

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

)	
)	Subcase No. 01-10397
In Re SRBA)	(Oliver)
)	
)	ORDER ON MOTION TO FILE LATE
Case No. 39576)	NOTICE OF CLAIM
)	
_____)	

Motion to File Late Notice of Claim: **Denied.**

Appearances:

Alan Oliver, *pro se.*

Peter C. Monson, Esq., Denver, Colorado, for United States Department of Justice.

Candy L. Jackson, Fort Hall, Idaho, for the Shoshone-Bannock Tribes.

**I.
Procedural Background**

1. On March 2, 2001, Alan Oliver (hereinafter "Mr. Oliver") filed a *Motion to File a Late Notice of Claim* (Standard Form 4), together with an explanatory letter dated February 26, 2001, seeking to claim a water right on land located within the Fort Hall Indian Reservation and part of the Fort Hall Irrigation Project.

2. On April 13, 2001, the United States of America filed an *Opposition to Motion to File Late Notice of Claim.*

3. On April 16, 2001, the Shoshone-Bannock Tribes filed an *Opposition to Motion to File Late Notice of Claim.*

4. On May 16, 2001, Mr. Oliver filed a letter dated April 26, 2001, in response to the United States' and the Tribes' Oppositions.

5. On July 10, 2001, a hearing on this matter was held in open court at the SRBA courthouse in Twin Falls, Idaho, Honorable Roger S. Burdick presiding.

II. Matter Deemed Fully Submitted

A hearing on this matter was held on July 10, 2001. At the conclusion of the hearing, the parties did not request additional briefing, and the Court does not require additional briefing on this matter. Therefore, this matter is deemed fully submitted for decision on the next business day, July 11, 2001.

III. Relevant Law and Legal Standards

A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *See AOI* § 4d(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a "good cause" for untimeliness standard. I.R.C.P. 55(c). The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935, 854 P.2d at 279 (Ct. App. 1993). The I.R.C.P. 55(c) standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent; and
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland, 123 Idaho at 936, 854 P.2d at 279.

IV. Findings and Discussion

According to Mr. Oliver's *Claim to a Water Right* filed with IDWR, and the letters he sent to the Court, the land for which Mr. Oliver is seeking to file a late notice of

claim consists of 80 acres of allotted land located entirely within the Fort Hall Indian Reservation. Further, Mr. Oliver states that the land is "recognized by the Secretary of the Interior as being part of the Fort Hall Irrigation Project." Mr. Oliver also states that he is a Tribal member, and the subject land is held in trust for him by the United States. The priority date Mr. Oliver seeks to claim is June 14, 1867.

On August 2, 1995, the SRBA Court (Judge Hurlbutt) issued a *Partial Final Consent Decree Determining the Rights of the Shoshone-Bannock Tribes to the Use of Water in the Upper Snake River Basin* (hereinafter "1995 Decree"), which is based upon the 1990 Fort Hall Indian Water Rights Agreement, and decreed to the United States as trustee for the Shoshone-Bannock Tribes several federal reserve water rights. The 1995 Decree was affirmed by the Idaho Supreme Court in *Fort Hall Water Users Assn. v. United States, et al.*, 129 Idaho 39, 921 P.2d 739 (1996). Mr. Oliver's land and the water rights used thereon are covered by this 1995 Decree. The duty to administer and distribute the water rights contained in the 1995 Decree is charged to the Secretary of the Interior pursuant to 25 U.S.C.A. § 381 (General Allotment Act).

Mr. Oliver is not seeking an independent state-law based water right. Rather, the water right Mr. Oliver is seeking appears to be a derivative or portion of the federal reserved water right contained in the 1995 Decree. In other words, Mr. Oliver is asking this Court to designate or apportion a specific quantity of the federal reserved water right to his land. Mr. Oliver's legal theory as to how this can be accomplished is twofold. First, Mr. Oliver asserts the following:

The land which the claim is being filed upon has had a water supply through the Fort Hall Irrigation Project for much of the time the Project has existed. The Congressional Act of March 1, 1907 which established the Fort Hall Project authorized the Secretary of the Interior to ' . . . acquire . . . lands, rights, and property which he may determine to be necessary to the success of any plan or project for said purpose . . . '. The Act went on to provide 'The water rights acquired or provided for in this measure shall be appurtenant to the lands irrigated . . . '. Thus, it was the 'lands' recognized by the Secretary which were to have the water right, not the Tribal government.

February 26 letter, ¶ 4. Mr. Oliver's "appurtenancy" argument is misplaced. Whatever was intended by Congress in the above-quoted Act with respect to water rights being "appurtenant" to land, it is clearly not a basis for this Court to apportion the water

rights contained in the 1995 Decree to individual parcels of land within the Fort Hall Reservation.

The second prong of Mr. Oliver's argument relies upon language found in sections 7.13 and 10.4 of the 1990 Fort Hall Indian Water Rights Agreement, which states that the Tribal water rights may be reduced if an allottee is decreed water for Indian lands. As pointed out by the United States and the Tribes in their respective Oppositions, these provisions merely protect the State of Idaho from overlapping claims to water for Indian lands within the Reservation, and do not provide any independent legal authority that would allow this Court to apportion a federal reserved water right.

A. MR. OLIVER HAS NOT SATISFIED THE “MERITORIOUS DEFENSE” STANDARD.

Mr. Oliver is asking this Court to allow him to proceed with a water right claim that is a derivative of a previously decreed federal reserved water right. Mr. Oliver has not shown any legal authority that would allow him or the Court to proceed on this unique legal theory. The legal authority holds to the contrary. In *Grey v. United States*, 21 Cl.Ct. 285 (1990), the Court of Claims discussed the relationship between tribal water rights and allotted tribal lands held by tribal members. “Allotted tribal lands and the corresponding *Winters* right to water are communal in nature. Title resides in the tribe itself and is not held by individual Indians.” *Id.* at 299 (citing *United States v. Chase*, 245 U.S. 89, 99-100 (1917)). Additionally,

Nothing in the General Allotment Act or other statutes governing irrigation of allotments suggests that Congress was partitioning and conveying tribal water rights as it did with tribal lands. Neither the Supreme Court nor the Federal Circuit have presumed a congressional intent to convey to Indian allottees an appurtenant right to an individual share of their tribe’s reserved waters. The Supreme Court has only confirmed that an Indian allottee has the ‘right to use some portion of tribal waters essential to cultivation’

Id. (quoting *U.S. v. Powers*, 305 U.S. 527, 532 (1939)). Finally,

The [General Allotment Act] implies that individual Indians with allotments should have access to a share of tribal irrigation water. The Act does not create a vested right in Indian allottees to receive water beyond their individual share of tribal water. Congress clearly intended that farm allotments should be irrigated. Section 381 provides a means for the secretary to allocate available irrigation water equitably among allotted

reservation lands. The statutes do not provide, however, for an individual hold on a vested property right in a *pro rata* share of the tribe's reserved right.

Id.

Even if the law provided to the contrary, it is unclear as to how this Court would even have jurisdiction to reopen the 1995 Decree in order to allow Mr. Oliver to proceed with his claim. As set forth in Section III of this Order, the standard under I.R.C.P. 55(c) takes into account whether a meritorious position has been presented. Based upon the foregoing discussion, this Court finds that Mr. Oliver has not met his burden of setting forth a meritorious position.

B. REVISITING THE 1995 CONSENT DECREE IN ORDER TO ALLOW MR. OLIVER TO PURSUE HIS LATE CLAIM WOULD RESULT IN EXTREME PREJUDICE TO THE SIGNATORIES.

Alternatively, even if Mr. Oliver's argument was legally supportable, the claimed water rights were taken into account and used to quantify the Tribal rights covered by the 1995 Decree. The rights have already been decreed. The 1995 Decree has also been congressionally ratified. In order to allow Mr. Oliver to pursue his late claim, the terms of 1995 Decree, at a minimum, would have to be revisited. To the extent Mr. Oliver takes issue with how the rights were adjudicated, the appropriate time to raise such issues has long since expired. To the extent the terms of the 1995 Decree would have to be revisited, the Court finds that extreme prejudice would result to all the parties that timely participated therein.

That being said, this Court would like to reiterate what has been stated by the United States and the Tribes in their respective Oppositions with respect to the appropriate remedy if Mr. Oliver is aggrieved by the administration or delivery practices of the water rights contained in the 1995 Decree. Specifically, if Mr. Oliver contends that he is not receiving "just and equal distribution" of water, his recourse is to seek the assistance of the Secretary of the Interior under 25 U.S.C.A. § 381.

V.
Conclusion

For the above-stated reasons, Mr. Oliver's *Motion to File a Late Notice of Claim* is **denied**.

IT IS SO ORDERED.

Dated July 24, 2001.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

ROGER S. BURDICK
Presiding Judge of the
Snake River Basin Adjudication