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. 36-02080**
	)	
Case No. 39576	)	**ORDER DENYING MOTION FOR LEAVE TO FILE LATE OBJECTION**
	)	

BACKGROUND

On December 22, 1994, the Magic Valley Underground Pumpers Association, Inc., and each of its individual members (Association) filed its *Motion for Leave to File Late Objection and Memorandum in Support (Motion)*. Attached to the *Motion* was a list of 96 Association members who together filed 457 water right claims in the SRBA, 427 of which are in Reporting Area 3 (Basin 36). The *Memorandum* states that the Association is a non-profit association with a membership of over 130 individual water right holders who pump ground water from the Eastern Snake Plain Aquifer.

The Association seeks leave to file a late objection to Water Right No. 36-02080, a license-based claim filed by the United States of America, Bureau of Reclamation, for 1,100 cfs of ground water from 177 wells for domestic use and to irrigate 62,159.2 acres in Minidoka and Jerome Counties from April 1 to November 1 with a priority date of September 9, 1948. The diverting works are described as "Wells, Pumps, Motors- A&B Irrigation District (Unit B)." The total consumptive use claimed is 160,993 acre feet per annum.

At this point, it might be helpful to review earlier developments in Subcase No. 36-02080. On April 27, 1993, A&B Irrigation District filed the first Objection to this water right claim as recommended in the director's report. The Objection stated:

> There should be a confirmation of the contract between A&B Irrigation District and the United States of America, confirming the contractual interest of the

irrigation district with the United States in regard to the water right held for the benefit of the lands of landowners in the District.

On April 30, 1993, the United States filed the second Objection to the director's report. The United States said that certain remarks in the original filing of the claim describing the diversion and use of water within the boundaries of the project/district were omitted. It wanted the following language added to remarks: "Relift drain pumps are used within the boundaries of the district for reuse of return flows."

On May 3, 1993, the Conservation Groups[1] filed their *Motion for Leave to Intervene* in Case No. 39576 "as Parties Respondent for the purpose of Objecting in Basin 36." They alleged that they have a "significantly protectable interest in the subject matter of this action" which only they could protect. On January 14, 1994, Presiding Judge Daniel C. Hurlbutt, Jr., denied the Groups' *Motion*. An appeal from that order is pending before the Idaho Supreme Court. Then, on February 25, 1994, the Groups filed an *Amended Motion to Intervene* in Subcase Nos. 36-02080 and 36-15127 and lodged *Amended Objections* in both subcases. The *Amended Motion* and the *Amended Objections* are on hold awaiting the Supreme Court ruling.

Now, back to the Association's *Motion* filed in Subcase 36-02080. On June 19, 1995, A&B Irrigation District filed its *Brief in Opposition to Motion for Leave to File Late Objection.* On June 28, 1995, the United States filed its *Response to Motion to File Late Objection.* Last, on July 14, 1995, the Association filed its *Reply Brief in Support of Motion for Leave to File Late Objection.*

A hearing on the *Motion* was held before the Special Master on July 27, 1995, in Rupert, Idaho. The Association was represented by Lawrence J. Jensen, appearing *pro hac vice*, and Dana L. Hofstetter. Daria J. Zane and R. Lee Leininger argued for the United States. Roger D. Ling represented A&B Irrigation District. Deputy Attorneys General Cheri Jacobus, A. Lynne Krogh, Nicholas B. Spencer and Susan E. Hamlin appeared on behalf of the State of Idaho and the Idaho Department of Water Resources. No one appeared on behalf of the Conservation Groups.

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[1] Idaho Conservation League, Inc., Idaho Rivers United, Inc., Idaho Wildlife Federation, Inc., and Northwest Resource Information Center, Inc.

THE FACTS

The Association objects to the priority date of September 9, 1948, recommended in the Director's Report for Water Right No. 36-02080 for 177 wells in the A&B Irrigation District, North Side Pumping Division, Minidoka Project.[2] In its Objection lodged with the court, the Association stated:

> The proof of completion of works was not timely submitted for water right no. A36-02080 (formerly no. 20736). Accordingly, the priority date should not relate back to the date of permit application submission, September 9, 1948.... The members of the Magic Valley Underground Pumpers Association, Inc. seek to have the priority date amended in accordance with applicable legal principles to reflect the actual date(s) of development of the water right for each well.

There are no significant disagreements about the facts. For purposes of the present *Motion*, two key documents are the Certificate of Completion of Works and the License and Certificate of Water Right for Permit No. 20736.[3] On June 10, 1965, State Reclamation Engineer[4] Carl E. Tappan signed both documents awarding to the United States a priority date of September 9, 1948, for use of 1,100 cfs of ground water from 177 wells for irrigation and domestic uses covering 62,604.3 acres, "all within the boundaries of the A&B Irrigation District, North Side Pumping Division, Minidoka Project, Idaho."

The Certificate of Completion recited that the United States "has fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said Permit. . . . Proof of Completion of Works Made: January 13, 1964."

The License stated that "said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho. . . . The right hereby confirmed dates from September 9, 1948."

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2 In 1965, the United States was awarded a License and Certificate of Water Right for Water License No. 20736 (now 36-02080) with a priority date of September 9, 1948, for the 177 wells.

3 Both documents are Exhibit K to A&B Irrigation District's *Brief in Opposition to Motion for Leave to File Late Objection.*

4 The State Reclamation Engineer is now called the Director, Idaho Department of Water Resources.

The relevant history behind this contentious water right began on September 9, 1948, when the United States Bureau of Reclamation filed for a water permit application to appropriate 1,333.28 cfs of groundwater from 306 wells. The lands to be irrigated totaled 66,664.3 acres. However, by 1964, when proof of completion was made, only 177 wells were completed. Of that total, 110 wells were completed before November 5, 1955. The remaining 67 wells were completed after that date.

The Association argued that certain issues related to the November 5, 1955 date are critical because of a decision first made on April 5, 1956, by State Reclamation Engineer Mark R. Kulp:

> It is the further decision of the State Reclamation Engineer, that the priority date of that part of the right initiated by Permit No. 20736 depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736 and depending on works not completed by November 5, 1955, may relate back to November 5, 1955.
>
> . . . .
>
> The time for completion of works for items not completed by November 5, 1955, is extended three years from November 5, 1955, and the time for making proof of completion of works on all work is extended to November 5, 1958.[5]

Mr. Kulp's reasoning was likely similar to that of his successor in office, Mr. Tappan. Some reasons behind the decision to "split" the priority dates were that the State Reclamation Engineer "found no justification nor statutory authority to extend further the time" for completion of the works beyond the extensions already granted. On the other hand, he clearly did not want to cancel the permit. Further, the State Reclamation Engineer was concerned with minimizing harm to *all* groundwater pumpers in the area:

> The present work of the department is now directed towards determining what the order of the development of all wells, with the thought that no serious consequences will be suffered by any one in the [Minidoka] project or the

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5 Quoted language is from a letter dated October 31, 1956, from State Reclamation Engineer Kulp addressed to H.T. Nelson, U.S. Bureau of Reclamation. Exhibit D to the Association's *Motion.*

adjoining area. This works needs a study of the water table elevations and amount of withdrawals for a study of the effect of the irrigation.[6]

When notice was published that the Bureau of Reclamation applied for one of several extensions of time to complete the works, protests were filed by private individuals who completed nearly 300 wells in the adjoining area between 1948 and 1963. However, in a Memorandum to the Governor on February 6, 1964, the State Reclamation Engineer noted:

> Publication of intention to make proof of beneficial use was made in late December of 1963, and the date for making proof was set for January 13, 1964. That proof was made before a Justice of the Peace in Boise and no formal protests were filed in that time."[7]

On February 28, 1964, Assistant Idaho Attorney General Stephen W. Boller wrote to State Reclamation Engineer Tappan. The opinion letter concluded:

> Because of the lack of diligence vis-a-vis compliance with the requirements of the law, the inchoate right initiated by Permit No. 20736 has not ripened, and the permit is subject to cancellation.
>
> It is therefore the opinion of the attorney general that Permit No. 20736 should be cancelled.
>
> As noted above, [former State Reclamation Engineer] Kulp's order of April 5, 1956, divided the dates of priority under Permit No. 20736 around November 5, 1955. There is no indication in that order of what statutory or other basis Kulp utilized in making that portion of the order, and our research reveals none. The question of the effect of this order becomes moot, however, in view of our opinion that the permit should be cancelled, should you so decide.[8]

Almost eight years after his predecessor first decided to "split" the priority date for Permit No. 20736, State Reclamation Engineer Tappan disregarded the Attorney General's recommendation to cancel the permit. On June 25, 1964, Mr. Tappan wrote to the Regional Director, United States Bureau of Reclamation, saying virtually the same thing as his

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6 Memorandum dated February 6, 1964, from State Reclamation Engineer Tappan to Idaho Governor Robert E. Smylie. Exhibit D to A&B Irrigation District's *Brief in Opposition to Motion for Leave to File Late Objection.*

7 Same February 6, 1964 Memorandum.

8 Exhibit F to the Association's *Motion.*

predecessor.[9] The priority date would be "split." Only works constructed before November 5, 1955, would relate back to the 1948 priority date. Works constructed afterwards would relate back to the 1955 priority date. He also added: "The licensee will provide a list of the wells and lands which will be licensed under the date of priority as set out herein."[10]

On January 15, 1965, acting Regional Director E.E. White, United States Bureau of Reclamation, wrote to State Reclamation Engineer Tappan with a list of wells completed both before and after November 5, 1955, and the lands they serve. He added, though:

> We emphasize that the [Minidoka] project is one integrated system, physically, operationally, and financially. Some lands, depending on project operational requirements, can be served from water from several wells. Therefore, it is impracticable and undesirable to designate precise land areas within the project served only by each of the specific wells on the list.
>
> As we have heretofore informed you, both we and the A&B Irrigation District, the organization representing the 600 farm families on the project, are convinced that the project is entitled legally and equitably to a water right with a 1948 priority and that such a priority does no practical harm to any other known water user or water right holder."[11]

In the meantime, Mr. Tappan's letter of June 25, 1964, to the Bureau of Reclamation generated a whole flurry of lawsuits in five different counties in southern Idaho.[12] All five suits were called "appeals" from Mr. Tappan's decision announced in that letter. The State then moved for dismissal of the Minidoka County suit. On May 6, 1965, District Judge Lloyd J. Webb effectively dismissed all five suits: "Court finds the Appeal is premature and Motion to

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9 Exhibit E to the Association's *Motion.*

10 Mr. Tappan reiterated his decision to issue a "split" priority date in another letter dated December 21, 1964, addressed to the Bureau of Reclamation. He concluded that letter by saying: "This department is desirous of issuing a license as specified above upon receipt of a list of the wells and lands to be submitted by the licensee, and therefore ask that said list be submitted not later than January 15, 1965." Association's Exhibit I, *Reply Brief in Support of Motion for Leave to File Late Objection.*

11 Exhibit J to A&B Irrigation District's *Brief in Opposition to Motion for Leave to File Late Objection.*

12 Except where noted, the following litigation history is taken from a Memorandum dated February 16, 1968, from Assistant Attorney General William D. Collins to State Reclamation Engineer R. Keith Higginson. Exhibit G to the Association's *Motion.*

Dismiss is granted."[13] The judge reasoned that the letter was neither an issuance of a license nor a refusal to issue a license.

At this point in the history of the water right, there is a major shift and no record of why. Just over a month after Judge Webb dismissed the "appeal" as premature, on June 10, 1965, State Reclamation Engineer Tappan granted Water License No. 20736 to the Bureau of Reclamation with a single priority date of September 9, 1948, for all 177 wells in the Minidoka Project. As noted earlier, the license recited "that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho."

The record contains no information of why the State Reclamation Engineer changed his mind about issuing a "split" priority date. We can only guess at the reasons. In any event, those whose appeals were dismissed as premature were not formally notified that the license had been issued.

The first appeal from the actual granting of the license was filed in Minidoka County on September 28, 1965--110 days after its issuance. The State moved to dismiss the suit on the basis that it was not filed within a statutory 60 day appeal period. On February 16, 1966, Judge Webb agreed with the State and dismissed the appeal as not timely filed. In his *Opinion*, dated February 9th, Judge Webb stated:

> The appellant [G.L. Dean and Sons] states that certain procedural steps essential to the issuance of the license were not accomplished by the United States. The respondent [State Reclamation Engineer Tappan] argues that appellant cannot, in any event, appeal because it failed to lodge formal protests within the time required by law. As I see it, neither question can be decided at this stage of the proceedings. The only question is whether the appeal, on the basis of its filing date, can be considered at all.
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> It is apparently true that the respondent agreed to keep the appellant's counsel advised of whatever action was taken upon the United States' application for the waters in question. His failure to do so is at least censurable and possibly gives rise to a suspicion of a deliberate intention to avoid an appeal. Nevertheless, our law is rather well established that appeal times are jurisdictional and the fact is that the appeal was not filed within the required time. It is the filing and not the notice that starts the time. I am of the opinion that I am without authority to

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[13] Exhibit E to A&B Irrigation District's *Brief in Opposition to Motion for Leave to File Late Objection.*

reach any other conclusion. It occurs to me that a direct action against the respondent would be warranted in this case but that question is not before me and I make no comment as to the liklihood [sic] of success of such a venture."[14]

Eventually, related appeals in the other counties were likewise dismissed. There is no evidence of any court proceedings beyond dismissals of the appeals as premature or untimely.

The Director's Report for Reporting Area 3 (Basin 36) was filed with the court on November 2, 1992. The deadline for filing objections was May 3, 1993.

The Association alleged that it and its members did not file a timely objection to the Director's recommendations concerning 36-02080 because "virtually all of the members of the Association" were unaware of events that occurred 30 or more years ago.[15] They first became aware that there were "substantial grounds" for objecting to the 1948 priority date only after A&B Irrigation District filed a Petition for Delivery Call for ground water from the Eastern Snake Plain Aquifer. Notice of that petition was issued August 10, 1994.[16]

THE LAW

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. Motions to file late claims are to be reviewed under the criteria of I.R.C.P. Rules 55 (c) ["Setting aside default judgment"], and 60 (b) ["Mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, grounds for relief from judgment on order"].[17] However, the customary practice in the SRBA court has been to apply the same criteria to both late claims and late objections.

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14 Exhibit F to A&B Irrigation District's *Brief in Opposition to Motion for Leave to File Late Objection.*

15 Of the Association's current members appearing on the list attached to its *Motion*, at least three members filed late protests after the January 13, 1964 date for making proof. It is not known if the Magic Valley Pumpers Association, which also filed a late protest, is related to the Magic Valley Underground Pumpers Association, Inc. Another of its current members was the appellant whose appeal of issuance of Water License No. 20736 was dismissed as untimely by Judge Webb in 1966. Exhibits 4, 7 and 8-10 to *United States' Response to Motion to File Late Objection.*

16 Association's *Motion*, at 3-5 and Exhibit C to the *Motion.*

17 AO-1, 4A, c (4) (b), page 7.

Idaho courts follow a dual-track system to determine when a party is entitled to relief from default. A party trying to set aside a clerk's entry of default need only show "good cause" under I.R.C.P. Rule 55 (c). If a final judgment by default has been entered, then a party must, in addition, satisfy the requirements of I.R.C.P. Rule 60 (b). That is, the party must show: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud, 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 the operation of the judgment.

The 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 recognized 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 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).

In either case, Idaho courts have applied additional requirements to set aside a default. 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 its 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).

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).

Mistake or inadvertence sufficient to warrant setting aside a default judgment must be one of fact and not of law. Inadvertence or neglect must be excusable, or in other words, it must be conduct that might be expected of a reasonably prudent person. The law cannot excuse willful ignorance but imposes an obligation on such a person to seek out assistance of legal counsel. *Newbold* v. *Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

A party's claim of excusable neglect is determined by examining what might be expected of a reasonably prudent person under similar circumstances. *Johnson* v. *Pioneer Title Co. of Ada County*, 104 Idaho 727, 662 P.2d 1171 (App. 1983). Courts must consider each case in light of its unique facts. *Baldwin* v. *Baldwin*, 114 Idaho 525, 757 P.2d 1244 (App. 1988). A party's ignorance of laws or rules of procedure generally will not amount to excusable neglect such as may justify relief from judgment. *Washington Fed. Sav.* v. *Transamerica*, 124 Idaho 913, 865 P.2d 1004 (App. 1993). Besides exercising due diligence in prosecution of his or her rights, a party alleging excusable neglect must not have exhibited indifference or unreasonable delay. *Olson* v. *Kirkham*, 111 Idaho 34, 720 P.2d 217 (App. 1986).

DISCUSSION

In Idaho, to set aside a default, and thus file a late objection in the SRBA, a party must exercise due diligence *and* show a meritorious defense. The case law suggests that these two requirements constitute "good cause shown" under I.R.C.P. Rule 55 (c). The Association has not shown good cause to file a late objection in this subcase.

The Association argues that it has been diligent in filing its *Motion* after the deadline for filing objections because many of its members were not even born when the license was issued. Hence, they argue, they had no way of knowing that there were grounds for objecting to the priority date recommended by the Director until 1994. On the other hand, the Association offered no explanation of why some of its senior members did not file timely objections in the SRBA, particularly those members who filed formal protests back in 1964. Be that as it may, the argument misses the main points.

The Association, or more exactly, its predecessors in interest, failed to exercise due diligence by not taking some action against the State Reclamation Engineer soon after the appeals were dismissed. Judge Webb virtually invited such a lawsuit: "It occurs to me that a direct action against the respondent [State Reclamation Engineer] would be warranted in this case." All the evidence was then available, including witnesses, and there was a sympathetic court. But no one pursued what the Association now wants to argue before this court 30 years later--the validity of the September 9, 1948 priority date awarded to the United States in 1965.

Because its predecessors in interest exhibited indifference or unreasonable delay in prosecuting their rights, the Association also failed to show a meritorious defense. When the State Reclamation Engineer issued Water License No. 20736, he found that "said right to the use of said waters has been perfected in accordance with the laws of Idaho." That finding is exactly what the Association disagrees with because they allege that "proof of completion of works was not timely submitted." Essentially what the Association has alleged is that the right to use water under Water License No. 20736 was *not* perfected in accordance with the laws of Idaho.

At one time, the Association's claimed defense to the priority date may have had merit. At least, Judge Webb thought so. In that circumstance, an ordinarily prudent person acting in good faith and exercising due diligence in the prosecution and protection of his or her rights

would have filed a direct action against the State Reclamation Engineer or appealed the dismissal. Neither was done. Now, because of this inaction and the passage of time, the Association's claimed defense is barred by the doctrine of *res judicata*. *Aldape* v. *Akins*, 105 Idaho 254, 668 P.2d 130 (App. 1983). It would be an idle exercise to allow the Association to file a late objection when the basis of its objection is barred. There is no justiciable controversy.

ORDER

THEREFORE, IT IS ORDERED that the *Motion for Leave to File Late Objection* filed by the Magic Valley Underground Pumpers Association, Inc. and each of its individual members is **denied.**

Dated: August 21, 1995.

TERRENCE A. DOLAN
Special Master, Reporting Area 3
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the **ORDER DENYING MOTION FOR LEAVL TO FILE LATE OBJECTION** was mailed on August 21, 1995, with sufficient first-class postage to the following:

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