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**DEPARTMENT OF
WATER RESOURCES**

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: 22-163B

**MEMORANDUM IN SUPPORT OF MOTION
TO SET ASIDE PARTIAL DECREE
PURSUANT TO I.R.C.P. 60**

Siddoway Sheep Co. Inc., (hereinafter, "Siddoway"), by and through its counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submits this *Memorandum in Support of Motion to Set Aside Partial Decree Pursuant to I.R.C.P. 60*. For the reasons set forth below, the court should set aside the partial decree because of a clear error to not incorporate the results of an approved 1990 transfer into the partial decree of Water Right No. 22-163B.

I. BACKGROUND.

As set forth in the Argument section below, the issued partial decree for Water Right No. 22-163B must be set aside in order to match a description of the water right that resulted from an approved transfer in 1990. It is unclear why the water right descriptions do not match up, but it is self-evident that the water right descriptions should match because the administrative change to the

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water right (in 1990) occurred after the commencement of the SRBA and after the original water right was claimed (in 1988).

In order to fully understand this water right, it is necessary to review the (1) original decree of Water Right No. 22-163; (2) The sale of 1/3 of Water Right No. 22-163 (which is now designated with the “A” suffix after 163–Water Right No 22-163A); and (3) a transfer approved in 1990 (Transfer No. 3729) clearly defining the elements of the water right after it was claimed in 1988. The historical documents offered to understand these issues are attached to the Affidavit of Robert L. Harris (the “*Harris Aff.*”).

Water Right No. 22-163 was decreed to James T. Beard for 200 inches (4.0 cfs) from the Teton River, with a priority date of April. 1, 1896. *Harris Aff* at Ex. A. The place of use described for this water right was “N1/2 of NW1/4 of Sec. 22, T. 7 N., R. 41 E.; S1/2 of SW1/4 of Sec. 14; E1/2 of SE1/4 of Sec. 15, T. 7 N., R. 41 E. B.M., containing 240 acres.” *Harris Aff.* At Ex. B. Based upon the transfer documents discussed in further detail below, this 4.0 cfs water right for the irrigation of 240 acres was later numbered 22-163. See, e.g., *Harris Aff.* Ex. C (Application Part A description fo the water right identifying James T. Beard as the person to whom the right was decreed).

As some point in time, the N1/2 of the NW1/4 of Sec. 22, Township 7N, Range 41E (80 acres), was purchased by Wright R. and DeAnn B. Noel and Arnold R. and Sarah Bingham (collectively “Noel and Bingham”). The purchase of these 80 acres amounts to 1/3 of the total original place of use of 240 acres. The remaining 160 acres was also, at some point in time, purchased by Siddoway. The 1/3 to 2/3 allocation of the original 4.00 cfs water right would have

provided 2.67 cfs, or 2/3 of the water right, to Siddoway, with the remaining 1/3 of the water right (1.33 cfs) owned by Noel and Bingham.

On June 13, 1978, Siddoway filed an application for water right transfer, which was numbered Transfer No. 2260. *Harris Aff.* at Ex. C. Based upon review of the transfer document, it appears to have had two purposes. First, as shown on the actual transfer, there is a handwritten note on the front page indicating that it “Splits right into A & B.” The transfer therefore split the right into two portions. Second, the transfer purported to first define the point of diversion because the Rexburg Decree did not define a point of diversion for Water Right No. 22-163. *Id.* at p.1-2. The requested point of diversion designation was the SE1/4SW1/4 of Section 14, Township 7N, Range 41E. *Id.*

Notably, on the second page of the transfer document, it describes the amount of water to be changed, which was 2.67 cfs, or the portion of Water Right No. 22-163 now owned by Siddoway. This is confirmed by the advertisement that was published by IDWR on June for Transfer No. 2260 on June 29th and July 6th, 1978. *Harris Aff.* at Ex. D. As stated in the notice, the proposed change was described as follows: “Only 2.67 c.f.s. of water will be diverted within the SE1/4SW1/4, Sec. 14, T. 7N, R. 41E, B.M., Fremont County and used to irrigate 160 acres within the S1/2SW1/4, Sec. 14, NE1/4SE1/4, S1/2SE1/4, Sec. 15, T. 7N, R. 41 E, B.M.” *Id.*

Based upon review of the historical documents, the transfer was not protested, and was approved in August of 1978. *Harris Aff.* at Ex. C, p. 4 (signature of approval portion of transfer document made by Norman C. Young, Administrator). Transfer No. 2260 was therefore approved, and served as the basis for the SRBA claim for Water Right No. 22-163B, which is discussed in

more detail below (after historical explanation of what happened to the “A” portion of Water Right No. 22-163A).

As set forth above, the “A” portion of Water Right No. 22-163 was owned by Noel and Bingham. On January 31, 1985, Noel and Bingham entered into a contract of sale in order to sell the entirety of Water Right No. 22-163A (66 2/3 inches or 1.33 cfs) to the Canyon Creek Lateral Ditch Water Users Association. *Harris Aff.* at Ex. E. As a result of the conveyance, Canyon Creek Lateral Ditch Water Users Association filed an application for transfer, which was identified as Transfer No. 3146, on April 22, 1985. *Harris Aff.* at Ex. F, p. 6. The transfer was filed in order to combine Water Right No. 22-163A with the other rights owned by the Canyon Creek Lateral Ditch Water Users Association. Page 2 of the transfer application references the “purchase agreement” in part C, item 1.c The transfer was approved on August 13, 1985. *Id.* (see signature of L. Glen Saxton in approval portion of transfer, which was signed on August 13, 1985).

With the Siddoway Transfer No. 2260 approved for Siddoway’s 2.67 cfs (Water Right No. 22-163B), and the remaining 1.33 cfs evidenced by Water Right 22-163A now owned by the Canyon Creek Lateral Ditch Water Users Association, there is no question that the original Water Right No. 22-163 has been split.

On October 18, 1988, Jeff Siddoway, on behalf of Siddoway Sheep Co., Inc., submitted his SRBA claim for Water Right No. 22-163B. *Harris Aff.* at Ex. G. The claim was for the 2.67 cfs portion of original Water Right No. 22-163 that appurtenant to 160 acres. Under item No. 14, the claim references “Trans. 2260” which is discussed above and attached to the *Harris Aff.* at Exhibit C. The SRBA claim exactly matched the results of approved Transfer No. 2260.

Two years after the SRBA claim was submitted, Canyon Creek Lateral Ditch Water Users Association filed an application for transfer for Water Right No. 22-163B on behalf of Siddoway. This transfer, numbered Transfer No. 3759, was filed on June 12, 1990. *Harris Aff.* at Ex. H. The document describes the reason for the transfer as “Siddoway Sheep Company wants water to be delivered via our pipeline system to the existing place of use.” *Id.* at p. 1. Transfer No. 3759 was for the same 2.67 cfs allocated to Siddoway when Water Right No. 22-163 was split, and changed the point of diversion from the SE1/4SW1/4, Sec. 14, Township 7N, Range 41E, B.M. (which was authorized after Transfer No. 2260 was approved in 1978) to the heading of the Canyon Creek Lateral Ditch Water Users Association located at the SE1/4NE1/4 of Section 30, Township 7N, Range 42E. *Id.* The transfer was approved on October 29, 1990. *Id.* at p. 2 (approval signed by L. Glen Saxton on October 29, 1990).

Transfer No. 3729 is significant. It is an administrative order amending the elements of Water Right No. 22-163B pursuant to Idaho Code § 42-222. However, it was approved **after** the SRBA claim for this water right was filed in 1988. For reasons not evident from the record, the claim was not updated to reflect the administrative changes to the water right. This was likely an oversight by the Claimant to not amend his claim, but it was not unreasonable because the Claimant probably presumed that the IDWR order would automatically amend the previously-filed claim. In any event, it is absolutely clear that, based on when the approval for Transfer No. 3729 was issued, the partial decree for Water Right No. 22-163B should be exactly like the administrative order approving the transfer.

The partial decree for Water Right No. 22-163B looks very different than the approved 1990 transfer order (Transfer No. 3729). *Harris Aff.* at Ex. I. The partial decree only allows for the

diversion of 1.7 cfs as opposed to 2.67 cfs, it only allows for the irrigation of 102.1 acres as opposed to 160 acres authorized under the transfer, and it lists the point of diversion as being in the NE1/4SE1/4SW1/4 of Township 7N, Range 41E, Sec. 14, as opposed to the point of diversion provided in Transfer No. 3729, which is the SE1/4NE1/4 of Section 30, Township 7N, Range 42E. A hand-written strikethrough version of what Water Right No. 22-163B should look like—in order to comport with the IDWR administrative order approving Transfer No. 3729 issued in October of 1990—is attached to the *Harris Aff.* at Ex. J.

We should note that Siddoway has now begun diverting the water right from the pump on the Teton River that was originally allowed pursuant to the 1978 transfer (Transfer No. 2260) at the NE1/4SE1/4SW1/4 of Township 7N, Range 41E, Sec. 14, but with the approval of Transfer No. 3729 in 1990 moving the point of diversion into the Canyon Creek Later Ditch Users Association's delivery system, it will be necessary for Siddoway to file a transfer application to memorialize this change once the partial decree is corrected because the change would not qualify as an accomplished transfer in the SRBA pursuant to Idaho Code § 42-1425 as the change did not occur before 1987.

Siddoway recently became aware of the discrepancy between the original claim, approved Transfer No. 3729 from 1990, and the partial decree issued by the SRBA court. Siddoway regrets not catching the error much sooner, but as set forth below, the partial decree for Water Right No. 22-163B should be set aside pursuant to I.R.C.P. 60 and in the interests of accuracy as the 1990 Transfer No. 3729—an administrative order of the Department—cannot simply be ignored in the partial decree of Water Right No. 22-163B.

II. ARGUMENT.

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

Siddoway has submitted its motion to set aside the partial decree for Water Right No. 22-163B under I.R.C.P. 60. This section sets forth the applicability of Rule 60(a). The applicability of Rule 60(b) is set forth in the following Section II.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*. 140 Idaho 410, 95 P.3d 28 (2004). 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. 140 Idaho 410, 411, 95 P.3d 28, 29 (2004). 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. *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.” *Id.* 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 . . .”¹ 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.” *Id.* at 412, 95 P.3d at 30.

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 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).

...

¹ *Id.* at 412, 95 P.3d at 30.

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.

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

There should be no dispute that there was an error in not incorporating the results of Transfer No. 3729 in the partial decree for Water Right No. 22-163B. 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, the 1990 Transfer No. 3729 was apparently not considered in the issuance of the partial decree for Water

Right No. 22-163B. In the review of the claim for this water right, either the Claimant should have made IDWR aware of the change, or IDWR should have reviewed its own administrative decision prior to issuing its initial recommendations. It is obvious that errors were made in the review of this claim, but that the recommendation that led to the partial decree was not based upon a legal determination that Transfer No. 3729 should not apply. Indeed, it **must** apply under Idaho law. It therefore appears that no legal determination was made as to the non-applicability of this approved IDWR order, and therefore, it appears that the error made was clerical.

With approved Transfer No. 3729, issued in 1990, there is a clear document that reflects the elements of the water right. There is therefore a record to be corrected under Rule 60(a).

Further, counsel for Siddoway 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. BLF Land, LLC was a successor-in-interest to lands formerly owned by Richard Egbert. In these subcases, the original claimant (Mr. Egbert) filed claims based upon the water right permit elements of these water rights, which permit had not been licensed at the time the claims were submitted (although proof of beneficial use had been submitted). After the claims were submitted, the Department eventually issued licenses, 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, just like in this matter for Water Right No. 22-163B, there was an administrative decision that could not be ignored in the partial decrees of water rights 21-7295 and 21-7296, and

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. In recommending issuance of amended partial decrees, the court did not clearly articulate under what portion of Rule 60 it relied upon, likely because procedurally, the matter regarding the inconsistency between the license and partial decree was raised *pro se* by the Claimant, BLF Land, LLC, with a motion to file late objection. See *Order Granting Motion to File Amended Claim and Setting Subcase Deadlines*, Subcase Nos. 21-7295 and 21-7296, June 23, 2008, at 1. The more correct labeling of that motion would have been a motion to set aside the partial decree. Nevertheless, it was very apparent that the licensing order could not be ignored in the partial decree for these water rights, and Special Master Bilyeu granted the motion based upon the following findings:

At the hearing, counsel for BLF Land, LLC, Robert Harris, explained that these water rights were erroneously claimed and recommended in the SRBA with fewer acres than the licenses. The claimant [Richard Egbert] may have believed that the administrative licensing procedure resolved the acres and did not understand the need to also correct the acreage in the parallel SRBA proceedings. Therefore, the claims should be amended to accurately decree these rights as licensed. There was no opposition to the *Motion*. Therefore, the *Motion to File Amended Notice of Claim* is **granted**.

Id. (bolding in original).

Eventually, an Amended Director's Report was issued for Water Right No. 21-7295 and 21-7296 matching the proposed amended partial decree with the issued licenses. No objections were filed, and the Special Master recommended to the Presiding SRBA Judge that an amended partial decree be issued. An *Order of Amended Partial Decree* was issued on March 23, 2009 by Judge Melanson. *Order of Amended Partial Decree*, Subcases 21-07295 and 21-07296, March 23, 2009.

In the BLF subcases, it appeared that the position of the court was simply that if an administrative decision describing the water right was issued after the claim was filed, it is self-

evident that the eventual partial decree should reflect that administrative decision. Whether or not the error was a clerical error under Rule 60(a), or another type of error under Rule 60(b), appears to be immaterial. The administrative decisions of the Department certainly mean something.

The situation surrounding the BLF subcases is nearly identical to the situation now facing Siddoway. Both involved the failure to incorporate post-claim administrative decisions to their water right(s)—In BLF's case, it was a licensing order, and in Siddoway's case, it was a transfer order. Based on this precedent, we request that the partial decree for Water Right No. 22-683B be set aside pursuant to Rule 60(a) or Rule 60(b), the latter of which is described in more detail below. The amended partial decree for Water Right No. 22-683B should match the approved 1990 transfer (Transfer No. 3729).

We should further note that the partial decree as issued only allows for the diversion and use of 1.7 cfs for the irrigation of 102.1 acres. This is less than the standard .02 cfs/acre, or the inch-to-the-acre rule. At a minimum, it appears that this reduced amount of diversion rate was also an error, and that the water right diversion rate should be at least 2.04 cfs even with this reduced acreage. Overall, with this oversight, as well as the more significant failure to consider Transfer No. 3729, the partial decree for Water Right No. 22-163B should be set aside.

In the event the partial decree is set aside, there should be no question by the Claimant or IDWR as to what the elements of the amended partial decree should look like. They are already described in Transfer No. 3729. Indeed, we should further note that the issued partial decree includes the Section 14 point of diversion, which is where water is now being pumped by Siddoway, but is not the point of diversion authorized under Transfer No. 3729. Proper procedure should be undertaken with a future transfer application (in the event the partial decree is set aside) to protect

against injury. Otherwise, if the partial decree stands, the potential for injury to other water users may exist. Given the topography of the Teton Canyon at this location, we do not anticipate any injury to others, but the process must still be protected to ensure compliance with state law in every instance.

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 Rule 60(b) provides that a judgment can set aside at any time for “any other reason justifying relief”

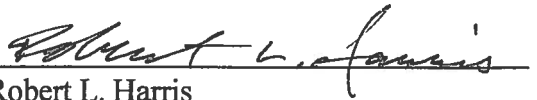
In the alternative to the motion to set aside the partial decrees under Rule 60(a), the partial decrees should be set aside under Rule 60(b)(6). We note, however, that in *Leasefirst v. Burns*, the Idaho Supreme Court held that “60(b)(1) and 60(b)(6) are mutually exclusive provisions, such that a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6).” 131 Idaho 158, 163, 953 P.2d 598, 603 (1998). It appears that what happened with Water Right No. 22-163B 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. Clearly, an administrative order of IDWR issued after the claim for Water Right No. 22-163B was filed cannot be ignored under any circumstances. This would appear to fall under the “other reason justifying relief” component of Rule 60(b)(6) in the event the errors described above cannot be classified as a “clerical error” under Rule 60(a).

IV. CONCLUSION.

For the reasons set forth above, this court has legal authority to set aside the partial decree for Water Right No. 22-163B, and it should be set aside under Idaho Rule of Civil Procedure 60(a).

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

Dated this 8th day of July, 2011.


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

CERTIFICATE OF MAILING

I certify that on this 8th day of July ~~8~~, 2011, 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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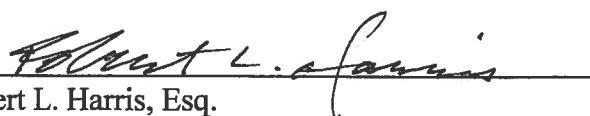
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