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DEPARTMENT OF
WATER RESOURCES

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 Nos: 34-2459, 34-2460, 34-2461,
34-2462, and 34-10925

RESPONSE BRIEF ON PERMISSIVE REVIEW

On Permissive Review from Special Master Bilyeu's
September 9, 2009 *Order on Motion to Set Aside Partial Decree*

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Telford Lands, LLC (“Telford”) and Isom Acres Limited Partnership (“Isom”), by and through their counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, hereby submit this *Response Brief on Permissive Review*, which is a response to the *Joint Opening Brief on Permissive Review* filed the Objectors¹ on February 17, 2012. This *Response* is supported by the prior affidavits, director’s reports, supplemental director’s reports, water rights documents, and pleadings submitted in this matter.

I. INTRODUCTION AND BACKGROUND

A. Water Right Claims and Historical Usage.

This matter concerns the adjudication of the above subcases (Subcase Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925, hereinafter the “Telford Water Rights”) that were initially claimed by Willard Bell of Crater Farms, Inc., a predecessor-in-interest to a farm that was then purchased by Isom, and has now been recently purchased by Telford.

Water Right Nos. 34-2459, 34-2460, 34-2461, and 34-2462 are commonly referred to as the “Airport Water Rights.”² Originally, these water rights were licensed in the 1960s with four points of diversion which are commonly referred to as the “Airport Wells.” Over time, two of the wells became unusable. There are now currently only two operating Airport Wells, which are located in the SWSNW and the SENESW, both in Section 2, Township 3N., Range 26E. The two unusable “lost” Airport Wells were essentially replaced by the two Island Wells (described in the next paragraph) in order to fully irrigate Crater Farms’ 1,980 acres.

¹ The Objectors are Doug Schureman, Tyler Felton, Jim Huelsman, Darrell McDonald, and Norm Sowards.

² The “airport” reference is a shorthand way of referring to the water rights and the original wells that diverted them because the wells are located near the Arco Airport.

Water Right No. 34-7037 which is also appurtenant to the same place of use as the Airport Water Rights was licensed in 1990. The license was based on a 1985 field exam, which licensed the diversion of water through two wells found in the NESENE of Section 3, Township 4N., Range 26E., and the SENWSW of Section 34, Township 5N., Range 26E. Based up on a review of IDWR well driller's logs, the first of these wells was drilled in August of 1976 and the second was drilled in May of 1982. They are commonly referred to as the "Island Wells" because these wells divert into what is known as the Island Canal (located east of the Big Lost River), which then empties briefly into the Big Lost River before the heading of another canal known as the Munsey Canal. Water diverted under Water Right No. 34-7037 is delivered to the same place of use as water diverted from the Airport Wells.

The initial SRBA claims for the Airport Water Rights were filed On February 28, 1989. *Affidavit of Attorney Robert L. Harris* at Exhibits C through E (hereinafter the "First Harris Affidavit"); *Second Affidavit of Paul L. Arrington at Exhibits A-D*. Apparently, there was initially no SRBA claim filed for Water Right No. 34-7037, which is likely because this water right had not yet been licensed. The original claims for the Airport Water Rights included the original four points of diversion contained in the Airport Water Right licenses. None of these original claims contained express references or information supportive of an accomplished transfer for use of the Island Wells for diversion of the Airport Water Rights.

Approximately one and a half years later, on October 30, 1990, amended claims for Water Right Nos. 34-2459, 34-2460, 34-2461, and 34-2462, were filed by Mr. Bell. *Id.* at Exhibits E-H. Importantly, **each** of the amended claims contained two maps: one map of the water right place of use (near the Arco Airport) and three claimed points of diversion (the

Airport Wells), and a second map depicting the location of the Island Wells. This second map depicting the Island wells was not included in the original claim filed by Mr. Bell. *Second Harris Affidavit* at Exhibit A.

Further, in the claim document itself, at item 14 (the “Remarks Section”), it states the following:

Rediversion from Munsey Ditch: NW SE SE, (2 points), Section 2; SW SW NW, (2 points) Section 13.; SE SE NE Section 15; SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range 26 East.”

Second Harris Affidavit at Exhibit A. However, the Airport Wells do not divert into the Munsey Canal, but divert through a private system to the place of use. Any use of the Munsey Canal is from water diverted upgradient from the Airport Wells, and in this case, must be from the Island Wells. See *Third Harris Affidavit* at Exhibit A (GIS map showing the Airport Wells and the private ditch through which diverted water is delivered). Reference to the Munsey canal was not contained anywhere in the original claim documents.

The submission of this second map and the statement in the remarks section is evidence Mr. Bell intended to claim an accomplished transfer to include the Island Wells as authorized points of diversion under the Airport Water Rights to effectively replace the two unusable Airport Wells. Unfortunately, the legal descriptions for the Island Wells were not included on the first page of the amended claim (where the written legal descriptions are to be listed) as they apparently should have been based upon the included maps. The claims therefore suffered from an internal inconsistency with regards to the claimed points of diversion.

At the time Isom purchased Mr. Bell’s farm, Mr. Bell informed Charles Isom of his practice of using the Island Wells when the Airport Wells did not produce sufficient amounts of

water, which Isom continued. *Affidavit of Charles B. Isom*. Mr. Bell's historical irrigation practices were confirmed with an official field examination performed by IDWR personnel in August of 1985, which demonstrated that the Island Wells had the physical capacity and ability to divert 24.66 cfs, which is more than the entirety of the Airport Water Rights and Water Right No. 34-7037 (24.5 cfs). *Second Harris Affidavit* at Exhibit D (license for Water Right 34-7037 stating expressly that the Island Wells have the capacity to divert 24.66 cfs). Obviously, if these wells did not have the capacity to divert the entirety of the Airport Water Rights and Water Right No. 34-7037, then there would have been no basis upon which to claim an accomplished transfer.³ Neither would it have made sense for Mr. Bell to construct the wells and pumps with double the capacity to divert Water Right No. 34-7037 if he did not intend to move water rights to the Island Wells.

In further support of Charles Isom's testimony, during the time period just prior to when Mr. Bell sold his farm to Isom, Mr. Bell, in 1995, entered into a *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District for use of the Island Canal for an amount of 1000 inches (20 cfs) after the original 600 inches (12 cfs) amount was lined out and initialed. *Second Affidavit of Robert L. Harris* at Exhibit G. Thus, at the time his rights were going through the adjudication process, he was diverting more than the 12 cfs allowed from the Island Wells under Water Right No. 34-7037. Mr. Bell sold his farm in January of 1998 just after issuance of the incorrect partial decrees for the Airport Water Rights on December 16, 1997, and

³ The field exam was performed in order to license Water Right No. 34-7037, and is found in the water right back file of this water right, and is part of the public record already examined and relied upon by IDWR. The field exam confirms what is listed on the license for this water right, which is included at Attachment 1.

after he entered into the *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District in 1995.

The original partial decrees were also later amended for other reasons in 2001 as necessitated by the case of *A&B Irrigation Dist. v.; Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998), with an order amending those decrees *nunc pro tunc*. *Second Harris Affidavit* at Exhibit B. As a result, the historical practices of Mr. Bell, which were continued by Isom, and now Telford, were not preserved in these decrees. The internal inconsistency of the claims was not raised by IDWR, and recommendations for the Airport Water Rights without the Island Wells listed as authorized points of diversion were not objected to by Mr. Bell.

B. Motion to Set Aside Partial Decrees.

Because of the clerical error in the initial partial decrees, on April 28, 2008, the then-lessee of the Isom property, Mitchell Sorensen, filed a *Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(a)* for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, 34-10925, and 34-7037. The basis for the motion was that the Isom informed Mr. Sorensen that Mr. Bell told them that they could divert 24.5 cfs from the Island Wells, and that the ability to divert all of Isom's water rights could be diverted from either the Airport Wells or the Island Wells. Isom had continued that practice when they owned the property. However, the original partial decrees did not provide for the diversion of 24.5 cfs from the Island Wells.

When the hearing on Mr. Sorensen's motion was held on July 23, 2008, the motion was initially continued until November 17, 2008 because of concerns voiced by the Special Master regarding whether there was enough evidence of a clerical error. The Special Master was

obviously very careful with regards to the motion, recognizing that a motion to set aside partial decrees should not be taken lightly, and requested additional information from Mr. Sorensen.

The additional information was provided and summarized in documents submitted to the SRBA court on November 14, 2008. At the November 17, 2008 hearing, counsel for IDWR represented to the court that IDWR personnel had concerns regarding the motion to set aside. The hearing was **again** continued until March 25, 2009.

Between the November 17, 2008 and March 25, 2009 hearings, Sorensen met with IDWR staff to further explain the rationale behind the motion to set aside partial decrees. Specifically, IDWR's concern related to Sorensen's claim that the Island Well water rights should have the Airport Wells listed as points of diversion on Water Right No. 34-7037. The licensing of Water Right No. 34-7037 (the license was issued in 1990) specifically excluded the Airport Wells. Therefore, it was clear that there could be no clerical error with regards to Water Right No. 34-7037, and that the only wells that could divert 34-7037 were the Island Wells.

However, as to whether or not the remaining water rights—Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925—should have the Island Wells listed as points of diversion under an accomplished transfer, IDWR did not find any document that would foreclose a claim of such an accomplished transfer. Sorensen had submitted Mr. Bell's amended claims and their attached documents as evidence of the clerical error, which showed the conflicting maps, remarks, and listed points of diversion on the first page of the claim. At the March 25, 2009 hearing, Sorensen made an oral motion to withdraw his motion to set aside Water Right No. 34-7037 in response to IDWR's legitimate concern regarding the license issued for that water right.

Therefore, the only water rights that Sorensen contended should be set aside were Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925.

At the March 25th hearing, the Court **again** expressed its concern that the alleged clerical error identified by Sorensen may not be sufficient to meet the standard contained in I.R.C.P. 60(a) to set aside these remaining water rights. The court requested additional briefing from Sorensen on this issue with summarized legal authority on the issue, which Sorensen provided on April 8, 2009.

After careful consideration, taken over a year and a half of when the initial motion to set aside was filed, the Special Master issued an *Order on Motion to Set Aside Partial Decree* on September 4, 2009, based on the evidence that was submitted. Summarily, the Special Master found that the clerical error was self-evident because Mr. Bell's amended claims were internally inconsistent because of the attached maps that showed the Island Wells, but the Island Wells were not listed on the front page of the claims forms: "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 4.

C. Subsequent Objection Proceedings.

After the Court's *Order on Motion to Set Aside Partial Decree*, based upon the information provided by the Claimants, IDWR issued *Amended Director's Reports* on December 8, 2009 for the above subcases, which changed the partial decrees to allow for the interchanged use of the Airport and Island Wells for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925. In other words, IDWR found sufficient evidence of an accomplished transfer.

The amended partial decrees were also different from the original partial decrees in several other respects. The amended partial decrees included a remark simply indicating that water diverted from the Island Wells is injected into a canal system owned and operated by the Big Lost River Irrigation District (“BLRID”). The condition reads as follows:

Groundwater diverted from the points of diversion in T05N 26E S34 SENWSW and T04N R26E S3 NESENW is comingled with the Island Canal then injected into the Big Lost River at the point of injection and rediverted into the Munsey Canal at the point of rediversion.

Second Harris Affidavit at Exhibit E. IDWR also took the opportunity to add volume limitations to the individual water rights, which is now standard IDWR practice, but was not at the time of issuance of the original partial decree because Basin 34 was one of the first test basins.

Most importantly, however, to protect against potential or conceivable injury because of the finding of an accomplished transfer, the amended partial decrees for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 also included the following subordination condition:

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 NESENW has a priority date of May 18, 1982.

Second Harris Affidavit at Exhibit E. Importantly, this condition means that to the extent a delivery call is filed because of a water shortage, existing water rights are protected pursuant to this condition, including water rights owned by the objectors.⁴ The subordination condition was

⁴ IDWR does not always subordinate water rights that are transferred to new locations. For example, one of the objectors, Schureman, filed for and received approval for Transfer No. 75394, on July 9, 2009. Schureman’s property is adjacent to and directly east of the Telford property. Schureman added a well very close to the Island Wells (located in NWSWSE, Township 4N, Range 26E, Section 3) as an authorized point of diversion for his water rights that originally only had wells located near his place of use as authorized points of diversion authorized under the water rights. But because, as noted on the transfer application, his “current wells [were] not capable of diverting decreed amounts,” Schureman was able to amend his water rights to add this well further up the valley to his water

not something that Sorensen or Isom had requested or anticipated, nor were they particularly happy with, but nevertheless, it appeared to both of these parties that IDWR was being cautious, and ultimately decided not to object to the subordination condition, or any of the other changes in the amended partial decrees.

It should be further noted the Claimant's priority date for diversion of Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 from the Island Wells has been advanced to a date junior to the Objector's water rights. As admitted in the *Affidavit of Darrell E. McDonald*, for example, "[m]y water rights described above are senior to 1982." *McDonald Aff.* ¶ 10; See also *Affidavit of Norman K. Sowards* ¶10 (same).

After the *Amended Director's Report* was issued, objections were subsequently filed by BLRID to the quantity of the water rights, the point of diversion, the place of use, and for other easement-related issues, specifically that "there is no transport agreement in place with the Big Lost River Irrigation District for this right," and that "[i]f the water right makes reference to transportation of water through the Big Lost River Irrigation District facilities, it must state that it is subject to the permission, rules and regulations of the Big Lost River Irrigation District."

Objections were also filed by Doug Schureman, Jim Huelsman and Tyler Felton, who alleged that the diversion rate was inaccurate, that the acre-feet limitation of 8441.5 acre-feet was unjustified, and should be limited to 6930 acre-feet, and that IDWR should perform an "injury analysis" as to inclusion of the Island Wells in the above subcases. There was no indication in the objection that these objectors did not agree with the alleged clerical error.

rights. The transfer was not protested. *Fourth Harris Aff.* at Exhibit A and B.

On November 4, 2010, Isom filed a motion for summary judgment regarding the volume and acreage elements of the amended partial decrees, and argued that these elements remained unchanged from the initial partial decrees, and therefore, challenges to these elements are barred by claim preclusion or issue preclusion. Isom also asserted that the historic place of use of 1,980 acres could not be challenged because the prior licenses for Water Right Nos. 34-7037 and 34-7138 showed the same place of use. Isom further asserted that the BLRID easement matters should be resolved by summary judgment, because the objections voiced by BLRID concerned easement matters, which are separate and independent issues. See, e.g., *Beach Lateral Water User's Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006). Isom also argued that no contrary evidence existed demonstrating that the Island Wells did not divert 24.5 cfs, and that an injury analysis requested by IDWR should not be performed because the advanced priority date condition.

While the motion for summary judgment was pending, two other objectors—Darrell McDonald and Norman Sowards—filed motions to file late objections/motions to participate. The hearing on these motions, as well as the motions for summary judgment, was held on December 1, 2010. On November 30, 2010—one day prior to the hearing—BLRID and Isom resolved BLRID's objections pursuant to a stipulation to remove reference to BLRID's delivery system from the amended partial decrees.

After considering the arguments raised by the parties, the court denied Isom's motion for summary judgment on all counts on March 28, 2011. On the same day, the court granted McDonald and Sowards' motion to file late objection/motion to participate.

D. Trial Dates, Settlement Conferences, Injury Analysis, Supplemental Director's Report, and Motion for Permissive Review.

While the court was considering the motions discussed in the prior section, the parties filed a motion to vacate the original trial date set for March 16, 2011. On April 13, 2011, the parties participated in a status conference, and set dates and deadlines for a settlement conference in May of 2011, injury analysis, and a supplemental director's report. A trial date for July 27, 2011 was also scheduled, with injury documents to be submitted by the Objectors by June 10, 2011, and any response analysis by the Claimants to be filed by June 30, 2011.

In the spring of 2011, Telford purchased the Isom farm. An NCAP evidencing the change in ownership was filed with the court on July 25, 2011.

The parties did not reach settlement in May, and the injury documents were thereafter timely filed. In the meantime, due to concerns over the timing of the Supplemental Director's Report ("*SDR*") coming out just before trial, the court agreed to again vacate the trial and instead, have the July 27th date reserved for another settlement conference.

The *SDR* was issued by IDWR on July 25, 2011. Even after reviewing the injury analysis documents, IDWR concluded that "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." *SDR* at 4.

The parties had the benefit of the *SDR* at the July 27th settlement conference, and the parties left that conference with the understanding that the parties had reached a settlement. In the process of preparing the SF5, McDonald and Sowards' attorney understood one aspect of the settlement to include Water Right No. 34-7037 (which, as set forth above, is not a water right that has been set aside nor received an amended partial decree), and therefore concluded that the

parties did not have an agreement. Consequently, the parties again attempted mediation on September 8, 2011, but without success.

On September 21, 2011, Telford submitted a motion for reconsideration of the court's prior decision denying summary judgment. Just prior to that, on September 15, 2011, the Objectors filed their motion for permissive review and motion to stay trial. Special Master Bilyeu denied the motion for reconsideration, but granted the motion for permissive review on January 27, 2012. In her *Order Granting Motion for Permissive Review*, the special master made it clear that "[t]he decision has been made on Rule 60(a)." *Order Granting Motion for Permissive Review* at 4. The special master further explained that the evidence presented by Telford was "sufficient to persuade this Special Master to allow the reopening of these subases under Rule 60(a). . . 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 [Wells]" *Id.* Nevertheless, the Special Master concluded that there are grounds for a difference of opinion on this issue, and recommended permissive review.

Based upon this recommendation, Judge Wildman issued an *Order Granting Permissive Review* on February 1, 2012 "limited to the issue of the application of Rule 60(a) to the facts of this case." *Order Granting Permissive Review* at 6. The matter is scheduled to be argued on March 2, 2012.

II. REVIEW STANDARD FOR PERMISSIVE REVIEW.

A district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); *Rodriguez v. Oakley Stone, Inc.*, 120 Idaho 370, 377, 816 P.2d 325, 333 (1991). In determining whether findings of fact are clearly erroneous, a reviewing court "inquires whether the findings of fact are supported by substantial and competent evidence." *Gill v. Viebrock*, 125 Idaho 948, 951, 877 P.2d 919, 922 (1994). The party challenging

the findings of fact has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party. SRBA Springs & Fountains Memorandum Decision & Order on Challenge, Subcase No. 67-13701 (July 28, 2006), p. 18.

The special master's conclusions of law, however, are not binding upon a reviewing court, although they are expected to be persuasive. *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). This permits the district court to adopt the master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a reviewing court's standard of review of the special master's conclusions of law is one of free review. *Id.*

Memorandum Decision & Order on Challenge, Subcase Nos. 74-15051, et al. (294 "High Flow" Claims) (January 3, 2012) at 4-5.

III. ARGUMENT.

A. The Amended Claims Are Part of the Court's Record.

In a general adjudication, a claim to a water right must be filed after there is a court order commencing a general adjudication, which is to be specified in the director's notice of order to water right claimants. Idaho Code § 42-1408 states very clearly that in a general adjudication "all claimants, except as specifically excluded by law, [are] to file for each water right, a notice of claim on a form furnished by the director; failure to file a required notice of claim will result in a court determination that no water right exists for the use of water for which the required notice of claim was not filed." Therefore, a claim to a water right is an allegation made by a water user as to the elements of the water right, which is synonymous with a complaint filed in a typical court proceeding. Water right adjudications themselves are analogous to quiet title actions for property which seek to have a court determine the rights and legal obligations of all parties to that proceeding.⁵ In the general adjudication of the SRBA there are thousands of

⁵ See Idaho Code § 55-101 (water rights are defined as real property under Idaho law).

parties who have submitted tens of thousands of claims each requesting a determination of their claim(s) to water.

The nature of the amended claims as a complaint that initiates a legal action is self-evident when reviewing the amended claims filed by Willard Bell in 1990, which have the court caption of the SRBA proceeding, the Civil Case Number, and the dispute description of “IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN SYSTEM.” *First Harris Affidavit* at Exhibits C through E; *Second Affidavit of Paul L. Arrington at Exhibits A-D*. In any civil action that is reviewed by a reviewing court, both the original complaint and any amendments are automatically part of the standard record before the reviewing court under Idaho Appellate Rule 28(b)(1)C. SRBA Administrative Order 1, Rules of Procedure (“A01”), 9.e. specifically references Idaho Appellate Rule 12 in the permissive review process, which would also incorporate other applicable appellate rules, such as those identifying what is in the record. Because the review is occurring within the same court (the SRBA court) as the special master, the court file becomes that record on appeal, which includes the document that initiated the action in the first place—the claim and any amendments thereto.

It is understandable why the Objectors would prefer to exclude consideration of the amended claim by the Presiding Judge in this matter because it contains the very evidence supportive of the special master’s decision to set aside the partial decrees for the Airport Water Rights, which are expected to be persuasive under the standard of review articulated above. It is consistent with their strategy in this permissive review action to attempt to persuade this court to very narrowly construe Rule 60(a) and prevent Telford from having a full trial on the merits of

their claims of an accomplished transfer on grounds of a procedural technicality. The Objectors' position that the 1990 amended notices of claim "are not in the Court's record" is without merit. See *Opening Brief* at 4. A claim to a water right is a complaint alleging an interest to a water right, and is part of the legal record before this court. It is therefore part of the record for purposes of this permissive review regarding the applicability of Rule 60(a).

B. The Special Master Was Correct in Her Application of Rule 60(a) To the Facts of This Case.

a. The Nature of SRBA Must Be Taken Into Account.

Regarding the scope and interpretation of all of the Idaho Rules of Civil Procedure, Rule 1(a) states that "[t]hese rules shall be liberally constructed to secure the just, speedy and inexpensive determination of every action and proceeding." Therefore, when considering the application of Rule 60(a) in this matter before the SRBA, it should not be lost that the SRBA is unique legal proceeding that seeks to inventory water rights that are used within the entire Snake River Basin of Idaho. As such, Rule 1(a) supports a liberal construction of Rule 60(a) in this matter.

In the SRBA, claims to water rights must be submitted to the court's designated expert, the Idaho Department of Water Resources, for review and recommendation. The water right claim must have a legal basis for its use, which could be evidenced by a prior court decree, a water right license issued by the Idaho Department of Water Resources or its predecessor agencies, a beneficial use water right, a statutory claim, etc. What can then add to the complication is specific legislation allowing for the new concept of enlargement water rights that must be tied to parent water rights, and accomplished transfers to those rights that allow certain elements of those rights to be changed without going through the typical statutory process. See

Idaho Code §§ 42-1425 and 42-1426. Furthermore, in a number of proceedings in the SRBA, proof of beneficial use has been submitted for a permitted water right before the commencement of the SRBA, and yet licenses for these rights were not issued at the time SRBA claims were taken, which has often resulted in an administrative order licensing a water right that is inconsistent with the water right claim upon which a recommendation is later based upon.

It is to be expected that in the process of inventorying these rights, there will be items that are lost in translation in the claiming, investigation, and decreeing of tens of thousands of water rights which have numerous elements, complicated legal descriptions, the possibility of further administrative action from IDWR, etc. This fact was noted by the Special Master in her *Order Granting Motion for Permissive Review*, where she noted that “the SRBA Court has utilized Rule 60(a) somewhat more broadly than other District Courts. It seems appropriate to do so as the Court strives to accurately record the elements of water rights.” *Order Granting Motion for Permissive Review* at 5. The Special Master further noted that “the application of Rule 60(a) has rarely been challenged in the SRBA.” *Id.*

We would agree that a vast majority of participants in the SRBA believe the overarching goal of this process is to provide water users the opportunity to present their case for their water right(s) and be as accurate as possible. Therefore, when errors do arise, the issue is not who made the error, but that the error should be corrected, particularly when there is evidence in support of the need for that correction that must pass through the court’s appointed expert and gatekeeper, IDWR. Rule 60 is the vehicle that allows the court and IDWR to be as accurate as possible, and with so many claims to process, it stands to reason why the SRBA has and must

continue to utilize Rule 60(a) more broadly than the narrow construction advocated by the Claimants.

In short, when errors do arise, they often cannot be blamed on any one person involved in this process, but they are functions of the mechanical and colossal undertaking of adjudicating all of the rights in the Snake River Basin of Idaho, which is now rapidly approaching its end.

b. Rule 60(a) and its Application in Idaho Cases.

I.R.C.P. 60(a) provides the following:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

There are a number of cases in the SRBA which have utilized Rule 60(a) to correct clerical errors, which are discussed below in more detail. In review of non-SRBA cases, the most recent case from the Idaho Supreme Court discussing Rule 60(a) is *Silsby v. Kepner*, 140 Idaho 410, 95 P.3d 28 (2004). In this case, the court explained the difference between a clerical error and a legal error:

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. The clerical mistake under Rule 60(a) may be differentiated from the mistake or inadvertence referred to in Rule 60(b)(1), upon the ground that the latter applies primarily to errors or omissions committed by an attorney or by the court which are not apparent on the record." (citation omitted) *Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.2d 815, 818 (Ct.App.1987). "Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b). Thus a motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." (citation omitted) *Dursteler*, 112 Idaho at 597, 733 P.2d at 818. *Silsby*, relying on *Dursteler*, argues that the mistake at issue is not a clerical error or omission and not subject to correction under I.R.C.P. 60(a). In that case, the Court of Appeals found that where post-judgment interest is a matter of right and therefore mandatory, the

failure to include the interest was a clerical error and correctable under Rule 60(a).

...

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 n. 2. We find the 9th Circuit’s construction of Rule 60(a) to be proper and applicable here. Where the magistrate did not intend to make the award in the first place, it was not a clerical error to be corrected under Rule 60(a), but rather a legal error that falls outside the remedy of this rule.

Silsby v. Kepner, 140 Idaho 410, 411-12, 95 P.3d 28, 29-30 (2004).

In *Silsby*, the former husband of a married couple filed a petition for modification of child support payments that resulted from an order from the magistrate court setting the child support amount. *Id.* The petition did not include any offset to the former husband for the tax benefit to the former wife of the child dependency exemption. The former husband was served, but did not appear to contest the divorce complaint or judgment. The court entered a default judgment and decree. *Id.*

Thereafter, the former husband filed a motion to correct a clerical error under Rule 60(a) alleging that the original divorce decree failed to give the former husband credit for the tax exemption benefits awarded to the former wife. Under I.R.C.P. 6 (c)(6) § 8, it states that the “parent not receiving the exemption(s) is entitled to a pro rata share of the income tax benefit or child tax credit.” *Id.* The provision is therefore mandatory, not discretionary. As a result, the magistrate held that under Rule 60(a), there had been a clerical error, even though there was nothing in the divorce decree—which contained the same terms as the divorce complaint—addressing the tax exemption issue.

After an appeal to the Idaho Court of Appeals, it affirmed the magistrate court. The Idaho Supreme Court, however, reversed. The Idaho Supreme Court agreed that the provision regarding the tax exemption was mandatory, but concluded that the mistake made by the magistrate judge was “a legal error and not a clerical error . . .” *Id.* at 412, 95 P.3d at 30. Thus, “[w]here the magistrate did not intend to make the award in the first place, it was not a clerical error to be corrected under Rule 60(a), but rather a legal error that falls outside the remedy of this rule.” *Id.*

The types of errors that can be corrected under Rule 60(a) are therefore clerical errors and not legal errors. The facts of *Silsby* are instructive as to why the issue raised in that case was a legal error and not a clerical error. *The distinction is that clerical errors must be supported with other evidence in the record that fails to be included or considered in the final judgment. If there is no contrary evidence or items on the subject of the alleged error in the record, then there is no record to correct, and it is therefore a legal error.*

In *Silsby*, the divorce petition did not include any offset to the former husband for the tax benefit to the former wife of the child dependency exemption, and because the husband defaulted, he did not allege or argue that he was entitled to that offset. His decision not to appear and contest the divorce complaint or judgment did not provide evidence in the record demonstrating intent to claim that exemption, and therefore, there was nothing in the record for the *Silsby* court to correct. The Supreme Court was correct in finding that his failure to provide some evidence during the divorce proceedings was not a clerical error. It was a legal error.

Thus, a clerical error is one where the court's judgment is inconsistent with other documents in the record. The inconsistency allows the court to correct itself, but when no such inconsistency exists, no clerical correction can be made. The father in *Silsby* should have asserted somewhere in the record his desire to have the tax exemption apply to him, but he did not. Had he done so, he likely would have received it based upon the mandatory nature of this provision.

The same interpretation of Rule 60(a) was followed in *Thorn Creek Cattle Association, Inc. v. Bonz*, 122 Idaho 42, 830 P.2d 1180 (1991), which among other matters, involved the district court's decision to amend a notice of sheriff's sale of property under Rule 60(a). The appellants challenged the district court's decision to amend an incorrect legal description contained in the notice. *Id.* at 47, 830 P.2d at 1185. The court specifically noted that "[t]he sheriff had been given a correct description of the property, but he decided to prepare his own description, and in the process, erroneously described two parcels." *Id.* The court discussed a prior case, where that court corrected an erroneous legal description, holding that "'the mistake was purely a clerical one, of a character frequently occurring in cases of lengthy descriptions of

land.” *Id.* (citing *Wilcox v. Wells*, 5 Idaho 786, 51 P. 985 (1898)). The court in *Thorn Creek* therefore upheld the district court’s application of Rule 60(a) because there was a correct legal description in the record, but the correct description was lost in translation between the correct instrument and the incorrect notice.

An incorrect legal description is a substantive error much different than a simple typo or math error. An incorrect reference to a quarter-quarter, or a section, results in misidentified property, and has real legal consequences because of how property in Idaho is described under the PLSS system. Yet even with the substantive nature of this kind of error, the court in *Thorn Creek* held that there was an inconsistency in the record that allowed for the correction, meaning that the error was clerical and capable of correction under Rule 60(a).

The opposite was true in *McGrew v. McGrew*, 139 Idaho 551, 82 P.3d 833 (2003), where the court’s record did not contain evidence of an inconsistency on an issue that the appellant sought correction. In *McGrew*, the appellant challenged a magistrate’s decision to enter partial satisfaction of judgment on a child support amount provided to the court. *Id.* at 561, 82 P.3d at 843. The appellant contended that two of the seven payments were temporary child support payments made prior to the date specified in the decree, and therefore, the inclusion of these two payments allowed the respondent to skip two child support payments. *Id.* The evidence supporting this claim was found in the records of the Department of Health and Welfare. Based on this claim, the appellant filed a motion before the magistrate court seeking “an order requiring the Idaho Department of Health and Welfare to correct their child support records in this case” based on Rule 60(a), which the magistrate court denied. *Id.*

The Idaho Supreme Court upheld the magistrate court, and in so doing held that the Department of Health and Welfare was not a party to the litigation, and any errors with respect to their records were not amendable under Rule 60(a). *Id.* The court further reasoned that the “other parts of the record” referred to in Rule 60(a) referred to the “court’s record, not the records of another branch of government,” and because the records of the Department of Health and Welfare were not a part of the court’s record, there was nothing for the court to correct. Therefore, because there was not an inconsistency in the record that allowed for the correction, the error was not clerical.

The Idaho Court of Appeals has likewise been consistent with the Idaho Supreme Court in its application of Rule 60(a). In *Dursteler v. Dursteler*, 112 Idaho 594, 733 P.2d 815 (1987), the appellants challenged whether or not the district court should have corrected its revised judgment under Rule 60(a) to include postjudgment interest from the date of the original judgment. *Id.* at 597, 733 P.2d at 818. The issue arose when the parties arrived at a balance due amount which was not challenged, but a later revised judgment did not specify that it would bear postjudgment interest from the date of the original judgment. *Id.* As a result, the respondents immediately offered to pay the amount, which the appellants rejected because it did not include postjudgment interest. Thirty-six days after the revised judgment was issued, the appellants moved to correct the judgment by adding a provision for postjudgment interest. *Id.* The district court agreed that the failure to include the postjudgment interest clause on the revised judgment was a clerical error under Rule 60(a).

On appeal, the Court of Appeals noted the absence of postjudgment interest on the district court’s revised judgment. *Id.* at 598, 112 Idaho at 594 (“the judgment was merely silent

on the point.”). However, there was reference to postjudgment interest in the original judgment, and therefore, there was an inconsistency in the record upon which the district court could apply Rule 60(a). *Id.* The Court of Appeals upheld the district court’s application of Rule 60(a), citing to federal court cases recognizing Rule 60(a) as an appropriate vehicle to amend a judgment to include postjudgment interest. *Id.*

The above Idaho cases are consistent and clear that Rule 60(a) applies to clerical errors which can be corrected by referring back to an item in the court’s record that is inconsistent with court’s judgment. Therefore, a clerical error is one where the court’s judgment is inconsistent with other documents in the record. This principle, in an even more broad fashion, has been followed by the SRBA Court, as explained below.

c. Rule 60(a) and its Application in the SRBA.

As explained above, the SRBA is unique legal proceeding that seeks to inventory water rights that are used within the Snake River Basin of Idaho. It is different than typical legal proceedings involving few parties. It is to be expected that in the process of inventorying these rights, there will be items that are lost in translation in the claiming, investigation, and decreeing of tens of thousands of water rights which have numerous elements, complicated legal descriptions, the possibility of further administrative action from IDWR, etc. This fact was noted by the Special Master in her *Order Granting Motion for Permissive Review*, where she noted that “the SRBA Court has utilized Rule 60(a) somewhat more broadly than other District Courts. It seems appropriate to do so as the Court strives to accurately record the elements of water rights.” *Order Granting Motion for Permissive Review* at 5.

Throughout their *Opening Brief*, the Objectors state repeatedly that Mr. Bell's inactions by failing to object to the water right recommendations should prevent application of Rule 60(a) in this matter. See, e.g., *Opening Brief* at 18 ("Even if the Claimants did intend to claim the Island Wells as alternate points of diversion, their actions and inactions following the submission of the amended claims are fatal to their claim for relief."). If followed through to its logical end, this narrow interpretation of Rule 60(a) would effectively render it a nullity. Rules are to be "interpreted the same way as statutes," *Kimbrough v. Idaho Bd. of Tax Appeals*, 150 Idaho 417, 420, 247 P.3d 644, 648 (2011), and "[c]onstrutions that would lead to absurd or unreasonably harsh results are disfavored. . . . This Court 'will construe a statute so that effect is given to [all of] its provisions, and no part is rendered superfluous or insignificant.'" *Thompson Creek Mining Co. v. Idaho Dep't of Water Resources*, 148 Idaho 200, 210-11, 220 P.3d 318, 328-29 (2009).

In every instance where Rule 60(a) is applied, the argument could be made that the persons asserting the clerical error should have caught the error. The fact that Rule 60(a) is even raised at all indicates that there was a "blunder in execution" on the issue, often because the translation on the alleged clerical error was mechanical in nature. The SRBA has not interpreted application of Rule 60(a) in such a narrow fashion, and if it did, would undermine the SRBA's often-stated intent of simply getting it right. It certainly would have been better for Mr. Bell to have caught the error during the objection period or when the initial partial decrees were issued but he did not, which we can only presume was because he was aged and because he was in the process of selling his farm. But we do know he was diverting more than 12 cfs from the Island Wells at the time his water rights were being adjudicated in the 1990s. In 1995, Mr. Bell entered

into a *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District for use of the Island Canal for an amount of 1000 inches (20 cfs) from the Island Wells after the original described 600 inches (12 cfs) amount was lined out and initialed by a BLRID representative. *Second Affidavit of Robert L. Harris* at Exhibit G. Thus, it was clear that at the time, he was diverting more than the 12 cfs allowed from the Island Wells under Water Right No. 34-7037.

What is also clear is that Mr. Bell signed the amended claims which included all of the information in them, including the new maps depicting the Island Wells attached to the Airport Water Rights claims and references to the Munsey canal, and we presume that in reviewing the number of water rights and their conditions once the partial decrees were issued, he overlooked the omission of the Island Wells from the Airport Water Rights. There are no documents in the IDWR record indicating that it considered the accomplished transfer of these rights, nor that the maps and descriptions were inconsistent with the listed points of diversion on the first page of the claim.

No matter how it was overlooked, whether by Mr. Bell or IDWR, the clear discrepancy from the amended claims and the partial decrees is exactly the type of clerical error that Rule 60(a) is intended to fix. Without it, parties to litigation would be bound by “blunders in execution” made in the course of this adjudication. This argument, of course, is untenable. The SRBA has not interpreted application of Rule 60(a) in such a narrow fashion, and if it did, would undermine the SRBA’s often-stated intent of simply getting it right. The SRBA’s track record in this regard is evidenced by the fact that it often takes up clerical error matters at its monthly status conference with IDWR. Further, the below subcases support the SRBA’s approach, but

only represent a few of those cases which counsel for Telford is aware of. No doubt there are many more that the court has decided.

i. Subcases 21-7295 and 21-7296.⁶

Rule 60(a) was applied to Subcases 21-7295 and 21-7296 to correct a partial decree that did not take into account a license that was issued after the original claims for these rights were filed. The original claims for these rights were filed on January 4, 1989, and stated clearly that the claims were based on permits that were previously issued under the same water right number.

Regarding the permitting process for Water Right No. 21-7295, as stated on the Water Right License for Water Right No. 21-7295, attached for convenience as Attachment 1, a permit was issued to develop this water right on March 11, 1982 for the irrigation of 160 acres. Proof of beneficial use was submitted on June 27, 1985, which was before the commencement of the SRBA. After a field exam was performed on June 27, 1989 (which was after commencement of the SRBA), the license was issued on October 1, 1991. Importantly, the license was issued for the diversion of 144 acres.

The original SRBA claim for 21-7295, filed on January 4, 1989 (prior to issuance of the water right license) sought a water right for the irrigation 126 acres. Eventually the partial decree for this water right was issued on February 2, 2007, but did not reflect the place of use element administratively determined in the permitting process when this water right was licensed. It is unclear why this was the case, but over a year later, the new owner of the water right, BLF Land LLC, filed a motion to correct the error. Upon hearing the motion, the court

⁶ The water rights documentation is available on IDWR's website by searching for Water Right No. 21-7295, and clicking on related documents. The permitting background is taken from the Water Rights Backfile pdf, and the Adjudication Claim backfile. These water rights have now been split due to an approved transfer filed in 2009, with the children rights designated as Water Right Nos. 31-13092 and 21-13093.

determined that “the claims should be amended to accurately decree these rights as licensed.” Subcase Nos. 21-7295 and 21-7296, *Order Granting Motion to File Amended Claim and Setting Subcase Deadlines* (June 23, 2008). Eventually an amended partial decree was entered on March 23, 2009, consistent with the elements of the underlying license.

In this subcase, the issue was not how the error was made, or who did not catch the need to update the claim. Certainly the claimant could have updated his claim or later filed an objection to the water right, but he likely presumed that IDWR would update the claim in accordance with an administrative order licensing the water right that IDWR issued itself. Similarly, IDWR likely presumed that the claimant would amend his claims once he received the license, but certainly IDWR could have also updated the claim because, after all, it issued the license. But neither correction from the Claimant or IDWR occurred, and it did not matter how the error occurred because the matter of utmost importance was to get the partial decree of the water right correct. Reference to the permit in the claim document provided notice to all involved of the pending license, and if the court had not corrected the partial decree, the result would have been an SRBA decree inconsistent with an IDWR administrative order, which would be contrary to Idaho law. Thus, the need for Rule 60(a) is not based on who to blame for their inaction, but the need to make the correction and get the matter correct based upon the record.

ii. Subcase Nos. 22-13212 and 22-13503.

At times in the SRBA, the situation on the ground where irrigation occurs is such that there can be no doubt a clerical error was made, even if the record does not contain conflicting evidence in that regard. As noted in Special Master’s *Order Granting Motion for Permissive Review* in this matter, “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.” *Order Granting Motion for Permissive Review* at 5; See also Subcase Nos. 22-13212 and 22-13503, *Special Master’s Report and Recommendation, Findings of Fact and Conclusions of Law*, at 9-10 (July 30, 2010).

This is further evidence of the SRBA’s more broad interpretation of Rule 60(a) given the uniqueness of this adjudication process as explained above. Even without conflicting evidence from the Rexburg Decree proceeding or era, the Special Master still utilized the vehicle of Rule 60(a) to correct this apparent mistake. This is a broader interpretation and application of Rule 60(a) than has been articulated by Idaho’s non-SRBA courts, and highlights how an adjudication based on prior decrees, licenses, etc., presents unique and different circumstances than typically addressed in non-SRBA courts. Furthermore, the Special Master’s interpretation is “expected to be persuasive” on how Rule 60(a) is to be applied in this proceeding. See *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993).⁷

iii. The SRBA’s Practice of Amending Partial Decrees *Nunc Pro Tunc*.

The ongoing nature of the SRBA, and the need for the SRBA court to have a vehicle to amend previously issued partial decrees due to matters that arise after such partial decrees are entered, is further evidenced by the SRBA court’s practice of amending partial decrees *nunc pro*

⁷ Regarding the decision by the SRBA to not amend the priority date in the Paradise Springs matter, as well as in the Lemhi matter cited by the Objectors (Order of Partial Decrees for Water Rights 74-250, 74-735, 74-739, 74-741 and 74-7147 (January 12, 2009)), these decisions are consistent with the requirement that there had to be something in the record of the original decree that would evidence the error. There was none presented in either case, and evidence, and therefore, the failure to address the priority date issue at the time of the original decrees was a legal error not capable of correcting.

tunc. In fact, even in the very subcases at issue in this matter, an *Order Amending Irrigation Period of Use Element in Partial Decree and Incorporating Into Partial Decree an Express Statement Regarding General Provisions, Nunc Pro Tunc* (December 14, 2001) was issued. *Second Harris Affidavit at Exhibit B*. This was done not out of an inconsistency in the record, but because of a later Supreme Court decision. While not express in the order, given the date the original partial decree was issued to Mr. Bell (1997) and the order *nunc pro tunc* (2001), Rule 60(a) was clearly the vehicle that allowed this order to be entered. This amended the description of the irrigation season place of use to 4-01 to 11-01. Given the ongoing nature of the SRBA, this was an appropriate exercise of Rule 60(a) because of the Idaho Rules of Civil Procedure's admonition that the rules of procedure are to be "liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1(a). This is again a broader interpretation and application of Rule 60(a) than has been articulated by Idaho's non-SRBA courts.

iv. Subcase No. 74-381B and Subcase No. 37-22567.

In Subcase No. 74-381B, the SRBA court recently filed a *Notice of Court's Intent to Issue an Amended Partial Decree* on January 13, 2012 to correct an error in the description of the source element to include a tributary description. The error was brought to the court's attention by IDWR, even though the partial decree was issued in 2007. *Id.* Using Rule 60(a), the court is now correcting the omission. The notice did not explain who made the error, or who should have caught it, but only that it had been made and should be corrected.

In Subcase No. 37-22567, the court issued a partial decree that described a part of the place of use in a NESE quarter-quarter section, but should have been a NWSE quarter-quarter

section. The court looked at the record in this matter, noting that “correspondence represents that all parties to the subcase agree that the description of the aforementioned place of use is in error.” Subcase No. 37-222567, *Notice of Court’s Intent to Issue Amended Partial Decree, and Notice of Hearing Thereon*, (February 13, 2012). The court concluded that the error was “clerical,” and provided notice of the court’s intent to issue the amended partial decree. Again, the SRBA court has consistently applied Rule 60(a) to correct errors that are certain to arise in an undertaking as significant as the SRBA.

d. The Telford Water Rights Should Be Set Aside Based on The Internal Inconsistency in the Amended Claims.

As explained above, the Special Master was consistent with SRBA precedent and Idaho case law on how the vehicle of Rule 60(a) can be applied to correct inconsistencies in the record. When applied to the specific facts of this matter, it is evident that the amended claims of the Airport Water Rights, filed by Willard Bell, are internally inconsistent when describing the point of diversions for these rights. Under the SRBA court’s broad interpretation of Rule 60(a), and under the interpretation of Rule 60(a) by the Idaho Supreme Court and Idaho Court of Appeals, there is evidence in the record to support the corrections sought.

As explained above, the initial claims for the Telford Water Rights were filed in the late 1980s. On October 30, 1990, amended claims for Water Right Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 were filed by Mr. Bell. Importantly, the amended claims contained two maps: one map of the water right place of use (near the Arco Airport) and three claimed points of diversion (the Airport Wells), and the second map depicting the location of the Island Wells. This second map depicting the Island wells was not included in the original claim filed by Mr. Bell. *Second Harris Affidavit* at Exhibit A.

Further, in the claim document itself, at item 14 (the “Remarks Section”), it states the following:

Rediversion from Munsey Ditch: NW SE SE, (2 points), Section 2; SW SW NW, (2 points) Section 13,; SE SE NE Section 15; SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range 26 East.”

Second Harris Affidavit at Exhibit A. However, the Airport Wells do not divert into the Munsey Canal, but divert through a private system to the place of use. Any use of the Munsey Canal is from water diverted upgradient from the Airport Wells, and in this case, must be from the Island Wells. See *Third Harris Affidavit* at Exhibit A (GIS map showing the Airport Wells and the private ditch through which diverted water is delivered).

In further support of Charles Isom’s testimony, during the time period just prior to when Mr. Bell sold his farm to Isom, Mr. Bell, in 1995, entered into a *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District for use of the Island Canal for an amount of 1000 inches (20 cfs) after the original 600 inches (12 cfs) amount was lined out and initialed. *Second Affidavit of Robert L. Harris* at Exhibit G. Thus, it was clear that at the time his rights were going through the adjudication process, he was diverting more than the 12 cfs allowed from the Island Wells under Water Right No. 34-7037. Mr. Bell sold his farm in January of 1998 just after issuance of the incorrect partial decrees for the Airport Water Rights on December 16, 1997, and after he entered into the *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District in 1995.

The submission of this second map and the statement in the remarks section makes it self-evident that Mr. Bell claimed the Island Wells as authorized points of diversion under this water right. Unfortunately, the legal descriptions for the Island Wells were not included on the

first page of the amended claims (where the written legal descriptions are to be listed) as they apparently should have been based upon the included maps. The amended claims therefore suffered from an internal inconsistency with regards to the claimed points of diversion. This is also evident when considering that the original claims made no reference to the Munsey Canal, nor did the original claim include a map of the Island Wells. The fact that Mr. Bell amended his claims to now include the Island Wells map and reference to the Munsey Canal is the very best evidence of his intent to claim the accomplished transfer. The original map attached to the original claim for the Airport water rights did not include the Island Wells as points of diversion, but only depicted the Airport Wells. See *Second Arrington Aff.* at Exhibit D (last page of original claim for 34-2461).

Despite the clear internal inconsistencies, the Objectors would have the court only look at the first page of the amended claim form, and insist that Mr. Bell did not intend to claim an accomplished transfer because he did not list the Island Wells on the first page. *Memorandum in Support of Motion for Permissive Review of the Special Master's September 4, 2009 Order & Motion to Stay Trial* at 10. The Objectors further argue that the same maps were included in all of the amended claims “likely as a matter of convenience,” and “[i]t is likely that the Claimants simply prepared one map for all claims . . . rather than preparing separate maps for each individual claim.” *Id.* In other words, the Objectors also argue that the exact same map was attached to the Airport Well water right claims, and this evidences that Mr. Bell did not intend to claim an accomplished transfer.

Precisely the opposite, the inclusion of the exact same map on the Airport Well Licenses clearly evidences the intent of Mr. Bell to claim the Island Wells as points of diversion for the

Airport Water Rights. The Island Wells are depicted on the attached maps on an entirely separate page from the Airport Wells. It would have been simple for Mr. Bell to simply exclude the second page of this map from the Airport Water Rights claims if he did not intend to claim an accomplished transfer. Or perhaps if Mr. Bell did not intend to claim an accomplished transfer, he could have included the original map from his original claim for the Airport Wells because this has everything IDWR would need for that claim. But he did not and instead elected to include entirely new maps (two pages worth) depicting **both** the Airport Wells and the Island Wells. Each of the amended claims for the Airport water rights had to be retyped to show the correct diversion amount and volume for each Airport water right, and reference to the Munsey Canal in Item 14 could simply not have been included. But this is not what happened. Two items in the amended claim—the reference to the Munsey claim and the second page of the map—are in conflict with the first page of the water right claims.

Additionally, it is worth noting that other water users claimed accomplished transfers similar to the situation now before the court with Telford. In fact, one of the objectors has a water right that was the beneficiary of an accomplished transfer where a well was moved further up the Big Lost River Valley within approximately $\frac{1}{4}$ mile from the Island Wells. *See* Water Right No. 34-2480A (with notation that the right includes an accomplished change of point of diversion, which was decreed on July 10, 2002). It was therefore not uncommon or unusual for this type of practice in the SRBA.

If Mr. Bell had not included the maps, nor referenced the Munsey Canal in the amended claims, then there would not have been an internal inconsistency in the amended claims, and there would likely be no basis to set aside the partial decrees on account of a clerical error. But

because of the internal inconsistency, there was a basis to set aside the partial decrees, which the Special Master understood: “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 4.

It should also be considered that merely because Rule 60(a) applies in this matter to set aside these water right partial decrees, this does not entirely end the matter. The evidence of the accomplished transfer, and the Objectors’ challenges to that claim, must still be presented at a subsequent trial, and based on the evidence above, Telford should be allowed to do so and have the matter decided on its merits rather than a procedural technicality. This is the intent and purpose behind Rule 1(a) of the Idaho Rules of Civil Procedure discussed above:

It has long been judicial policy in Idaho that controversies be determined and disposed of each on its own particular facts and as substantial justice may require. The exercise of judicial discretion should tend to bring about a judgment on the merits. [] The California District Court of Appeal, Second District, in *Brown v. Guy*, 167 Cal.App.2d 211, 334 P.2d 67, 69-70 (1959), said: “There is, of course, a strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith.”

...

A “determination” of an action within the meaning of Rule 1 is meant to be a Determination of the controversy on the merits not a termination on a procedural technicality which serves litigants not at all. A determination entails a finding of the facts and an application of the law in order to resolve the legal rights of the litigants who hope to resolve their differences in the courts.

Bunn v. Bunn, 99 Idaho 710, 711-712, 587 P.2d 1245, 1246-47 (Idaho, 1978) (internal citations omitted).

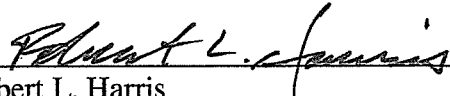
The ability of Mr. Telford to effectively operate his farm is to have the ability to fully utilize the Island Wells, which Isom and Mr. Bell were both also allowed to do. His right to do so has even been subordinated, but nevertheless, even with that subordination, Telford should be

able to prove up that right in a trial. IDWR has issued its *Amended SDR* with a recommendation in favor of the accomplished transfer, which further evidences the merits of Telford's position. The ability to obtain that authorization through an accomplished transfer, just like so many other water users, should be heard at trial, and not dismissed at this stage of the proceedings.

IV. CONCLUSION

For the reasons set forth above, the court should uphold the Special Master's decision to set aside Subcase Nos. 34-2459, 34-2460, 34-2461, 34-2462, and 34-10925 pursuant to Rule 60(a).

Dated this 24th day of February, 2012.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF MAILING

I certify that on this 24th day of February, 2012, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

(☒) *First Class Mail*
(☐) *Facsimile*

2. Copies to:

Paul L. Arrington
Barker, Rosholt & Simpson, LLP
PO Box 485
Twin Falls, ID 83303

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W. Kent Fletcher
Fletcher Law Office
PO Box 248
Burley, ID 83318

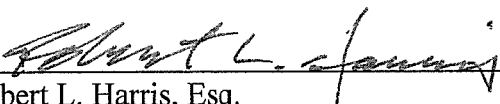
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Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

ATTACHMENT NO. 1

State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 21-07295

Priority: March 11, 1982

Maximum Diversion Rate:

2.00 CFS

Maximum Diversion Volume:¹

432.0 AF

This is to certify, that RICHARD A. EGBERT

TETONIA ID 83452

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated March 11, 1982; and has submitted Proof of Beneficial Use on June 27, 1985. An examination indicates that the works have a diversion capacity of 2.000 cfs of water from a GROUNDWATER source, and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/01 to 11/01	2.00 CFS	432.0 AF

LOCATION OF POINT(S) OF DIVERSION:

NWNW , Sec. 6, Township 07N, Range 38E
JEFFERSON County

PLACE OF USE: IRRIGATION

<u>TWN</u>	<u>RGE</u>	<u>SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
07N	38E	6	NENW 39	NWNW 34	SWNW 33	144
			SESW 38			

Total number of acres irrigated: 144

CONDITIONS/REMARKS:

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
5. This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 3.0 afa per acre for the lands above.

NOV 13 1991

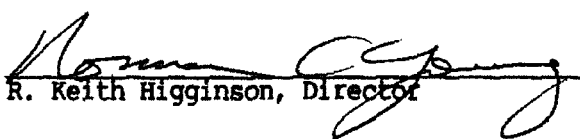
State of Idaho
Department of Water Resources

WATER RIGHT LICENSE

WATER RIGHT NO. 21-07295

This license is issued pursuant to the provisions of Section 42-219, Idaho Code.
Witness the seal and signature of the Director, affixed at Boise, this 1st
day of OCTOBER, 1991.

Acting for


R. Keith Higginson, Director

NOV 13 1991