

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

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|----------------|---|--------------------------------|
| In Re SRBA |) | Subcase: 74-07169 |
| |) | |
| Case No. 39576 |) | ORDER DENYING MOTION TO |
| _____ |) | ALTER OR AMEND |

I. PROCEDURAL BACKGROUND

This water right was claimed in the SRBA by Ross Bond, Jr., and recommended in the *Director's Report* as claimed. Both the claim and the *Director's Report* listed the point of diversion as T19N, R23E, S30, SWNWNE. The United States objected to the point of diversion, but later withdrew its objection.

A ***Special Master's Report and Recommendation*** was issued for this water right on October 19, 1999, after the objector United States filed a *Motion to Dismiss Objection to Water Right Number 74-07169*. The *Motion to Dismiss* stated that "[t]he Point of Diversion on BLM land is authorized by Right of Way permit dated October 1999 and is subject to the terms of the Right of Way permit. Therefore, BLM's objection should be dismissed with prejudice."

The ***Special Master's Report and Recommendation*** recommended this water right with the same legal description for point of diversion that was contained in the claim and the *Director's Report*. Nevertheless, the United States and the claimant Ross Bond, Jr., filed a *Joint Motion to Alter or Amend Special Master's Report to Correct Clerical Error* (Nov. 16, 1999). The *Joint Motion* asserted that the ***Special Master's Report and Recommendation*** contained a "clerical error" in the legal description for the point of diversion.

A hearing on the *Joint Motion* was held January 12, 2000. IDWR submitted a *Supplemental Report by IDWR Concerning the Determination of Legal Descriptions Using a Global Positioning System* dated February 25, 2000.

II. ANALYSIS

A. ISSUES RAISED BY THE JOINT MOTION

The *Joint Motion to Alter or Amend Special Master's Report to Correct Clerical Error* asserts that the ***Special Master's Report and Recommendation*** for this right contained a clerical error in describing the point of diversion. The ***Special Master's Report and Recommendation*** described the point of diversion as T19N, R23E, S30, SWNWNE. There was no transcription error since both the claim and the *Director's Report* described the point of diversion the same way. The United States essentially asserts that the point of diversion was described incorrectly at the outset. In support of its theory, the United States has a single argument. "The point of diversion was located by aid of Global Positioning System and found to be T19N, R23E, S30, NENENW."

The issues raised by the *Joint Motion* are:

1. Whether a legal description contained in a claim and a *Director's Report* and then included in a ***Special Master's Report and Recommendation*** can constitute a clerical error?
2. Whether the evidence submitted for this claim regarding a new proposed legal description is sufficient to show the original legal description was in error?

B. CLERICAL ERROR

This Special Master concludes that it may be possible that a legal description in a ***Special Master's Report and Recommendation*** could contain a "clerical error" even though the ***Special Master's Report and Recommendation*** properly transcribed the legal description exactly as found in a previous license, claim, and *Director's Report*.

This Motion was brought as a *Motion to Alter or Amend*, not as a *Motion to Correct Clerical Error* pursuant to I.R.C.P. 60(a). Nevertheless, the reason alleged for the *Motion to Alter or Amend* is that a "clerical error" was made in the point of diversion. Thus it is instructive to look to the standards and cases analyzing Rule 60(a) to evaluate this *Motion to Alter or Amend*.

The critical inquiry is the intent of the prior license, decree, or *Director's Report*. If the intent was to describe a particular point of diversion and that was incorrectly described, it may be possible to characterize that as a "clerical error" which can be corrected even after judgment is entered. See, e.g., I.R.C.P. 60(a).

Idaho Courts have previously recognized the potential for clerical errors in legal descriptions. In *Thorn Creek Cattle Assoc., Inc., v. Bonz*, 122 Idaho 42, 830 P.2d 1180 (1992), the Idaho Supreme Court observed that clerical errors frequently occur in cases of lengthy descriptions of land. The court recognized the authority of courts to correct clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission pursuant to I.R.C.P. 60(a).

In Idaho and many other states, appellate courts distinguish between "clerical errors," which can be corrected to fairly reflect the court's original intent, and "judicial errors," which cannot be corrected. In *Haddock v. Jackson*, 51 Idaho 560, 8 P.2d 279 (1932), the Idaho Supreme Court recognized that a court could not later correct a judicial error, but may correct a "clerical error" to conform to the facts of the case. See also, *Weaver v. Searle Bros.*, 131 Idaho 610, 615, 962 P.2d 381, 386 (1998), and *Annest v. Conrad-Annest, Inc.*, 107 Idaho 468, 470, 690 P.2d 923, 925 (1984).

The Supreme Court of Wyoming defined "clerical error" as an error which prevents a decree from accurately reflecting the judgment rendered. According to the Wyoming Supreme Court, a "clerical error" may be corrected even after a long period of time has passed.

Recently this court was called upon in *Matter of Estate of Kimball*, Wyo. 1978, 583 P.2d 1274 to determine whether a district court erred in correcting a 28-year-old decree under Rule 60(a), and it was said: '* * * * A clerical error has been defined as a mistake or omission that prevented the judgment as entered from accurately reflecting the judgment that was rendered. (Stated another way) the mistake must be apparent upon the face of the record * * *that the error in the original decree of distribution was a clerical one, and that such a mistake is readily apparent from an inspection of this record. Even though many years elapsed before any action was taken, there are no time parameters on the court's power and authority to correct errors of this nature.

Kane v. Kane, 616 P.2d 780 (1980).

The Washington Supreme Court distinguished “clerical error” from “judicial error.” In *Presidential Estates Apartment Associates v. Barrett*, 129 Wash.2d 320, 917 P.2d 100 (1996), the Washington Court defined “clerical error” as an error which failed to embody the court’s

intention: In deciding whether an error is ‘judicial’ or ‘clerical,’ a reviewing court must ask itself whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial. . . . If the answer to that question is yes, it logically follows that the error is clerical in that the amended judgment merely corrects language that did not correctly convey the intention of the court, or supplies language that was inadvertently omitted from the original judgment. If the answer to that question is no, however, the error is not clerical, and therefore, must be judicial. Thus, even though a trial court has the power to enter a judgment that differs from its oral ruling, once it enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record.

Id.

In applying the analyses of our Idaho Court decisions and those of our sister states, this Special Master concludes that an inaccurate legal description may be corrected as a “clerical error” if the recorded legal description did not reflect the intent of the original judgment.

C. EVIDENCE SUBMITTED REGARDING GPS

The *Joint Motion* contained the bare assertion that “[t]he Point of Diversion was located by aid of Global Positioning System (GPS) and found to be T19N, R23E, Section 30, NENENW.” The Court requested that the United States and IDWR submit affidavits explaining in detail how GPS was used to find the legal description. The United States submitted the *Affidavit of Larry A. Brown in Support of Motion to Alter or Amend*. IDWR submitted a *Supplemental Report by IDWR Concerning the Determination of Legal Descriptions Using a Global Positioning System* dated February 25, 2000.

GPS determinations of legal descriptions are generally accepted by experts such as professional land surveyors who determine legal descriptions. IDWR’s *Supplemental Report* explains that a Global Positioning System (GPS) is a collection of orbital satellites which broadcast signals to earth. Satellite signals are received by GPS receivers which can calculate position on earth using an algorithm which triangulates the receiver’s location from the satellite signals. The

data obtained by the GPS receiver is then stored and downloaded for “post-processing” which includes compensation for a variety of margins of error¹ and is essential to the accuracy of the product. *Supplemental Report*.

The accuracy of a GPS receiver depends on the grade of GPS receiver. Hobby-grade receivers used by outdoor enthusiasts typically have a margin of error of 3 to 100 meters. Resource-grade receivers typically record a margin of error of 1 to 10 meters. Survey-grade receivers are the most accurate with a margin of error of less than 1 meter. *Supplemental Report*.

IDWR accepts only measurements conducted by resource-grade or survey-grade GPS receivers and only if the data has been differentially corrected. In addition, IDWR cautions that GPS determinations should be compared to Public Land Survey System’s grid of townships, sections and quarter-quarter sections.

To compare the two properly, a GPS or traditional land survey would need to be done to subdivide the township into section and quarter sections. This survey would need to assign coordinates to all PLSS corners in the vicinity of the point of diversion (POD). The GPS location could then be accurately compared with the survey coordinates of the surrounding PLSS. The legal description of the GPS location could then be determined.

Supplemental Report (Feb. 25, 2000).

D. EVIDENCE ON GPS APPLICATION TO THIS CLAIM

The only information provided regarding application of GPS to the determination of the point of diversion for this water right is provided in the *Affidavit of Larry A. Brown in Support of Motion to Alter or Amend*. The *Affidavit* refers to an attached letter from the United States Department of the Interior, Bureau of Land Management, Salmon Field Office dated October 13, 1999. The *Affidavit* asserts that:

[T]he letter states that the point of diversion for the above captioned water right claim was field verified by Global Positioning System by BLM personnel. The point of diversion is depicted on a Global Positioning System map attached to the

¹ Error is introduced, for example, when satellite signals interfere with one another, when the earth’s atmosphere delays the satellite signal, or when the satellite’s atomic clocks become inaccurate. In addition, the GPS satellites are maintained by the United States Department of Defense which intentionally introduces error signals to protect against hostile forces.

letter. The letter and the map are official United States government documents maintained in the 'case file' . . . located in the Salmon Field Office, Salmon, Idaho.

Affidavit of Larry Brown.

The *October 13, 1999 Letter* makes the broad conclusion that GPS was used to determine the point of diversion, but the letter itself does not provide details regarding the type of GPS receiver used, or how it was used to determine the point of diversion.

We used a Global Positioning System (GPS) unit to verify the actual point of diversion and found that it is located upstream of the legal description in the R/W application and the water license. This will need to be amended to reflect the point of diversion as shown above.

October 13, 1999 Letter.

A court should not rely on such broad conclusory statements, but should rely on evidence and foundation which would allow the court to conclude that the legal description was in error. Critically, the *October 13, 1999 Letter* does not provide information regarding what type of GPS receiver was used, does not identify who used the GPS receiver, does not identify what training the GPS user had, and does not provide information about the circumstances surrounding the application of GPS to this water right.

III. CONCLUSIONS

This Special Master finds that the evidence presented as to how GPS was applied in determining a legal description for the point of diversion failed to meet the burden of showing that the ***Special Master's Report and Recommendation*** contained an error. This Special Master recognizes the potential for error in legal descriptions; and where clear errors are apparent, courts may have the flexibility to correct them. However, legal descriptions should not be changed without substantial evidence that an error exists. Courts should be reluctant to change legal descriptions contained in prior licenses, deeds, or decrees which water right owners and neighboring land holders have relied on without substantial evidence that those legal descriptions contain errors. Mere assertion that a new legal description has been "verified" by GPS is not enough.

Where the record does not describe the grade of GPS receiver used, does not identify the GPS user or his training, does not explain how or whether the change in the legal description could impact neighboring property, or refer to existing Public Land Survey Systems there is insufficient evidence of a "clerical error." Therefore, this Special Master **denies** the *Joint Motion to Alter or Amend*. Therefore, water right 74-07169 should **be decreed** with the legal description for the point of diversion as set forth in the *Director's Report* and the ***Special Master's Report and Recommendation***.

DATED April 5, 2000.

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING MOTION TO ALTER OR AMEND was mailed on April 5, 2000, with sufficient first-class postage to the following:

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