

Parties' Names: Harold and Evea Powers

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DEPARTMENT
WATER RESOURCES

**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 No. 69-4103A
Case No. 39576	)	
	)	POWERS' RESPONSE TO MOTION
	)	TO FILE A LATE OBJECTION
	)	

Harold A. Powers and Evea H. Powers hereby respond to the motion of Douglas M. and Charletta A. Scism for leave to file a late objection in the above-captioned matter.

I. Introduction

Mr. and Mrs. Powers own water rights in Basin 69. Their neighbors, the Scisms, who are the movants in this matter, seek to upset the orderly adjudication of the Powers' water rights by interposing a late objection, perhaps because the Powers have timely objected to certain aspects of the Scisms' water right claims (Subcase Nos. 69-4103B and 4104B). Having missed the clear statutory and procedural deadlines, the Scisms now ask this Court for special consideration outside the rules. Because the Scisms have not met their burden of proving good cause for this exceptional treatment, their motion must fail.

II. Procedural History

The Director of the Idaho Department of Water Resources ("IDWR") sent a cover letter and Notice to all water right claimants in Reporting Area 19, Basin 69 regarding the filing of the Director's Report for irrigation and other water rights in Basin 69. The cover letter was dated March 23, 2006.

In both the cover letter and in the Notice itself, the Director informed the recipients that they had until May 26, 2006 in which to file objections. This date provided three days for mailing of the Notice to the claimants plus an additional 60 days in which to lodge objections. The Notice complied with Idaho Code Section 42-1411(6)(f).

Over two months beyond the deadline for filing of objections and over four months beyond the date of the Notice, the Scisms filed their motion to file a late objection.

III. The Deadline For Filing Objections To Water Right Claims Is Both Clear and Absolute.

The Director of IDWR provided statutory notice of the availability of the Director's Report affecting water right claims for Basin 69, including both the Powers' and Scisms' claims. The Director emphasized the objection deadline in his Notice by stating:

If you disagree with any element of the recommendation for . . . anyone else's water right and want to be heard in court, file an objection with the SRBA Court. Your objection must be **received** by the SRBA Court on or before **May 26, 2006**.¹

The Idaho Legislature has codified a clear, absolute rule:

Any claimant who desires to object to a water right . . . shall file an objection with the district court within the time period specified in the notice of filing of the director's report.²

¹ Director's Notice of Filing Director's Report for Basin 69, at 2 (emphasis in original).

² I.C. § 42-1412(1).

This Court's rules of procedure for the SRBA Adjudication are equally clear. Pursuant to AO1 Rule 4(d)(1)(d), "The *Notice of Filing the Director's Report*, filed by IDWR, shall set out the dates when objections and responses are due and shall be computed to include weekends and holidays. The objection or response must be **received** by the court by the deadline specified." (emphasis in original.)

Thus, in the statutory Notice filed by the Director, in the Idaho Code, and in the rules of procedure of this Court, the rule is clear, consistent, and emphasized; the Scisms had until May 26, 2006 to file their objections to the Powers' water right claims. The Idaho Code and the Court's rules of procedure provide an "*absolute* rule for responses: 'The objection or response must be *received* by the court by the deadline specified.'" ³ "By the plain language of the SRBA rules," the Scisms' objection was untimely and this Court may correctly deny their motion to file a late objection. ⁴

IV. The Scisms' Fail To Show Good Cause Why The Law and Rules Should Not Be Applied To Them.

AO1 provides specifically for the filing of motions to file a late notice of claim but there is no specific rule providing for a motion to file a late objection. Perhaps this is because the Idaho Supreme Court has held that the filing deadline is an "absolute rule." Thus, the Scisms seek refuge in Idaho Rule of Civil Procedure 55(c) and a decision of this Court. ⁵

But neither the Idaho Rules of Civil Procedure nor the decisions of this Court, when applied to the facts of this case, justify a departure from the statute and procedural rules. In

³ *State v. United States*, 134 Idaho 106, 109, 996 P.2d 806, 809 (Idaho 2000) (emphasis in original).

⁴ *Id.*

⁵ Order on Motion to Set Aside Partial Decrees and File Late Objections, Subcases 65-7267, et al. (Jan. 31, 2001).

considering similar motions of others, this Court has relied upon the Idaho Court of Appeals' decision in *McFarland v. Curtis*.⁶ By incorporating the "good cause" standard from I.R.C.P. 55(c), the Court of Appeals and this Court have determined that the following factors may be used to decide whether a departure from the absolute rule is appropriate: (1) whether the default was willful; (2) whether setting aside the judgment would prejudice the opponent; and (3) whether a meritorious position has been presented.⁷ The Scisms fail to meet their burden of showing that their motion meets all three elements of the test.

A. The Scisms' Default Was Willful.

The Scisms seek to avoid the application of the first prong of the *McFarland* test by suggesting that their noncompliance was excusable neglect. They "were not represented by counsel, and were unaware of their legal rights, until after the objection period stated in the Director's Report for Basin 69 had ended."⁸ In Idaho, lack of counsel is no excuse. In the Order cited by Scisms in support of their argument, this Court stated "The general rule in Idaho is that *pro se* litigants are held to the same standards and rules as those represented by attorneys. (citations omitted.) . . . Accordingly, the standard is the same for *pro se* litigants as well as those represented by counsel."⁹ The reason, as stated by this Court, is that to otherwise give special consideration to *pro se* litigants in determining whether to allow filing of late objections would seriously impair the administration and progress of the SRBA given the fact that a significant number of parties to the SRBA appeared *pro se*.¹⁰

⁶ 123 Idaho 931, 854 P.2d 274 (Idaho 1993).

⁷ Order on Motion, Subcases 65-7267, et al. at 6-7.

⁸ Motion To File A Late Objection at 1.

⁹ Order on Motion, Subcase 65-7267 at 7.

¹⁰ Order Granting Motions To File Late Objection in Subcases 51-11921 et al. at 8 (Apr. 1, 2002).

The Scisms' default was willful in the sense that they made a conscious decision to ignore their rights.¹¹ The Scisms do not allege any irregularity in the service of the notice of the filing of the Director's Report. Service of the notice is considered constitutionally sufficient for purposes of due process.¹² The Scisms chose to ignore the notice and the actions required by it. The Scisms offer no affidavit to support any other conclusion. The Scisms have failed to meet their burden of proving their actions were not willful and merely careless, thoughtless, or inadvertent.¹³

B. The Scisms' Motion Prejudices The Powers.

No other parties have filed objections to the Powers' claimed water right in this matter. But for the Scisms' motion, the Powers' claim would remain uncontested. This is not to suggest that the claim would escape a decision on the merits. Whether contested or not, the claim would still be decided given that Idaho's statutory scheme for the SRBA and the rules of procedure for this Court "set forth a comprehensive process for adjudicating both uncontested and contested state based claims."¹⁴ This interruption in the process causes some prejudice to the Powers.¹⁵

C. The Scisms Have Failed to Assert A Meritorious Position.

The Scisms purport to meet the third prong of the *McFarland* test by attaching a Standard Form 1 Objection to their motion in which they have checked several boxes and provided a sentence or two in support. The Scisms attempt to reserve the right to object later. While this

¹¹ *Id.* at 11.

¹² *LU Ranching Company v. United States*, 138 Idaho 606, 610, 67 P.3d 85, 89 (Idaho 2003).

¹³ Memorandum Decision and Order on Challenge, Subcases 47-16433 et al. at 12 (Mar. 22, 2005).

¹⁴ Order on Motion, Subcase 65-7267 at 8.

¹⁵ Memorandum Decision and Order on Challenge, Subcases 47-16433 et al., (Mar. 22, 2005).

form of objection would have been sufficient had it been timely filed, it does not constitute a requisite meritorious defense when filed late.

Pursuant to *McFarland* and this Court, four criteria must be satisfied to establish a meritorious defense in this context. The Scisms must: (1) allege facts, (2) which, if established, (3) would constitute a defense to the action, and (4) the facts supporting the defense must be detailed.¹⁶ Assuming for argument that the first three criteria are satisfied by the Standard Form 1 Objection, that form does not fulfill the fourth criterion of a detailed submission of facts supporting the defense. The general notice provided by a timely Standard Form 1 Objection is insufficient when submitted late.¹⁷

The purpose for the detailed factual presentation is so that the Court may determine whether there is a real controversy. As the Idaho Supreme Court has held “[i]t would be an idle exercise for the court to set aside a default [judgment] if there is in fact no real justiciable controversy.”¹⁸ Having failed to detail the facts supporting their defense, the Scisms fail to meet the meritorious defense criterion.

V. Conclusion

In support of their Motion To File A Late Objection, the Scisms lean entirely upon a single order of this Court interpreting Idaho Rule of Civil Procedure 55(c). But that order and others of this Court and the decisions of Idaho appellate courts refute their argument. As in the *LU Ranching* decision of the Idaho Supreme Court, this is a simple case where the Scisms did

¹⁶ *McFarland*, 123 Idaho at 934, 854 P.2d at 277; Order on Motion, Subcase 65-7267 at 6.

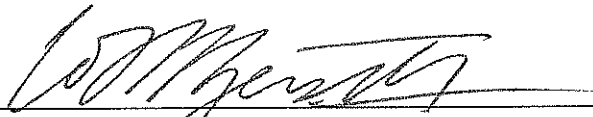
¹⁷ *Reeves v. Wisenor*, 102 Idaho 271, 272, 629 P.2d 667, 668 (Idaho 1981).

¹⁸ *McFarland*, 123 Idaho at 934, 854 P.2d at 277., (citing *Hearst Corp. v. Keller*, 100 Idaho 10, 12, 592 P.2d 66, 68 (Idaho 1979)).

not act how “a reasonably prudent person under the circumstances’ should have acted.”¹⁹ The law and the rule requiring the filing of a timely objection are absolute and clear. The Scisms have failed to show that their default was not a willful disregard of the law and rule. They have failed to set forth a meritorious defense. Either of these failures is enough to deny their motion. When combined with the prejudice their actions now cause the Powers, their motion should be denied.

Respectfully submitted this 14th day of September 2006.

HOLLAND & HART LLP

By 
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Attorneys for Harold and Evea Powers

¹⁹ *LU Ranching*, 138 Idaho at 611, 67 P.3d at 90.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September 2006, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

SRBA Court
253 Third Avenue North
P.O. Box 2707
Twin Falls ID 83303-2707

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☐ Hand Delivered
☒ Overnight Mail
☐ Telecopy (Fax)

IDWR
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Boise, ID 83720-0098

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Chief, Natural Resources Division
Office of the Attorney General
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P.O. Box 44449
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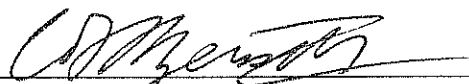
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