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Department of Water Resources

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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 41-10031

) (Cox)

) ORDER GRANTING WALKER'S MOTION
) TO WITHDRAW MOTION TO RESCIND and
) SPECIAL MASTER REPORT AND
) RECOMMENDATION ON NIELSONS'
) MOTION TO RESCIND

FINDINGS OF FACT

Notice of Claim and Director's Report

Glen and Ida Cox, 531 Teton Drive, Burley, Idaho 83318, filed a *Notice of Claim to a Water Right* on February 27, 1990, claiming 1.68 cfs from Spring Creek (tributary to Rock Creek) for year-'round stockwater use and for irrigation of 100 acres from April 1 to November 1 with a priority date of May 1, 1880, based on a decree.

The Director of the Idaho Department of Water Resources filed his *Director's Reports for Irrigation and Other, Reporting Area 7, IDWR Basin 41* on November 2, 1999. The Director recommended claim 41-10031 as filed but for irrigation of 103 acres from April 1 to October 31.

Objection

Merrill E. Walker filed an *Objection* on December 27, 1999, objecting to priority date and alleging the priority date should be May 28, 1891.

SF-5, Special Master Report and Partial Decrees

On November 2, 2000, the Coxes, Mr. Walker and IDWR filed a *Standard Form 5* agreeing that claim 41-10031 should be decreed as recommended by IDWR. The Special Master filed a *Special Master Report and Recommendation* on November 2, 2000, and the Presiding Judge entered an *Order of Partial Decree* on June 5, 2001, both in accordance with the SF-5.

On August 27, 2001, the Presiding Judge entered a *Notice of Court's Intent to Correct Apparent Clerical Error in Partial Decree; I.R.C.P. 60(a)* and *Order Setting Hearing* to correct a clerical error in the remark regarding the quantity element. The hearing was held on September 18, 2001, in Pocatello, Idaho, and the same day, the Presiding Judge entered an *Order Correcting Clerical Error in Partial Decree; I.R.C.P. 60(a)* and *Order of Amended Partial Decree Entered Nunc Pro Tunc*.

Motions to Rescind

On September 24, 2001, Arthur H. Nielson, Jr., wrote to the Court a letter entitled "*Motion to Rescind Partial Decree Issued*," concerning subcase 41-10031, stating:

[The *Partial Decree*] was issued while the Spring Creek water was in the hearing stage with the settlement still pending. . . . This Partial Decree grants to Mr. Cox the rights to use the water that is Decreed to Arthur H. Jr. and Bonnie Nielson.

On September 28, 2001, Merrill E. Walker also wrote to the Court a letter entitled "*Motion to Rescind Partial Decree Issued*," in subcase 41-10031 stating the decree was granted prematurely: "All users to Spring Creek water have not totally agreed to its use, and settlement is still pending." Mr. Walker said the *Partial Decree* was premature because it was issued prior to a "hearing" before Special Master Bilyeu on June 27, 2001.¹ In addition, Mr. Walker said the *Partial Decree* should be rescinded because it granted Mr. Cox "well over the norm of one (1) inch per acre."

Orders of Reference

On September 24, 2001, the Presiding Judge entered an *Order of Reference to Special Master Dolan* concerning Mr. Nielson's *Motion to Rescind*. The purposes of the appointment included:

- a. To determine the intended purpose of the correspondence and the legal significance of the correspondence, if any. . . .;
- b. To determine whether the correspondence complies with *SRBA Administrative Order 1 (AO1)* and the Idaho Rules of Civil Procedure or whether additional time should be granted to allow the party to file an appropriate motion with the Special Master and/or to obtain counsel in the matter; whether the matter

¹ In his *Motion to Rescind*, Mr. Nielson also mentioned the "hearing" with Special Master Brigitte Bilyeu on June 27, 2001, at the city office building in Rockland, Idaho. He wrote it was during this "hearing" that he first learned about the *Order of Partial Decree* dated June 5, 2001. That hearing was actually a settlement conference conducted by Special Master Bilyeu as settlement moderator in subcase 41-00057.

should be dismissed on its face; or to determine whether the matter would be more appropriately processed administratively through the Idaho Department of Water Resources;

c. If the correspondence is ultimately deemed a sufficient motion, or in the event a new motion is filed in compliance with the applicable rule(s), the Special Master shall conduct all proceedings necessary to issue a recommendation as to the underlying merits.

On November 2, 2001, the Presiding Judge entered an *Order of Reference to Special Master Dolan, Re: Motion to Rescind Partial Decree Issued, filed by Merrill E. Walker*. The purposes of this second appointment were the same as the previous *Order of Reference* concerning Mr. Nielson's *Motion to Rescind*.

Hearing

A hearing on Mr. Nielson's *Motion to Rescind* was held on November 9, 2001, in Rockland, Idaho. Arthur and Bonnie Nielson appeared *pro se*;² David F. Shirley appeared for claimants Glen and Ida Cox; and Garrick L. Baxter appeared for IDWR.

The Nielsons said they wanted to present all their evidence in support of their *Motion to Rescind* at that hearing. The Coxes objected because of insufficient notice, but participated fully when the Nielsons were allowed to present their case through documents and witness testimony.

Post-hearing Matters

On November 13, 2001, the Coxes filed their *Objection to Motions to Rescind Partial Decree and Memorandum in Opposition to Motions to Rescind Partial Decree*. The Coxes argued: 1) the Nielsons' and Mr. Walker's *Motions to Rescind* do not comply with I.R.C.P. Rule 7(b)(1), 2) neither *Motion* sets forth any legal theory or authority under which it is filed and 3) the arguments and facts alleged in the *Motions* are insufficient grounds for rescinding a partial decree.

On November 30, 2001, Mr. Walker filed his *Pleading to Withdraw Motion to Rescind Partial Decree to Water Right* "to eliminate any further expense to the State of Idaho and all other parties involved." That left the Nielsons' *Motion to Rescind* as the only matter for determination.

² Although Mr. Nielson filed the *Motion to Rescind* in his name only, he and his wife both appeared and argued the *Motion*. Therefore, the *Motion* will be referred as their joint *Motion* hereinafter.

Following the hearing on the Nielsons' *Motion to Rescind*, the Special Master visited IDWR's state office in Boise to review its public records concerning the history of water rights in the Rockland area. Specifically, the Special Master gathered background on a "decision of arbitration" entered on April 1, 1890, recorded in the Oneida County book of judgments but never endorsed by a District Court as a judicial decree. During the hearing, the parties and witnesses variously referred to this as the "1890 decree" or the "Houtz arbitration"³ - the beginning point of water rights administration on Rock Creek.⁴

The main IDWR file reviewed by the Special Master is entitled: *In the Matter of Application for Transfer No. 3518/ Water Right No. 41-00013 & Transfer No. 3519/ Water Right No. 41-00008 in the Name of James Juan Spillett*. In the *Final Memorandum Decision and Order*, dated August 30, 1990, p. 10, the seminal importance of the 1890 "decision of arbitration" was described as follows:

For purposes of administering the water rights on Rock Creek, the Department, and the parties diverting water from Rock Creek, have recognized the decision of arbitration as a judgment decreeing the water rights in Rock Creek. The waters from Rock Creek have been administered according to the decision of arbitration since the decision was rendered. A water district has been created by the Department, and a watermaster has distributed water from Rock Creek to the respective users.

DISCUSSION

AO-1 and Rule 60(b)

SRBA Administrative Order 1, Rules of Procedure (AO-1) states in relevant part: "Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." *AO-1*, 14, d, at 22. Since the Nielsons have not alleged there were clerical mistakes in the *Partial Decree*, Rule 60(b) is the standard for reviewing their *Motion to Rescind Partial Decree*.

The Nielsons were not parties to subcase 41-10031 until they filed their *Motion to Rescind*. They failed to object to the Coxes' claim and they failed to move to alter or amend or challenge the *Special Master Report and Recommendation*. In this unique circumstance, the

³ A unique consequence of the "Houtz arbitration" was the use of a Houtz box to measure diversions of water in the Rockland area. The quantity figures recorded with this devise do not correspond to Idaho's measurement standards. Hence, IDWR had to accommodate those figures in its recommendations.

⁴ The Coxes' water right claim in the present matter, 41-10031, diverts from Spring Creek, a tributary to Rock Creek.

closest analogy is for the court to review their *Motion to Rescind* like a motion to set aside judgment entered by default, even though there was no actual default.

Under Rule 60(b), a party seeking to set aside a final judgment by default must show 1) mistake, inadvertence, surprise or excusable neglect, 2) newly discovered evidence, 3) fraud, misrepresentation or other misconduct of an adverse party, 4) the judgment is void, 5) the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or 6) any other reason justifying relief from operation of the judgment. Motions alleging mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or any other reason justifying relief from operation of the judgment must be filed not more than 6 months after the judgment was entered.

The Nielsons filed their *Motion to Rescind* less than 4 months after the Presiding Judge entered the *Order of Partial Decree* and 6 days after entry of the *Order Correcting Clerical Error in Partial Decree; I.R.C.P. 60(a)* and *Order of Amended Partial Decree Entered Nunc Pro Tunc*. Therefore, the Nielsons' *Motion* was filed well within the 6 month deadline.

The Nielsons claimed surprise as the reason they feel they are entitled to relief from the *Partial Decree*. They said they first learned of the *Partial Decree* on June 27, 2001, during a "hearing" in Rockland, Idaho, where the Nielsons, the Coxes, Mr. Walker and others discussed settlement of other disputed water rights.

Standards for Review

A motion to set aside a default judgment presents the trial court with a factual determination. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). In determining whether to set aside a default judgment, a standard of liberality must be applied rather than one of strictness and the party moving to vacate default judgment must be given the benefit of any genuine doubt. *Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 662 P.2d 1171 (App. 1983). A motion to set aside a default judgment is addressed to the sound discretion of the trial court whose discretion will not be reversed in the absence of abuse of that discretion; however, it would be an abuse of discretion for the trial court to grant such a motion without an adequate legal basis for doing so. *Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

In addition to requiring a party to state a reason justifying relief from operation of the judgment, Idaho courts require more. First, a party must show that he or she has acted in good faith and exercised due diligence in the prosecution and protection of his or her rights, such as an ordinarily prudent person would exercise under similar conditions. *Council Improvement Co. v. Draper*, 16 Idaho 541, 102 P. 7 (1909) and *Kovachy v. DeLeusomme*, 122 Idaho 973, 842 P.2d 309 (App. 1992).

Second, a party must show a meritorious defense to set aside a default: Mere mistake, inadvertence, surprise or excusable neglect without disclosure of meritorious defense or meritorious defense without disclosure of mistake, inadvertence, surprise or excusable neglect will not suffice. . . . The facts constituting the defense, whether disclosed by answer, affidavit or both, must also be detailed and must be sufficient, when established, to constitute a defense to the action on the merits. The conclusion of the party or his attorney . . . is not sufficient. Whether the pleaded facts are sufficient to constitute a defense is also one for the trial court.

Thomas v. Stevens, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956).

The policy of requiring a showing of a meritorious defense is founded on the doctrine that it would be an idle exercise for a court to set aside a default if, in fact, there is no justiciable controversy. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). A party who seeks to set aside a default has the burden of supplying detailed facts of the proposed defense. *Smith Electric, Inc. v. Crandlemire*, 100 Idaho 172, 595 P.2d 321 (1979).

Meritorious Defense

Leaving aside such issues as whether the Nielsons provided the Coxes adequate notice of their *Motion to Rescind* and whether the Nielsons exercised due diligence in filing the *Motion* when they failed to join the subcase earlier, the Nielsons' *Motion* must be denied because they failed to show a meritorious defense. That being the case, the Nielsons cannot show good cause to have the *Partial Decree* modified or set aside.

Basis for Director's Recommendation

Steve Clelland, IDWR Adjudication Bureau claims investigator, testified during the hearing at the request of the Special Master concerning the basis of IDWR's recommendation for 41-10031. Mr. Clelland said he based his investigation on a 1980 *Judgment and Decree* ("1980

Decree”) entered in a lawsuit between Rachel Hunter Cox (Glen Cox’ mother and the Coxes’ predecessor-in-interest) and the Nielsons.⁵

The *1980 Decree* awarded to Ms. Cox “all the waters of Spring Creek, with a priority date of May, 1880” to irrigate certain real property (no acreage specified). The Court estimated the entire flow of Spring Creek to average between 1.1988 cfs (50 miner’s inches) and 1.6 cfs (80 miner’s inches).

The *1980 Decree* awarded to the Nielsons,
[T]he right to divert the waters of Spring Creek across a portion of their property .
. . for the purpose of flood irrigating approximately fifteen (15) acres, as long as
they allow the water to then return to the natural channel of Spring Creek and
flow unimpeded to Plaintiff’s [Ms. Cox] land for application.

Mr. Clelland said the *1980 Decree* was not appealed by either party and hence, remains valid. He also said that while the *1980 Decree* was binding on the parties to the lawsuit, it was not binding on IDWR because it was not a named party. Mr. Clelland then explained IDWR’s statutory duty to determine and report all the elements of each water right claim, including missing or vague elements. I.C. § 42-1411 That meant determining: 1) the claimants, 2) source of water, 3) quantity, 4) priority date, 5) purpose of use, 6) period of use and 7) acreage for both claims - 41-10031 (Cox) and 41-00057 (Nielson).⁶ Those are the minimum elements necessary to define and administer water rights acquired under state law. Mr. Clelland cautioned that even decreed water rights are subject to loss because of forfeiture or abandonment.

Binding Effect of Prior 1980 Decree

The Nielsons argued the SRBA *Partial Decree* is invalid because Judge Hargraves did not have complete information when he entered his *1980 Decree*, even though the information was available in Power and Oneida County records. The Nielsons said they began to find documents proving their claim 2 years ago. The Nielsons feel they are entitled to the entire flow of Spring Creek, rather than the Coxes, because the records prove an appropriation made by the

⁵ The *Judgment and Decree* was entered by District Judge George W. Hargraves on June 9, 1980, in Power County District Court, Case No. 6674, entitled: *Rachel Hunter Cox, a widow, plaintiff, v. Arthur H. Nielson Jr. and Bonnie F. Nielson, husband and wife, and James Woodworth, defendants*. The record is not clear who James Woodworth is or what his involvement was.

⁶ On April 4, 1990, the Nielsons filed a *Notice of Claim* under 41-00057 for .3 cfs from Spring Creek to flood irrigate 15 acres from March 15 to November 15 with a priority date of April 30, 1880, based on a decree. IDWR has recommended .1 cfs to irrigate 5 acres.

Coxes' predecessors-in-interest in 1880 was invalid. Finally, the Nielsons argued that if IDWR is not bound by the **1980 Decree**, neither are they.

In 1997, the Idaho Supreme Court discussed the binding effect of prior decrees on IDWR and parties:

Nowhere in Title 42 is the Director "obligated to accept a prior decree" issued in a private adjudication "as being conclusive proof of the nature of a water right." This is especially true in light of longstanding decisions in Idaho that decreed water rights, although protected like any other water right, are not insulated from re-examination by the court and may be lost or reduced based on evidence that the water right has been forfeited, abandoned or lost through adverse possession. Although a decree evidences a legal right to the use of water, it does not obligate the Director to make a recommendation contrary to his findings.

A decree issued in a private water adjudication binds only those parties to the decree. . . .

To hold that the Director is "obligated to accept prior decrees as being conclusive proof of the nature of a water right" is contrary to the Director's statutory role in the SRBA and such a holding would have the effect of binding water right owners not parties in a prior adjudication to a prior decree issued in a private adjudication. This is an untenable outcome [citations omitted].

State v. Hagerman Water Right Owners, 130 Idaho 736, 741-742, 947 P.2d 409, 414-415 (1997).

Based on a review of case law and the facts of this case, it is evident that the Nielsons have failed to show a meritorious defense and thus cannot show good cause to have the **Partial Decree** modified or set aside. They are bound by the terms of the **1980 Decree**, a private adjudication to which they were parties.

IDWR examined the Coxes' claim 41-10031 based on the **1980 Decree** and recommended the elements as required by statute. Once the *Director's Reports* were filed with the SRBA Court, its recommendation constituted *prima facie* evidence of the nature and extent of claim 41-10031. The **Partial Decree** was entered in accordance with that evidence.

ORDER

Merrill E. Walker, having filed his *Pleading to Withdraw Motion to Rescind Partial Decree to Water Right*, the *Pleading* being in the nature of a motion,

THEREFORE, IT IS ORDERED that Mr. Walker's motion is **granted**.

CONCLUSIONS OF LAW

The Nielsons have **not** shown good cause to have the *Partial Decree* entered in subcase 41-10031 modified or set aside.

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that the Nielsons' *Motion to Rescind Partial Decree Issued* in subcase 41-10031 be **denied**.

DATED April 17, 2002.



TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING WALKER'S MOTION TO WITHDRAW MOTION TO RESCIND and SPECIAL MASTER REPORT AND RECOMMENDATION ON NIELSONS' MOTION TO RESCIND was mailed on April 18, 2002, with sufficient first-class postage to the following:

GLEN R COX
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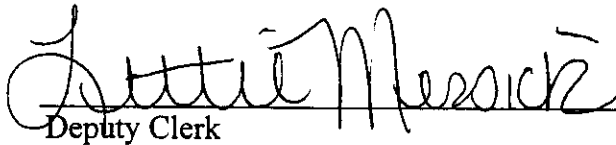
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