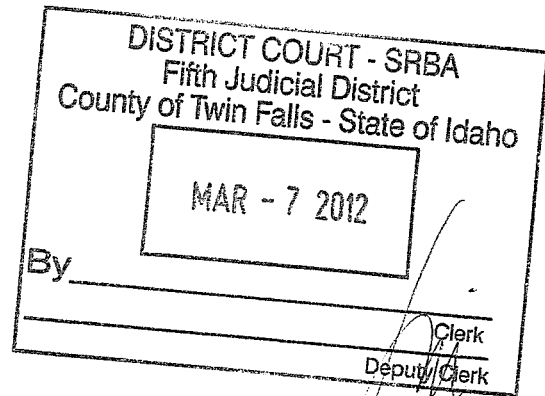


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DEPARTMENT OF
WATER RESOURCES



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

)
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)
)
) MEMORANDUM DECISION AND
) ORDER ON PERMISSIVE REVIEW
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Holding: The ruling of the Special Master is reversed, and the *Motion to Set Aside Partial Decrees* is hereby denied.

Appearances:

Paul L. Arrington of Barker Rosholt & Simpson, LLP, Twin Falls, Idaho, attorneys for Doug Schureman, Tyler Felton & Jim Huelsman.

James P. Speck of Speck & Aanestad, a professional corporation, Ketchum, Idaho, attorneys for Darrell McDonald and Norm Sowards.

Robert L. Harris of Holden, Kidwell, Hahn & Crapo, PLLC, Idaho Falls, Idaho, attorneys for Telford Lands, LLC and Isom Acres Limited Partnership.

I.

STATEMENT OF THE CASE

A. Nature of the case.

This matter comes before the Court pursuant to an *Order Granting Permissive Review* issued in the above-captioned matter on February 1, 2012. The *Order* was entered in response to a request by Doug Schureman, Tyler Felton, Jim Huelsman, Darrell McDonald and Norm Sowards (collectively, “Objectors”) that this Court review the Special Master’s determination to set aside the *Partial Decrees* previously issued for the above-captioned water rights pursuant to Idaho Rule of Civil Procedure 60(a). The Objectors assert that the Special Master’s determination in this respect is contrary to law and asks this Court to deny Telford Lands, LLC’s *Motion to Set Aside Partial Decrees*.

B. Statement of facts and course of proceedings.

1. This matter originated on February 28, 1989, when Crater Farms, Inc. filed *Notices of Claim* with the Idaho Department of Water Resources (“IDWR” or “Department”) for water rights claims 34-2459, 34-2460, 34-2461 and 34-2462. The claims asserted the right to divert groundwater through two wells located in T03N R26E S02 of Butte County for irrigation purposes.¹ The parties have referred to these two wells as the “Airport Wells.”

2. On November 14, 1990, Crater Farms, Inc. filed a *Notice of Claim* for water right claim 34-10925.² In addition to asserting the right to divert groundwater through the two Airport Wells, this claim also asserted the right to divert groundwater through two wells located in T04N R26E S03 and T05N R26E S34 respectively for irrigation purposes. The parties have referred to these two wells as the “Island Wells.” Attached to this *Notice of Claim* were two maps: one map identifying the location of the Airport Wells, and a second identifying the location of the Island Wells.

3. On November 14, 1990, Crater Farms, Inc. also filed *Amended Notices of Claim* for water right claims 34-2459, 34-2460, 34-2461 and 34-2462. With respect to the point of

¹ The claims actually asserted the right to divert from four wells, but only those two located in T03N R26E S02 of Butte County (i.e., the Airport Wells) are at issue here.

² Water right claim 34-10925 was claimed as an enlargement of water right nos. 34-2459, 34-2460, 34-2461 and 34-2462.

diversion element, the *Amended Notices of Claim* continued to assert the right to divert groundwater through the two Airport Wells only. However, each *Amended Notice of Claim* included the same two maps attached to the *Notice of Claim* for water right claim 34-10925, identifying the location of the Airport Wells as well as the Island Wells. These two maps were not included in the original *Notices of Claim* for these water rights. In addition, each *Amended Notice of Claim* included the following remark under the “Remarks” section that was not included in the original *Notices of Claim*:

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 26E.³

4. 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. The *Director’s Report* recommended the Airport Wells as the only two authorized points of diversion for each claim.

5. No *Objections* to the recommendations were filed by any party, and on December 17, 1997, *Partial Decrees* were entered for the above-captioned water right claims on the grounds that they were uncontested. Consistent with the *Director’s Report*, the *Partial Decrees* identified the Airport Wells as the only two authorized points of diversion for each water right.

6. On December 14, 2001, *Amended Partial Decrees* were issued for the above-captioned water rights *nunc pro tunc*, for reasons unrelated to the point of diversion element.⁴ Again, the *Amended Partial Decree* identified the Airport Wells as the only two authorized points of diversion for each water right.

7. On April 24, 2008, Mitchell Sorensen, a successor to Crater Farms, Inc. and a predecessor-in-interest to the present claimant Telford Lands, 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).

³ This remark is consistent with the delivery of water from the Island Wells. Water is diverted from the Island Wells under water right 34-7037, also decreed to Crater Farms, Inc. Water right 34-7037 is also appurtenant to the same place of use as the Airport Wells. The diversion rate for 34-7037 is 12 cfs. However, the Island Wells have the capacity to deliver up to 24.66 cfs.

⁴ The Idaho Supreme Court’s holding in *A&B Irrigation Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998) required amendments be made to the season of use element of these water rights.

The *Motion to Set Aside* asserted a clerical error with respect to the point of diversion elements for each of the above-captioned water rights. Specifically, that the point of diversion elements should have identified the two Island Wells as authorized points of diversions based on a prior accomplished transfer in addition to the two Airport Wells. The *Motion* asserted that the two Island Wells were omitted by the claimant as additional points of diversion in the *Amended Notices of Claim* as a result of clerical error.

8. 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*.

9. 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 Decrees*,” 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 Reports*.

10. *Amended Notices of Claim* for the above-captioned water rights were filed on September 21, 2009, asserting the right to divert groundwater from the two Island Wells in addition to the two Airport Wells.

11. On December 10, 2009, the Director issued his *Amended Director’s Report* for the above-captioned water rights. The *Amended Director’s Report* recommended the two Airport Wells and the two Island Wells as authorized points of diversions.

12. *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 the Objectors.⁵

13. On September 15, 2011, the Objectors filed a *Motion for Permissive Review*, seeking review of the Special Master’s determination that sufficient grounds exist to set aside the *Partial Decrees* under Rule 60(a). The *Motion* was opposed by Telford.

⁵ *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.

14. 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.

15. On February 1, 2012, this Court entered an *Order Granting Permissive Review* pursuant to *SRBA Administrative Order 1*, Section 9.e.

16. On February 17, 2012, the Objectors filed their *Joint Opening Brief on Permissive Review*. A *Response* in opposition was subsequently filed by Telford, and on February 29, 2012, the *Objectors* filed their *Joint Reply Brief*.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

Argument on permissive review was heard before the Court on March 2, 2012. The parties did not request additional briefing, nor does the Court require any. The matter is therefore deemed fully submitted the following business day, or March 5, 2012.

III.

STANDARD OF REVIEW

The SRBA's permissive review procedure permits review by this Court of an "interlocutory determination which involves a controlling question of law as to which there are substantial grounds for difference of opinion." *SRBA Administrative Order 1* ("A01"), Section 9.e. On permissive review, the Court must only review the question(s) of law which the Court has been requested by either the Special Master or parties to review. *Id.* Any factual findings, if they exist, are not ripe for review and the nature of permissive review does not allow the Court to make factual findings. The Court's inquiry, then, is limited to review of the Special Master's legal conclusions, and the application of those legal conclusions to any facts that exist at the time of the permissive review.

A Special Master's conclusions of law are not binding upon a district court, although they are expected to be persuasive. *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816.

P.3d 326, 334 (1991); *Higley v. Woodard*, 124 Idaho 531, 534, 861 P.2d 101, 104 (1993). This permits a district court to adopt the Special Master's conclusions of law only to the extent they correctly state the law. *Id.* Accordingly, a district court's standard of review of a Special Master's conclusions of law is one of free review. *Higley*, 124 Idaho at 534, 861 P.2d at 104. Further, the label put on a determination by the Special Master is not decisive. If a finding is designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. *Wright and Miller, supra*, § 2588; *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1975). *Harney v. Weatherby*, 116 Idaho 904, 906–07, 781 P.2d 241, 243–44 (Ct.App.1989). Compliance with the rules of civil procedure is a question of law. *Bedke v. City of Oakley*, 149 Idaho 532, 237 P.3d 1 (2010) (citing *State v. Hagerman Water Users*, 130 Idaho 736, 740, 947 P.2d 409, 413 (1997)).

IV.

DISCUSSION

The parties have placed one issue before this Court on permissive review: whether the Special Master erroneously applied Idaho Rule of Civil Procedure 60(a) to the facts of this case to set aside the *Partial Decrees* previously entered for the above-captioned water rights. In her *Order Granting Motion for Permissive Review*, the Special Master found that the Claimant's failure to claim the two Island Wells as points of diversion for the above-captioned water rights constituted a clerical error under Rule 60(a). Specifically, the Special Master determined "the omission of the Island Wells on the face of the *Amended Claims* 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)."

Idaho Rule of Civil Procedure 60(a) provides for the correction of "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." The Idaho Supreme Court has directed that 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." *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004). The Court has further directed that clerical errors "include those where what is written or recorded is not what the court intended to write or record," and where "the error can be corrected whether it is made by a clerk or by the judge." *Id.* at 412, 95 P.3d at 30 (quoting *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir.

1987)). Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b), as “Rule 60(a) is not a vehicle for relitigating matters that already have been litigated and decided, nor to change what has been deliberately done.” *Dursteler v. Dursteler*, 112 Idaho 594, 597–98, 733 P.2d 815, 818–19 (Ct. App. 1987).

In this case, the Objectors first argue that Rule 60(a) cannot be utilized to correct errors in the 1990 *Amended Notices of Claim* as they do not constitute “judgments, orders or other parts of the record.” They assert that the *Amended Notices of Claim* are not part of the Court’s record in these subcases, as they were filed with the Department under Idaho Code § 42-1409(4).⁶ The Objectors’ argument in this respect is unavailing. The law of the case in the SRBA establishes that the 1990 *Amended Notices of Claim* are part of the record before this Court. In his *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, subcases 36-02708 *et al.* (Dec. 29, 1999), p.27, the Honorable R. Barry Wood held that “[a] notice of claim is a pleading within the SRBA,” and that “[t]he filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA.” More recently, this Court provided that *Notices of Claim*, although filed with the Department, are nonetheless part of the record in the SRBA. *Memorandum Decision and Order on Challenge*, subcase no. 02-2318A (August 29, 2011), p.2, fn.3.

The Objectors next assert that the error alleged by the Claimant is not the type or nature of error capable of correction under Rule 60(a). This Court agrees. As an initial matter, the claimed error – the Claimant’s omission of the Island Wells as additional points of diversion from the *Amended Notices of Claim* – is not a mechanical error which can simply be corrected by this judge or the clerk of the court without further proceedings. To the contrary, correction of the claimed error would require the reopening of the case, the filing of *Amended Notices of Claim*, the filing of *Amended Director’s Reports*, the filing of *Objections*, and a trial on an element of the claims (i.e., the point of diversion element) on which a judicial determination has already been made. In short, it would require the complete relitigation of a matter that already has been litigated and decided, resulting in prejudice to the Objectors. A correction requiring relitigation of this nature is not the type of correction contemplated by Rule 60(a), but rather is properly

⁶ Idaho Code § 42-1409(4) provides that “[a]ll claimants of water rights that are included in a general adjudication shall file with the director a notice of claim for all water rights.”

pursued by a motion under Rule 59(e) or 60(b). *Dursteler*, 112 Idaho at 597–98, 733 P.2d at 818–19 (Ct. App. 1987).

Additionally, the alleged error is not readily apparent from the record in this case. The record reflects that the original *Notices of Claim* for water right claims 34-2459, 34-2460, 34-2461, 34-2462 failed to claim the Island Wells as additional points of diversion. The *Amended Notices of Claim* for those water rights likewise failed to claim the Island Wells as additional points of diversion. The Department, following its independent investigation of the claims, recommended the Airport Wells as the only two authorized points of diversion for the water rights. The fact that the Department did not recommend the two Island Wells as additional points of diversion is presumed to be the deliberate result of its investigation. The Claimant had the opportunity and duty to review the recommendations and timely file objections to any perceived errors contained therein. I.C. § 42-1412. However, the Claimant failed to timely do so. As a result, *Partial Decrees* were entered for the above-captioned water rights decreeing the two Airport Wells as the only two authorized points of diversion. In light of the SRBA process, the *Partial Decrees* as they pertained to the point of diversion element were thus “consistent” with the *Notices of Claim*, the *Amended Notices of Claim* and the *Director’s Report*. In short, the *Partial Decrees* accurately reflect the record, and as a result, the alleged error is not “mechanical in nature which is apparent in the record.” *Silsby v. Kepner*, 140 Idaho at 411, 95 P.3d at 29. In essence, two errors occurred in this case. The first was the alleged clerical error in the claims and the second and more problematic error was the subsequent failure of the Claimant to timely object to the recommendations in the *Director’s Report*, which by very nature of the process can vary from the claims. In this case, whether or not Rule 60(a) provides grounds for correcting the alleged error in the claims, it does not provide relief for the failure to timely object to the *Director’s Report*.

Notwithstanding, the Claimant argues the SRBA Court routinely corrects clerical errors in *Partial Decrees* under Rule 60(a). In some cases the *Partial Decrees* were issued many years prior. The Claimant also argues the SRBA Court applies a more “liberal” standard than other districts courts in applying Rule 60(a). This assertion is incorrect, and the Claimant mischaracterizes the process used by the Court for correcting errors in *Partial Decrees*. What the Claimant refers to is a process used under certain circumstances by this Court where an error is identified in a *Partial Decree* and there are no objections by any party to correcting the

identified error. Under such circumstances, the process utilized by the Court provides a mechanism for all affected parties to not only agree that the *Partial Decree* contains an error but also agree to the Court issuing an *Amended Partial Decree* to correct the error. In essence the process is akin to a stipulation to amend the *Partial Decree* to correct the error. The process is not a substitute for a *Motion to Set Aside a Partial Decree* under Idaho Rule of Civil Procedure 60 in order to provide the party alleging the error the opportunity to relitigate the claim due to the error or omission.

The high level of detail involved with adjudicating a water right claim invariably invites the potential for errors even under the most stringent review. When an alleged error is identified, and the Department as well as the parties to the subcase agree that the error should be corrected in a certain way, the Court issues a *Notice of Intent to Correct Clerical Error and Issue an Amended Partial Decree to Correct Clerical Error* explaining the nature of the alleged error and how the Court intends to correct the error in the absence of any objections. The matter is then set for hearing. Notice is served on the parties to the subcase and notice also follows SRBA docket sheet notice procedure. Any party to the adjudication can file an objection and/or appear at the hearing and contest the Court taking the intended action. In the absence of an objection the Court will amend the *Partial Decree* to correct the error as specified in the *Notice*. The process provides an expedient mechanism for correcting errors pursuant to notice and a hearing where there is agreement among the affected parties.

However, that procedure is not pertinent here because there is no agreement among the affected parties and the Department.⁷ Under the circumstances present in this case, the Court is

⁷ The Claimant cites to a number of instances where the SRBA Court has corrected clerical errors in *Partial Decrees*. In 2012, the Court issued a *Notice of Court's Intent to Issue an Amended a Partial Decree* for water right 74-381B that was issued in 2007, to add an omitted "tributary" description. No objections were filed following notice and the objection deadline has now expired.

Similarly, in subcase no. 37-22567 the Court issued a *Notice of Court's Intent to Issue Amended Partial Decree, and Notice of Hearing Thereon*, where the Department notified the Court in writing of an error in a legal description in the place of use element and represented that all parties to the subcase were in agreement as to the error. The matter is currently set for hearing in May 2012 and to date the Court has received no objections.

A *Motion to Set Aside a Partial Decree* was filed in March of 2008 for water rights 21-7295 and 21-7296 that were decreed in 2007. The *Partial Decrees* failed to take into account changes arising from an intervening license issued after the claims were filed. The Court issued *Amended Partial Decrees* based on the recommendation of the Special Master, which provided: "There was no opposition to the Motion to

required to make the determination of whether the affected *Partial Decrees* can be set aside under Rule 60. For the reasons stated above, the Court finds that Rule 60(a) does not provide an appropriate mechanism to set aside the *Partial Decrees* in this case. Whether an avenue exists to set aside the *Partial Decrees* under Rule 60(b) is not before this Court.

Set Aside the Partial Decree. An Amended Director's Report was filed on August 27, 2008. No objections were filed to the Amended Director's Report and the time for filing objections has now expired." See *Special Master's Report and Recommendation on Motion to Set Aside Partial Decree*, water right no. 21-7295 (Nov. 4, 2008).

In another case, a motion to set aside a number of *Partial Decrees* issued in 1998 was filed in 2008 to correct clerical errors in the legal description for the point of diversion element. The *Motion* was filed after an intervening administrative transfer had occurred. The matter was referred to a Special Master and an *Objection* to the *Motion* was initially filed. The Court issued *Amended Partial Decrees* correcting the clerical error based on the absence of any challenges to the recommendation of the Special Master, which provided:

Multiple hearings were held on the Motion. At the hearings the [Special Master] determined the following:

- 1.) The parties to these subcases concur with the Motion to correct the point of diversion.
- 2.) No parties in the SRBA objected to the *Motion*.
- 3.) The point of diversion was described in the 1998 Partial Decree as T06N R25E S24 NWNWNE. The point of diversion should be described as T06N R25E S24 NENWNE.
- 4.) There was no finding of specific prejudice to other parties.

Special Master's Report and Recommendation on Motion to Set Aside Partial Decree, water right nos: 34-119C *et. al.* (July 29, 2010).

In all of the subcases listed to this point, no objections were raised to correcting the identified errors, and the errors were corrected based on the agreement of all affected parties.

Finally, in subcase no. 22-13212 the Special Master recommended a water right claim based on a prior decree (*Rexburg Decree*) where it was alleged the prior decree issued in 1910 was in error regarding the legal description of the decreed right on which the claim was based. In that case, while the Special Master did indeed make reference to the court being able to correct legal descriptions in prior decrees under I.R.C.P. 60(a), the issue was nonetheless decided based on a finding of satisfaction of the accomplished transfer provisions of Idaho Code § 42-1425. Moreover, no challenges were filed to the *Special Master's Report and Recommendation*. *Special Master's Report and Recommendation; Findings of Fact and Conclusions of Law*, water right nos. 22-13212 and 22-13503 (July 30, 2010).

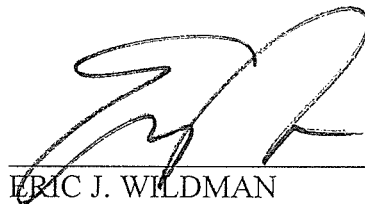
Accordingly, none of the above-referenced cases lend support to the argument that I.R.C.P. 60(a) authorizes relief from a judgment based on a clerical error for purposes of setting aside the judgment and relitigating the merits of the claim or that a more liberal I.R.C.P. 60(a) standard is applied in the SRBA.

V.

CONCLUSION

For the foregoing reasons, the Special Master's determination to set aside the *Partial Decrees* previously entered for the above-captioned water rights pursuant to Idaho Rule of Civil Procedure 60(a) **is hereby reversed**, and Telford Lands, LLC's *Motion to Set Aside Partial Decrees* **is hereby denied**.

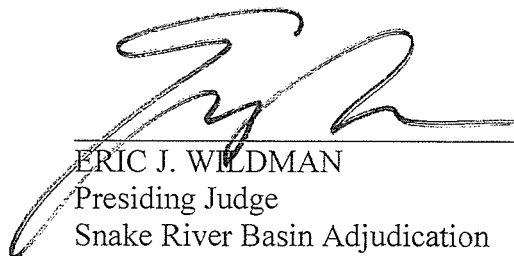
DATED: March 7, 2012


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: March 7, 2012


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM
DECISION AND ORDER ON PERMISSIVE REVIEW was mailed on March
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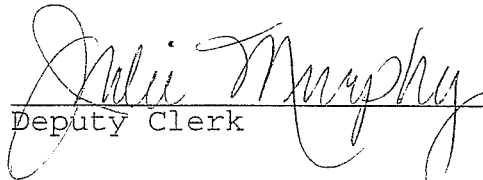
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ORDER

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