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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

)
) **Subcase Nos. 34-2459, 34-2460,**
) **34-2461, 34-2462,**
) **34-10925**
)
) **MEMORANDUM IN SUPPORT OF**
) **MOTION FOR PERMISSIVE**
) **REVIEW OF THE SPECIAL**
) **MASTER'S SEPTEMBER 4, 2009**
) **ORDER & MOTION TO STAY**
) **TRIAL**
)
)

COMES NOW, Doug Schureman, Tyler Felton, Jim Huelsman, Darrell McDonald and
Norm Sowards (collectively, referred to as "Objectors"), by and through their undersigned

attorneys of record, and hereby submit this memorandum in support of their *Motion For Permissive Review of the Special Master's September 4, 2009 Order on Motion to Set Aside Partial Decree & Motion to Stay Trial*.

INTRODUCTION

This matter is before the Court on the Claimants'¹ *Motion to Set Aside Partial Decrees*. The Claimants assert that the Amended Claims filed in the above subcases had "clerical errors" that should be corrected by setting aside the partial decrees pursuant to Idaho Rule of Civil Procedure 60(a). In a September 4, 2009 *Order on Motion to Set Aside Partial Decree*, the Special Master held that a "clerical error" in the amended claims warranted an order setting aside the partial decree.

Whether or not the partial decrees should be set aside due to an alleged "clerical error" in the underlying Amended Claims' is a threshold legal question and jurisdictional issue that must be answered before these water rights proceed to trial. A final decision on this issue is essential to avoid the risk of wasted time and money. Indeed, if the Court determines that the decrees should not be set aside, then there would be no need for trial – and thus, no need for the significant expense in time, money and other resources necessary to prepare for, and participate in, that trial.² The interest of judicial economy further warrants finally deciding the Rule 60(a) motion prior to forcing the parties to a trial that may be unnecessary.

Furthermore, whether or not the partial decrees should be set aside is a "controlling legal question" that will bear on the outcome of any future proceedings. In such instances, both case

¹ There have been at least three owners of the water right claims at issue here. The claims were originally filed by Crater Farms, Inc. The *Motion to Set Aside Decree* was filed by Charles and Fern Isom and their lessee, Mitch Sorenson. The rights are now owned by Telford Lands, LLC. Given the number of owners of these water rights, the Objectors will refer to them collectively as "Claimants."

² In fact, on September 15, 2011, the Objectors were served with discovery requests from the Claimants, which will require more time and expense for a response. Objectors may also desire to serve additional discovery requests on the Claimants if this matter proceeds to trial.

law and Administrative Order #1 (“AO1”) 9.e authorize permissive review to “materially advance the orderly resolution” of the subcases.

Finally, and most importantly, there was no “clerical error” in these subcases that would warrant setting aside the partial decrees. Indeed, the information in the back files demonstrates that it was not the Claimants’ intent to seek an accomplished transfer of the points of diversion for water rights 34-2459, 34-2460, 34-2461 and 34-2462 (the “Airport Well Licenses”). The exclusion of the so-called “Island Wells” as listed points of diversion on Claimants’ Amended Notices of Claim for the Airport Well Licenses was not a “clerical error” nor did it lead to or cause this Court to commit a “clerical error” in issuing the partial decrees. As such, the Claimants cannot meet the standard set forth in Rule 60(a).

Even if, however, it was error to leave the Island Wells off of the amended applications, any alleged “clerical error” should have been corrected during the original SRBA proceedings. However, rather than challenge the absence of the Island Wells, the original Claimants did not object to the recommendations and the water rights were decreed accordingly. The Claimants had the opportunity provided by law to review the recommendations but failed to take any action. The partial decrees that followed, therefore, should not be viewed as a surprise or error in any manner.

Granting a motion to set aside a partial decree, where the only “error” was the Claimants’ failure to act, flies in the face of the binding nature of a partial decree. I.C. § 42-1420. Accordingly, the Special Master should grant permissive review of the September 9, 2009 *Order* so that the Court can finally determine whether or not the partial decrees should be set aside. Once that threshold legal issue has been determined, further proceedings on this matter can be held, if necessary.

FACTUAL & PROCEDURAL BACKGROUND

On February 28, 1989, the Claimants filed their Notice of Claim for the Airport Well Licenses. *Second Affidavit of Paul L. Arrington* Exs. A-D. None of these Notices of Claim identified the two wells commonly referred to as the “Island Wells” as points of diversion for the water rights. *Id.*

On November 14, 1990, the Claimants filed an Amended Notice of Claim for each of the Airport Well Licenses. *Id.* at Ex. E-H. They listed and identified the same points of diversion as the original claims. *Id.* However, the claimed place of use for each water right was amended to identify a 1,989 acre permissible place of use for irrigation based on an accomplished transfer of the original licensed place of use for each of these water rights. *Id.* In a subsequent analysis, the Department reviewed each of the claims and concluded that the accomplished transfer had been completed. *Id.* at Ex. I. As with the original Notices of Claim, the Claimants made no mention of, and did not list, the Island Wells as points of diversion in their Amended Notices of Claim. *Id.* at Exs. E-H.

On November 14, 1990, the Claimants filed a late Notice of Claim for water right 34-10925 based on the enlargement statute (then, Idaho Code § 42-1416(2)). *Id.* at Ex. J. Importantly, this right, which was claimed on the same day as the Amended Notices of Claim, did include the Island Wells as listed points of diversion in the proper space on the first page. *Id.* Water right 34-10925 was claimed as an enlargement of the above water rights as well as water right 34-7037, which, at that point, was only a permit to divert water from the Island Wells for irrigation.³ In a subsequent analysis, the Department questioned the inclusion of the Island Wells on the enlargement claim. *Id.* at Ex. K. (“How did he get well [sic] in Sec. 34?”). Recognizing

³ Water right 34-7037 was licensed on September 2, 1994.

that the Section 34 wells (i.e. the Island Wells) were included as an enlargement of the 34-7037 permit, the Department “drop[ped]” the Island Wells from the recommendation because the Claimant “can’t claim an expansion of permit.” *Id.*⁴

On or near May 27, 1992, the Department issued its Directors Report for Basin 34, recommending the above water rights to the SRBA District Court. *Id.* at Exs. L-P. Importantly, none of the recommendations identified the Island Wells as a point of diversion. *Id.* Notwithstanding the absence of the Island Wells as points of diversion, the Claimants did not object to the recommendations in the SRBA Court.

On December 16, 1997, the SRBA District Court entered partial decrees for the above water rights.⁵ As with the Director’s Recommendation, none of the partial decrees included the Island Wells as points of diversion. Claimants failed to take any action at that time to change these partial decrees to add the Island Wells as points of diversion.

These partial decrees were issued before the property was sold by the original Claimant. Both the original claims, *id.* at Ex. A-D, and the Amended claims, *id.* at Ex. G-H, were filed by Crater Farms, Inc., and signed by Willard Bell as its president. Crater Farms, Inc. sold the property and water rights on January 7, 1998. *Id.* at Ex. Q. The new owners also failed to take any action at that time to address any alleged “clerical errors” on these partial decrees.

On April 24, 2008 – more than a decade after the partial decrees were entered – the Claimants filed their motion to set aside partial decrees. On April 25, 2009, the Presiding Judge

⁴ In their prior briefing on the Rule 60(a) motion, the Claimants failed to address the distinction between the points of diversion listed on the Amended Notices of Claim for the Airport Well Licenses and those listed on the 34-10925 Notice of Claim. Claimants also failed to put in the record the above-described analysis by the Department specifically addressing the accomplished transfer basis of that claim.

⁵ On December 14, 2001, the partial decrees were amended to establish beginning and ending days for the irrigation season. *See Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating into Partial Decree an Express Statement Regarding General Provisions, Nunc Pro Tunc* (in each subcase).

issued an *Order of Reference Appointing Special Master Brigitte Bilyeu*, charging the Special Master with reviewing the motion and determining if the partial decrees should be set aside.

On September 9, 2009, the Special Master issued her *Order on Motion to Set Aside Partial Decree*, wherein the Special Master concluded:

The Amended Claim contained a clerical error which can be corrected under Rule 60(a) because it is apparent from the attached maps that the claimant intended to claim the "Island Wells." The court also notes that this *Motion* was not contested. This decision may have been different if IDWR had intended to omit the "Island Wells." It is appropriate to allow the Movant to file an Amended Claim.

Order at 3-4.⁶

On December 10, 2009, the Department submitted its Amended Director's Report for the above water rights. This time, the Department included the Island Wells as points of diversion for the Airport Well Licenses and for 34-10925.⁷ On January 28, 2010, the Objectors, Schureman, Heulsman and Felton, filed a timely objection. On March 28, 2011, the Special Master allowed the remaining Objectors, McDonald and Sowards, to file late objections.

On May 23, 2011, July 27, 2011 and September 7, 2011, the parties all participated in settlement discussions, seeking to resolve the objections filed in these subcases. However, notwithstanding the parties' good faith efforts to resolve the objections, no settlement was reached. This matter is currently set for trial on November 9-10 and 16, 2011.

⁶ It is not surprising that "this *Motion* was not contested" at the time of filing. As originally claimed, recommended and partially decreed, the above water rights did not include the Island Wells as points of diversion. As such, the Objector's diversions were not impacted and no objection was necessary. With partial decrees entered in 1997, it was understood that these rights were resolved. See I.C. § 42-1420. The Objectors were not served copies of the *Motion to Set Aside Partial Decrees*. The Objectors learned of the Claimants' efforts to add the Island Wells as points of diversion shortly before the Amended Director's reports were issued in late 2009. They filed timely objections or were given leave to file late objections in this matter. The Objectors have always challenged the Claimants' theories in this matter – including their theory that an alleged "clerical error" in the Amended Claims warrants setting aside the partial decrees.

⁷ The amended recommendations improperly included the Island Wells as points of diversion for water right 34-10925 (the enlargement right). See I.C. § 42-1425 (the accomplished transfer statute is "not applicable to any claim based upon an enlargement of use").

ARGUMENT

I. The Issue Decided in the Special Master's September 9, 2009 Order is a "Controlling Question of Law;" Therefore, Since "an Immediate Appeal May Materially Advance the Orderly Resolution" of These Subcases, Permissive Review is Warranted.

Idaho law provides the standard for when a permissive appeal may be taken from an interlocutory order:

Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation.

State v. Maynard, 139 Idaho 876, 880 (2004). AO1 9.e echoes this standard:

Permissive Review - A Special Master or any party to the subcase may seek permissive review by the Presiding Judge of the Special Master's interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion and on which immediate consideration of the determination may advance the orderly resolution of the litigation following the procedures set forth in I.A.R. 12. The Special Master shall review the motion and responses and recommend, with findings, whether it should be granted or denied. The motion and the Special Master's recommendation shall be forwarded to the Presiding Judge for determination.

Recently, this Court granted the right to permissive review of certain objections involving water rights in Basin 01. There, the Special Master recommended permissive review because "the general agreement was that, depending the outcome of permissive review, most of the subcases will be resolved." *Recommendation to Grant Motion for Permissive Review of Interlocutory Determinations*, Subcase Nos. 01-04, *et al.* (Feb. 16, 2011).

In granting the Motion for Permissive Review, the Presiding Judge concluded:

The Court has reviewed the file in the above-captioned matter and finds that the issues addressed in the Special Master's [*Order*] are indeed controlling issues of law and that an interlocutory determination of the issues would facilitate an orderly and expedient resolution of the various subcases.

Order Granting Permissive Review of Special Master's Order on Motions for Summary Judgment; AOI 9.e, Subcase Nos. 01-04, *et al.* (Feb. 24, 2011).

Likewise, in this case, the question of whether or not the partial decrees should be set aside is a “controlling question of law” that will “facilitate an orderly and expedient resolution of” these subcases. If the motion is denied then it is jurisdictional and the Claimants have no right to any further proceedings before the Special Master. Indeed, the sole basis for the proceedings before the Special Master rests on the conclusion that the partial decrees should be set aside. If the Court determines that the partial decrees should not be set aside, then any time, money and other resources spent on trial will have been wasted.

The Presiding Judge will have the final word as to the request to set aside the partial decrees. *See Order of Reference* at 1 (the Special Master shall “issue a recommendation”); *Order on Motion to Set Aside Partial Decree* at 4 (recognizing that the Special Master will issue a “recommendation” to the Presiding Judge). It makes no sense to force the parties to expend the significant time, money and other resources to conduct discovery and prepare for a trial before that decision is made – particularly when that trial may not even be necessary.

Accordingly, the Objectors seek permissive review of the Special Master’s September 9, 2009 *Order*.

II. In order to Avoid the Risk of Wasted Time and Resources, the Court’s September 9, 2009 Order Should be Reviewed by the Presiding Judge and a Final Decision on the Motion to Set Aside Prior Decrees Should be Issued.

A final determination as to whether or not the partial decrees should be set aside is a necessary threshold determination in these proceedings. Indeed, if the Court determines that the alleged “clerical errors” in the amended claims do not warrant setting aside the partial decrees, then any time and money spent in preparation for trial will have been wasted.

The law recognizes that judicial proceedings should be conducted in such a manner as to maximize judicial efficiency and economy. The Civil Rules provide that they must be “liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.” I.R.C.P. 1(a). The Ninth Circuit has recognized that a court “has broad discretion to bifurcate a trial to permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues.” *Jinro Am., Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 998 (9th Cir. 2001).

Requiring the parties to expend significant time and resources before it is even known whether or not the partial decrees will be set aside – a “potentially dispositive preliminary issue” – is contrary to these legal mandates. In order to ensure that the most “just” and “inexpensive” decision is reached in this matter, it is imperative that a final decision on the Claimants’ Rule 60(a) motion be issued prior to any further proceedings. Indeed, this is the motive behind the AO#1 grant of authority to seek permissive review. AO#1 9(e) (allowing permissive review of issue for which “immediate consideration of the determination may advance the orderly resolution of the litigation”).

Granting permissive review is consistent with this law and policy. As such, permissive review is warranted.

III. Neither the Facts Nor the Law Support a Conclusion that “Clerical Errors” in the Amended Claims Warrant Setting Aside the Partial Decrees.

Further justifying the need for permissive review is the fact that neither the law nor the facts support the Claimants’ Rule 60(a) motion. In essence, the motion is an attempt to take a second bite at the apple and avoid responsibility for failing to act when required by Idaho law.

First, the history of these water rights reveals that the Claimants did not intend to seek an accomplished transfer of the Airport Well Licenses. Indeed, the Claimants filed a separate claim

(34-10925) at the same time that did include the Island Wells as points of diversion. 2nd

Arrington Aff. Ex. I.

The map attached to the Notice of Claim for 34-10925 identifies the location of the Island Wells as points of diversion, consistent with the list on the first page of the Notice of Claim. *Id.* at Ex. J. It is clear, therefore, that the Claimants were aware of the Island Wells and knew that they could be claimed as points of diversion. The exact same map was attached to the Amended Notices of Claim for the Airport Well Licenses. The fact that this same map was attached to each water right, including the Amended Claims for the Airport Well Licenses, does not result in the conclusion that there was a “clerical error.” *See Id.* at Ex. E-H. Rather, use of the same map was just as likely a matter of convenience. It is likely that the Claimants simply prepared one map for all claims (including water right 34-10925 that did include the Island Wells), rather than preparing separate maps for each individual claim.

Furthermore, Item 5 on the Amended Claims shows that there was no intent to claim an accomplished transfer. Item 5 requires:

Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, headgates, Etc.), including the ***dates of any changes or enlargements in use***, the dimensions of the diversion works as constructed and an enlarged and the depth of each well.

Id. (emphasis added).

Noticeably, the Claimants’ response to Item 5 was simply: “Wells open discharge to private ditch – pump mainline to sprinkler.” *Id.* Even though Item 5 requires a description of diversion works “including the dates of any changes ... in use,” the Claimants failed to include any reference to the Island Wells or any other information indicating a “change ... in use” of the diversions ever occurred. *Id.*

The Claimants knew that, if their intent was to claim an accomplished transfer, they would be required to reference the diversion works necessary to obtain water from the Island Wells in Item 5. Indeed, for water right 34-10925 – which did include the Island Wells as claimed points of diversion – the Claimants described the diversion works in Item 5 as follows: “Wells open discharge to private ditch **or Munsey Ditch** – pump mainline to sprinklers.” *Id.* at Ex. J (emphasis added). According to the Claimants, the “Munsey Ditch” is the method of delivering water from the Island Wells to the place of use. *Memorandum of Points & Authorities Regarding Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(a)*, at 4 (Apr. 7, 2009).⁸ Notwithstanding this knowledge, the Claimants failed to identify the Island Wells or Munsey Ditch in the required location on their Amended Claims.

Similarly, the Claimants were aware of the accomplished transfer statute (then Idaho Code § 42-1416A), as evidenced by the fact that they claimed a permissible place of use based on an accomplished transfer theory. Yet, they specifically failed to add any additional points of diversion to the Amended Claims and signed the Amended Claims, “solemnly swear[ing]” that they were “true and correct.” 2nd *Arrington Aff.* at Exs. E-H.

Even if the Claimants did intend to claim the Island Wells as alternate points of diversion, their inaction defeats this attempt to set aside the partial decrees. In particular, the Claimants had multiple opportunities to correct the so-called “clerical error,” but failed to do so. Idaho law does not give them countless opportunities to change their claim or set aside a partial decree.

On May 27, 1992, the Director submitted its original recommendations for the above water rights. 2nd *Arrington Aff.* Exs. L-P. Importantly, none of the recommendations included

⁸ Reference to “Munsey Ditch” on Item 14 (“Remarks”) of the Amended Claims does not overshadow the fact that the Claimants failed to identify the Island Wells as points of diversion and failed to identify the Munsey Ditch as part of the diversion works. Rather, it likely recognizes that some of the water rights identified in Item 13, namely 34-7037 and 34-7138, are delivered to the place of use via the Munsey ditch.

the Island Wells as points of diversion. *Id.* The Claimants, who were served with the recommendations, apparently agreed with the recommendations, as they failed to object in the SRBA Court. Rather, they allowed the matter to proceed through the SRBA Court until partial decrees were issued on December 14, 1997.

Importantly, Crater Farms, and its President, Willard Bell, who filed both the original and amended claims, still owned the water rights at the time the partial decrees were issued. *Id.* at Q (property sold in January, 1998). Mr. Bell would have been in the best position to know whether there was any error in the Amended Claims and Director's reports. Importantly, he did not object to the recommendation.

Mr. Bell was served with copies of the original partial decrees. Still, he failed to take any action to set aside the decrees or correct the alleged "clerical error." The property was sold to Charles and Fern Isom less than a month later. *Id.* at Q. Yet, the Isoms failed to take any action to correct the alleged "clerical error."

In 2001, the SRBA Court amended the partial decrees to clarify the irrigation season. The amended partial decrees were served on the Isoms who, again, failed to take any action to correct the alleged "clerical error." It was not until 2008 – more than a decade after the partial decrees were entered – that the Claimants finally decided to argue that there was a "clerical error."

The Supreme Court has provided guidance on the application of Rule 60(a):

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."

Silsby v. Kepner, 140 Idaho 410, 411 (2004).

In *Silsby*, the Court was asked to modify a divorce decree to allow for a pro rata share of tax benefits. The original complaint failed to identify any division of benefits, and the lower court entered a decree that mirrored the complaint. *Id.* In denying the Rule 60(a) motion, the Court provided further insight into the application of the civil rule:

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 412.

It is apparent from the case law that Rule 60(a) is meant to correct "blunders in execution" – not failures to act. It applies only to "mechanical errors" – not willful disregard of the mandated procedures. It grants an opportunity to correct a mistake made by the Court – not a second bite at the apple to the Claimant.

Here, Idaho law requires a party to file an objection when they "desire to object to a water right." I.C. § 42-1412. Filing an objection triggers the litigation process, which includes opportunities for settlement and trial, if necessary. *Id.* Had the Claimants felt that the original recommendations were in error, they were required to file an objection. Failure to file an objection as required by Idaho's adjudication code does not warrant setting aside the partial decrees now.

The Presiding Judge's decision in *Order of Partial Decrees for Water Rights 74-250, 74-735, 74-739, 74-741 and 74-7147* (Jan. 12, 2009), is instructive here. In that case, the claimants sought a water right with a priority date that was earlier than the priority date decreed in the Lemhi Decree. According to the claimants, there was evidence that the water rights were diverted much earlier than the date in the Lemhi Decree. This information was available to the owners at the time of the Lemhi Adjudication, but, for unknown reasons, was not argued before the Lemhi Court. Now, the claimants, as subsequent owners, sought to correct the oversight in the SRBA Court.

Although the Special Master recommended that the priority date be changed, the Presiding Judge reversed the decision. The Court held, at pages 5-6 of that order:

The Court makes two observations in this respect. First, the fact that the present owner of a previously decreed water right may now have evidence of an earlier use or larger quantity than was previously decreed does not mean that an error or oversight occurred when the predecessor-in-interest filed (or failed to file) the claim in the prior adjudication. There are other plausible explanations. For instance, claims can be made in a manner so as to avoid contests. Existing differences between users over water rights can be worked out prior to the claims being filed so as to avoid litigation in the adjudication process. Settlements such as these may dictate what each user eventually claims in the adjudication. Therefore, parties or their successors-in-interest to the prior decree are entitled to rely upon the prior decree, at least to the extent that the scope of the right will not be expanded beyond what was previously adjudicated.

Next, allowing a claimant to reopen a prior decree to present evidence of earlier use or larger quantity than was previously decreed completely undermines the principles of res judicata and the Supreme Court's ruling in State v. Hagerman Water Right Owners, as well as law-of-the-case in the SRBA. (Emphasis added).

Here, the facts are almost identical. A subsequent owner of a water right has provided the Court with information alluding to an accomplished transfer. However, Mr. Bell – the owner at the time of the original claims, the amended claims and the partial decrees – failed to act upon that information even though it was available to him at that time.

The fact that Claimants failed to identify (i) the Island Wells as points of diversion and (ii) the “Munsey Ditch” as part of the diversion works for the Airport Well Licenses, “does not mean that [a ‘clerical error’] occurred when the predecessor-in-interest filed” the Amended Claims. Rather, as this Court aptly concluded, “there are other plausible explanations.” For example, when all of the November 14, 1990 filings are viewed in their entirety (i.e. the Amended Claims and the Notice of Claim for 34-10925), it is apparent that the filings served two purposes: (1) creation of a permissible place of use following an accomplished transfer, 2nd *Arrington Aff.* Ex. I, and (ii) file an enlargement claim for additional acres, *id.* at Ex. K (rejecting enlargement claim for the permit, 34-7037). They did not seek to add the Island Wells as alternate points of diversion for the Airport Well Licenses.

Alternatively, Mr. Bell could have determined that the requirements of the accomplished transfer statute had not been met and that he could not show that he had used the Island Wells as points of diversion for the Airport Well Licenses.⁹ Or, he could have simply recognized the significant controversy associated with increased diversions from the Island Wells¹⁰ and decided that he did not want to pursue an accomplished transfer theory for these water rights. In short,

⁹ Such a conclusion would be consistent with the pre-1987 conveyance agreements between the Claimants and the Big Lost River Irrigation District (“BLRID”) that did not identify the Island Wells as points of diversion from which the Claimants were authorized to divert water into the BLRID system. *See Affidavit of Paul L. Arrington*, Exs. A-D (filed in this matter on Nov. 17, 2010). The conveyance agreements identified the following points of diversion:

E ½ SW, § 23, T3N, R26

SESW, NESE, § 33, T5, R26

Id. These are not the Island Wells, which are located at the following legal descriptions:

NESENW §3, T4N, R26E

SENWSW, §34, T5N, R26E

¹⁰ *See Arrington Aff.* Ex. E (discussing the numerous protests to the Claimants efforts to amend the application for permit 34-7037 to add a point of diversion and the significant concerns that added points of diversion would result in increased diversions from the Island Wells above the permitted diversion rate).

there is nothing in the record to support the claim that Mr. Bell's failure to act constitutes a "clerical error" justifying an order setting aside the partial decrees.

Allowing the Claimant to set aside a partial decree at this time, based on these facts, would "completely undermine" the principles of *res judicata*. These decrees were issued in 1997, and the Objectors have relied on those decrees, which do not authorize diversions under the above rights from the Island Wells. As such, the Claimants' motion should be denied.

IV. The Trial in this Matter Should be Stayed Until the Presiding Judge Has Issued a Decision on Permissive Review.

If the Court grants the Objectors' request for permissive review, the trial in this matter should be stayed until the Presiding Judge has determined whether or not the partial decrees should be set aside. Bifurcating these proceedings to allow for permissive review would "permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Jinro Am., Inc., supra*.

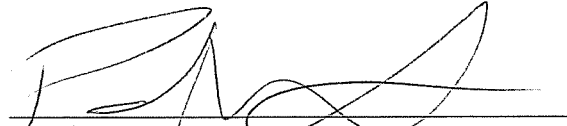
CONCLUSION

Idaho law, and, in particular, AO1, authorizes the Special Master to recommend permissive review of interlocutory orders where the orders involve a "controlling question of law." Here, permissive review is warranted to determine whether or not the Claimants' 60(a) motion should be granted. Absent such a final determination, this Court has no authority to proceed with trial in this matter and any further expenditures of time, money and other resources by the parties, Department and Court may be wasted. Accordingly, the Objectors request authority for permissive review of the Special Master's September 9, 2009 *Order*. Objectors also request a stay of the trial until the Presiding Judge can issue a final decision on this threshold legal issue.

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DATED this 15th day of September, 2011.

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to be 'T. Thompson', written over a horizontal line.

Travis L. Thompson
Paul L. Arrington

*Attorneys for Doug Schureman, Tyler Felton &
Jim Huelsman*

SPECK & AANESTAD, P.A.

A handwritten signature in black ink, appearing to be 'J. Speck', written over a horizontal line.

Attorneys for Darrell McDonald & Norm Sowards

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2011, I served a true and correct copy of the foregoing document on the persons listed below, via first class mail, postage prepaid:

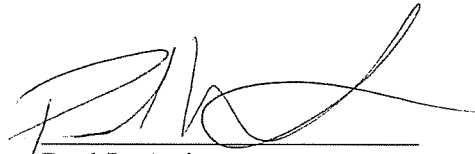
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