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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
JAN 27 2012	
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

ORDER GRANTING MOTION
FOR PERMISSIVE REVIEW

WATER RIGHTS: 34-2459, 34-2460,
34-2461, 34-2462, and 34-10925

I. PROCEDURAL HISTORY

These subcases are before the court on a *Motion to Set Aside Partial Decrees*. The movants asked to set aside the *Partial Decrees* under I.R.C.P. 60(a) due to a clerical error originating in the *Amended Claims*. The Objectors, Doug Schureman, Tyler Felton, Jim Huelsman, Darrell McDonald and Norman Sowards, filed a *Motion for Permissive Review of the Special Master's Order on Motion to Set Aside Partial Decree*.

The Objectors argued that whether or not the *Partial Decrees* may be set aside under Rule 60(a) is a threshold legal question that should be answered prior to the trial scheduled for these subcases. Objectors asserted that interests of judicial economy will be served by a permissive appeal of this issue.

The main thrust of the Objectors' argument asserts that the analysis under Rule 60(a) is a "controlling legal question" that will have a significant bearing on the outcome of future proceedings. The SRBA Court's Administrative Rules establish that permissive review is authorized when that review would "materially advance the orderly resolution" of the subcases. *A01 9e* reflects the standard advanced in Idaho Appellate Rule 12 for permissive review. The

Objectors note that permissive review by the SRBA District Court will allow the court to determine whether further proceedings are necessary, or whether a decision under Rule 60(a) is conclusive.

The original claimants filed *Notices of Claim* covering the Airport Well licenses in 1989. In November 1990, *Amended Notices of Claim* were filed for the Airport Well Licenses. The *Amended Notices of Claim* did not include the legal description for the Island Wells on the first page. However, the *Amended Claims* contained two maps as attachments. One map showed the Airport Wells, and a second map showed the Island Wells. The claim also included a reference to the Island Wells. The Remarks Section referred to a redirection from the Munsey Ditch which holds water diverted from the Island Wells. The *Director's Report* for these rights was issued in 1992. It did not include the Island Wells. The claimants did not object to the *Director's Report* exclusion of the Island Wells as points of diversion. The SRBA court issued *Partial Decrees* for these rights consistent with the *Director's Reports*. Consequently, the Island Wells were not included as points of diversion in the *Partial Decrees*.

In 2008, the claimants filed the *Motion to Set Aside Partial Decrees*. This Special Master issued an *Order on Motion to Set Aside Partial Decree* (Sept. 9, 2009). Accordingly, IDWR issued an *Amended Director's Report* on December 10, 2009. The *Amended Director's Report* recommended the Island Wells as points of diversion. A trial is currently scheduled for June 20, 21 and 22, 2012.

II. STANDARD OF REVIEW

A motion for permissive appeal under *AOI 9.e* is based on Idaho Appellate Rule 12. Motions should be granted if 1) there are substantial grounds for a difference of opinion, and 2) the immediate appeal may materially advance orderly resolution of the litigation. *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 789, 215 P.3d 505, 509 (2009). It is clear that interlocutory orders do not usually create appealable orders, and permissive appeals are an unusual posture. *Id.* As a general policy, courts exercise caution when deciding whether or not to grant permissive appeals because of the general policy against piecemeal litigation.

III. DISCUSSION

A predecessor of Telford, Mitchell Sorensen, filed a *Motion to Set Aside Partial Decrees* to correct what was perceived as clerical error in the *Partial Decrees*. The court held hearings on the *Motion* on July 23, 2008, November 17, 2008, and again on March 25, 2009. Mr. Sorensen submitted the *Amended Claims* and the attached maps as evidence of the clerical error. The court allowed the claimants to go forward with the assertions about the clerical error finding that “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.” *Order on Motion to Set Aside Partial Decree* at 14. The *Order* “presumed without deciding that sufficient grounds exist to support setting aside these *Partial Decrees*.” *Id.* at 4. IDWR then proceeded with *Amended Director’s Reports* recommending changes to the partial decrees to allow use of the Airport Wells and Island Wells for 34-2459, 34-2460, 34-2461, 34-2462 and 34-10925. IDWR also added volume limitations to the individual water rights which is currently standard practice for IDWR, but was not the practice during the time that Basin 34 *Director’s Reports* were issued. In addition, IDWR added a subordination condition to protect against injury due to the accomplished transfer.

Pursuant to a call, in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R25E S3 NEWENW has a priority date of May 18, 1982.

The Objectors filed *Objections* alleging that the diversion rate was inaccurate and the acre-feet limitation of 8441.5 acre-feet was unjustified. The Objectors requested that IDWR conduct an injury analysis for the accomplished transfer and inclusion of the Island Wells as points of diversion. IDWR did issue a *Supplemental Director’s Report* which concluded “on remand IDWR concludes that the rights as presently recommended provide the objectors sufficient protection against injury. It sees no need to amend its recommendations of these rights.” *Supplemental Director’s Report* at 4.

A. The Special Master Has Ruled On Rule 60(a)

The *Order on Motion to Set Aside Partial Decree* explained the current procedure for a Special Master to include both a recommendation on the grounds for setting aside a partial decree and a recommendation on the elements concurrently.

The Special Master notes that Mr. Sorensen has asked that the *Partial Decrees* for these rights be set aside. The Special Master is prepared to rule on that *Motion*, however, the SRBA District Court prefers to have one *Special Master's Report and Recommendation* at the conclusion of the proceedings that includes a recommendation for the elements of each water right. This Special Master presumes without deciding that sufficient grounds exist to support setting aside these Partial Decrees. A full decision on that question shall issue after the *Amended Claims* have been considered.

Telford argued that the *Motion for Permissive Review* is premature because “In essence, the Objectors seek review of the Special Master’s presumption, which is premature at this stage of the proceedings. Consequently, on that basis, the Objectors’ *Motion for Permissive Review* should be denied.” *Memorandum* at 13. This Special Master understands the basis for Telford’s argument. Usually the final determination on Rule 60(a) is made when the *Special Master’s Report and Recommendation* is issued. However, in this case, the issue has been thoroughly raised and briefed. The decision has been made on Rule 60(a).

B. Substantial Grounds Exist

There must be substantial grounds for a difference of opinion as to whether the facts here and application of Rule 60(a) justify a clerical error under the rule. Telford submits that the amended claims were internally inconsistent. Telford argued that this clear inconsistency mitigates against a conclusion that substantial grounds exist for a difference of opinion. Telford points to the two maps attached to the *Amended Claim* as persuasive evidence that a clerical error existed. Telford bolsters this with language on the face of the claim document referring to a redirection from the Munsey Ditch.

Those indicators were sufficient to persuade this Special Master to allow the reopening of these subcases under Rule 60(a) and to allow IDWR to consider the Island Wells. However, the evidence supports a finding that substantial grounds exist for a difference of opinion.

Telford argued that the second map and the statement about the Munsey Ditch show an internal inconsistency regarding the claimed points of diversion. Telford explained that the *Amended Claims* constituted a clerical error when considering the original claims which made no reference to the Munsey Canal, nor did they include a map of the Island Wells. The Court agrees that the *Amended Claims* appear to have an internal inconsistency and appear to have erroneously omitted the legal description for the Island Canals.

On the other hand, the Objectors point out that the error could be characterized as a legal error which is not covered under Rule 60(a). The Objectors argue that Telford's predecessors failed to file Objections or take other action to correct the omission of the Island Wells. Thus, there are substantial grounds for a difference of opinion.

C. Permissive Review Will Assist Application of Rule 60(a)

During the pendency of the SRBA, Rule 60(a) has been applied in many subcases based on many different factual scenarios. By far the most common application of the rule has been to correct legal descriptions. Many of those legal descriptions have involved situations where the point of diversion or the place of use has not changed locations, but the legal description was simply wrong to begin with. For example, the trial in subcase 22-13212 involved an SRBA resolution of a clerical error in the *Rexburg Decree* some 100 years ago. The parties, IDWR, and the SRBA Court agreed that the legal description in the *Rexburg Decree* mistakenly described a different property owned by the predecessor in interest. The Court utilized Rule 60(a) to correct the legal description. IDWR testified that it was impossible to irrigate the decreed place of use from the source, that no one had claimed water from the incorrect place of use, and that many parties had claimed from the correct place of use. However, in the same subcase, the Court denied an asserted clerical error in the priority date. The Court found no indication that the *Rexburg Decree* had made a clerical error in finding the priority and determined that if there was an error, it was a legal error not capable of correction under IRCP 60(a).

This court has utilized Rule 60(a) to set aside a *Partial Decree* and correct a legal description where the place of use was located in an unsurveyed area. IDWR reported that the water agent indicated in his file that a determination of the legal description was difficult because a survey had not been conducted. After the *Partial Decree* was issued, subsequent owners conducted a survey and identified the legal description.

However, this Special Master notes that the SRBA Court has utilized Rule 60(a) somewhat more broadly than other District Courts. It has seemed appropriate to do so as the Court strives to accurately record the elements of water rights. However, the application of Rule 60(a) has rarely been challenged in the SRBA. Therefore, it is important to allow the SRBA District Court to test the manner in which the Special Masters have applied Rule 60(a).

IV. CONCLUSION

It is this Special Master's view that the omission of the Island Wells on the face of the *Amended Claim* was a clerical error because the attached maps illustrated that both the Island Wells and the Airport Wells were intended to be claimed. IDWR carefully scrutinized its files and determined that it did not investigate or recommend the exclusion of the Island Wells. IDWR did not recommend the Island Wells because it looked only at the incomplete legal description. That omission was not objected to and was carried over to the *Partial Decrees*. As a result, the *Partial Decrees* did not include the Island Wells as authorized points of diversion. Application of Rule 60(a) to these facts is in line with other rulings of the SRBA Court to correct errors in *Partial Decrees*.

However, this Special Master is aware that the opposing view raises substantial grounds for a difference of opinion on applying Rule 60(a). Specifically, the opposition points out 1) that the error in the *Amended Claim* was not an error made by the Court or the clerk and 2) the error was not corrected by an *Objection*, *Motion to Alter or Amend*, or a *Challenge*.

AOI 9(e) allows a Special Master to recommend permissive review of an interlocutory determination which involves a controlling question of law as to which there are substantial grounds for a difference of opinion where the consideration may advance the orderly resolution of the litigation. **This Special Master recommends that the Presiding Judge consider the application of Rule 60(a) in this instance for two reasons.** First, this is a threshold issue which could determine whether a trial on the merits of including the Island Wells is needed. Second, reviewing the parameters of Rule 60(a) in the context of the SRBA will help future litigants and the Court. **Therefore, Permissive Review is recommended.**

Dated January 27, 2012.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION FOR PERMISSIVE REVIEW was mailed on January 27, 2012, with sufficient first-class postage to the following:

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