

RECEIVED

FEB 26 2010

DEPARTMENT OF
WATER RESOURCES

Michael C. Creamer [ISB No. 4030]
Michael P. Lawrence [ISB No. 7288]
GIVENS PURSLEY LLP
601 West Bannock Street
P.O. Box 2720
Boise, Idaho 83701-2720
Office: (208) 388-1200
Fax: (208) 388-1300
www.givenspursley.com
Attorneys for F. Stanley Lloyd

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

Subcase No.: 43-192

**MOTION TO SET ASIDE PARTIAL
DECREE AND MEMORANDUM IN
SUPPORT THEREOF**

F. Stanley Lloyd ("Mr. Lloyd"), by and through his counsel Givens Pursley LLP, and pursuant to Idaho Rule of Civil Procedure 60(b), hereby moves this Court for an order setting aside the partial decree issued in subcase no. 43-192 and to reopen the subcase to correct errors of fact and law.

Oral argument is requested.

BACKGROUND

In 1928, water right no. 43-192 was decreed in *Albion-Idaho Land Company v. Jobe Adams, et al.*, Decree No. 992 (D. Idaho 1928) ("Jobe Adams Decree"), to Mr. Lloyd's uncle, S.H. Lloyd, with the following elements:

Priority Date:	April 30, 1880
Diversion Rate:	0.8 cfs
Source:	Green Canyon Creek
Purpose of use:	Irrigation
Place of use:	Lots 3 and 4, Sec. 7, T14S, R25E; E1/2SE1/4, Sec. 12, T14S, R24E

The Jobe Adams Decree did not state the number acres authorized for irrigation within the place of use, although the property described in the table above encompasses approximately 80 acres. *Affidavit of F. Stanley Lloyd in Support of Motion to Set Aside Partial Decree* ¶ 8, subcase no. 43-192 (Feb. 22, 2010) (“Lloyd Affidavit”). A copy of the Jobe Adams Decree is attached as Exhibit A to the Lloyd Affidavit.

Around 1935, Mr. Lloyd’s father acquired S.H. Lloyd’s property and appurtenant water right no. 43-192 following S.H.’s death. Lloyd Affidavit ¶ 3. Around 1964, Mr. Lloyd’s father conveyed this land and water right to Mr. Lloyd. *Id.* ¶ 4.

On June 15, 1989, Mr. Lloyd filed a claim for right no. 43-192 in the SRBA to irrigate 74 acres with 0.80 cfs based on the Jobe Adams Decree. Lloyd Affidavit ¶ 5 and Exhibit B.

In 1989 Mr. Lloyd filed, and in 1992 IDWR approved in part, transfer application no. 3580 “to correct the recorded place of use description and show the actual current place of use and amount of irrigated acreage.” Lloyd Affidavit ¶ 9 and Exhibit C (*Order Approving Transfer in Part* ¶ 1 p. 1, In the Matter of Application for Transfer No. 3580 of Water Right No. 43-0192 in the name of F. Stanley Lloyd (Feb. 11, 1992)).¹ The 1992 transfer resulted in the following place of use for right no. 43-192:

Township	Range	Section	Quarter-Quarter	Number of irrigated acres
14S	24E	12	SWSE	23
14S	24E	12	SESE	17
14S	25E	7	NWSW	1
14S	25E	7	SWSW	4
TOTAL				45

The SRBA claim for right no. 43-192 was amended by IDWR to reflect the approved transfer.

¹ Application for Transfer no. 3580 also sought a change in point of diversion and source from Green Canyon Creek to ground water, but this portion of the transfer was denied.

Also in 1992, and without filing another application for transfer, Mr. Lloyd moved the headgate on the delivery ditch (Green Canyon Ditch) from its original location to a point about 800 feet down-ditch.² Lloyd Affidavit ¶ 10. This resulted in Mr. Lloyd no longer irrigating some of the 45 acres authorized for irrigation by approved transfer no. 3580, but instead irrigating other lands that were not authorized by the transfer. These changes were made to upgrade the system (“to install a proper headgate and measuring device”) and to establish his ditch diversion on his own property rather than keep it on federal land where the original ditch diversion was located. *Id.*

In 1994, IDWR conducted a field examination to prepare a Director’s Report recommendation for water right 43-192. Field Exam Memo at 1. Because of the changes to the headgate location on Green Canyon Ditch noted in the preceding paragraph, the field examiner believed that actual irrigation practices in 1994 did not comport with the claim as amended by approved transfer no. 3580. The following table, reproduced from the Field Exam Memo, shows the “claimed” irrigated acres, the irrigated acres “found” by the field examiner, and the field examiner’s “recommended” acres:

	Sec 12		Sec 7		
	SWSE	SESE	NWSW	SWSW	
Claimed and transfer approved acres	23	17	1	4	45
Found irrigated acres	9.1	32	1.7	7.1	
Recommended acres	9.1	17	1	4	31.1

As shown in this table, the field examiner recommended the lesser of the “Claimed and transfer approved acres” or “Found irrigated acres” in the Director’s Report for right no. 43-192. Where the “claimed” acres exceeded the “found” acres, he determined that forfeiture for non-use

² A December 8, 1999 memorandum prepared by IDWR employee Kelly K. Christensen (“Field Exam Memo”) states that Stan Lloyd told Mr. Christensen that the changes occurred in 1992. A copy of the Field Exam Memo is attached to the Lloyd Affidavit as Exhibit D.

between 1992 and 1999 had occurred. Where the “found” acres exceeded the “claimed” acres, he determined that “the transfer established the maximum number of irrigated acres” and, apparently, that he was bound by the transfer. *Id.*

The Director’s Report for right no. 43-192 was issued in 2001 for the acres shown as “Recommended acres” in the table above and a diversion rate of 0.62 cfs (i.e. one miner’s inch per acre). No objections were filed. In 2002, the Court issued a partial decree with the recommended acreages and diversion rate.

In 2007, Mr. Lloyd was working with the Water District 43-C water master to improve diversion quantities to users on Green Canyon Ditch when the water master informed him that the SRBA Court’s partial decree for right no. 43-192 authorized only 0.62 cfs to irrigate 31.1 acres, rather than the 0.80 cfs to irrigate 45 acres that Mr. Lloyd he believed he was entitled to irrigate under the Jobe Adams Decree and approved transfer no. 3580. Lloyd Affidavit ¶ 13. Mr. Lloyd contacted this law firm in 2009 to advise him about getting his right no. 43-192 corrected. Lloyd Affidavit ¶ 15.

DISCUSSION

A. This motion is made under Rule 60(b)(5) and (6).

Mr. Lloyd requests this Court set aside the partial decree for water right no. 43-192 as allowed under SRBA Administrative Order 1 (“AO1”) and I.R.C.P. 60(b),³ which states in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative 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 under Rule 59(b); (3) fraud (whether heretofore

³ AO1 states in relevant part: “Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b).” Since the error in the partial decree for right no. 43-192 cannot be characterized as a clerical mistake, Mr. Lloyd bases his motion on Rule 60(b).

denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken.

(Emphases added.) This motion is based on reasons (5) and (6)—that “it is no longer equitable that the judgment should have prospective application” and any other reason the Court believes justifies relief.⁴

In addition to satisfying one of the standards set forth in Rule 60(b), a party seeking relief from operation of a judgment must show they acted in good faith and that they have a meritorious position. *Special Master Report and Recommendation on Motions to Set Aside Partial Decrees* at 5, In re SRBA Subcase no. 41-00013A, et al. (Apr. 29, 2002) (“Weston-Spillett Order”).

The Rule 60(b)(5) and (6) standards are addressed below, following the discussion of Mr. Lloyd’s good faith and meritorious position.

B. Mr. Lloyd acted in good faith.

Admittedly, it has taken considerable time for Mr. Lloyd to seek to set aside the partial decree for right no. 43-192. Nevertheless, this Court reasonably can and should find that Mr. Lloyd acted in good faith and exercised due diligence in the prosecution and protection of this water right and grant him his requested relief.

Mr. Lloyd did not know that water right no. 43-192 had been decreed in 2002 for only 0.62 cfs to irrigate 31.1 acres—rather than the historical amounts of 0.80 cfs to irrigate 40-plus acres—until 2007, when he was working with the water master to improve deliveries down the

⁴ Per Rule 60(b), motions to set aside brought under reasons (5) and (6) are not required to be brought within 6 months.

Green Canyon Ditch. Lloyd Affidavit ¶ 13. Until that time, Mr. Lloyd believed the SRBA Court had decreed his water right with the same elements set forth in the Jobe Adams Decree and approved in transfer no. 3580. *Id.* Since he had never reduced the quantity of water diverted or the number of acres irrigated under the right, he believed the right would be decreed the same as it was decreed in 1920. Lloyd Affidavit ¶ 14.

The changes Mr. Lloyd made to his diversion and delivery system in 1992 were not intended to result in any cessation of use or abandonment of water right no. 43-192. Indeed, Mr. Lloyd would not have changed his diversion and delivery system in 1992 if he had any inclination that he could lose part of his water right—the most senior water right on Green Canyon Creek. *Id.*

Mr. Lloyd was not represented by legal counsel during the pendency of his SRBA claim for this water right. Lloyd Affidavit ¶ 5. He was unaware of the IDWR field examiner's analysis that incorrectly concluded that part of right no. 43-192 was forfeited, nor did he recall reading a copy of the Field Exam Memo, until after he was alerted to the contents of the partial decree by the water master in 2007. Lloyd Affidavit ¶ 14. During the pendency of his SRBA claim, Mr. Lloyd admittedly did not fully understand the documents he received from IDWR or the SRBA Court concerning his water right claim. Now he does not understand how or why IDWR or the SRBA Court took away some of his water right. Lloyd Affidavit ¶¶ 13-14

C. Mr. Lloyd's reason for setting aside the partial decree has merit.

The legal basis for setting aside the partial decree is to correct the erroneous determination in IDWR's recommendation—which followed through to the partial decree—that Mr. Lloyd forfeited a portion water right no. 43-192. It was incorrect for IDWR's field examiner to conclude that a portion of 43-192 was forfeited between 1992 and 1999 because Mr. Lloyd changed the right's place of use without an administrative transfer proceeding. This was in error

because the right was claimed in the SRBA in 1989 and decreed in 2002, and therefore was protected from forfeiture in the period between 1992 and 1999. *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, In re SRBA Subcase Nos. 36-02708 *et al.* (Dec. 29, 1999) ("Facility Volume Decision") ("once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree").

The field examiner based his forfeiture conclusion on his belief that there were "[n]o legal remedies . . . to protect those acres." Field Exam Memo at 1. However, the field examiner could not have known of the Facility Volume Decision's rule tolling the forfeiture clock because the Field Exam Memo (December 8, 1999) predated the Facility Volume Decision (December 29, 1999). It does not appear that the field examiner's analysis in the Field Exam Memo was corrected to address the tolling rule prior to IDWR's issuance of a Director's Report for 43-192 as it should have been. The partial decree should be set aside to correct this error and to decree right no. 43-192 to reflect historical use.

In addition, even though Mr. Lloyd changed the place of use for the right without seeking an administrative transfer, that fact does not mean he forfeited any portion of the right. In his *Memorandum Decision and Order on Challenge; and Order of Partial Decree ("Wood v. Trout")*, subcase no. 65-05663B, dated May 9, 2002, SRBA Presiding Judge Burdick disagreed with the "the proposition that the automatic sanction for failing to receive proper authorization prior to changing any element of a water right is forfeiture upon accrual of the five-year period of such unauthorized use." *Wood v. Trout* at 13. Mr. Lloyd believed he was still lawfully using water right no 43-192 after he changed the point of diversion and place of use. Lloyd Affidavit

¶¶ 10, 14. The diversion from Green Canyon Creek did not change; Mr. Lloyd simply moved his diversion on the Green Canyon Ditch about 800 feet downstream. Field Exam Memo at 1. This change did not result in the irrigation of new lands; rather, these were lands that had been irrigated with right no. 43-192 off and on for as long as Mr. Lloyd could remember (akin to a permissible place of use). Lloyd Affidavit ¶¶ 8, 10. Mr. Lloyd would not have made the change to his Green Canyon Ditch diversion or his place of use had he thought such changes would cause him to forfeit a portion of the most senior water right on Green Canyon Creek. Lloyd Affidavit ¶ 14.

By setting aside the partial decree, the Court will provide the Director of IDWR a second opportunity to fulfill his statutory duty “to assure that claims to water rights acquired under state law are accurately reported . . .” *Special Master Report and Recommendation on Motions to Set Aside Partial Decrees* at 7, In re SRBA Subcase no. 41-00013A, et al. (Apr. 29, 2002) (“Weston-Spillett Order”), quoting I.C. § 42-1401B. The Special Master in the Weston-Spillett Order set aside the partial decrees in those subcases on a finding that they did not “accurately reflect the actual historical use of water.” *Id.*⁵ This is indistinguishable from this case, where Mr. Lloyd seeks to set aside the partial decree for right no. 43-192 because it does not reflect the historical use of 0.80 cfs to irrigate 40-plus acres. Accordingly, this Court should set aside the partial decree for 43-192 to give IDWR the opportunity to accurately report the water right and so that the decreed right will reflect actual historic water use.

⁵ The partial decrees in the Weston-Spillett Order’s subcases did not accurately reflect the actual historical use of water because they were “15 inches short.”

D. The partial decree for water right no. 43-192 should be set aside under Rule 60(b)(5) because it is no longer equitable that it should have prospective application.

“The prospective application of a judgment is no longer equitable if it is no longer just and fair to all concerned.” *VFP VC v. Dakota Co.*, 142 Idaho 675, 679, 132 P.3d 432, 436 (2006). “To rely on Rule 60(b)(5), a movant must show two things: (1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written.” *Meyers v. Hansen*, No. 35534, slip op. at 6 (S.Ct. Idaho Nov. 27, 2009), quoting *Rudd v. Rudd*, 105 Idaho 112, 118, 666 P.2d 639, 645 (1983). “In addition, the motion for relief must be made ‘within a reasonable time.’” *Meyers* at 6, quoting I.R.C.P. 60(b). The partial decree issued in this case meets these criteria. In addition, the SRBA Court has set aside partial decrees under Rule 60(b)(5) where they did not accurately reflect historical water use. Accordingly, the partial decree for right no. 43-192 should be set aside because it is no longer equitable that it should have prospective application.

1. A partial decree is prospective in nature.

“[A]ny component of the order is a ‘prospective judgment,’ and can be modified under Rule 60(b)(5), if it is susceptible to the legal or equitable rights of the parties as they evolve due to changes in law or circumstance.” *Meyers* at 7. A partial decree is prospective under this definition because a partial decree does not simply determine a right that existed in the past; it determines a right that will be exercised in the future.

In the past, the SRBA Court has implicitly held that a partial decree is prospective in nature by setting aside partial decrees under Rule 60(b)(5). *See, e.g., Weston-Spillett Order* (setting aside four partial decrees on a showing that it was no longer equitable that they should have prospective application). The same reasoning should apply in this subcase.

2. *It is no longer equitable to enforce the partial decree.*

Under Rule 60(b)(5), a movant must show “a sufficient change of circumstances rendering enforcement of the judgment inequitable.” *VFP VC v. Dakota Co.*, 142 Idaho 675, 679, 132 P.3d 432, 436 (2006); *Rudd*, 105 Idaho at 119, 666 P.2d at 646. Here, enforcement of the partial decree for 43-192 is inequitable because the SRBA Court’s ruling in the Facility Volume Decision that the forfeiture clock is tolled while claims are pending in the SRBA was not announced until eight years after IDWR’s field examiner conducted his field exam and first analyzed his recommendation for 43-192. Field Exam Memo at 1. The recommendation should have been changed to recognize the tolling rule, but it was not. These changed circumstances render enforcement of the partial decree for 43-192 inequitable.

In any case, even if the tolling rule did not exist, the field examiner should not have concluded that forfeiture had occurred. As can be calculated from the table in the Field Exam Memo reproduced above, the field examiner “found” 49.9 acres irrigated in 1994—4.4 acres more than allowed by approved transfer no. 3580, albeit partially in a different place of use. An appropriate determination by the field examiner would have been to inform Mr. Lloyd that his irrigation at that time as unauthorized under his water right. Mr. Lloyd then could have changed his irrigation practices to conform to his water right, or sought an administrative transfer for his new place of use. But he was not told of these options. Lloyd Affidavit ¶ 14.

Again, this subcase is indistinguishable from the subcases at issue in the Weston-Spillet Order. The Special Master in those subcases set aside the partial decrees on finding that it was inequitable to enforce them because they did not reflect actual historic water use. The same reasoning warrants setting aside the partial decree for 43-192 here.

3. *This Motion is timely.*

“[W]hen the movant alleges that a judgment has become inequitable under Rule 60(b)(5), the court should examine the movant’s delay after the moment it became reasonably apparent that the order is inequitable due to a change in law or circumstances.” *Meyers* at 8. As discussed, it first became apparent to Mr. Lloyd that the partial decree for right no. 43-192 was incorrect in 2007. Mr. Lloyd contacted this law firm in November 2009 to review his water right matters. This firm reviewed the matter and, at the end of December 2009, advised him that he would have to have the partial decree set aside in order to correct it. It is now February 2010. It is within this Court’s discretion to find that this motion is timely despite Mr. Lloyd’s slight delay in acting once he became aware of the issues. Accordingly, this Motion is timely.

E. This Court also has authority to set aside the partial decree for water right no. 43-192 under Rule 60(b)(6).

In addition to the express reasons allowing this Court to set aside a partial decree under Rule 60(b), Rule 60(b)(6) grants the Court discretion to set aside a partial decree for “any other reason justifying relief from the operation of the judgment.” A trial court “is vested with broad discretion in determining whether to grant or deny a Rule 60(b)(6) motion . . . on a showing of ‘unique and compelling circumstances’ justifying relief.” *Berg v. Kendall*, 147 Idaho 571, ___, 212 P.3d 1001, 1008 (2009) (quoting *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996)).

Here, these are unique and compelling circumstances that would justify this Court’s setting aside the partial decree for water right no. 43-192 under Rule 60(b)(6). First, Mr. Lloyd’s efforts to improve the efficiency and reliability of his and his neighbors’ water use resulted in water right no. 43-192 being decreed for less than its historical beneficial use. Lloyd Affidavit ¶ 10. Mr. Lloyd never intended to abandon or forfeit any portion of water right no. 43-192 when

he changed the location of his diversions from the Green Canyon Ditch, which resulted in his irrigation of different lands than before. Lloyd Affidavit ¶¶ 10, 14. In fact, Mr. Lloyd was trying to set an example for the other users on the Green Canyon Ditch and in Water District 43-C by installing new, efficient diversion works and measuring devices. Lloyd Affidavit ¶ 10. Mr. Lloyd “would not have changed anything if [he] thought it would result in losing any part of the most senior right on Green Canyon Creek.” Lloyd Affidavit at ¶ 14. Indeed, he had no idea what had occurred until the water master alerted him to it in 2007. Lloyd Affidavit at ¶ 13.

Moreover, the timing of the field exams and preparation the Field Exam Report prior to the issuance of the Facility Volume decision is unique and compelling. As discussed above, because the Facility Volume decision was not issued until after the field examiner prepared his report in which he set out the reasoning and conclusions for IDWR’s recommendation for water right no. 43-192, he could not have known the Facility Volume Decision’s holding that the forfeiture clock was tolled while SRBA claims were pending. Had he known this rule, he could not have concluded that there were “[n]o legal remedies . . . to protect those acres.” Field Exam Memo at 1.

It is also worth noting that other water users will not be adversely affected if this partial decree is set aside and Mr. Lloyd can successfully obtain a new partial decree for 0.80 cfs to irrigate 45 acres. Mr. Lloyd has been diverting 0.80 cfs and irrigating at least 45 acres under water right 43-192 at his property since transfer no. 3580 was approved in 1992. Lloyd Affidavit ¶ 13. Neither the water master nor any other water users have sought to curtail this use. *Id.* In other words, changing the partial decree to reflect 0.80 cfs and 45 acres will not affect actual historical irrigation practices among the various water users diverting from Green Canyon Creek.

For the foregoing reasons, Mr. Lloyd respectfully requests that this Court grant this Motion and set aside the partial decree for water right no. 43-192.

DATED this 25th day of February, 2010.

Respectfully submitted,

GIVENS PURSLEY LLP

By: 
Michael P. Lawrence

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of February, 2010, the foregoing was filed, served, or copied as follows:

ORIGINAL FILED

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

☐ U. S. Mail
☐ Hand Delivered
☒ Overnight Mail
☐ Facsimile
☐ E-mail

SERVICE

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

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

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail

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

☒ U. S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile
☐ E-mail



Michael P. Lawrence