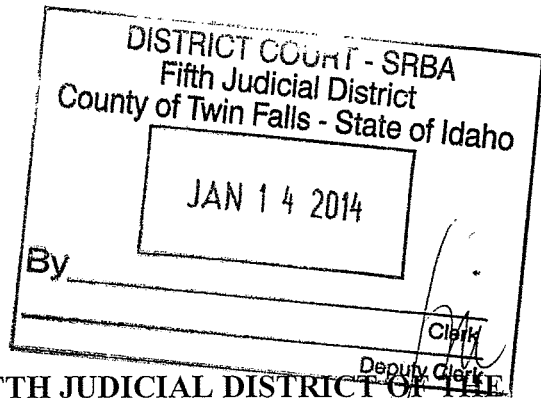


RECEIVED
JAN 16 2014
DEPARTMENT OF
WATER RESOURCES



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. 02-00080

)

)

) ORDER DENYING MOTION TO SET
) ASIDE PARTIAL DECREE

)

) ORDER DENYING MOTION TO FILE
) AMENDED NOTICE OF CLAIM

)

)

)

)

I.

PROCEDURAL BACKGROUND

1. On October 27, 2009, a *Partial Decree* was entered for the above-captioned water right in the name of the Grand View Mutual Canal Company ("Grand View"). It authorizes the diversion of 25 cfs from the Snake River for irrigation purposes under an April 1, 1952, priority date. The *Partial Decree* was Rule 54(b) certified as a final judgment. No appeal was taken from the entry of the *Partial Decree*.

2. On September 30, 2013, Grand View filed a *Motion to Set Aside Partial Decree* and a *Motion to File Amended Notice of Claim*. Through its *Motions*, Grand View seeks to set aside the *Partial Decree* and amend its claim to increase the quantity of water claimed under the right from 25 cfs to 62 cfs. The *Motions* are supported by the *Affidavit of Corbin Knowles*, the *Affidavit of Rohl Hipwell*, and a *Memorandum in Support*.

3. On December 16, 2013, the Idaho Power Company filed a *Response* to Grand View's *Motion to Set Aside Partial Decree*. Idaho Power asserts that it does not necessarily oppose the *Motion* as long as it obtains assurances "that the increase in the rate of diversion

sought . . . will not increase the consumptive use of water by the Grandview Mutual Canal Company, and further, that the increase in the rate of diversion will not place an additional burden on the Snake River.”

4. A hearing on the *Motions* was held on December 17, 2013. At the hearing, Josephine Beeman appeared as counsel on behalf of the Field Family, members of which previously appeared and participated as objecting parties in this matter.¹ They informed the Court that if the *Partial Decree* is set aside, they intend to participate in the investigation of some of the factual issues raised by Grand View’s *Amended Claim*. 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 December 18, 2013.

II. ANALYSIS

A. Motion to Set Aside.

Grand View first asks this Court to set aside the *Partial Decree* entered for the above-captioned water right pursuant to Idaho Rule of Civil Procedure 60(b)(6). Under Rule 60(b)(6), a court may relieve a party from a final judgment, order, or proceeding for “any ... reason justifying relief from the operation of the judgment.” The decision to grant or deny a request for relief from an order or judgment under Rule 60(b) is committed to the sound discretion of the trial court. *Waller v. State, Dept. of Health and Welfare*, 146 Idaho 234, 237–38, 192 P.3d 1058, 1061–62 (2008). Although the Court is vested with broad discretion in determining whether to grant or deny a Rule 60(b)(6) motion, its discretion is limited and the motion may be granted only on a showing of “unique and compelling circumstances” justifying relief. *Miller v. Haller*, 129 Idaho 345, 349, 924 P.2d 607, 611 (1996). The Idaho Supreme Court has noted that “[t]he appellate courts of this state have infrequently granted relief under Rule 60(b)(6).” *Berg v. Kendall*, 147 Idaho 571, 578, 212 P.3d 1001, 1008 (2009).

Consideration of Grand View’s Rule 60(b)(6) argument requires a brief history of the above-captioned right in the SBRA. This matter originated when Grand View filed a *Notice of Claim* for the above-captioned water right. With respect to the quantity element, the *Notice of*

¹ *Objections* to Grand View’s original SRBA *Notice of Claim* were filed by Frances Field and Oscar and Frances Filed Family Limited Partnership.

Claim claimed the right to divert 25 cfs from the Snake River. The Department, following its independent investigation of the claim, recommended the claim be decreed for the diversion of 25 cfs from the Snake River. *Director's Report, Irrigation & Other Users, Basin 02* (Dec. 29, 2006). Grand View had the opportunity and duty to review the recommendation and timely file an objection to any perceived error contained therein. I.C. § 42-1412. Grand View failed to timely do so. However, timely objections were filed by the United States Bureau of Land Management, Frances Field, and the Oscar and Frances Field Family Limited Partnership.² On April 29, 2009, the parties filed a *Standard Form 5* stipulated settlement. As part of the settlement, the parties stipulated to a quantity element of 25 cfs. A *Partial Decree* was entered on October 27, 2009, pursuant to the stipulated settlement decreeing the right with a quantity element of 25 cfs. The *Partial Decree* was Rule 54(b) certified as a final judgment. No appeal was taken from the entry of the *Partial Decree*.

Grand View now asks this Court to set aside the *Partial Decree* pursuant to Rule 60(b)(6) to allow it to claim more water under the right. If set aside, Grand View intends to amend its *Notice of Claim* to seek the right to divert 62 cfs from the Snake River, as opposed to the 25 cfs it originally claimed. Grand View alleges the additional quantity is for conveyance losses in delivering water through the Grand View Mutual Canal, which it asserts it erroneously failed to account for in its original claim. Grand View owns and operates the Grand View Mutual Canal ("Canal"). The Canal delivers water diverted from C.J. Strike Reservoir to its shareholders and other water users. At present, the Canal is approximately 15 miles long from its origin to its terminus. Prior to 1952, Grand View asserts the Canal was several miles shorter, and diverted water straight out of the Snake River. And that in that year, it entered into an agreement with the Idaho Power Company to move its point of diversion several miles upstream to receive water from C.J. Strike Reservoir through an Idaho Power canal, resulting in the present length of the Canal.

Grand View asserts that when it filed its original *Notice of Claim* in the SRBA, it erroneously failed to account for lengthening of the Canal, and the resulting conveyance loss that occurs in delivering water from C.J. Strike Reservoir to its pre-1952 point of diversion. While such mistake, inadvertence and neglect on the part of Grand View could arguably be grounds for

² The *Objections* did not relate to the quantity element of the right, but rather the place of use.

relief under Rule 60(b)(1), Grand View did not timely make a Rule 60(b)(1) motion, and well over six months have passed since entry of the *Partial Decree*. Under Idaho law, Grand View cannot now disguise the same argument as a Rule 60(b)(6) motion to avoid the six month filing requirement. *See e.g., Leasefirst v. Burns*, 131 Idaho 158, 163, 953 P.2d 598, 603 (1998) (holding “a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6)”); *Pullin v. City of Kimberly*, 100 Idaho 34, 37, 592 P.2d 849, 852 (1979) (holding, “it is well settled that 60(b)(1) and 60(b)(6) are mutually exclusive, such that a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6)”).

Furthermore, Grand View has failed to establish a reason why it did not timely raise the quantity element issue prior to the issuance its *Partial Decree*, or at the very least under the timeframe allowed by Rule 60(b)(1) following the issuance of the *Partial Decree*. The record establishes that Grand View has been aware since 1952 that additional water for conveyance loss may be necessary to deliver its water from C.J. Strike Reservoir to its pre-1952 point of diversion. In the April 10, 1952, Agreement with Idaho Power that resulted in the lengthening of the Canal, the parties first recognized that Grand View owned three water rights for an aggregate flow of 75 cfs from its pre-1952 point of diversion.³ The parties next expressly recognized that since the Canal would be lengthened by several miles, additional water may be necessary for conveyance loss:

10. The Power Company Agrees:

(b). That it will make available, in the manner hereinafter specified, for diversion in the Mutual Canal of the Mutual Canal parties where the said Mutual Canal joins onto the Power Company’s said outlet works at the terminus of the Power Company’s canal . . . without charge, cost or expense . . . a sufficient flow and quantity of irrigation water from its C.J. Strike Reservoir to provide the respective Mutual Canal parties herein-after named at their respective outlet works and diversion points from said Mutual Canal, ***after allowing for reasonable evaporation, seepage and other canal losses in transmission in the Mutual Canal***, the flow and quantity of water as follows:

To the Canal Company, a flow of seventy-five (75) cubic feet per second of time;
....

³ In the SRBA, Grand View has received three *Partial Decrees* for an aggregate flow of 75.5 cfs. These include: (1) a *Partial Decree* issue for water right claim 02-80 on October 27, 2009, for 25 cfs; (2) a *Partial Decree* for water right claim 02-81 issued on October 27, 2009 for 49.5 cfs; and (3) a *Partial Decree* for water right claim 02-7336 on October 27, 2009, for 1.0 cfs.

Agreement, p.7 (April 10, 1952) (emphasis added).⁴ Therefore, the record makes clear that the issue of conveyance loss resulting from the lengthening of the Canal has been known to Grand View since 1952.

Therefore, for the reasons set herein, this Court in an exercise of its discretion finds that Grand View has failed to set forth grounds justifying relief from the *Partial Decree* under Rule 60(b)(6).

B. *Motion to File Amended Notice of Claim.*

In the event the *Partial Decree* is set aside, Grand View next asks this Court for permission to file an *Amended Claim*. Since Grand View's *Motion to Set Aside* is denied for the reasons set forth above, its *Motion to File Amended Notice of Claim* is likewise denied. However, even if the *Motion to Set Aside* were granted, it is not appropriate to allow the above-captioned water right claim to be amended at this stage in the SRBA proceedings.

Basin 02 is a substantially completed basin, meaning that almost all claims that were timely filed in the basin have been fully adjudicated. Furthermore, the basin was closed to the taking of late claim as of January 31, 2013. *Order Establishing Deadline for Late Claim Filings in Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63*, SRBA main case no. 39576, SRBA subcase no. 00-92099 (Oct. 12, 2012) (hereinafter, "*Deadline Order*"); *Order Closing Claims Taking Basins 01, 02, 03, 31, 34, 35, 36, 37, 41, 45, 47, and 63, and Disallowal of Unclaimed Water Rights*, SRBA main case no. 39576, SRBA subcase no. 00-92099 (Feb. 13, 2013) (hereinafter "*Closure Order*"). The instant *Motion to File Amended Notice of Claim* is akin to a late claim in that it seeks to claim new water that was not originally claimed. Amendment of the claimed quantity element in this matter would require the reopening of the case, the filing of an *Amended Notice of Claim*, the filing of an *Amended Director's Report*, the opportunity for the filing of *Objections* and *Responses* to the *Amended Director's Report*, and, if necessary, a trial on an element of the claim 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 resolved via stipulation of the parties. Allowing the instant claim to be amended

⁴ A copy of the *Agreement* is attached as Exhibit A to the *Affidavit of Corbin Knowles*.

and re-litigated at this point in time would disrupt the finality of process intended by this Court's *Deadline and Closure Orders*.

Furthermore, interim administration of surface water rights has been authorized in basin 02 according to decreed rights since 2011. *Order Granting State of Idaho's Motion for Order of Interim Administration of Decreed Surface Water Rights in Basin 02*, SRBA Subcase No. 00-92021-02 (Sept. 12, 2011). As a result, water users in basin 02 are certainly justified in relying upon the basin being substantially completed, and in having water administered according their *Partial Decrees*. For these reasons, allowing the instant claim to be amended and re-litigated at this stage would prejudice other parties to the SRBA

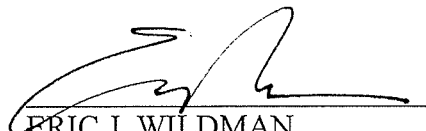
III.

ORDER

THEREFORE, BASED ON THE FORGOING, THE FOLLOWING ARE ORDERED:

1. Grand View's *Motion to Set Aside* **is hereby denied**.
2. Grand View's *Motion to File Amended Notice of Claim* **is hereby denied**.

DATED: 1/14/2014.


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO SET ASIDE PARTIAL DECREE / ORDER DENYING MOTION TO FILE AMENDED NOTICE OF CLAIM was mailed on January 14, 2014, with sufficient first-class postage to the following:

GRAND VIEW MUTUAL CANAL CO

Represented by:
DANIEL V STEENSON
SAWTOOTH LAW OFFICES PLLC
1101 W RIVER ST STE 110
PO BOX 7985
BOISE, ID 83707
Phone: 208-629-7447

OSCAR & FRANCES FIELD FAMILY

Represented by:
JOSEPHINE P BEEMAN
409 W JEFFERSON ST
BOISE, ID 83702-6049
Phone: 208-331-0950

IDAHO POWER COMPANY

Represented by:
SHELLEY M DAVIS
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE, ID 83701-2139
Phone: 208-336-0700

UNITED STATES OF AMERICA

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

