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DEPARTMENT OF
WATER RESOURCES

Fifth Judicial District County of Twin Falls - State of Idaho	
SEP 26 2013	
By _____	Clerk
_____	Deputy Clerk

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

In Re SRBA

Case No. 39576

) SPECIAL MASTER'S REPORT AND
) RECOMMENDATION ON MOTION
) TO SET ASIDE PARTIAL DECREES

) SUBCASE NOS. 23-19D, 23-20B,
) 23-47D, 23-93B, 23-11257, 23-11258,
) 23-11259, 23-11260, 23-11261, 23-11262,
) 23-11263, and 23-11264

I. PROCEDURAL BACKGROUND

On September 18, 2008, Glen Bills moved to set aside partial decrees in subcases 23-19D, 23-20B, 23-47D, 23-93B, 23-11257, 23-11258, 23-11259, 23-11260, 23-11261, 23-11262, 23-11263, and 23-11264. The *Motion to Set Aside Partial Decrees and Consolidate Issues* relates to Mr. Bills' Late Claim for 23-11329. During the hearings on that Late Claim, the Idaho Department of Water Resources reported that 23-11329 was claimed as derivative of A.J. Bernard's water rights from the *Rexburg Decree*. However, the entire quantity of A.J. Bernard's rights from the *Rexburg Decree* had already been partially decreed in the SRBA. Consequently, the *Director's Report* recommended 23-11329 for disallowance.

The SRBA Court issued *Partial Decrees* for related water rights 23-19D, 23-20B, 23-47D, 23-93B, 23-11257, 23-11258, 23-11259, 23-11260, 23-11261, 23-11262, 23-11263, and 23-11264 in January 2005. The *Partial Decrees* were based on *Director's Reports* to which no Objections were filed. In addition, no parties appealed the *Partial Decrees*. Mr. Bills asked that those *Partial Decrees* be set aside to allow his late claim for 23-11329.

II. HISTORICAL BACKGROUND

A. The Rexburg Decree

The water rights at issue are located in the area of Swan Valley, Idaho and have Rainey Creek as their source. The rights originated from three rights decreed to A.J. Bernard in 1910 in

Rexburg Irrigation Co. v. Teton Irrigation Canal Co. (Idaho, Sixth Judicial Dist. 1910) (hereafter “*Rexburg Decree*”) The *Rexburg Decree* did not assign water right numbers and did not connect specific priority dates to specific acreage. The Bernard water rights were subject to transfers after the *Rexburg Decree*. Mr. Bills contends that administrative transfers after the 1910 *Rexburg Decree* contained errors. He asserts that transfer errors were carried over in the *Director’s Reports* and *Partial Decrees*. Therefore, Mr. Bills seeks to obtain quantity from the Bernard rights by setting aside the *Partial Decrees* to correct mistakes from the transfers.

The index from the *Rexburg Decree* lists three rights for A.J. Bernard. The first right has a priority of April 15, 1889 for 160 inches. The second right has a priority of June 20, 1889 for 80 inches, and the third right has a priority of April 9, 1889 for 80 inches. (*Rexburg Decree* at 4) The *Rexburg Decree* provides a legal description for Bernard’s property as follows:

NE1/4 of NE1/4 of Sec. 7	40 acres
N1/2 of NW1/4 of Sec 8	80 acres
SE1/4 of SW1/4 of Sec. 5 (T1N, R44E)	40 acres
E1/2 of SW1/4 of Sec. 36 (T2N, R44E)	80 acres
SE1/4 of SE1/4 of Sec. 6	40 acres
SW1/4 of SW1/4 Sec. 5 (T1N R44E)	40 acres

No water right numbers were assigned to the Bernard rights at the time of the *Rexburg Decree*. In addition, priority dates were not assigned to specific portions of the legal description in the *Rexburg Decree*. Therefore, it is unclear which water rights or priority dates were connected to each portion of the legal description. Nevertheless, the transfers were completed many years ago.

B. Late Claim

Mr. Bills filed a late claim in 2004 for water right 23-11329. The late claim is related to the subcases he seeks to set aside because all are derivative of the Bernard water rights from the *Rexburg Decree*. At the Late Claim hearing on 23-11329, Judge Melanson questioned whether Mr. Bills intended to file Late Objections to the related claims from the *Rexburg Decree*. Counsel indicated that Mr. Bills did not intend to file late Objections to those claims. At the time of the Late Claim hearing, the related claims from the *Rexburg Decree* had not been partially decreed. No late Objections were filed.

Based on representations made at the Late Claim hearing, those related water rights were

decreed in 2005. The *Director's Report* for 23-11329 was filed on April 27, 2007. The *Directors Report* recommended disallowance of the late claim because all of the water from the *Rexburg Decree*, on which the late claim was based, had already been decreed.

Objection deadlines were July 6, 2007, and response deadlines were September 7, 2007. No Objections were ever filed. In 2008, a *Motion to Set Aside* the other rights was filed.

C. Summary of Transfers

The Bernard rights were the subject of several administrative transfers after the *Rexburg Decree*. Mr. Bills asserts that errors were made during the administrative transfers which were repeated in the *Director's Reports* and *Partial Decrees*. Mr. Bills contends that the *Partial Decrees* should be set aside to allow him to claim a portion of those water rights in late claim 23-11329.

In order to understand the transfers, it is useful to follow each portion of the legal description from the *Rexburg Decree* through the administrative transfers. A summary follows:

NE1/4 of NE1/4 of Sec. 7	40 acres	T 383 (April 15, 1889) + T383A (April 9, 1889)
N1/2 of NW1/4 of Sec. 8	80 acres	T 383 (April 15, 1889) + T383A (April 9, 1889)
SE1/4 of SW1/4 of Sec. 5	40 acres	T 383 (April 15, 1889) + T383A (April 9, 1889)
SE1/4 of SE1/4 of Sec. 6	40 acres	T 383 (April 15, 1889) + T383A (April 9, 1889)
SW1/4 of SW1/4 of Sec. 5	40 acres	T 383 (April 15, 1889) + T383A (April 9, 1889)
E1/2 of SW1/4 of Sec. 36	80 acres	T 488 (April 9, 1889) + corrected legal description.

1. Transfer T383

This transfer was approved July 7, 1926. Transfer T383 identified the water right being transferred as originating in the *Rexburg Decree* from water rights of Alfred Joseph Bernard. The transfer identified the water being transferred with priority date April 15, 1889. This transfer described the land to which the April 15, 1889 right was appurtenant as SE1/4 SE1/4 S6, (40 acres) NE1/4 NE1/4, Section 7, (40 acres) S1/2 SW1/4, S5, (80 acres) and N1/2 NW1/4 S8 (80 acres) all in T1N R44E. In total, T383 assigned 240 acres with an April 15, 1889 priority.

The *Rexburg Decree* assigned the April 15, 1889 portion of the right to 160 inches which converts to 3.2 cfs and would normally be for 160 acres. (*Rexburg Decree* at 4) T383 transferred only half of the April 15, 1889 right because it transferred 1.6 cfs out of the 3.2 cfs. The transfer also moved part of the water onto a new, corrected legal description. The new place of use was

T1N R44E S 5 for a total of 160 acres.

2. Transfer T383A

This transfer was also approved July 7, 1926. Transfer T383A identified the water right being transferred as originating in the *Rexburg Decree* from water rights of Alfred Joseph Bernard. This transfer identified the water right being transferred with priority date April 9, 1889. T383A described the land to which the April 9, 1889 right was appurtenant as SE1/4 SE1/4, S 6, (40 acres) NE1/4 NE1/4, S 7 (40 acres), S1/2 SW1/4, S 5, (80 acres) and N1/2 NW1/4, S 8, (80 acres) all in T1N R44E. Thus, T383A describes the same 240 acres as described in T 383 and links that land to water rights with the April 9, 1889 priority date.

The *Rexburg Decree* assigned the April 9, 1889 portion of the right to 80 inches of water or 1.6 cfs. (*Rexburg Decree* at 4) However, T383A transferred only half of the quantity of the April 9, 1889 right since it transferred .8 cfs of the original 1.6 cfs. The transfer also moved a portion of the quantity onto the new, corrected legal description. The Transfer T383A identified the same new land that was described in T383 or T1N R44E S5 for a total of 160 acres. (Section 5 includes four ¼ ¼ sections, to make the entire SE quarter).

Mr. Bills' *Motion to Set Aside* focused on this Transfer T383A. The *Motion* asserts that a mistake was made in this transfer, and seeks to set aside the 2005 SRBA *Partial Decrees* based on an error in this transfer.

3. Transfer 488

A later transfer also affected the Bernard rights. Transfer T488 was approved on June 10, 1930, and allowed Gustus Jacobson to transfer the entire 1.6 cfs attributed to the April 9, 1889 right. This transfer identified the land to which the 1.6 cfs of April 9, 1889 was appurtenant as: the E1/2 SE1/4 S36 T2N R43E. However, this legal description was not listed in the *Rexburg Decree* at all. The Transfer may have been correcting an inaccurate legal description contained in the *Rexburg Decree* of E1/2 SW1/4 S36 T2N R44E. The Transfer documents, however, do not address the discrepancy in the legal descriptions.

Transfer T488 transferred the entire quantity associated with the April 9, 1889 right to the N1/2 N1/2 Section 4, T1N R44E, which is four ¼ ¼s or 160 acres. Thus, T488 transferred more water than was available. Out of the 1.6 cfs associated with the April 9, 1889 priority, half of that water or .8 cfs had already been transferred by T383A to land owned by Weeks. It is not known

whether Gustus Jacobson owned all of the land from which the water right was transferred. If Gustus Jacobson did not own all the land from which the water right was transferred, T488 could have been successfully challenged as an invalid transfer if someone had protested the transfer 78 years ago.

The water right for part of 23-20 was apparently delivered to Ranell Weeks for some time. In 1992, however, Que Hansen requested that IDWR deliver the right to him. At that time, it was determined that the right was appurtenant to Hansen's land instead of Weeks' land. That determination was made by IDWR after a computer database research. *See*, Exhibit C. Since approximately 1992, IDWR has not delivered the 1889 water right to the Weeks/Bills land.

D. Water Right Numbers

The Idaho Department of Water Resources later assigned water right numbers to the three Bernard rights. The April 15, 1889 right for 160 inches was assigned water right 23-19. The June 20, 1889 right for 80 inches was assigned water right 23-20. Finally, the April 9, 1889 right for 80 inches was assigned water right 23-21.

III. STANDARD OF REVIEW

A. I.R.C.P. 60(a)

There is no time limitation on a court's ability to correct clerical mistakes under I.R.C.P. 60(a). Courts have some latitude in correcting judgments that misrepresent the court's intention. For example, the federal rule, F.R.C.P. 60(a) has allowed a court to resolve an ambiguity in its original order to more clearly reflect contemporaneous intent and ensure that the court's purpose was fully implemented. 12 MOORE § 60.11[1][c], *See Burton v. Johnson*, 975 F.2d 690, 694 (10th Cir. 1992) However, a movant must show that there were clerical errors in the *Partial Decree* in order to justify setting aside a *Partial Decree* under Rule 60(a).

B. I.R.C.P. 60(b)

Motions to Set Aside Partial Decree may be considered under Idaho Rule of Civil Procedure 60(b). I.R.C.P. 60(b) allows a court to relieve a party from a final judgment, order or proceeding for the following reasons:

- 1) mistake, inadvertence, surprise, or excusable neglect;
- 2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial;

- 3) fraud, misrepresentation or other misconduct of an adverse party;
- 4) the judgment is void;
- 5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it was based has been reversed or otherwise vacated;
- 6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) contains time limits, however, and requires that a motion to set aside be made within a reasonable time, and for reasons 1, 2, 3, and 6, not more than six (6) months after the judgment, order or decree.

C. Transfers

In the SRBA, a party may not challenge elements or conditions decided in a prior license or transfer if the party or his predecessor was involved in the original proceeding. The SRBA Court generally prohibits nonparties from collaterally attacking a license if they had an opportunity to protest, but failed to do so. The SRBA Court's decision regarding a water right claimed by Ruby Springs Water Company is illustrative. Ruby Springs Water Company obtained a water right after the transfer of a licensed water right. Objectors had not opposed the licensing or transfer proceedings. In the SRBA, the Objectors attempted to dispute elements which had been determined in the prior license and transfer proceedings. The SRBA Court prohibited the Objectors from re-litigating the licensing decisions:

The [Objectors] had the opportunity to protest the License transfer at the time of issuance which they failed to do. They have waived any challenge to the issuance of the License. The SRBA is not a case authorized to revive lost challenges to licensing decisions.

Order Adopting Special Master's Report and Recommendation (Ruby Springs) (Subcase 36-07092A) (Dec. 11, 1997)

Accordingly, a *Motion to Set Aside Partial Decrees* will be denied if the issues raised were decided in a prior transfer. Although collateral attacks on licenses or transfers are not favored in the SRBA, a party may raise facts which occur after a transfer if they impact the elements. For example, a party may argue that a transfer correctly decided the elements, but assert facts which occurred after the transfer resulted in forfeiture.

D. SRBA Venue

IDWR is not a party to the SRBA. IDWR functions in the SRBA as a technical expert

without party status. Therefore, the SRBA does not review appeals of IDWR administrative decisions.

Thus, the SRBA court is not the proper venue to appeal those transfers. Even if the SRBA court was the proper venue to appeal transfers, the transfers were never appealed. However, the SRBA does have jurisdiction to determine the elements of water rights and the legal significance of prior administrative decisions. In addition, the SRBA determines the legal significance of facts which occur after an administrative decision. For example, determinations of whether rights were forfeited or abandoned after transfers are properly before this court.

IV. ANALYSIS

A. I.R.C.P. 60(a)

The movant did not assert that a clerical error was made in the *Partial Decrees* for 23-19D, 23-20B, 23-47D, 23-93B, 23-11257, 23-11258, 23-11259, 23-11260, 23-11261, 23-11262, 23-11263, and 23-11264. The court is also unaware of any clerical errors contained in the *Partial Decrees* for these rights.

B. I.R.C.P. 60(b)

The Idaho Supreme Court has held that the time limits in Rule 60(b) are mandatory, and consequently, any attempt to modify or set aside a judgment or order pursuant to subdivisions (1), (2), or (3) will not be allowed where the applicable time limit under the rule has clearly expired. *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990). The *Partial Decrees* in the SRBA were issued in January of 2005. Thus, the *Partial Decrees* cannot be set aside under subparts (1), (2), or (3), since the *Motion to Set Aside* was filed several years after their issuance.

There are no such time limits for subparts (4) or (5) of I.R.C.P. 60(b). There are no facts of record, however, that indicate that the *Order of Partial Decrees* were “satisfied, released, or discharged” within the language of Rule 60(b)(5). The *Partial Decrees* cannot be set aside under Rule 60(b)(5).

No facts were alleged within the terms of Rule 60(b)(4). Rule 60(b)(4) sets forth a method for a court to set aside a void judgment. A judgment is generally found to be void only if it is totally beyond the court’s power to render. A judgment is valid whenever the court that renders it has jurisdiction over the subject matter and the parties. A judgment is void only if the court lacked jurisdiction or in circumstances in which the court’s judgment amounted to a plain usurpation of

power constituting a violation of due process. 12 Moore's Federal Practice 3d relief from judgment or order § 60.44[1][a]. The SRBA court had subject matter jurisdiction over these water rights. There was no assertion to the contrary. There was also no argument that the SRBA lacked personal jurisdiction over the parties. Similarly, there was no valid assertion that Rule 60(b)(6) justifies setting aside these *Partial Decrees*. In summary, the *Orders of Partial Decree* for these water rights cannot be set aside under I.R.C.P. 60(b)

C. Transfers

The *Partial Decrees* which Mr. Bills seeks to set aside in the SRBA were derived from water rights decreed to Mr. Bernard in the 1910 *Rexburg Decree*. As with many older decrees, the *Rexburg Decree* did not assign water right numbers to each portion of the place of use. In addition, the *Rexburg Decree* did not assign a priority date to specific places of use. The old decree merely listed the legal description of Mr. Bernard's land, listed priority dates and quantities.

After the *Rexburg Decree*, several administrative transfers changed the elements of these water rights. The transfers identified specific places of use and connected the priorities for each water right.

D. Analysis of Transfers

The SRBA disfavors collateral attacks on transfers. Generally, a party may not collaterally attack a prior administrative decision. The *Motion to Set Aside Partial Decrees* asserts that transfers in 1926 and 1930 erred in either priority dates, quantity, or the legal descriptions of the rights that were transferred. The series of transfers involved include T383, T383A, and T488. All of these transfers occurred more than 75 years prior to the issuance of *Partial Decrees* in the SRBA.

After examining the *Rexburg Decree* and transfers T383, T383A, and T 488, it is possible that those transfers could have contained mistakes. However, none of the potential errors can be construed as clerical errors. In addition, any errors could have been corrected by timely appeals of the transfer decisions. Because there were no timely appeals, subsequent purchasers of the property have relied on the deeds and administrative records of those transfers for more than 75 years.

The SRBA has analyzed similar mistakes previously, and determined that such errors do

not justify setting aside a partial decree. The SRBA Court held in *Memorandum Decision and Order on Challenge* (New International Decree) (Subcases 36-00003C, et. al.) (Nov. 23, 1999) that a decree cannot allocate more water than was originally allocated to the root right. In other words, claims which assert a portion of an earlier decree cannot receive a total quantity greater than the root right on which they are based. “To hold otherwise would be to allow the Claimant of the 03 right to unilaterally expand the quantity element previously decreed, while maintaining the ancient priority date, or place an additional burden on the water master to administer the rights collectively, not to exceed the 20 cfs total.” *Memorandum Decision* at 31-32.

“Hence, in claiming a portion of a previously decreed – and then subdivided – water right, each of the claimants are required to produce evidence which demonstrates their ownership of a share of such right. . . .If all of the prior conveyances are silent regarding the portion of any water right that is appurtenant to a particular claimant’s land, then by operation of law that claimant would receive a percentage share that correlates to the amount of land received.” *Id* at 32.

In the *Memorandum Decision*, the SRBA Court reviewed a situation remarkably similar to the situation here. In that decision, *Partial Decrees* for much of the quantity from the old *New International Decree* had been issued. The court recognized that claims to portions of a root right were interrelated and should have been joined in one action. They were not. Nevertheless, the SRBA Court noted that “the fact that partial decrees have been issued is not an insurmountable obstacle to a fair and just adjudication of these water rights.” *Id* at 34.

The court stated that prior to entry of the *Partial Decree* for water rights for Buckeye Farms, the counsel for claimants was aware that Buckeye Farms was claiming a significant portion of the prior decreed right. The court determined that statements were made indicating knowledge of the competing claim in 1996. The *Partial Decree* for the competing Buckeye Farms claim was issued later in 1997. The court ruled that it was incumbent upon claimants to bring to the Court’s attention that entry of the *Partial Decree* should be stayed until a resolution had been made regarding the other rights derivative of the same right. “It is difficult for the claimants to now argue that they are somehow prejudiced by Buckeye Farms’ water rights, especially given that none objected to Buckeye Farms’ claims and none asked the Court to stay a resolution until all rights were decided. . . . Simply put, this Court cannot decree more water than exists. *Id.* at 35.

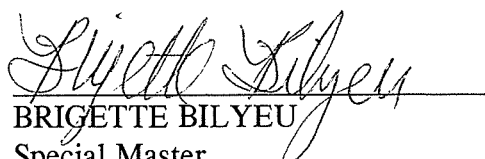
In the instant case, the movant was aware of the connected claims from the *Rexburg Decree* during the hearing on the *Motion for Late Claim* for 23-11329. The SRBA court asked whether the related rights would have late Objections. The movant informed the court that no late Objections were anticipated. No late Objections were filed, and the related water rights were decreed. At this juncture, the court is in the same position as in the Buckeye Farms scenario. The court has no basis to set aside the *Partial Decrees*, and the court cannot decree more water than exists.

Accordingly, the *Motion to Set Aside Partial Decrees* is **denied**.

V. CONCLUSION

The issue before this court is whether *Partial Decrees* based on long standing transfers can stand, or whether they should be set aside based on the facts presented here. The elements of these water rights were determined in administrative transfer proceedings before IDWR. Those administrative transfers occurred in 1926 and 1930. Subsequently, water delivery and property rights have relied on those administrative decisions for several decades. Those administrative decisions may have contained errors. Had those errors been raised in a timely appeal of the transfer decisions, a court could have corrected any possible mistakes. At this juncture, however, the SRBA court cannot alter the elements which have been relied on for decades. The law of the case on the affect of prior transfer decisions is clear. Accordingly, the *Motion to Set Aside Partial Decrees* is **denied**.

DATED: September 26, 2013.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication