

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

DISTRICT COURT-SRBA
TWIN FALLS CO. IDAHO
FILED
2004 JAN 30 PM 4 38

In Re SRBA

Case No. 39576

ORDER RECOMMENDING
PARTIAL DECREE BE SET ASIDE

SUBCASE NOS.: 31-7311, 31-2357
and 31-2395

I. PROCEDURAL BACKGROUND

The SRBA District Court issued *Partial Decrees* for water rights 31-07311, 31-02395, and 31-02357 on February 22, 2002. On April 15, 2003, claimant Ben Jernberg sent a letter to the SRBA Court indicating he disagreed with the way these rights were decree. The SRBA District Court issued an *Order of Reference to Special Master Brigitte Bilyeu* on April 24, 2003. Mr. Jernberg filed a *Motion to Set Aside and Vacate Partial Decree and to Allow the Filing of a Late Objection*. The *Motion to Set Aside* was filed only in 31-7311.

The Idaho Department of Water Resources (hereafter "IDWR") submitted a *Supplemental Director's Report Regarding Subcase No. 31-2357, 31-2395 and 31-7311* that set forth the basis for the recommendations contained in the *Director's Reports* for these water rights. A hearing on the *Motion to Set Aside* was held October 22, 2003. At the hearing, Mr. Jernberg agreed that the *Motion to Set Aside* applied only to 31-7311. Mr. Jernberg agreed that 31-2375 and 31-2395 should **not be set aside**.

II. FINDINGS

A. Application and Claim

On February 20, 1979, Mr. Jernberg filed an application for a permit for 16 cfs of well water in 31-7311. The application requested a license to irrigate approximately 1,200 acres. *Affidavit of Ben D. Jernberg in Support of Motion to Vacate and Set Aside Partial Decree and Leave to File Late Objection* (hereafter "*Affidavit of Jernberg*") at ¶3. On August 2, 1984,

Mr. Jernberg submitted information to IDWR to show that the well had been drilled and that water was diverted from the well and used for irrigation at the rate of 15 cfs. *Affidavit of Jernberg* at ¶3.

IDWR examined the place of use where the water was diverted and applied. A 1986 examination by IDWR indicated that the well under Permit No. 31-7311 may have produced 13.45 cfs. However, no license was issued at that time. On March 31, 1989, Mr. Jernberg filed a claim in the SRBA for water right 31-7311. *Supplemental Director's Report* at 2. At that time, IDWR had still not issued a license for 31-7311.

B. License

A license was issued for water right number 31-7311 on September 5, 1997. The license was for 4.62 cfs of water to irrigate 461 acres. The licensed elements included only the cultivated pasture. The elements of the license did not include the quantity of water or acreage claimed by Mr. Jernberg for a portion of his property that was irrigated, uncultivated pasture grass. The license addressed the uncultivated land in two conditions:

Water diverted under this right, and an additional 4.99 cfs of ground water diverted from the points of diversion described above may also be diverted onto 663 acres of uncultivated pasture located in T07N, R34E, Sections 15, 16, 21, and 22, but this additional use is not an appurtenance of the land upon which it occurs.

Any application for transfer proposing to change the point of diversion, place of use, nature of use, or period of use of this right or any portion of this right shall include for consideration by the director the entire use of water on the uncultivated pasture land referenced above. Action taken by the director on any such transfer application may include modification or curtailment of all or any part of the use of water on the uncultivated pasture land.

Supplemental Director's Report at 3-4.

IDWR stated that it did not include the uncultivated land in the elements of the license because it concluded there was insufficient proof of using water on the uncultivated land. Therefore, IDWR did not include that water or acreage in the elements of the license. However, IDWR added the two conditions in the license to allow Mr. Jernberg to irrigate the uncultivated land while limiting his ability to transfer that use without further proof. The licensing decision was not appealed by Mr. Jernberg.

C. Director's Report

The *Director's Report* filed in the SRBA for 31-7311 was similar to the license. The quantity of water and the acreage for the uncultivated pasture were not included in the elements. Instead, this use was included under the "other provisions necessary" to define or administer clause.

Water diverted under this right, and an additional 4.99 cfs of ground water diverted from the points of diversion described above may also be diverted onto 663 acres of uncultivated pasture located in T07N, R34E, Sections 15, 16, 21, and 22, but this additional use is not an appurtenance of the land upon which it occurs.

Director's Report (Water Right Claim) 31-7311 at 1.

Language limiting the claimant's ability to transfer this water use was also included in the *Director's Report*. Mr. Jernberg did not file an Objection to the *Director's Report* for 31-7311. On February 22, 2002, a *Partial Decree* was issued by the SRBA District Court for 31-7311 including elements and language essentially identical to the *Director's Report*. In February 2003, Mr. Jernberg attempted to transfer a portion of the water used on the uncultivated land. At that time, Mr. Jernberg was informed by IDWR that the language on the license and the *Partial Decree* restricted his transfer of the 4.99 cfs from the 663 acres of uncultivated pasture.

D. Motion to Set Aside

Mr. Jernberg sent correspondence to the SRBA Court on April 15, 2003, indicating he disagreed with the *Partial Decree*. Mr. Jernberg filed a *Motion to Set Aside and Vacate Partial Decree and to Allow the Filing of a Late Objection* on July 15, 2003. Both the letter and the *Motion to Set Aside* were filed more than a year after the *Partial Decree* issued.

III. ANALYSIS

Mr. Jernberg asks the court to set aside the *Partial Decree* for 31-7311 because it did not include the 4.99 cfs and the 663 acres of uncultivated pasture in the elements of the right. Mr. Jernberg asserts that both the *Director's Report* and the *Partial Decree* are in error because IDWR improperly interpreted the law applicable to irrigation of uncultivated land. Mr. Jernberg did not file a timely appeal to the license for 31-7311 or a timely objection to the

Director's Report. Both the letter and *Motion to Set Aside* were filed more than a year after issuance of the *Partial Decree*.

A. Collateral Attacks Disfavored

The SRBA Court has consistently held that where a water user disagrees with a license issued by IDWR, the SRBA Court is not the proper forum for appealing licensing issues. In general, it is inappropriate to object to aspects of a *Director's Report* in the SRBA that were decided in previous administrative proceedings. If a party disagrees with any aspect of a license, that party's remedy is to seek an administrative review of the license and a judicial review of the license if necessary. *Hardy v. Higginson*, 123 Idaho 485, 849 P.2d 946 (1993). If the license is not appealed when issued, attempts to appeal the license in a subsequent legal proceeding such as the SRBA would constitute a collateral attack on the license. See, *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984). See, *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)* (Subcases 36-02048) (July 31, 1998) at 11-12. *Memorandum Decision and Order on Challenge; Order on State of Idaho's Motion to Dismiss Claimant's Notice of Challenge* (River Grove Farms) (Subcase No. 36-08099) (January 11, 2000)

B. Rule 60(b):

Since a *Partial Decree* for 31-7311 was issued February 22, 2002, Mr. Jernberg focused on setting aside the *Partial Decree*. *Motions to Set Aside Partial Decree* are considered under Idaho Rule of Civil Procedure 60(b). I.R.C.P. 60(b) allows 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 which by due diligence could not have been discovered in time to move for a new trial;
- 3) fraud, misrepresentation or other misconduct of an adverse party;
- 4) the judgment is void;
- 5) the judgment has been satisfied, released or discharged; and
- 6) any other reason justifying relief from the operation of the judgment.

The Rule requires that a motion to set aside be made within a reasonable time, and for reasons 1, 2, 3, and 6, not more than six (6) months after the judgment, order or decree. The

Idaho Supreme Court has held that the time limits in Rule 60(b) are mandatory, and consequently, any attempt to modify or set aside a judgment or order pursuant to subdivisions (1), (2), (3) or (6) will not be allowed where the applicable time limit under the rule has clearly expired. *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990). The *Partial Decree* for 31-7311 cannot be set aside under subparts (1), (2), (3) or (6), since the *Motion to Set Aside* was filed more than six months after the issuance of the *Partial Decree*.

There are no such time limits for subparts (4) or (5) of I.R.C.P. 60(b). There are no facts of record, however, that indicate that the judgment or *Partial Decree* can be said to have been "satisfied, released, or discharged" within the language of Rule 60(b)(5). The *Partial Decree* cannot be set aside under Rule 60(b)(5).

There are no facts of record that come within the terms of Rule 60(b)(4). Rule 60(b)(4) sets forth a method for a court to set aside a void judgment. A judgment is generally found to be void only if it is totally beyond the court's power to render. A judgment is valid whenever the court that renders it has jurisdiction over the subject matter and the parties. A judgment is void only if the court lacked jurisdiction or in circumstances in which the court's judgment amounted to a plain usurpation of power constituting a violation of due process. 12 JAMES T. McLAUGHLIN, MOORE'S FEDERAL PRACTICE § 60.44[1][a] (3d ed. 1997). There is no suggestion here that the SRBA court lacked subject matter jurisdiction over water rights in the Snake River Basin or over this water. There is no evidence that the SRBA lacked personal jurisdiction over Mr. Jernberg. And there was no showing that the entry of the *Partial Decree* constituted a usurpation of power relating to a violation of due process.

C. No Fraud on the Court

I.R.C.P. 60(b) does not limit a court's inherent power to set aside a judgment procured by fraud on the court. No time limit or laches applies to relief based on fraud on the court. The reason is because fraud on the court concerns the integrity of the judicial process itself, so that a judgment may be set aside for fraud on the court at any time. 12 MOORE'S FEDERAL PRACTICE § 60.21[4][g] (3d ed. 1997). Claims of fraud on the court are distinct from claims of fraud under Rule 60(b)(3). Fraud on the court is limited to fraud that seriously affects the normal process of adjudication so that the judicial process cannot perform its impartial task in the usual manner. 12 MOORE'S FEDERAL PRACTICE § 60.21 [4][a] (3d ed. 1997).

Mr. Jernberg argues that IDWR's *Director's Report* for 31-7311 perpetrated a fraud on the SRBA Court because IDWR failed to tell the SRBA Court that the *Director's Report* was based on an incorrect interpretation of law regarding uncultivated pasture. Mr. Jernberg correctly states that irrigating uncultivated land to produce natural grasses and vegetation can be a beneficial use. See, e.g., *Pyke v. Burnside*, 8 Idaho 487, 69 P. 477 (1902); *Rudge v. Simmons*, 39 Idaho 22, 226 P. 170 (1924). However, the record does not support the contention that the *Director's Report* was based on an erroneous interpretation of the law. IDWR eliminated the uncultivated pasture from the elements of this water right because it concluded there was insufficient proof of beneficial use, not because IDWR thought it was impermissible to perfect a water right on uncultivated land. See, *Supplemental Director's Report* at 4-8. This Special Master finds no fraud on the court.

D. Ambiguous Language

A judgment which is ambiguous and uncertain may be construed or read in connection with the entire record. A judgment is considered ambiguous if reasonable persons would differ as to its effect and meaning.

The elements of this water right set forth in the *Partial Decree* are clear and unambiguous. There is no legal justification for this Special Master to interpret or recommend setting aside the elements of the *Partial Decree*. What is ambiguous in the *Partial Decree* is the "other provisions necessary" to define or administer section. The language of that provision is ambiguous because it is unclear whether that language defines a vested water right or not. If the language used in a judgment is ambiguous, there is room for construction.

The language in the "other provisions necessary" section did not originate from the SRBA District Court. As with other unobjected-to water rights, the language originates with the *Director's Report*. The *Supplemental Director's Report* states that the language under "other provisions necessary to define or administer" was intended to allow Mr. Jernberg to use the water he had been using on the uncultivated land. However, IDWR concluded it had insufficient evidence to recommend a water right on that land. IDWR added language in the "other provisions necessary" clause with the intent of allowing Mr. Jernberg to use the water, but not recognize that use as a vested water right. Although we know the intent of IDWR from the *Supplemental Director's Report* and discussion on the record, we do not have any record

upon which we can glean the intent of the court. In construing judgments, the determinative factor is the intention of the court, not that of the parties.

Since the SRBA District Court did not have the benefit of the *Supplemental Director's Report* or any record explaining the "other provisions necessary" clause, we cannot assume that the SRBA Court intended to allow Mr. Jernberg to use the water, but not to recognize a valid water right.

E. Rule 60(a)

This Special Master cannot justify setting aside the *Partial Decree* under I.R.C.P. 60(b). Nor do the facts show fraud on the court that could support setting aside the *Partial Decree*. However, it appears that the SRBA Court's inclusion in the *Partial Decree* of a water use that was not appurtenant to the land may have been a clerical error that is correctable under I.R.C.P. 60(a).

There is no time limitation on a court's ability to correct clerical mistakes under I.R.C.P. 60(a). Courts have some latitude in correcting judgments that misrepresent the court's intention. For example, the federal version of this rule, F.R.C.P. 60(a) has allowed a court to resolve an ambiguity in its original order to more clearly reflect contemporaneous intent and ensure that the court's purpose is fully implemented. 12 MOORE'S FEDERAL PRACTICE § 60.11[1][c] (3d ed. 1997), *See Burton v. Johnson*, 975 F.2d 690, 694 (10th Cir. 1992)

Here, the *Partial Decree* was entered during the ministerial process the SRBA court has for decreeing water rights that are unobjected-to. The volume of such cases is enormous, and it is likely that the SRBA District Court did not consider the "not appurtenant" language. It is unlikely that the SRBA District Court intended to create a non-appurtenant water right.¹

It would be inappropriate to alter the *Partial Decree* to make the water use on the uncultivated land appurtenant to the land on which it is used, since it was not recommended in the *Director's Report* in that manner. Since the SRBA depends on the notice provided in the *Director's Report*, it would be inappropriate for the court to change the right without going

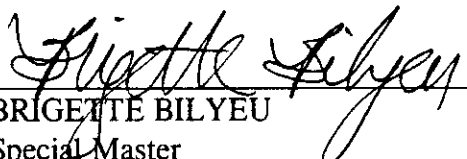
¹ This Special Master notes that a water right in basin 34 with language regarding uncultivated pasture grass not appurtenant to that land was issued in 2001. That water right resulted from *Partial Decree* including that language issued May 30, 2001 based on an SF-5 that contained language similar to the language at issue in 37-7311. *Order of Partial Decree* (Subcase No. 34-00964) (May 30, 2001)

through the Docket Sheet and Subcase process outlined in *AOI*. However, it is appropriate to set aside that portion of the *Partial Decree* that was previously decreed as not appurtenant to the land on which it is used. That portion of the claim should be evaluated by allowing the claimant to file a late objection and prove whether it is a valid water right.

IV. CONCLUSIONS OF LAW

Since the claimant withdrew his motion on 31-2357 and 31-2395 IT IS RECOMMENDED that the *Partial Decrees* for 31-2357 and 31-2395 not be set aside. IT IS RECOMMENDED that the *Partial Decree* for 31-7311 be set aside and an *Amended Partial Decree* be issued with the elements as set forth in the attached *Special Master's Recommendation for Partial Decree*. The *Special Master's Recommendation for Partial Decree* leaves the elements of 31-7311 unchanged and deletes the "other provisions necessary" clause relating to the uncultivated land. Since the additional uncultivated land was already claimed, no new claim is necessary. IT IS RECOMMENDED that a deadline be set for IDWR to file an *Amended Director's Report* addressing only the uncultivated land, and that IDWR assign a new water right claim number to that portion of the claim. IT IS RECOMMENDED that Mr. Jernberg be allowed to file a late objection once the *Amended Director's Report* is filed.

DATED January 30, 2004.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

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

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

2004 JAN 30 PM 4 38

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
)
) Water Right 31-07311

NAME AND ADDRESS: BEN D JERNBERG
14306 W MORNING STAR TRAIL
SURPRISE, AZ 85374

BEN D JERNBERG
3170 SYCAMORE LN
BILLINGS, MT 59102

SOURCE: GROUND WATER

QUANTITY: 4.62 CFS

USE OF THIS RIGHT WITH RIGHT NO. 31-02357 IS LIMITED TO A
TOTAL COMBINED ANNUAL DIVERSION VOLUME OF 1613.5 AF.

PRIORITY DATE: 04/23/1979

POINT OF DIVERSION: T07N R34E S10 SESESW Within Jefferson County
SWSESW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-15 TO 10-15	4.62 CFS

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS
EARLY AS APRIL 1 AND MAY CONTINUE TO AS LATE AS OCTOBER 31,
PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE
OF WATER BEFORE APRIL 15 AND AFTER OCTOBER 15 UNDER THIS REMARK
IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY
OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE
A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE:	Irrigation	Within Jefferson County
	T07N R34E S09	NESE 33.0 SWSE 27.0
	S10	SESE 26.0 NWSW 4.0 SWSW 28.0
	S15	NWNW 39.0 SWNE 34.0 NENW 40.0
	S16	NENE 39.0 NWNW 39.0 SWNE 34.0 NENW 40.0 SENW 34.0 NWSW 20.0 NWSE 15.0
	461.0 Acres Total	

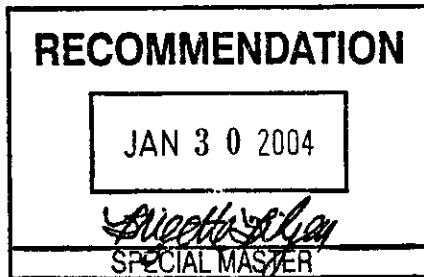
USE OF THIS RIGHT WITH RIGHT NO. 31-02357 IS LIMITED TO THE
IRRIGATION OF A COMBINED TOTAL OF 461 ACRES IN A SINGLE
IRRIGATION SEASON.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.



John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

2004 JAN 30 PM 4 38

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)
_____)

CERTIFICATE OF MAILING

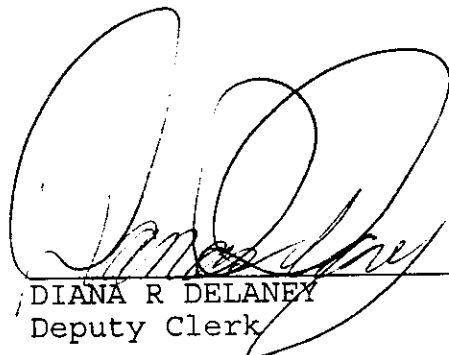
Water Right(s): 31-07311

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on January 30, 2004, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

BEN D JERNBERG
Represented by:
ROGER D LING
PO BOX 396
RUPERT, ID 83350
Phone: 208-436-4717



DIANA R DELANEY
Deputy Clerk

CERTIFICATE OF MAILING

PAGE 1
01/30/04

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2004 JAN 30 PM 4 38

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)
)
_____)

NOTICE OF ISSUANCE OF
SPECIAL MASTER'S
RECOMMENDATION

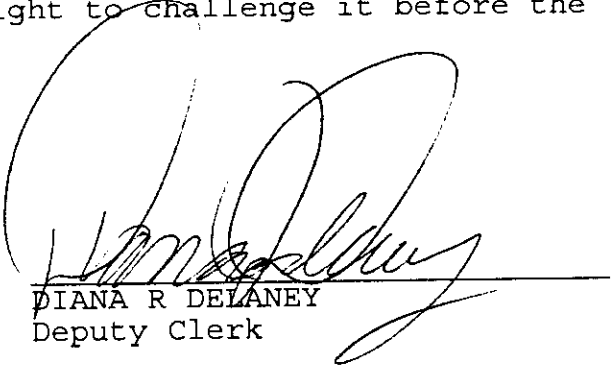
Water Right(s): 31-07311

On January 30, 2004, Special Master BRIGETTE BILYEU
issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s)
pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party
to the adjudication including parties to the subcase, may file a Motion
to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate
in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION
shall constitute a waiver of the right to challenge it before the
Presiding Judge.

DATED January 30, 2004.



DIANA R DELANEY
Deputy Clerk