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DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

JUL - 9 2019

By

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

Clerk

Deputy Clerk

In Re SRBA

) Water Right No.: 67-2097A

Case No. 39576

) ORDER ON RULE 60(a) NOTICE OF
) COURT'S INTENT TO ISSUE
) AMENDED PARTIAL DECREE

I.

BACKGROUND

Claimant Double C & J Land Co., Inc. filed a claim for the above-captioned water right in the Snake River Basin Adjudication ("SRBA").¹ The claim sought to divert surface water from Jenkins Creek for irrigation, irrigation storage, irrigation from storage, and diversion to storage. Under the quantity element, the claim sought a total quantity of 6.54 cfs and 345 afy. However, under the purpose of use element the claim attributed the following quantities to each use:

Purpose of Use	Quantity
Irrigation	6.72 cfs
Irrigation Storage	345 afy
Irrigation from Storage	345 afy
Diversion to Storage	14.5 cfs

The quantity attributed to diversion to storage by the Claimant exceeded the total quantity of water claimed by it under the quantity element.² The claim contained an inherent conflict in this respect.

On December 22, 2006, the Director filed his recommendation for the claim.³ Under the quantity element, the Director recommended a total quantity of 6.54 cfs and 345 afy. Under the

¹ A copy of the *Notice of Claim* in pertinent part is attached hereto as Exhibit A. The Court notes the claim was originally filed by John and Grace Mainvil. However, Double C & J Land Co., Inc. filed a notice of change of ownership for the right in 2000, thereby taking over ownership of the claim.

² The Court notes the quantity of water attributed to the irrigation purpose of use likewise exceeds the total quantity claimed. However that discrepancy was ultimately corrected in the Director's recommendation.

purpose of use element, the Director recommended that the following quantities be attributed to each use:

Purpose of Use	Quantity
Irrigation	6.54 cfs
Irrigation Storage	345 afy
Irrigation from Storage	345 afy
<u>Diversion to Storage</u>	<u>14.5 cfs</u>

The quantity recommended for diversion to storage exceeded the total quantity recommended under the quantity element. Like the claim, the Director's recommendation contained an inherent conflict in this respect. Notwithstanding, no objections were filed to the recommendation.

On October 20, 2009, the Court entered a *Partial Decree* for the uncontested claim. The quantity element of the *Decree* authorizes a total diversion of 6.54 cfs and 345 afy from Jenkins Creek. Under the purpose of use element, it attributes the following quantities to each use:

Purpose of Use	Quantity
Irrigation	6.54 cfs
Irrigation Storage	345 afy
Irrigation from Storage	345 afy
<u>Diversion to Storage</u>	<u>14.5 afy</u>

Unlike the claim and recommendation, the quantity attributed to diversion to storage does not exceed the total quantity decreed under the quantity element. As a result, the *Partial Decree* does not contain the internal conflict found in the claim and recommendation. That said, it is undisputed that the purpose of use element of the *Partial Decree* is inconsistent with the recommendation. The *Decree* authorizes 14.5 afy to be diverted for diversion to storage while the Director recommended 14.5 cfs for the same use.

On February 25, 2019, the Department filed a Request for Correction of Error, notifying the Court of the inconsistency between the *Partial Decree* and the recommendation. On March 4, 2019, the Court issued a *Notice of Court's Intent to Issue Amended Partial Decree*. In the *Notice of Court's Intent*, the Court recognized the inconsistency to be the result of a Rule 60(a) clerical error. The Court proposed issuing an amended partial decree changing the quantity authorized for diversion to storage from 14.5 afy to 14.5 cfs. The *Notice of Court's Intent* set a hearing on the Court's proposed action and directed that "[a]ny party wishing to object or

³ A copy of the Director's recommendation is attached hereto as Exhibit B.

comment on the Court's proposed action shall do so at that time." It was then served on parties to the SRBA via the docket sheet.

On April 12, 2019, Eckhardt Family LLLP ("Eckhardt") filed an objection to the Court's proposed action, asserting that no amended partial decree should issue. The Claimant subsequently filed a response in support of the Court's proposed action, asserting that an amended partial decree should issue. A hearing on the *Notice of Court's Intent* was held on June 18, 2019.

II.

ANALYSIS

Idaho Rule of Civil Procedure 60(a) provides for the correction of clerical errors in judgments, orders, or other parts of the record arising from oversight or omission. It applies to those errors in which the type of mistake or omission is "mechanical in nature which is apparent in the record." *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004). Errors of a more substantial nature are to be corrected by a motion under Rule 59(e) or 60(b), as "Rule 60(a) is not a vehicle for relitigating matters that already have been litigated and decided, nor to change what has been deliberately done." *Dursteler v. Dursteler*, 112 Idaho 594, 597–98, 733 P.2d 815, 818–19 (Ct. App. 1987). Rule 60(a) permits a court to correct a clerical error pursuant to motion or upon its own volition, with or without notice. Here, the Court's proposed correction is made upon its own volition, pursuant to notice, after being notified of the inconsistency by its independent expert – the Idaho Department of Water Resources. The decision whether to modify a judgment under Rule 60(a) is left to the sound discretion of the trial court.⁴

This case provides a unique set of circumstances. The error which the Court identified in its *Notice of Court's Intent* pertains to the period of use element of the *Partial Decree*. With respect to that element, the Director recommended a quantity of 14.5 cfs for the diversion to storage purpose of use. The recommendation for the claim was uncontested and it was the intent of the Court to issue a *Partial Decree* for the claim consistent with the recommendation. The fact that the *Partial Decree* issued with the purpose of use element identifying 14.5 afy of water to be diverted for diversion to storage (as opposed to 14.5 cfs) was the result of an inadvertent

⁴ Rule 60(a) is discretionary in that it states a court "may" correct a clerical mistake. It does not mandate or require that such a mistake be corrected.

typographical error on the Court's end. Thus, the Court finds the inconsistency between the *Partial Decree* and the Director's recommendation with respect to the purpose of use element to be the result of a clerical error.

That said, it has come to the Court's attention that if it were to correct the clerical error it would create conflict in the *Partial Decree* where none presently exists. As the *Decree* now stands there is no conflict between the quantity element and the purpose of use element of the right. The quantity element authorizes a total diversion of 6.54 cfs and 345 afy. The purpose of use element authorizes a specific diversion rate for each purpose of use which falls within the cumulative parameters set forth in the quantity element. The two elements presently exist in harmony and can be administered consistently with one another. Were the Court to correct the clerical error it would create conflict in the *Decree*, resulting in confusion as to how it should be administered. Namely, the purpose of use element would authorize a rate of diversion for a single use (14.5 cfs) that exceeds the total cumulative rate of diversion authorized under the quantity element (6.54 cfs).⁵ It is axiomatic that a single purpose of use cannot divert a rate of flow which exceeds that cumulatively authorized under the quantity element. The quantity element defines the total amount of water that may be diverted under a water right. The purpose of use element defines how much of the total quantity may be applied to each use.

The unique circumstance faced by the Court is that the Claimant has not asked the Court to make any change to the quantity element of the *Partial Decree*.⁶ Such a change cannot be accomplished under Rule 60(a) as there is no clerical error with respect to the quantity element. The Court notes the Claimant has not filed a *Motion* under Rule 60(b) to reopen the subcase. Rather, it is the Claimant's position that the Court should correct the clerical error in the period of use element, thereby creating inherent conflict in the *Decree*. The *Partial Decree* for this water right was entered over 10 years ago. The *Final Unified Decree* for the SRBA was entered over 4 years ago. In an exercise of its discretion, the Court is disinclined to issue an amended

⁵ In all candidness, had the Court initially realized that correcting the clerical error would create inherent conflict in the *Partial Decree* it would not have issued its *Notice of Court's Intent*. That such a conflict would be created was not realized by the Court until after the *Notice of Court's Intent* was issued and served. It is for circumstances like this that it is the practice of the Court to correct clerical errors in the SRBA after parties to the SRBA are given notice of the error and a chance to be heard.

⁶ Likewise, the Department in its Request for Correction of Error does not notify the Court of any error with respect to the quantity element.

partial decree at this stage in the SRBA proceeding which is irreconcilable on its face and will result in administrative uncertainty.⁷

The Court further holds that correcting the clerical error would be inequitable under the circumstances. The Court finds *Albion-Idaho Land Co. v. Adams*, 58 F.Supp.579 (D. Idaho 1945) to be instructive on this issue. *Albion-Idaho Land Co.* involved an action to adjudicate water rights on the Raft River and its tributaries. 58 F.Supp at 579. A decree was entered in that adjudication on October 23, 1928. *Id.* Approximately 16 years later, Marlin H. Booth, a holder of one of the decreed water rights, brought a Rule 60(a) motion to correct a clerical error in the decree. *Id.* It was conceded that the water right at issue was erroneously decreed with an irrigation season from October 1 to October 15, as opposed to the correct season of April 1 to October 15. *Id.* Notwithstanding, the court denied Booth's Rule 60(a) motion. The denial was based in part on the court's finding that it would be inequitable to grant the requested relief given the length of time that had passed since the error was made and the harm that may accrue to intervening interests:

Although there are exceptions to the rule, freedom from fault and negligence on the part of one seeking such relief is essential, and in the light of the facts here the motion to correct this error cannot be sustained. Clearly this Court should have been advised of the error so that it could have been corrected long before this time. It is well established as a principle of equity that a party seeking relief in a matter like this must use due diligence in asserting his right, and that negligence and laches in this regard are equally effectual bars to relief, and this is especially so if the correction would be harmful to intervening rights. The authorities are uniform in so holding.

There is no evidence that either Crane or Booth was hindered in any way from discovering the mistake and it will be presumed that Booth knew what he was buying and of what the water right consisted at the time the deed was issued to him. There was nothing to hinder Booth at the time from finding out. He was at least carelessly inattentive to what he was buying unless he knew the contents of the decree. He had legal notice of its contents and there is no reasonable showing why both Crane and Booth have slept on their rights for so many years while other rights have intervened by purchase of land and water, not only by the parties appearing here and objecting to the correction of the decree who are injured if the decree is corrected, but no doubt where there are over four hundred other rights, other parties have purchased land and water over the last sixteen years who could claim injury by having the decree corrected.

⁷ If the Claimant believed it was entitled to divert 14.5 cfs for diversion to storage it was required to timely object to the Director's recommendation that the right only be authorized to divert a cumulative quantity of 6.54 cfs. I.C. § 42-1411(5). It did not.

Id. at 581–582.

As in *Albion-Idaho Land Co.*, the Court finds that correcting the clerical error here would be inequitable given the length of time that has passed and the harm that may accrue to intervening interests. On September 12, 2018, Eckhardt filed multiple applications for permit and a transfer application with the Department for water rights on Jenkins Creek and various tributaries thereto. In making the determination to file those applications, Eckhardt relied upon the plain language of the *Partial Decree* issued for the above-captioned water right, which unambiguously authorizes a total diversion rate of 6.54 cfs and 345 afy. As the *Partial Decree* constitutes a final judgment entered in a general stream adjudication, the Court finds Eckhardt's reliance on it to be justified. The Claimant filed objections to Eckhardt's applications, claiming among other things that its *Partial Decree* will be injured by the applications.

The above-captioned water right is senior to Eckhardt's applications. Were the Court to correct the clerical error, it would create conflict as to whether it should be administered to divert a total cumulative quantity of 6.54 cfs or 14.5 cfs from Jenkins Creek. Creating such conflict could potentially decrease the amount of water available in Jenkins Creek to be appropriated under Eckhardt's applications. It may also increase the burden placed upon Eckhardt in the application proceedings before the Department. As its *Partial Decree* was entered in 2009, the Claimant had ample time prior to the filing of Eckhardt's applications to review it and seek appropriate corrections before this Court. It did not. Rather, it sat on its rights and instead has waited all these years to attempt to have the clerical error corrected. The Court finds that equity disfavors correcting the error at this time given: (1) the length of time that has passed since the error was made, (2) the harm that may accrue to Eckhardt's intervening interests, and (3) the fact that correcting the error will result in the issuance of a *Partial Decree* which is irreconcilable on its face. For the foregoing reasons, the Court in an exercise of its discretion will refrain from correcting the clerical error in the *Partial Decree* and will revoke it *Notice of Court's Intent*.

III.
ORDER

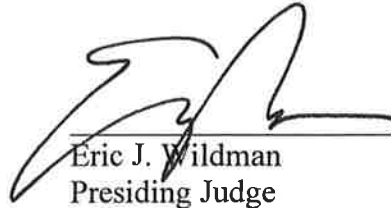
THEREFORE, BASED ON THE FOREGOING, THE FOLLOWING ARE HEREBY ORDERED:

1. In an exercise of its discretion the Court will refrain from taking the Rule 60(a) action proposed by it in its *Notice of Court's Intent to Issue Amended Partial Decree*.

2. The *Notice of Court's Intent to Issue Amended Partial Decree* issued by the Court on March 4, 2019, is hereby revoked.

IT IS ORDERED.

DATED: July 9, 2019


Eric J. Wildman
Presiding Judge
Snake River Basin Adjudication

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A67-02097A

Date Received: 10/ 4/1989

Receipt No: M004809

Received By: _____

COPY FOR
YOUR FILES

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

COPY FOR
YOUR FILES

1. Name: DOUBLE C & J LAND CO INC
Address: 990 JENKINS CREEK RD
WEISER ID

208-549-1232

83672

2. Date of Priority: JUN 29, 1914

3. Source: JENKINS CREEK

Trib. to: SNAKE RIVER

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
11N	05W	6	SE	NW		R	WASHINGTON
		7	SE	NW		R	WASHINGTON
		18	NW	NW	2	R	WASHINGTON
12N	06W	24	NE	NE			WASHINGTON

5. Description of diverting works:

ONE DAM IS ON JENKINS CREEK AND ONE IS OFF STREAM.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or)	A.F.A.
IRRIGATION	03/15	11/15	6.720		
IRRIGATION STORAGE	01/01	12/31			345.00
IRRIGATION FROM STORAGE	03/15	11/15			345.00
DIVERSION TO STORAGE	01/01	12/31	14.500		

7. Total Quantity Appropriated is:

6.540 C.F.S. (and/or) 345.00 A.F.A.

8. Total consumptive use is 1011.0 Acre Feet Per Annum.

9. Non-irrigation uses:

NONE

SCANNED
MAY 10 2004

10. Place of Use:

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
11N	05W	6	SE	SW		IRR	30.0
						Section Acres	30.0
		7	NE	NW		IRR	30.0
			SE	NW		IRR	30.0
			NE	SW		IRR	35.0
			SW	SW	4	IRR	10.0
			SE	SW		IRR	35.0
			NW	SE		IRR	12.0
			SW	SE		IRR	15.0
						Section Acres	167.0
		18	NE	NW		IRR	30.0
			NW	NW	1	IRR	20.0
			SW	NW	2	IRR	30.0
			SE	NW		IRR	30.0
			NW	SW	3	IRR	30.0
						Section Acres	140.0
						Total Acres	337.0

11. Place of use in counties: WASHINGTON

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
67-02097B, 67-02044

14. Remarks:

LIC. DOES NOT LIST ALL P/D 'S.
RESERVOIR #2 LOCATED IN SWSW, S19, T12N, R5W.
RESERVOIR #1 LOCATED IN NWSE, S7, 11N, R5W.
OWNERSHIP CHANGED BY LH 2/7/00.

15. Basis of Claim: LICENSE

Water Right Number: 10558

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 67-2097A

NAME AND ADDRESS: DOUBLE C & J LAND CO INC
990 JENKINS CREEK RD
WEISER ID 83672

SOURCE: JENKINS CREEK

TRIBUTARY: SNAKE RIVER

QUANTITY: 6.540 CFS
345.00 AFY

Right Nos. 67-2044, 67-2097A, 67-2097B, 67-4520, 67-14246, 67-14247
and 67-14251 are limited to a total combined diversion rate of 9.06 cfs.

PRIORITY DATE: 06/29/1914

POINT OF
DIVERSION:

T11N R05W S6 SENW Within WASHINGTON County
T11N R05W S6 SENW Within WASHINGTON County
T11N R05W S18 NWNW Lot 2 Within WASHINGTON County
T12N R06W S24 NENE Within WASHINGTON County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/01 11/15	6.540 CFS
DIVERSION TO STORAGE	01/01 12/31	14.500 CFS
IRRIGATION STORAGE	01/01 12/31	345.00 AFY
IRRIGATION FROM STORAGE	03/01 11/15	345.00 AFY

PLACE OF USE:

IRRIGATION in WASHINGTON County

T11N R05W S06	SENW	1.50	T11N R05W S06	NESW	10.00
T11N R05W S06 Lot 7 SWSW		6.00	T11N R05W S06	SESW	37.00
T11N R05W S07	NENW	35.00	T11N R05W S07 Lot 1 NWNW		6.00
T11N R05W S07 Lot 2 SWNW		1.50	T11N R05W S07	SENW	35.00
T11N R05W S07	NESW	37.00	T11N R05W S07 Lot 3 NWSW		10.00
T11N R05W S07 Lot 4 SWSW		19.00	T11N R05W S07	SESW	33.00
T11N R05W S07	NWSE	10.00	T11N R05W S07	SWSE	11.00
T11N R05W S18	NENW	15.00	T11N R05W S18 Lot 1 NWNW		30.00
T11N R05W S18 Lot 2 SWNW		40.00	T11N R05W S18	SENW	15.00
T11N R05W S18	NESW	1.00	T11N R05W S18 Lot 3 NWSW		40.00
T11N R05W S18 Lot 4 SWSW		40.00	T11N R05W S18	SESW	20.00

IRRIGATION FROM STORAGE same as IRRIGATION

453 ACRES TOTAL

Right Nos. 67-2044, 67-2097A, 67-2097B, 67-4520, 67-14246, 67-14247
and 67-14251 are limited to the irrigation of a combined total of 453 acres in
a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for
the definition of the rights or for the efficient administration of the water
rights as may be ultimately determined by the Court at a point in time no
later than the entry of a final unified decree. Section 42-1412(6), Idaho
Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

Right includes accomplished change in place of use pursuant to Section
42-1425, Idaho Code.

CERTIFICATE OF MAILING

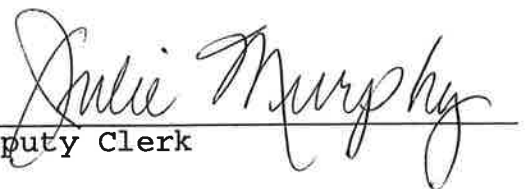
I certify that a true and correct copy of the ORDER OF RULE 60(A) NOTICE OF COURT'S INTENT TO ISSUE AMENDED PARTIAL DECREE was mailed on July 09, 2019, with sufficient first-class postage to the following:

CANDICE M MCHUGH
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

CHRIS M BROMLEY
380 S 4TH STREET STE 103
BOISE, ID 83702
Phone: 208-287-0991

NORMAN M SEMANKO
PARSONS BEHLE & LATIMER
800 WEST MAIN STREET STE 1300
BOISE, ID 83702
Phone: 208-562-4900

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the printed text "Deputy Clerk".