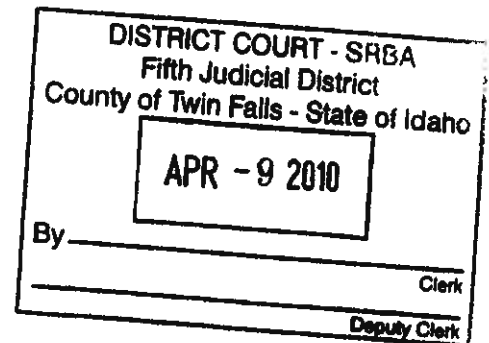


S. BRYCE FARRIS (ISB #5636)
 RINGERT LAW CHARTERED
 455 S. Third, P. O. Box 2773
 Boise, Idaho 83701-2773
 Telephone: (208) 342-4591
 Facsimile: (208) 342-4657
 Attorneys for Killgore's Salmon River Fruit Co.



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: 79-02063, 79-02094 and
 79-04001

**RESPONDENT'S RESPONSIVE BRIEF IN
 SUPPORT OF SPECIAL MASTER'S
 PRELIMINARY RECOMMENDATION AND
 MOTION TO REOPEN SUBCASE**

COMES NOW, Killgore's Salmon River Fruit Co. (hereinafter "Killgore"), by and through its counsel of record Ringert Law Chartered, and hereby submits this Respondent's Responsive Brief in Support of Special Master's Preliminary Recommendation and Motion to Reopen Subcase pursuant to this Court's scheduling order dated February 24, 2010. This Responsive Brief is supported by the pleadings and record already before the Court.

I. INTRODUCTION

On January 8, 2010, Special Master Theodore R. Booth issued a Preliminary Recommendation (hereinafter "Recommendation") concerning Killgore's Motion to Reopen Subcase for water right no. 79-02063 in the name of Daryl and Linda Mullinix (hereinafter "Mullinix"). After considering the circumstances involved and the facts presented, the Special Master's Recommendation concluded that the partial decrees for Mullinix (79-02063) and the decrees for

Killgore (79-02094 and 79-04001) should be reopened for the purpose of allowing objections by both Mullinix and Killgore.

Mullinix has now appealed the Recommendation of the Special Master to this Court pursuant to a Motion for Permissive Review. However, other than re-arguing the same points that were made to the Special Master, Mullinix have not met their burden to demonstrate that the Special Master's findings were "clearly erroneous" or that the Special Master's Recommendation that the partial decrees should be reopened was an abuse of discretion. To the contrary, the Special Master correctly concluded that:

in balancing considerations of finality with the competing interest of justice and accuracy in the Partial Decrees issued for these three water right claims, such considerations of finality do not carry much weight given the short length of time between the filing of the Partial Decree for water right 79-02063 and the filing of the motion to reopen. Finally, based upon the affidavits filed in connection with the motion to reopen, this Special Master finds Killgore has presented a meritorious position.

Recommendation, pg. 5.

The affidavits referenced in the Recommendation are those of Heather Killgore, Jim Killgore and Carl Killgore which respectively state that water has not been used on the Mullinix property since 1985, 1970 and 1974. Rather than presenting any affirmative evidence that the Mullinix property has been irrigated during these time frames, because they cannot, they suggest that conflicting evidence/inferences in the water rights of Killgore should preclude the reopening of these decrees. Such conflicting evidence/inferences may justify reopening of the Killgore water rights to correctly address the merits of the issues, but it is not sufficient to meet Mullinix's burden that the Special Master's findings were not supported by substantial evidence. Nor has Mullinix presented

any argument or evidence to meet their burden that the Special Master's Recommendation was the result of an abuse of discretion, or is not consistent with policy favoring determination of the issues on the merits. Mullinix is requesting that this Court disregard the findings and conclusions of the Special Master, disregard the policy favoring cases being resolved on the merits and disregard the affidavits of Heather, Carl and Jim Killgore so that Mullinix can avoid the fact that their land has not been irrigated from Joe Creek, and cannot be irrigated from Joe Creek, since the 1970s.

II. STANDARD OF REVIEW

A. Standard of Review of the Special Master's Recommendation.

This matter comes to this Court following the Recommendation containing the findings and conclusions of the Special Master that the subcases should be reopened and Killgore's motion should be granted. Both Administrative Order 1 and I.R.C.P. 53(e)(2) clearly stated that this Court "shall accept the Special Master's finding of fact unless clearly erroneous." This Court analyzed what is meant by the term "clearly erroneous" and held that this Court's "standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial, although perhaps conflicting, evidence." (*Memorandum Decision and Order on Challenge of Partial Decrees*, pg. 7 of 49, Subcases 55-10288B et al, (LU Ranches), January 4, 2005). Substantial evidence does not mean uncontradicted evidence. Rather it means that the Special Master's findings can only be rejected "if the evidence was so weak that reasonable minds could not come to the same conclusion the special master reached." *Id.* note 2. The applications of these principles and the inferences from both documentary evidence and testimonial evidence is the prerogative of the special master. *Id.* pg. 8 of 49 (citing to Lewis, Idaho Trial Handbook, § 35.14 (1995), (citing to *Treasure Valley*

Plumbing & Heating v. Earth Resources Co., 115 Idaho 373, 766 P.2d 1254 (Ct.App. 1988)). Lastly, "the party challenging the findings of fact [Mullinix] has the burden of showing error, and a reviewing court will review the evidence in the light most favorable to the prevailing party [Killgore]." *Id.*

Based upon the above principles, this Court shall accept any findings made by the Special Master unless clearly erroneous, and even though there may perhaps be conflicting evidence, the findings may not be rejected if reasonable minds could not come to the same conclusion as the Special Master. These principles would apply to any of the findings contained in the Special Master's Recommendation, including, but not limited to, a finding that despite conflicting evidence of forfeiture the Killgore's have presented a meritorious position. Finally, the evidence presented is to be viewed in a light most favorable to Killgore and Mullinix bears the burden of showing error by the Special Master.

B. Standard of Review under I.R.C.P. 60(b).

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 under the criteria set forth in I.R.C.P. 60(b). (*Order Conditionally Granting Motion to Set Aside Partial Decrees*, pg. 7, Subcases 37-07454 and 37-07602, (Hubsmith), December 3, 2003). The decision whether to grant the relief under I.R.C.P. 60(b) is discretionary. *Id.* As the Special Master correctly noted in his Recommendation, the Special Master is charged with determining the facts concerning the circumstances of issuance of the partial decree and applying I.R.C.P. 60(b) to those facts. Relief is appropriate whenever such action is "appropriate to accomplish justice" and involves "balancing the competing interests of finality and the desire to

achieve justice." *Recommendation*, pgs. 2-3 (citations omitted).

This Court, sitting in its appellate capacity, reviews the relief granted pursuant to I.R.C.P. 60(b) by the Special Master through the abuse of discretion lens. As stated in *Eby v. State*, __ Idaho __, __ P.3d __ *5210 WL 963477 (March 18m 2010), cited by Mullinix:

A trial court's decision whether to grant relief pursuant to I.R.C.P. 60(b) is reviewed for abuse of discretion. The decision will be upheld if it appears that the trial court [Special Master] (1) correctly perceived the issue as discretionary, (2) acted within the boundaries of its discretion and consistent with the applicable legal standards, and (3) reached its determination through an exercise of reason. A determination under Rule 60(b) turns largely on questions of fact to be determined by the trial court [Special Master]. Those factual findings will be upheld unless clearly erroneous. If the trial court [Special Master] applies the facts in a logical manner to the criteria set forth in Rule 60(b), while keeping in mind the policy favoring relief in doubtful cases, the court [Special Master] will be deemed to have acted within its discretion.

Id. pg. 4 (emphasis added).

The abuse of discretion standard, when applied to the discretionary decision by the Special Master, also confirms that the findings of fact will be upheld unless clearly erroneous and confirms that determinations under Rule 60(b) largely turns on questions of fact. The standard also reiterates a policy favoring relief in doubtful cases because of an overriding preference for having a case decided on its merits. Here, the Special Master clearly perceived the issue as discretionary, applied the applicable standards, and reached his determination through the exercise of reason. There was no abuse of discretion and the findings and determination by the Special Master should be upheld.

III. ARGUMENT

A. Reopening the Partial Decrees.

As recognized by the Special Master's Recommendation, Mullinix's water right was recommended in a different Director's Report than those of Killgore. Killgore's water rights were

reported in the Director's Report for Basin 79 on October 24, 2006. Mullinix's water right was reported in the late claim Director's Report on March 21, 2008, after the Killgore's water rights had been partially decreed. The evidence is undisputed that Killgore did not have knowledge that Mullinix had filed a Motion for a Late Claim or that there was a subsequent Director's Report for a competing water right. It is not disputed that Mullinix did not provide notice to Killgore, IDWR did not provide notice to Killgore and the SRBA did not provide notice to Killgore. Once Killgore discovered that Mullinix had filed a late claim which was partially decreed by this Court, the Killgores timely filed a motion to reopen the subcase. Based upon these facts, among others, the Special Master correctly concluded that after balancing the competing interests of finality and the desire to achieve justice, Killgore has satisfied the requirements of Rule 60(b)(6) showing of unique and compelling circumstances justifying relief.

Mullinix suggests that because Killgore and Mullinix were involved in issues concerning Mullinix's use of the Killgore pipeline that the Special Master's findings and discretionary conclusions are somehow erroneous. However, the dispute referenced by Mullinix involved easement/right-of-way issues concerning the interference with the Killgore's pipeline. The record in this matter is void of any response from Mullinix that they asserted a right to use the pipeline based upon a claimed water right and the record is void of any notice by Mullinix that they claimed a water or would be filing a late claim for a water right. Indeed, Mullinix did not provide notice or a response to Killgore that they were filing a late claim or that a late claim had been recommended in the late claim Director's Report. Again, by the time the late claim report for Mullinix's claim was issued, Killgore's water rights had already been decreed. Mullinix, who did not comply with the

time requirements to file claims in the SRBA, is now attempting to use to their advantage the fact that Mullinix failed to timely file a claim and that their motion for a late claim did not require notice to Killgore.

The fact remains that the letters concerning the right of way and use of the pipeline are insufficient to meet Mullinix's burden of showing that the Recommendation is erroneous or that the Special Master abused his discretion. Mullinix has also failed to meet their burden that the interests of justice and policy in favor of the resolution of cases on the merits should be disregarded when there is ample evidence to show that Mullinix's property has not been irrigated since the 1970s. Mullinix suggests that there are no unique or compelling circumstances which would warrant reopening these subcases even though the purpose of the SRBA is to accurately decree water rights, Killgore's were not provided notice of Mullinix's late claim, there are obvious issues concerning the competing claims of Mullinix and Killgore and there is ample evidence to suggest that Mullinix's water right has been forfeited. This Court should affirm the Recommendation of the Special Master that these issues should be resolved on the merits rather than allow a water right, which itself was filed late, to be incorrectly decreed.

B. Meritorious Position.

The Special Master correctly found that based upon the affidavits filed in connection with the motion to reopen, "Killgore has presented a meritorious position." *Recommendation*, pg. 5. The affidavits referenced by the Special Master include the Amended Affidavit of Heather Killgore, the Affidavit of Jim Killgore and the Affidavit of Carl Killgore which respectively stated that Mullinix's property has not been irrigated from Joe Creek since 1985, 1970 and 1974.

Noticeably absent from Mullinix's arguments in these proceedings is any evidence or affidavits that there has been irrigation or use on the property currently owned by Mullinix since 1970. This is because there is no such evidence. Instead of addressing the non-use and forfeiture of the water right with any evidence of use, Mullinix suggests that water right files for the Killgore water rights demonstrate that the Killgore water rights include Mullinix's property. Mullinix then asks the Special Master and this Court to infer that because there have been transfers or other proceedings involving the Killgore rights a meritorious position has not been presented. The Special Master dismissed this invitation to infer from the water rights file because, among other things, the transfer proceedings involved the Killgore rights, the source was the Salmon River and IDWR would not necessarily examine whether any forfeiture has occurred. Thus, the Special Master was presented with the direct testimony and evidence by Heather, Jim and Carl Killgore that Mullinix's water right was subject to forfeiture and on the other hand then asked to infer that it has not been forfeited because of proceedings in water right file which may or may not have addressed forfeiture. Based upon the standards addressed, *supra*, this is at most conflicting evidence, and it does not meet Mullinix's burden that the Special Master's findings were clearly erroneous, that the findings were not supported by substantial evidence or that the Special Master's Recommendation was an abuse of discretion.

IV. CONCLUSION

For the reasons set forth herein, Killgore respectfully request that this Court affirm the Recommendation of the Special Master and allow the subcases to be reopened to address the merits. Mullinix, while avoiding the direct issues of the non-use of water on their land from Joe Creek since

the 1970s, have not met their burden of establishing that the Special Master abused his discretion, and that the findings by the Special Master were clearly erroneous and not supported by substantial evidence. The policy of deciding issues on the merits, and the purpose of the SRBA to accurately decree water rights, substantially favors reopening these decrees in order to ensure that the forfeiture issue is addressed on the merits and fact that the rights appear to include overlapping acres should be resolved. To avoid these issues, as suggested by Mullinix, is not appropriate to accomplish justice.

Dated this 9th day of April, 2010.

RINGERT LAW CHARTERED


S. Bryce Farris

CERTIFICATE OF SERVICE

I certify that on April 9th, 2010, I served copies of this document, including all attachments by mailing a copy thereof, postage prepaid, to each of the parties listed below.

Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098

Daryl K. Mullinix
Linda L. Mullinix
Represented by:
Albert P. Barker
1010 W. Jefferson, Ste. 102
P.O. Box 2139
Boise, ID 83701-2139


Person serving documents