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DEPARTMENT OF
WATER RESOURCES

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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) Subcase 35-4037
Case No. 39576) (Polatis Brothers Farms)
)
) SPECIAL MASTER REPORT
) AND RECOMMENDATION

FINDINGS OF FACT

Notice of Claim

Richard and Daniel Polatis, 174 South, 175 West, Blackfoot, Idaho, 83221, filed a *Notice of Claim to a Water Right* under 35-4037 on May 31, 1989, claiming 2.01 cfs from groundwater to irrigate 156 acres in Bingham County from April 1 to October 15 with a priority date of May 1, 1959, based on beneficial use.¹

IDWR Investigation

A former IDWR agent, Lyn Bushaw, conducted an examination of the Polatises' claim on July 18, 1991, accompanied by Richard Polatis. Her *Beneficial Use Field Report*, with two photographs, confirmed the existence of a well and pump diversion system with a center pivot sprinkler attached.² The examination generally supported the claimed use of the water, but there remained the matter of priority date.³

¹ The address given on the *Notice of Claim* for Richard and Daniel Polatis, or Polatis Brothers Farms, a partnership (174 South, 175 West, Blackfoot, Idaho, 83221), is important as will be noted later.

² IDWR called Mr. Polatis sometime after the IDWR field examination to amend his claim to match the findings of the examination. Mr. Polatis visited IDWR's eastern region office on August 1, 1991, and signed an amended *Notice of Claim* claiming 2.91 cfs to irrigate 151.6 acres.

³ There is no evidence in the record of why the issue of priority date was not addressed when Mr. Polatis was in IDWR's eastern region office to sign his amended *Notice of Claim*.

First Letter

IDWR wrote to Richard Polatis on June 12, 1991, stating:

The Notice [of Claim] indicates the water usage is based on "Beneficial Use" or a "Statutory Claim". Water rights of this type are established by the historical use of water, dating back to when water was first used for the purpose claimed, at or on the place of use identified on the Notice. The date the water was first put to use, known as the priority date, has not been confirmed by a License, Decree, or Permit. For this reason, proof must be provided supporting the priority date.

....

It is our goal to recommend this historical water rights [sp] within the Snake River Basin as accurately as possible. Field exams to verify other items of the Notice have been or soon will be conducted by Department personnel. But, the Department will not recommend the Notice be decreed by the court if no evidence of a priority date is submitted.

Please submit the required evidence supporting the priority date by July 12, 1991.

IDWR's June 12, 1991 letter was addressed to:

RICHARD D. POLATIS
174 S 175 W
Blackfoot ID 83221 [emphasis added]

Second Letter

IDWR wrote a follow-up letter marked:

FINAL REQUEST
* RESPONSE DEADLINE*
JANUARY 20, 1992

This second letter, dated December 18, 1991, stated: "If we do not receive the requested documentation, the Department will recommend the claim be disallowed, due to lack of evidence supporting any priority date [emphasis in the original]." This letter, like the first letter, was addressed to:

RICHARD D. POLATIS
174 S 175 W
Blackfoot ID 83221 [emphasis added]

Director's Recommendation

The Director of the Idaho Department of Water Resources filed his *Director's Report for Irrigation and Other Uses, Reporting Area 5, Part III (IDWR Basin 35)* on January 29, 1999.

The Director recommended that claim 35-4037 be denied: "No lawful appropriation shown."

Partial Decree

When no one objected to the Director's recommendation, the SRBA Court disallowed the claim. See *Partial Decree of Disallowed Water Right Claims*, 35-4037, *et al.*, March 12, 2002.

The SRBA Court mailed a copy of the *Partial Decree* on March 12, 2002, addressed to:

Richard D. Polatis
174 S 175 W
Blackfoot, ID 83221 [emphasis added]

The *Partial Decree* was returned to the Court and forwarded to IDWR for records-keeping. The unopened envelope was marked:

Returned to Sender
Not Deliverable As Addressed
Unable to Forward

Motion to Set Aside Partial Decree

Richard Polatis filed a *Motion for Relief from Partial Decree* and a *Motion to File Late Objection* under I.R.C.P. 60(b) on April 8, 2005, stating that the "claimant has substantial evidence of the diversion and application to beneficial use of groundwater for the irrigation of approximately 151.6 acres of land during each irrigation season, commencing with the irrigation season of 1959, to the present." *Motion to File Late Objection*, at 1.⁴ In his *Objection* lodged with the *Motions*, Mr. Polatis alleged the claim should be recommended for 2.91 cfs from groundwater to irrigate 151.6 acres in Bingham County from April 1 to October 31 with a priority date of May 1, 1959, based on beneficial use.

Richard Polatis

In his sworn statement attached to his *Motions*, Richard Polatis stated that he "resides at 174 South 1075 West, Blackfoot, Idaho 83221, and with his brother, Daniel Polatis, is involved in an Idaho farm partnership known as Polatis Brothers Farms [emphasis added]." Richard Polatis said he has been primarily responsible "for taking care of the paperwork associated with the farming operation, including water rights matters." He continued:

Unfortunately during the time affiant [Richard Polatis] normally would have been paying attention to the water rights matters regarding this land, he began to

⁴ For all practical purposes, the two *Motions* together are effectively a motion to modify or set aside the *Partial Decree* disallowing the claim. See *SRBA Administrative Order 1, Rules of Procedure*, 14, d, at 22 (*AO-1*).

experience health problems which distracted him and made it difficult for him to concentrate and take care of business as he desired. The health problems became sufficiently severe in about 1997 or 1998 to seriously affect affiant's ability to focus on the water rights issues as he would have desired. Affiant had some neck surgery in December of 2001, which, over a period of time, resulted in significant improvement. Before affiant recovered to any great extent from the surgery however, he experienced a stroke on December 25, 2003, which left much of his left side paralyzed and continued to interfere with his ability to focus on his normal business affairs, including the water rights matters for the farms. Affiant had now recovered substantially and continues to improve, especially in his ability to concentrate and to deal with water rights matters. Affiant recently discovered for example that water right number 35-4037 had been disallowed because of affiant's inability to respond to the communications received from the Idaho Department of Water Resources or to assist in the providing of evidence that would have been possible if affiant had been in better health.

Statement of Richard Polatis, at 1-2.

Glen Kirkpatrick

Mr. Polatis also attached to his *Motions* the *Affidavit of Glen E. Kirkpatrick* and a sworn statement by Frank Tominaga. Mr. Kirkpatrick, a former neighbor of the Polatises' predecessor-in-interest, recalled that Herman L. Hauck cleared the 160 acres now owned by Polatis Brothers Farms, drilled a well and farmed the land during the summer months beginning in 1955. Mr. Hauck first used a diesel engine to operate the well and later installed electric power in 1958.

Frank Tominaga

Mr. Tominaga wrote that he bought the farm from Mr. Hauck in the late 1950's and sold it to Bill Dishman around 1970. Mr. Tominaga farmed and irrigated all 160 acres, except that witch [sp] was covered by rock piles." Statement by Frank Tominaga, at 1.

Richard Polatis

Mr. Polatis said that he and his brother leased the 160 acres beginning in 1987, and bought the land in 1989: "There was an existing well located on said land with an operating electric pump in it and every indication that the approximately 160 acres had been irrigated from the well for a long period of time." Statement of Richard Polatis, at 1-2.

Order of Reference

SRBA Presiding Judge John M. Melanson entered an *Order of Reference Appointing Special Master Terrence A. Dolan* on April 11, 2005, to issue a recommendation "as to how the

Partial Decree should be amended, if it is determined that said *Partial Decree* should be set aside or amended.”

Hearing

A hearing on Mr. Polatis’ *Motions* was held by telephone on May 5, 2005. Kent W. Foster appeared for Mr. Polatis. No one appeared for IDWR and no one opposed the *Motions*.

I.R.C.P. 53(e)(5) Draft Report and Amended Motions

On May 12, 2005, the Special Master sent an e-mail to counsel for Mr. Polatis and IDWR with a draft report under Rule 53(e)(5) pointing out an unresolved issue of errors with Mr. Polatis’ mailing address. The e-mail concluded:

Depending on Richard Polatis’ recollections, the motion to set aside the partial decree may implicate I.R.C.P 60(a) as well as 60(b). The obvious problem, of course, is the lapse of over 3 years from the date of entry of the Partial Decree and the filing of the motion to set aside the Partial Decree.

On May 31, 2005, counsel for Richard Polatis filed an *Amended Motion for Relief from Partial Decree* and an *Amended Motion to File Late Objection*. The same date, he lodged an *Amended Standard Form 1 Objection* and a *Supplemental Affidavit of Richard D. Polatis*, along with a cover letter dated May 27, 2005, addressed to the Special Master.

In his *Supplemental Affidavit*, Mr. Polatis recalled that, although he signed the *Notice of Claim* in 1989, he did not see the typed error in his mailing address (“174 S. 175 W.” should have been “174 S. 1075 W.”). Mr. Polatis also said that he had “no recollection of having received any notices, letters, recommendations or other written communication regarding the processing of this claim. . . . [It was January, 2005], that he was informed of the disallowance of the claim and that he needed to take action to keep from being required to shut off the pump for this property.” In his *Amended Objection*, Mr. Polatis alleged the water right should be decreed with an earlier priority date than originally claimed – May 1, 1955, instead of May 1, 1959.

Additional Hearing

A hearing on the *Amended Motions* and *Objection* was held by telephone on July 14, 2005. Mr. Foster again appeared for claimant Mr. Polatis and Candice M. McHugh appeared for IDWR. No one opposed the *Amended Motions* and *Objection*.

CONCLUSIONS OF LAW

AO-1 and I.R.C.P. 60

AO-1 states in relevant part: "Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." *AO-1*, 14, d, at 22.

Under Rule 60(a), "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court *at any time* of its own initiative or on the motion of any party and after such notice, if any, as the court orders [emphasis added]."

Under Rule 60(b), a party seeking to set aside a final judgment by default must show:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application*; or (6) any other reason justifying relief from operation of the judgment [emphasis added].

Motions alleging mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or any other reason justifying relief from operation of the judgment must be filed not more than six months after the judgment was entered. There is no similar time limit when a court finds "it is no longer equitable that the judgment should have prospective application."

Standards for Review

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 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). Judgments by default are not favored and the general rule in doubtful cases is to grant relief from default to reach a judgment on the merits. *Nickels v. Durbano*, 118 Idaho 198, 795 P.2d 903 (Ct.App.1990). A motion to set aside a default judgment is addressed to the sound discretion of the trial court whose discretion 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).

In addition to requiring a party to state a reason justifying relief from operation of the judgment, Idaho courts require more. First, a party must show that he or she has acted in good faith and exercised due diligence in the prosecution and protection 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:

Mere mistake, inadvertence, surprise or excusable neglect without disclosure of meritorious defense or meritorious defense without disclosure of mistake, inadvertence, surprise or excusable neglect will not suffice The facts constituting the defense, whether disclosed by answer, affidavit or both, must also be detailed and must be sufficient, when established, to constitute a defense to the action on the merits. The conclusion of the party or his attorney . . . is not sufficient. Whether the pleaded facts are sufficient to constitute a defense is also one for the trial court.

Thomas v. Stevens, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956).

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 justiciable controversy. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). 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).

Compliance Under I.R.C.P. 60(a) and 60(b)

Mr. Polatis has shown that he is entitled to relief under both Rules 60(a) and 60(b) and he has supplied detailed facts in support of a meritorious claim to a water right. Relief is warranted under Rule 60(a) because there was a clerical error in "the record" arising from an oversight

when Mr. Polatis filed his original *Notice of Claim*. That clerical error prevented Mr. Polatis from receiving timely notice of proceedings right through entry of the *Partial Decree* disallowing his claim. He did not know of that development until “about January of 2005” and he exercised reasonable diligence in filing his *Motion for Relief from Partial Decree* and a *Motion to File Late Objection* on April 8, 2005. In any event, since there is no time constraint for relief under 60(a) for a clerical error in the record, Mr. Polatis has demonstrated that the *Partial Decree* should be set aside and he is entitled to pursue a claim for a water right as described in his *Amended Standard Form 1 Objection* – a claim which IDWR agrees is warranted and no one opposes.

Mr. Polatis is also entitled to relief under Rule 60(b)(5) because under these unique circumstances, it is no longer equitable that the judgment should have prospective application. Neither Mr. Polatis nor IDWR were aware of the error with Mr. Polatis’ mailing address until some time after Mr. Polatis filed the instant *Motions* on April 8, 2005 – over 3 years after entry of the *Partial Decree*. But more particularly, former SRBA Presiding Judge Roger S. Burdick was also unaware of the mistake when he entered the *Partial Decree*. The specter of Mr. Polatis losing a valuable property right without being afforded minimal due process clearly suggests an inequity entitling him to relief under Rule 60(b)(5).⁵

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that:

1. Mr. Polatis’ *Amended Motion for Relief from Partial Decree* and *Amended Motion to File Late Objection* be **granted**; and
2. The *Partial Decree* in subcase 35-4037 be **set aside**.

⁵ “To rely on Rule 60(b)(5), a movant must show two things: (1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written.” *Rudd v. Rudd*, 105 Idaho 112, 118, 666 P.2d 639, 645 (1983). The *Partial Decree* in this subcase is prospective in the sense that the well was drilled in 1955, and approximately 160 acres have been irrigated with the groundwater since then. If the *Partial Decree* disallowing Mr. Polatis’ claim is not set aside, IDWR will order that the pump be shut off. It is no longer equitable to enforce the judgment because the mistaken mailing address deprived Mr. Polatis of minimal due process notifying him of critical events leading to IDWR’s recommendation and entry of the *Partial Decree* disallowing his claim.

DATED July 19, 2005.

A handwritten signature in black ink, reading "Terrence A. Dolan". The signature is written in a cursive style with a horizontal line underneath.

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 July 19, 2005, with sufficient first-class postage to the following:

RICHARD D POLATIS

Represented by:

KENT W FOSTER

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