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	)	**Subcases 41-00013A (Weston) and**
	)	**41-00008E, 41-00013C and 41-10230**
Case No. 39576	)	**(Spillett)**
	)	
	)	**SPECIAL MASTER REPORT AND**
	)	**RECOMMENDATION ON MOTIONS**
	)	**TO SET ASIDE PARTIAL DECREES**

FINDINGS OF FACT

Partial Decrees

41-00013A (Weston)

On July 31, 2000, the Presiding Judge entered a ***Partial Decree*** in subcase 41-00013A disallowing a claim filed by Herbert and R. Scott Weston, 4448 State Hwy 37, Rockland, Idaho 83271, for .2 cfs from the South Fork of Rock Creek (via Jackson Ditch) to irrigate 70 acres from April 1 to November 1 with a priority date of May 1, 1881, based on a decree. The Director of IDWR recommended the claim be disallowed: "Forfeited / abandoned due to non-use from 1979 to 1998." No one filed a timely objection to his recommendation.

41-00008E, 41-00013C and 41-10230 (Spillett)

On March 12, 2001, the Presiding Judge entered ***Amended Partial Decrees*** for three uncontested claims filed by James and Robert Spillett, P.O. Box 144, Rockland, Idaho 83271 for the following water rights from the South Fork of Rock Creek:

41-00008E (Adzhead Ditch[1]) - .355 cfs (.72 cfs claimed) to irrigate 43 acres (59.4 acres claimed) with a priority date of October 1, 1879, based on a decree[2];

[1] The parties and IDWR could not agree on the spelling of Adshead, Adzehead or Adze Head.

[2] The *Notice of Claim* forms in 41-00008E and 41-00013C state: "The supporting document is not a decree but is merely an arbitrator's findings and conclusions. The only party listed in the pleadings is H.P. Houtz." In his *Final Memorandum Decision and Order*, dated August 30, 1990, p. 10, *In the Matter of Application for Transfer No. 3518/ Water Right No. 41-00013 & Transfer No. 3519/ Water Right No. 41-00008 in the Name of James Juan Spillett*, former IDWR Director R. Keith Higginson explained the importance of the 1890 Houtz arbitration decision:

41-00013C (Jackson Ditch) - .1 cfs (.2 cfs claimed) to irrigate 5 acres (59.4 acres claimed) with a priority date of May 1, 1881, based on a decree; and

41-10230 (Adshead Ditch) – 1 cfs to irrigate 43 acres with a priority date of April 1, 1909 (April 1, 1908 claimed), based on beneficial use.

Motions to Set Aside Partial Decrees

41-00013A (Weston)

Claimant R. Scott Weston first wrote to the SRBA Court by letter dated October 1, 2001, stating: "I would like to be included in the review of the jackson ditch in Rockland Idaho. To reestablish the water rights that were disallowed." That letter was received by the Court more than 14 months after the ***Partial Decree*** was entered (July 31, 2000). Then, Mr. Weston wrote another letter, dated October 29, 2001, to the SRBA Court concerning the ***Partial Decree*** disallowing his claim (41-00013A) because of non-use:

> I have been renting my water shares, by the year, to my neighbor Bob Spillett and also watermaster James Robinson was delivering the water to the Spilletts. I thought things were in order.
> The confusing has been in my misunderstanding that I need to file a transfer with the water department. This oversight has cost me this permit. Therefore, I request that this water right be restored. Sorry for the oversight on my part.

41-00008E, 41-00013C and 41-10230 (Spillett)

Claimants James and Robert Spillett, along with Eva and Rae Spillett, wrote a letter to the Presiding Judge on September 5, 2001:

> We would like to have the adjudication ["Case # 39576"] reopened. We would also like the water rights in the Jackson Ditch restored.
> . . .
> When we came to Twin Falls and met with a representative about our water rights in 1999, we didn't understand that the usage was based on irrigated acres as of 1987. In 1987, we were irrigating more ground than was reported. This difference was mainly due to the natural movement of stream beds and inability to get water out of the diversion. Juan Spillett wanted to sprinkle irrigate and in

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For purposes of administering the water rights on Rock Creek, the Department, and the parties diverting water from Rock Creek, have recognized the decision of arbitration as a judgment decreeing the water rights in Rock Creek. The waters from Rock Creek have been administered according to the decision of arbitration since the decision was rendered. A water district has been created by the Department, and a watermaster has distributed water from Rock Creek to the respective users.

> order to get the required amount of water, he had to change the point of diversion. We let him use 10 of our inches and Scott Weston let him use 10 of his inches to go with the 10 inches that Juan Spillett all ready had . . . . The legal paper we received not long ago says that we are only allowed enough water for the 5.5 acres in that area. In actual fact in 1987, we were irrigating 10 acres or more. When we received the court papers at that time we did not realize the consequences. We only found out from the water master.

That letter was received by the Court less than 6 months after entry of the ***Amended Partial Decrees*** (March 12, 2001). The Court responded to the Spilletts' letter by suggesting they contact IDWR and then file appropriate motions or pleadings with reference to the particular water right number(s). The Spilletts then wrote to IDWR asking it to bring their "appeal" to the attention of the Special Master and referenced two of their claims: 41-00013C and 41-10230. They mistakenly referred to 41-00008C as their third claim which is actually 41-00008E.

Nicholas B. Spencer, attorney for IDWR, forwarded the Spilletts' letters to the Court on November 30, 2001, requesting the letters be treated as motions to set aside the ***Amended Partial Decrees***. Mr. Spencer wrote:

> [The Spilletts'] request to set the partial decrees aside arises from a meeting that IDWR had last August [2001] with all the parties using water from the Adze Head ditch. During that meeting it became apparent that the Messrs. Spillett believe that the partial decrees of their rights contain errors that need correcting. That is the basis of their request to set the partial decrees aside.

Orders of Reference

41-00013A (Weston)

On October 31, 2001, the Presiding Judge entered an ***Order of Reference to Special Master Dolan*** concerning Mr. Weston's letters. The purposes of the appointment included:

> a. To determine the intended purpose of the correspondence and the legal significance of the correspondence, if any . . . ;
> b. To determine whether the correspondence complies with ***SRBA Administrative Order 1 (AO1)*** and the Idaho Rules of Civil Procedure or whether additional time should be granted to allow the party to file an appropriate motion with the Special Master and/or to obtain counsel in the matter; whether the matter should be dismissed on its face; or to determine whether the matter would be more appropriately processed administratively through the Idaho Department of Water Resources;
> c. If the correspondence is ultimately deemed a sufficient motion, or in the event a new motion is filed in compliance with the applicable rule(s), the Special

> Master shall conduct all proceedings necessary to issue a recommendation as to the underlying merits.

41-00008E, 41-00013C and 41-10230 (Spillett)

On November 26, 2001, the Presiding Judge entered an ***Order of Reference to Special Master Dolan*** concerning the Spilletts' letters. The purposes of this second appointment were the same as the previous ***Order of Reference*** concerning Mr. Weston's letters.

Initial Hearing

An initial hearing on Mr. Weston's and the Spilletts' correspondence was held on January 11, 2002, in Rockland, Idaho. R. Scott Weston appeared *pro se*; Robert and James Spillett appeared *pro se*; and Nicholas B. Spencer appeared for IDWR, along with Steve Clelland, senior water resource agent for IDWR. James Robinson, Watermaster for Water District 41, attended along with James Juan Spillett and his attorney, Timothy J. Schneider, because James Juan Spillett also claims water from the South Fork of Rock Creek (41-00008B and 41-00013B).

DISCUSSION

AO-1 and I.R.C.P. Rule 60(b)

SRBA Administrative Order 1, Rules of Procedure (***AO-1***) states in relevant part: "Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)." ***AO-1***, 14, d, at 22. Since the Westons and the Spilletts have not alleged there were clerical mistakes in the ***Partial Decrees***, Rule 60(b) is the standard for reviewing their letters which may fairly be considered as motions to modify or set aside the ***Partial Decrees***.

Under Rule 60(b), a party seeking to set aside a final judgment by default must show:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application*; or (6) any other reason justifying relief from operation of the judgment [emphasis added].

Motions alleging mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or any other reason justifying relief from operation of the judgment must be filed

not more than 6 months after the judgment was entered. There is no similar time limit when a court finds "it is no longer equitable that the judgment should have prospective application."

Standards for Review

A motion to set aside a default judgment presents the trial court with a factual determination. *Reeves* v. *Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). In determining whether to set aside a default judgment, a standard of liberality must be applied rather than one of strictness and the party moving to vacate default judgment must be given the benefit of any genuine doubt. *Johnson* v. *Pioneer Title Co. of Ada County*, 104 Idaho 727, 662 P.2d 1171 (App. 1983). A motion to set aside a default judgment is addressed to the sound discretion of the trial court whose discretion will not be reversed in the absence of abuse of that discretion; however, it would be an abuse of discretion for the trial court to grant such a motion without an adequate legal basis for doing so. *Newbold* v. *Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983).

In addition to requiring a party to state a reason justifying relief from operation of the judgment, Idaho courts require more. First, a party must show that he or she has acted in good faith and exercised due diligence in the prosecution and protection of his or her rights, such as an ordinarily prudent person would exercise under similar conditions. *Council Improvement Co.* v. *Draper*, 16 Idaho 541, 102 P. 7 (1909) and *Kovachy* v. *DeLeusomme*, 122 Idaho 973, 842 P.2d 309 (App. 1992).

Second, a party must show a meritorious defense to set aside a default:

> Mere mistake, inadvertence, surprise or excusable neglect without disclosure of meritorious defense or meritorious defense without disclosure of mistake, inadvertence, surprise or excusable neglect will not suffice . . . . 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 the merits. The conclusion of the party or his attorney . . . is not sufficient. Whether the pleaded facts are sufficient to constitute a defense is also one for the trial court.

Thomas v. *Stevens*, 78 Idaho 266, 271, 300 P.2d 811, 813 (1956).

The policy of requiring a showing of a meritorious defense is founded on the doctrine that it would be an idle exercise for a court to set aside a default if, in fact, there is no justiciable controversy. *Reeves* v. *Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). A party who seeks to set aside a default has the burden of supplying detailed facts of the proposed defense. *Smith Electric, Inc.* v. *Crandlemire*, 100 Idaho 172, 595 P.2d 321 (1979).

Good Cause and Meritorious Defense

There was remarkable unanimity at the January 11, 2002 initial hearing in Rockland on how water from the South Fork of Rock Creek has been historically used. Unrecorded transfers, informal water exchanges, unwritten rotation agreements and unreported changes in points of diversion have been routine in the Rockland area for as long as anyone could recall. On any given day during the irrigation season, an irrigator who needs more water might "borrow" another user's water by diverting through the same ditch, another ditch or maybe even directly from the Creek. The water is beneficially used, but not by the owner of record on his or her land, and this transfer might go on for hours (rotation agreements) or years.

Those at the initial hearing said all the water users in the area know about the transfers, including the Watermaster for Water District 41, and the record-owner of the water routinely pays his or her assessment for the water. The water users also know many of the transfers are not recorded with IDWR, but they agree the practices promote water efficiency and good husbandry of the resource.

In these subcases, James Juan Spillett "borrowed" 10 inches of water from the Westons and 10 inches from Robert and James Spillett to get enough water to sprinkle irrigate James Juan Spillett's land. Again, the water was used, but when IDWR inspected and reported the claims, the water was not being used as claimed by the record-owner.

At the initial hearing, Watermaster Robinson wondered in cases like these, who should claim the water - the record-owner or the current user – and who should be decreed the water right? On top of these concerns, there is the problem of measurement of water because the "Houtz Box" has been used in the Rockland area for nearly 112 years. The devise does not yield the same measurement standard used elsewhere in Idaho. Mr. Robinson even wondered whether IDWR used Houtz Box inches or Idaho inches for its recommendations.

Everyone at the initial hearing agreed the ***Partial Decrees*** entered in 41-00013A (Weston) and 41-00008E, 41-00013C and 41-10230 (Spillett) do not accurately reflect the actual historical use of water from the South Fork of Rock Creek. Mr. Robinson said the total water currently decreed by the SRBA Court for the Adshead and Jackson Ditches comes up 15 inches short of actual historical use. As the one who administers the water in Water District 41, Mr. Robinson suggested the only viable solution to this dilemma is for the Court to set aside the ***Partial Decrees*** so the claims can be re-examined and re-recommended by IDWR.

IDWR Agent Steve Clelland said the Weston / Spillett claims, as well as other claims for water from the South Fork of Rock Creek, are complex because of informal transfers. He did not understand or begin to piece together the whole situation until he met with the parties in Rockland in August, 2001 – well after the ***Partial Decrees*** were entered (July 31, 2000, and March 12, 2001). He said if the ***Partial Decrees*** are set aside, the first step would be for IDWR to record all transfers before the claims could be re-recommended to the Court.

CONCLUSIONS OF LAW

IDWR recommended 41-00013A (Weston) be disallowed because of forfeiture or abandonment from non-use from 1979 to 1998. However, the law of the SRBA case is that "once a claimant files a claim in the SRBA, for a particular right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree." ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***, subcases 36-02708, *et al.*, December 29, 1999, at 27. Since the Westons filed claim 41-00013A on March 13, 1990, IDWR could only include the period from 1979 to 1990 to determine there was forfeiture "by a failure for the term of five (5) years to apply [water] to the beneficial use for which it was appropriated . . . ." I.C. § 42-222(2).

Aside from the issue of forfeiture in the Westons' claim which was decreed as disallowed, the Special Master finds the Westons and the Spilletts have shown good cause to have the ***Partial Decrees*** set aside. Their letters to the SRBA Court, while less than artful, were clearly motions to set aside the ***Partial Decrees***. They acted in good faith and exercised due diligence in the prosecution and protection of their rights once they, like IDWR, began to unravel the complex web of unrecorded transfers, informal water exchanges, unwritten rotation agreements and unreported changes in points of diversion

The Westons and the Spillets also showed meritorious defenses to set aside the ***Partial Decrees***. Simply put, as all the parties agreed, the ***Partial Decrees*** do not accurately reflect the actual historical use of water from the South Fork of Rock Creek. The ***Partial Decrees*** leave the amounts of water historically used in two ditches 15 inches short. Under these circumstances, the Westons and the Spilletts have shown "it is no longer equitable that the [***Partial Decrees***] should have prospective application." I.R.C.P. Rule 60(b).

By setting aside the ***Partial Decrees***, the Court will provide the Director of IDWR a second opportunity to fulfill his statutory duty "to assure that claims to water rights acquired under state law are accurately reported . . . ." I.C. § 42-1401B. It will also enable the Court to help restore the integrity of water rights administration in the Rockland area.

RECOMMENDATION

THEREFORE, IT IS RECOMMENDED that the ***Partial Decrees*** entered in subcases 41-00013A (Weston) and 41-00008E, 41-00013C and 41-10230 (Spillett) be **set aside** and that IDWR further investigate the claims, record all transfers and re-recommend the claims to the Court.

DATED April 29, 2002.

__/s/_____
TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication