

JUN - 9 2003

Department of Water Resources

Louis L. "Leon" and Iris B. Hubsmith

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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	)	Subcase Nos. 37-07454 and 37-07602
	)	
Case No. 39576	)	MOTION TO SET ASIDE JUDGMENTS
_____	)	AND MEMORANDUM IN SUPPORT

Motion

Pursuant to SRBA Administrative Order 1 and Rule 60(b) of the Idaho Rules of Civil Procedure, Louis L. "Leon" and Iris B. Hubsmith, by and through their counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, respectfully move that the Court set aside its judgments with respect to Subcase Nos. 37-07454 and 37-07602.

This Motion is made on the grounds of mistake, inadvertence, surprise, excusable neglect, and newly discovered evidence, as well as the existence of material facts that constitute a meritorious defense. These grounds are more specifically described in the

Memorandum below, and this Motion is further supported by the Affidavit of Allen Merritt and the Affidavit of Dana L. Hofstetter filed contemporaneously herewith.

Memorandum

1. Factual Background.

Three water right water permits (nos. 37-07268, 37-07602 and 37-07454) were obtained during the 1970's for irrigation of Lincoln County lands from a new well. Each of the permits was obtained at a different time, had a different proof of beneficial use deadline and provided for the irrigation of different lands, although all three permits related to the same well. An apparent error in designating the wrong water right number on a proof of beneficial use form, resulted in the erroneous lapsing of one permit (37-07268) and the incorrect diminishment of another (37-07602). These errors, which only recently were discovered, underlie the basis for this Motion. While water right no. 37-07454, apparently was not directly involved in this confusion, it has a combined use limitation with water right no. 37-07602 which will need to be corrected in conjunction with correction of the acreage and quantity of water right no. 37-07602.

On September 19, 1973, the Idaho Department of Water Resources (then called the Department of Water Administration) issued Permit No. 37-07268 to Ralph Bowen for a ground water right from a well located in Section 30, Township 6 South, Range 18 East, Boise Meridian in Lincoln County, Idaho. *Affidavit of Dana L. Hofstetter, Exhibit A.* On

September 8, 1975, Ralph Bowen assigned Permit No. 37-07268 to Steven R. Shaw.

Affidavit of Dana L. Hofstetter, Exhibit B. Steven Shaw then proceeded to obtain other permits to irrigate additional lands from the Section 30 well. On December 30, 1975, the Idaho Department of Water Resources ("IDWR") issued Permit No. 37-07454 to Steven R. Shaw for irrigation of an additional 200 acres. *Affidavit of Dana L. Hofstetter, Exhibit L.* Likewise on June 29, 1977, IDWR issued Permit No. 37-07602 to Steve Shaw for an additional 3.2 cubic feet per second ("cfs") to irrigate 160 acres from the well in Section 30. *Affidavit of Dana L. Hofstetter, Exhibit I.*

Because Permit No. 37-07268 had been obtained first, its proof of beneficial use form was due the earliest, by September 1, 1978. *Affidavit of Dana L. Hofstetter, Exhibit A.* Proof of beneficial use for Permit No. 37-05454 was not due until December 1, 1980. *Affidavit of Dana L. Hofstetter, Exhibit L.* And proof of beneficial use for Permit No. 37-07602 was not due until June 1, 1982. *Affidavit of Dana L. Hofstetter, Exhibit I.*

As is customary, IDWR on June 30, 1978 sent Mr. Shaw a sixty day notice regarding the September 1, 1978 proof of beneficial use deadline for Permit No. 37-07268. *Affidavit of Dana L. Hofstetter, Exhibit C.* On August 2, 1978, Mr. Shaw filed with IDWR's Southern Regional office a Proof of Application of Water to Beneficial Use form. *Affidavit of Dana L. Hofstetter, Exhibit H and Affidavit of Allen Merritt.* While the exact circumstances concerning the filing are not available since Mr.

Shaw is deceased, it appears that IDWR personnel assisted Mr. Shaw with completion and filing of the form on August 2, 1978. *Affidavit of Dana L. Hofstetter, Exhibit H and Affidavit of Allen Merritt.* The form is typed in a fashion similar to the way that IDWR Southern personnel prepared forms at the time. *Affidavit of Allen Merritt.* The person notarizing Mr. Shaw's signature on the form was an IDWR Southern Regional office employee at the time, and the form was notarized in Twin Falls, although the form indicates that Mr. Shaw resided elsewhere. *Affidavit of Allen Merritt.*

In preparing and completing the form, an error was made in identifying Permit No. 37-07602, rather than Permit No. 37-07268. While proof of beneficial use for Permit No. 37-07268 was due September 1, 1978, proof of beneficial use for 37-07602 was not due for almost four more years, until June 1, 1982. As a result of the erroneous identification of Permit No. 37-07602, Mr. Shaw's Permit No. 37-07268 lapsed for the failure to submit that proof of beneficial use form by the September 1, 1978 deadline. *Affidavit of Dana L. Hofstetter, Exhibit D.*

The field examination for Permit No. 37-07602 that was conducted as a result of the submission of the proof of beneficial use was premature. That 1980 field examination identified only 35 acres under Permit No. 37-07602 actually irrigated at that time, instead of the 160 acres that Permit No. 37-07602 authorized. *Affidavit of Dana L. Hofstetter, Exhibit J.* As a result of this, License No. 37-07602 was issued for irrigation of only 35

acres and 0.70 cfs, instead of the full 160 acres and 3.20 cfs authorized under the Permit.

Affidavit of Dana L. Hofstetter, Exhibit K. While Permit No. 37-07454 proceeded to licensing without apparent direct involvement in the proof of beneficial use form mix up, License No. 37-05454's combined quantity limitation with License No. 37-07602 now links the two water rights. *Affidavit of Dana L. Hofstetter, Exhibit M.* Proper correction of License No. 37-07602 likely will invoke the need to correct the combined quantity limitation with water right no. 37-07454.¹

Shortly after Leon Hubsmith purchased the subject property, he learned of lapsed Permit No. 37-07268 for he quickly took steps to reinstate the Permit. *Affidavit of Dana L. Hofstetter, Exhibit E.* These steps were successful; however, because of the belief that proof of beneficial use had not been timely submitted for this water right, IDWR advanced the priority date on the water right from August 23, 1973 to July 11, 1988. *Affidavit of Dana L. Hofstetter, Exhibits A and F.* Ultimately, License No. 37-07268 did issue with an advanced priority date of July 11, 1988. *Affidavit of Dana L. Hofstetter,*

¹ It also should be noted that this combined quantity limitation (5.09 cfs) exceeds the total quantities of each individual water right as licensed (4.0 and 0.7 cfs) and appears on its face to be erroneous. Ordinarily a combined quantity limitation is less than or equal to the total of the individual quantities of the associated water rights. In this case, the combined quantity limitation exceeds the total of the individual quantities of both rights. Nevertheless, this combined use quantity may be determined inappropriate if IDWR has an opportunity to reevaluate the proof of beneficial use form submitted on August 2, 1978 and the appropriate quantity for water right no. 37-07602.

Exhibit G. The incorrectly numbered proof of beneficial use form was discovered only recently in April 2003, after Mr. Hubsmith hired legal counsel to advise him on another matter related to Water Right No. 37-07268. *Affidavit of Dana L. Hofstetter.*

2. Standard of Review.

Two requirements apply to setting aside a default judgment. *Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561. A ground, such as mistake, inadvertence, surprise, or excusable neglect, under Rule 60(b), I.R.C.P., must apply. *Id.* Newly discovered evidence is also a basis for setting aside a judgment under Rule 60(b). Further, the movant must plead facts which, if established, would constitute a meritorious defense. *Clear Springs*, at 143, 845 P.2d at 561. The decision of whether to set aside a default judgment lies within the sound discretion of the trial court. *Baldwin v. Baldwin*, 114 Idaho 525, 527, 757 P.2d 1244, 1246 (Ct. App.1988). However, defaults are not favored and relief from a default judgment should be granted in doubtful cases. *Id.* at 528, 757 P.2d at 1247.

3. Not Just One, But Several of the Grounds for Setting Aside a Judgment are Satisfied.

(a) The proof of beneficial use form for water right no. 37-07268 mistakenly identified water right no. 37-07602.

The identification of Permit No. 37-07602 on the proof of beneficial use form was a clear mistake. Proof of beneficial use for Permit No. 37-07602 was not due until almost

four years later on June 1, 1982, whereas proof of beneficial use for Permit No. 37-07268 was due by the next month, on September 1, 1978. *Affidavit of Dana L. Hofstetter, Exhibits A and F.* Further evidence that the proof of beneficial use form submitted in August 1978 was not intended to apply to Permit No. 37-07602 is found in the 1980 field examination report. In that report, the IDWR field examiner noted that the lands in Section 19 which were covered by Permit No. 37-07602 were not yet being irrigated and further found that the lands in Section 30 covered by Permit No. 37-07268, however, were being irrigated:

Lands in Sec. 19 not irrigated at present by well. [H]owever,
other lands not listed on permit and not covered by other rts.
[rights] are irrigated.

Affidavit of Dana L. Hofstetter, Exhibit J. Because the proof of beneficial use form was premature for Permit No. 37-07602, most of the acreage covered by Permit No. 37-07602 was not yet irrigated. At the time of the field examination, Permit No. 37-07268 had been lapsed and the field examiner erroneously found that the irrigated lands in Section 30 were not covered by another water right. *Affidavit of Dana L. Hofstetter, Exhibit J.* However, comparison of the lands that were found to be irrigated to Permit No. 37-07268 confirms that 110 acres found to be irrigated in Section 30 but with no associated water right, actually were covered by Permit No. 37-07268. *Affidavit of Dana L. Hofstetter, Exhibits A and J.*

Based on the evidence, it appears that the permit holder, Steve Shaw, after receiving the 60 day notice letter regarding the September 1, 1978 proof of beneficial use deadline for Permit No. 37-07268 went to IDWR's Southern Regional office on August 2, 1978. *Affidavit of Dana L. Hofstetter, Exhibit H.* It further appears that on that date IDWR personnel assisted with preparation of the proof of beneficial use form as the form is typed in a manner similar to the way IDWR Southern Regional office staff typically typed forms at that time, the notary public acknowledging Steve Shaw's signature on the form was an employee of IDWR's Southern Regional office and the form was filed with IDWR Southern on the same day. *Affidavit of Allen Merritt.* Given these facts, it appears likely that Mr. Shaw had come to IDWR's Southern Regional office on August 2, 1978 to submit the Proof of Beneficial Use that was due by September 1, 1978. The evidence establishes that the IDWR employee preparing the form for Mr. Shaw typed an incorrect permit number, a permit for which beneficial use was not due until 1982. This mistake resulted in the subsequent lapsing of Permit No. 37-07268 and the identification of reduced acreage and quantity on License No. 37-07602. *Affidavit of Dana L. Hofstetter, Exhibits D and K.* While we may never know why or how an incorrect permit number came to be identified on the proof of beneficial use form, the evidence establishes that the form incorrectly identified a permit number for which proof was not due until 1982 and for which the subject land was not yet fully irrigated.

A mistake of fact, such as this one concerning the proof of beneficial use, is sufficient to set aside a default judgment. *See Gro-Moore, Inc. v. Butts*, 109 Idaho 1020, 1023, 712 P.2d 721, 724 (Ct. App. 1985). For relief under Rule 60(b), the mistake need not have been made by the movant, but may have been made by others. *See Sines v. Blaser*, 98 Idaho 435, 438, 566 P.2d 758, 761 (1977) (“[T]he mistake, inadvertence, surprise or excusable neglect need not be that of the party making the motion.”). On the basis of mistake with regard to water right no. 37-07602 and, indirectly, also to related water right no. 37-05454, the judgments should be set aside.

(b) In addition, inadvertence, surprise and excusable neglect justify setting aside the judgments.

Mr. And Mrs. Hubsmith believed that the SRBA Director’s Report recommendation for Water Right No. 37-07602, based on the previously issued license, was correct. Until the recent discovery of the misnumbered proof of beneficial use form, they had no reason to believe otherwise. Since the Hubsmiths believed that the Director’s Report recommendation correctly reflected the water right, they did not realize the need to object. Under the circumstances, the Hubsmiths’ failure to realize that it was necessary to file an objection with the SRBA Court constituted inadvertence and excusable neglect. The discovery of the misnumbered proof of beneficial use form, buried deep in IDWR files, only just recently occurred, in April 2003. *Affidavit of Dana L. Hofstetter*. This discovery and the determination that water right no. 37-07602 had been inappropriately

limited in acreage and quantity came as an unexpected surprise.

**(c) Newly discovered evidence also
justifies setting aside the judgments.**

The very recent discovery of the misnumbered proof of beneficial use form also constitutes newly discovered evidence which independently justifies setting aside the judgments. Ever since Mr. Hubsmith acquired the land and associated water rights, he operated under the mistaken belief that Permit No. 37-07268 had been properly lapsed for the failure to submit a timely proof of beneficial use form. He took action to get the lapsed permit reinstated based on the fact that he needed additional water rights to cover all of the irrigated acreage on the property. *Affidavit of Dana L. Hofstetter, Exhibit E.* However, since he believed the Permit had been properly lapsed, he agreed to advancement of the priority date. *Affidavit of Dana L. Hofstetter, Exhibit G.*

The ultimate discovery of the error required a side-by-side comparison of two license files, IDWR File Nos. 37-07268 and 37-07602. *Affidavit of Dana L. Hofstetter.* That Steve Shaw had submitted a very early proof of beneficial use in August 1978 for one permit, yet had failed to submit a proof of beneficial use form for the other permit with the impending deadline, was the error discovered in April 2003. *Id.* The actions of the Hubsmiths and IDWR confirm that the error had remained undiscovered prior to April 2003. Accordingly, also on the basis of newly discovered evidence, the judgments should be set aside.

**4. There is a Mentorious Case that Water Right No. 37-07602
Should have More Acreage and a Greater Quantity.**

The license files confirm the premature submission of the proof of beneficial use for water right no. 37-07602 and the concomitant reduction in acreage and quantity as a result of that premature submission. The Hubsmiths would like an opportunity, with the aid of aerial photographs, witnesses, documents and other available evidence, to confirm the proper development of Permit No. 37-07602. There is substantial evidence in IDWR records that the Section 30 acreage which originally had been covered by Permit No. 37-07602 but ultimately was not licensed as a result of the premature proof of beneficial use submission, actually would have been licensed, had proof of beneficial use been submitted in accordance with the correct 1982 deadline. *Affidavit of Dana L. Hofstetter, Exhibits G, O and P.* Some of this acreage and associated water quantity was included on License No. 37-07268 which ultimately issued with the advanced priority date. *Affidavit of Dana L. Hofstetter, Exhibit G.* The remainder of this Section 30 acreage appeared on License No. 37-08679 after IDWR specifically found that there was sufficient information justifying out of sequence water right issuance since the evidence established irrigation of the subject lands by the early 1980's. *Affidavit of Dana L. Hofstetter, Exhibits N, O and P.*

The evidence confirms that proof of beneficial use for Permit No. 37-07602 was submitted prematurely and that this resulted in an inappropriate acreage limitation of 35

acres and an associated 0.70 cfs. Other evidence indicates by the early 1980's when the proof of beneficial use actually was due for Permit No. 37-07602, virtually all of the originally 160 permitted acres actually were irrigated. Accordingly, had proof of beneficial use for Permit No. 37-07602 been properly submitted in 1982 when it was due, the ultimately licensed acreage and quantity elements would have been greater than 35 acres and 0.70 cfs respectively. Accordingly, based on available evidence, a meritorious case justifying the setting aside of the judgments is presented.

5. Conclusion.

For the foregoing reasons, the judgments with respect to Water Right Nos. 37-07454 and 37-07602 should be set aside.

DATED this 6th day of June, 2003.

HOFSTETTER LAW OFFICE, L.L.C.
For Louis L. "Leon" and Iris B. Hubsmith

By 
Dana L. Hofstetter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of June, 2003, I caused a true copy of the foregoing MOTION TO SET ASIDE JUDGMENTS AND MEMORANDUM IN SUPPORT to be served by the method(s) indicated on the following:

Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 3rd Avenue North
Twin Falls, Idaho 83303
☐ U.S. Mail ☐ Fed Ex ☒ Hand ☐ Fax

Copies to:

IDWR Document Depository
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