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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	)	
	)	Subcase Nos. 34-2459, 34-2460,
	)	34-2461, 34-2462,
Case No. 39576	)	34-10925
	)	
	)	REPLY 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 reply 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

The Objectors seek permissive review of a clear issue: Whether Civil Rule 60(a) allows the Court to set aside a partial decree where the only alleged “clerical error” is an error in the amended claim form? A review of the case law discussing Rule 60(a) leads to the conclusion that the rule does not apply to these subcases based on the facts alleged by Telford.

Telford's response to the Objectors' motion does not focus on the issue before the Court. Rather, Telford asserts that the issue relates to whether or not an accomplished transfer occurred. The Special Master should not be distracted by these various arguments, as they do not address the issue at hand.

Importantly, Telford cannot dispute the material facts that are fatal to the Rule 60(a) motion to set aside the partial decrees. For example, there is no dispute that (1) the alleged “error” is in the amended claim form and was not made by the Court or clerk, and (2) that the original claimant failed to seek any changes to the Director's original recommendations when the law required.

Rule 60(a) cannot be used as a means of avoiding responsibility in the SRBA. The law requires a claimant to take certain actions – such as filing an objection – to correct alleged errors in the Director's recommendations. Failure to take such actions will generally result in a partial decree that mirrors the recommendation – as was the case here.

Any further actions in these subcases must be preceded by a determination from the Presiding Judge as to whether or not the partial decrees should be set aside. Accordingly, permissive review is warranted and the current trial schedule should be stayed.

ARGUMENT

I. AO1 9.e Provides that the Special Master “Shall” Issue a Recommendation to the Presiding Judge on the Objectors’ Motion for Permissive Review.

AO1 9.e provides the procedural requirements for a motion seeking permissive review. Importantly, the rule provides that the Special Master “shall” send the matter to the Presiding Judge.

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.*

(Emphasis added).

The language of this rule is clear. Upon review of the pleadings relating to the Objectors’ motion, the Special Master “shall” issue a recommendation to the Presiding Judge as to whether or not the request for permissive review should be granted and “shall” forward that recommendation together with the pleadings to the Presiding Judge for his decision. In short, it is the Presiding Judge who makes the final decision as to whether or not the request for permissive review is allowed.

II. The Objector’s Motion is Not Premature.

Telford asserts that the Objector’s motion is premature since, in the September 9, 2009 *Order*, the Special Master concluded that she “presumes without deciding that sufficient grounds exist to support setting aside these Partial Decrees.” *Telford Br.* at 12-13. They concluded that the Objectors cannot seek review of a “presumption” because it was “not necessarily a decision

on the motion to set aside.” *Id.* Therefore, this motion must be denied. *Id.* This attempt to devalue the Special Master’s *Order* cannot stand.

The Objectors do not desire to get into a battle of semantics with Telford. Whether termed a “presumption” or otherwise, the Special Master’s *Order* found that “sufficient grounds exist” to grant Telford’s motion. *Order* at 4. Indeed, 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 (emphasis added).

Had the Special Master “presumed” that there were not “sufficient grounds,” then these proceedings would have concluded at that time – no amended claims would have been submitted, no amended Director’s report would have issued, no objections would have been filed, no summary judgment motions would have been briefed, no remand proceedings would have been held and no settlement conferences would have been needed. This matter is proceeding solely because the Special Master found that “sufficient grounds exist.” Objectors seek review of that decision.

Under Telford’s theory of the law, no permissive review would ever be appropriate. The fact that the *Order* is interlocutory and is not in the form of a “recommendation” does not warrant denial of Objector’s motion – indeed, it is the very reason that this motion is necessary.

III. It is Not Required that the Special Master Issue a Recommendation on All Issues Before the Presiding Judge Reviews the Decision on the Motion to Set Aside.

The Special Master’s *Order*, at page 4, concluded that “the SRBA District Court prefers to have one Special Master’s Report and Recommendation” so “a full decision on [the motion to

set aside] shall issue after the Amended Claims have been considered.” Telford clings to this language, repeating it often in the response brief, asserting that “in light of the SRBA court’s process for handling motions to set aside partial decrees ... it makes eminently more sense for the trial to proceed.” *Telford Br.* at 17.

There is no formal “policy” requiring the Special Master to decide all factual issues before the Presiding Judge determines whether or not a motion to set aside should be granted. In fact, in a recent decision in subcase 75-14236, also involving a motion to set aside a partial decree, Special Master Dolan concluded that “minimal due process” required the matter to be bifurcated – with a decision on the motion to set aside by the Presiding Judge followed by any further proceedings, as necessary, before the Special Master.

In order to satisfy minimal due process, the parties and IDWR agreed these matters require multiple steps, first requiring a Special Master recommendation [sic] the *Final Order Disallowing* be set aside followed by an order of the Presiding Judge setting aside the *Order*. Next, the Tippetts will have to file a motion to amend their claim 75-14236. If their motion to amend is granted, IDWR will file its recommendation of the amended claim correcting the POD error.

Special Master Report & Recommendation, Subcase No. 75-14236, at 3 (Aug. 29, 2011) (emphasis added).

The Objectors seek the same result here – a bifurcated proceeding wherein the threshold legal issue is decided before the parties proceed with the time and expense of a potentially unnecessary trial. This is not a matter of seeking a “piecemeal appeal” as Telford asserts throughout his brief. Rather, as discussed in more detail below, the orderly resolution of these proceedings requires that this vital issue be decided before the matter proceeds to trial. *See Jinro Am., Inc. v. Secure Inv., Inc.*, 266 F.3d 993, 998 (9th Cir. 2001) (the Court “has broad discretion

to bifurcate a trial to permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues”).

IV. The Objectors Have Met their Burden to Establish that Permissive Review is Warranted.

Permissive review is warranted where there are “substantial grounds for difference of opinion” and “an immediate appeal may materially advance the orderly resolution of the litigation.” *State v. Maynard*, 139 Idaho 876, 880 (2004); *see also* AO1 9.e. Telford asserts that permissive review is not warranted here because there is no difference of opinion as to the applicability of Rule 60(a). *Telford Br.* at 13-18. Telford is wrong.

There is a substantial and legally significant dispute over the applicability of Rule 60(a) here. Indeed, Objectors assert that Rule 60(a) is not applicable here. The decision relied on by Telford and the Special Master confirms this result. *Silsby v. Kepner*, 140 Idaho 410 (2004).

In *Silsby*, the Court denied a similar motion, and concluded:

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.***”

...

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 411-12 (emphasis added).

In a Rule 60(a) inquiry, the question is what the court originally intended. *Guenther v. United States*, 44 F. App'x 149, 150 (9th Cir. 2002). The rule authorizes a district court to correct a judgment if doing so reflects the court's original intentions. *Id.* (citing *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990) (in a Rule 60(a) inquiry, “our focus is on what ***the court originally intended to do***”) (emphasis added); *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987) (same).

Therefore, Rule 60(a) applies to errors made by the Court or clerk. As the Supreme Court stated, the rule addresses “correctable” errors that are “not what the court intended to write” – i.e. errors “made by the clerk or by the judge.” *Id.* (emphasis added). The alleged “error” here is not an error by the Court. Rather, the only alleged “error” is in the amended claim. The Court simply decreed the water right as it was recommended by the Department. The recommendation reflected the rights as claimed. As such, Rule 60(a) does not apply.

Furthermore, Rule 60(a) does not apply where the mistake or omission involves a “legal decision or judgment by an attorney.” *Silsby, supra*. Since Crater Farms, Inc., the original claimant of the above water rights, was a business entity (as opposed to an individual), it was required to be represented by an attorney in the SRBA. In fact, Crater Farms was represented by attorney Kent Foster in 1990, when it filed the amended claims for 34-2459, 34-2460, 34-2461 and 34-2462, and the late claim for 34-10925. *Second Affidavit of Darrell E. McDonald* (“*2nd McDonald Aff.*”) at Ex. A; see also *Notice of Appearance* (filed in each subcase). Since there was no withdrawal of counsel in these subcases, Mr. Foster continued to represent Crater Farms in 1992, when the Director’s Report recommendations were issued. This is further evidenced by the fact that the recommendation for 34-10925 was mailed directly to Mr. Foster. *2nd McDonald*

Aff. at Ex. B. Mr. Foster, who assisted in the preparations of the amended claims and would have been familiar with any alleged accomplished transfer claim for the points of diversion, reviewed the recommendations and did not comment or otherwise note that the recommendations were in error. There is no indication that Mr. Foster ever recommended that his clients file an objection to the recommendations – even though they failed to include the Island Wells as points of diversion.

Notwithstanding the fact that Rule 60(a) only applies to errors that “can be corrected whether it is made by the clerk or by the judge,” *id.*, Telford continues to assert that an error in the amended claims warranted setting aside the partial decree. The Special Master’s *Order* agreed. *Order* at 4 (“The Amended Claim contained a clerical error which can be corrected under Rule 60(a)”). This is not the law. In addition, neither Telford nor the Special Master has addressed the “legal decision or judgment” by the Crater Farms attorney that resulted in no objection being filed. Since there is a substantial dispute over the application of Rule 60(a) in this matter, permissive review is warranted.

In addition, the issue presented by the Special Master’s *Order* is one of first impression and significant precedential importance. Telford claims that the “issue surrounds a finding of an accomplished transfer.” *Telford Br.* at 17. While that may be true if this matter proceeds to trial, it is not the case for this motion. The issue here is whether Rule 60(a) applies to an alleged error by a claimant and its attorney on a claim form – as opposed to errors by the court or clerk, as required under the *Silsby* precedent. Making this case even more unique is the fact that the Claimants failed to file any objections or take any actions to correct the alleged error when the law required. Objectors have not been able to find any case where this issue has been addressed and decided by the Court – and Telford does not provide any.

Telford cites to the proceedings in Subcases 21-7295 and 21-7296 as involving Rule 60(a). *Telford Br.* at 19-20. Noticeably, however, Telford fails to cite to any pleading or decision in those proceedings. This is undoubtedly because nothing in those proceedings states that it was decided based on the Rule 60(a) standard – or that the case was even raised pursuant to Rule 60(a). There is no analysis by the Court and no written argument by the parties. Given the paucity of information from that matter, it is impossible to know what, if any, Rule 60 standard was applied and therefore, it is inapposite here.

Furthermore, even assuming, *arguendo*, that Rule 60(a) was applied in those subcases, the facts are different. It is well settled in the SRBA “that a party may not subsequently challenge elements or conditions decided in a license.” *Order on Motion to Dismiss Objections & Request for Attorney Fees*, Subcase Nos. 37-494, *et al.*, at 5 (Oct. 10, 2008); *see also, e.g., Memorandum Decision & Order on Motions for Summary Judgment*, (Subcase Nos. 63-2529, *et al.*) (June 11, 2009) (attempt to challenge licensed diversion volume “constitutes an impermissible collateral attack on the prior administrative proceedings”). As such, absent evidence of subsequent change to the licensed right, the Court was required to issue a partial decree that was consistent with the license.

Furthermore, during the pendency of the SRBA, IDWR retained jurisdiction for water right applications and permits. I.C. § 42-1421(4). Whenever a partial decree is issued for an application or permit – before it is licensed – the resulting decrees must be conditioned such that they will be “subject to the terms and conditions of the license to appropriate water that is ultimately issued.” I.C. § 42-1421(3). In subcases 21-7295 and 21-7296, it was an “oversight or omission” of the Court to not issue partial decrees consistent with the underlying licenses. Since

the Court was required to do this, the fact that the claimant failed to amend his claims once the licenses were issued is irrelevant.

Furthermore, subcases 21-7295 and 21-7296, in which there were no third party objectors, are in direct contrast to both subcase 75-14236, discussed above, and the present subcases which do involve third party objectors. As Special Master Dolan stated, “minimal due process” for the third party objectors requires a decision of the Presiding Judge on motions to set aside before there are any further proceedings on the specific terms and conditions of the new decrees for the water rights in the present subcases.

V. Permissive review is necessary to effectuate “orderly resolution of the litigation.”

“Orderly resolution of the litigation” demands that the parties know whether or not the decree will even be set aside before going to the time and expense of a trial. *See Order Granting Permissive Review of Special Master’s Order on Motions for Summary Judgment; AO1 9.e*, Subcase Nos. 01-04, *et al.* (Feb. 24, 2011) (granting permissive review where the issues presented were “indeed controlling issues of law” and “an interlocutory determination of the issues would facilitate an orderly and expedient resolution of the various subcases”). Yet, Telford would have the Special Master “put the cart before the horse” by holding a trial that may not ever be necessary.

Telford claims that permissive review should be denied because it is possible that the Court could hold against Telford and an appeal by Telford would be necessary. *Telford Br.* at 18-19. Condensing the appeals on these issues into “one appeal, as opposed to the potential for two appeals ... would save the parties time and expense, not cost them more, as claimed by the Objectors.” *Id.*

It is unclear how holding a trial that may never be necessary will save the parties and Court money and resources. Using the same logic advanced by Telford, the Presiding Judge could hold deny Telford's motion to set aside. In such an instance, all further proceedings in this matter would be terminated – including any trial.¹ Requiring the parties to proceed to trial when the Presiding Judge could deny the request to set aside the partial decrees will cost more.

Ironically, while demanding that the parties proceed with a trial that may not be necessary, Telford complains that permissive review would actually cost more money – particularly to Telford who will “shoulder the entire expense burden on his own on an appeal.” *Telford Br.* at 22-23. This argument does not make sense. Holding a trial – including the attendant preparation, discovery, etc., that is necessary – will cost significantly more of the Court's and parties' money and resources than not holding that trial. If the Court determines that the partial decrees should not be set aside, the parties would have wasted the time and money spent in holding a trial.

In truth, an orderly resolution of these proceedings requires a finding by the Court that the partial decrees should, or should not, be set aside. Until that decision is issued, any further proceedings here are unnecessary and unauthorized. *Supra*.

VI. The Court Cannot Lightly Overlook the Claimants' Failure to Act when the Law Required.

Telford attempts to have the Special Master overlook the fact that the Claimants failed to act when the law required by filing an objection to the now-asserted error. They claim that, while it “certainly would have been better for Mr. Bell to have caught the error,” the fact that he failed to file an objection should not sway the Special Master's decision. *Telford Br.* at 19-20.

¹ Barring, of course, the outcome of any potential appeal by Telford.

These facts, however, should not be taken lightly. Indeed, they are the very reason that Rule 60(a) does not apply here.

As discussed above, Rule 60(a) applies to errors of the “court” or “clerk.” *Silsby, supra*. Here, there are no such errors. Indeed, the only alleged error is on the amended claim form, which Telford asserts should have included the points of diversion for an accomplished transfer. These amended claims with the alleged errors were signed and presumably reviewed and approved by both Mr. Bell and his attorney, Mr. Foster.

There is no claim that the Court or clerk made a “clerical error.” Indeed, there cannot be. The Court simply decreed the water right as it was recommended by the Department when no objections were filed.

The Claimants and their attorney did have the opportunity to correct the alleged clerical errors in the amended claims (which were included in the Director’s recommendations) by filing objections with the SRBA Court, as required by Idaho Code § 42-1412. Indeed, the original recommendations were issued in 1992 – nearly 6 years before the partial decrees were issued. *2nd Arrington Aff.* Exs. L-P. There was plenty of time to review the recommendations and file objections. Yet, no action was taken.

The Presiding Judge’s observations in the Lemhi Decree matter are instructive:

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.

There is no explanation as to why the Claimants failed to act to correct the alleged clerical error when the law required.

Rather than address this argument, Telford simply accuses Objectors of being “misleading.” Contrary to Telford’s characterizations, however, the facts are virtually identical. First, both cases involved subsequent owners attempting to change the elements of previously decreed water rights based on information that was available to the prior owners during the adjudication process.

Furthermore, the Lemhi matter involved the Lemhi Decree – a final adjudication decree. This case involved partial decrees issued by the SRBA that each included a Rule 54(b) certification – making them final decrees. *See* AO1 2.o (a “partial decree” represents the “final determination of the elements of a water right”). Importantly, the Rule 54(b) certification provides that the decisions – i.e. the partial decrees – are “final judgments” and that “the court has and does hereby direct that the above judgment or order shall be a final judgment.” Rule 54(b). The fact that Telford has filed his motion “**in the SRBA** to set aside an incorrect partial decree **in the SRBA**,” *Telford Br.* at 22 (emphasis in original), therefore, is a distinction without a difference. Telford cites no law to support his assertion that an SRBA partial decree with a Rule 54(b) certification is somehow less final or less effective than the decree from the Lemhi adjudication.

VII. Until the Presiding Judge Has Determined Whether or Not the Partial Decrees Should be Set Aside, There is No Justiciable Case or Controversy for Trial; As such, the Trial Should be Stayed.

One important limitation on a court’s jurisdiction is the requirement that there be an actual, justiciable, case or controversy. The pivotal elements of a justiciable controversy are:

A “controversy” in this sense must be one that is appropriate for judicial determination. ... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. ... The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. ... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Idaho Sch. for Equal Educ. Opportunity v. Idaho State Board of Educ., 128 Idaho 276, 281-82 (1995).

Until the Court determines whether or not the partial decrees can be set aside, there is no justiciable case or controversy. Here, partial decrees have been entered in each of the subcases. Each partial decree was made a final, appealable, judgment pursuant to Rule 54(b). *See* AO1 2.0 (a “partial decree” represents the “final determination of the elements of a water right”). As such, there is no justiciable controversy. Until the Presiding Judge determines that the partial decrees can be set aside, any trial would simply be “a difference or dispute of a hypothetical or abstract character.” *Idaho Scho. For Equal Educ. Opportunity, supra*. Accordingly, all proceedings in this matter should be stayed.

The Objectors are sensitive to the Court’s schedule and to the fact that trial is about 6 weeks away.² However, it is important that the correct decision is reached. Indeed, Telford goes to great lengths to identify the Special Master’s “careful consideration, taken over a year and a half” to issue the *Order*. The Objectors do not question that the Special Master understood the importance of this issue and gave the matter appropriate consideration prior to issuing the *Order*.

² Telford implies that the Objectors have waited until the eleventh hour in an effort to derail these proceedings. Not true. The Objectors were very interested in settling these subcases and participated in good faith in the settlement negotiations. Although the Objectors have always disagreed with the application of Rule 60(a) in these subcases, they chose to focus their resources on the settlement negotiations. It was not until it was apparent that a settlement would not be reached that the Objectors determined a request for permissive review was necessary.

Given the Special Master's thoughtful consideration of the issue,³ it makes eminent sense to make sure that there is a final decision by the Presiding Judge on this very important and threshold issue before proceeding to trial.

Furthermore, staying the trial is warranted since the Presiding Judge will have to decide whether permissive review should be granted in the first place. As required by AO1 9.e, the Special Master will issue a recommendation to the Presiding Judge on this request for permissive review. The Presiding Judge will then decide whether or not permissive review is warranted. In light of the current trial schedule, and the fact that discovery is ongoing, the best use of the Court's and parties' resources requires a stay of these proceedings before the Special Master until the Presiding Judge has issued a decision on the motion to set aside the partial decrees.

CONCLUSION

The application of Rule 60(a) in these subcases should be reviewed by the Presiding Judge before this matter proceeds to trial. Until such time, the schedule in this matter should be stayed.

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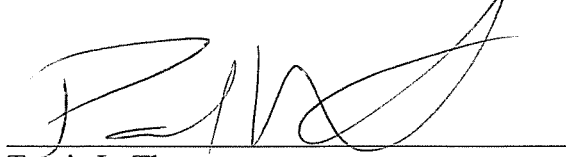
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³ The Objectors were not parties to those proceedings and the Special Master did not then have the benefit of the additional facts presented and legal arguments now made by the Objectors.

DATED this 3rd day of October, 2011.

BARKER ROSHOLT & SIMPSON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2011, I served a true and correct copy of the foregoing document on the persons listed below, via first class mail, postage prepaid:

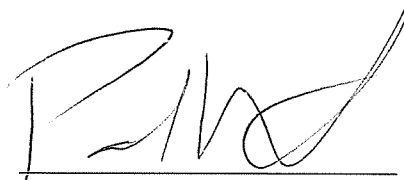
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