

RECEIVED

JUL 18 2013

DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA Fifth Judicial District County of Twin Falls - State of Idaho
JUL 17 2013
By _____ Clerk
Deputy Clerk

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 63-05181 & 63-05182
Case No. 39576)
ORDER GRANTING MOTION TO FILE
LATE OBJECTIONS
ORDER VACATING TRIAL SCHEDULE
ORDER SETTING SCHEDULING
CONFERENCE

On June 5, 2013, The State of Idaho, Department of Fish and Game (IDFG), through its attorney Deputy Attorney General Harriet A. Hensley, filed a *Motion to File Late Objections* together with a proposed objection. On June 28, 2013, the claimant of the water rights, the estate of Tina Iest, through its attorney Dana L. Hofstetter, filed a *Response to Motion to File Late Objections*. A hearing on the *Motion* was held on July 2, 2013. As explained below, this Special Master finds that the requirement of I.R.C.P. 55(c) have been met and accordingly the *Motion* is **granted**. The Clerk of the Court is instructed to file the previously lodged objection.

1. Applicable Standard. In cases for which partial decrees have not been entered, late objections are viewed under Idaho Rule of Civil Procedure 55(c), which provides a "good cause" standard for setting aside the entry of a default. The I.R.C.P. 55(c) standard takes into account the following factors:

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

2. Whether the Untimeliness was Willful. With respect to the untimeliness on the part of the IDFG in seeking to file these objections, the Claimant does not assert, nor is there anything in the record to indicate that such untimeliness was willful. By way of background, the State asserts that its untimeliness was an inadvertent oversight. The subject water right claims have heretofore been uncontested, but have been withheld from the issuance of partial decrees for the reason that they have been identified pursuant to I.C. § 42-1412(7) as claims that may be affected by the outcome of contested claim 63-00174. On March 11, 2013, IDWR filed an *Amended Director's Report* for water right claim 63-00174 for the purpose of correcting a typographical error in the legal description of the point of diversion. The corrected legal description for the point of diversion for 63-00174 now lists the POD the same as was reported for claims 63-05181 and 63-05182. The IDFG timely filed an objection to the *Amended Director's Report* for 63-00174, objecting to the recommended POD, and asserting: "The point of diversion for this and water rights 63-5181, 63-5182 is located on property owned by the Idaho Department of Fish and Game."

3. Lack of Evidence that IDFG is the Owner of the Land where the POU is Located. Claimant Estate of Tina Iest asserts that the IDFG's *Motion* must be denied because of the failure on the part of objector to support its *Motion* with evidence, via affidavit or otherwise, that IDFG is the owner of the land that comprises the point of diversion recommended in the *Director's Report*. This Special Master disagrees for the reason that even if the IDFG is not the owner of the land where the recommended POD is located, it still has standing to object to the director's report for a water right claim. Idaho Code section 42-1412(1) states: "Any claimant who desires to object to a water right, or to a general provision in the director's report, shall file an objection with the district court within the time specified in the notice of filing of the director's report." Idaho Code section 42-1401A(1) states: "'Claimant' means any person asserting ownership of rights to the use of water within the state of Idaho or on whose behalf ownership of rights to the use of water is asserted." The IDFG is a claimant in the SRBA

and therefore has standing to object to the director's report.¹ *Fort Hall Water Users Ass'n v. U.S.*, 129 Idaho 39, 921 P.2d 739 (1996). There is no requirement in the SRBA that the objector assert particularized damages to its interests as a prerequisite for filing an objection, even if the objection is untimely.

4. Whether the Claimant would be Prejudiced by Allowing a Late Objection.

Claimant Estate of Tina Iest asserts that it would be prejudiced because the issues that are potentially involved in the IDFG's objection to the place of use element for 63-00174 are vastly different to the issues that would be involved for 63-05181 and 63-05182. The Claimant asserts that this difference is on account of 63-00174 being a water right that was decreed in the 1906 *Stewart Decree*, whereas 63-05181 and 63-05182 are based upon appropriation through diversion and application to beneficial use. This Special Master finds that the Claimant is unlikely to be prejudiced as a result of allowing IDFG to file its late objections.

In the proposed objections to 63-05181 and 63-05182 lodged in these subcases, the IDFG has simply checked the box to object to point of diversion (without stating what the point of diversion should be), and further stating as the reason for its objection: "The point of diversion for these water right claims and water right claim 63-00174 is located on property owned by the Idaho Department of Fish and Game."

While the objection form does not specify what relief is being sought by the IDFG with respect to the recommended POD for these water rights, the *Motion* states that the IDFG wishes to "clarify the circumstances under which the claimant may access IDFG property" While the specifics are difficult to ascertain from the "check-the-box" pleading, it appears that the IDFG is raising issues relative to the existence or nature of an easement that would allow the Claimant to have its diversion and conveyance structures located on IDFG land. Contrary to the assertion of the Claimant that the issues involved in the IDFG objection to the recommended POD for 63-00174 would be vastly different to the issues involved in the IDFG objection to the recommended POD for 63-05181 and 63-05182, the issues appear to not be too dissimilar, particularly in light of the fact that

¹See e.g. Subcase 25-04129.

the recommended POD for 63-00174 is not the same as the POD originally decreed in the 1906 *Stewart Decree*, with the POD apparently having been moved at some point in time, and the *Director's Report* for the POD for 63-00174 stating that the water right includes an accomplished change in the POD pursuant to I.C. § 42-1425.

5. Whether IDFG has Stated a Meritorious Position. The Claimant asserts that the IDFG has not set forth a meritorious position. According to the Claimant, the issue raised in IDFG's objection is whether the Claimant has an easement upon IDFG land for the purpose of the existence and maintenance of Claimant's diversion and conveyance structures. Claimant asserts that any such easement related issues are separate and independent from any issues that might be involved in determining the elements of the water right claims. Claimant further asserts that IDFG's objection has no merit because IDFG has presented no evidence that the Claimant does not have an easement or right of way at the subject location. For the reasons set forth below, this Special Master finds that IDFG has presented a meritorious position.

With respect to Claimant's assertion that any issues regarding the existence or nature of an easement are separate from the issues that pertain to the elements of the water right, this Special Master agrees that Claimant has correctly stated Idaho law in this regard. That being said, at this stage of the proceeding it would be inappropriate to relegate the proposed objection (which again simply check the "Point of Diversion" box and states as the reason that "[t]he point of diversion . . . is located on property owned by [IDFG].") to being solely an issue about the existence or nature of an easement. There are other issues that may be involved with a water right owner having a POD on the land of another. For example, the Claimant brings up subcase 02-02318A, where the *Partial Decree* issued for that right contains a remark stating, in part, that the judicial determination of the water right is not a determination of a right of way to access the POD. The inclusion of such a remark on a partial decree for a water right is certainly a remedy that can be sought by an objector via the adjudication of a water right in the SRBA (even if perhaps the actual adjudication of a claimed easement might best be brought in another forum).

With respect to the Claimant's assertion that the IDFG has not provided evidence to demonstrate the non-existence of an easement for the subject water right claims, the Claimant has not provided any authority, nor is this Special Master aware of any authority, that would require an objector to make such a showing in the context of seeking to file a late objection.

6. Order Vacating Trial and Setting Scheduling Conference. The trial and all associated dates and deadlines set forth in the May 14, 2012 *Trial Scheduling Order* are hereby **vacated**.

A scheduling conference will be held on **August 6, 2013 at 9:30 AM** Mountain Time at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 1-215-446-0193 and when prompted entering the code 675342#.

Dated July 17, 2013

A handwritten signature in black ink, appearing to read 'T.R. Booth', written over a horizontal line.

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING LATE OBJECTION; VACATING TRIAL; AND SETTING SCHEDULING CONFERENCE was mailed on July 17, 2013, with sufficient first-class postage to the following:

TINA IEST

Represented by:
DANA L HOFSTETTER
608 W FRANKLIN ST
BOISE, ID 83702-5509
Phone: 208-424-7800

STATE OF IDAHO

Represented by:
STATE OF IDAHO
PO BOX 44449
BOISE, ID 83711-4449
Phone: 208-334-2400

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098

