

RECEIVED

JAN 03 2013

DEPARTMENT OF
WATER RESOURCES

Jerry R. Rigby (ISBN 2470)
 RIGBY, ANDRUS
 & RIGBY, Chartered
 Attorneys at Law
 25 North Second East
 Rexburg, Idaho 83340
 Telephone: (208) 356-3633
 Facsimile: (208) 356-0768

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	Subcase: 22-13457
	)	
	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO SET ASIDE PARTIAL
Case 39576	)	DECREE
	)	
	)	
	)	

The Claimant, Richard F. Smith, moves to set aside the Partial Decree for water right **22-13457** on the grounds of clerical mistakes, factual reasons justifying relief from the operation of the partial decree and that a partial decree is subject to revision at any time before the entry of the final decree adjudication all the claims and the rights and liabilities of all parties to the SRBA, all pursuant to the Idaho Rules of Civil Procedure 60(a), 60(b) (6) and 54(b).

BACKGROUND

Richard F. Smith's affidavit dated this even date is attached hereto and incorporated herein as the factual background in order to justify his motion to vacate the partial decree for water right 22-13457 in the Snake River Basin Adjudication (hereinafter SRBA) and allow him to file the necessary amended claim(s) in order to rectify the clear mistake, including one based upon Accomplished Transfer.

APPLICATION

The Court has discretion to set aside a partial decree. It is allowed this discretion by the Idaho Rules of Civil Procedure 60(b)(6) and 54(b), and by prior case law.

I.R.C.P. 60(b)(6) gives the court the discretion to relieve a party or their legal representative from a final judgment, order, or proceeding for “any other reason justifying relief from the operation of the judgment.” The rule is not specific as to what kinds of “reasons” must be shown in order for the moving party to be granted relief by the court. *Ausman v. State*, 124 Idaho 839, 864 P.2d 1126, Idaho, 1993. Nor does the rule state that it applies to any specific area of civil law or to any specific types of judgments or orders. *Id.* At 1130. This rule is simply a general rule of civil procedure, and whether or not a court grants a motion under this rule is entirely discretionary. *Id.* I.R.C.P. 60(a) also gives the court the right to correct any “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.”

Furthermore, I.R.C.P. 54(b) states that “the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”

In the case before the court, it is clear that both the Department and the Claimant, Richard F. Smith, made a mistake and failed to finalize an exchange agreement between Franko Farms, Inc. (“Websters”) and the Smiths even though the exchange was based upon valid licenses and permits which properly covered all the acreage of both Franko Farms, Inc., and the Claimant and there is no factual dispute as to the lands having been fully watered between the

two claimants and properly permitted and licensed.

Because correct exchange agreement plan was never properly fully addressed by IDWR, its recommendation of 22-13457 was inherently flawed. As such, the partial decree based on that recommendation is also flawed and does not represent the historical use of 22-13457. Unfortunately, the Claimant, as a third party, have been injured by the recommendation and partial decree. It is within the discretion of the Court to set aside the partial decree so that this water right may be properly adjudicated on its actual merits.

I.R.C.P. 54(b) states that in cases involving multiple claims, “any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.” The claims in the SRBA are clearly subject to this rule because this rule applies to judgments upon multiple claims or involving multiple parties. The SRBA has thousands of claims and thousands of parties. In fact, the SRBA specifically allows for appeals to partial decrees pursuant to I.R.C.P 54(b).

Administrative Order 1, page 22.

This is not a typical motion to file a late claim where NO claim was originally filed and the basin has been closed. A claim was filed and even amended. Unfortunately, due to the improper direction understood by the Department and Claimant, it has yet to be amended correctly and in order to comply with the Accomplished Transfer which facts are undisputed.

The Courts have also established precedent, inside the SRBA and outside of the SRBA, that the Court has the discretion to set aside a partial decree. In *Baker v. Pendry*, the Supreme Court of Idaho ruled that a judge may set aside a partial decree at any time prior to a final

adjudication of claims. 98 Idaho 745, 748, 572 P.2d 179, 182 (1977). In that case, the Supreme Court relied on both IRCP 60(b)(1) and 54(b) to allow a lower court the discretion to set aside a partial decree even more than one year after the partial decree had been entered. The case currently before the Court is a multi-party case in which no final adjudication of claims has been entered. Relying on this precedent, the Court clearly has discretion to set aside a partial decree. Furthermore, when one realizes what actually happened to create the mistake, the facts cry for relief from the above entitled Court as allowed under I.R.C.P. 60(b)(6).

Recently, the SRBA Court set aside an order disallowing a claim for the claimant Bannock Jim Slough. Water Right Nos. 1-139 and 1-140. In that case, the Court had originally disallowed the water rights because the Claimants had simply not organized their irrigation company into a corporate form all the members could agree upon in a timely manner. While a disallowance is not exactly the same as a partial decree, it is for all intents and purposes the same in that it is an order by the Court which essentially decrees the elements of the water right, or lack thereof. In that case, the Court set aside the order of disallowance and allowed the claimants to file a late objection, which resulted in the Claimants having the ability to divert the water they had historically diverted. Another case most recently decided by the above entitled Court was for Claimant Dale Daw under the partial decree of water right 22-4046, where the claimant was unaware of what his neighbor had failed to claim on his behalf as well as his mistaken understanding of the Department's continued need to have his or the Webster's claim amended.

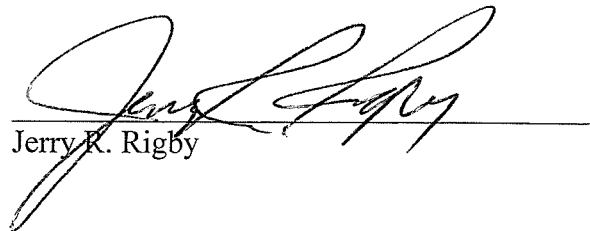
CONCLUSION

It is clear that the Court has the authority and discretion to set aside the partial decree of

water right 22-13457. This authority and discretion is grounded in the Idaho Rules of Civil Procedure and precedent set by the Idaho Supreme Court and the Snake River Basin Adjudication District Court as well. If the Claimant is not allowed to set aside the Partial Decree, the Claimant will not be allowed to continue with the historic practice of diverting a validly permitted ground water for irrigation under water right 22-13457.

Therefore, the Claimant respectfully submits that the Court should set aside the Partial Decree on this claim so that Claimant may file a Motion to File a Late Objection and amend his claim to include the 80 acres of Webster Exchanged land under the legal authority of Accomplished Transfer.

DATED this 28th day of December, 2012.


Jerry R. Rigby