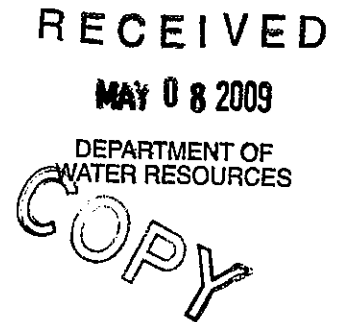


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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

A. Subcase: 35-2389

**MEMORANDUM IN SUPPORT OF MOTION TO SET
ASIDE PARTIAL DECREE**

Kortney Albertson, by and through his counsel of record, Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this Memorandum in Support of Motion to Set Aside Partial Decree. For the reasons set forth below, we respectfully request this court to set aside the partial decree listed above.

I. BACKGROUND.

Water Right No. 35-2389 received a partial decree in the Snake River Basin Adjudication on January 31, 2002. The partial decree confirmed a water right which allowed for the diversion of 4.44 cfs and 1384 acre-feet per year of ground water for the irrigation of 346 acres. Unfortunately, the partial decree did not accurately document the historic irrigation practice of the water right, and removed acres from the place of use documented by the originally-issued water right license.

Attached at Exhibit A to the Affidavit of Attorney Robert L. Harris is a copy of the License and Certificate of Water Right originally issued to Lynn Lake, the predecessor-in-interest to Kortney

Albertson. It documents the application of beneficial use of 4.44 cfs for the irrigation of 360 acres, which was issued on July 10, 1957.

For reasons not entirely clear, Water Right No.35-2389 received a partial decree of 4.44 cfs, but for only 346 acres. It appears that the reduction of 14 acres was an error, which may be corrected pursuant to Rule 60 of the Idaho Rules of Civil Procedure, as set forth below.

II. ARGUMENT.

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

The error to Water Right No. 35-2389 set forth above may be corrected pursuant to Rule 60(a) of the Idaho Rules of Civil Procedure. 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 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

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

¹ 140 Idaho 410, 95 P.3d 28 (2004).

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

³ *Id.*

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.

The Idaho Court of Appeals 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:

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

⁴ *Id.*

⁵ *Id.* at 412, 95 P.3d at 30.

⁶ *Id.*

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 there was an error in the partial decree of the above water right for two reasons. First, the partial decree does not comport with past IDWR practice and procedure. The water right license was originally for 4.44 cfs for the irrigation of 360 acres. This equates to a rate per acre of .0123 cfs/acre. Based on past IDWR practice, a reduction in 14 acres would typically result in a reduction of .172 cfs, down to 4.27 cfs. It is generally the practice of officials at the Idaho Department of Water Resources—in recommending water rights in the SRBA—to

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

pro rata reduce the amount of ground water allotted if the acreage has been reduced through non-use after issuance of a license. A departure in this practice evidences an error in the partial decree.

Secondly, a reduction of 14 acres does not comport with the historic irrigation under this water right. From a review of IDWR's recommendation, it appears that a 14-acre area irrigated by the claimant for grazing was removed from the place of use, as it appears that the acres were not clearly cultivated as the other acres within the place of use were and currently are. The Claimant and his predecessors-in-interest have continually irrigated these acres for grazing purposes, even though from the aerial photo the acres do not clearly look like they are part of the cultivated field. Evidence in support of this assertion has been provided to IDWR. From a historic view, therefore, there should not have been a reduction in the place of use acreage. The correct historical determination of use under Water Right No. 35-2389 is that the full 4.44 cfs was used for the irrigation of 360 acres, just as the water right was originally licensed. This is how the partial decree should be amended.

The issue now before the court is to determine 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 decree and the *Silsby* case is that there are documents in the record which the correction can be based upon. The license clearly confirmed the use of 4.44 cfs for the irrigation of 360 acres, and the claim for the water right exactly mirrored the license. The resulting partial decree was different than the license in its elements, and a partial decree inconsistent with past IDWR practice in recommending water rights. There is

therefore an item in the record upon which the correction may be based, and therefore, the acreage can be corrected under Rule 60(a).

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 decree, 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 decree 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 under Rule 60(b)(6).

C. The SRBA Court Has Set Aside Partial Decrees to Correct Errors.

The setting aside of partial decrees in the SRBA to correct inaccurate partial decrees which are different than the original water right licenses has been undertaken previously. In subcases 21-7295 and 21-7296, there was clearly an error in the issuance of partial decrees for both of these water rights as they did not match the licenses issued after the claims were filed. Because there was 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

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

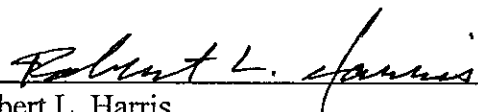
partial decrees were entered, therefore, these partial decrees were set aside pursuant to Rule 60(a).

Additionally, the court previously set aside stockwater claims in Basin 27 because of inconsistencies with remarks added to some of the claims.⁹ In a letter from Deputy Attorney General Garrick Baxter to Special Master Brigitte Bilyeu dated November 18, 2008, IDWR requested that the SRBA court allow IDWR to submit amended director's reports for identified water rights to fix inconsistencies and errors found in IDWR's review of the numerous stockwater rights.¹⁰ The court granted the request and set aside the stockwater partial decrees. Similar to the stockwater right issue, Water Right No. 35-2389 contains an error that should be fixed. Thus, the court has permitted the revisiting of incorrect partial decrees, and based on this precedent, should likewise permit Water Right No. 35-2389 to be correctly amended.

IV. CONCLUSION.

For the reasons set forth above, this court has legal authority to set aside the partial decree for Water Right No. 35-2389.

Dated this 6th day of May, 2009.



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

⁹ See, e.g., Subcase Nos. 27-11344, 27-12094, and 27-12095.

¹⁰ See Letter from Garrick Baxter to Special Master Brigitte Bilyeu, November 18, 2008, at 2.

CERTIFICATE OF MAILING

I certify that on this 6th day of May, 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:

1. Original to:

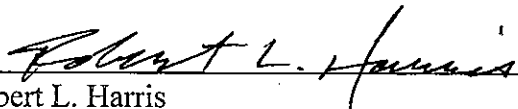
Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724


Robert L. Harris

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