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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: 73-12121 & 73-12122

**MEMORANDUM IN SUPPORT OF MOTION
TO SET ASIDE PARTIAL DECREES**

Chris Drakos and Chris Drakos Enterprises, Inc. (hereinafter collectively "Drakos"), by and through their counsel of record, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby submits this *Memorandum in Support of Motion to Set Aside Partial Decrees*. For the reasons set forth below, the court should set aside the partial decrees issued for Water Right Nos. 73-12121 and 73-12122 because errors associated with a historical water right split—which errors were incorporated into a *Notice of Completed Administrative Proceeding* filed in this court for these rights—were discovered when the ownership of the above subcases was requested to be updated again in 2012.

I. BACKGROUND.

A detailed background of the issues involved in the motion to set aside the above-referenced partial decrees is set forth in a *Memorandum* dated August 6, 2012 prepared by

Garrick Baxter, Deputy Attorney General, to Jonie Barg, Technical Records Specialist at the Eastern Regional Office of IDWR (hereinafter, the “Baxter Memorandum”). The *Baxter Memorandum* is attached as Exhibit 1 to the *Affidavit of Robert L. Harris*.

II. ARGUMENT.

Drakos asserts that the partial decrees for 73-12121 and 73-12122 should be set aside under any one or more of the following bases: (1) Pursuant to Rule 60(a) of the Idaho Rules of Civil Procedure; (2) pursuant to an agreement and stipulation to amend the partial decrees; and/or (3) pursuant 60(b) of the Idaho Rules of Civil Procedure.

A. The partial decrees for 73-12121 and 73-12122 should be set aside pursuant to Rule 60(a) of the Idaho Rules of Civil Procedure.

I.R.C.P. 60(a) provides the following:

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.

In this court’s *Memorandum Decision and Order on Permissive Review*, Subcase No. 34-2459 et al., March 7, 2012 (hereinafter, the “Telford Decision”), Judge Wildman explained the application of Rule 60(a) in the SRBA:

Idaho Rules 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.” 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.”

Telford Decision at 6 (internal citations omitted). Therefore, a clerical error as described under Rule 60(a) is (1) “a mechanical error which can simply be corrected by this judge or the clerk of the court without further proceedings[.]” and (2) the alleged error is “readily apparent from the

record” of a particular subcase. *Id.* at 7-8. As described below, there are two identified mechanical errors with 73-12121 and 73-12122 which can be corrected.

As explained in the *Baxter Memorandum*, a *Notice of Change of Water Right Ownership* (an “NCO”) was submitted on May 27, 1998. *Baxter Memorandum* at 1. Without deeds included in the NCO, the ownership for all of Water Right No. 73-7003 (the parent water right to 73-12121 and 73-12122) was updated to the Parkinsons.

A second NCO was submitted on April 19, 2007, which split 73-7003 into 73-12121 and 73-12122. As is typical and mechanical in the SRBA, a *Notice of Completed Administrative Proceeding* (an “NCAP”) was filed by the Department in the SRBA informing the court of the ownership change. Eventually, based on the NCAP, partial decrees for 73-12121 and 73-12122 were issued.

Eventually a third NCO was submitted on February 21, 2012 by Drakos. This NCO included a series of deeds to evidence the change of ownership of 73-12121. However, a review of the deeds revealed that the result of the first NCO—which was processed without review of deeds—was not correct. *Id.* at 2. The problem with the first NCO—and therefore the first error in this matter—is that the Parkinsons did not actually purchase all of property which contained the place of use of 73-7003. Thus, “it appears that when the first ownership change was processed back in 1998, the Department should have split the water right instead of transferring the entire water right to the Parkinsons.” *Id.* at 2.

The second error was also revealed by information submitted with the third NCO. One of the deeds submitted with the third NCO—which was filed *after* the partial decrees were issued for 73-12121 and 73-12122—was a correction deed correcting a deed submitted with the second NCO. This correction deed “is significant because . . . 40 acres [were] identified by the

Department as being withheld in the second ownership change and thus recommended and decreed to the Parkinsons.” *Id.*

As a result of these two errors, the mechanical subsequently-issued NCAP was filed with the SRBA court based on the administrative ownership changes, and the errors in the NCAP are now readily apparent from the record. There should actually be three water rights split from the 111 acres contained in the parent water right, 73-7003, as described in the chart prepared by Jonie Barg attached to the *Baxter Memorandum*, which is replicated here for convenience:

	Current Owner	Acres	CFS	Annual Volume
	Jack Furey	15.5	.2	46.5
	Doug Parkinson	1.5	.02	4.5
	Chris Drakos Enterprises	94	1.22	282
Total		111.0	1.44	333.0

Because 73-12121 and 73-12122 have been decreed incorrectly, IDWR cannot process the third NCO in a way that corrects the past two errors: “The Department can split water right no. 73-12121, but it can only put in Chris Drakos’s name those acres that were both decreed to the Carraways and Whitworth and are currently owned by Chris Drakos. Moreover, the Department is not in a position to modify the Parkinson’s partial decree for water right no. 73-12122.” *Id.* Therefore, as suggested by Garrick Baxter, “I recommend they approach the SRBA district court and seek to have the partial decrees set aside and corrected consistent with the underlying deeds.” *Id.* It is upon this bases described herein, as well as the recommended of Mr. Baxter, that Drakos has submitted his motion.

Because the errors identified in 73-12121 and 73-12122 are mechanical in nature, and are readily apparent from the record of the land and water right transactions contained in the deeds, the

errors can be corrected by the court without the need for any litigation or further proceedings. This is because the law in Idaho is clear with regard to the nature a water right as an appurtenance to real property and how water rights are transferred. Idaho court decisions hold that as an appurtenance to land, irrigation water rights beneficially used on real property are presumed to be included in a sale of the property unless the water right is expressly reserved in the deed or it can be clearly shown that it was known to both parties that the water right was not intended to be conveyed. This has been confirmed as recently as 2010:

Unless they are expressly reserved in the deed or it is clearly shown that the parties intended that the grantor would reserve them, appurtenant water rights pass with the land even though they are not mentioned in the deed and the deed does not mention ‘appurtenances.’”

Bagley v. Thomason, 149 Idaho 799, 241 P.3d 972 (2010) (citing *Joyce Livestock Co. v. United States*, 144 Idaho 1, 56 P.3d 502 (2007)).¹

The general rule is therefore that water rights of any kind appurtenant to the property are transferred with the property unless the water rights, or one of the water rights, are specifically reserved with language in the deed or purchase and sale documents. This is the law *even if* the deed does not mention the water rights and *even if* the deed does *not* contain the generic “appurtenances” language. The above rules concerning conveyances of land involving water rights by deed also apply to deeds of trust and mortgages. See Idaho Code § 55-813 (the term “conveyance” embraces every instrument by which an estate or interest in real property is created, alienated, mortgaged or encumbered, or by which the title may be affected, except wills).

¹ *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911) (a deed conveying land “together with appurtenances” carries with it the water right appurtenant at the time of the conveyance “unless it was specifically reserved in the deed or it could be clearly shown that it was known to both parties that the water right was not intended to be conveyed”); *Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65 (1933) (water rights “pass with land though not mentioned as such or as appurtenances[,...]unless it affirmatively appears to the contrary directly or by implication”); *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924) (in the absence of fraud or mistake or a reservation to the contrary, a deed conveying real property with the “usual appurtenance” clause effects a transfer of appurtenant water rights).

In short, the errors that led to the incorrect NCAP were mechanical in nature, and can be corrected based on the deeds now contained in the record. Given the clear state of the law, the water rights must be split based on the deeds, and this should not instigate any litigation in the SRBA. For these reasons, which are consistent with the Rule 60(a) principles articulated in the *Telford Decision*, the partial decrees for 73-12121 and 73-12122 should be set aside in order for IDWR to issue an amended NCAP splitting 73-7003 into three water rights as described by IDWR agent Jonie Barg.

B. The partial decrees for 73-12121 and 73-12122 should be set aside pursuant to agreement.

In the *Telford Decision*, Judge Wildman explained a second avenue where errors in the SRBA can be corrected—by agreement—which 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.” *Telford Decision* at 8-9. In this situation, not only do the parties agree to fix the 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.” *Id.* at 9.

With specific regard to 73-12121 and 73-12122, the partial decrees for these water rights should be set aside because the agreement for how they should be decreed is already described in the deeds. However, to ensure that there is no concern from those to whom 73-12121 and 73-12122 were decreed to, these individuals have been included in the certificate of service of the motion, this memorandum, and its supporting documents. To the extent they dispute the motion, they may certainly appear in these proceedings, although given the intent of the parties expressed by the recorded deeds, it appears unlikely that there will be any concern.

C. Idaho Rule of Civil Procedure 60(b).

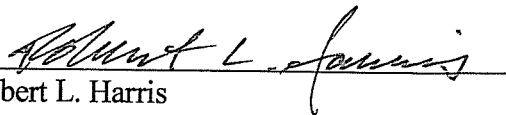
Because the partial decrees for the above water rights were issued more than six months prior to the motion to set them aside, Rule 60(b)(1), 60(b)(2), and 60(b)(3) are not applicable in this matter, even though it appears that mistake or inadvertence could be present. Therefore, the only provision of Rule 60(b) that may apply in this matter is Rule 60(b)(6). This portion of Rule 60(b) provides that a judgment can set aside at any time for “any other reason justifying relief”

In the alternative to the motion to set aside the partial decrees under Rule 60(a), the partial decrees should be set aside under Rule 60(b)(6). We note, however, that in *Leasefirst v. Burns*, the Idaho Supreme Court held that “60(b)(1) and 60(b)(6) are mutually exclusive provisions, such that a ground for relief asserted, falling fairly under 60(b)(1), cannot be granted under 60(b)(6).” 131 Idaho 158, 163, 953 P.2d 598, 603 (1998). Therefore, to the extent the court feels what occurred with 73-12121 and 73-12122 falls into a separate category of error than those described in subparts (1) through (5), then the water right partial decrees should be set aside for other reasons justifying relief outlined in subpart (6).

III. CONCLUSION.

For the reasons set forth above, this court has legal authority to set aside the partial decrees for Water Right Nos. 73-12121 and 73-12122 pursuant to the provisions of Rule 60 of the Idaho Rules of Civil Procedure or by agreement as described herein.

Dated this 6th day of March, 2014.


Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF MAILING

I certify that on this 16th day of March 6, 2014, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, ID 83303-2707

2. Copies to:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

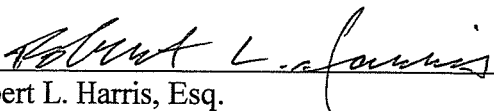
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