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WATER RESOURCES

IGNACIA S. MORENO

Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

DAVID L. NEGRI, ISB #6697

United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
550 West Fort Street, MSC 033
Boise, Idaho 83724
Phone: (208) 334-1936
Fax: (208) 334-1414

Counsel for the United States of America

**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 No.: 73-12037
	)	
Case No. 39576	)	UNITED STATES' RESPONSE BRIEF IN
	)	OPPOSITION TO MOTION TO SET ASIDE
	)	PARTIAL DECREE
	)	
	)	

The United States' of America, acting through the Department of Interior, Bureau of Land Management ("BLM"), presents its Response Brief in Opposition to the *Motion to Set-Aside Partial Decree* ("Motion") filed by claimants Robert P. and Dawn M. Sullivan ("Sullivans").

INTRODUCTION

As explained in the Sullivans' *Memorandum in Support of Motion* ("Memo."), the procedural history of this subcase is somewhat complicated. The water right for this subcase, water right no. 73-12037, is the result of a split of water right claim no. 73-10014. Water right claim no. 73-10014 was also split into water right no. 73-12038. Water right claim no. 73-10014 was originally filed as a combination of several prior decrees: 73-00020, 73-00021 and 73-00024. *Memo.* at 2. The Sullivans now attempt, through this *Motion*, to acquire water decreed under 73-00024 appurtenant to land now owned by the BLM. *Memo.* at 4.

Pursuant to a Standard Form 5 filed on May 19, 2010, the Sullivans, represented by counsel, agreed and stipulated to the partial decree they now challenge. The sole basis they present for their *Motion* is a general complaint that they were treated differently by IDWR than the claimant to water right no. 73-12038.

The standard applicable to set-aside motions in the SRBA is well established, and includes as an element a requirement that the movant must allege facts, if established, that would constitute a meritorious claim or defense. The Sullivans have presented no evidence that would establish their right to the water they now seek to claim. In addition, the provision of Idaho R. Civ. P. 60(b)(5) on which the Sullivans rely does not apply to water right decrees and other judgments awarding property rights. Accordingly, the Court must deny the *Motion*.

ARGUMENT

In the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P. 60

(b). *Memorandum Decision and Order on Motion to Set Aside Partial Decrees*, subcase nos. 55-02373 *et al.* (May 1, 2001) (“*L.U. Ranching*”) at 8 (citing *AOI* § 14d (“Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)”). In this instance, the Sullivans rely on I.R.C.P. 60(b)(5), the relevant portion of which provides that a final judgment may be set aside if “it is no longer equitable that the judgment should have prospective application.” *See Memo.* at 7. In addition to satisfying one of the criteria set forth in I.R.C.P. 60(b), the movant must also allege facts which, if established, would constitute a meritorious claim or defense. *L.U. Ranching* at 8. Because the Sullivans have failed to allege any facts that would support their claim to water, and because an SRBA partial decree is not prospective in nature and cannot be set aside under I.R.C.P. 60(b)(5), the Court must deny the *Motion*.

1. The Sullivans have failed to allege facts that would constitute a meritorious claim or defense.

The Sullivans, by their *Motion*, attempt to set aside the partial decree in this subcase because they claim that they are entitled to a greater quantity of water than that decreed. *See Memo.* at 3 (citing letter from IDWR explaining why the Department could only recommend a diversion rate of 4.6 cfs, and not the 6.4 cfs requested by the Sullivans). The Sullivans argue that they are entitled to water decreed in 1921 as 73-00024 for use on a different piece of property. *Memo.* at 4 (complaining of failure of IDWR to recommend water from decree 73-00024 to this claim); Allen Affd., Exh. 5 at 1 (73-00024 was decreed in 1921 in *Maelzer v. Smith* to a piece of property about a mile west of the place of use claimed in this subcase). In 2006, IDWR informed the Sullivans that it could not include water from 73-00024 in its recommendation for this water right. Allen Affd., Exh. 5 at 1. The Department’s reasoning was

simple and persuasive: Because the Sullivans had not produced any record “that shows 73-24 was transferred or conveyed to the property you or your neighbor own,” the Department could not recommend such water to the Sullivans in this subcase. *Id.* IDWR encouraged the Sullivans to “continue to research the matter” by, for instance, communicating with the Water Master and searching county records for a conveyance document. *Id.* at 1-2.

It appears that such steps, if taken, were unproductive, as the Sullivans now ask this Court to set aside this partial decree without a single piece of evidence showing any basis for their claim to water decreed in water right 73-00024. Water right 73-00024 was not conveyed to them. Water right 73-00024 was not decreed for use on any property they own. The Sullivans present no conveyance document or other information that in any way supports their claim to water right 73-00024. In fact, the *Motion* and supporting *Memorandum* lack any information, documentation, or other evidence that would indicate in any way that they have any lawful claim to this water.

The sole basis for the Sullivans’ claim appears to be that a portion of water from 73-00024 was recommended to the claimant of water right no. 73-12038, but not to them. *Memo.* at 4. Such argument provides absolutely no support for a claim that they are entitled to any water decreed in 73-00024. A water right claimant in Idaho is required to demonstrate ownership of the property right on the strength of their own title, not on the strength or weakness of another’s claim to title. *L.U. Ranching* at 32 (quoting *Memorandum Decision and Order on Challenge*, subcases 36-00003A, *et al.* (Nov. 23, 1999) at 35-36).

Because the Sullivans have failed to provide any evidence indicating that they have a meritorious claim to the water at issue, the *Motion* must be denied.

2. Because SRBA partial decrees are not prospective, Rule 60(b)(5) cannot be used to challenge such decrees.

By its explicit terms, Rule 60(b)(5) only applies if a judgment has prospective application. *See* I.R.C.P. 60(b)(5) (providing relief if “it is no longer equitable that the judgment should have prospective application”). The Sullivans concede that, to prevail under Rule 60(b)(5), a movant must show that the judgment is prospective. *Memo.* at 7. They argue, however, that injunctive relief is prospective and that “a partial decree is in essence an injunction.” *Memo.* at 7.

That is simply not true. The partial decree at issue here contains absolutely no injunctive language. *See* Allen Affd., Exh. 11. There is no order or other directive in the decree enjoining any party from any action. *Id.* An injunction, in general, is “a writ or order requiring a person to refrain from a particular act.” *Harris v. Preston-Whitney Irrig. Co.*, 443 P.2d 482, 485 (Idaho 1968) (quoting I.C. § 8-401(repealed S.L. 1975, ch. 242, §1)).

Furthermore, the Idaho Supreme Court has specifically found that orders awarding property rights are not prospective in nature and cannot be set aside under Rule 60(b)(5). *Curl v. Curl*, 772 P.2d 204, 208-209 (Idaho 1989). An award of property is effective immediately and adjudicates rights as of the date of the judgment. *Id.* at 209. Likewise, a judgment that quiet titles to land is not a judgment having prospective application. *Id.* (citing *Gajewski v. Bratcher*, 240 N.W.2d 871, 891 (N.D. 1976)). Although judgments awarding property will have “an impact on future dealings” and allow the litigant “to have the future benefit of that and all other

property awarded to him,” that does not give such judgments “prospective application within the meaning of I.R.C.P. 60(b)(5).” *Id.* Because the partial decree challenged here fully adjudicates a right to real property, *see* I.C. § 55-101 (water rights are real property), such decree cannot be challenged under Rule 60(b)(5).

Finally, it is clear that the Court has no authority to grant the motion as an independent action for equitable relief. “[A]n independent action in equity is a most unusual remedy, ‘available only rarely and under the most exceptional circumstances’ and will lie only in the presence of an extreme degree of fraud or overreaching.” *Harper v. Harper*, 835 P.2d 1346, 1348 (Idaho App. 1992) (citations omitted). It is clear that the factual basis for such a claim does not exist in this case. *See Memo.* at 6 (“Claimants here are not claiming that IDWR had a deliberate or intentional plan of discrimination . . .”).¹

CONCLUSION

Because 1) the Sullivans have presented no evidence to support a meritorious claim to the water quantity they now seek, and 2) the partial decree they challenge is not prospective in nature and cannot be challenged under Rule 60(b)(5), the Court must deny the Motion.

¹ In addition, the Idaho Supreme Court has held that a Rule 60(b)(5) motion is not a substitute for a timely appeal. *Bubak v. Evans*, 788 P.2d 1333, 1335 (Idaho 1989) (citation omitted); *see also Matter of Estate of Bagley*, 793 P.2d 1263, 1266 (Idaho 1990) (“Rule 60(b)(6) may not be used as an end-run around the time limits of I.A.R. 14.”) (citation omitted).

Dated this 14th day of February, 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Negri", is written over a horizontal line.

DAVID L. NEGRI

United States Department of Justice
Environment and Natural Resources Division

Attorney for the United States of America

CERTIFICATE OF SERVICE

I certify that on February 14, 2013, I served a true and correct copy of the foregoing **UNITED STATES' RESPONSE BRIEF IN OPPOSITION TO MOTION TO SET ASIDE PARTIAL DECREE** by placing the documents in the United States Mail in Boise, Idaho, postage paid, and addressed as follows:

MICHAEL D. ALLEN

Sanderson Law Office

P.O. Box 159

Afton, WY 83110

REPRESENTING:

Robert P. and Dawn M. Sullivan

-claimants of 73-12037-

[copy also provided by email to:

sandersonlaw@silverstar.com

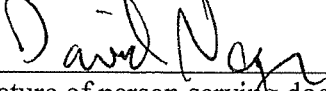
mdallen74@gmail.com]

Garney B. and Victoria F. Ball

1955 Oak Wy

Arroyo Grande, CA 93420

-pro se claimants of 73-12037



Signature of person serving documents