

I. BACKGROUND

This matter is before the Court on Pumpers' Motion for Permissive Review of the Special Master's decision denying Pumpers' Motion to File Late Objection. The facts relating to this matter have been fully discussed in the previous briefings and the Special Master's decision. They will not be reiterated here. Briefly, Pumpers attempted to file their Motion for Late Objection approximately two years following the close of the objection period. Although they claimed to have discovered new evidence that led to their filing the objection, the fact is that the evidence was always available. In fact, the evidence was known to members of Pumpers' association and their predecessors long ago. The Pumpers' members and their predecessors participated in prior proceedings and raised the same arguments they attempt to raise here. Pumpers are bound by the decisions in those proceedings.

The Special Master denied the Motion for Late Objection. In reaching his decision, the Special Master relied on the standards of "good cause" set forth in I.R.C.P. Rule 55(c), i.e., that the party show due diligence and a meritorious claim. The Special Master found that the Pumpers' members and predecessors lacked diligence by not asserting their claims long ago, despite knowledge of them. The Special Master further found that res judicata would bar the claims made so that they lacked merit.

II. ARGUMENT

Because the Special Master's decision is not a final decision, Pumpers have no appeal as of right. As a result, they seek permissive review of the Special Master's ruling pursuant to Administrative Order No. 1 (AO 1). In their brief, Pumpers claim that there are three reasons why permissive review is appropriate. First, they claim that the Special Master erroneously applied the standards under I.R.C.P. Rule 60(b) instead of I.R.C.P. Rule 55(c) in denying their motion. Second, they claim that the Special Master abused his discretion in deciding that the actions of Pumpers' members and members' predecessors in interest established a lack of due diligence. Finally, Pumpers argue that the Special Master misapplied the law governing res judicata. As set forth below, Pumpers' arguments are without merit. Pumpers have not satisfied the test for permissive review. Pumpers' motion should be denied.

A. Standards Relating To Permissive Review.

In Administrative Order No. 1, paragraph 11d, the SRBA Court established the standard for granting permissive review of a Special Master's interlocutory determination. The Court established that review is appropriate where

the interlocutory determination involves a controlling question of law as to which there are substantial grounds for difference of opinion and in which immediate consideration of the determination may advance the orderly resolution of the litigation.

This standard is identical to the standard for permissive appeal of an interlocutory decision of a district

court under Idaho Appellate Rule 12. To date, there has not been much judicial interpretation of these standards under I.A.R. 12. However, that rule and the standards set forth therein are identical to the standards for interlocutory appeals in federal courts contained in 28 U.S.C. § 1292(b). As a result, the caselaw interpreting these same standards under the federal statute are instructive. See Budell v. Todd, 105 Idaho 2, 665 P.2d 701 (1983).

It is well established that the interlocutory appeal provisions should "be used sparingly and only in exceptional cases." Department of Economic Development v. Arthur Andersen & Co., 683 F. Supp. 1463, 1486 (S.D.N.Y. 1988); White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994); S. Rep. No. 2434, 85th Cong. 2d Sess (1958), reprinted in, 1958 U.S.Code Cong. & Admin. News 5255, 5260 (legislative history of statute); 16 Wright & Miller, Federal Practice and Procedure, § 3929 (1982 & Supp. 1995). The reason for the test is to prevent piecemeal appellate review in all but exceptional cases. The mere fact that a decision may have significant practical effects on the litigation and the aggrieved party is not, in and of itself, a reason for granting permission to appeal. See Link v. Mercedes-Benz of N. Am., Inc., 550 F.2d 860, 862-63 (3d Cir.), cert. denied, 431 U.S. 933 (1977); see also Mazzella v. Stineman, 472 F. Supp. 432, 436 (E.D. Pa. 1979).

In deciding whether such a motion should be granted, the burden is on the movant. That burden is a heavy one. The

movant must demonstrate that the case is an exceptional one and that immediate review is warranted. See White v. Nix, 43 F.2d at 376.

Several cases have interpreted the three criteria that movant must demonstrate to warrant permissive review. As to the first, the "controlling question of law," it has been held that the question must be one of law, not fact. See Link, 550 F.2d at 863; Harriscom Svenska AB v. Harris Corp., 947 F.2d 627, 631 (2d Cir. 1991).

Further, matters within the discretion of the trial court are not controlling questions of law. Allegations that a court abused its discretion do not create legal issues. Allegations relating to the exercise of a fact finder's discretion are not the type recognized to be appropriate for interlocutory review. See White v. Nix, 43 F.3d at 377.

Essentially, to be controlling, the issue must be serious to the conduct of the litigation either practically or legally. On the practical level, saving of time and expense is deemed to be a highly relevant factor. It may be controlling if resolving it may appreciably shorten the time, effort and expense of conducting a lawsuit. See Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir.), cert. denied, 419 U.S. 885 (1974), citing S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958), reprinted in, 3 U.S.Code Cong. & Admin. News, p. 5256 (1958). Thus, if reversal of a ruling of law would terminate the action, a legal

issue has been found to be controlling. See Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir. 1990)

The second factor is whether there is a substantial difference of opinion. This factor has focused on whether the law in the area of issue is well settled or is subject to disagreement. For instance, courts have recognized that review may be appropriate where there are a sufficient number of conflicting and contradictory opinions. See White, 43 F.3d at 378. On the other hand, if the issues are not difficult or of first impression, they are not considered reviewable. See Klinghoffer, 921 F.2d at 25. Essentially, to satisfy the second prong, the question must be difficult, novel and a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions. See In Re Grand Jury Proceedings June 1991, 767 F. Supp. 222, 226 (D. Colo. 1991).

The third prong requires a showing that immediate review will materially advance the ultimate termination of litigation. This is often intermixed with the issue of controlling question of law. If appeal of a matter will terminate the litigation it is sometimes considered controlling and it has been held to satisfy the third prong as well. See Harriscom, 947 F.2d at 631; Dept. of Economic Development, 683 F. Supp. at 1486.

B. The Pumpers Do Not Demonstrate Any Controlling Issue Of Law.

Pumpers challenge the Special Master's discretionary ruling deciding whether to permit their motion for late objection. The Special Master's decision to grant the motion for late objection which applies the standards under I.R.C.P. Rule 55(c) or I.R.C.P. Rule 60(b) is a matter of discretion. It will not be reversed absent a showing of an abuse of discretion. See Newbold v. Arvidson, 105 Idaho 663, 664, 672 P.2d 231, 232 (1983). Because it is a matter of discretion, it is not a controlling issue of law for purposes of granting interlocutory review. See White, 43 F.3d at 377. As such, it is not appropriate for permissive review.

In addition, Pumpers' argument relating to the standard applied by the Special Master is erroneous and, thus, does not raise a controlling issue of law. Pumpers claim that the Special Master erroneously applied the standard set forth in I.R.C.P. Rule 60(b) in deciding their motion rather than the standard set forth in I.R.C.P. Rule 55(c).

A review of the Court's opinion and the law governing setting aside defaults shows that the Special Master did, in fact, apply the standard under I.R.C.P. Rule 55(c). The Special Master reviewed the standards governing both I.R.C.P. Rule 55(c) and I.R.C.P. Rule 60(b). Following his review of the tests relating to each rule, the Special Master recognized two criteria that must be satisfied under both rules. Those criteria are (1) a showing of due diligence on the part of the party seeking to set aside the default; and (2) a showing of a meritorious

defense. Caselaw supports the Master's findings. See Kovachy v. DeLeusomme, 122 Idaho 973, 842 P.2d 39 (App. 1992) and Thomas v. Stevens, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956).

The purpose behind each of these requirements supports the Master's findings that they apply to both I.R.C.P. Rule 55(c) and I.R.C.P. Rule 60(b) determinations. The first requirement is intended to place the burden on movants of showing some reason beyond mere conclusory allegations why they should be excused from the default. They must show that they have acted reasonably and diligently. In addition, they must show that their claims have merit so that if the Court grants the motion it will not be futile. These requirements are intended to maintain the integrity of the judicial system by preventing lackadaisical persons from being excused from legal obligations and court deadlines and by preserving judicial economy by preventing frivolous claims. The goals to be served by each of these requirements applies whether the default was entered by the clerk or by judgment. A party must satisfy these tests whether default was by the clerk or by judgment.

It was on those two standards that the Special Master based his findings. As such, he applied the standards that apply to I.R.C.P. Rule 55(c), the very standard that Pumpers argue should be applied. As a result, there is no issue of law

relating to the standard to be applied. Because there is no issue of law, there is certainly no controlling issue of law.¹

Pumpers' other arguments raise issues of fact rather than law. Pumpers argue that they disagree with the facts upon which the Special Master based his finding that it lacked due diligence.² Pumpers also argue that the Special Master erred in determining that the actions of Pumpers' predecessors in interest can bind Pumpers.

The determination that there was an opportunity to object long ago is a factual one within the sound discretion of the Special Master. Similarly, the Special Master's finding that these persons had a relationship with Pumpers such that Pumpers

¹Even if the Special Master applied the standard under I.R.C.P. Rule 60(b), it is not clear that application of that standard would not be correct. Administrative Order No. 1 clearly provides that such a motion shall be governed by both the standards of I.R.C.P. Rule 55(c) and I.R.C.P. Rule 60(b). Because the Court used the term "and", not "or", under the principles of statutory construction, the Court appears to have intended to require that the tests under both rules must be satisfied. See Cameron v. Minidoka County Highway Dist., 125 Idaho 801, 874 P.2d 1108 (1994). As such, the Special Master would have been justified in applying the standards contained in both rules, not just I.R.C.P. Rule 55(c). Because he is justified, there is no question of law at issue much less a controlling one.

²Pumpers argue that they disagree with the Special Master's factual finding that there was an opportunity for them to make their arguments long ago, instead arguing that they are only four months late. It is uncertain how Pumpers arrive at the four-month calculation. The time for filing objections is set by the Court rules, not by the timing of Pumpers' alleged discovery of information. The time for filing objections in Basin 36 ended in 1993. Pumpers did not attempt to file their motion for late objection until 1995. Thus, the time for filing objections had expired more than four months before Pumpers' motion was filed.

are bound is also a factual finding based on the Special Master's discretion. Because these are both factual determinations, they do not raise issues of law. Because they do not raise issues of law, they do not fall within the category of issues that are controlling issues of **law** [emphasis added].

Even if it could be argued that these arguments raise issues of law, again they are matters within the Special Master's discretion. As such, they are not controlling issues of law. Permissive review is inappropriate.

C. There Is No Substantial Difference Of Opinion As To The Governing Law.

1. The Law Governing the Standards To Apply Is Not In Dispute.

There is no substantial difference of opinion with regard to the law relating to the standards to be applied for granting motions for late objections. The law relating to setting aside defaults under both I.R.C.P. Rule 55(c) and I.R.C.P. Rule 60(b) is well established. It is not a novel area for which no precedent exists. Thus, there is no substantial difference of opinion that would warrant immediate permissive review.

The case McNeil v. Aquilos, 820 F. Supp. 77, 79 (S.D.N.Y. 1993), addressed this issue. In that case, the Court held that an order vacating a default does not meet the second prong because the standard for vacating a default judgment were well-settled in that jurisdiction. Similarly, in Idaho, the standard for vacating a default is well established. As such,

Pumpers' argument does not satisfy the substantial difference test.

2. The Law Governing Res Judicata Clearly Precludes Pumper's Claims and Is Not Subject To Dispute.

Pumpers claim that the Court misapplied the doctrine of res judicata. Pumpers do not claim that they are not bound by these prior proceedings. Rather, they claim that res judicata only applies where an issue has been litigated on the merits.

Pumpers' argument ignores the well established law that res judicata applies to all matters that were or could have been litigated in a prior case. See Robinson v. Robinson, 70 Idaho 122, 128, 212 P.2d 1031, 1034 (1949); Gramm v. Lincoln, 257 F.2d 250, 256 (9th Cir. 1958) (construing Idaho law). It has been recognized that principles of res judicata apply to questions of jurisdiction and apply though a proceeding was decided by motion. See American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932). Res judicata has been specifically recognized to apply though a judgment was entered by default. See Lewiston Lime Co. v. Barney, 87 Idaho 462, 394 P.2d 323, 328 (1964), citing Robinson.

The well established law demonstrates that the doctrine of res judicata applies to the Pumpers and that Pumpers are bound by the prior proceedings involving Pumpers' members and their predecessors in interest. It applies though those cases were decided on jurisdictional grounds. It applies to all matters that could have been litigated in those cases. One such matter is the very issue Pumpers wish to raise in this subcase. Pumpers

are bound by these prior proceedings. As such, Pumpers' arguments are barred by res judicata.³

Because the law relating to res judicata is well established and there are no contradictory opinions, there is simply no difference of opinion. Pumpers have failed to satisfy the second prong. Permissive review is not warranted.

D. Permitting Immediate Appeal of Pumpers' Claims Will Not Advance Resolution Of This Litigation.

Permitting immediate review of the Special Master's decision on any of the grounds argued by Pumpers will not advance resolution of this litigation. In actuality if the interlocutory review is allowed to proceed, it will delay further proceedings in this subcase, a subcase that has been pending before the Special Master in Basin 36 since September 1993. Given the issues raised by Pumpers, the Special Master may well have to stay further proceeding in the subcase at all until the permissive review is final.

In addition to delaying matters procedurally, appellate review at this time could actually prolong the subcase. The issues raised by the proposed objection have not previously been raised. The issues raised involve facts and circumstances that

³The fact that Pumpers' Association itself was not a party to the prior action is not dispositive. Pumpers' members and predecessors in interest were parties. As such, Pumpers are bound by those predecessors in interest. See Lewiston.

Moreover, Pumpers Association itself cannot claim some separate right to bring this objection unrelated to its members. Pumpers' Association in and of itself does not claim or own a water right in the SRBA. As such, it is not a party. Because it is not a party, it does not have standing.

occurred more than thirty years ago. Interlocutory review and reversal of the Special Master's decision would allow these different issues that involve factual matters that occurred more than thirty years ago to be litigated. Because the facts relating to these issues span 30 years, development of the facts through discovery and formulation of the issues will take additional time.

Rather than advancing resolution of this subcase, granting permissive review will have the reverse effect regardless of the decision on review. It will either delay proceedings or enlarge issues and extend the time necessary to finish proceedings.

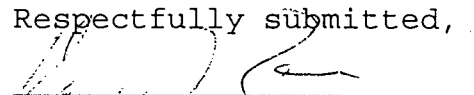
On the other hand, there will be no harm by refusing permissive review. Pumpers claim that permissive review must be granted because otherwise they will not be able to pursue their arguments. However, refusing to grant permissive review will not prevent them from pursuing their right to challenge pursuant to the procedures set forth in Administrative Order No. 1, ¶ 12 when appropriate. Even if the Special Master is later reversed, no time will have been wasted given the issues raised by Pumpers are not duplicative and do not overlap with issues currently in the subcase. At the same time, if the Special Master is affirmed, there will have been no delay at all and the issues will have been resolved in an orderly fashion while preserving the well established rule governing review from final judgments versus piecemeal review.

Pumpers have simply failed to meet the heavy burden required for permissive review. They have not shown that this is an exceptional case. Rather, the issue involves well established principles of law and the routine exercise of the Special Master's discretion. The fact Pumpers want immediate review does not demonstrate that the matter is exceptional. It does not warrant interlocutory review.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the United States respectfully requests that the Pumpers' motion for permissive review be denied.

Respectfully submitted,



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DATED: 2/6/96

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CERTIFICATE OF SERVICE

I certify that on the 10 day of February, 1996, I served a true and correct copy of the United States' Response to Magic Valley Underground Pumpers' Brief in Support of Motion for Permissive Review by postage prepaid, first class mail on the the following individuals:

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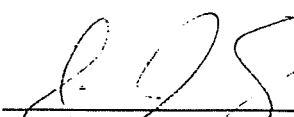
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