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	)	**ORDER CONDITIONALLY GRANTING MOTION TO SET ASIDE PARTIAL DECREES**
Case No. 39576	)	
	)	**For Water rights 37-07454 and 37-07602**

I.
PROCEDURAL AND FACTUAL BACKGROUND

1. Three ground water right permits (nos. 37-07268, 37-07602 and 37-07454) were issued during the 1970s for irrigation of Lincoln County lands from a new well. Each of the permits was obtained at a different time, had a different proof of beneficial use deadline and provided for the irrigation of different lands, although all three permits related to the same well.[1] The Claimants, Louis and Iris Hubsmith ("Hubsmith") allege that a predecessor in title erroneously and prematurely submitted the proof of beneficial use for permit 37-07602 instead of for permit 37-07268, which ultimately resulted in the lapsing of permit 37-07268 as well as a diminishment of the acreage authorized under permit 37-07602, which had yet to be developed at the time of the field inspection.

2. On September 19, 1973, permit 37-07268 was issued to a Ralph Bowen, a predecessor in title, for a ground water right from a well located in Section 30, Township 6 South, Range 18 East, Boise Meridian in Lincoln County, Idaho ("Section 30 well"). *Affidavit of Dana L.*

[1] Hubsmith asserts that each permit sought to divert from the same well. However, points of diversion listed on permits 37-07268 and 37-07602 actually describe different quarter-quarter sections. Permit 37-07268 lists the point of diversion as NE1/4 of NW1/4 of Section 30. Permit 37-07602 lists the point of diversion as NW1/4 of the NE1/4 of Section 30. Apparently a point of diversion located in the NE1/4 of the NW1/4 as stated in the 37-07268 permit does not exist; this may have contributed to the alleged problem.

Hofstetter ("Affidavit"), Exhibit A. The permit had a proposed priority of August 23, 1973, and authorized the diversion of 3.2 cfs for the irrigation of 160 acres.[2] Proof of beneficial use was to be submitted on or before September 1, 1978.

3. On September 8, 1975, Ralph Bowen assigned permit 37-07268 to Steven Shaw, who succeeded Bowen in interest. *Affidavit, Exhibit B.* Shaw then proceeded to obtain two other permits to irrigate additional lands from the Section 30 well.

4. On December 30, 1975, Idaho Department of Water Resources (IDWR) issued permit 37-07454 to Shaw. The permit had a proposed priority of September 8, 1975, and authorized a rate of diversion of 4.0 cfs for the irrigation of 200 acres.[3] The permit required proof of beneficial use to be submitted on or before December 1, 1980. *Affidavit, Exhibit L.*

5. On June 29, 1977, IDWR issued permit 37-07602 to Shaw. The permit had a proposed date of priority of May 4, 1977, and authorized a rate of diversion of 3.2 cfs to irrigate an additional 160 acres.[4] Proof of beneficial use was to be submitted on or before June 1, 1982. *Affidavit, Exhibit I.*

6. On June 30, 1978, IDWR sent Shaw a 60-day notice regarding the September 1, 1978, proof of beneficial use deadline for permit 37-07268. *Affidavit, Exhibit C.*

7. On August 2, 1978, Shaw filed a *Proof of Application of Water to Beneficial Use* form with IDWR's southern regional office. However, the *Proof of Beneficial Use* form was for

[2] The 160 acres being located in Section 30 as follows: 40 acres in the NW1/4 of the NE1/4, 40 acres in the SW1/4 of the NE1/4, 40 acres in the NE1/4 of the NW1/4, and 40 acres in SE1/4 of the NW1/4.

[3] The 200 acres being located in Section 30 as follows: 40 acres in the NE1/4 of the NE1/4, 40 acres in the NE1/4 of the SW1/4, 40 acres in the SE1/4 of the SW1/4, 40 acres in the NW1/4 of the SE1/4, and 40 acres in the SW1/4 of the SE1/4.

[4] Forty of the 160 acres being located in the NW1/4 of the NW1/4 of Section 30 and the remaining 120 acres being located in Section 19 located immediately north of Section 30 as follows: 40 acres in the NE1/4 of the SW1/4, 40 acres in the SW1/4 of the SW1/4, and 40 acres in the SE1/4 of the SW1/4.

permit 37-07602, not 37-07268. *Affidavit, Exhibit H.* [5] The circumstances surrounding the filing are not apparent from the record, but Hubsmith alleges that personnel from IDWR's regional office assisted Shaw with filling out and filing the *Proof of Beneficial Use* form. *See also Affidavit of Allen Merritt*. The *Proof of Beneficial Use* form described the elements for 37-07602 as contained in the permit for 37-07602, so it was not just a matter of incorrectly labeling the application form with the wrong water right number.

8. As a result of Shaw's failure to timely file the *Proof of Beneficial Use* for 37-07268, the permit lapsed. On September 7, 1978, Shaw was notified in writing of the permit lapse and that he had 60 days within which to file the *Proof of Beneficial Use* to reinstate the permit. *Affidavit, Exhibit D*. No further action was taken and the permit ultimately lapsed as a result.

9. On December 24, 1980, a license for water right 37-07454 was issued with a September 8, 1975, priority date, for the full 200 acres previously described under the permit. The license contained a combined diversion rate and afy limitation with the 37-07602 right, which at the time had been permitted but not licensed.

10. As a result of the filing of the *Proof of Beneficial Use* form a field examination for permit 37-07602 was conducted on July 30, 1980. However, at the time only 35 acres were being irrigated as opposed to the 160 acres authorized by the permit, arguably because of the premature filing of the *Proof of Beneficial Use*. The 35 acres including 35 of the 40 acres located in Section 30; none of the 120 authorized acres in Section 19 were developed for irrigation at the time. The field inspection report indicated:

> Lands in Section 19 not irrigated at present by well, however, other lands not listed on permit and not covered by other rts. are irrigated. This rt. is recommended to be amended to cover these lands.
>
> The well also supplies water for rts. 37-7454 and 37-7149.[6]

Affidavit, Exhibit J.

[5] As previously stated, proof of beneficial use for 37-07602 was not required until on or before June 1, 1982.

[6] Water right 37-7149 is not addressed in this *Motion*. However, the right is now decreed with a different point of diversion than indicated in the field inspection report and is for the irrigation of 287 acres in adjacent Section 29.

The field inspection report also recommended the place of use be amended to cover an additional 110 acres, which included: 39 acres in the NW1/4 of the NE1/4 of Section 30, 32 acres in the SW1/4 of the NE1/4 of Section 30, and 39 acres in the NE1/4 of the NW1/4 of Section 30. All of this acreage was originally authorized under the 37-07268 permit. Therefore it is apparent from the field inspection that at least 110 of the 160 acres covered by the lapsed 37-07268 permit were being irrigated at the time. The field inspection report conflicts with the affidavits of Jess Southwick and Neil Bowman who both state that all subject lands in section 30 were irrigated continuously since 1976 or 1977.[7] The 37-07602 permit was never amended to include the 110 acres.[8]

11. Hubsmith asserts that although the Section 19 lands covered by the 37-07602 permit were not developed and being irrigated at the time of the inspection, the lands were subsequently developed and irrigated prior to June 1, 1982, which was the deadline for filing the *Proof of Beneficial Use* for the 37-07602 right.

12. On August 31, 1982, a license was issued for water right 37-07602 for .70 cfs for the irrigation of the 35 of the160 acres originally authorized under the permit with a priority date of May 4, 1977. The 35 acres being those located in the NW1/4 of the NW1/4 of Section 30. No further action or appeal was taken from the license.

13. On June 10, 1986, the land and appurtenant water rights were conveyed to Hubsmith by the mortgage company holding title to the land. (Apparently, Shaw was killed in an automobile accident and title was transferred to the mortgage company.) The warranty deed to Hubsmith is silent as to the subject water rights, so it is unclear as to exactly what was expressly conveyed to Hubsmith or exactly what Hubsmith was aware of regarding the water rights at the time the property was purchased. Additionally, the warranty deed was subject to an agreement between

[7] The field inspection report did not indicate that the 40 acres or a portion thereof located in the SE1/4 of the NW1/4 of Section 30 was being irrigated which was also authorized by the lapsed 37-07268 permit.

[8] The recommendation to amend the 37-07602 right would have made sense because the point of diversion for the 37-07268 right was listed in a different quarter-quarter section than the Section 30 well.

Bowen and Shaw, the substance of which is not part of the record so its not known whether the agreement involved water rights.

14. On July 11, 1988, Hubsmith filed a letter to IDWR requesting that the lapsed permit application for 37-07602 be reinstated, together with proof of beneficial use. *Affidavit, Exhibit E.* The exhibits accompanying the proof of beneficial use filed by Hubsmith do not specify which particular lands were being irrigated.

15. On December 8, 1988, IDWR issued an ***Order*** containing findings of fact and conclusions of law. The findings of fact and conclusions of law concluded that Hubsmith demonstrated sufficient cause for reinstating the permit, but pursuant to I.C. § 42-218a the priority date was advanced to the date of filing the proof of beneficial use (July 11, 1988) instead of the August 23, 1973, originally recommended under the 37-07268 permit. No judicial review of the ***Order*** was sought. A license was then issued on June 10, 1992, for the irrigation of 160 acres.[9]

16. On July 25, 1994, Hubsmith was issued a license for water right 37-08679, which has a priority date of August 23, 1990, a rate of diversion of 1.92 cfs and is for the irrigation of 96 acres located in Sections 19 and 30.[10] The acreage in Section 19 consisted of the remainder of the acreage covered by the diminished 37-07602 permit that was not covered by the reinstated 36-07628 permit.

17. On June 24, 1988, Hubsmith filed claims in the SRBA for water rights 37-07602 and 37-07454. Water right claim 37-07602 was claimed based on the elements contained in the prior license. Water right claim 37-07454 was claimed with the same rate of diversion as contained in the license, but with a slightly different acreage description than as contained in the license,

[9] The acreage included: 29 acres in the SE1/4 of the SW1/4 of Section 19 (acreage previously covered by the 37-07602 permit), 40 acres in the NW1/4 of the NE1/4 of Section 30; 40 acres in the SW1/4 of the NE1/4 of Section 30, 40 acres in the NE1/4 of the NW1/4, and 11 acres in the SE1/4 of the NW1/4 of Section 30 (acreage all previously covered by the 37-07268 permit.

[10] The acreage included 33 acres in the NE1/4 of the SW1/4 of Section 19, 35 acres in the SW1/4 of the SW1/4 of Section 19, 11 acres in the SE1/4 of the SW1/4 of Section 19; and 3 acres in the SW1/4 of the NW1/4 of Section 30, 7 acres in the NW1/4 of the SW1/4 of Section 30, and 7 acres in the NW1/4 of the SE1/4 of Section 30.

claiming an error in the description contained in the license. However, the acreage distribution/description in 37-07454 is not at issue. A claim for licensed water right 37-07268 did not need to be filed in the SRBA because the priority date is later than the date of commencement for the SRBA.

18. On August 5, 2002, IDWR filed recommendations for both rights. Water right claim 37-07602 was recommended as claimed, including a diversion rate of .70 cfs. Water right claim 37-07454 was recommended as claimed, including a diversion rate of 4.0 cfs. Both rights had a combined diversion limitation of 5.09 cfs.[11] No objections were filed to IDWR's recommendations.

19. On December 11, 2002, ***Partial Decrees*** were issued for both rights in accordance with IDWR's recommendations.

20. On June 6, 2003, Hubsmith, through counsel, timely filed the instant *Motion to Set Aside Partial Decrees* for water rights 37-07602 and 37-07454. Hubsmith seeks to have the ***Partial Decrees*** set aside for water right 37-07602 in order to attempt to have the acreage in Section 19, which was lost as a result of the alleged premature field inspection and later reinstated in the 37-08679 license, included in the original license with the May 4, 1977, priority date. Hubsmith seeks to have the ***Partial Decree*** for water right 37-07454 set aside because of the combined diversion rate limitation with the 37-07602 right. Presumably, Hubsmith will correspondingly move IDWR to set aside or amend the 37-08679 license which covers the same acreage, as well as the 37-07268 which covers the lapsed but reinstated Section 30 acreage.

II.

MATTER DEEMED FULLY SUBMITTED FOR DECISION

The hearing on this *Motion* occurred on October 21, 2003. Hubsmith did not request additional briefing, and the Court does not require any additional briefing on this matter.

[11] The combined diversion rate exceeds the sum of the individual diversion rates for the two rights. Typically, a combined diversion limitation is less than the sum of the individual diversion rates.

Therefore, this matter is deemed fully submitted for decision the next business day, or October 22, 2003.

III.
LEGAL STANDARDS FOR SETTING ASIDE A PARTIAL DECREE

1. I.R.C.P. 60(b) Standard

In the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P. 60(b). ***AO1*** § 14d ("Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)). I.R.C.P. 60(b) permits a court to relieve a party from a final judgment, order, or proceeding for the following reasons:

> 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;
> 3) Fraud, misrepresentation or other misconduct of an adverse party;
> 4) The judgment is void;
> 5) The judgment has been satisfied, released or discharged; and
> 6) Any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b). The decision whether to grant relief under this rule is discretionary with the Court. *See e.g. Johnson v. Pioneer Title Co*., 104 Idaho 727, 662 P.2d 1171 (Ct.App. 1993).

2. Mistake, Inadvertence, Surprise, and Excusable Neglect; I.R.C.P. 60(b)(1).

Pursuant to I.R.C.P. 60(b)(1) whether a party's conduct in allowing a default to be entered constitutes "excusable neglect" is determined by comparing the alleged "excusable neglect" against what might be expected of a reasonably prudent person under similar circumstances. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983)(citing *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981)). The Court must weigh each case in light of its unique facts. *Id.* (citing *Orange Transportation Co., Inc. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951)). Where "mistake" is alleged as grounds for relief, the mistake must be factual rather than legal and must also be conduct that might be expected of a reasonably prudent person under the circumstances. *Reeves v. Wisenor*, 102 Idaho at 272, 629 P.2d at 668.

3. **Newly Discovered Evidence; I.R.C.P 60(b)(2).**

Permits setting aside a judgment based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under I.R.C.P. 59(b)(14 days after entry of judgment).

4. **The Meritorious Defense Standard.**

In addition to satisfying one of the criteria set forth in I.R.C.P. 60(b), the movant must also allege facts, which if established, would constitute a meritorious defense. The legal standard of what must be shown to satisfy the meritorious defense requirement has been discussed several times by the Idaho appellate courts. *See McFarland v. Curtis*, 123 Idaho 931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979); *Thomas v. Stevens*, 78 Idaho 266 (1956). The meritorious defense standard requires that a movant:

1) Allege facts,
2) Which if established,
3) Would constitute a defense to the action, and
4) The facts supporting the defense must be detailed.

The detailed factual requirement also goes beyond the mere general notice requirement that would ordinarily be sufficient if pled prior to default. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). The policy behind pleading a meritorious defense is founded on the doctrine that "it would be an idle exercise for a court to set aside a default judgment if there is in fact no justiciable controversy." *McFarland*, 123 Idaho at 934, 854 P.2d at 277 (quoting *Hearst Corp.,* 100 Idaho at 12, 592 P.2d at 68).

5. **The Preference for Disposition on the Merits.**

The standards for setting aside a default judgment both take into account the overriding preference for having a case decided on its merits. In making the determination, the Court must take into consideration that judgments by default are not favored, the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits, and procedural rules other than those which are jurisdictional should be applied to promote disposition on the merits. *Reeves*, 102 Idaho at 272, 629 P.2d at 668 (citing *Hearst Corp. supra*). This is a factual determination and is discretionary with the Court. *Johnson,* 104 Idaho at 732, 662 P.2d at 1176.

The SRBA presents it own unique set of circumstances. In a non-SRBA case, the entry of a default or default judgment typically occurs when a party fails to take some required action. Although ***AO1*** incorporates the standards for setting aside a default and a default judgment and applies these standards by analogy, water right claims that proceed uncontested through the SRBA are not entirely analogous to a default situation. Uncontested claims are prosecuted by claimants who are usually active in their subcase but face no objectors. Although uncontested, the claims are still in fact "decided on the merits." Idaho's statutory scheme for the SRBA, together with ***AO1*** procedure, set forth a comprehensive process for adjudicating both uncontested and contested state-based claims. This process affords additional procedures and safeguards not otherwise present in non-SRBA cases.

Director's reports that are uncontested are typically decreed as reported. I.C. § 42-1411(4). Although this is normally what occurs, the SRBA Court retains discretion to apply law to the facts and render its own conclusion regarding uncontested water rights. *State v. Higginson*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). The district court can also delay entry of a partial decree for the uncontested portions of the director's report if the court determines the unobjected claim may be affected by the outcome of a pending contested matter. I.C. § 42-1412(7). Ultimately, the claim is subject to a final review by the court prior to the entry of the partial decree.

Therefore, although there is a preference for having a case decided on its merits, an uncontested water right that proceeds to partial decree is subject to more scrutiny than in a typical non-SRBA case where a default judgment is ultimately entered. In the SRBA, "deciding a case on the merits" must be placed in the proper context.

6. **Time Limitations under I.R.C.P. 60(b).**

I.R.C.P. 60(b) also requires that a motion to set aside be made within a reasonable time and, for I.R.C.P. 60(b)(1), (2), (3) and (6), not more than six months after the judgment, order, or decree. The Idaho Supreme Court has held the time limits in Rule 60(b) are mandatory any attempt to modify or set aside a judgment or order pursuant to subdivisions (1), (2), (3), or (6) is not allowed where the applicable time limit under the rule has clearly expired. *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990) (citing *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984)). The time limit is also applied as a matter of course in the SRBA.

7. **Prohibition against Collaterally Attacking Prior License in the SRBA.**

The SRBA Court has consistently held that if judicial review of a license is not timely sought in accordance with the Administrative Procedures Act, any attempt to attack the license in a subsequent judicial proceeding like the SRBA would constitute an impermissible collateral attack on the license. *See* ***Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue***, subcase 36-02708, *et al*. (Dec. 29, 1999)(citing *Mosman v. Mathison*, 90 Idaho 76, 408 P.2d 450(1965); *Bone v. City of Lewiston*, 107 Idaho 844, 693 P.2d 1046 (1984).

IV.
DISCUSSION AND CONCLUSIONS OF LAW

Hubsmith alleges that with the assistance of IDWR personnel the *Proof of Beneficial Use* form for the 37-07602 permit was erroneously and prematurely filed in place of the *Proof of Beneficial Use* for the 37-07268 permit. Further, the error resulting in the lapsing of the 37-07628 permit and the diminishment of the 37-07602 permit was discovered only recently when counsel reviewed Hubsmith's water rights relative to another issue. Hubsmith relies on I.R.C.P. 60(b)(1) and (2) in support of the *Motion*. In applying the above-referenced legal standards to the facts, the Court makes the following conclusions of law.

1. The *Motion* was uncontested. The Court also acknowledges this is not a situation where significant time has elapsed since the majority of the water rights in the same administrative basin were decreed.

2. **Timeliness of Motion:** The *Motion* was timely filed within the 6-month time limitation period.

3. **Mistake of Fact/Newly Discovered Evidence:** For purposes of satisfying I.R.C.P. 60(b)(1) and (2), Hubsmith has presented a plausible explanation for the lapse of one permit and the diminishment of another. The Court notes however, it may not be the only explanation. For example, the 37-07268 permit refers to a point of diversion that does not exist. Whether that point of diversion was ever intended to be developed or whether it was simply an error in the permit cannot be determined from the record. Also at the time of the field inspection for the 37-07602 permit, water right 37-07149 was also being diverted from the same Section 30 well as well as the Section 30 lands covered by the lapsed 37-07268 permit. The capacity for the

diversion works stated in the permits is exceeded by the accumulative rate of diversion for the water then being diverted, although the point of diversion for the 37-07149 right has subsequently been transferred. Simply put, Shaw's actions may have been attributable to some other reason, omission or intention other than an error by IDWR personnel.

The Court also considers why the problem was not discovered at the time the 37-07628 permit was being reinstated or what was known by Hubsmith with respect to the water situation at the time the property was purchased. Because of the lapsed permit and the diminished permit, Hubsmith should have been aware that existing water rights were insufficient to irrigate the entire acreage. The Court only addresses these issues because IDWR may want to investigate further if it elects to determine whether or not any alleged errors were attributable to IDWR. **This Court makes no ruling that the alleged errors were in anyway attributable to IDWR personnel, only that Hubsmith has provided a plausible explanation for purposes of satisfying the appropriate legal standard. The ultimate determination whether or not to revisit Hubsmith's licenses should be made by IDWR.**

4. **Meritorious Defense:** The Court perceives the meritorious defense standard as the primary issue in this *Motion*. The subject rights are both predicated on previously issued licenses. Because the rights are ground water rights with post-1963 priority dates the only viable claim to the rights is through the permit and licensing procedures, and both rights proceeded through the appropriate administrative procedure to licenses. The alleged errors in licenses are substantive in nature as opposed to clerical. In order to have the ***Partial Decrees*** for the two rights ultimately amended Hubsmith will necessarily seek to have the licenses amended.

The SRBA Court has repeatedly held that attempting to amend a licensed water right in the SRBA proceedings based on circumstances existing prior to the issuance of the license constitutes an impermissible collateral attack on a license.[12] However, Hubsmith is not asking the Court to decree an element different from the license but rather is asking that the ***Partial Decrees*** be set aside so he may appear before IDWR in an attempt have the licenses readdressed and amended. Therefore, implicit in satisfying the meritorious defense standard, Hubsmith necessarily must show there is a legal mechanism for having the licenses amended in proceedings before IDWR. Although the time limits for seeking judicial review of the licenses

[12] A license is not conclusive proof of a water right in the SRBA because a licensed right is not immune from diminishment or loss through abandonment or forfeiture.

have since expired, in limited circumstances, IDWR has available some mechanisms for reinstating lapsed permits to the original priority date in the event it is determined an error is attributable to IDWR. *See e.g.* I.C. 42-218a. Under this reasoning, if IDWR revisits the reinstated 37-07268 license, IDWR may also revisit the underlying licenses for the two subject rights which were also affected by the same alleged error.

In this regard and in exercising its discretion, the Court will permit the *Partial Decrees* to be conditionally set aside for purposes of allowing Hubsmith to seek an available remedy, if any, before IDWR and have the underlying licenses amended. This *Order* is conditional in that if IDWR declines to readdress the matter on procedural grounds or revisits the matter but concludes that no error was attributable to IDWR personnel and ultimately declines to amend the licenses as a result, then the *Partial Decrees* will remain as decreed. If the licenses are amended by IDWR then this Court will grant leave to amend the existing decrees as may be necessary in accordance with SRBA procedure. This *Order* affords Hubsmith the opportunity to go back before IDWR and seek to have any alleged errors by IDWR corrected, if IDWR so elects, but should in no way be construed as making the finding or conclusion that IDWR must revisit the licenses to correct any alleged errors.

IT IS SO ORDERED

Dated: December 3, 2003.

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JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication