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DEPARTMENT OF
WATER RESOURCES

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
1000 Riverwalk Dr., Ste. 200
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518
Idaho State Bar Number 7018

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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

A. Subcase: 34-2459, 34-2460, 34-2461,
34-2462, and 34-10925

**MEMORANDUM OF AUTHORITY REGARDING
MOTION TO SET ASIDE PARTIAL DECREES
PURSUANT TO I.R.C.P. 60(a)**

Mitchell Sorensen, by and through his counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this Memorandum of Authority Regarding Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(a).

I. BACKGROUND.

On April 23, 2008, Mr. Sorensen filed a motion to set aside the above partial decrees. A hearing on the matter was heard on July 23, 2008, but the hearing was continued to November 17, 2008 in order for Mr. Sorensen to provide additional information to the court. A memorandum

supported by the Affidavit of Attorney Robert L. Harris in Support of Motion to Set Aside Partial Decrees (the "Harris Affidavit") was subsequently provided to the court.

At the November 17, 2008 hearing, counsel for IDWR represented to the court that IDWR personnel had concerns regarding the motion to set aside. The hearing was again continued until March 25, 2009.

Between the November 17, 2008 and March 25, 2009 hearings, Sorensen met with IDWR staff to further explain the rationale behind the motion to set aside partial decrees. Specifically, IDWR's concern related to a claim that the Island Well water rights should have the Airport Wells listed as points of diversion on Water Right No. 34-7037. The licensing of Water Right No. 34-7037 specifically excluded the Airport Wells. As to whether or not the remaining water rights—Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925—should have the Island Wells listed as points of diversion under an accomplished transfer, IDWR did not find any document that would foreclose a claim of such an accomplished transfer.

At the March 25, 2009 hearing, Sorensen made an oral motion to withdraw his motion to set aside Water Right No. 34-7037 in response to IDWR's legitimate concern. Therefore, the only water rights that Sorensen contends should be set aside are—Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925.

At the March 25th hearing, the court expressed its concern that the alleged clerical error identified by Sorensen may not be sufficient to meet the standard contained in I.R.C.P. 60(a) to set aside these remaining water rights. The court requested additional briefing from Sorensen on this issue, which is provided with this brief.

II. ALLEGED CLERICAL ERROR.

In order to be very clear on the clerical error alleged by Sorensen to have occurred, the following is a description of that clerical error.

As the water rights are currently listed, Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 share two common points of diversion which are located in the SWSENW and the SENESW, both in Section 2, T3N., R26E. These wells are commonly referred to as the "Airport Wells". Water Right No. 34-7037 is diverted through two wells found in the NESENW of Section 3, T4N., R26E., and the SENWSW of Section 34, T5N., R26E. These wells are commonly referred to as the "Island Wells", and these wells divert into the Island Canal to be delivered to the same place of use as water from the Airport wells are delivered.

The original claims filed for these water rights were filed by Willard Bell of Crater Farms, Inc. These original claims only claimed the Airport Wells as points of diversion under these water rights.

On October 30, 1990, amended claims were filed by Willard Bell of Crater Farms, Inc. which were prepared by Kent W. Foster of Holden, Kidwell, Hahn & Crapo, PLLC. Importantly, the amended claim contained two maps: one map of the water right place of use (near the Arco Airport) and three claimed points of diversion (the Airport Wells), and the second map depicting the location of the Island Wells. This second map depicting the Island wells was not included in the original claim filed by Mr. Bell.

Further, in the claim document itself, at item 14 (the "Remarks Section"), it states the following

“Rediversion from Munsey Ditch: NW SE SE, (2 points), Section 2; SW SW NW, (2 points) Section 13,; SE SE NE Section 15; SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range 26 East.”

At the March 25th hearing, Sorensen represented to the court that this reference to the listed rediversion points can only be from water delivered from the Island Wells. The face of the claim, therefore, has a reference to use of the Island Wells.

The submission of this second map and the statement in the remarks section indicates that Mr. Bell and Mr. Foster claimed the Island Wells as authorized points of diversion under this water right. Unfortunately, for reasons not evident in the file, the legal descriptions for the Island Wells were not included on the first page of the amended claim (where the legal written legal descriptions are to be listed) as they apparently should have been based upon the included maps.

Given this reference in the remarks section, and the inclusion of the map depicting the Island Wells as points of diversion, the clerical error is that the legal description for the Island Wells was not included on the first page of the claim. This creates an inconsistency between the first page, and the second page and map submitted to IDWR to have these water rights adjudicated.

III. ARGUMENT.

A. Idaho Rule of Civil Procedure 60(a).

Sorensen has submitted his motion to set aside the above partial decrees under Rule 60(a). The applicability of Rule 60(b) is set forth in the following Section III.B.

I.R.C.P. 60(a) provides the following:

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.

The most recent case from the Idaho Supreme Court discussing Rule 60(a) is *Silsby v. Kepner*.¹ At the March 25th hearing on this matter, counsel for Sorensen briefly discussed the Court of Appeals counterpart to this case—found at 140 Idaho 412, 95 P.3d 30—when counsel was asked to provide support at the oral argument regarding the motion to set aside under Rule 60(a). No briefing of authority had been submitted on this issue. From the case note of this case in the annotated book for the Idaho Rules of Civil Procedure, counsel used the language from this annotation to support the argument under Rule 60(a). However, it must be made clear to this court that the Court of Appeals case was subsequently reversed by the Idaho Supreme Court. Nevertheless, the *Silsby* case from the Idaho Supreme Court does support the motion made by Sorensen with regards to the standards discussed for Rule 60(a). For the reasons set forth below, we meet the standards of Rule 60(a), and the partial decrees identified above should be set aside.

In *Silsby*, the former husband of a married couple filed a petition for modification of child support payments that resulted from an order from the magistrate court setting the child support amount.² The petition did not include any offset to the former husband for the tax benefit to the former wife of the child dependency exemption. The former husband was served, but did not appear to contest the divorce complaint or judgment. The court entered a default judgment and decree.³

¹ 140 Idaho 410, 95 P.3d 28 (2004).

² 140 Idaho 410, 411, 95 P.3d 28, 29 (2004).

³ *Id.*

Thereafter, the former husband filed a motion to correct a clerical error under Rule 60(a) alleging that the original divorce decree failed to give the former husband credit for the tax exemption benefits awarded to the former wife. Under I.R.C.P. 6(c)(6) § 8, it states that the “parent not receiving the exemption(s) is entitled to a pro rata share of the income tax benefit or child tax credit.”⁴ The provision is therefore mandatory, not discretionary. As a result, the magistrate held that under Rule 60(a), there had been a clerical error, even though there was nothing in the divorce decree—which contained the same terms as the divorce complaint—addressing the tax exemption issue.

After an appeal to the Idaho Court of Appeals, it affirmed the magistrate court. The Idaho Supreme Court, however, reversed. The Idaho Supreme Court agreed that the provision regarding the tax exemption was mandatory, but concluded that the mistake made by the magistrate judge was “a legal error and not a clerical error . . .”⁵ Thus, “[w]here the magistrate did not intend to make the award in the first place, it was not a clerical error to be corrected under Rule 60(a), but rather a legal error that falls outside the remedy of this rule.”⁶

In making this determination, the court articulated numerous standards regarding Rule 60(a). While it is usually not good practice to include large block quotations in any briefing, the inclusions of these standards here in their entirety is helpful. We have taken the liberty to bold those portions most relevant:

⁴ Id.

⁵ Id. at 412, 95 P.3d at 30.

⁶ Id.

Rule 60(a) applies to those errors in which the "... type of mistake or omission [is] mechanical in nature which is **apparent in the record and which does not involve a legal decision or judgment by an attorney**. The clerical mistake under Rule 60(a) may be differentiated from the mistake or inadvertence referred to in Rule 60(b)(1), upon the ground that the latter applies primarily to errors or omissions committed by an attorney or by the court which are not apparent on the record." (citation omitted) *Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.2d 815, 818 (Ct.App.1987). "Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b). Thus 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." (citation omitted) *Dursteler*, 112 Idaho at 597, 733 P.2d at 818. Silsby, relying on *Dursteler*, argues that the mistake at issue is not a clerical error or omission and not subject to correction under I.R.C.P. 60(a). In that case, the Court of Appeals found that where post-judgment interest is a matter of right and therefore mandatory, the failure to include the interest was a clerical error and correctable under Rule 60(a).

...

Rulings in other jurisdictions and in the federal appellate circuits generally favor the determination that legal errors, as opposed to clerical errors, are not entitled to correction under Rule 60(a). In *Blanton v. Anzalone*, 813 F.2d 1574 (1987), the 9th Circuit found:

"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 the judge." 813 F.2d at 1577.

The court further explained:

The basic distinction between "clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" whereas the latter consist of instances where the court *changes its mind*, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Id. at n. 2. We find the 9th Circuit's construction of Rule 60(a) to be proper and applicable here. Where the magistrate did not intend to make the award in the first

place, it was not a clerical error to be corrected under Rule 60(a), but rather a legal error that falls outside the remedy of this rule.⁷

There should be no dispute that an error in the claiming of the above water rights was made. The issue is whether the error is a legal error or a clerical error. In *Silsby*, the Idaho Supreme Court concluded that a legal error was made, because there was nothing in the divorce complaint from the former wife relating to the tax benefit, and nothing in the divorce decree, which was based on the complaint. Therefore, there was nothing in the record to correct. Rather, the magistrate simply changed his mind after a legal error was made.

The distinction between the motion to set aside the above partial decrees and the *Silsby* case is that there are documents in the record which can be corrected. As set forth above, there is a reference in the remarks section of claim document itself regarding the Muncie Ditch, and the map which was attached to the claim depicting the Island Wells as points of diversion. This was inconsistent with the legal description for the Island Wells that was not included on the first page of the claim. This creates an inconsistency between the first page of the claim, and the second page claim and map submitted to IDWR to have these water rights adjudicated. There is therefore a record to be corrected under Rule 60(a).

If we assume for sake of argument that the amended claims did not include the reference to the Muncie Ditch at item 14 and did not include the map, then there would not be items in the record to correct. Any claim that there was a clerical error in this instance would not pass the test articulated in *Silsby*. While it could be said that an error was made, this would be a legal error in that

⁷ *Silsby v. Kepner*, 140 Idaho 410, 411-12, 95 P.3d 28, 29-30 (2004).

the claimant simply did not claim the points of diversion. We would not have relief available under Rule 60(a). However, because there is a record to correct and because the errors did not involve a conscious legal decision or judgment by an attorney to exclude the points of diversion, rule 60(a) is applicable to this matter.

Further, counsel for Sorensen has had previous experience with this court regarding a motion to set aside partial decrees pursuant to Rule 60(a) in subcases 21-7295 and 21-7296 in the name of BLF Land, LLC. In these subcases, the original claimant filed claims based upon the water right permit elements, which permit had not been licensed. After the claims were submitted, the Department eventually issued a license, with elements that were different than the permit and claim. Both water rights were recommended based on their claims, which were not consistent with the license. The claimant, now deceased, likely presumed that IDWR would update the claim based on issuance of the licenses, but that did not happen. IDWR likely presumed that the claimant would amend his claims once he received the licenses. Neither correction occurred.

Thus, similar to the instant subcases, there was clearly an error in the issuance of partial decrees for water rights 21-7295 and 21-7296 and a record upon which to base a correction. This court set those partial decrees aside, and amended partial decrees were issued on March 23, 2009. The motions to set them aside were filed a year after the partial decrees were entered, therefore, these partial decrees were set aside pursuant to Rule 60(a). The issues surrounding 21-7295 and 21-7296 are the exact same as the issues in the instant subcases.

In sum, there is a record upon which this court can find a clerical error in the issuance of the partial decrees for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925. The

remarks on the claim document itself, coupled with the submission of the map, clearly show that Willard Bell of Crater Farms intended to claim the Island Wells as points of diversion under the above water rights. Not listing these points of diversion on the front page was an error. This court should therefore set aside these partial decrees under Rule 60(a) to include these points of diversion.

B. Idaho Rule of Civil Procedure 60(b).

Because the partial decrees for the above water rights were issued more than six months prior to the motion to set aside partial decrees, Rule 60(b)(1), 60(b)(2), and 60(b)(3) are not applicable in this matter, even though it appears that mistake or inadvertence was present. Therefore, the only provision of Rule 60(b) that may apply in this matter is Rule 60(b)(6). This portion of the Rule 60(b) provides that a judgment can set aside at any time for “any other reason justifying relief”

In the alternative to the motion to set aside the partial decrees under Rule 60(a), the partial decrees should be set aside under Rule 60(b)(6). We note, however, that in *Leasefirst v. Burns*, the Idaho Supreme Court held that “60(b)(1) and 60(b)(6) are mutually exclusive provisions, such that a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6).”⁸ It appears that what happened with the claims to the above water rights was a mistake or inadvertence, but to the extent the court feels it falls into a separate category of error, then the water right partial decrees should be set aside for these other reasons justifying relief.

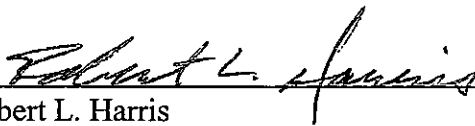
⁸ 131 Idaho 158, 163, 953 P.2d 598, 603 (1998).

IV. CONCLUSION.

For the reasons set forth above, this court has legal authority to set aside the partial decrees for 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 under Idaho Rule of Civil Procedure 60(a).

In the alternative, the partial decrees should be set aside pursuant to Rule 60(b)(6).

Dated this 7th day of April, 2009.



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF MAILING

I certify that on this 7th day of April, 2009, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

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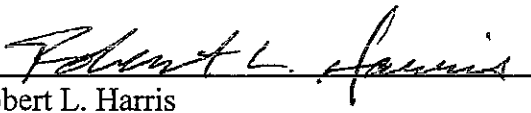
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Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724


Robert L. Harris

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