

Magic Valley Underground Pumpers Association, Inc.

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Department of Water Resources
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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: No. 36-02080

Case No. 39576

ASSOCIATION'S REPLY BRIEF
IN SUPPORT OF MOTION FOR
PERMISSIVE REVIEW

I. INTRODUCTION

Magic Valley Underground Pumpers' Association, Inc. ("Association"), through its attorneys, Givens Pursley & Huntley LLP, replies to the United States' Response ("U.S. Response") to the Association's Brief in Support of Permissive Review.

II. ARGUMENT

A. The United States incorrectly styles the issue as whether the Special Master abused his discretion.

The United States apparently misunderstands the Association's Motion For Permissive Review as alleging that the Special Master abused his discretion. U.S. Response at 5. The United States thus incorrectly argues that because the Special Master's decision to grant or deny a motion for late objection "is a matter of discretion, it is not a controlling issue of law for purposes of granting interlocutory

review." U.S. Response at 7. This argument is a red herring, since whether the Special Master abused his discretion in denying the Association's Motion for Leave to File a Late Objection ("Association's Motion") is not at issue here. The Special Master precluded himself from exercising informed discretion by making mistaken rulings on controlling issues of law as to 1) the standard for filing a late objection in the SRBA and 2) the binding affect of a prior adjudication on the SRBA. The Special Master has no discretion in whether to correctly apply the law.

Even assuming that the Special Master's applications of *res judicata* and of the standards for filing a late objection truly were discretionary, which they were not, the United States is incorrect in inflexibly asserting that courts will not permissively review a discretionary order. See U.S. Response at 5. Determining what orders are properly reviewable is not made "by a mechanical application of labels such as 'discretionary' or 'nondiscretionary'" but by deciding whether the order to be reviewed truly implicates the policies favoring interlocutory appeal. *Katz v. Carte Blanche Corp.*, 796 F.2d 747, 756 (3rd Cir. 1974). To postulate a "general rule that no district court order involving some exercise of discretion may be reviewed in an [interlocutory] appeal is to misread [the] statute and to disregard its legislative history." *Id.* at 753; *Accord, General Dynamics Corp. v. American Tel. and Teleg. Co.*, 658 F.Supp. 417, 419 (N.D.Ill. 1987) ("[T]he fact that the decision in question was within the discretion of the court does not preclude interlocutory review").

As already well-demonstrated in the Association's prior pleadings, the policies underlying permissive review support allowing it here. Perhaps the most important

reason to grant permissive review here is that approximately 130 individual water rights holders would otherwise have been barred from objecting simply because they have associated themselves today with a few persons who previously attempted to contest the BOR's single-priority license in court. The Association was formed to respond to A & B's July 1994 delivery call, not to contest A & B's single-priority license in the subcase. When the Association was formed, these members had no idea that each of their 130 individual water rights was actually senior to some held by A & B, nor did they have reason to suspect that a few of the other Association members had contested the BOR's license in court and would potentially be held to "poison" the ability to object to wrongfully claimed rights in the SRBA.

When these 130 or so individuals first learned that the BOR's single-priority license was problematic they could have filed 130 separate late objections in their own names, and would presumably not have been barred under the Order's rationale. Permissive review should be granted in this situation.

B. The Court should review the Special Master's legal ruling as to the standard for allowing a late objection.

The United States asserts that the Special Master reviewed the Association's Motion under the appropriate standard by requiring the Association to establish diligence and a meritorious defense, and thus asserts that no controlling question of law exists as to the standard of review because the Special Master "applied the standards that apply to I.R.C.P. Rule 55(c), the very standard that Pumpers argue should be applied." *See* U.S. Response at 7-9. The United States is incorrect.

While the Association agrees that a clerk's entry of default should be set aside under Rule 55(c) upon a showing of 1) diligence and 2) a meritorious defense, it believes the Special Master's Order misapplies these requirements in ruling on the Association's motion.

1. The Order misapplies the diligence requirement by holding that thirty-year old events prevent the Association from diligently prosecuting its rights in the SRBA.

To set aside a default, a defaulted party must have been "reasonably diligent in his effort to set aside the default, *once he learned of it*. This diligence is a requirement in demonstrating reasonably prudent conduct." *Baldwin v. Baldwin*, 114 Idaho 525, 528, 757 P.2d 1244, 1247 (Ct.App. 1988) (emphasis added). The defaulted party must also have been diligent in his "subsequent efforts to get the default judgment set aside." *See Clark v. Atwood*, 112 Idaho 115, 117, 730 P.2d 1035, 1037 (Ct.App. 1986).

The Order focuses on whether water right holders thirty years ago had diligently contested the issuance of BOR's license, rather than on whether the Association has diligently objected today in the Basin 36 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 that 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 point.*

The Association, or more exactly, its predecessors in interest, failed to exercise diligence by not taking some action against the State Reclamation Engineer soon after the appeals were dismissed.

Order at 11 (emphasis added).

The Association has correctly argued that it diligently prosecuted its rights in attempting to enter the Basin 36 subcase by promptly filing a late objection upon learning of the objection's grounds, and as soon as the Court lifted the stay in the SRBA main case. Basin 36 objections were due on May 1, 1993. On April 27, 1994, the Court imposed a stay in the SRBA main case. On July 27, 1994, A & B filed a petition for delivery call ("Petition") that threatened the water rights of individual water right holders in Basin 36. Many of these individual water right holders then formed the Association to respond to A & B's Petition. It was in preparing this response that the Association became aware that the BOR's single-priority license had been improperly issued and resolved to object in this subcase. When the Court lifted the stay on December 7, 1994, the Association promptly moved to file its objection on December 22, 1994.

In discussing the Association's diligence, the Association's Brief in Support of Permissive Review mistakenly states that the Association missed the objection filing deadline by four months. The Association apologizes for this inadvertent error. The delay actually was approximately 14 months between the time objections initially were due in May 1993 and when the Association learned of the split-priority issue following A & B's call in July 1994. However, the Court-imposed stay had been instituted in the meantime.

In either case, the Association's point remains valid: The vast majority of the Association's members did not know, and had no reason to suspect, that the BOR's single-priority license was improper until the objection filing deadline had passed. And the Association did object as soon as possible after learning of the problem. The Special Master should have focused on the Association's diligence during this time period. By holding that thirty-year-old events foreclose the Association from now establishing its diligence in the SRBA, the Special Master's Order misapplies the diligence requirement. The Special Master's determination of the legal effect of thirty-year-old events on the Association's rights today is a question of law. The Court should immediately review the Special Master's ruling on this controlling legal standard.¹

2. *Res judicata* does not prevent the Association from alleging facts which, if established, would constitute a meritorious defense to A & B's single-priority license.

The Order misapplies *res judicata* by holding that thirty-year-old lawsuits that were dismissed solely for jurisdictional reasons and involved parties other than the Association now bar the Association from alleging a meritorious defense. The

¹ Moreover, the correct *level* of diligence appropriate to set aside a clerk's entry of default for "good cause" under Rule 55(c) is best defined as a "lack of willfulness," which is a lesser degree of diligence than that needed 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). While the Order notes that setting aside an entry of default and setting aside a default judgment are governed by different standards (Order at 9 ¶ 2), the Order thereafter cites only the standards for setting aside a default judgment under Rule 60(b) for "mistake, inadvertence, or excusable neglect." No reference is made to the "lack of willfulness" requirement nor is there any indication that this lower diligence standard was considered or applied here. See Order at 8-11. The Association did not willfully default or delay in filing its late objection. The Court should review the Order's discussion of the standard for filing a late objection and should rule that the requisite level of diligence amounts to a "lack of willfulness."

determination of these prior suits' preclusive effect on the Association is not a matter of discretion, but a ruling on a controlling issue of law.

The Special Master's Order incorrectly holds:

At one time, the Association's claimed defense to the priority date may have had merit. At least Judge Webb thought so [A]n ordinarily prudent person . . . would have filed a direct action against the State Reclamation Engineer or appealed the dismissal. 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 11-12.

The mere fact that thirty-year-old lawsuits challenged the BOR's license but then were dismissed and not appealed should not bar the Association from alleging a meritorious defense here. This is so for at least three reasons.

First, to justify a late objection, the Association is required only to plead facts which, if established, would constitute a meritorious claim. *Baldwin v. Baldwin*, 114 Idaho 525, 527, 757 P.2d 1244, 1246 (Ct.App. 1988). The Association has more than met this burden by explaining in detail why both the State Reclamation Engineer and the State Attorney General concluded in 1964 that the BOR was not entitled to a uniform 1948 priority date for all of its 177 wells. See Motion for Leave to File Late Objection and Memorandum in Support 2-5. The Special Master's Order notes that even though Judge Webb dismissed the prior lawsuits for jurisdictional reasons, he believed that the defenses to BOR's priority date had merit. The Association clearly satisfied the "meritorious defense" requirement for setting aside a default by alleging

facts which, if true, would result in split-priorities for the BOR's right. Thus, the Special Master should have allowed the Association's objection.

Second, applying *res judicata* to bar the Association's objection is inappropriate because Judge Webb dismissed the thirty-year-old lawsuits solely for jurisdictional reasons without reaching the merits of the BOR's single-priority date. Without an adjudication on the merits, these prior lawsuits cannot present a *res judicata* bar or compel denial of the Association's Motion. One should not be sidetracked by the United States' assertion that *res judicata* applies to "questions of jurisdiction." U.S. Response at 11.² A dismissal for lack of jurisdiction is given preclusive effect, but *only on the issue of jurisdiction*—it does not touch a cause of action's merits. See Jack H. Friedenthal et al., *Civil Procedure* § 14.7, at 652 (2nd ed. 1993).

Professors Friedenthal, Kane, and Miller report:

Many judicial decisions, rules, and statutes . . . use "on the merits" to indicate what type of judgment will bar a subsequent action. Moreover, the requirement that a judgment be on the merits to have full *res judicata* effect accords with the modern procedural notion that a claimant is entitled to a day in court and that he should not lose the right to a hearing on the substance of his grievance because of procedural errors.

Id. § 14.7, at 652-53 (citing e.g., F.R.C.P. 41, on voluntary and involuntary dismissals).

Like its federal counterpart, I.R.C.P. 41(b) mandates that dismissals for lack

² The United States also asserts that *res judicata* applies "though a judgment was entered by default." U.S. Response at 11 (citing *Lewiston Lime Co. v. Barney*, 87 Idaho 462, 394 P.2d 323, 328 (1964)). The United States apparently argues that a court is precluded from setting aside a default because the default has been entered. This argument is tautological. The legal issue is whether prior lawsuits dismissed solely for jurisdictional reasons compel denial of the Association's Motion.

of jurisdiction are not adjudications on the merits:

Unless the court in its order for dismissal otherwise specifies, a *dismissal . . . other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join [an indispensable] party under Rule 19, *operates as an adjudication on the merits*.

I.R.C.P. 41(b) (emphasis added); *See Friedenthal et. al., supra*, at 654 (involuntary dismissals for lack of jurisdiction do not operate as an adjudication on the merits, but decide only that the court is an inconvenient one or that it is without power to adjudicate the dispute; they do not reach any consideration of the merits) (citing *Bauscher Grain v. National Sur. Corp.*, 92 Idaho 229, 440 P.2d 349 (1968)).

The Idaho Supreme Court has ruled that I.R.C.P. 41(b) dismissals are not a *res judicata* bar to subsequent litigation of a claim's merits. *See Bauscher Grain v. National Sur. Corp.*, 92 Idaho 229, 231, 440 P.2d 349, 351 (1968) (noting "the overriding policy to have issues between litigants decided on the merits," and holding that "[f]ailure to join indispensable parties is not a decision on the merits and does not bar a later action"); *accord*, *Advisory Committee Notes* on F.R.C.P. 41(b) (dismissal for lack of an indispensable party "does not bar new action, for it is based merely 'on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim'").

Third, the record does not support the Order's legal conclusion that the prior suits involved persons or organizations who were the Association's "predecessors in interest." Thus, the necessary privity required for an application of *res judicata* is absent in this case.

Thus, it is incorrect as a matter of law to conclude that thirty-year-old lawsuits, dismissed solely for jurisdictional reasons, bar the Association from stating a meritorious defense or compel denial of the Association's Motion under the *res judicata* doctrine. The Court should immediately review the Special Master's application of the law.

III. CONCLUSION

The Special Master's Order denying the Association's Motion is premised on errors of law, not on matters of discretion. These controlling questions of law warrant immediate review by the Court. For the above reasons and those stated in the Association's Brief in Support of Permissive Review, permissive review of the Special Master's Order should be granted.

Dated this 27th day of February, 1996.



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1996, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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