor the version it provided to counsel in 2016, can serve as competent proof that IDWR actually served the statutorily required Second Round Service Notice on the Edens with respect to 37-864. Thus, the record includes no proof to support the District Court's finding in this regard.

Under the applicable statutes, IDWR is required to file with the SRBA Court adequate proof of service to demonstrate compliance with the extensive substantive and procedural Second Round Service Notice requirements: "The director shall file with the district court such proof of service as may be required to demonstrate compliance with the [Second Round Service] ... requirements." Idaho Code § 42-1408(5). However, the Second Round Service Affidavit that

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[4] The version of the *Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1* attached to the Hofstetter Affidavit is different from the *Affidavit of Danni M. Smith Re: Second Round Service of Commencement Notice for Basin 37, Part 1* that IDWR actually filed with the SRBA Court on June 1, 2005. *Compare* R Vol. I, pp. 215-227 and pp. 924-932.

IDWR filed with the SRBA Court in 2005 to satisfy this requirement is missing Exhibit A, the Notice itself, and has no marked Exhibit B, the mailing list. Accordingly, that Affidavit is inadequate to demonstrate compliance with the substantive and procedural Second Round Service requirements, as mandated by Idaho Code § 42-1408(5). The Affidavit of Danni M. Smith, attached to the Hofstetter Affidavit as Exhibit 2, also cannot satisfy the statutory requirement that the IDWR "director shall file with the district court" proof of Second Round Service.

Under Rule 60(b)(4), a party must be relieved from a final judgment, order, or proceeding if the judgment is determined to be void: "[R]elief from a void judgment pursuant to Rule 60(b)(4) is nondiscretionary and is subject to free review on appeal." *Fisher Sys. Leasing, Inc. v. J & J Gunsmithing & Weaponry Design, Inc.*, 135 Idaho 624, 627, 21 P.3d 946, 949 (Ct. App. 2001). "A judgment is [] void where it is entered in violation of due process because the party was not given notice and an opportunity to be heard." *McGrew v. McGrew*, 139 Idaho 551, 558, 82 P.3d 833, 840 (2003). Relief has been granted where notice was not properly given. *Farber v. Hawell,* 105 Idaho 57, 665 P.2d 1067 (1983) (holding that default judgment was voidable for failure to comply with rule requiring that party against whom judgment by default is sought be served with written notice of application for judgment at least three days prior to hearing on application.) Indeed, notice requirements must be strictly complied with and, if not, the judgment is voidable. *Deutz-Allis Credit Corporation v. Smith*, 117 Idaho 118, 120, 785 P.2d 682, 684 (Ct. App. 1990), (holding that "[e]ntry of a default judgment without the requisite three-day notice of application for the judgment renders the

judgment voidable.") For example, the Court has vacated a default judgment under 60(b)(4) for lack of personal jurisdiction when the plaintiff failed to mail copies of the summons and complaint to the defendant. *McGloon v. Gwynn,* 140 Idaho 727, 731, 100 P.3d 621, 625 (2004).

Providing adequate notice and due process in the SRBA is of utmost importance: "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, 67 P.3d 85, 87 (2003) (discussing notice and due process in the SRBA). The notice requirements for the SRBA are set forth by statute. First, pursuant to Idaho Code § 42-1408(1)-(3), IDWR was required to serve notice of the SRBA's commencement. Then, IDWR was required to provide "second round service" "[u]pon expiration of the period for filing notices of claims." Idaho Code § 42-1408(4). These statutory first and second round notice SRBA procedures have been determined adequate to meet constitutional due process requirements. *LU Ranching Co. v. U.S.,* 138 Idaho 606, 608-610, 67 P.3d 85, 87-89 (2003).

Idaho Code § 42-1408(4) requires, as part of the second round service process, that IDWR identifies unclaimed water rights, then for each such unclaimed water right, undertake a "reasonably diligent effort ... to determine the land to which the possible claim is appurtenant, the last known owner of that land, and the last known address of that owner." The statute then requires that IDWR serves the second round service notice, containing a list of statutorily required information "on the last known owner of the water right." Idaho Code 42-1408(4).

Additionally, the second round service notice must provide "in no case less than ninety (90) days from the date the notice is served, in which the notice of claim must be received by the [IDWR] director." *Id.* Further, the statute requires IDWR to file adequate proof of service of second round service with the Court: "The [IDWR] director shall file with the district court such proof of service as may be required to demonstrate compliance with the above [notice] requirements." Idaho Code § 42-1408(5).

Problematically, the SRBA Court's record does not support its finding that IDWR served a proper and sufficient Second Round Service Notice on the Edens, although, as the property owners of the land appurtenant to unclaimed previously decreed Water Right 37-864, they were statutorily entitled to such Notice under I.C. 42-1408. The Second Round Service Affidavit that IDWR filed with the SRBA Court, purports to include as Exhibit A, "[a] Second Round Service of Commencement Notice for Basin 37, Part I," and as Exhibit B, a mailing list for the Second Round Notice. R Vol. I, p. 925. However, Exhibit A is omitted completely and it is therefore impossible to verify whether IDWR ever actually sent the Second Round Service Notice, and even it was sent, whether it contained the statutorily specified information. *See* R Vol. I, pp. 924-932. A few pages with addresses are attached but none of these pages are marked as Exhibit B and, therefore, whether these pages constitute the referenced Exhibit B mailing list is uncertain. R Vol. I, pp. 928-932. Because the record does not establish that proper Second Round Service occurred, the record does not support the Court's finding that the Edens received the Second Round Service Notice required by statute.

The defective Second Round Service Affidavit at issue here concerned unclaimed water rights in Basin 37, Part 1. This Second Round Service Affidavit covered only a portion of Basin 37, one of many basins included in the SRBA. Thus, the potential impact of this defective Affidavit is limited, affecting the Edens and others owning property associated with unclaimed water rights in Basin 37, Part 1. If the unlabeled mailing list attached to the Second Round Service Affidavit IDWR filed with the Court in 2005 is complete, it appears there were about 86 recipients in Basin 37, Part 1 identified as entitled to such Second Round Service. Perhaps, many of those parties subsequently filed claims. Thus, it is likely that a relatively few, if any, would continue to be affected today by this defective proof of Second Round Service. In any event, in view of the inadequate proof of service IDWR filed with the SRBA Court for Basin 37, Part 1, the record does not establish that the Second Round Service requirements were met with respect to Water Right No. 37-864 and the Edens.

Since there is no competent proof of service of a proper Second Round Service Notice, satisfying statutory and due process requirements, and, thus, no valid evidentiary support for the District Court's decision in this regard, Rule 60(b)(4) mandates that the judgment of disallowal of Water Right 37-864 be set aside on this basis alone.

D. The District Court Improperly Ruled that the Partial Decree of Disallowal Entered in Default Would Not Be Set Aside Under I.R.C.P. 60(b)(4), Because the Edens Were Not Personally Served with Required Notice of the Default Pursuant to I.R.C.P. 55.

The District Court also should have set aside under I.R.C.P. 60(b)(4) the Partial Decree of Disallowal of Water Right No. 37-864 that was entered in default because the Edens were not personally served with notice of the default, as was required by I.R.C.P 55(b)(2).

At the time of the 2012 Deadline Order, and the 2013 Partial Decree of Disallowal, I.R.C.P. 55(b)(2) required 3 days prior notice of default to a party who had appeared, providing that "[i]f the party against whom judgment by default is sought has appeared in the action, the party ... shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application." I.R.C.P. 55(b)(2) (2004-2014).[5] Although "a prerequisite to the three-day notice is an appearance in the action by the party against whom judgment by default is sought" the "appearance is not limited to a formal court appearance." *Nickels v. Durbano*, 118 Idaho 198, 201–02, 795 P.2d 903, 906–07 (Ct. App. 1990). Instead, "conduct on the part of the defendant which indicates an intent to defend against the action can constitute an appearance within the meaning of the rule." *Catledge v. Transport Tire Company, Inc.*, 107 Idaho 602, 606, 691 P.2d 1217, 1221 (1984). "A default judgment entered without the requisite three day notice is voidable as it has been irregularly obtained." *Radioear Corporation v. Crouse*, 97 Idaho 501, 503, 547 P.2d 546, 548 (1976).

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[5] A copy of I.R.C.P. 55 (2004-2014) is provided in the Addenda hereto.

Additionally, Rule 55(b)(2), in effect at the time, also required follow up service of notice of the default judgment: "Any application for a default judgment must contain written certification of the name of the party against whom the judgment is requested and the address most likely to give the party notice of such default judgment, and the clerk shall use such address in giving such party notice of judgment." I.R.C.P. 55(b)(2) (2004-2014).

In *Deutz-Allis Credit Corporation v. Smith*, the Court of Appeals held that the Rule 55(b)(2) notice requirements must be strictly complied with and, if not, the judgment is voidable:

> [A] Court's usual discretionary authority to grant or deny such a motion [60(b)] may be greatly narrowed where certain procedural safeguards were not strictly complied with in obtaining the judgment. In cases were a party has appeared in the action, default judgment must be taken pursuant to I.R.C.P. 55(b)(2). [citation omitted] Under this rule, "the party against whom judgment by default is sought ... shall be served with written notice of the application for judgment at least (3) days prior to the hearing on such application." Entry of a default judgment without the requisite three-day notice of application for the judgment renders the judgment voidable.

117 Idaho at 120, 785 P.2d at 684.

The application of the Idaho Rules of Civil Procedure to the SRBA has been questioned because the SRBA required special procedural rules. *See In Re SRBA*, 128 Idaho 246, 912 P.2d 614 (1995). Nonetheless, the SRBA's special procedures have been determined to supplement, but not to supplant, the Rules of Civil Procedure:

> The Idaho Rules of Civil Procedure (I.R.C.P.), Idaho Rules of Evidence (I.R.E.), and the Idaho Appellate Rules (I.A.R.) govern litigation in the SRBA. SRBA Administrative Order 1 (AO1) provides procedures to supplement the I.R.C.P., I.R.E., and I.A.R. "to the extent necessary to allow for the fair and expeditious

resolution of all claims or issues in the SRBA." AO1 (1)(b).

In Re SRBA, 157 Idaho 385, 391, 336 P.3d 792, 798 (2014).

The Supreme Court has found that special legislatively created procedural rules could become necessary, and, thus, pass Constitutional separation of powers muster, in the absence of an applicable procedural rule from the Supreme Court. *In Re SRBA*, 128 Idaho 246, 254, 912 P.2d 614, 622 (1995). ("This Court has consistently recognized that Article V, Section 13 of the Idaho Constitution empowers the Legislature of this State to enact procedural rules when such rules are necessary because of changing times or circumstances or the absence of a rule from this Court."). In that same case, the Supreme Court also specifically addressed the applicability of I.R.C.P. 55 in the SRBA, finding that Rule, along with the other Rules of Procedure, applicable:

> The procedure to be followed by the [SRBA] district court where no objection has been raised is established by the rules for entering a default judgment in civil actions, set out in I.R.C.P. 55. In addition to providing for the entry of judgment by default, that Rule retains in the district court the inherent power to apply law to facts and render a decision. That Rule states:
>
> > If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.
>
> I.R.C.P. 55(b)(2). At oral argument, counsel for the State conceded that the district court would have the inherent power to correct errors in the report. To the extent that the 1994 statutes attempt to remove from the district court the power to exercise its discretion

> in determining what provisions of the [SRBA] Director's report shall be decreed, those provisions are in conflict with I.R.C.P. 55.
>
> Although a general water adjudication is a unique type of proceeding, such an adjudication is nonetheless a suit within the original jurisdiction of the district court, as conferred by Article V, Section 20 of the Idaho Constitution.

Id. at 258, 912 P.2d at 626 (emphases added).

Thus, although entered in the SRBA, the Partial Decree of Disallowal for the Edens' Water Right No. 37-864, being a court-issued default judgment, was subject I.R.C.P. 55(b)(2) and its pre- and post-judgment notice requirements. The Edens satisfied the appearance requirements of I.R.C.P. 55(b)(2) because in 2005, they had attempted to file an SRBA Claim with IDWR for Water Right No. 37-864 and IDWR was aware of their claim to this Right, as reflected in the May 19, 2005, IDWR letter. R Vol. I, p. 229. Additionally, by 2013, when the Partial Decree of Disallowal was entered, the Edens already had been decreed at least one water right in the SRBA (37-10953). R Vol. I, p. 709.

Because the Edens had appeared in the case, they were entitled to notice under I.R.C.P. 55(b)(2) at least 3 days prior to the entry of the default judgment and, also, after judgement. Nonetheless, there is no evidence that the Edens were personally served with the Deadline Order or any other notice at least 3 days prior to or after the Partial Decree of Disallowal and actually they were not. The Deadline Order's Mailing List does not include the Edens, which establishes that they were not served with this Order providing a final deadline of January 31, 2013, to claim Water Right No. 37-864 to avoid default. R Vol. I, pp. 9-13. Also, the Edens received no notice after the default judgment as required by Rule 55(b)(2), as the

mailing list attached to the Partial Decree of Disallowal does not include the Edens. R Vol. I, pp. 114-118.

Because the Edens did not receive the requisite personal service of written notice of a impending default at least three days prior to the entry of the Partial Decree of Disallowal or the required post-judgment notice under Rule 55(b)(2), their Water Right No. 37-864 was decreed disallowed in default, unbeknownst to them. For this reason, also, the Partial Decree of Disallowal as to Water Right No. 37-864 is voidable and should be set aside in accordance with Rule 60(b)(4).

E. The District Court Improperly Ruled that the Partial Decree of Disallowal Entered in Default Would Not Be Set Aside under I.R.C.P. 60(b)(4), Because the Statutorily Required Second Round Service Notice Purportedly Sent Pursuant to Idaho Code 42-1408(4), Was Defective, under the Facts of this Case, Since the Edens Sought the Assistance of IDWR in Filing the Claim for Water Right No. 37-864, as the Purported Notice States, and IDWR Responded to the Edens at an Incorrect Address, Different from the Correct Address the Edens Had Confirmed to IDWR, and, Therefore, the Edens Never Received that IDWR Response.

In Idaho, when a default judgment is based upon an erroneously entered default, the judgment is voidable pursuant to I.R.C.P. 60(b)(4). *Knight Insurance, Inc. v. Knight*, 109 Idaho 56, 59, 704 P.2d 960, 963 (Ct. App. 1985). Relief has been granted where notice was not properly given. *Farber v. Hawell,* 105 Idaho 57, 665 P.2d 1067 (1983). Additionally, relief has been granted under Rule 60(b)(4) where the notice provided was inadequate, confusing recipients and leading them down the wrong path:

> The district judge, perceiving the question to be one of discretion, refused to grant relief from the default judgment. In his view, the Knights adequately had been informed of the twenty-day appearance deadline by the proposed form of order accompanying

> the motion for leave to withdraw and by statements made in open court. But we think the controversy over whether the Knights were genuinely confused by the April 22 order, and, if so, whether such confusion represented mistake or excusable neglect under Rule 60(b)(1), illustrates the wisdom of treating noncompliance with Rule 11(b)(3) as a defect in the default, rendering the default judgment voidable under Rule 60(b)(4).

Knight, 109 Idaho at 59, 704 P.2d at 963.

Notice which is substantively inaccurate, ambiguous or otherwise provides inadequate information is not sufficient:

> In reaching our conclusion, we are unpersuaded that Deutz-Allis' earlier "notice of intent to take default" properly apprised Smith of the corporation's intent to seek a default judgment, or that it provided Smith with the required three-day time period in which to respond to the application. Our reading of this document suggests that it was prepared by Deutz-Allis *in anticipation* of requesting a default judgment and did not, in any way, suggest that such proceedings were then pending. Simply put, Smith never received the notice required under Rule 55(b)(2) before judgment was obtained against him.

Deutz-Allis, 117 Idaho at 120, 785 P.2d at 684 (emphasis in original).

The Second Round Service Notice, that IDWR purports it served, was inadequate under the facts of this case because, even if actually served, it would have led the Edens down a path for claiming 37-864 that ultimately was a dead end. IDWR's purported Second Round Service Notice states 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." R Vol. I, p. 221. (emphasis added). This path turned out to be unavailable to the Edens.

The Edens actually did what the purported Second Round Service Notice stated. They attempted to claim 37-864 with IDWR. R Vol. I, p. 229. When IDWR then used the incorrect address for the May 19, 2005, follow-up letter, the Edens were effectively denied the IDWR assistance that the purported Second Round Service Notice states would be forthcoming. The Edens never received IDWR's May 19, 2005, letter enclosing the IDWR Notice of Claim form and associated instructions. While, the Edens recently had confirmed their correct, current address in Shoshone, IDWR continued to use the Edens' incorrect, former address in Gooding to send them the important May 19, 2005, letter rejecting their attempted claim for 37-864 and supplying additional instructions. R Vol. I, p. 229. Because the Edens never received this letter, they did not receive or submit IDWR's enclosed Notice of Claim form for Water Right No. 37-864. Without a response, the Edens believed IDWR had accepted their submission and that it was adequate. R Vol. I, pp. 231 and 239. Having no response from IDWR, although they had just recently confirmed their correct address, the Edens reasonably believed IDWR had accepted their SRBA claim for 37-864. R Vol. I, pp. 231 and 239.

Under the facts of this case, the purported Second Round Service Notice was substantively inadequate. IDWR's purported Second Round Service Notice instructs: 1. seek the assistance with IDWR in filing claims; and 2. filing a facsimile in place of a formal Notice of Claim form is acceptable. The Edens did exactly that but received no response from IDWR that more was required of them. The purported Second Round Service Notice would not have provided the Edens accurate guidance because by sending the May 19, 2005, follow-up letter to the wrong address, IDWR effectively did not assist the Edens with properly claiming 37-864 as

the purported Second Round Service Notice provides IDWR would. Instructing the Edens to seek the assistance of IDWR, as the purported Second Round Service Notice does, would have been ineffective and inadequate notice under the specific facts and circumstances of this case.

F. The District Court Improperly Ruled that the Partial Decree of Disallowal, Entered in Default, Would Not Be Set Aside under I.R.C.P. 60(b)(6), Because There Were "Unique and Compelling Circumstances" Involving the Edens' Confirming in Writing their Correct Mailing Address, and IDWR, Nevertheless, Then Using an Incorrect Mailing Address to Provide the Edens Information that their SRBA Claim for 37-864 Was Insufficient and Had Been Rejected.

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, 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. *See Printcraft Press, Inc. v. Sunnyside Park Utilities, Inc.*, 153 Idaho 440, 283 P.3d 757 (2012). A review of the facts in this case reveals circumstances particular to the Edens and Water Right No. 37-864 that are both unique and compelling.

The Edens' attempt to file the Notice of Claim for 37-864 and their failure to receive the May 19, 2005, IDWR response, due to IDWR's use of an incorrect mailing address, although the Edens had recently confirmed their correct mailing address with IDWR, certainly together constitute "unique and compelling circumstances," justifying relief under Rule 60(b)(6). Thus,

taking into account the law's preference for having a case decided on the merits, the Edens also should be granted relief from the judgment under Rule 60(b)(6).

G. The District Court Improperly Denied the Edens' Motion to File Late Notice of Claim on the Basis that their Motion to Set Aside the Partial Decree of Disallowal Had Been Denied.

The District Court denied the Edens' Motion to File Late Notice of Claim for Water Right No. 37-864 on the basis that there were insufficient grounds under Rule 60(b) to set aside the Partial Decree: "Since the Movants have failed to set forth sufficient grounds under Rule 60(b) to set aside ... their Motion to File Late Notice of Claim must be denied." R Vol. I, p. 381. Therefore, if on Appeal, this Court determines that at least one of the Rule 60(b) grounds for setting aside the Partial Decree is satisfied, the District Court's ruling as to the Motion to File Late Notice of Claim also should be overturned. In that circumstance, since this is a default judgment situation, questions may arise as to whether the Edens have presented a meritorious case in support of their Motion to File Late Notice of Claim and whether there is possible prejudice to others. *See Dorion v. Keane*, 153 Idaho 371, 283 P.3d 118 (Ct. App. 2012).

The meritorious case determination has been described as alleging detailed facts which, if established, would constitute a claim or defense to the action. *See McFarland v. Curtis,* 123 Idaho 931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller,* 100 Idaho 10, 592 P.2d 66 (1979), *abrogated on other grounds by Shelton v. Diamond Int'l Corp.*, 108 Idaho 935, 703 P.2d 699 (1985); *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).

With regard to presenting a meritorious case, the prior 1918 Decree for 37-864 and the Edens' deed to the subject place of use were submitted attached to their Motion to File Late Notice of Claim. R Vol. I, pp. 254-258. This documentation confirms the existence of the water right, its specific elements, and the Edens' justifiable claim to this right which is appurtenant to their land. This documentation is sufficient to establish that the Edens have alleged a detailed meritorious case with respect to their claim to Water Right No. 37-864.

Further, the Basin 37 Wastermaster's affidavit establishes the lack of prejudice if 37-864 were reinstated: "In view of the long-term existence of 37-864, I would not anticipate prejudice to other existing water users if it were reinstated." R Vol. I, p. 282. Watermaster Lakey also explained that, "Typically, water right no. 37-864 is delivered during the first part of the irrigation season. Then it is the practice for supplemental storage water from American Falls Reservoir District #2 to be delivered to the place of use." R Vol. I, p. 281.

Water Right No. 37-864 has a priority date of September 28, 1896, and was decreed in 1918. This decree establishes that 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 claim for 37-864 lodged by the Edens with the SRBA Court describes the water right as the right was decreed in 1918. R Vol. I, pp. 251-255. 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, as the record reflects the water has been historically delivered at least up until 2015. R Vol. I, pp. 231 and 356. Little investigation will be required of IDWR to confirm

the right as part of the SRBA process because the Edens have claimed the right as it was decreed in 1918.

While there will be no prejudice to other water users, the prejudice to the Edens will be profound and devastating if their Motion to File Late Notice of Claim is denied. The Edens no longer will receive water that has historically irrigated the land, and likely would be left with no ability to irrigate this land, greatly reducing the land's value and making them unable to farm or lease this 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 in the SRBA 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 by maintaining the *status quo*, as confirmed by IDWR through its usual SRBA claim investigation and reporting process.

Nor can it be asserted that prejudice will occur if 37-864 is reinstated because other junior water right holders would be affected. This is not the kind of prejudice considered in connection with a default judgment, otherwise there could never be relief from a default judgment as the assertion of one party's rights in a proceeding consequentially affect other parties' rights. Thus, prejudice in this context must mean something more than just the result of pursuing a claim:

> Even though courts frequently express a concern for the party not in default, they generally conclude that no substantial prejudice will be caused by granting relief in the case before them, however. Thus, for example, courts have ruled that the fact that plaintiff would have to try the case on the merits if relief is granted is not the kind of prejudice that should preclude relief. Similarly, the fact that reopening the judgment would delay plaintiff's possible recovery has not, in itself, been deemed to bar relief. Something more must be shown.

Wright, Miller & Kane, *Federal Practice and Procedure* Civil 3d § 2699. Similarly here, there would be no prejudice of the type that should prevent the Edens' being granted the opportunity to file their legitimate water right claim.

The Edens have pled adequate specific facts, confirmed by a prior water right decree, to establish a meritorious case. Additionally, as confirmed by the Watermaster, the successful pursuit of the Edens' claim for 37-864 would not result in prejudice to other water users. Accordingly, their Motion to File Late Notice of Claim should be granted.

IV.
CONCLUSION

For each of the foregoing reasons, it is respectfully submitted that the SRBA Partial Decree of Disallowal for Water Right No. 37-864, entered in default, should be set aside, along with the portion of the Final Unified Decree which incorporates it by reference, and the Edens' Motion to File Late Notice of Claim for Water Right No. 37-864 granted.

DATED THIS 23rd day of June, 2017.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Dana L. Hofstetter, ISB(#3867
Attorneys for Appellants Gary and Glenna Eden

V.
ADDENDA

Timeline of Key Dates

April 28, 2005	IDWR sends the Edens a letter requesting confirmation of their mailing address for the SRBA.
May 5, 2005	IDWR purports to mail the Edens the Second Round Service Notice for unclaimed Water Right No. 37-864, the Notice required pursuant I.C. 42-1408(4). (The proof of Second Round Service that IDWR files with the SRBA Court is defective, omitting Exhibit A, a copy of the Notice, and having no marked Exhibit B, the mailing list.)
May 17, 2005	IDWR has received the Edens' confirmation of their correct mailing address along with their enclosures attempting to claim 37-864.
May 19, 2005	IDWR drafts the Edens a letter addressed to an incorrect mailing address acknowledging receipt of the Edens' confirmation of their correct mailing address and their enclosures attempting to claim 37-864 and providing follow up instructions for claiming 37-864. (The Edens never receive this incorrectly addressed letter.)
October 12, 2012	SRBA Court sets a deadline of January 31, 2013, for claiming Water Right No. 37-864. (The Edens are not personally served with this Deadline Order.)
February 13, 2013	The SRBA Court issues a Partial Decree of Disallowal for Water Right No. 37-864 for the failure to claim it. (The Edens are not personally served with this Partial Decree of Disallowal.)
August 26, 2014	The SRBA Court enters the Final Unified Decree which references the Partial Decree of Disallowal for Water Right No. 37-864. (The Edens are not personally served with notice of the Final Unified Decree.)

WESTLAW

West's Idaho Code Annotated
Idaho Court Rules
Idaho Rules of Civil Procedure

Rule 55. Default judgments

ID R RCP Rule 55 West's Idaho Code Annotated (Approx. 2 pages)

Idaho Rules of Civil Procedure (**I.R.C.P.**), Rule **55**

Rule 55. Default judgments

Currentness

(a)(1) *Default--Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the court shall order entry of default against the party. Default shall not be entered against a party who has appeared in the action unless that party (or, if appearing by representative, the party's representative) has been served with three (3) days written notice of the application for entry of such default.

(2) *Default Proof--Time Limitation.* Default proof shall not be presented to the court nor a default entered against a party prior to the expiration of the period of time allowed by these rules for an appearance or defense unless, (1) the party required to make the appearance or defense executes a waiver under oath stating that the party waives the permitted time for appearance or defense, refuses to plead further, and consents to the immediate hearing of a default proceeding without further notice, and (2) the court enters an order shortening the time for appearance or defense by such party for good cause shown by the affidavit or testimony of the moving party. Upon compliance with this rule, default may be entered, a default proceeding held and judgment by default be entered without notice to the defaulting party in the same manner as though the normally prescribed time for an appearance or defense had expired, subject to the limitations of section 32-716, Idaho Code.

(3) *Actions at Issue--Not Default.* This rule shall not prevent a trial hearing on any action which is at issue in which the parties are represented in person or by their attorneys of record, which hearing shall not be deemed a default hearing whether or not a defending party actively participates or opposes the claim of another.

(b)(1) *Default Judgment by the Court or Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the court or the clerk thereof, upon request of the plaintiff, and upon the filing of an affidavit of the amount due showing the method of computation, together with any original instrument evidencing the claim unless otherwise permitted by the court, shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person, and has been personally served, other than by publication or personal service outside of this state. Any application for a default judgment must contain written certification of the name of the party against whom judgment is requested and the address most likely to give the defendant notice of such default judgment, and the clerk shall use such address in giving such party notice of judgment. An application for default judgment in a divorce or annulment action must be accompanied by a certificate furnished by the department of vital statistics fully filled out by the party seeking the default divorce or annulment.

(2) *Default Judgment by the Court--Persons Exempt From.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to

take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. In actions for divorce, the statutes of the state of Idaho shall apply. Any application for a default judgment must contain written certification of the name of the party against whom the judgment is requested and the address most likely to give the party notice of such default judgment, and the clerk shall use such address in giving such party notice of judgment.

(c) Setting Aside Default Judgment. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants Covered by Default Judgment Rule. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the State. No judgment by default shall be entered against the state of Idaho, an officer, agency or political subdivision thereof, unless the claimant establishes the claimant's right by evidence satisfactory to the court.

Credits

[Amended December 19, 1975, effective January 1, 1976; January 8, 1976, effective March 1, 1976; April 22, 2004, effective July 1, 2004.]

<The rule headings for Idaho Rules of Civil Procedure have been editorially supplied.>

CROSS REFERENCES

Actions at issue; not default, see ID R RFLP Rule 303.
Default judgment by the court or clerk, see ID R RFLP Rule 304.
Default judgment by the court; persons exempt from, see ID R RFLP Rule 305.
Default proof; time limitation, see ID R RFLP Rule 302.
Default; entry, see ID R RFLP Rule 301.
Judgment against the state, see ID R RFLP Rule 308.
Plaintiffs, counterclaimants, cross-claimants covered by default judgment rule, see ID R RFLP Rule 307.
Setting aside default judgment, see ID R RFLP Rule 306.

Rules Civ. Proc., Rule **55**, ID R RCP Rule **55**

Current with amendments received through 5/15/14

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of June, 2017, I caused to be served two (2) true copies of the foregoing APPELLANTS' BRIEF by the method(s) indicated below, and addressed to each of the following:

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