

Bruce Byron Bedke
in care of: 42 East Basin Road
UNITED STATES POST OFFICE
Oakley, Idaho

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Department of Water Resources

Jared K. Bedke
in care of: 42 East Basin Road
UNITED STATES POST OFFICE
Oakley, Idaho

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT IN AND
FOR THE STATE OF IDAHO COUNTY OF TWIN FALLS

In Re SRBA	)	Subcases 45-12475, et al. -- 64 claims
	)	and
Case No. 39576	)	Subcases 45-12477, et al. -- 30 claims
	)	
	)	MEMORANDUM ON BEDKES' MOTIONS
	)	TO FILE LATE OBJECTIONS
_____	)	

Pursuant to the SCHEDULING ORDER ON BEDKE MOTIONS TO FILE
LATE OBJECTIONS of September 9, 2005, this is the MEMORANDUM ON BEDKES'
MOTIONS TO FILE LATE OBJECTIONS from Bruce Byron Bedke and Jared K.
Bedke, pro se litigants, in the above named subcases.

PROCEEDURAL BACKGROUND

On April 7, 1999 Bruce and Jared Bedke lodged MOTIONS TO FILE LATE
OBJECTIONS in the above named subcases. On July 2, 2001, Special Master Dolan
issued an ORDER PARTIALLY STAYING SUBCASES in Basins 45 and 47, including

the above subcases because of common issues. On January 5, 2005 Special Master Dolan issued an ORDER VACATING STAYS, ORDER DENYING MOTIONS TO FILE LATE OBJECTIONS and RECOMMENDATION OF PERMISSIVE REVIEW. On January 18, a hearing was held and on January 19, 2005 the court entered an ORDER GRANTING PERMISSIVE REVIEW OF SPECIAL MASTER'S ORDER DENYING MOTION TO FILE LATE OBJECTIONS; AO1 9.e.

After briefings and oral argument on the Permissive Review, the District Court entered an *Order on Permissive Review and Order of Recommitment*, 15-12475, *et al.* on August 3, 2005. The parties then agreed to submit the following memoranda to the Special Master to address the issue of the Bedkes' motions to file late objections.

Factual Background

On March 20, 1998, IDWR filed the Director's Report for Basin 45. The BLM's Basin 45 de minimus stockwater claims were reported in the Director's Report. Six of Bruce Bedke's claims were reported in the Directors Report¹. On July 2, 1998 the State of Idaho filed objections to the subcases at issue. The BLM also filed objections to 18 of the subcases on July 2, 1998. On July 13, 1998 Scott Bedke filed a Motion to File Late Objection to 5 of the subcases at issue (12524, 12560, 12682, 12795, 12827) and the Court granted the motion on July 21, 1998.

Initial hearings were scheduled for the 64 subcases listed on Exhibit A on April 7, 1999 (the 30 subcases on Exhibit B, were apparently not scheduled for initial hearings at

¹ The six claim numbers were 45-04050, 45-10488, 45-10505, 45-10506, 45-10332, 45-02810. Claim numbers 45-04050 and 45-10488 were for small domestic sources and have been partially decreed. Claim numbers 45-10505, 45-10506, and 45-10332 were originally claimed as non-deminimus rights, but were converted in the Director's Report to de minimus filings by the IDWR. The IDWR also added Bruce Bedke's name to claim number 45-02810, originally filed by the BLM and State of Idaho, and recommended it as a joint claim. Bruce Bedke's original filing for the waters described in claim number 45-02810, is actually 45-10491 and did not make the original Director's Report.

that time). The initial hearings were held on April 7, 1999 in the Cassia County Courthouse. An SF-5 deadline of April 28, 1999 was set for the 18 BLM subcases that had pending objections by the State of Idaho and the BLM. Bruce and Jared Bedke filed their Motions to File Late Objections in the above named subcases on April 7, 1999 after the initial hearings, as well as many others. A revised Objection List was subsequently filed by Jared Bedke on June 2, 1999 and a similar list was filed by Bruce Bedke on July 6, 1999.

Discussion

In the Court's *Order on Permissive Review and Order of Recommitment*, 15-12475, *et al.* of August 3, 2005 (Order) the District Court remanded these subcases to the Special Master to make findings of fact and apply the "good cause" standard under I.R.C.P. 55(c) and *McFarland*, 123 Idaho at 935:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) As with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland, 123 Idaho at 936, 854 P.2d 279.

A. Good Cause

Background

After having learned of the commencement of the Snake River Basin Adjudication, Bruce Bedke set out to file claims on all of his stockwater rights contained within his adjudicated grazing allotments in the spring of 1989. Not knowing exactly how to do so, he drove to the Twin Falls office of the IDWR and

sought the aid of the IDWR in filing. He described the nature of his claims to the staff in the office who determined that they were non-deminimus in nature, and provided Mr. Bedke with a pamphlet on how to file these claims. (Objectors Opening Brief on the Order Granting Permissive Review, In Re SRBA, Case No. 39576, Subcases 45-12475 *et al.*, Exhibit 1) ² Contained within this pamphlet, was a table for determining the quantity of water that was to be claimed as a diversion rate for his stockwater filings. (Exhibit 2) Mr. Bedke's filings were received and accepted by the IDWR in 1989.

Several years after Bruce Bedke filed, the United States filed stockwater claims for the waters on Mr. Bedke's adjudicated grazing allotments. The United States' filings however, were numerous and de-minimus in nature.

Subsequent to Bruce Bedke's filing of claims, the IDWR in an attempt to accelerate the adjudication process, with the consent of the SRBA Court bifurcated the reporting process. The result of the bifurcation was that all claims of a de-minimus nature would be reported early, as they were numerous, but small in nature. The remainder of the claims, those with diversion rates greater than 0.02 cfs, would be reported as originally scheduled at a later date.

Some time after the initial Directors Reports for Basins 45 and 47, the Objectors became aware that the United States' claims had been reported on this earlier schedule. Contact was made with the IDWR to see what the private claimants needed to do with respect to the United States' claims, and were advised that if the claims conflicted with those of the private claimants, both

² In an attempt to reduce the paper load of the Court, Exhibits attached to this previous pleading are hereinafter referred to as "Exhibit 1, Exhibit 2, etc."

would be reported to the court, and the court would determine who owned the water right.³ In the spring of 1999, Objectors learned that they indeed needed to file objections to the United States' claims, as their non-deminimus claims were not scheduled to be reported until a much later date, but the objection deadline had passed. Objectors then made motion to file late objections in the above named subcases.

In a hearing on June 7, 1999, oral argument was made by the Bedke's and other claimants who filed motions to file late objections in the above named subcases (Exhibit 3). At this hearing, the Bedke's, and others seeking objections, made arguments that the motions to file late objections should be allowed under rule 55(c) of the I.R.C.P. and also under rule 60(b) of the I.R.C.P. The movants explained in great detail the circumstances surrounding their confusion as to the process of whether or not objections had to be filed in what they perceived to be conflicting claims (see Exhibit 3). To further complicate the situation, it was not until a subsequent hearing in what has been called "related and overlapping" subcases in Basin 47 on July 1, 1999 that the Bedke's first became aware of the strict definition the Idaho Department of Water Resources (IDWR) used in determining conflicting claims (see Exhibit 4, page 53 beginning Line 5). The other parties involved in the 2:00 P.M. hearing have since withdrawn their motions to file late objections to the above named subcases, but the arguments they made at that hearing, and in subsequent briefings, still hold as valid.

1. Confusion

The Bedke's and other private claimants were confused by the advice they were

³ This is exactly what occurred in subcase 45-02810. See footnote 1

given regarding the effects of the bifurcation of the water claims (Exhibit 3, pp. 78-87).

At a hearing for the related and overlapping subcases in Basin 47 on July 1, 1999 at 2:15 P.M. Mr. Spencer of the IDWR explained what the bifurcation of the reporting process actually did.

“I think that the proper perspective to apply here is that this bifurcation has not caused delay. What the bifurcation in effect has done has resulted in some of these rights being reported two years ahead of where they otherwise would have been.

And so it's not a matter that we are delaying the process through the bifurcation. It is a matter that we now have some rights that actually are way out in front of where they would have been had there not been a bifurcation.” (Exhibit 5, Page 37, beginning Line 17)

This acceleration of the subcases at issue, created much confusion, and distrust of the process with the Bedke's and others (private claimants). The IDWR advised the private claimants that they wouldn't necessarily have to object to the accelerated claims, because if these claims were in conflict with those of the private claimants, then both would be reported to the court as one water right and the court would then determine which party the water right belonged to (see Exhibit 3, page 80 et. seq.). The private claimants mistakenly interpreted this advice to mean where claims were based on the same water, same use, same cattle, that these water claims would be in direct conflict and therefore would be recommended to the court as one claim--the ownership of which would be determined at that point (see Exhibit 3). The private claimants acted as any reasonably prudent person would in their situation, and relied upon the advice given to them by the agency that they'd been dealing with throughout the process. At a 3:45 P.M. hearing on July 1, 1999, Roxanne Brown of the IDWR finally explained what the strict definition of conflicting claims that the IDWR used was: Claims identical to each other in all elements except the name (Exhibit 4, Ms. Brown page 53 beginning at line 8).

The fact that the IDWR believed that the bifurcation could cause some confusion and difficulties is undisputed (Exhibit 3, Mr. Tuthill page 44 beginning Line 4). It is also undisputed that the Bedke's were confused by the process as well (See Transcript of 9:00 A.M. hearing April 7, 1999, relevant pages attached as Exhibit 6, Mr. Bramer page 50 beginning Line 16, see also Exhibit 3, page 80 et. seq.).

In *Johnson v Pioneer Title Co. of Ada County* the Idaho Supreme Court ruled:

"[10,11] Undoubtedly, Pioneer's manager could have acted *more* prudently by delivering the summons and complaint immediately to Pioneer's attorneys. However, this does not compel a conclusion that he acted so imprudently that relief should be denied. In determining whether to set aside a default judgment, we must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt. *Stoner b. Turner, supra*. In view of the confusion which existed, we cannot say that Pioneer was guilty of indifference or deliberate delay in failing to answer the complaint. We thus hold that Pioneer's failure to respond was excusable neglect under I.R.C.P. 60(b)(1)." [emphasis unchanged] *Johnson v. Pioneer (supra)*, 733

As with Pioneer, it has been argued that Objectors could have acted more prudently by objecting immediately to the water right claims at issue, but as the Idaho Supreme Court directed in *Johnson*, the facts in this case also do not compel a conclusion that Objectors acted so imprudently that relief should be denied.

2. Bedkes Acted Promptly in Requesting Relief

The Bedke's first became aware of the need to file objections to the United States' claims shortly before the April 7, 1999 hearing and immediately sought to identify the above named subcases in Basins 45 & 47 and filed their motions to file late objections as soon as they could (Exhibit 3, page 83 Line 3 et. seq., also See *Schraufnagel v. Quinowski* 113 Idaho 753(App.), 755). In fact, the Bedke's filed their motions on the same day that the initial hearings for the Objections of the State of Idaho, BLM, and Scott

Bedke took place.

B. Meritorious Position

As with any motion under Rule 55(c) the party moving to set aside a default judgment must plead facts which, if established, would constitute a defense to the action. As some of the subcases at issue are dual based claims, we shall address each basis separately.

1. State Based Beneficial Use Claims

Currently in Idaho, a water right “shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied”. (IC 42-101) All of the subcases at issue deal with stockwater rights, so the question arises, to what *thing* does the right become appurtenant? In dealing with this question the court must look to the Idaho Code and to previous rulings made by courts with competent subject matter jurisdiction of such an issue. In IC 42-101, the phrase “the land or other thing to which, through necessity, said water is being applied” gives a clear and unambiguous test as to determine just exactly what the water is appurtenant to. In the case of a stockwater right, the livestock puts the water to beneficial use and the court has held:

“...the point of use for the water is the cow’s head, which is an extension of the base ranch.” (FINAL OPINION: FINDINGS OF FACT, HAGE V. US, ___ Fed. Cl. ___, at 25 (2002))

As the court has determined the facts that 1.) the cow is the point of use and 2.) it is an extension of the base ranch, any use made by that cow is a use by the base ranch or the owner of the livestock. Any beneficial use claim for stockwater, therefore, must

also be based on the consumption of water by livestock, whose use directly vests in the base ranch or owner of the livestock.

a. Whose Livestock put the Water to Beneficial Use?

The United States in its proprietary capacity must meet all the requirements of any other citizen of the State in order to secure a stockwater right. (*Camfield v. United States, supra.*) The first of these requirements is that the livestock diverting the water must be owned by the party claiming the stockwater right.

To determine the ownership of livestock in the State of Idaho, one must look to the Idaho State Code. Idaho Code 25-1140 states in part:

“USE OF BRANDS RESTRICTED. Every stock grower in this state must use a brand for cattle, and a brand for horses, mules and asses, which brand must be placed in a conspicuous place on the animal. It shall be unlawful for any person to use any brand as herein provided, unless such brand be designated in the application for the recording of the brand and the brand be recorded with the state brand inspector.”

The United States has never recorded a brand in the State of Idaho. (See Exhibit 7). This court also makes note of a Judicial Admission by the United States in its Order of 2/6/98:

“Here, the United States admits that it is not the party that actually appropriated the water with its own stock (Tr., p. 35, ll. 10-15)” (*at 7, see 2/6/98 Order, supra*)

And finally concludes with:

“If the United States does not claim a reserved right, appropriate its own water right, purchase or otherwise negotiate for a water right, adversely possess a water right, or obtain a right through the efforts of an agent who actually appropriated the water on behalf of the United States, the United States does not own a water right. Absent one of these ownership theories, the United States does not own a water right simply because it manages the public domain.” (*at 11, 2/6/98 Order, supra*)

It is, and always has been, the Bedke's position that the original use of the water in the subcases at issue was made by the Bedke's predecessors in interest prior to the establishment of the Forest Reserves and Bureau of Land Management, and that the United States has never put the water to any beneficial use, as the only way stockwater could be put to use is by livestock (See Exhibit 3). If the Bedke's motions to file late objections are granted, through evidence, witnesses, and testimony they will be able to prove the IDWR did little or no investigation of the United States claims at issue (Exhibit 8), that the United States did not ever put the water to beneficial use, the only use of the water at issue was by and for the benefit of private individuals, and therefore the United States should not have the subcases at issue recommended as valid water rights. The Bedke's will also rely on precedent case law such as the United States Supreme Court opinion in *United States v. New Mexico* 438 U.S. 696 (1978) where the court held "The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree." (at 716)

2. PWR 107 Claims

While the Idaho Supreme Court has ruled that PWR 107 is a valid basis for a water right, the subcases at issue based on federal law do not carry the same presumptive weight as those based on State law.⁴ The United States therefore

⁴ "In the case of claims filed pursuant to federal law, the Director of IDWR does not file a Director's Report. Instead, an 'abstract' of the claim is filed. Since the abstract does not carry the same presumptive weight as the Director's Report, the claiming party must establish a *prima facie* case independently of the abstract. I.C. 42-1411A(2)." **Memorandum Decision and Order on Challenge (Scope of PWR 107 Reserved Rights); Order of Recommitment to Special Master Cushman** Consolidated Subcases 23-10872 *et al.*, Joint Submission Subcases 23-10894 *et al.* (Issued 12/28/2001), at 7.

needs to establish that all of the dual based subcases at issue meet the factual requirements of a valid PWR 107 reservation.

In order for a PWR 107 land withdrawal to be valid, there needs to be a paper trail of 3 distinct documents for each specific location reserved:

1. A letter from the United States Geological Survey to the President of the United States identifying a location that meets the qualifications established in the Executive Order;
2. A similar letter from the Secretary of the Interior to the President of the United States identifying the same location as qualifying for a PWR 107 reservation; and
3. A document signed by the President of the United States withdrawing the specific location from disposal under the land disposal laws of the United States pursuant to PWR 107.

If the United States does not produce these three documents for each of the claims based on PWR 107, a Federal Reserve of the land did not occur, and they are not entitled to a water right.

3. Prejudice to the Parties Involved

At the time the Bedkes' Motions were filed, all of the subcases at issue had outstanding timely objections pending.⁵ Several of these subcases had an SF-5 deadline of April 28, 1999 set as well. Once the SF-5's had been filed with the

⁵ As previously mentioned, the State of Idaho had pending objections to all of the subcases at issue, the BLM had self-objected to 18 of the subcases and Scott Bedke had valid objections to 5 of the subcases at issue.

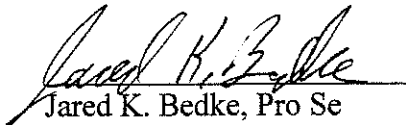
court, a new objection deadline would have opened up and the Bedkes could have filed timely objections to the SF-5 amended claims. Presumably, most, if not all of the outstanding objections made by the State of Idaho, would have been settled in the same fashion, and a new objection window would have opened allowing the timely filings of objections by the Bedkes and other parties to these subcases. As such, no prejudice against the United States could exist.

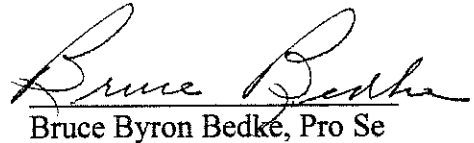
Furthermore, if the Bedkes' Motions are allowed, the entire burden of overcoming the prima facie weight of the original recommendation would lay with the Bedke's therefore no undue prejudice to the United States would be added, as it has nothing further to prove.

CONCLUSION

For the reasons stated above, as well as all of the Objector's previous pleadings, this court should grant relief to the Objectors by granting the Objector's Motions to File Late Objections in the above named subcases because they have fully met the conditions imposed by the Court in this matter.

Dated this 4th day of November, 2005.


Jared K. Bedke, Pro Se


Bruce Byron Bedke, Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2005 I served a true and correct copy of the foregoing MEMORANDUM ON BEDKES' MOTIONS TO FILE LATE OBJECTION upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

LARRY A. BROWN
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BOISE, ID 83724

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

STATE OF IDAHO
Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

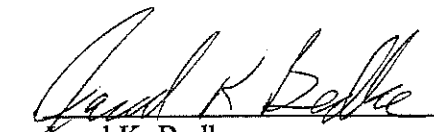

Jared K. Bedke

EXHIBIT A

Subcase Nos:

45-12475	45-12804
45-12493	45-12807
45-12495	45-12808
45-12499	45-12809
45-12515	45-12810
45-12517	45-12811
45-12522	45-12813
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45-12803	

(Subcase list: LTEOBJBEKE)
9/09/05

EXHIBIT B

Subcase Nos:

45-12477
45-12479
45-12481
45-12483
45-12497
45-12541
45-12543
45-12545
45-12658
45-12693
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