

Scott J. Smith (ISB# 6014)
RACINE OLSON NYE BUDGE
& BAILEY, CHARTERED
201 E. Center St. / P.O. Box 1391
Pocatello, ID 83204-1391
Tel: (208) 232-6101
Fax: (208) 232-6109

RECEIVED
MAY 16 2005
DEPARTMENT OF
WATER RESOURCES

Attorney for 7UD Ranches

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

In Re SRBA	)	Subcases 41-8C (Taysom),
	)	41-8D (Weston), and
Case No. 29576	)	41-8F (7UD Ranches)
	)	
	)	7UD RANCHES' MOTION TO ALTER
	)	OR AMEND SPECIAL MASTER
	)	REPORT AND RECOMMENDATION
	)	DATED MAY 2, 2005
	)	

COMES NOW, 7UD Ranches, by and through its attorney of record, Scott J. Smith of the firm of Racine Olson Nye Budge & Bailey, Chartered, and submits its Motion to Alter or Amend the Special Master Report and Recommendation dated May 2, 2005. This motion is timely filed pursuant to Section 13(a) of the SRBA Administrative Order #1.

ARGUMENT

The aforementioned Special Master Report and Recommendation (hereinafter "Special Master Report") recommends that the partial decrees entered on July 28, 2000, in the above-captioned subcases be set aside based upon a Motion to Set Aside filed on June 14, 2004, by J. Juan Spillet (hereinafter "Spillet"). 7UD Ranches respectfully contends that this recommendation to set aside is in error and that it should be altered or amended as discussed below.

The setting aside of the partial decrees in this case is governed by Idaho Rule of Civil Procedure 60(b). *See* SRBA Administrative Order #1, 14(d). Under Rule 60(b), a party seeking to set aside a partial decree must show at least one of the following:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . (3) fraud, misrepresentation, or other misconduct . . . (4) the judgment is void; (5) the judgment . . . is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from operation of the judgment.

Pursuant to Rule 60(b), a motion to set aside filed under subsections (1), (2), (3), and (6) must be filed within six months after the partial decree is entered.

A. The Special Master Report should be altered or amended because Spillet's motion to set aside did not refer to Rule 60(b)(5).

Spillet's motion to set aside filed in this case only requests relief under subsection (1) of Rule 60(b). Because Spillet's motion to set aside was filed long after the expiration of the six-month deadline and because it does not specifically request relief under any other subsection of Rule 60(b), the Special Master Report should be amended to recommend the denial of Spillet's motion.

B. The Special Master Report should be altered or amended because Rule 60(b)(5) requires a "change in circumstances" occurring after the entry of the partial decrees, which hasn't been shown in this case.

It is recognized that the recommendation in the Special Master Report was based upon subsection (5) of Rule 60(b) even though that subsection was not specifically referenced in Spillet's motion. Notwithstanding, 7UD Ranches contends that the Special Master Report improperly applied that subsection in this case.

As mentioned, Rule 60(b)(5) permits the setting aside of a partial decree when "it is no longer equitable that the judgment should have prospective application." With regard to this subsection, the Special Master Report found that the partial decrees were "no longer equitable"

because they may cause the Adshead Ditch to be “over appropriated.” However, this finding does not satisfy the requirements of Rule 60(b)(5) as established by the Idaho Supreme Court in *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990).

The facts of *Gordon* are instructive. In that case, a husband and wife were obtaining a divorce. Just prior to the divorce, they were attempting to obtain guardianship of a young girl. Although the temporary guardianship order had expired, the husband stated to the court prior to the entry of the divorce decree that the young girl was staying with the family pursuant to a valid court ordered guardianship. Based upon the husband’s statement, the divorce decree entered in December 1987 ordered him to pay child support for this young girl. In January 1989 (approximately thirteen months later after the entry of the divorce decree), the husband filed a motion to set aside and modify the divorce decree. Because he failed to file his motion within six months, the Idaho Supreme Court refused to set aside the divorce decree under subsections (1), (2), (3), or (6) of Rule 60(b).

The Idaho Supreme Court in *Gordon* then looked to Rule 60(b)(5) because the husband had argued that the divorce decree was “no longer equitable” because he had discovered that he, in fact, had no legal duty to pay support for the young girl. In addressing this argument, the Supreme Court explained that “the ‘no longer equitable’ language of Rule 60(b)(5) however, implies some change in circumstances.” *Gordon*, 118 Idaho at 807, 800 P.2d at 1021. The Supreme Court then explained:

The rule allows relief if it is “no longer equitable” for the judgment to have prospective application. This provision is not a substitute for an appeal. It does not allow relitigation of issues that have been resolved by the judgment. Instead it refers to some change in conditions that makes continued enforcement inequitable.

Id. (citing 11 Wright and Miller, *Federal Practice and Procedure: Civil* § 2863, pp. 206-07 (1973)). Indeed, the Supreme Court held that it required a “real and substantial change in circumstances.” *Id.* The Supreme Court reviewed the record in that case and concluded that there had been no “real and substantial change in circumstances” warranting relief under Rule 60(b)(5). Therefore, the Supreme Court denied the husband’s motion to set aside.

The significance of the *Gordon* case is that even though it was undisputed that the divorce decree in that case wrongly required the husband to pay child support, it was nonetheless not subject to being set aside because the husband either waited past the six-month deadline or and failed to show a “real and substantial change in circumstances” occurring after the entry of the divorce decree.

As required by the Idaho Supreme Court in *Gordon*, Spillet must show that at some time after July 28, 2000 (when the partial decrees were entered) that there has been a “change in circumstances” that now make the partial decrees “no longer equitable” under Rule 60(b)(5). In filing his motion to set aside in this case, Spillet failed to make such a showing. Nor would it have been possible to do so. There has been no “change in circumstances” since the partial decrees were entered on July 28, 2000.

The Special Master Report recites from the Supplemental Director’s Report, which stated (1) that IDWR’s senior water resource agent had made a recommendation concerning the above-captioned partial decrees based upon so-called “billed quantities” while other recommendations for other water rights in the valley had been based upon so-called “historic quantities”; (2) that the so-called “billed quantities” were the “best information available to him at the time”; and (3) that IDWR does not know, even now with the benefit of hind-sight, whether this was an error.

This appears to form the basis of the Special Master Report's finding that the setting aside of the partial decrees is justified in this case under Rule 60(b)(5). However, this history from the Supplemental Director's Report was readily known and available prior to the entry of the partial decrees. Indeed, there is nothing discussed in the Supplement Director's Report that happened after July 28, 2000, when the partial decrees were entered. Consequently, there is nothing in the Supplemental Director's Report that would justify relief under Rule 60(b)(5). Because there has been no showing of a "change in circumstances" occurring after the entry of the partial decrees in the above-captioned subcases, setting aside of the partial decrees under Rule 60(b)(5) is not permissible. The Special Master Report should be amended to recommend the denial of Spillet's motion.

B. The Special Master Report should be altered or amended because its finding that IDRW expressly acknowledged an error contradicts IDWR's Supplemental Director's Report.

The Order of Reference in this case states that the partial decrees should not be set aside unless there is an "express acknowledgment" from IDWR that an error was made. The Special Master Report concluded that IDWR expressly acknowledged an error. However, this conclusion is in direct conflict with the statements made in IDWR's Supplemental Director's Report.

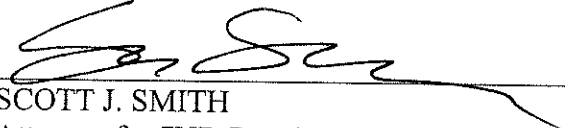
Nowhere in the Supplemental Director's Report does IDWR expressly acknowledge an error in making its prior recommendations. In fact, IDWR states that it's prior recommendations were based upon the "best information available to him at the time" and that, even now, IDWR does not know whether this was an error. Because there has been no express acknowledgment of

any error or mistake, the Special Master Report should be amended to recommend the denial of Spillet's motion pursuant to the language of the Order of Reference.¹

CONCLUSION

It is respectfully requested that the Special Master Report and Recommendation be altered or amended to deny Spillet's motion to set aside the partial decrees in the above-captioned subcases, for the following alternative reasons. First, Spillet's motion to set aside did not refer to Rule 60(b)(5) and therefore that rule should not have been relied upon for the recommendation to set aside the partial decrees. Second, the Idaho Supreme Court has held that Rule 60(b)(5) requires a "real and substantial change in circumstances" occurring after the entry of the partial decrees and there has been no evidence or showing of such a change in this case. Lastly, the Order of Reference required an "express" acknowledgment on the part of IDWR that an error was made and IDWR did not expressly acknowledge any error in the Supplemental Director's Report but instead found that it had relied upon the best information available at the time.

DATED this 13 day of May 2005.


SCOTT J. SMITH
Attorney for 7UD Ranches

¹ Notwithstanding, even if there had been an express acknowledgment of a mistake (which there was not), it could not justify setting aside the partial decrees because a motion to set aside based upon a mistake falls under Rule 60(b)(1) which must be filed within six months of the entry of partial decree and Spillet failed to file his motion to set aside within that time period.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of May, 2005, I caused a true, correct and complete copy of the foregoing document to be served by U.S. first-class mail, postage prepaid, upon the following, unless a different method of service is indicated:

Director of IDWR
P.O. Box 83270
Boise, ID 83270-0098

Jason D. Walker
Attorney for James V. Spillet
P.O. Box 396
Rubert, ID 83350-0396

Robert R. Spillett
P.O. Box 144
Rockland, ID 83271

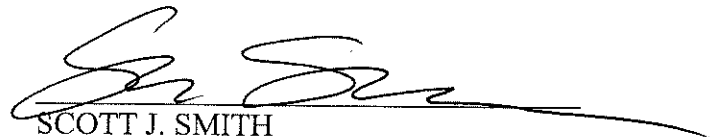
James Robinson
Bench Ditch Irrigation Co.
P.O. Box 157
Rockland, Idaho 83271

Kelvin Taysom
Suzanne Taysom
2809 W. Sandhollow Rd
Rockland, ID 83271

Herbert R. Weston
R. Scott Weston
4448 Rockland Hwy.
Rockland, ID 83271

James V. Spillett
986 W. Bryan
Pocatello, Idaho 83202

James Juan Spillett
P.O. Box 278
Rockland, Idaho 83271


SCOTT J. SMITH