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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**

TWIN FALLS CO. IDAHO
FILED
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In Re SRBA

Case No. 39576

) **ORDER SETTING ASIDE ORDER OF**
) **PARTIAL DECREE DISALLOWING**
) **WATER RIGHT NO. 72-02068;**
)
) **ORDER CONSOLIDATING**
) **SUBCASES 72-02068 and 72-02068B**
) **and DESIGNATING SUBCASE AS**
) **72-02068;**
)
) **ORDER REINSTATING OBJECTION**
) **TO 72-02068 FILED BY THE UNITED**
) **STATES;**
)
) **ORDER OF RECOMMITMENT TO**
) **SPECIAL MASTER TERRENCE**
) **DOLAN**
)

I.

PROCEDURAL BACKGROUND AND FACTS

A. Water right 72-02068 is a hydropower and industrial claim based on a license. In 1989, the right was claimed in the Snake River Basin Adjudication (SRBA) on behalf of Clayton Silver Mines, Inc., ("Clayton Mines") by Roland Rovetto (Rovetto"). At the time Rovetto was an employee (caretaker for the mine) for Clayton Mines and his address was listed as the address of service for Clayton Mines.

B. In May of 1993, the mine property, together with appurtenant water rights, was transferred from Clayton Mines to Versalle Real Estate Company ("Versalle") via quitclaim deed. (The deed was silent as to water rights and the schedule referred to in the

deed was not submitted as part of the record.) Versalle is a Panamanian corporation owned by Mr. and Mrs. Andree Doyle ("Doyle").

C. According to Doyle, Rovetto failed to inform Doyle of the pendency of the claim in the SRBA proceedings in conjunction with the purchase of the mine. Rovetto's role in the property transaction is not ascertainable from the record. However, following the sale of the mine in 1993, Doyle/Versalle failed to notify the Idaho Department of Water Resources (IDWR) of the change in ownership of the license (irrespective of the pendency of the SRBA). As a result, the address of service for SRBA proceedings continued to be that for Clayton Mines and Rovetto. After the property changed ownership in 1993, Rovetto no longer worked for Clayton Mines. Rovetto did not establish any employment or other agency type relationship with Versalle.

D. In 1999, IDWR recommended and reported the right in the *Director's Report Irrigation & Other Basin 72* that was filed with the SRBA Court on January 26, 1999.

E. On June 2, 1999, the United States Bureau of Land Management (BLM) filed a *Standard Form 1 Objection*, contesting the recommended place of use for the right.

F. An initial hearing was held before the Special Master on November 30, 1999. Pursuant to the notice sent to Rovetto on behalf of Clayton Mines, Rovetto appeared at the hearing and notified the Special Master that he was no longer affiliated with Clayton Mines. Thereafter, counsel for the BLM attempted to perfect service on Clayton Mines' last known address and learned that Clayton Mines was no longer authorized to conduct business in Idaho. Service was attempted somewhere in Florida.

G. On January 31, 2000, the BLM filed a *Motion to Dismiss for Failure to Prosecute*. On February 15, 2000, the Special Master issued a *Special Master's Report, Findings of Fact and Conclusions of Law* recommending that the right be disallowed for failure to prosecute, as the claimant or successor in interest failed to prosecute.

H. On April 25, 2000, based on the recommendation of the Special Master, an ***Order of Partial Decree Disallowing Water Right 72-02068*** was issued by Judge Barry Wood, then presiding.

I. Following the issuance of the Special Master's recommendation on January 31, 2000, but prior to the order disallowing the right issued on April 25, 2000, Rovetto filed a ***Motion to File Late Notice of Claim*** on February 4, 2000, for the same water right previously recommended disallowed. (The claim was filed in his own name and not on behalf of Clayton Mines). The claim was based on the same license but assigned water right number 72-02068B.

J. On May 16, 2000, Judge Wood granted Rovetto's ***Motion to File Late Notice of Claim***. Presumably because the 72-02068 right was previously reported and subsequently disallowed, IDWR never reported the 72-02068B right in a Director's Report. That claim is still pending and no further action has been taken since the granting of the late claim.

K. On December 22, 2003, Doyle and Versalle, through counsel, filed an ***Independent Action for Relief from Partial Decree of Disallowance/Special Master's Report*** seeking to set aside the order disallowing the 72-02068 right. Versalle/Doyle assert breach of fiduciary duty on behalf of Rovetto for failure to notify of the pending SRBA proceeding as basis for setting aside the ***Partial Decree***.

II.

CONCLUSIONS OF LAW

A. **No Finding of Breach of Fiduciary Duty**

Versalle/Doyle assert breach of fiduciary duty on behalf of Rovetto for failing to notify of the pendency of the SRBA litigation. Based on the record, this Court is not convinced that Versalle/Doyle established a fiduciary relationship.

Rovetto was only an employee for Clayton Mines. He was not a principal in the corporation. Immediately after the mine was sold to Versalle, Rovetto ceased to be an employee of Clayton Mines. Whether Rovetto was informed as to the terms of the

transaction, particularly whether the water rights were transferred or under what terms, is not apparent from the record. (Again, the quitclaim deed is silent as to water rights.) When the property was sold, Versalle had the duty to notify IDWR of a change in ownership of the license, irrespective of the SRBA. Had IDWR been notified of the change in ownership, the new ownership would have also been reflected in the SRBA. The property was sold in 1993, and the claim was not reported until 1999, thus Versalle had approximately six years within which to notify IDWR or at least inquire as to whether any action needed to be taken as with respect to the hydropower right a result of the sale.

This is not a case where the existence of a water right is in doubt, as may occur with a beneficial use right when a deed is silent. Given the hydropower nature of the right with its related infrastructure, Versalle was presumably aware of the existence of the water right. Thus reasonable efforts should have included making inquiry of IDWR as to compliance with any requirements incidental to a change in ownership of the license, particularly with respect to a hydropower right. This was clearly not Rovetto's responsibility.

When Rovetto appeared at the Initial Hearing for 72-02068, he represented that he no longer worked for Clayton Mines. The Court cannot find that Rovetto had a duty to notify Versalle of the pending adjudication based on the nature of Rovetto's former relationship with Clayton Mines. Rovetto's conduct in subsequently filing the late claim in his own name is not necessarily suspect, as there may be legitimate legal theories under which Rovetto could pursue the claim in his own name. For example, if neither Versalle nor Clayton Mines were conducting business in Idaho or otherwise using the right since 1993, the question is at least raised as to who was using the water right.

For these reasons, for purposes of the instant motion only, the Court finds that the record would not support the relief requested based on breach of fiduciary duty. However, the Court grants the relief requested on other grounds.

B. Effect of Granting Late Claim in 72-02068B

The Court finds that Judge Wood's granting of the late claim in 72-02068B is sufficient grounds for granting the relief requested because both claims 72-02068 and 72-

02068B are for the same water right based on the same license. Therefore, whether the Court sets aside the ***Partial Decree*** in 72-02068 and allows the claim to proceed under 72-02068B, the net result is the same. Versalle can still object to the claim and contest ownership. Judge Wood's granting of the late claim essentially reopened the matter. Therefore, it becomes unnecessary to address I.R.C.P. 60(b) standards. Accordingly, for purposes of properly adjudicating the late claim, this Court will grant the motion and set aside the ***Partial Decree*** disallowing the late claim in 72-02068 and consolidate the two subcases.

Therefore, based on the foregoing, the following are hereby ordered:

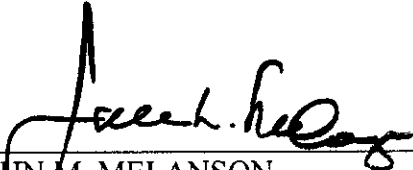
1. IT IS ORDERED that the ***Partial Decree Disallowing Water Right 72-02068*** is hereby set aside;
2. IT IS FURTHER ORDERED that subcases 72-02068 and 72-02068B are consolidated and designated under subcase 72-02068. Parties to the individual subcases will be deemed parties to 72-02068. The Clerk of the Court is instructed to make the appropriate entries in the register of actions for each water right number;
3. IT IS FURTHER ORDERED that the ***Standard Form 1 Objection*** filed by the BLM in 72-02068 is hereby reinstated and need not be re-filed unless an amended director's report is ultimately determined by the Special Master to be required. As the record now stands, because the two rights are identical the Court finds no reason to have the right re-reported by IDWR in a forthcoming late claims director's report for the benefit of other parties to the adjudication, albeit the parties to the subcase should be given leave to file objections and responses, if deemed necessary;
4. ORDER OF REFERENCE TO SPECIAL MASTER DOLAN. Due to Special Master Cushman's forthcoming retirement, this matter is hereby referred to Special Master Terrence Dolan for proceedings on the late claim and objection consistent with this ***Order***. Special Master Dolan shall have the authority to preside over this subcase and issue reports as set forth in ***SRBA Administrative Order 1*** and shall have the authority to: fix the time and conditions for the filing of supplemental pleadings and amendments to pleadings; schedule and hear dispositive and nondispositive motions of any party; schedule and conduct all pretrial matters, including pretrial, status and scheduling conferences; issue pretrial orders; schedule and limit the scope of discovery;

order the discovery of facts known and opinions held by experts; issue protective orders; issue orders compelling discovery; sanction failure to comply with pretrial, trial-related or post-trial orders; summon witnesses and issue subpoenas; take such evidence as may be introduced or deemed necessary by her; rule on the admissibility of evidence; call witnesses on behalf of the Court; and appoint expert witnesses for the Court.

Special Master Dolan shall set proceedings in conformity with **SRBA Administrative Order 1**, section 9, notwithstanding the provisions of I.R.C.P. 53(d)(1), and exercise the power to regulate all proceedings in every hearing and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order.

IT IS SO ORDERED.

Dated May 10, 2004.



JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER SETTING ASIDE PARTIAL DECREE; ORDER CONSOLIDATING SUBCASES; ORDER REINSTATIN ORDER OF RECOMMITMENT was mailed on May 10, 2004, with sufficient first-class postage to the following:

ANDREE DOYLE
VERSALLES REAL ESTATE CORP
Represented by:
THOMAS B. DOMINICK
SHORELINE CENTER, SUITE 100
1471 SHORELINE DRIVE
BOISE, ID 83702
Phone: 208-336-2844

USDI BLM
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

CLAYTON SILVER MINES INC
ROLAND ROVETTO
BOX 31
CLAYTON, ID 83227
Phone: 208-838-2224

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

A handwritten signature in cursive script, reading "Julie Murphy", is written over a horizontal line. The signature is in dark ink and is positioned to the right of the "Deputy Clerk" text.