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

In Re SRBA)
)
Case No. 39576)
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_____)

Subcase No. A29-11342

**MEMORANDUM IN SUPPORT OF
MOTION TO FILE A LATE CLAIM
OR IN THE ALTERNATIVE TO
SET ASIDE A PARTIAL DECREE
PURSUANT TO I.R.C.P. 60(a) AND
ALLOW AMENDMENT OF CLAIM**

COMES NOW the claimant, FMC CORPORATION, by and through its counsel John K. Simpson, of the firm Barker, Rosholt & Simpson, LLP, and moves this Court pursuant to Idaho Rules of Civil Procedure 7(b)(1), 55(c) and 60(a) for an order (1) allowing FMC Corporation ("FMC") to file a late claim to correct the incorrect claim for the right as a beneficial use rather than as a licensed right, or in the alternative, for an order (2) setting aside the partial decree entered for water right number 29-11342, and to

allow the amendment of the claim submitted by FMC in 1990 to reflect the correct basis for the claim.

STANDARDS TO GRANT REQUESTED RELIEF

Pursuant to this Court's Administrative Order 1, Rule 4, this Court will review a motion to allow the filing of a late claim pursuant to the good cause standard set forth at Idaho Rule of Civil Procedure 55(c). SRBA Court, AO1, 4. Id. R. Civ. P. 55(c). Rule 55(c) authorizes a court to set aside a default judgment "[f]or good cause shown." *Id.* FMC Corporation, for the reasons set forth herein, can demonstrate the good cause required to allow the filing of a late claim.

If however, the Court finds that the entry of a decree for water right no. 29-11342 without objection by FMC constitutes a default judgment, then FMC can demonstrate that a clerical error was committed by the Idaho Department of Water Resources excusing FMC's failure to object to the Director's report, and warranting this Court's Order to set aside the partial decree pursuant to Idaho Rule of Civil Procedure 60(a) to allow the amendment of the claim. Cases interpreting the application of Rule 55(c) have stated that "[j]udgments by default are not favored and the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits." *Washington Federal Savings and Loan, Ass'n. v. Transamerica Premier Insurance Co.*, 124 Idaho 913, 916, 865 P.2d 1004, 1007 (1993), *citing Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct.App. 1983). Whether to grant relief from a default judgment is a decision committed to the discretion of the court. *Id.* "When exercising its discretion, the court must examine whether the litigant engaged in conduct which, although constituting neglect, was

nevertheless excusable because a reasonably prudent person might have done the same thing under the circumstances.” *Washington Federal Savings and Loan, Ass’n v. Transamerica Premier Insurance Co.*, 124 Idaho 913, 916, 865 P.2d 1004, 1007 (1993), citing *Schraufnagel v. Quinowski*, 113 Idaho 753, 754, 747 P.2d 775, 776 (Ct.App. 1987).

The movants request that this Court apply the same analysis of Idaho Rule of Civil Procedure 60(a) that it has in the past to allow a claimant to have the record corrected to reflect what was actually meant at the time of entry of an order of this court. Id. R. Civ. P. 60(a). Order Recommending Partial Decree be Set Aside, SRBA Subcase Nos. 31-7311, 31-2357 and 31-2395. Idaho Rule of Civil Procedure 60(a) provides in relevant part that:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Id. R. Civ. P. 60(b). “Errors correctable under Rule 60(a) include those where what is written or recorded is not what the court intended to write or record. The error can be corrected whether it is made by a clerk or by a judge.” *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004), citing *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987). In this case water right number 29-11342 was inadvertently attributed to the City of Pocatello, when in fact the right had been transferred to FMC Corporation. Although FMC failed to timely object to the July 11, 2003, *Director’s Report for Irrigation & Other Uses, Reporting Area 9, IDWR Basin 29*, it did so because it did not recognize the claim number listed in that report as its own. The original claim was noted as “A29-11342” while the water right number listed in the Report was “29-11342.” The clerical error occurred in the report submitted to and relied upon by this Court in its *Final Order*

Disallowing Water Rights Claims dated March 25, 2004. That Order incorrectly included water right number 29-11324 because it had been incorrectly listed in the Director's Report for the Basin, and recognized as part of another right for which the claim had been withdrawn.

PERTINENT FACTUAL AND PROCEDURAL HISTORY

The matter concerns water right number 29-11342, alternatively referred to as claim number A29-11342. This water right was originally a licensed right for municipal purposes for the City of Pocatello bearing the priority date of September 1, 1953. Affidavit of Shelley Davis in Support of Motion to Allow Filing of a Late Claim or Alternatively To Set Aside Partial Decree and Allow Amendment of Claim (hereinafter "Davis Aff."), Exh. A. At that time the right was classified under Use Permit No. G-24451. *Id.* The license permitted the city to draw up to 1.1 cfs from the well. *Id.* The well from which the water was drawn has been historically referred to as the 'Pilot House' well, or well number 11. *Id.*

In 1990, the claimant, FMC Corporation, purchased property from the City of Pocatello. Davis Aff., Exh. B. The Pilot House well, or well number 11, was an appurtenance to that property. *Id.* On April 20, 1990, FMC Corporation filed a Notice of Claim to a Water Right Acquired under state law with this Court. Davis Aff., Exh. C. The right was claimed as a beneficial use right for approximately 1.1 cfs based upon the water right and land acquired from the City of Pocatello. *Id.* The Claim was assigned number A29-11342. *Id.* In 1990, at the time that FMC filed its Claim, Pocatello recognized that the right to claim the water was properly FMC's as evidenced by the Claim filed by the City and signed by the Mayor. Davis Aff., Exh. D. On September 21,

1992, Dave Carlson, of the Department of Water Resources sent a letter to FMC informing them that their application for change in ownership for claim number A29-11342 had been processed, and that FMC was recognized as the current owner of the right. Davis Aff., Exh. E.

In 1997 the City of Pocatello filed an application for transfer of a water right which included right numbers 29-02274, 29-02338, and 29-07375. Davis Aff., Exh. F. The 1.1 cfs from well number 11 that was claimed by FMC was inadvertently included in the water transferred in right number 29-02338. *Id.* Also see Affidavit of Carter Frischle in Support of Motion to Allow Filing of A Late Claim or Alternatively to Set Aside Partial Decree and Allow Amendment of Claim. (Hereinafter "Frischle Aff.").

In 2001, as part of the investigation of SRBA claims, Bryce Contor of the Idaho Department of Water Resources sent a letter to FMC describing the extent and point of their investigation into FMC's water right claims, including the Pilot House well right and water use. Davis Aff., Exh. G. In 2002, IDWR approved FMC's lease of a number of water rights as part of the Interim Stipulated Agreement for Water District 120 (Basin 35). Davis Aff., Exh. H. The Pilot House well water right was included among the leases approved. *Id.*

On April 25, 2003, the City of Pocatello amended its claims to exclude the 1.1 cfs from the Pilot House well citing that it had been sold in 1992. Davis Aff., Exh. I. However, when the Department of Water Resources made its Preliminary Recommendation of Water Rights on May 10, 2003, less than three weeks after Pocatello had withdrawn its claim, the Pilot House well water claim was still included in the water

recommended decreed to the City under right number 29-02338. Davis Aff., Exh. J. Also see, Fritschle Aff.

On July 11, 2003, the Department of Water Resources filed its Director's Report for Irrigation & Other Uses, Reporting Area 9, IDWR Basin 29. Davis Aff., Exh. K. In the report the Department recommended that right number 29-11342 be disallowed, citing the reason that the right had been recommended as part of right no. 29-02338. *Id.* FMC did not object to the recommendation because it did not recognize that right as the right associated with the Pilot House well. Affidavit of Rob Hartman in Support of Motion to Set Aside Partial Decree and Allow Filing of a Late Claim. FMC believed that the right associated with the Pilot House well was classified under number A29-11342. *Id.*

ARGUMENT

I. Good Cause Exists to Allow FMC Corporation to File a Late Claim for Water Right Number 29-11342.

As set forth in the facts above, on April 20, 1990 FMC Corporation filed its Notice of Claim to a Water Right Acquired Under State Law with this Court. In that claim FMC indicated that it claimed the 1.1 cfs from well number 11, or the Pilot House well, that it was acquiring through the purchase of the property on which the well was located, and on which the water from the well had been continuously used. The claim was assigned the identification number A29-11342. The basis of the claim was incorrectly identified as beneficial use. In the remarks section of the Notice the drafter states that "[t]his well is being claimed based on a beneficial use although it is described in license 24451." Ex. C, pg. 2. Additionally, when FMC was notified by Dave Carlson, the Water Rights Agent to the Adjudication, that the water right had been changed to

identify FMC as the owner of the right, the water right was once again identified as A29-11342, denoting the claim was made as a beneficial use, rather than as a licensed right.

Ex. E.

The improper identification of the basis of the claim to the water from well no. 11 is good cause to allow FMC to file a late claim. In all legal actions, it is important that the resulting record correctly reflect the truth of the information presented. Here, if FMC is not allowed to file a late claim to correct the record and amend the basis of its claim to truthfully reflect the history of water right no. 29-11342, then the record will forever misrepresent the history of the water issued under license no. G-24451. This demonstrates good cause for the filing of a late claim.

FMC's failure to object to the recommendation in the Director's Report that their claim be disallowed is excusable given the fact that the right was identified by a different number than the number that had been represented to FMC. It is reasonable that FMC failed to object to the disallowance of right no. 29-11342 as they understood the Pilot House right to be identified as A29-11342. These facts present a clear case for the operation of Rule 55(c), and because judgments of default are disfavored, "the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits." *Johnson v. Pioneer Title Co.*, 104 Idaho at 732, 662 P.2d at 1171 (Ct.App. 1983). Because FMC did not object to the recommendation to disallow their claim, then the entry of the decree functions as a default judgment. Additionally, the mistakes that led to this motion to file a late claim were made due to "mistake, inadvertence, surprise, or excusable neglect," justifying the grant of a motion to file a late claim. *Id.* FMC Corporation has presented this Court with documentation to prove that it is the rightful

owner of the licensed right under A29-11342, constituting a defense to the entry of the order disallowing it claim. For the forgoing reasons, FMC Corporation has demonstrated good cause to allow them to file a late claim, and requests that this Court grant it leave to file a late claim correcting the basis for claim no. A29-11342.

II. The Inclusion of the Water Right from the Pilot House Well in The City of Pocatello's Recommendation was a Clerical Error Correctible Pursuant to Idaho Rule of Civil Procedure 60(a).

If this Court determines that because a decree has already been entered for right no. A29-11342 then it must be set aside in order to allow the amendment of the claim, the clerical error that caused the entry of the erroneous decree gives this Court the power to do so pursuant to Idaho Rule of Civil Procedure 60(a). In this case the clerical error that gave rise to the entry of a partial decree that recommended a water right to the City, which had recognized that it was no longer the owner of the right by filing an amended claim, was originally committed in the record prepared for the Court to rely upon in making its determination to allow or disallow certain water rights claims. It is clear from the Department of Water Resources file that the water right associated with the Pilot House well is the property of FMC, who made a claim for the water in 1990. It is also clear that the City recognized its mistake in claiming the 1.1 cfs from the Pilot House well in its original claim, and thereby filed an amended claim withdrawing that request. The Court, by relying on the erroneous recommendation of the Department, entered an order disallowing the claim because according to the Director's Report it had been "recommended as right 29-2338." Davis Aff., Exh. K. Because the Court relied upon a mistaken assertion in the Director's Report, the Partial Decree disallowing 29-11342 was made in error.

“It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake.” *American Trucking Association v. Frisco Transp. Co.*, 358 U.S. 133, 145, 79 S.Ct. 170, 177 (1958). “[A] motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced.” *Silsby v. Kepler*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004), *citing Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.3d 815, 818 (1987). While the Court is not allowed to use the dictates of Rule 60(a) to change the substantive result of the case, where as here “the mistake or omission” was “mechanical in nature” and “did not involve a legal decision or judgment of an attorney,” then this is the type of clerical error that the Court may correct using Rule 60(a). *Dursteler*, 112 Idaho at 597, 733 P.2d at 818.

The Department of Water Resources serves a unique role in the Snake River Basin Adjudication proceedings. It is an advisor to the Court, that, given the great volume of claims to be adjudicated, the Court must rely upon to present it with an accurate record. In its Order Recommending Partial Decree Be Set Aside in subcase numbers 31-7311, 31-2357, and 31-2395, the Court explained the process of decreeing unobjected to water rights as a “ministerial process.” *Order Recommending Partial Decree Be Set Aside*, SRBA Subcase Numbers 31-7311, 31-2357, and 31-2395, January 30, 2004. The Court went on to explain that “the SRBA depends on the notice provided in the Director’s Report,” and that because of that “it would be inappropriate for the court to change the right without going through the Docket Sheet and Subcase process outline in AO1.” *Id.* In conformance with this Court’s earlier precedent, the claimant, FMC

requests that the decree disallowing water right number 29-11342 for erroneous reasons be set aside, and that FMC be allowed to amend its claim to correct the record.

CONCLUSION

FMC Corporation has demonstrated good cause to be allowed to file a late claim for right no. A29-11342 and asks that this Court grant it leave to do so. Alternatively, for the reason that the Director's Report for IDWR Basin 29 erroneously recommended that the claimant's water right be disallowed because it was already recommended in another right for which the claim had been withdrawn, the claimant requests that the Court set aside the partial decree disallowing the claim and allow the claimant to correct the record by amending its claim.

Dated this 2nd day of May, 2005.

BARKER ROSHOLT & SIMPSON LLP


Shelley M. Davis

Attorneys for FMC Corporation

CERTIFICATE OF MAILING

I certify that on May 2, 2005, I mailed the original and copies of this Memorandum in Support of Motion to File a Late Claim or in the Alternative to Set Aside a Partial Decree Pursuant to I.R.C.P. 60(a) to Allow Amendment of Claim including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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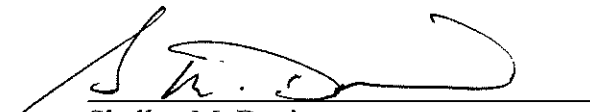
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