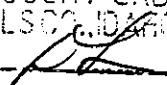


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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED 

**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: 65-02949A and 65-02949B
	)	
Case No. 39576	)	ORDER DENYING MOTION FOR
	)	LATE OBJECTION
	)	

APPEARANCES

These subcases came before the Special Master for hearing on a *Motion to File Late Objection*, in each subcase, filed by Charter Mountain Ranch, Inc. The claimant in subcase 65-02949A, Kristen Allen, appeared *pro se*. Charter Mountain Ranch, Inc., the claimant in subcase 65-02949B, appeared through its attorney, Bruce Smith, Esq. of the firm MOORE, SMITH, BUXTON & TURCKE, CHTD.

PROCEDURAL BACKGROUND

These subcases were originally licensed under the parent right 65-02949 in 1965 for 150 AFY, in the name of John Hughes, Helen Wilson and Annalee Melton. In May, 1971, a claim for the parent right (65-02949) was filed by Mrs. Allen's mother, Annalee Melton, (on behalf of all three claimants) in the Payette River Adjudication, for 150 AFY. A partial decree for the entire water right was issued on January 21, 1986, in the Payette River Adjudication for 150 AFY. On November 10, 1988, Mrs. Melton filed a claim for 65-02949 in the SRBA for 150 AFY, in the name of the three claimants. At some time prior to November 17, 1988, Charter Mountain purchased a portion of the property. On November 18, 1988, the McCallums (Charter Mountain Ranch) filed a claim on the same property, claiming the entire 150 AFY. IDWR then split the claim into 65-02949A and 65-02949B, based on the partition of the property. The *Director's Reports* on these claims were filed on December 13, 1999, recommending the total 150 AFY, but proportioned the

amount consistent with each claimant's portion of the property; 65-02949A (Allen) was recommended at 34.5 AFY and 65-02949B (Charter Mountain) at 115.5 AFY. Charter Mountain's attorney acknowledged at hearing that his client timely received the *Director's Report*. The objection period expired on April 14, 2000. Mrs. Allen, not being sure how much water she was now entitled to have, filed an objection, *pro se* on April 12, 2000. On April 24, 2000, she withdrew this objection.

On June 9, 2000, the Bureau of Reclamation filed a *Motion for Leave to File a Late Objection* concerning the general provisions of Basin 65 part I, not this claim, *per se*. The SRBA District Court granted that *Motion* on July 27, 2000.

On August 21, 2000, Mr. Smith filed his notice of appearance for Charter Mountain along with his *Motion to File Late Objection*, without affidavit.

On December 6, 2000, the parties were present at the initial hearing for contested subcases held in Cascade, Idaho. The issue at hand dealt with the Bureau of Reclamation's objection to the separate streams general provision. The individual elements of subcases were not set to be heard that day.

The *Motion for Late Objection* was set for hearing on February 6, 2001, at Emmett, Idaho.

STANDARD OF REVIEW

As Mr. Smith pointed out in his *Motion*, in 1997, Special Master Dolan set forth the standard to be applied in determining whether to grant a Motion to File Late Objection, and held:

SRBA Administrative Order 1, Rules of Procedure (AO-1), does not provide guidance for review of motions to file late objections. AO-1 only refers to late *claims* that are reviewed under the criteria of I.R.C.P. 55(c), (Setting aside default judgment). However, customary practice in the SRBA has been to apply the same criteria to both late claims and late objections. Hence Buckeye Farms' *Motion* will be considered under Rule 55(c): . . .

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 newly discovered evidence.

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 ([Ct.] 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 ([Ct.] App. 1992). Second, a party must show a meritorious defense to set aside a default. *Thomas v. Stevens*, 78 Idaho 266, 300 P.2d 811 (1956).

(*Order Granting Motion to File Late Objections, In re SRBA Case No. 39576* (Subcases 36-02338, 36-02414, 36-02734, and 36-04011) (Mar. 24, 1997)).

DECISION

Based upon the hearing and the file of these subcases, the Special Master finds that Charter Mountain has not met either prong of the standard. First it has presented no evidence of "good cause," even though that is a factual issue to be decided by the Special Master. *See, Reeves*, 102 Idaho 271 (1981). The *Motion* was neither accompanied by an affidavit nor supported by any testimony or other evidence at the hearing. Even if the argument of counsel, concerning the motion is considered, the argument does not present "good cause." The McCallums and Charter Mountain¹ are sophisticated entities with many claims and objections within the SRBA. They have managed to timely file notices of claims, objections and other pleadings in the SRBA for other subcases. The *Director's Report* clearly and unambiguously reported less water than the McCallums had claimed and they seasonably knew so. Although unsubstantiated, in his argument, Mr. Smith said that some

¹ The claim was filed by Mr. & Mrs. McCallum, individually, but the *Motion to File Late Objection* was filed by Charter Mountain Ranches, Inc. The Special Master believes this is a closely held corporation of the McCallums.

unnamed person at IDWR told Mr. McCallum that there was less total water available and that was the reason for the reduction in the *Director's Report*. However, that explanation is unsupported by any evidence. The Director reported the exact same amount for the total or parent right that had been licensed in 1965 and decreed in 1986. At the time of filing, Mr. McCallum was on notice that someone else was claiming part of the original right because it was at that time that the right was split into an "A" and "B" part. The *Director's Report* showed that the two parts totaled 150 AFY. There has been no showing, good or otherwise, of why no action was timely taken.

However, even if that prong had been met, Charter Mountain has not provided a basis for its position in the proposed objection. Charter Mountain argument was that it had acquired the entire water right by adverse possession, because Mrs. Melton had not been using the water. The Special Master assumes that this theory means that, first, Mrs. Melton had forfeited her portion of the right and that Charter Mountain had then (or contemporaneously with the forfeiture) acquired it by adverse possession. However, the "A" portion of this right could neither have been forfeited nor could Charter Mountain have acquired it under adverse possession, as a matter of law. Either concept, i.e., forfeiture or adverse possession, requires a five-year period to pass before it may be claimed. See I.C. §§ 5-207, 5-210, and 42-222(2). In this case that is not possible based upon the information in the case file. In the Payette River Adjudication, with all of the original owners, cooperatively participating, the parent right was partially decreed in 1986.² Less than three years later Mrs. Melton filed her claim in this adjudication, thus, tolling any period for forfeiture or adverse possession. In *Re SRBA, Order on Challenge of Facility Volume*, Subcases 36-02708, *et al.* (December 29, 1999).

Moreover, the Special Master is unaware of any theory, post-1986, that would have allowed Charter Mountain, or anyone, to acquire water without some administrative action through IDWR, be it by permit and license or transfer. Self-help acquisition by beneficial use under the Idaho Constitution was not available during this time frame. There is no allegation nor proof that Charter Mountain had filed for a permit or transfer for this water, even if it had been forfeited and was available.

² Mrs. Melton is the person who filed the claim for the entire right, including Charter Mountain's share, in that adjudication.

ORDER

The *Motion for Leave to File a Late Objection* is **denied** in all respects, *nunc pro tunc* to February 6, 2001.

DATED February 27, 2001.



THOMAS R. CUSHMAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of ORDER DENYING MOTION TO FILE LATE OBJECTION was mailed on February 27, 2001, with sufficient first-class postage prepaid to the following:

Director of IDWR
PO Box 83720
Boise, ID 83720-0098

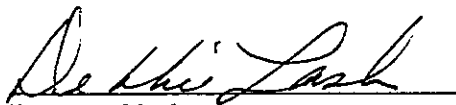
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