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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
OCT 31 2011	
By _____	Clark
Deputy Clerk	

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 No. 02-2318A
	) (Wilkerson)
Case No. 39576	)
	) MEMORANDUM DECISION AND
	) ORDER ON MOTION TO ALTER OR
	) AMEND JUDGMENT
	)
	) ORDER GRANTING MOTION TO
	) STRIKE
	)

Holding: *Motion to Strike is granted.*
Motion to Alter or Amend is denied.

Appearances:

Debra K. Ellers, McCall, Idaho, Dana L. Hofstetter, Hofstetter Law Office, LLC, Boise, Idaho, Attorneys for Raymond C. Barker, Jr., Charles J. Kritz Jr. and Diane B. Kritz.

Josephine P. Beeman, Jane M. Newby, Beeman & Associates, P.C., Boise, Idaho, Attorneys for William R. Wilkerson, Sr. and Imogene E. Wilkerson.

I.

FACTUAL AND PROCEDURAL BACKGROUND

1. On August 29, 2011, this Court issued a *Memorandum Decision and Order on Challenge and Order of Partial Decree* ("Memorandum Decision") in the above-captioned matter. The procedural background and facts set forth in the *Memorandum Decision* are incorporated herein by reference and will not be repeated.

2. On September 12, 2011, William and Imogene Wilkerson (collectively, "Claimants") filed a *Motion to Alter or Amend*, followed subsequently by a *Brief* in support. The Claimants request that this Court alter or amend two aspects of the *Memorandum Decision* to be discussed below.

3. Raymond C. Barker, Jr., Charles J. Kritz, Jr. and Diane B. Kritz (collectively, “Objectors”) filed a *Response* in opposition to the *Motion to Alter or Amend* on September 26, 2011.

4. On October 11, 2011, the Claimants filed a *Reply Brief* in support of their *Motion* along with the *Affidavit of Josephine P. Beeman* (“*Beeman Affidavit*”).

5. Oral argument on the Claimants’ *Motion to Alter or Amend* was held before this Court on October 13, 2011. At the hearing the Objectors moved to strike the *Beeman Affidavit*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument on the Claimants’ *Motion to Alter or Amend* was heard before this Court on October 13, 2011. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or October 14, 2011.

III.

DISCUSSION

A. Objectors’ Motion to Strike.

At oral argument the Objectors moved to strike the *Beeman Affidavit* on the grounds that it impermissibly attempts to introduce new evidence in conjunction with the *Motion to Alter or Amend*. Idaho Rule of Civil Procedure 59(e) governs motions to alter or amend a judgment. Pursuant to Rule 59(e), “a district court can correct legal and factual errors in proceedings before it.” *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007). Since Rule 59(e) provides a mechanism for corrective action before the trial court short of an appeal, “such proceedings must of necessity . . . be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.” *Lowe v. Lym*, 103 Idaho 249, 263, 649 P.2d 1030, 1034 (Ct. App. 1982). As a result, it is well established that new evidence may not be presented under Rule 59(e) in conjunction with a motion to alter or amend. *Johnson v. Lambros*, 143 Idaho 468, 472 fn.3, 147 P.3d 100, 104 fn.3 (Ct. App. 2006).

Attached as Exhibit A to the *Beeman Affidavit* are copies of certain documents from the Idaho Department of Water Resources' back file for water right 02-2318B.¹ Two of the documents are simply more legible copies of documents already contained in the record. Namely, a more legible copy of the *Notice of Claim* filed in the SRBA for water right 02-2318 as well as a more legible copy of the *Adjudication Claim Report of Examiners* for water right claim 02-2318. Less legible, although otherwise identical, copies of these two documents are already contained in the record as Exhibits C and D respectively to the June 10, 2010 *Affidavit of Jon C. Gould*. Counsel for the Objectors notified the Court at the hearing that Objectors have no objection to the Court considering the more legible copies of these two documents.

However, the Objectors ask this Court to strike the remainder of the Exhibit A documents, as well as all of the documents attached to Exhibit B to the *Beeman Affidavit*.² The remainder of the Exhibit A documents and all of the documents attached as Exhibit B to the *Beeman Affidavit* constitute new evidence that was not included in the record at the time the *Memorandum Decision* was issued. Since Idaho law makes clear that a motion to alter or amend must be directed to the status of the case as it existed when the court rendered its decision, it is inappropriate for the Court in this case to consider such new evidence in conjunction with Claimants' *Motion to Alter or Amend*. *Lowe v. Lym*, 103 Idaho at 263, 649 P.2d at 1034; *Johnson v. Lambros*, 143 Idaho at 472 fn.3, 147 P.3d at 104 fn.3. Therefore, the new evidence attached as Exhibits A and B to the *Beeman Affidavit* will be stricken from the record and not considered by this Court. Notwithstanding, the Claimants argue that this Court should consider all of the Exhibit A documents since they are part of the IDWR back file for water right 02-2318B. They note that this Court considered certain documents from the IDWR back file for water right 02-2318A when considering the *Challenge*, after that back file was cited to by the Claimants in their briefing. *Memorandum Decision*, p4, fn.3. However, water right 02-2318B is not before the Court in this proceeding, and therefore the back file for that water right is not part of the record in this proceeding.

¹ Water right 02-2318B is not at issue in this proceeding. It was partially decreed in the SRBA in favor of the Objectors on January 4, 2011. It is a split from former license 02-2318. The water right at issue here, 02-2318A, is likewise a split from former license 02-2318.

² Attached as Exhibit B to the *Beeman Affidavit* are copies of certain documents filed in *Wilkerson v. Snake River R.V. Resort, et.al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).

Based on the foregoing, the Objectors' *Motion to Strike* is granted. All of the documents constituting Exhibits A and B to the *Beeman Affidavit* shall be stricken from the record, save the following two documents to which there were no objections: (1) the more legible copy of the *Notice of Claim* for water right 02-2318, a copy of which is attached hereto as Exhibit 1, and (2) the more legible copy of the *Adjudication Claim Report of Examiners* for water right 02-2318, a copy of which is attached hereto as Exhibit 2.

B. Claimants' Motion to Alter or Amend.

"As a means to circumvent an appeal, Rule 59(e) provides a trial court a mechanism to correct legal and factual errors occurring in proceedings before it." *Slaathuag v. Allstate Ins. Co.*, 132 Idaho 705, 707, 979 P.2d 107, 109 (1999). So long as a motion to alter or amend is filed within fourteen days after entry of the judgment, "notions of finality are not disturbed." *Id.* The decision to grant or deny a Rule 59(e) motion to alter or amend is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent a showing of an abuse of that discretion. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982). In this case, the Claimants' *Motion to Alter or Amend* requests that this Court alter or amend two aspects of the *Memorandum Decision*. Each will be addressed in turn.

i. Footnote 1.

Claimants first request that this Court alter or amend footnote 1 of the *Memorandum Decision*, which provides as follows:

The field examiner's report for the claim filed for the right in a prior adjudication was based on an aerial photograph taken in 1977. *Gould Aff.*, Ex. D. The 13 Acre Parcel was therefore irrigated at least as of this date.

Memorandum Decision, p.3. Claimants assert that Exhibit D to the *Gould Affidavit* establishes that a field examination of the subject property was done on September 16, 1983, and contend that the footnote should be amended to "clarify that an IDWR filed exam on September 16, 1983 confirmed irrigation of the 13 Acre Parcel."³ *Motion to Alter or Amend*, p.1. The Objectors assert in response that Exhibit D to the *Gould Affidavit* does not confirm the irrigation of the 13

³ Claimants additionally rely on certain documents attached as Exhibit A to the *Beeman Affidavit* in support of their contention in this respect. However, the Court will not consider those documents in light of its ruling on the Objectors' *Motion to Strike*.

Acre Parcel in either 1977 or 1983, but rather is inconclusive as to both dates. They further contend that the footnote is not essential or material to the Court's ruling, since the *Memorandum Decision* was decided on other grounds. This Court agrees.

The *Motion to Alter or Amend* attempts to raise a factual issue as to whether Exhibit D to the *Gould Affidavit* establishes that the 13 Acre Parcel was being irrigated in 1977, 1983, or both. However, that factual issue is immaterial to the Court's ultimate holding and reasoning in the *Memorandum Decision*, which turned primarily on the effect of the filing of the SRBA claim for water right 02-2318 on the Objectors' assertions of forfeiture and/or abandonment of water right 02-2318A. The footnote was merely contextual editorializing on the part of the Court, and if left in the opinion would be viewed merely as dicta. Therefore, rather than raise a new factual issue post-judgment which is not necessary or relevant to the Court's ultimate decision, the Court will simply remove the footnote as immaterial to the opinion.

ii. Remark.

Claimants also request that this Court alter or amend the following remark located in the "other provisions necessary for the definition or administration of this water right" section of the *Partial Decree* for the above-captioned water right. The remark provides as follows:

This water right is a split from former license 02-2318. As a result, access to the decreed point of diversion and delivery system for this water right is located on property other than that to which this water right is appurtenant. The decreed elements for this water right do not constitute a judicial determination of the validity of any right to access the point of diversion and/or conveyance system located on property other than to which this water right is decreed appurtenant. The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541). Any right of access to the point of diversion and the conveyance system located on property other than to which this water right is decreed appurtenant is subject to any final judgment entered in that proceeding.

("Remark"). Claimants assert that the Remark needs to be removed or clarified on the grounds that it could be "misconstrued" as determining that there was never a valid right of access for water right 02-2318A. This Court disagrees.

The parties to this case are presently engaged in litigation regarding two separate and distinct legal issues. The first – the existence of a valid water right benefitting the 13 Acre

Parcel – was addressed and decided by this Court. The second – the existence of a valid right of access (i.e., whether a license, legal easement or other legal arrangement) across the Riverfront Property in favor of the 13 Acre Parcel – was not addressed or decided by this Court. This Court lacks the jurisdiction to address or decide the right of access issue as it has not been raised before this Court. Rather the Claimants placed that issue before the jurisdiction of the Owyhee County District Court when they, acting as plaintiffs, filed their complaint in Owyhee County Case No. CV-06-05541. The Remark was included in the *Partial Decree* for water right 02-3218A simply to make clear that any issues pertaining to the validity and existence of a right of access across the Riverfront Property in favor of the 13 Acre Parcel were vested in another jurisdiction and were not decided by this Court. The Court finds, contrary to the contentions of the Claimants, that the Remark is clear in this respect and does not need to be altered or amended.⁴

The Claimants additionally argue that the last two sentences of the Remark should be removed or clarified because the right of access case before the Owyhee County District Court has not been fully resolved at this time, and that if the parties settle, the right of access settlement may not be reflected by a judgment of the Owyhee County District Court. While the Court is aware that the Owyhee County District Court case has not been fully resolved at this time, it does not find that the last two sentences of the Remark need to be altered or amended. As presently constituted, the second to last sentence of the Remark reads as follows: “The judicial determination of the right of access to the point of diversion and conveyance system was decided separately in *Wilkerson v. Snake River R.V. Resort, et. al.*, Third Judicial District, Owyhee County (Case No. CV-06-05541).” The language “was decided” was included as opposed to “will be decided” since the *Partial Decree* for water right 02-3218A will be in place in perpetuity, long after the case is resolved. Last, Claimants’ concern that any settlement that may be reached may not be reflected in the judgment entered in Owyhee County Case CV-06-05541 may be addressed by the parties, who in such event, may stipulate that they settlement be reflected in the judgment.

⁴ It is worth repeating that a remark such as the one at issue here would ordinarily be unnecessary as the ownership of a water right does not in and of itself create a right of access across the property of another. In the exercise of discretion, the Court decided to include the remark to simply make clear and reiterate, as a courtesy to the parties, their successors-in-interest and the Owyhee County District Court, that this Court did not address or decide any issues pertaining to the existence of a right of access across the Riverfront Property in favor of the 13 Acre Parcel.

Based on the forgoing, the Claimants' *Motion to Alter or Amend* is denied and the Remark will remain in the *Partial Decree* for water right 02-3218A as presently constituted.

IV.

ORDER

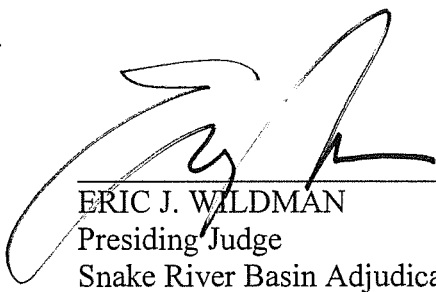
BASED ON THE FORGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. The Objectors' *Motion to Strike* is **hereby granted**. All of the documents constituting Exhibits A and B to the *Beeman Affidavit* **are hereby stricken** from the record, save the following two documents to which there were no objections:

- a. The more legible copy of the *Notice of Claim* for water right 02-2318, a copy of which is attached hereto as Exhibit 1, and
- b. The more legible copy of the *Adjudication Claim Report of Examiners* for water right 02-2318, a copy of which is attached hereto as Exhibit 2.

2. The Claimants' *Motion to Alter or Amend* is **hereby denied**, although the Court will issue an *Amended Memorandum Decision and Order On Challenge and Order of Partial Decree* that removes footnote 1 as immaterial.

DATED: _____.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF _____

IN THE MATTER OF THE GENERAL DETER-
 MINATION OF RIGHTS TO THE USE OF _____
 WATER RIGHT FROM BASE OF MTL
 DAM TO OREGON DRAINAGE BASIN
 BORDER.

**NOTICE OF CLAIM
 TO A
 WATER RIGHT**

6-2-22-3	Map No.
1000	1015
Fee Paid	Receipt No.

Notice is hereby given that

J & L FARNIS

(Name of Claimant)

(Mailing Address)

(Zip Code)

Telephone No.

357-3311 or 357-3323

claims a right to the diversion and beneficial use of the surface or ground water. The extent and nature of said claim is as follows:

(1) Date of priority: (When was the water first applied to a beneficial use, or priority date of decreed, licensed or permit right) _____

(2) Describe the source of water: (Name of stream, lake, spring, etc., or ground water) _____ tributary to _____

(3) Describe the purpose for which the water has been used and the time during the year when you have used the right claimed:

Quantity _____ Use _____ Period of Use From _____ To _____
 (CFS, GPD, AF) (Domestic, Irrigation, stock, etc.) (Mo., Day) (Both dates inclusive)

Quantity _____ Use _____ Period of Use From _____ To _____
 (CFS, GPD, AF) (Domestic, Irrigation, stock, etc.) (Mo., Day) (Both dates inclusive)

Quantity _____ Use _____ Period of Use From _____ To _____
 (CFS, GPD, AF) (Domestic, Irrigation, stock, etc.) (Mo., Day) (Both dates inclusive)

Quantity _____ Use _____ Period of Use From _____ To _____
 (CFS, GPD, AF) (Domestic, Irrigation, stock, etc.) (Mo., Day) (Both dates inclusive)

(4) _____ TOTAL QUANTITY CLAIMED.

(5) A) Point of Diversion: Give location of point where water is diverted from its source _____ % _____ %
 Sec. _____ Twp. _____ Rge. _____ S. B.M. _____ County _____
 Additional Points: _____

B) Describe means of diversion of water: (Pump and pipeline, well, diversion dam, reservoir, length of ditch and field, etc.). Give sizes and capacities: be as specific as possible. Describe any changes in the system and give the date of the change. _____

(6) A) Describe location of use by listing number of irrigated acres within each 40-acre tract in appropriate box. If use is not for irrigation, place an "X" in appropriate box to show location.

T	R	SEC.	NEX			NWX			SWX			SEX			TOTAL
			NEX	NWX	SWX	NEX	NWX	SWX	NEX	NWX	SWX	NEX	NWX	SWX	
						3	9	38							

Total no. of acres _____

B) If water is used for other than irrigation, fully describe that use, being as specific as possible: _____

NOTE: Include here the type and number of stock watered: _____

(7) If you are claiming water as a member of an organization, list name of organization: _____

(8) Remarks _____

(9) Basis of claim (Check one) ☐ A) Right based on diversion and beneficial use.
☐ B) Right decreed by court, cite title of case.

Department of Water Resources
 Western Regional Office

☒ C) Right based on application, permit, license, or previous statutory claim filed with the Idaho
 Department of Water Resources. Give No. _____

Be it known that the undersigned, after being duly sworn on oath, depose(s) and say(s) that all statements included herein are true and accurate to the best of (his, her, their) knowledge.

Individual

(Date)

(Signature of Claimant)

Organization

(Signature of Sponsor)

State of _____

Organization

County of _____

Seal

(Signature of Authorized Agent)

On this _____ day of _____, In the year _____ before me

a notary public, personally appeared _____

known to me to be the person(s) whose name(s) are subscribed to the above instrument, and acknowledged to me that (he, she, they, corporation, partnership or _____) executed the same.

Commission expires _____

Notary Public residing at _____

EXHIBIT

1

State of 1
Department of Water Resources

ADJUDICATION CLAIM
REPORT OF EXAMINERS

Claim No. 02-2318

1. Name of Applicant Jargalur & Sumardi

2. Priority 6/5/68

3. Source of Water Snake R.

4. (Quantity) (Domestic, Irri., Stock Water, etc.) (Period of Use)
_____ cfs Use _____ From _____ to _____

.66 cfs Use irrigation From 3/15 to 11/15

_____ cfs Use _____ From _____ to _____

5. Location of Point of Diversion: _____ of Section _____

Twp. _____, Rge. _____, County of _____

6. Describe Diversion Works: _____

7. Describe Location of Use: _____

TWP	RGE	SEC	NE $\frac{1}{4}$			NW $\frac{1}{4}$			SE $\frac{1}{4}$			SW $\frac{1}{4}$			TOTALS
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
								46	25						
3N	5W	14						4	29						33

TWP. _____ RGE. _____ COUNTY _____ SCALE: 1" = 1 MILE

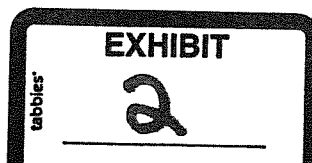
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+

8. Purpose other than irrigation: none

9. Remarks: a portion of this farm has been sectioned off for housing development.

This examination was made on the 16 day of Sept., 19 83.

(Signed) John X. Noyes
Examiner



State of :
Department of Water Resources

ADJUDICATION CLAIM ANALYSIS SHEET

Review by 9KA

Date 9/16/83

Right No. 02-2818

Claimant Jargahis a sumodi

Recommendation differs from claim: ☒ Yes ☐ No ☐ Disallow
(Document any differences)

Claim Details Verified Against:

Check (X or ✓) those searched. Circle records used for recommendation.
Include copies or memos where applicable to explain findings.

☒ License

☐ Previous Statutory Claim.

☐ Permits, valid or lapsed. Number(s) if different than above _____

☐ Decree. Name & date _____

☐ Conveyance Loss Calculations. See printout included.

☐ Title abstract. ☐ In file. Or, Name & location _____

☐ County records. ☐ In file. Or, Name & location _____

☐ Affidavits. ☐ In file.

☐ Posted Notices, Water Locations Notices. ☐ In file.

☐ Deed Records. ☐ In file. Or, Name & location _____

☐ Patent Records. ☐ In file. Or, Name & location _____

☐ Metzker Maps. Identify _____

☒ A.S.C.S. Records. Year & Photograph No. 1977 Alt. attached

☐ Irrigation Company/District Records. ☐ In file. Or Name & location _____

☐ Historical Books. Name(s) & location _____

☐ Interview(s). Attach conversation memorandum.

☐ Other _____

☐ _____

Field Exam Made: ☒ Yes ☐ No Date 9/16/83 acreage + P.D. only.

☐ Adj. Report in file ☐ Beneficial Use Report in License (S.O.) File

Measurement _____ cfs. Amount recommended _____ cfs.

Type of measuring device: _____ Meter No. _____

Condition _____ Date _____ Time _____

Adjudication Photo(s) Used: Name or No. _____, WFO 10 1224

Field Photographs Taken ☐ Yes ☒ No

NICHOLINED

Memorandum in file ☐ Yes ☒ No

Remarks G.D. was changed from original P.D. but
was stream - stiller from 140 acre
has a change on license in in error

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION AND ORDER ON MOTION TO ALTER OR AMEND JUDGMENT; ORDER GRANTING MOTION TO STRIKE was mailed on October 31, 2011, with sufficient first-class postage to the following:

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