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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho	
FEB - 1 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	) Subcase Nos. 34-2459, 34-2460, 34-2461,
	) 34-2462 and 34-10925
Case No. 39576	)
	) ORDER GRANTING PERMISSIVE
	) REVIEW; <i>AOI</i> 9.e.
	)
	) SCHEDULING ORDER AND NOTICE
	) OF HEARING ON PERMISSIVE
	) REVIEW
	)
	)

I.

PROCEDURAL BACKGROUND

1. This matter comes before the Court pursuant to an *Order Granting Motion for Permissive Review* issued by the Special Master in the above-captioned subcases. In the *Order*, the Special Master recommends that this Court grant permissive review on the limited issue of the application of Idaho Rule of Civil Procedure 60(a) to the facts of this case.

2. This matter originated on February 28, 1989, when the Idaho Department of Water Resources ("IDWR" or "Department") received *Notices of Claim* for water rights claims 34-2459, 34-2460, 34-2461 and 34-2462.¹ A *Notice of Claim* for water right claim 34-10925 was subsequently received by the Department on November 15, 1990.

¹ *Amended Notices of Claim* were filed for water right claims 34-2459, 34-2460, 34-2461 and 34-2462 on November 14, 1990.

3. On June 18, 1992, the Director filed his *Director's Report for Basin 34 (Big Lost River Basin)*, which contained recommendations for the above-captioned water right claims. No *Objections* to the recommendations were filed by any party, and *Partial Decrees* were entered for the uncontested water rights on December 16, 1997.

4. On April 24, 2008, Mitchell Sorensen, a predecessor-in-interest to the present claimant Telford Farms, LLC ("Telford"), filed a *Motion to Set Aside Partial Decree* with this Court, requesting that the *Partial Decrees* issued for each of the above-captioned water rights be set aside pursuant to Idaho Rule of Civil Procedure 60(a).

5. On April 25, 2008, the Court issued an *Order of Reference* appointing the Special Master to preside over the *Motion to Set Aside* and issue a recommendation to this Court consistent with *SRBA Administrative Order 1*.

6. On September 4, 2009, the Special Master entered an *Order on Motion to Set Aside Partial Decree*. In that *Order*, the "Special Master presume[d] without deciding that sufficient grounds exist to support setting aside these *Partial Decree*," but stated that "[a] full decision on that question shall issue after the Amended Claims have been considered." The *Order* set forth scheduling deadlines for the filing of amended claims, the issuance of *Amended Director's Reports*, and the filing of objections and responses to the *Amended Director's Report*.

7. *Amended Notices of Claim* for the above-captioned water rights were filed on September 21, 2009, followed by the Director's issuance of his *Amended Director's Reports* on December 10, 2009.

8. *Objections* to the quantity and point of diversion elements of the recommendations contained in the *Amended Director's Reports* were subsequently filed by various parties, including Doug Schureman, Tyler Felton, Jim Huelsman, Darrell McDonald and Norm Sowards (collectively, "Objectors").²

9. On September 15, 2011, the Objectors filed a *Motion for Permissive Review*, seeking review of the Special Master's September 4, 2009 *Order on Motion to*

² *Objections* to the recommendations were also filed by the Big Lost River Irrigation District. Those *Objections* were resolved and are not at issue as part of the permissive review.

Set Aside Partial Decree, and in particular the issue of whether sufficient grounds exist to set aside the *Partial Decree* under Rule 60(a). The *Motion* was opposed by Telford.

10. On January 27, 2012, the Special Master entered an *Order Granting Motion for Permissive Review*. In that *Order* the Special Master first addressed the issue previously reserved as to whether sufficient grounds exist under Rule 60(a) to set aside the *Partial Decrees* for the above-captioned water rights. With respect to that issue, the Special Master ruled in the affirmative. Then, the Special Master recommended that this Court grant permissive review to address the limited legal issue of the application of Rule 60(a) to the facts of this case.

II. DISCUSSION

A. Standard of review.

SRBA Administrative Order 1, Rules of Procedure ("AOI"), 9.e. sets forth the standard for granting 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.

The decision to grant or deny a request for permissive review rests in the sound discretion of the trial court.

B. Whether permissive review is procedurally appropriate.

The Objectors' *Motion for Permissive Review* was opposed by Telford on both procedural and substantive grounds. One of the issues raised before the Special Master was whether permissive review is procedurally proper at this time under *AOI*, §9.e, which provides that permissive review may be sought under the circumstances provided therein

“following the procedures set forth in I.A.R. 12.” Idaho Appellate Rule 12(b) provides that a motion for permission to appeal from an interlocutory order or judgment “shall be filed . . . within fourteen (14) days from the date of entry of the order or judgment.”

I.A.R. 12(b). In this case, the Special Master’s *Order on Motion to Set Aside Partial Decree* was issued on September 4, 2009, while the Objectors’ *Motion for Permissive Review* was not filed until September 15, 2011, well over fourteen days later.

A review of the record reveals that the Objectors could not have filed their *Motion for Permissive Review* within fourteen days of the issuance of the *Order on Motion to Set Aside Partial Decree* because they did not appear as parties in these subcases until well after that *Order* was issued. However, Telford’s argument is not that the *Motion* is late, but rather that it is premature. Telford argues that at the time the *Motion* was filed by Objectors, the Special Master had not ruled on the issue of whether the *Partial Decrees* could be set aside under Rule 60(a). Telford is correct in this respect. In her *Order on Motion to Set Aside Partial Decree*, the “Special Master presume[d] without deciding that sufficient grounds exist to support setting aside these *Partial Decree*,” and stated that “[a] full decision on that question shall issue after the Amended Claims have been considered.” Thus, at the time the Objectors filed their *Motion for Permissive Review*, no interlocutory determination had been made by the Special Master as to whether the *Partial Decrees* could be set aside under Rule 60(a).

However, the analysis as to whether a valid *Motion for Permissive Review* has been filed in this matter does not end here. Subsequent to the filing of the *Motion for Permissive Review* the Special Master re-addressed and decided the Rule 60(a) issue in her *Order Granting Motion for Permissive Review*. In that *Order*, the Special Master found 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,” and that “[t]hose indicators were sufficient to persuade this Special Master to allow the reopening of these subcases under Rule 60(a)” Thus, the Special Master decided the issue, albeit after the filing of the *Motion for Permissive Review*.

Given the circumstances this Court holds that the Objectors' *Motion for Permissive Review*, though premature, became valid upon the entry of the Special Master's *Order Granting Motion for Permissive Review*. This is not a case where the record does not contain an interlocutory determination of the Special Master from which permissive review may be sought under *A01*, §9.e. Rather this is a case where such an interlocutory determination exists in the record and a *Motion for Permissive Review*, though premature, was filed. Idaho case law has differentiated between the two situations when addressing whether a notice of appeal, though premature, is nevertheless sufficient to effectuate an appeal, and directs that such an appeal is valid where the record contains a final and appealable order. *See e.g., Weller v. State*, 146 Idaho 652, 653-654, 200 P.3d 1201, 1202-1203 (Ct. App. 2008) (holding that a premature notice of appeal was nevertheless effective where the record contained a final and appealable order entered by the district court after the notice of appeal was filed). Such is the case here.

Therefore, this Court holds that the Objectors' *Motion for Permissive Review* of the Special Master's determination that sufficient grounds exist under Rule 60(a) to set aside the *Partial Decrees* for the above-captioned water rights is procedurally appropriate under *A01*, §9.e.

C. Whether permissive review is substantively appropriate.

Substantively, Telford argued before the Special Master that substantial grounds for differences of opinion as to the applicability of Rule 60(a) do not exist in this matter, and that permissive review will not materially advance the orderly resolution of the litigation. This Court disagrees.

The Court has reviewed the files in the above-captioned matter and finds that the issue pertaining to the applicability of Rule 60(a) to the facts of this case is a controlling issue of law and that an interlocutory determination of the issues would facilitate an orderly and expedient resolution of the various subcases. The Court finds that there are substantial grounds for differences of opinion as to whether the error alleged by Telford to be a clerical error in this matter should be characterized as falling under the scope of

Rule 60(a) and whether Rule 60(a) authorizes the setting aside of the *Partial Decrees* under the circumstances of this case.

The Court further finds that immediate consideration by this Court of the subject issue on permissive review will advance the orderly resolution of the litigation in this matter. The issue of whether the *Partial Decrees* for the above-captioned water rights can be set aside is a threshold issue in this matter, and potentially a determinative issue. Under the circumstances, the Court agrees with the Objectors that the orderly and efficient resolution of this matter would be advanced by first letting the parties know whether the *Partial Decrees* will be set aside prior to requiring them to expend the time and resources necessary to prepare for a trial on the point of diversion and quantity element issues.

III. ORDER

THEREFORE, based on the foregoing, THE FOLLOWING ARE HEREBY ORDERED:

1. Permissive review of the above-captioned matter is **GRANTED** limited to the issue of the application of Rule 60(a) to the facts of this case.

2. Briefing Schedule: On permissive review, the parties shall abide by the following briefing schedule:

- | | | |
|----|------------------------------------|----------------|
| a. | Objectors' Opening Brief | Due: 2/17/2012 |
| b. | Telford's Responsive Brief | Due: 2/24/2012 |
| c. | Objectors' Optional Rebuttal Brief | Due: 2/29/2012 |

3. Oral Argument: Notice is hereby given that oral argument on permissive will be held on **March 2, 2012, at 1:30 p.m. (Mountain Time)** at the Snake River Basin Adjudication District Court, 253 3rd Avenue North, Twin Falls, Idaho. Telephone participation will be available by dialing 1-215-446-0193 and entering 406128# when prompted. Video teleconferencing ("VTC") will also be available by appearing at the

Idaho Department of Water Resources, Idaho Water Center, 322 E. Front St., Conference
Rm. B, Boise, Idaho.

IT IS SO ORDERED

Dated February 1, 2012



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING PERMISSIVE REVIEW / SCHEDULING ORDER AND NOTICE OF HEARING ON PERMISSIVE REVIEW was mailed on February 01, 2012, with sufficient first-class postage to the following:

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