

Thomas B. Dominick, Esq.
HOAGLAND, DOMINICK & HICKS
ATTORNEYS AT LAW, PLLC
Shoreline Center, Suite 100
1471 Shoreline Drive
Boise, Idaho 83702
Telephone (208) 343-9111
Facsimile (208) 386-9944
ISB No. 2908

RECEIVED

DEC 22 2003

Department of Water Resources

Attorneys for Andrée Doyle and
Versalles Real Estate Corporation

**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: 72-02068

MEMORANDUM IN SUPPORT OF
RELIEF FROM PARTIAL DECREE
OF DISALLOWANCE/SPECIAL
MASTER'S REPORT

COPY

COME NOW Andrée Doyle and the Versalles Real Estate Corporation (Versalles) by and through undersigned counsel of record, Thomas B. Dominick, Esq. of the firm Hoagland, Dominick & Hicks, PLLC and respectfully submit this Memorandum in Support of Independent Action for Relief from Order of Partial Decree Disallowing Water Right 72-0268 entered April 25, 2000 and the Special Master's report dated February 15, 2000.

STATEMENT OF FACTS

As the Affidavits of Thomas B. Dominick and Andrée Doyle filed in support of this motion attest, Clayton Silver Mine owned water right license number 16995 asserting a priority date of October 18, 1928 for industrial and power usage. A claim was filed by Roland Rovetto, a former caretaker of the

mine, in a timely fashion on or about October 25, 1989. After Mr. Rovetto filed the claim on behalf of the Clayton Silver Mines, listing his own address as the place for service of notice with respect to water adjudication proceedings, a dispute arose between the Clayton Silver Mines and Mr. Rovetto concerning wages during the year 1992. Mr. Rovetto claimed he was owed back wages of over \$100,000 and refused to serve any longer as caretaker. In May of 1993, Versailles, then owned by Mr. and Mrs. Andr e Doyle, obtained title to the property pursuant to a quit claim deed. There is no evidence that Mr. Rovetto ever informed the Doyles or Versailles that he had filed a claim in the Snake River Basin adjudication. Versailles is a Panamanian Corporation.

After he received notice of the hearing in 1999 with respect to the water right, Mr. Rovetto failed to notify either the Doyles or Versailles that the claim was proceeding to a hearing. See Affidavit of Andr e Doyle. Mr. Rovetto recently informed Mr. Dominick that he attempted to contact Mr. Doyle in approximately the year 2000 but was unable to do so. See Affidavit of Thomas B. Dominick. Mr. Rovetto then informed the Special Master at the hearing that he was not involved with the corporation any longer. As a result, a motion to dismiss for failure to prosecute was brought by the United States and the Special Master dismissed the claim after repeatedly trying to reschedule the hearing. It is not surprising that since Mr. Rovetto failed to notify Doyle or Versailles that the water right claim was proceeding to a hearing that no one appeared on behalf of the property owners.

After the Special Master's Order, Mr. Rovetto again failed to notify either the Doyles or Versailles that their water right was subject to forfeiture unless someone immediately appeared on behalf of the corporation to assert the water right.

Finally, in April of 2000, the Presiding Judge issued an Order of partial decree disallowing or attempting to set aside the Special Master's Order. Between the time the Special

Master issued his order of disallowance and the Presiding Judge issued the order of Partial Decree, Mr. Rovetto filed a claim to the water right under Versailles' license, claiming he was the owner of the property and asserting his own claim to the water right for industrial and power usage. He filed his own claim in February of 2000. As a result of Mr. Rovetto's actions, the water right was lost. Rovetto never informed Mrs. Doyle or Versailles of the Special Master's February 2000 Order disallowing their water right or of the Presiding Judge's Partial Decree at any time. See Affidavit of Andr e Doyle. It was not until a real estate agent/broker named Tom Hutchinson secured a buyer for the mine that Hutchinson was able to determine that the water right had been disallowed. Tom Hutchison provided the first such notice. To this day, Mr. Rovetto is attempting to assert the water right as his own. Mr. Rovetto had no reason to ever advise the Doyles, given their wage dispute, about the water right proceedings and every reason not to do so. Had he notified the owners they were about to lose their water rights, they could have appeared in the action and presented their claim properly.

Mr. Doyle died in the year 2000 and Mrs. Doyle has little, if any, understanding of water right issues. Given these facts, and for the reasons stated below, the Court should grant Versailles' action to set aside the Partial Decree disallowing water right dated April 25, 2000 and the Special Master's report dated February 15, 2000.

ARGUMENT

It is well settled in Idaho that Rule 60 (b) of the Idaho Rules of Civil Procedure specifically preserves three preexisting means of attacking a judgment. This part of the Rule reads as follows:

This Rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside, as provided by law, within one (1) year after judgment was entered, a judgment obtained against

a party who is not personally served with Summons and Complaint either in the State of Idaho or in any other jurisdiction, and who has failed to appear in such action, or to set aside a judgment for fraud upon the Court.

There is no time limit with respect to filing an independent action to relieve a party from a judgment. The Idaho Supreme Court held in Gregory v. Hancock, 81 Idaho 221, 340 P. 2d. 108 (1959), the power of the Court to entertain such an action is “inherent, not statutory, it is not subject to the time limitations imposed by the statute” which provided for attack of default judgments. Gregory, however, did hold that the independent action must be brought within a reasonable time. 81 Idaho at 237.

Historically, an independent action in equity to relieve a party from a judgment lies in the presence of extrinsic as opposed to intrinsic fraud. A typical definition of extrinsic fraud is:

Fraud is extrinsic where a party is prevented by trick, artifice or other fraudulent conduct from fairly presenting his claims or defenses or introducing relevant and material evidence. 7 Moore’s Federal Practice, para. 60.37(1), pp.612-13. See United States v. Throckmorton, 98 U.S. 61 (1978).

While the distinction between extrinsic and intrinsic fraud may be easy to state and understand in the abstract, it has proved extremely difficult of application to actual cases. As one commentator puts it “the distinction rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply.” 11 Wright & Miller, Federal Practice and Procedure, pp. 240-1. As a result, the Federal and Idaho Rules of Civil Procedure have abrogated the distinction between extrinsic and intrinsic fraud with respect to motions for relief from judgment, I.R.C.P. 60 (b) (3), and many commentators have urged the same abrogation with respect to the independent action.

In the present case, the actions of Roland Rovetto, the former caretaker, constitute, at the very least, serious over reaching and neglect. Mr. Rovetto filed the claim on behalf of the corporation in 1989 but failed to notify the owners of the property that he had filed a claim. After Versailles acquired the property, Rovetto was no longer working for the corporation. When he received notice of the hearing date, Rovetto simply appeared and stated that he no longer worked for the corporation. However, he failed to attend any other hearings. He did not contact Mr. Doyle, who died in 2000, Mrs. Doyle, or anyone else from Versailles to inform them that the claim was being adjudicated. After the Special Master dismissed the claim for failure to

prosecute, Mr. Rovetto almost immediately filed a claim on behalf of himself asserting that he “owned” the property. Mr. Rovetto’s claim was filed in February of 2000, more than two months before the Presiding Judge issued the Partial Decree of Disallowance. Whatever Mr. Rovetto’s motives, his failure to contact the property owners to allow them to assert their claim and his attempt to assert the claim on his own behalf, prevented the owners of the property from properly preserving their licensed water right. To this day, Mr. Rovetto is attempting to assert the water right claim under Versalle’s license. Since he is pursuing the water right on his own behalf he, regardless of motive, had no reason to ever inform the owners that they should assert the water right on behalf of themselves. Given Mr. Doyle’s death, Mrs. Doyle’s lack of knowledge of water rights and the actions of Mr. Rovetto, this Court should grant Versalles’ independent action for relief from the judgment and partial decree of disallowance dated April 25, 2000 and the Special Master’s Report dated February 15, 2000.

In the Fall of 2000, Versalles, having discovered that Mr. Rovetto’s actions had cost them their water right, retained its current attorney of record who has diligently proceeded to pursue Versalles’ water right. In October of 2003, counsel was informed by the Idaho Department of Water Resources that all that was needed was a change of ownership form changing ownership of the water right from Rovetto to Versalles. Within a few days of that request, counsel submitted documentation showing that Versalles owned the property to the Department of Water Resources. After a few weeks passed, the Department of Water Resources informed counsel for Versalles that in fact a partial decree of disallowance had been entered. Versalles acted reasonably in attempting to set aside the judgment and order in this matter given the complexity of the case, the necessity of contacting Mr. Rovetto and investigating the facts.

It would be tragic for a licensed water right to be lost and the sale of the mine property disrupted, under the unusual and rare facts of this case. Equity demands that the Partial Decree of Disallowance and Special Master’s report be set aside and Versalles be allowed to pursue this water right.

In conclusion and for the foregoing reasons, Versalles’ independent action for relief from

the Partial Decree entered April 25, 2000 and the Special Master's report dated February 15, 2000 should be granted.

DATED this 19 day of December, 2003.



THOMAS B. DOMINICK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of December, 2003, I served the foregoing document by having a true and complete copy personally delivered or by facsimile and/or by depositing the same in the United States Mail, postage prepaid thereon, and addressed to:

Director of IDWR
P.O. Box 83720
Boise, Idaho 83720-0098

USDI BLM
U.S. Department of Justice
Environmental & National Resources
550 West Fort Street, MSC 033
Boise, Idaho 83724

Hand Deliver _____
U.S. Mail X
Facsimile _____
Overnight Mail _____



Thomas B. Dominick