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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

NOV 18 2011

By _____

Clerk

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

Case No. 39576

) Subcase No. 02-2318A
) (Wilkerson)
)
) ORDER DENYING WILKERSONS'
) MOTION TO ALTER OR AMEND
) OCTOBER 31, 2011 AMENDED
) MEMORANDUM DECISION AND
) ORDER ON CHALLENGE
)
)
)

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*. The Claimants requested that this Court alter or amend two aspects of the *Memorandum Decision*.

3. On October 11, 2011, the Claimants filed the *Affidavit of Josephine P. Beeman* ("Beeman Affidavit") in support of their *Motion to Alter or Amend*. Attached as Exhibit A to the *Beeman Affidavit* were copies of certain documents from the Idaho Department of Water Resources' back file for water right 02-2318B.¹ Attached as Exhibit B to the *Beeman Affidavit*

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.

were 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).

4. Raymond C. Barker, Jr., Charles J. Kritz Jr. and Diane B. Kritz (collectively, “Objectors”) subsequently moved to strike the *Beeman Affidavit*.

5. On October 31, 2011, the Court entered a series of *Orders*. The first was its *Memorandum Decision and Order on Motion to Alter or Amend Judgment*, denying the Claimants’ *Motion to Alter or Amend*. The second was an *Order Granting Motion to Strike*, striking all of the documents constituting Exhibits A and B to the *Beeman Affidavit* save a more legible copy of the *Notice of Claim* for water right 02-2318 and a more legible copy of the *Adjudication Claim Report of Examiners* for water right 02-2318. Third, the Court entered an *Amended Memorandum Decision and Order on Challenge and Order of Partial Decree* (“*Amended Memorandum Decision*”).²

6. On November 14, 2011, Claimants filed a *Motion to Alter or Amend October 31, 2011 Amended Memorandum Decision* (“*Motion*”). Claimants’ *Motion* requests that this Court admit into the record the last eight pages of Exhibit A and all of the documents attached as Exhibit B to the *Beeman Affidavit*. Claimants’ *Motion* also requests oral argument.

II.

REQUEST FOR ORAL ARGUMENT DENIED

This Court in its discretion, and pursuant to Idaho Rule of Civil Procedure 7(b)(3)(D), hereby denies Claimants’ request for oral argument on their *Motion*. The Claimants have already had the opportunity to argue before this Court why the last eight pages of Exhibit A and all of the documents attached as Exhibit B to the *Beeman Affidavit* should be admitted into the record on Challenge at the oral argument held before the Court on October 13, 2011. The arguments previously submitted to the Court regarding the issue need not be repeated. Additionally, for the reasons set forth below, the Court finds that the Claimants’ *Motion* is without merit.

² The *Amended Memorandum Decision* is identical to the *Memorandum Decision* except that footnote 1 of the *Memorandum Decision* was removed.

III.

ANALYSIS

- A. The last eight pages of Exhibit A and the entirety of Exhibit B to the *Beeman Affidavit* constitute new evidence that cannot be offered in conjunction with a Rule 59(e) motion to alter or amend.**

This Court has already stricken the entirety of Exhibit A, save two identified documents, as well as the entirety of Exhibit B to the *Beeman Affidavit* in response to a *Motion to Strike* raised by the Objectors. The Claimants' *Motion* simply asks this Court to overrule that holding and re-argues to this Court arguments already made as to why the documents should be admitted and considered under Rule 59(e). However, Idaho law is clear on this issue. It directs 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, and that it is inappropriate for the Court to consider new evidence in conjunction with a motion to alter or amend. *Lowe v. Lym*, 103 Idaho 249, 263, 649 P.2d 1030, 1034 (Ct. App. 1982); *Johnson v. Lambros*, 143 Idaho 468, 472 fn.3, 147 P.3d 100, 104 fn.3 (Ct. App. 2006).

Simply put, in this case Claimants' attempt to introduce evidence in the form of the last eight pages of Exhibit A and the entirety of Exhibit B which was not before this Court, and which was not considered by the Court, at the time it entered its *Memorandum Decision* and/or *Amended Memorandum Decision*. Therefore, under Rule 59(e) and the above-cited case law the last eight pages of Exhibit A and the entirety of Exhibit B cannot now be introduced for this Court's consideration as a matter of law. The Claimants' *Motion* is denied in this respect.

- B. Claimants' request that last eight pages of Exhibit A to the *Beeman* be introduced into the record pursuant to Rule 60 is denied.**

Claimants further assert that the last eight pages of Exhibit A to the *Beeman Affidavit* should have been included in the Department back file for water right 02-2318A, but was not due to oversight by the Department. The Claimants contend this oversight created an error in the record for this proceedings which should be corrected by the Court under Idaho Rule of Civil Procedure 60(a), 60(b)(1) or 60(b)(2). This Court disagrees.

Rule 60(a) permits a court to grant a party relief from a judgment due to clerical mistakes. Rule 60(b)(1) permits a court to relieve a party from a final judgment in the event of

mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(2) permits a court to relieve a party from a final judgment where “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial” become available. The decision to grant or deny a Rule 60 motion rests with the sound discretion of the trial court. *Johnston v. Pascoe*, 100 Idaho 414, 599 P.2d 985 (1979).

Here the alleged error raised by Claimants is not a clerical mistake that occurred in this proceeding. Simply stated, had Claimants wished to submit the last eight pages of Exhibit A into the record they could have and should have timely done so in this proceeding before the Special Master. There has been no showing that the last eight pages of Exhibit A were not in existence during the pendency of this proceeding or that those documents were undiscoverable with due diligence. To the contrary, at the very least the Claimants could have timely retrieved the documents from the Idaho Department of Water Resources.

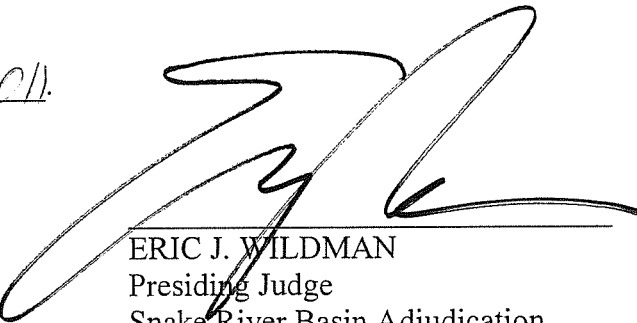
In addition, this Court finds that the factual evidence sought to be introduced as the last eight pages of the *Beeman Affidavit*, even if admitted into evidence, has no material relevance to this Court’s holding in its *Memorandum Decision* and *Amended Memorandum Decision* which turned primarily on 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. Therefore, the Claimants’ requested relief under Rules 60(a) and (b) is denied.

IV ORDER

Based on the foregoing IT IS ORDERED that Claimants’ *Motion to Alter or Amend October 31, 2011 Amended Memorandum Decision* is hereby denied.

DATED:

Nov 18, 2011.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING WILKERSONS' MOTION TO ALTER OR AMEND was mailed on November 18, 2011, with sufficient first-class postage to the following:

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