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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) Subcases 41-00042 and 41-00047
) (Roper)
Case No. 39576)
) SPECIAL MASTER REPORT
) AND RECOMMENDATION

Findings of Fact

41-00042

On February 25, 2004, Lance and Katrina Roper, 3822 Rock Creek Road, American Falls, Idaho, 83211, filed a *Motion to File Late Notice of Claim* in subcase 41-00042 seeking 3.9 cfs from Rock Creek to irrigate 195.4 acres in Power County from April 1 to October 31 with a priority date of September 15, 1882, based on a decree.¹ The Ropers gave the following reason for not filing the claim earlier:

IDWR had me file on 3.9 CFS of high water instead of the juniper water rights because of the confusing nature of it once being a mining right but used for irrigation. The 1909 date put on the high water right makes it worthless which I wasn't aware of till we had low water and I tried to get mine delivered. The juniper water right has a 1882 date that gave us all un-used water in the valley We have filed on an amount historically used on our farm and required to keep us in operation.²

¹ The *Standard Forms 4* filed by the Ropers were not marked as motions to file late notices of claims or motions to file amended notices of claims. At a later hearing on the *Motions*, counsel for the Ropers designated them as motions to file late notices of claims.

² On March 12, 2001, an *Amended Partial Decree* was entered for uncontested water right 41-10264 granting to Evelyn Roper (Lance Roper's mother) 3.9 cfs from Rock Creek to irrigate 195.4 acres in Power County from April 1 to October 31 with a priority date of April 1, 1909, based on beneficial use. Presumably, that is the "high water right" mentioned by the Ropers in their *Motions*. The "juniper water rights" they referred to derive from water appropriated by the Juniper Mining Company in 1882, for mining use and awarded to W.H. Filbrick in the 1903 *Houtz Arbitration*. More on that later.

The Special Master also noted that on March 12, 2001, an *Amended Partial Decree* was entered in uncontested water right 41-00041A granting to Ms. Roper 1.5 cfs from Rock Creek to irrigate 168 acres with a priority date of May 20, 1884, based on a decree. The record is not clear how this water right fits in the *Houtz Arbitration* and was not mentioned during the hearing on the *Motions to File Late Notices of Claims* in subcases 41-00042 and 41-00047.

The Ropers attached to their *Motion* pages 14 and 15 from the *Houtz Arbitration*, plus a single undated page called a water master's "delivery sheet" listing W.H. Filbrick's water rights (the Juniper water rights) for 400" and 50".³ Below the second W.H. Filbrick water right for 50", the delivery sheet contains the words: "note: all seepage, percolation or non use of upstream water to be added to Filbrick total." In the margin next to the Filbrick water rights are handwritten words, "Roper Ranch."

41-00047

The same date as the Ropers filed their *Motion* in subcase 41-00042, they filed an identical *Motion to File Late Notice of Claim* in subcase 41-00047. In their second claim, the Ropers seek 1.92 cfs from the same source to irrigate the same 195.4 acres with the same priority date, also based on a decree. They attached the same documents in support of their second *Motion* as were attached to their first *Motion*.

Referral

On May 25, 2004, SRBA Presiding Judge John M. Melanson entered an *Order of Reference to Special Master Terrence A. Dolan* to: 1) determine the purpose of the *Motions*, 2) conduct an I.R.C.P 55(c) "good cause" hearing and "make findings regarding the potential for prejudice, if any, to other parties who timely adjudicated their rights on the same source" and 3) report and recommend whether leave should be granted to file the late claims.

Hearing

A hearing on the Ropers' *Motions* was held on June 3, 2004, at the SRBA Courthouse in Twin Falls, Idaho. Brian J. Coffey appeared for the Ropers, accompanied by his client, Lance Roper, and Chris M. Bromley appeared by telephone for IDWR, accompanied by IDWR senior water right agent Steve C. Clelland.

Houtz Arbitration

Attached to this *Special Master Report and Recommendation* is a one page overview of what has been called the *Houtz Arbitration*. Since June 6, 1903, when the *Notice of Award* in the proceedings was entered in the Fifth Judicial District book of judgments, water users and particularly the state water administrators have considered it as a decree of the Fifth Judicial

³ Water rights awarded in the *Houtz Arbitration* were all described in inches measured through the "Houtz Box", a unique measuring devise specified in that "decree." The Special Master has been told in the past that Houtz Box measurements cannot be readily converted into cubic feet per second, the current legal standard for the measurement of water in Idaho. I.C. § 42-102.

District. There is no evidence that this recognition was ever challenged in court. For the present purposes, pages 14 and 15 of the *Houtz Arbitration* are relevant because the Ropers alleged their late claims derive from water rights awarded to W.H. Filbrick (or Philbrick), who in 1888, bought the Juniper Mining Company "property aforesaid and the ditche [sic] flumes and water rights pertaining thereto."

At the hearing on the *Motions*, Lance Roper characterized the *Houtz Arbitration Notice of Award* as "kinda contradictory." When the arbitrators took evidence in 1890, they found that the Juniper Mining Company built a flume and ditch in 1882, to divert 400" of water from lower Rock Creek to its placer mining claim on the Snake River below the mouth of Rock Creek. The Company used the water continuously until 1887, when it went bankrupt and its property was sold for delinquent taxes and eventually bought by W.H. Filbrick in 1888. The arbitrators also found that "since the year 1887, no water was used through said flumes and ditch except the attempt to irrigate about 5 acres of grain upon said mining premises in the year 1888." The arbitrators noted that since 1887, irrigated acreage above the Juniper ditch had been "largely extended under the general impression that the rights of the Juniper ditch had been forfeited by discontinuance of mining operations and upon the further fact that since said time said flume has been entirely out of repair and will have to be largely rebuilt before it will carry the water."

Despite the general impression that the Juniper water right had been forfeited, the arbitrators awarded W.H. Filbrick three water rights from lower Rock Creek through the Juniper ditch with a priority date of September 15, 1882:

September 1 to May 31 – 400" for mining purposes to and upon the Juniper Mining Company mining claim and

June 1 to August 31 – 50" for the purpose of "preventing said flume from warping, plus "any flow of water from said Rock Creek that may find its way to the head of said ditch by reason of seepage or percolation [sic] or non use by claimants above."

Ropers' Arguments

The Ropers argued that good cause exists to file their late notices of claims because they can show elements of fraud, mistake and excusable neglect which prevented them from claiming

the Juniper water rights earlier.⁴ The Ropers alleged that in 1999, they were told by IDWR personnel, including Steve Clelland, that they would not be able to file a consumptive use irrigation claim for water decreed for a non-consumptive mining use. They were also allegedly told they could not file for the “open-ended” water right awarded W.H. Filbrick in the *Houtz Arbitration* (“any flow of water from said Rock Creek that may find its way to the head of said ditch by reason of seepage or percolation [sic] or non use by claimants above”). Finally, the Ropers alleged they were told that a 1909 high water right “was the direction to go to get water and avoid the controversy over mining water” and having to prove an accomplished transfer from a mining use to an irrigation use. For those reasons, IDWR prepared the Ropers’ claim for a “high water right” based on beneficial use with a 1909 priority date (*Amended Partial Decree* 41-10264).

The Ropers do not feel that Mr. Clelland intentionally misled them or stated an untruth – only that he gave them an opinion that they would not be successful if they filed on a mining claim – and they relied on that representation to their injury.

The Ropers maintained that they have a cognizable claim to the Juniper water rights because the water has historically been used to irrigate almost 200 acres of what is now the Roper farm from 1884, till the present. Beginning sometime in the 1930’s, Lance Roper’s father leased some portion of W.H. Filbrick’s farm and used Juniper water to irrigate the land. In 1938, Lance Roper’s father bought the Fillbrick farm and then the adjacent Moore farm to form the current Roper farm. Both farms have been continuously irrigated with Juniper water since 1884. The Frodsham-Kelly Ditch, built in 1884, is the main ditch used to deliver Juniper water and it runs through the Roper farm.

In July, 2000, the Ropers saw their *Partial Decree* for water right 41-10264 (their high water right) with its 1909 priority date and they were satisfied with their water deliveries until the summer of 2003. By then, not enough water was being delivered to their farm. When they contacted IDWR, they were informed of the “full nature” of their water right and the significance of their later priority date. That summer, water from Rock Creek with a 1909 priority date was shut off on May 1st. The Ropers argued that last year was the first time they were injured

⁴ *SRBA Administrative Order 1, Rules of Procedure*, 4, d(2)(d), p. 7, requires that motions to file late notices of claims will be reviewed under the criteria of I.R.C.P. 55(c) which allows a court to set aside an entry of default “for good cause shown” or in accordance with I.R.C.P. 60(b). I.R.C.P. 60(b) allows a court, “on motion and upon such terms as are just,” to set aside a final judgment or order based on such reasons as fraud, mistake or excusable neglect, but the motion must be filed not more than six months after the judgment or order was entered.

because of the 1909 priority date and they filed their *Motions to File Late Notices of Claims* in subcases 41-00042 and 41-00047 within a reasonable time thereafter.

IDWR's Response

IDWR's Steve Clelland said it was not IDWR's standard practice to discourage anyone from filing a claim. People could file a claim on anything they chose. He could not imagine anyone discouraging the Ropers from claiming Juniper water. Mr. Clelland said he may have told the Ropers that filing on mining water to be used for irrigation would not be successful because of the hurdle of proving that the mining use (non-consumptive) had been transferred to an irrigation use (consumptive). He added that it is not clear from the history of the *Houtz Arbitration* and related deeds whether Juniper water was used for irrigation.

Conclusions of Law

Good Cause Standards

As noted earlier, motions to file late notices of claims in the SRBA are reviewed under the criteria of I.R.C.P. 55(c) which states: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

Idaho courts follow a dual-track standard to determine when a party is entitled to relief from default. A party wanting to set aside a clerk's entry of default need only show "good cause" under Rule 55(c). If a final judgment by default has been entered, then a party must, in addition to good cause, satisfy the requirements of Rule 60(b). That is, the party must show some basis such as mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud or any other reason justifying relief from operation of the judgment.

The very language in Rule 55(c) and Rule 60(b) suggests a different standard to set aside an entry of default versus a default judgment. The Idaho Court of Appeals recognizes that the Rule 55(c) "good cause" standard may be more lenient than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (App. 1993).

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 a 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 decision 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).

Whether part of good cause or in addition to it, Idaho courts have imposed further requirements. First, a party must show that he or she has acted in good faith and exercised due diligence in the prosecution 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. *Thomas v. Stevens*, 78 Idaho 255, 300 P.2d 811 (1956).

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). At a hearing on the motion, a party need not produce documents to *prove* a defense. It is sufficient if the movant *pleads* with particularity facts which, if proven, would constitute a meritorious defense. *State v. One 1990 Geo Metro*, 126 Idaho 675, 889 P.2d 109 (App. 1995). 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 real justiciable controversy. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981).

Good Cause Shown

The Ropers have shown good cause under I.R.C.P. 55(c) for the Court to grant their *Motions to File Late Notices of Claims* in subcases 41-00042 and 41-00047. They acted in good faith, exercised due diligence in the prosecution of their rights and pled particular facts which, if proven, would constitute a meritorious claim.

The Ropers alleged fraud, mistake and excusable neglect under I.R.C.P. 60(b), all of which would require that their motions be filed within six months of entry of the ***Amended Partial Decree*** in water right 41-10264. Since the ***Amended Partial Decree*** was entered on March 12, 2001, and the Ropers filed their *Motions* on February 25, 2004, they cannot meet the

six month requirement. However, since they have shown good cause under I.R.C.P. 55(c), the six month requirement is irrelevant.⁵

Rule 60(b) first requires an entry of default judgment. In the SRBA, that usually means entry of a partial decree for an uncontested water right such as the *Amended Partial Decree* for water right 41-10264. But it is not clear that the Ropers' *Motions to File Late Notices of Claim* in subcases 41-00042 and 41-00047 directly affect that water right. Their predecessor-in-interest, W.H. Filbrick, was awarded three water rights from Rock Creek and conceivably the Ropers' late claims may be in addition to that right.

What is puzzling is that IDWR recommended that the Ropers be awarded at least one water right in Rock Creek based on the *Houtz Arbitration*, 41-00041A, but with an 1884 priority date. And yet the *Houtz Arbitration* awarded W.H. Filbrick three water rights with a priority date of 1882. At least on the record, there seems to be a disconnect between IDWR's recommendations and the basis for the Ropers' claims, the *Houtz Arbitration*. To say the issues are confusing is an understatement and warrant further review.

The water master's delivery sheet, probably prepared sometime between the filing of the *Houtz Arbitration Notice of Award* in 1903, and when Lance Roper's father purchased the W.H. Filbrick property in 1938, listed W.H. Filbrick as entitled to three water rights with an 1882 priority date. The words, "Roper Ranch" next to the W.H. Filbrick entries suggest that Lance Roper's father was in turn entitled to the same three water rights. Equally as important, the delivery sheet may be evidence that W.H. Filbrick and his successors-in-interest were actually delivered and historically used the water awarded them in the *Houtz Arbitration* with an 1882 priority date.

The arbitrators in the *Houtz Arbitration* found "that since the year 1887, no [Juniper water rights] water was used through said flumes and ditch except the attempt to irrigate about 5 acres of grain upon said mining premises in the year 1888." As pointed out by IDWR's Steve Clelland, a puzzling aspect of the Ropers' late claims is how, when and how much water awarded to W.H. Filbrick for mining purposes was transferred to irrigation use. So far, there has been no suggestion of partial forfeiture arising from any transfer process, but if such were to

⁵ For the record, none of the statements allegedly made by IDWR personnel to the Ropers amount to fraud, mistake or excusable neglect. Simply pointing out the obstacles the Ropers would face in claiming mining water for irrigation use and suggesting a less burdensome approach do not equal those particular grounds for relief from default judgment.

arise, it would necessarily have to occur after June 6, 1903, when the *Houtz Arbitration Notice of Award* was filed.

Prior Partial Decrees

The SRBA Court is committed to granting late claims where the claimants can clearly show good cause under I.R.C.P. 55(c) or grounds for relief under I.R.C.P. 60(b). *SRBA Administrative Order 1, Rules of Procedure*, 1, a, p. 1. However, as each basin nears completion, the Court will examine late claims ever more closely to avoid prejudice to other claimants on the same source of water who timely filed their claims and whose water rights have been adjudicated. Late claims raise the possibilities of protracted litigation of new issues, re-litigation of settled issues, and disruption of settlement agreements, not to mention jeopardizing later administrative proceedings before IDWR contingent upon existing partial decrees. Parties to the SRBA will likely be required to demonstrate lack of prejudice to existing water right holders as part of their good cause or grounds for relief.

The adjudication of claims in Basin 41, and Rock Creek in particular, was nearing completion. But this week, a claimant to water from Rock Creek filed a *Motion to Set Aside Partial Decrees* in subcases 41-00008C, 41-00008D, 41-00008E and 41-00008F. It is likely that this effort, along with the Ropers' late claims, will occupy the SRBA Court for months to come. That raises another concern of the Court for all fully appropriated streams like Rock Creek: that the sum of all claims to a water source cannot exceed the water available or previously decreed. In some Hagerman area subcases, former-Presiding Judge Barry Wood held: "Because these claims arise from a prior decree, this Court cannot allocate more water to them than is available from their origin." *Memorandum Decision and Order on Challenge*, subcase 36-00003A, *et al.*, dated November 23, 1999. In the present subcases, that means the SRBA Court cannot allocate more water claimed under the *Houtz Arbitration* than was awarded in those proceedings.

Recommendation

THEREFORE, IT IS RECOMMENDED that the Ropers' *Motions to File Late Notices of Claims* in subcases 41-00042 and 41-00047 be **granted**.

DATED June 16, 2004.

A handwritten signature in black ink, appearing to read "Terrence A. Dolan".

TERRENCE A. DOLAN

Special Master

Snake River Basin Adjudication

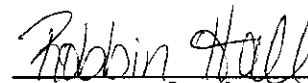
CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER REPORT AND RECOMMENDATION was mailed on June 16, 2004, with sufficient first-class postage to the following:

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

LANCE ROPER
3822 ROCK CREEK RD
AMERICAN FALLS, ID 83211
Phone: 208-406-4747

Brian Coffey
615 H St
PO Box 396
Rupert, ID 83350


Deputy Clerk

**IN THE MATTER OF THE ARBITRATION OF HENRY P. HOUTZ, *ET AL*, TO THE RIGHTS
TO THE USE OF THE WATERS OF ROCK CREEK AND ITS TRIBUTARIES
“HOUTZ ARBITRATION”**

April 1, 1890	Document, variously termed a <i>stipulation, agreement or articles of agreement of arbitration</i> filed in the District Court of the Third Judicial District of Idaho in and for the County of Oneida. The 43 named parties, including “James Mongn and John Mantiwitch, Indians,” agreed to submit [A]ll our matters of differences, in the matter of the division of the waters of Rock Creek, in Oneida County Idaho, and its tributaries, to the award and decision of Frank Campbell, D.W. Standrod and Henry R. Evans . . . and we further agree that this submission to arbitration of the controversy herein named shall be entered as an order of the District Court of the Third Judicial District of Idaho, in and for Oneida County.
April 1 or 2, 1890	Third Judicial District Court <i>Minute Order</i> submitted controversy to arbitrators requiring them to file an award signed by two or all of them on or before June 20, 1890.
June 18-20, 1890	Evidence taken at school house in Rockland, ID.
June 22, 1890	“[A]ward of said arbitrators was filed by the Clerk of the District Court of the Third Judicial District of Idaho, now the Fifth Judicial of Idah [<i>sic</i>] at Malad, Oneida County” The total costs and expenses of the arbitration were \$500 to be paid by the parties in various amounts from \$2.50 up to \$45.00. Each successful claimant was awarded a water right, generally with the following elements: 1) name of claimant, 2) date of priority, 3) source, 4) point of diversion, 5) description of diverting works, 6) purpose of use, 7) period of use, 8) quantity in inches and 9) place of use / acreage. Arbitrators included a requirement that a box or flume of specific dimensions (“Houtz Box”) be placed at the head of every ditch to measure the water flow.
June 6, 1903	“Notice of Award and Cert. of service, and other Papers” filed by the Clerk of the District Court of the Fifth Judicial District of Idaho, in and for Oneida County and “Recorded in Book ‘B’ of Judgments Page 206.”
-----	No evidence in the SRBA Court record that the arbitration award was entered as an order of the District Court of the Fifth Judicial District of Idaho.