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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 Nos. 36-00048A, 36-00049,
) 36-02169, 36-00039D, 36-04260B,
) 36-15168, 36-00051A, 36-00021 &
) 36-10283A

Case No. 39576

) CLAIMANTS' CONSOLIDATED
) MEMORANDUM OPPOSING
) INTERVENTION

* * * * *

THE MOVANTS HAVE FAILED TO MAKE THE ESSENTIAL SHOWING REQUIRED IN ORDER TO SUPPORT AN ORDER GRANTING LEAVE TO FILE LATE OBJECTIONS OR RESPONSES.

A. THE STANDARD.

In his *Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1* ("the Order"), Judge Hurlbutt opened the door for the filing of late objections and responses in specific subcases by parties to the main case who had not complied with the May 1, 1993 filing deadline imposed by A.O.1. The reason for his decision to grant this accommodation is central to understanding (1) what showing is required in order to secure this privilege; and (2) determining whether the moving parties have surmounted the standard in these subcases.

The *Order* was designed to deal with the effect of the statutory amendments to the adjudication statutes adopted by the 1994 Idaho Legislature, which removed the Director of IDWR as a party, and which recharacterized the Director's Reports as something other than adversary pleadings. See, Idaho Code §§ 42-1401B and 42-1412. The Court noted that "Because the Director was previously a party to the SRBA and to all subcases, some parties assumed that IDWR would participate and litigate in defense of the Director's Report" in connection with certain specific subcases. *Order*, p. 1. The Court was concerned that as a result, "[S]ome parties decided not to participate in certain subcases, choosing instead to rely on the Director's Report and IDWR's defense to its pleading." *Id.* The Court noted that given IDWR's newly-constituted status as a "non-party," and the decharacterization of the Reports as "pleadings," "Those . . . who opted to rely on IDWR

to litigate and advocate in favor of the Director's Report are now unable to do so," Id., p. 2, and found this unusual scenario "[N]ecessitates special consideration for some parties to the adjudication." Id., p. 1.

It is clear the Court did not intend the *Order* to constitute an "open amnesty" which indiscriminatorily permits every party to lodge a late objection or late response in any and every subcase. Rather, the Court noted that motions to file late responses and objections would be reviewed "under a criteria similar to that contained in I.R.C.P. 55(c). The proponent must show both good cause for untimeliness and the existence of a meritorious position." Id., p. 2 (emph. original).¹

B. THE REQUIREMENT OF A SHOWING OF "GOOD CAUSE".

The Court's requirement that a party seeking leave to file a late objection or response make a showing of "good cause" for not having filed the objection or response in a timely fashion is directly analogous to the showing of "mistake, inadvertence, surprise or excusable neglect" required to secure relief under Rule 55(c). Accordingly, it is appropriate to apply the additional subsidiary concepts adopted by the Idaho courts in evaluating whether a party's showing is sufficient.

In order to secure relief, the showing required to establish excusable neglect is measured against an objective, external criteria; it must constitute "conduct that might be expected of a reasonably prudent person under the same circumstances." Reeves v.

¹The standard under I.R.C.P. 55(c), which permits the Court to relieve a party from a default requires a two-fold showing of (1) "mistake, inadvertence, surprise or excusable neglect"; and (2) "facts which, if established, would constitute a meritorious defense" as against the claim in question. Clear Springs Trout Co. v. Anthony, 123 Idaho 141, 143, 845 P.2d 559 (1992).

Wisenor, 102 Idaho 271, 272, 629 P.2d 667 (1981); Hearst Corp. v. Keller, 100 Idaho 10, 11, 592 P.2d 66 (1979). The determination of whether the standard has been surmounted is one which "invokes both the fact-finding and law-applying functions of the trial court." Avondale on Hayden, Inc. v. Hall, 104 Idaho 321, 325, 658 P.2d 992 (Ct. App. 1983). The trial court's determination is deferentially reviewed; its factual component will not be set aside unless "clearly erroneous," and its application of the law will be set aside only if it constitutes a clear "abuse of discretion." Clear Springs Trout Co. v. Anthony, *supra*, 123 Idaho at 143-44; Avondale on Hayden, Inc. v. Hall, *supra*, 104 Idaho at 325.

Given the clear purpose of the special dispensation granted by the *Order*, it seems entirely clear that a litigant seeking to take advantage of the "mechanism" must, at a minimum, demonstrate the existence of a "good cause" for untimeliness by showing that the untimeliness was, as a matter of fact, the product of the moving party's earlier reasonable and justifiable "rel[iance] on IDWR to litigate and advocate in favor of the Director's Report . . ." If such a showing were not required, then the dispensation granted by the *Order* would become nothing more than a "general amnesty" automatically permitting every litigant to lodge late objections and responses at will; the two-part showing expressly required by the *Order* would become entirely superfluous. It is clear that that was not what the Court intended.

Of necessity, it is logical to conclude that in order to make the showing required by the *Order*, a party seeking leave to file untimely objections or responses must demonstrate that his earlier failure to file was a product of a deliberate, cognitive decision, rather than an ordinary omission due to lack of attention, or the like. If the central thesis

for granting the dispensation was the protection of parties against the consequences of an earlier decision to rely on IDWR, based upon the change in circumstances occasioned by the legislature's action, it stands to reason that the decision not to file an objection/response had to be a cognitive one, based upon the motivational considerations described in the *Order*.

The movants have fallen far short of even attempting to demonstrate, let alone establishing the existence of "good cause" of this nature.

The moving parties' view of "good cause" seems to consist of nothing more than the premises that (1) IDWR was formerly a party to this case; (2) filed a Director's Report making a specific recommendation concerning every water right claimed within Basin 36; and (3) IDWR could presumably be counted upon to "defend" the recommendations contained in the Director's Report. Therefore, they conclude, they relied to their detriment upon IDWR's anticipated participation, and given the change effected by the amending legislation, should now be afforded a second opportunity to weigh into the litigation.

This view would effectively constitute the *Order* as the "open amnesty" described above. Were this the entire showing of "good cause" required, then it is clear that every party, regardless of circumstances, would have the unquestionable right to intervene in an untimely way, in every subcase, merely by mouthing the magic word "reliance." This is clearly not what the Court expected, or what the *Order* was intended to require by way of a showing of "good cause."

The claimants submit that the moving parties should be required to make some showing of cognitive deliberation which amounts to an informed decision not to participate in the subcases in question, and that this decision was somehow motivated by reliance on IDWR's presumed intent to litigate for the purpose of sustaining the recommendations set out in the Director's Report. This is clearly a showing which they have not, and indeed cannot, make.

The depositions of the individual moving parties reveal that until recently, none of the moving parties were familiar with the claims or the claimants involved in these subcases, and none had even read the recommendations contained in the Director's Report for Basin 36. This is not a situation in which the movants had concerns with respect to the claims, but expecting IDWR to litigate the discrepancies between the claims and the recommendations, opted not to duplicate its efforts. Rather, this is a situation in which the movants had no actual knowledge about the claimants, or the claims, or the recommendations; there was no "assumption" as to IDWR's intent to litigate, and indeed no thought as to its role at all.

The movants also apparently seek to justify their failure to lodge timely pleadings on the premise that until the decision in Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994), they did not fully appreciate the importance of joining the fray in these specific subcases. However, they assert, once Musser became the law of the land on February 28, 1994, it became clear that those who appropriated groundwater tributary to the Snake Plain Aquifer had an immediate stake in the outcome of claims by others relating to ground or spring-water sources tributary to the aquifer.

The difficulty with their position is several-fold. First, it appears to be their supposition that until the Idaho Supreme Court issued its opinion in Musser, they were entirely ignorant of that proceeding and its potential ramifications. However, Musser was filed with the SRBA Court on June 22, 1993, and the Court's decision issuing the writ of mandate to Director Higginson was issued on August 5, 1993. If the "ominous portent" of Musser was the justification for the movants' delay, they, as parties to the case, both could and should have concluded that its pendency gave rise for concern long before August of 1995.

Even if we are to assume that until the Supreme Court released its opinion on February 28, 1994, the movants were blithely unappreciative of the risks to which it gave rise, they do not explain why they continued to delay requesting leave to participate in the pending subcases. Ordinary arithmetic tells us that from March 1, 1994 to August 18, 1995, when their motions were filed, a period of over 18 months elapsed.

If we tie the dawn of movants' ability to appreciate the existence of the "problem" to the date legislative action was completed in connection with amendments to the adjudication statutes, we can ascertain that as of April 12, 1994, they became aware that the Director was no longer a party to whom they could look for support, and the Director's Reports were no longer pleadings upon which movants could reasonably rely. 1994 Idaho Sess. Laws, ch. 454, § 35, p. 1478, and ch. 455, § 8, p. 1491. The 17-month delay is unexplained.

Simply put, the election to advance Musser and/or the pendency of the proposed revisions to the legislation as an explanation for movants' "decision" not to file

timely objections or responses is, as a matter of fact, singularly insincere and unpersuasive.

More importantly, the moving parties' failure to grasp the significance of these purely-legal developments vis-a-vis their own claims would not, as a matter of law, constitute the form of showing of "mistake" or "excusable neglect" which would entitle them to relief under Rule 55(c), nor, by parity of reasoning, can it constitute the showing of good cause "under a criteria similar to that contained in I.R.C.P. 55(c)." *Order*, p. 2 (emph. added). Where a party requests relief under Rule 55(c) based upon "mistake," the mistake must be one of fact, not one of law. See, e.g., Reeves v. Wisenor, *supra*, 102 Idaho at 272 ("Where, as here, mistake is alleged as grounds for relief, such must be factual rather than legal . . ."); Hearst Corp. v. Keller, *supra*, 100 Idaho at 11 ("A mistake sufficient to warrant relief setting aside a default judgment must be of fact and not of law.").

Suggesting that they cognitively elected not to file a timely objection because until the Supreme Court decided Musser, or until the legislature revised the adjudication statutes, they did not appreciate that their participation was advisable does not amount to a showing of "good cause" based upon some understandable lack of factual knowledge or information, or mistake of fact. Rather, it constitutes nothing more than a miscalculation, from a purely legal perspective, of the potentially significant result of a given subcase. That is clearly not the showing of good cause the *Order* contemplates.

C. THE SHOWING OF A "MERITORIOUS POSITION".

The second part of the standard announced in the *Order* is a showing of facts which, if proven, would establish "the existence of a meritorious position." *Order*, p. 2. The showing of a "meritorious position" is analogous to the showing required by Rule 55(c),

which requires that a party seeking relief from a default "[P]lead facts which, if established, would constitute a meritorious defense" to the underlying claim. Clear Springs Trout Co. v. Anthony, supra, 123 Idaho at 143.

This second requirement is both logical and practical; as the Supreme Court has explained in connection with requests for relief under Rule 55(c), "It would be an idle exercise for the court to set aside a default if there is in fact no justifiable controversy." Hearst Corp. v. Keller, supra, 100 Idaho at 12.

In earlier memoranda, the movants have relied heavily upon the concept that the determination of the existence of a "meritorious position" must be determined exclusively by reference to their allegations, standing alone, and that they are not required to prove the existence of the alleged facts at this juncture in order to secure relief. While it is true, as movants claim, that the focus must be upon the facts pleaded, this does not mean that movants may simply advance allegations, and those opposing the motion must blindly accept them as immutably true in every respect.

Rather, the facts advanced as demonstrating the existence of a "meritorious position," and which compels the conclusion that there is a real "justiciable controversy" which would justify permitting the filing of late objections or responses must go well beyond the mere allegational conclusion that movants "have a meritorious position." Borrowing from the standards which apply under Rule 55(c), it is clear that substantially more is required:

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 that the

defendant has a good defense in not sufficient. Whether the pleaded facts are sufficient to constitute a defense is also one for the trial court. (Citation omitted.)

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

See also, Hearst Corp. v. Keller, *supra*, 100 Idaho at 12 ("The defense matters must be detailed."); Baldwin v. Baldwin, 114 Idaho 525, 528, 757 P.2d 1244 (Ct. App. 1988) ("As before noted, [the moving party] must also show a meritorious defense. Factual details must be shown with particularity.").

In this context, the moving parties must allege the existence of facts which demonstrate the existence of a real, genuine and justiciable controversy between themselves and the specific claimants in these specific subcases. In this context, that means advancing at least a detailed factual allegation that the moving parties have a genuine interest in the outcome of the pending controversy in the subcases. Put another way, movants must, as a condition precedent to relief, leave the Court with enough information to demonstrate the existence of standing with regard to the subcase issues.

Here, that means, at a minimum, factual allegations which are at least sufficient to give rise to a genuine issue whether the claims asserted in the subcase, if resolved in favor of the claimant, would work some genuine loss or injury in fact to the moving party in relation to the moving party's own competing claim. Idaho law does not recognize standing based upon a mere generalized interest in the outcome of a case; rather, standing requires a showing of "injury in fact" peculiar to the specific litigant, and which is "uncommon to other similarly situated [parties]." Scott v. Buhl Joint School Dist. No. 412, 123 Idaho 779, 781, 852 P.2d 1376 (1993).

Here, there is no meaningfully-detailed allegation or showing that the moving parties will suffer injury particular to themselves and which would confer standing to assume the role of a full-blown litigant against the specific claimants, and with respect to the specific claims at issue in the denominated subcases. In point of fact, the results of the recent depositions clearly confirm that the moving parties are possessed of no personal knowledge which suggests the existence of an injury, or even a potential injury, which would justify according them an opportunity to litigate at length with these claimants concerning their rights.

In this instance, we were afforded the additional benefit of knowing that the moving parties seek leave to file late objections/responses for the purpose of attempting to overcome an earlier ruling which denied them "organizational standing," as the "North Snake Pumpers," to lodge late objections/responses on a collective basis. The preliminary showing made by the moving parties in these "individualized" motions are no more satisfactory than they previously advanced on an organizational basis.

While it may be entirely true that the moving parties are appropriators who claim beneficial rights to water tributary to the Snake Plain Aquifer involved in Musser, the situation before the Court is fundamentally different than that presented in Musser. In Musser, the petitioners both alleged, and ultimately proved, that the actions of the Director in refusing to comply with his statutory duty to deliver water to their unobjected-to rights created direct, immediate and significant consequences. Here, these moving parties have done neither.

Here, the moving parties apparently ask the Court to simply assume, a/a Musser, that it is an established matter of fact that the Snake Plain Aquifer is inextricably interconnected at every juncture, and that any withdrawal of water, by any claimant, at any location, at any time of year, in any amount, for any purpose, *ipso facto* operates to the direct and immediate loss of any other appropriator, regardless of location, despite the nature of use, and without respect to competing priority.

Neither this Court, nor the Supreme Court, made a determination to that effect in Musser. Rather, both courts merely determined that the Director had a statutory duty under former Idaho Code § 42-602 to deliver water in accordance with the prior appropriation doctrine, and that he had failed to do so. Regardless of movants' view concerning the significance of Musser, it cannot be understood as sanctifying litigation between aquifer appropriators based solely upon the single fact that they are aquifer appropriators.

Simply stated, it is clear that the moving parties have failed to come forward with particularized and detailed factual allegations which, if proven, would entitle them to relief in these subcases, as against these subcase claimants, with regard to these claimed rights. The limited discovery permitted takes the matter even one step further, demonstrating the proof of these preliminary but-indispensable facts does not exist, and even if the movants were permitted to belatedly join the litigation, proof of their existence will not be forthcoming.

D. METHOD AND BURDENS OF PROOF.

A word also needs to be said concerning the proper method by which the moving parties should be required to present the proof necessary to justify relief under the Order. Proceedings for relief from a default under Rule 55(c) are, by nature, on the record, in the form of the motion, supporting affidavits and other materials; hearings under Rule 55(c) are not evidentiary, and do not entail the taking of testimony from witnesses in open court. See, e.g., Thomas v. Stevens, *supra*, 78 Idaho at 271 ("The facts constituting the defense, whether disclosed by answer, affidavit or both, must also be detailed . . ."). See also, State ex rel. Frohnmayer v. Low, 105 Or. App. 357, 804 P.2d 1217, 1219-20 (1991) (in the absence of statute or rule, trial court's resolution of motion for relief from default was properly confined to motion, affidavits and other matters of record, and there was no error in refusing to take oral testimony).

On an equally important score, it is clear that the moving parties have, and at all times retain, the burden of making the two-fold showing required by the Order to justify the relief requested. The moving parties suggest that the Court should apply the long-standing principle applied to motions under Rule 55(c), which provides that "[I]n doubtful cases a standard of liberality rather than strictness must be applied." Federal Land Bank of Spokane v. Wright, 120 Idaho 32, 35, 813 P.2d 371 (Ct. App. 1991).

The "standard of liberality," assuming it is the correct standard to be applied, does not alter the allocation of burdens of proof, or obligate the Court to merely "assume" that a party is entitled to relief merely because relief has been requested. Rather, the party who requests relief "bears the burden of proving his right to relief." Matter of Adoption of

A Male Child, 102 Idaho 225, 227, 628 P.2d 1059 (1981) (emph. added). Here, that means establishing, upon the record, both of the requirements spelled out in the *Order*.

Because the moving parties have failed to shoulder the burden imposed by the *Order*, their motions should be denied.

Dated this 21st day of November, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: 
Patrick D. Brown
Attorneys for Claimants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 21st day of November, 1995, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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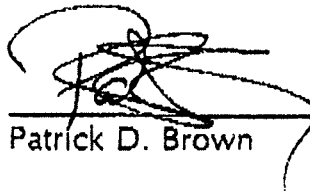
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