

**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 51-04037
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Case No. 39576)	ORDER GRANTING MOTION TO SET ASIDE ORDER AND MOTION TO ALTER OR AMEND and ORDER SETTING SCHEDULING CONFERENCE
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Background

Order Dismissing Objection and Special Master Report

On November 9, 2000, the Special Master entered an ***Order Dismissing Objection and Special Master Report***. The ***Order*** dismissed claimant Matthew Olivas' ***Objection***¹ to the IDWR Director's recommendation for claim 51-04037 because Mr. Olivas failed to attend two scheduled initial hearings for no valid reason. The ***Report*** concluded Mr. Olivas was entitled to a water right as recommended by IDWR and the attached ***Special Master Recommendation*** described the water right accordingly.²

Amended Special Master Report

On November 9, 2000, Mr. Olivas delivered to the SRBA Court a hand-written document, deemed to be a motion to reconsider the ***Order Dismissing Objection and Special Master Report*** entered the same day. Mr. Olivas wrote:

I, Matthew Olivas ask the court for forgiveness for not attending the calendar date initial hearing Monday Nov. 6th, 00 at 11: am.

¹ On June 15, 2000, an ***Order Granting Motion to File Late Objection*** was entered. Mr. Olivas' late ***Objection*** to quantity stated: "The use of the water right granted is for .06 cfs. Under N13 [?], the use is limited to 13,000 gallons a day, which is not nearly sufficient for commercial use. It is inconsistent with the .06 cfs granted, which is the correct amount. This application has been previously submitted, but no final decree has been entered."

² The ***Special Master Recommendation*** recommended the water right to Mr. Olivas for .06 cfs from Murphy Hot Springs for year 'round heating, domestic and commercial uses with a priority date of June 20, 1885. The recommended quantity element included the remark: "The quantity of water under this right shall not exceed 13,000 gallons per day."

Reason: 1 subcase No. 94-00013 was held prior. misunderstood and thought that case No. 51-04037 was to be presented to special master Terrence A. Dolan, at an other date.

Reason;2. confused court hearing dates with council repretatatives appointments.

An **Amended Special Master Report** was entered on November 14, 2000, in response to Mr. Olivas' motion to reconsider. The Special Master concluded:

Mr. Olivas' undated document, deemed to be in the nature of a motion to reconsider, failed to raise issues which would cause the Special Master to change the **Order Dismissing Objection and Special Master Report**. First, despite Mr. Olivas' statements concerning his repeated efforts to retain legal counsel, no attorney has entered a notice of appearance or contacted the Court since attorney Lloyd J. Walker's death last year. Second, until Mr. Olivas retains an attorney to represent him, like all litigants appearing *pro se*, he is held to the same standards and rules as one appearing with counsel. *Pro se* status does not excuse parties from adhering to procedural rules, even though they may be unaware of such requirements [citations omitted].

The Special Master then concluded a second time that Mr. Olivas was entitled to a water right as recommended by IDWR and as described in the **Special Master Recommendation**.

Olivas Motion to Set Aside Order and Motion to Alter or Amend

On December 19, 2000, Mr. Olivas' new attorney filed a *Notice of Appearance*, a *Motion to Set Aside Order Dismissing Objection* and a *Motion to Alter or Amend Amended Special Master Report of November 13, 2000 and Special Master Recommendation for Partial Decree*. In the accompanying *Memorandum*, Mr. Olivas argued:

This Motion is predicated upon the fact that claimant's actions constituted mistake, inadvertence and excusable neglect such that the Special Master's Order Dismissing Objection should be set aside pursuant to Rule 60 (b) of the Idaho Rules of Civil Procedure, that dismissal of claimant's Objection was unduly harsh and contrary to the presumption that matters before the Court be heard on their merits.

. . .

[Mr. Olivas] mistakenly believed that additional notice would be given to both claimant and to Janet O'Crowley following entry of the Order of the

Honorable Barry Wood, District Judge, dated November 3, 2000, by which the District Court ordered Janet O’Crowley to be designated as a party respondent in Subcase No. A51-04037.³ That this belief by claimant constituted a genuine and reasonable mistake is buttressed by the fact that Janet O’Crowley also failed to appear at the initial hearing set for November 6, 2000. This, after Ms. O’Crowley went to the effort to file the Complaint in the SRBA District Court on April 14, 1997 which was heard by the Honorable Barry Wood, District Judge on October 30, 2000.

In his *Affidavit in Support of Motion to Alter or Amend and to Vacate Order*, Mr. Olivas stated:

This affiant’s Objection challenged the quantity of the water recommended under Claim No. 51-04037. The Recommendation of the Director of IDWR was for only .06 cfs, while this affiant has established through measurements made by an employee of the Idaho Department of Water Resources that his diversions are at least 72.49 gallons per minute, or .1618 cfs....

O’Crowley Memorandum

On December 29, 2000, respondent Janet O’Crowley lodged her *Memorandum in Support of Special Master Report and Recommendation*. Ms. O’Crowley said:

These facts will show that water right 51-04037 has always historically been at .06 cfs and no more. Will also show that neither the Olivas’ nor their predecessors have ever been granted an enlarged right by the Idaho Department of Water Resources (IDWR). Neither have the above been granted a permit to bottle water for sale off the premises of their enterprise, the Desert Hot Springs Resort.

Ms. O’Crowley attached numerous documents to her *Memorandum* as evidence of Mr. Olivas’ alleged “experience in legal matters” and his “bottling water for sale; appropriating in excess of permit.”

Hearing on Motions

A hearing on Mr. Olivas’ *Motion to Set Aside Order* and *Motion to Alter or Amend* was held on February 15, 2001, in Twin Falls, Idaho. Attorney Timothy J. Schneider appeared for claimant Matthew Olivas; respondent Janet O’Crowley

³ Janet O’Crowley was added as a party to subcase 51-04037 by the *Order Designating O’Crowley as a Party Respondant [sic] in Subcase No. A51-04037*, dated November 3, 2000, entered by Presiding Judge Barry Wood in Subcase 94-00013.

appeared *pro se*; attorney Peter J. Ampe appeared for respondent the State of Idaho; and attorney Garrick Baxter appeared by telephone for IDWR.

At the hearing, the State opposed the *Motions* because Mr. Olivas' failure to attend two hearings in a row is not excusable neglect and because of Mr. Olivas' failure to allege facts to support a meritorious position. More precisely, the current claim is for .06 cfs, but Mr. Olivas did not specify the use for any additional quantity. Also, the State pointed out that Mr. Olivas would have to amend his claim if he wants more water.

Post-Hearing Documents

On February 22, 2001, Ms. O'Crowley lodged additional documents with the SRBA Court. First, she provided notice of her new mailing address in Carey, Idaho.⁴ Then, Ms. Crowley provided documents regarding bankruptcy proceedings⁵ wherein the Trustee sold at public auction on January 12, 2001, Matthew and Trina Olivas' non-exempt personal property, plus their interest in "real property known as Desert Hot Springs consisting of 14.9 acres and improvements of 9 rental cabins and outbuildings located in Owyhee County." The parcel of land described in the Trustee's Quitclaim Deed, dated January 17, 2001, includes the language: "Together with all water rights evidenced by water right numbers 51-04037, A51-04037 and A51-12760." The purchaser was Waterone Enterprises, LLC, 251 Versailles Ct., Tracy, California 95376.

Discussion

When Mr. Olivas failed to appear at the second initial hearing on November 6, 2000, counsel for the State moved for dismissal of Mr. Olivas' *Objection* and entry of a partial decree as recommended by IDWR. In the alternative, counsel requested an order to show cause and an award of attorney fees and costs from Mr. Olivas.

The ***Order Dismissing Objection*** was entered pursuant to I.R.C.P. 41 (b): "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

⁴ Janet O'Crowley's new mailing address is: 16 Stub Road, Carey, Idaho 83320.

⁵ The caption for the bankruptcy proceedings is: "United States Bankruptcy Court, District of Idaho, *In re: Matthew Olivas, Trina R. Olivas, Debtor*, Case No. 00-01741."

Before entry of the Order, the Special Master considered the length of delays caused by Mr. Olivas' failure to prosecute, his lack of justification for the delays and the extent of the resulting prejudice." *Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 837 P.2d 799 (1992).

At the hearing on Mr. Olivas' *Motion to Set Aside Order* and *Motion to Alter or Amend*, his counsel argued that Ms. O'Crowley's failure to attend the second initial hearing supported Mr. Olivas' mistake of not attending the same hearing. However, Ms. O'Crowley said she did not receive timely notice of the hearing because mail is delivered only three days per week for Murphy Hot Springs residents. Mr. Olivas never claimed he did not receive timely notice of the hearing as Ms. O'Crowley said. In fact, Mr. Olivas admitted he received the notice; he just thought he would receive "a new notice" because Ms. O'Crowley was recently joined as a respondent in subcase 51-04037. Under these facts, Mr. Olivas' claim of excusable neglect is not convincing.

However, there is the matter of ownership of water right 51-04037. Based on the bankruptcy documents submitted by Ms. O'Crowley, the Olivas' property, including their interest in Murphy Hot Springs land and appurtenant water right 51-04037, may have been part of bankruptcy proceedings at the time of entry of the **Order Dismissing Objection and Special Master Report** on November 9, 2000, and entry of the **Amended Special Master Report** on November 14, 2000. Further, Waterone Enterprises, which purchased the Olivas' property at public auction on January 12, 2001, is an indispensable party who was not provided notice of the hearing on Mr. Olivas' *Motion to Set Aside Order* and *Motion to Alter or Amend* held on February 15, 2001. The record does not indicate the SRBA Court was notified of the Olivas' bankruptcy proceedings until Ms. O'Crowley lodged the bankruptcy documents on February 22, 2001.

It is apparent that a special master report and recommendation to the Presiding Judge concerning 51-04037 is premature until the matter of ownership is determined. At a minimum, that will require notice to Waterone Enterprises and the opportunity for it to assert its interests. The proper remedy, then, is to vacate the **Order Dismissing Objection**, the **Amended Special Master Report** and the **Special Master**

Recommendation, although not for the reasons pled by Mr. Olivas. In the meantime, the Special Master will take the State's November 6, 2000 motion for attorney fees and costs from Mr. Olivas under advisement.

Order

THEREFORE, IT IS ORDERED that:

1. Mr. Olivas' *Motion to Set Aside Order Dismissing Objection and Motion to Alter or Amend Amended Special Master Report of November 13, 2000 and Special Master Recommendation for Partial Decree* are **granted**;
2. A scheduling conference shall be held on **Thursday, March 29, 2001, 10:00 a.m.**, at the SRBA Courthouse, 253 3rd Avenue North, Twin Falls, Idaho; and
3. A copy of this **Order** shall be mailed to Waterone Enterprises, LLC, at the address in the Trustee's Quitclaim Deed so that it may appear and assert its interests, if it so chooses.

Dated March 2, 2001.

TERRENCE A. DOLAN
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO SET ASIDE ORDER AND MOTION TO ALTER OR AMEND and ORDER SETTING SCHEUDLING CONFERENCE was mailed March 2, 2001, with sufficient first-class postage to the following:

Director of IDWR
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Boise, Idaho 83720-0098

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Rogerson, Idaho 83302

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Tracy, California 95376

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Rupert, Idaho 83350

Deputy Clerk