

RECEIVED

JAN 16 1996

OFFICE OF THE
ATTORNEY GENERAL

Magic Valley Underground Pumpers Association, Inc.

2-1

Jeffrey C. Fereday
Michael C. Creamer
Karl T. Klein
Givens Pursley & Huntley LLP
277 North 6th Street
PO. Box 2720
Boise, ID 83701
(208) 388-1200
(208) 388-1201 (fax)
4382\2\REVIEW.BRF

RECEIVED

JAN 17 1996

Department of Water Resources
Adjudication Bureau

**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

BRIEF IN SUPPORT OF
MOTION FOR PERMISSIVE
REVIEW

I. INTRODUCTION

Magic Valley Underground Pumpers' Association, Inc., and its individual members ("Association"), through its attorneys, Givens Pursley & Huntley LLP, file this brief in support of the Association's-recently designated Motion for Permissive Review of the Special Master's *Order Denying Motion for Leave to File Late Objection* ("Order"). Permissive review of the Special Master's Order should be granted because that Order decided controlling questions of law for the SRBA: What is the correct standard for reviewing a motion to file a late objection?; and Are parties and the Court barred from reviewing all the elements of a decreed or licensed water right in the SRBA? This Court's immediate consideration of these issues will advance the

orderly resolution of the SRBA.

II. BACKGROUND

The Association is an Idaho non-profit corporation representing over 130 individual water right holders who pump ground water from the Eastern Snake Plain Aquifer ("ESPA") for irrigation purposes. All of Association's members have filed water right claims in the SRBA.

The Association's members first formed the Association to prepare a joint response to the July 27, 1994 Petition for Delivery Call ("Petition") filed by A & B Irrigation District ("A & B"), with the Idaho Department of Water Resources ("Department") pursuant to the Department's conjunctive management rules. A & B has claimed water right 36-02080 in the SRBA. The United States Bureau of Reclamation ("Bureau") also has claimed the same water right in the SRBA.

While preparing its response to A & B's Petition, the Association learned that there were substantial grounds, based on events that took place over 30 years ago, for objecting to the priority date recommended by the Department for claim 36-02080. By examining files obtained from the Department, the Association discovered that the State Engineer had ruled in 1956, and again in 1964, that A & B's license for wells operated under water right 36-02080 should have had a split priority date rather than a single-priority date. The Association also learned that Idaho's Attorney General had opined in 1964 that a portion of the Bureau's permit had been abandoned and should have been canceled. Despite the Department's and Attorney General's findings, the license was improperly issued with a senior, single-priority

date for all of the A & B wells.

When the Association recognized in 1994 that there were substantial grounds for objecting to A & B's claimed priority date, it determined to do so soon after the Stay in the SRBA main case, imposed last April, was lifted on December 7, 1994. Shortly thereafter, on December 22, 1994, the Association moved for leave to file a late objection and enter the subcase to contest A & B's single-priority date. The Special Master denied the Association's motion.

According to the Special Master, missing the SRBA's objection deadline amounted to a default and

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.

Order at 11 (emphasis in original).

The "diligence" that apparently mattered to the Special Master was not that of the Association or the vast majority of its members who first learned of the grounds for objecting to A & B's single-priority date after the objection-filing deadline had passed. Rather, the Special Master focused on whether a separate and unrelated organization and several individuals, most of whom are deceased, but some of whom are now Association members, had acted diligently *30 years ago* when they learned that the Bureau had been awarded a single-priority water right under questionable circumstances. By focusing on others' diligence 30 years ago, the Special Master

found that

Now, because of inaction and the passage of time, the Association's claimed defense is barred by the doctrine of *res judicata*. . . . 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 at 11-12.

The Association filed both a Notice of Appeal pursuant to I.R.C.P. 83(f) and, alternatively, Objections to the Order pursuant to I.R.C.P. 53(e)(2). The Special Master deemed the Association's Notice of Appeal and Objections to the Special Master's Order together to be a Motion for Permissive Review filed pursuant to SRBA Administrative Order No. 1 ("AO 1"), § 11d. *See* December 14, 1995, *Order Deeming Notice of Appeal and Objections as a Motion for Permissive Review*. The Special Master granted the Association leave to file a brief in support of its recently designated Motion for Permissive Review.

III. STANDARD FOR GRANTING PERMISSIVE REVIEW

AO 1, § 11d provides that permissive review of a special master's interlocutory determination 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 essentially identical to the standard for permissive appeal under I.A.R. 12. The threshold questions under I.A.R. 12 are whether there is a controlling question of law, and whether an immediate appeal would advance the

orderly resolution of the litigation. *See Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 702 (1983). Determining what constitutes a controlling question does not involve asking whether a reversal ultimately would be necessary if it were wrongly decided by the Special Master - but whether an immediate appellate reversal might save time and expense for all concerned. *See FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE*, 2d ed., § 13.3, p. 596 (1993).

III. ARGUMENT SUMMARY

The Association's designated Motion for Permissive Review states various objections to the Special Master's Order denying the Association's motion to file a late objection. Those objections reflect that 1) the Special Master misapplied the standard for deciding whether to allow a late objection to be filed in the SRBA; and 2) the Special Master essentially has barred the Association, and the Court, from reaching the merits of A & B's and the Bureau's disputed senior, single-priority date. In resolving these important and controlling issues of law for which there are substantial differences of opinion, this Court would be faced with the following issues:

- A. Should a motion to file a late objection in the SRBA be reviewed under the standard used for setting aside a clerk's ministerial entry of default, or should it be reviewed under the more stringent standard for setting aside a court's final judgment of default?**

Despite the Special Master's reference to I.R.C.P. 55(c)'s "good cause" standard in his Order, the Special Master actually reviewed the Association's motion to file a late objection under I.R.C.P. 60(b)'s standard for setting aside a court's final judgment of default. The Association asserts that the proper standard of review is the more

lenient "good cause shown" standard used in setting aside a clerk's entry of default under I.R.C.P. 55(c).

B. To what extent do the actions or inaction of persons contesting a license long ago bind individuals and the SRBA Court today?

In applying the diligence element of I.R.C.P. 60(b) to deny the Association's motion to file a late objection, the Special Master focused on whether individuals other than the Association, a few of whom admittedly now are Association members, had diligently contested the license when it was issued under questionable circumstances *30 years ago*. The Association asserts that the Special Master's focus on events 30 years passed was improper, and that the diligence that matters in deciding whether to allow the Association to file a late objection is that of the Association in promptly objecting after discovering in 1994 that it had substantial grounds for attacking A & B's senior, single-priority date.

C. Did the Special Master properly apply the *res judicata* doctrine as precluding the Association and its members from having a meritorious claim?

The Special Master ultimately denied the Association's motion to file a late objection under the *res judicata* doctrine. In actuality, *res judicata* presents no bar to the present litigation because the previously dismissed lawsuits concerning A & B's license were not judgments on the merits. The Special Master's incorrect use of *res judicata* to prevent the Association from presenting evidence to this Court regarding the issuance of A & B's license undermines this Court's ability to correctly determine the nature, extent, and relative priority of all the water rights in the

system, and it thwarts recognized policy favoring the resolution of all doubts in favor of a defaulted party so that an adjudication on the merits may be reached.

The Special Master is specifically charged with hearing evidence and then reporting back to this Court on those claims which have "had full resolution of every element of the right. . . ." AO 1, § 11c. However, by denying the Association's motion to file a late objection to A & B's claim, the Special Master has precluded presentation of all relevant evidence regarding a primary element of A & B's water right: its priority. Without this evidence, the Special Master's ultimate report to this Court will incorrectly describe that element.

All of the above issues bear on the proper standard for reviewing late objections in the SRBA and the policy favoring the adjudication of a water right's merits. These are controlling issues of law for the SRBA, and this Court should not await the issuance of the Special Master's recommendation or a partial decree before resolving whether the Association should have been allowed to object to A & B's claim. Granting permissive review now to determine whether the Association may file a late objection will promote finality at an earlier stage as well as the orderly resolution of this litigation.

IV. ARGUMENT

The Court should grant permissive review and allow the Association to fully brief the following issues to the Court.

A. The Association's motion to file a late objection in the SRBA should be reviewed under the standard for setting aside a ministerial clerk's entry of default.

This Court has indicated that a motion to file late notice of claim will be reviewed under I.R.C.P. 55(c) and 60(b). A0 1, at 7. Rules 55(c) and 60(b) respectively set forth the standards for setting aside a clerk's entry of default and a final judgment of default. Given the similarities between a motion to file late notice of claim and a motion to file a late objection, it would also seem appropriate to review both types of motions under the standards set out in Rules 55(c) and 60(b).

By refusing to grant the Association's motion to file a late objection, the Special Master decided to forgo adjudicating the merits of the Association's claim. Whether the Special Master reviewed the Association's motion for late objection under I.R.C.P. 55(c)'s standards for setting aside a clerk's entry of default, or whether the Special Master proceeded under I.R.C.P. 60(b)'s more stringent standards for setting aside a default judgment, the Special Master's decision to deny the Association's motion and to forgo judgment on the merits of the Association's claim was inappropriate. Even in a doubtful case, which this is not, the general rule is to grant relief from a default to reach a judgment on the merits. *Johnson v. Pioneer Title Company*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct.App. 1983) (citing *Bunn v. Bunn*, 99 Idaho 710, 587 P.2d 1245 (1978) ("Judgments by default are not favored, and the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits"), and *Stoner v. Turner*, 73 Idaho 117, 121, 247 P.2d 469, 471 (1952) (Procedural rules, other than those which are jurisdictional, should be applied to

promote a disposition on the merits).

While the Special Master should have granted the Association's motion under either I.R.C.P. 55(c) or 60(b), he actually proceeded under the more stringent standard of I.R.C.P. 60(b). An important distinction between the applicability of the two rules must be recognized to avoid their misapplication in this case and in future subcases in the SRBA.

Under I.R.C.P. 55(c), entry of default by a clerk and entry of a final default judgment by a court are two distinctly different acts. *See Olson v. Kirkham*, 111 Idaho 34, 36, 720 P.2d 217, 219 (1986). The distinction between an entry of default and a default judgment becomes important when relief is sought. As might be expected, relief from an entry of default is more readily granted than from a default judgment, and a party seeking relief from a clerk's entry of default is required to meet a lesser burden under Rule 55(c) than a party attempting to set aside a final default judgment under Rule 60(b). *See McFarland v. Curtis*, 123 Idaho 931, 935-36, 854 P.2d 274, 278-279 (Ct.App. 1993) ("In addition to the wording of the rules which indicate different standards, other courts have held that the required showing to set aside a default is lower or more lenient than that required to set aside a default judgment.") (citing 10 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d §§ 2681-2702 (1983); *Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir. 1989) (A more lenient approach is consistent with the application of the policy that cases should be decided on their merits); *Traguth v. Zuck*, 710 F.2d 90 (2d Cir. 1983); *Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir. 1981); *Cribb v. Matlock Communications, Inc.*, 236

Montana 27, 768 P.2d 337 (1989) (Primary considerations in setting aside default under Rule 55(c)'s more lenient "good cause" standard are whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented)); *See also* FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE, 2d ed. § 9.4, p. 448 n. 1 (1993).

The Association's motion to file a late objection should have been reviewed under the more lenient "good cause shown" standard used in reviewing a motion to set aside a clerk's entry of default under I.R.C.P. 55(c). However, in denying the Association's motion, the Special Master applied the more demanding standards set forth in I.R.C.P. 60(b) for setting aside a court's final judgment of default.

While I.R.C.P. 60(b)'s standard for setting aside a final judgment of default might be appropriate if a party tries to file a late objection after a partial decree has been entered, no partial decree exists at this point, and so I.R.C.P. 60(b)'s higher standard should be inapplicable to the Association's motion to file a late objection.

B. The actions or inaction of persons contesting an element of a water right long ago should not bind individuals or the SRBA Court today.

Whether the diligence required by I.R.C.P. 60(b) in setting aside a final judgment of default refers to the actions or inaction of persons long ago or to the actions or inaction of the Association today is an important issue. In filing its late objection, the Association was technically only four months late. The Association believes that it acted diligently in moving to file its late objection and believes that the Special Master should have focused on the Association's actions rather than those

of certain individuals 30 years ago. See *Baldwin v. Baldwin*, 114 Idaho 525, 527-28, 757 P.2d 1244, 1247 (Ct.App. 1988) (To set aside a default judgment the moving party must demonstrate that the party "was reasonably diligent in his effort to set aside the default judgment, once he learned of it"); See also *Stoner*, 73 Idaho at 121, 247 P.2d at 471 (it should appear that the *defaulting party* is not guilty of indifference or unreasonable delay; that *he* acts promptly and diligently in seeking relief from default).

The Special Master imputed the inaction of persons other than the Association to the Association today. It is telling that had the Association discovered the defects in A & B's license prior to the deadline for filing SRBA objections, the Association would have faced no obstacle in appearing and contesting A & B's claim. The actions or inaction of persons 30 years ago regarding the license's issuance would have been irrelevant to whether the Association could contest the license now in the SRBA upon filing a timely objection.

C. The Special Master misinterpreted the *res judicata* doctrine as precluding the Association and its members from having a meritorious claim.

The question of *res judicata* appears to be the ultimate reason that the Special Master denied the Association's motion to file a late objection. Through a misapplication of *res judicata* the Special Master has precluded presentation of all relevant evidence on the priority of A & B's water right.

The Special Master states:

Because its predecessors in interest exhibited indifference or unreasonable delay in prosecuting their rights, the

Association also failed to show a meritorious defense. . . . At one time, the Association's claimed defense to the priority 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*.

Order at 12.

This holding seems to rely on the fact that a district court dismissed two actions in 1964 and 1965 which objected to the issuance of A & B's single-priority license. However, A & B's priority date was not litigated on the merits in those appeals. Rather, the appeals were dismissed solely for jurisdictional reasons.

The Association thus believes that *res judicata* presents no bar to the Association's filing of a late objection in the SRBA to contest the merits of A & B's single-priority water right. See I.R.C.P. 41(b) ("a dismissal . . . other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits"); *Gilbert v. Nampa School District No. 131*, 104 Idaho 137, 140-141, 657 P.2d 1, 4 (1983) (*res judicata* applies "only if an existing final judgment has been rendered on the merits of the case").

The Court should immediately review whether the Special Master misapplied the *res judicata* doctrine to bar the Association from appearing and presenting evidence on the validity of A & B's single-priority date.

D. Denying the Association's motion to file a late objection and to present evidence regarding the issuance of A & B's license prevents this Court from determining the true nature, extent, and priority of the A & B right.

Denying the Association's motion to file a late objection undermines SRBA's primary purpose. The Special Master has decided that this Court will not hear evidence, no matter how compelling, on the correct priority for A & B's license. Yet this would be inconsistent with a general adjudication's fundamental purpose of assuring "that state laws and procedures provide a fair and impartial forum for the adjudication of the rights of all claimants." Idaho Code § 42-1401. A general adjudication is defined broadly to mean

an action both for the judicial determination of the extent and priority of the rights of all persons to use water from any water system within the state of Idaho that is conclusive as to the nature of all rights to the use of water in the adjudicated water system.

Idaho Code § 42-1401A(6) (Supp. 1994). There would be little need for a forum in which to judicially determine the priority and other elements of water rights if all the rights embodied in A & B's license were deemed settled. As with any other *prima facie* evidence, A & B's license may be overcome by other evidence, such as that which would be presented by the Association. The proper forum for presenting that evidence is here, where all interested persons, including the Association, are given opportunity to be heard. The Special Master has the duty to hear evidence on water rights and then report to the Court those water claims which have "had full resolution of every element of the right" See AO 1, § 11c. Without the evidence

the Association would present, the Special Master's ultimate report to the Court will incorrectly describe A & B's priority. Properly resolving the priority of A & B's water right at the subcase level, at an earlier stage in these proceedings, is sound policy.

IV. CONCLUSION

The Special Master's Order denying the Association's motion to file a late objection wrongly decided controlling questions of law for the SRBA: What is the correct standard of review for a motion to file a late objection?; and Are parties and the Court barred from reviewing all of the elements of a deemed or licensed water right in the SRBA?

The Special Master applied the wrong standards in denying the Association's motion to file a late objection by applying the standard for setting aside a final judgment of default rather than the standard for setting aside a ministerial entry of default. Additionally, the Special Master's "diligence" inquiry improperly focused on the actions or inaction of persons other than the Association 30 years ago instead of on the Association's own actions in seeking to file a late objection after learning of the grounds for that objection in 1994. The standard applied by the Special Master also incorrectly involved elements of *res judicata*. The Special Master improperly decided that *res judicata* precludes the Association from having a meritorious defense because A & B's license had been challenged twice before but the cases had been dismissed for jurisdictional reasons.

The correct standard of review should be resolved immediately. If no one may raise issues regarding A & B's license now in the subcase, then the Special Master's

report will contain inaccurate information which will ultimately be reflected in this Court's decree. As the SRBA's purpose is to resolve controversy and achieve certainty in water rights development, a decree based on inaccurate information is hardly desirable.

The livelihoods of the Association's members depend on their water rights. Were the Association to object, it would present convincing evidence that A & B's single-priority license was improperly issued, and that the Association's water rights actually are senior to some held by A & B. The SRBA is an adjudication designed to determine *all* water rights in the Snake River Basin and all of the rights' elements. One should be given a reasonable and liberal opportunity to become a party to those subcases that would affect the person's water rights. The Special Master should have liberally allowed the Association to file its late objection and to pursue the merits of A & B's disputed single-priority license rather than summarily resolving the dispute against the Association through procedural default.

For the above reasons, permissive review of the Special Master's Order denying the Association's motion to file a late objection should be granted.

Respectfully Submitted this 16th day of January, 1996.

A handwritten signature in black ink, appearing to read "Michael C. Creamer", written over a horizontal line.

Jeffrey C. Fereday
Michael C. Creamer
Karl T. Klein
Givens Pursley & Huntley LLP
Attorneys for Magic Valley Underground
Pumpers Association, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 1996, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Chief
Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)

Roger D. Ling, Esq.
Ling, Nielsen & Robinson
615 H Street
P. O. Box 396
Rupert, ID 83350

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)

The U.S. Department of Justice
Environmental & Natural Resources Division
550 West Fort Street
MSC 033
Boise, ID 83724

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)

Laird Lucas
Land & Water Fund
P.O. Box 1612
Boise, ID 83701

HAND DELIVERY
 U.S. MAIL
 OVERNIGHT MAIL
 TELECOPY (FAX)



Michael R. Casper