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Department of Water Resources

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

In Re SRBA	)	Subcases 47-16433, <i>et al.</i>
	)	(see list of 26 subcases attached)
Case No. 39576	)	(USDA/FS)
	)	
	)	MOTION TO ALTER OR AMEND
	)	ORDER VACATING STAYS and
	)	ORDER DENYING MOTIONS
	)	TO FILE LATE OBJECTIONS

COMES NOW Bruce Byron Bedke and Jared K. Bedke, petitioners, Sui Juris, by special visitation, who are unschooled in law and ask the court to take Judicial Notice of the enunciation of principles as stated in Haines v. Kerner, 404 U.S. 519, wherein the court has directed that those who are unschooled in law making pleadings and/or complaints shall have the court look to the substance of the pleadings rather than the form, and hereby makes the following MOTION TO ALTER OR AMEND ORDER VACATING STAYS and ORDER DENYING MOTIONS TO FILE LATE OBJECTIONS in the above named subcases.

MOTION TO ALTER OR AMEND ORDER VACATING STAYS and ORDER DENYING MOTIONS TO FILE LATE
OBJECTIONS

BACKGROUND

On July 3, 2003, Special Master Dolan issued an ORDER VACATING STAYS and ORDER DENYING MOTIONS TO FILE LATE OBJECTIONS (herein after referred to as ORDER).

ERRORS and OMISSIONS

In the PROCEDURAL BACKGROUND section of the special master's July 3, 2003 ORDER, the court neglects to include petitioners RESPONSE TO MEMORANDUM IN OPPOSITION TO MOTIONS TO FILE LATE OBJECTIONS dated July 9, 1999 (See Exhibit A) (herein after referred to as RESPONSE), in which petitioners set out in great detail their good cause and meritorious defense, and in the DISCUSSION section of the July 3, 2003 ORDER relies solely on the original motion to file late objections dated June 4, 1999 for the same, and additionally includes part of a settlement discussion had off the record and after the conclusion of the status conference on June 19, 2003 (see ORDER page 6, paragraph 4) as a basis for concluding that petitioners "failed to plead a meritorious defense and failed to show good cause to file late objections." Petitioners will now address all of these issues.

GOOD CAUSE

In petitioners' motions to file late objections dated June 4, 1999 petitioners were not told by the court to submit an exhaustive legal brief stating in detail their good cause and meritorious defense along with their SF-1, but rather a synopsis of their position, so that the issue could be discussed in depth and briefed further at a later date. Petitioners, along with several other claimants, set forth in oral arguments before the court several good cause arguments and also filed the above mentioned RESPONSE dated July 9, 1999

(See Exhibit A) to further explain their positions to the court. Petitioners request the court review this document as it states in great detail petitioners' good cause arguments.

MERITORIOUS DEFENSE

Petitioners request the court review the RESPONSE dated July 9, 1999 (See Exhibit A) as it states in great detail petitioners' meritorious position.

In addition to the meritorious defenses set forth in oral arguments and in petitioners' RESPONSE dated July 9, 1999 (See Exhibit A), petitioners would also request that the court take notice of HAGE V. US in which the court ruled in its' FINAL OPINION: FINDINGS OF FACT that

“ ...the point of use for the water is the cow's head, which is an extension of the base ranch.” (HAGE V. US, ___ Fed. Cl., at 25)

As the court has determined the facts that the cow is the point of use and it is an extension of the base ranch, any use made by that cow is a use by the base ranch. Any beneficial use claim on a grazing allotment for stockwater, therefore, must also be based on the consumption of water by cattle, whose use directly vests in the base ranch. Therefore all use made of the water on petitioners' allotments by petitioners' cattle is directly attributable to, and vests in, petitioners, and no other entity (see RESPONSE page 8).

ARGUMENT

In the special master's ORDER he cites, as a recent development, the LU Ranching Co. decision in which the court was asked to decide the constitutionality of procedures giving notice to claimants in the SRBA (see ORDER, page 4), and relies heavily upon the ruling handed down by the court. There are several key differences between LU Ranching Co. and petitioners:

1. LU Ranching Co. filed several domestic/de minimus water right claims. *LU Ranching, ___ Idaho, at 2*. As these claims were de minimus in nature, they were included in the Director's first Domestic and Stockwater report for their reporting basins, and LU Ranching Co. was not a procedural victim of the bifurcated reporting process. Petitioners' water claims weren't included in the Director's first Domestic and Stockwater report for basins 45 & 47, and as such petitioners are procedural victims of the bifurcated reporting process and as such remedy needs to be granted;
2. LU Ranching Co. was seeking to overturn partial decrees (a procedural step that the subcases at issue in the special masters ORDER haven't reached) not by the fact that the bifurcated reporting process had caused LU undue hardship, but rather "...that requiring parties to sift through the Director's Reports so that they notify themselves as to claims potentially or actually adverse to their own is too onerous...". *LU Ranching, ___ Idaho, at 5*. Petitioners are requesting remedy from the inequities caused by the bifurcated reporting schedule (see RESPONSE page 7) before the subcases at issue are allowed to move forward to partial decree based on procedure, rather than on merit;
3. It is also important to note that LU Ranching Co. is a corporate entity and as such, is not entitled to appear pro se, but must be represented by an attorney in their dealings with the court. Since LU Ranching Co. could not act pro se, they weren't entitled to all the relief that

petitioners are entitled (see RESPONSE pages 7-8).

In the special master's ORDER he also cites, as a recent development, a *Stipulation* dated August 29, 2002, signed by the USDA/FS and several private parties and some of the terms and conditions contained therein. The court does, however, make note that petitioners did not sign the *Stipulation*.

The first questions before this court are whether or not petitioners have shown good cause and put forth a meritorious defense in their motions to file late objections to the subcases at issue, and if they have, then the Motions to File Late Objections should be granted. The court shouldn't consider any part of the *Stipulation* dated August 29, 2002 when making a ruling on the merits of the petitioners' Motion to File Late Objections for the express reason that petitioners aren't parties to the *Stipulation* and as such are not bound by its terms nor conditions. It need to be further stated that all negotiations, settlement discussions, and apparent reasons for petitioners' decision not to sign the above mentioned *Stipulation* should not be considered by the court when making its ruling on petitioners' Motions to File Late Objections, as they cannot be used as evidence before the court and have no bearing on the questions before the court.

Petitioners would now like to address what petitioners consider the inexcusable action of the special master in using a settlement discussion, had after the conclusion of the status conference on June 19, 2003, in his ORDER. In the ORDER (page 6, paragraph 4) Special master Dolan writes:

"In the status conference on June 19, 2003, the Bedkes said the reason they did not sign the *Stipulation* giving the private parties senior stockwater rights was because of the language in paragraph 7. That was the language stating the water rights "shall not alter the rights of a permittee under a valid grazing permit nor impede the authority of the United States to manage federal lands"

This discussion did not take place in the status conference on June 19, 2003, but rather occurred after the conclusion of the status conference when further settlement discussions about the stipulation occurred between petitioners and the representatives of the USDA/FS. Again petitioners would like to stress that all negotiations, settlement discussions, and apparent reasons for petitioners' decision not to sign the above mentioned *Stipulation* should not be considered by the court when making its ruling on petitioners' Motions to File Late Objections, as they cannot be used as evidence before the court and have no bearing on the questions before the court.

The next question before the court is the matter of prejudice to the other parties caused by the stay orders. In the ORDER it states, "If further proceedings in the above 26 subcases were to remain stayed until the Basin 47 "de maximus" stockwater claims are reported in the fall of 2004, the stockwater rights of the remaining parties who signed the *Stipulation* would be put on hold." This is simply not the case. The only subcases petitioners seek to object to in their Motions to File Late Objections are those which petitioners have identified in the Motions. As petitioners understand the *Stipulation*, SF-5's are being filed for each of the subcases of the private claimants who have chosen to participate in the *Stipulation*. Petitioners' Motions to file Late Objections do not seek to include any of the private claimant's subcases nor stop them from settling in any way. Continuing to stay the subcases at issue, does not stop the USDA/FS in any way from fulfilling its obligation to the private parties who signed the *Stipulation* nor does it stop the private parties from fulfilling their obligations to the USDA/FS. Petitioners only seek that if the Motions to File Late Objections be granted, that those subcases identified in petitioners' Motions be stayed until petitioners claims are reported so that one trial can be

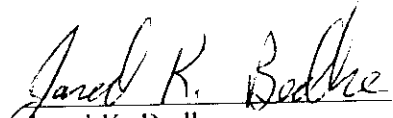
had to determine the merits of the “competing” claims. If, after the facts come out at trial, the court determines that the subcases at issue should be decreed as recommended, it can allow the USDA/FS’ signed SF-5’s at that time with no harm to any party in the *Stipulation*.

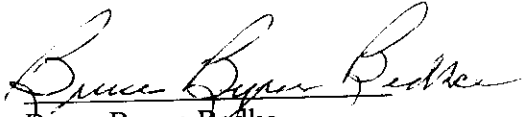
As the court can see, petitioners are indeed more concerned with stockwater rights than they are about conditions imposed on them by federal agencies as the court alleges in its ORDER (page 6, paragraph 5), and all issues that petitioners want to pursue with their Motions to File Late Objections are well within the jurisdiction of the SRBA in dealing with water claims.

REQUEST FOR REMEDY

Petitioners now request that the court alter or amend its ORDER and grant remedy to the wrongs suffered by petitioners throughout the bifurcated reporting process, as they have demonstrated good cause and a meritorious position, by allowing petitioners’ Motions to File Late Objections and continue the stays in the subcases at issue for the reasons set forth above.

Dated this 14th day of July, 2003.


Jared K. Bedke


Bruce Byron Bedke

ATTACHMENT 1

Subcase Nos:

47-16433
47-16434
47-16435
47-16437
47-16438
47-16440
47-16441
47-16442
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47-16458
47-16459
47-16460
47-16461
47-16463
47-16464
47-16465
47-16466
47-16470
47-16471
47-16474

(Subcase list: 16433 ETAL)
7/03/03

5
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Attorneys for Objectors Scott C. Bedke,
Michael A. Poulton and Gary Russel Poulton

**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 Nos. (See Exhibit A)
	)	
Case No. 39576	)	RESPONSE TO MEMORANDUM
	)	IN OPPOSITION TO MOTIONS
	)	TO FILE LATE OBJECTIONS
-----	)	

DESCRIPTIVE SUMMARY

This is the response of Objectors Scott C. Bedke, Michael A. Poulton and Gary Russel Poulton to the United States' Memorandum in Opposition to Motions to File Late Objections (June 29, 1999). The United States' opposition was to motions to file late objections filed by Scott C. Bedke¹, Michael A. Poulton, Gary Russel Poulton, and pro se claimants Bruce Bedke and Jared Bedke.

¹ Scott Bedke represented himself at the July 1, 1999 hearing on the Basin 47 subcases listed on Exhibit "A". A notice of appearance for Scott Bedke was subsequently filed in these Basin 47 subcases by Rosholt, Robertson & Tucker on July 2, 1999. A separate notice of appearance was filed in the Basin 45 subcases in which Scott Bedke is an Objector on April 30, 1999.

BACKGROUND

The United States of America, on behalf of the Forest Service and the Bureau of Land Management, has filed numerous de minimis stockwater claims in Basins 45 and 47. A number of these claims overlap with stockwater claims filed by the Objectors and other private parties in these two basins. The vast majority of private parties' claims have not yet been recommended to the SRBA Court by the Director and will not be reported until at least December, 2000 (Basin 45), or the year 2001 (Basin 47).² On the other hand, the United States' stockwater claims have already been recommended to the court as part of the Director's Domestic and Stockwater Reports for Basins 45 and 47.³ To date, this bifurcation of Basin 45 and 47 stockwater claims has resulted in "competing" or "overlapping" claims to the same stockwater being considered on different time schedules.

² Of the twelve (12) claims jointly filed by the Objectors in Basins 45 and 47, only one has been recommended by the Department. This one claim, no. 47-14923, was recommended in five parts and was the subject of an Initial Hearing held on July 1, 1999. It is unclear whether additional parts of this claim are yet to be recommended. The joint claims which have not been recommended because of the bifurcated reporting in Basins 45 and 47 include the following:

45-10325	47-14924
45-10327	
45-10329	
45-10330	
45-10331	
45-10332	
45-10333	
45-10334	
45-10335	
45-10336	

³ A review of the Director's Reports indicates that nearly 1,500 water right recommendations have been made by the Director in the name of the United States in Basins 45 and 47. See, Director's Report for Basin 45 Domestic and Stockwater Claims, Vol. 2, pp. D-2 to D-14 (Name Index) (February 27, 1998) and Director's Report for Basin 47 Domestic and Stockwater Claims, Vol. 6, pp. D-4 to D-27 (Name Index) (August 14, 1998).

On June 29, 1998, Scott Bedke received correspondence from the Idaho Department of Water Resources about the bifurcation of stockwater claims in Basins 45 and 47⁴. The letter noted the bifurcated reporting schedule that had caused confusion in Basin 45. With regard to Basin 47, the Department's letter stated: "In Basin 47, the claims may be equally as challenging, but the task can have a different outcome." Unfortunately, the Basin 47 Director's Report likewise failed to include all of the private parties' stockwater claims, resulting in further confusion and misunderstanding of the process by the Objectors. The Department did not send the June 29, 1998 letter to any of the other Objectors to inform them of the bifurcation of private and federal claims that had taken place.

The Objectors were also informed by the Idaho Department of Water Resources that the "conflicting" status of the United States and private stockwater claims in Basins 45 and 47 would be considered and resolved at a later date, after the Objectors' private claims were recommended to the SRBA Court. As a result of this mistaken information and the confused reporting schedule, the Objectors neglected to file objections to the recommendations in Basins 45 and 47.

Upon learning that the Basin 47 claims filed by the United States had in fact been recommended by the Department, and would therefore be decreed if no objections were filed, the Objectors prepared and filed their motions to file late objections.⁵

⁴ See, Exhibit "L" to the United States' Memorandum in Opposition to Motions to File Late Objections (June 29, 1999).

⁵ At the July 1 hearing, counsel for the Idaho Department of Water Resources confirmed that the bifurcated reporting of stockwater claims in Basins 45 and 47 has resulted in some claims (i.e., those of the United States) being reported two years earlier than they otherwise would have been -- and, therefore, two years earlier than other claims for the same stockwater (i.e., those of the private parties).

As explained at the July 1 hearing, the objections filed by Michael Poulton, Gary Poulton, Scott Bedke, Bruce Bedke, and Jared Bedke seek to have the United States' claims disallowed in a portion of the the Goose Creek Cattle & Horse Grazing Allotment, also known as the Wild Rose Grazing Allotment, or the "Westside" Grazing Allotment, located in Basins 45 and 47⁶.

In response to the motions to file late objections, the United States filed its Memorandum in Opposition to Motions to File Late Objections, dated June 29, 1999, before the July 1 hearing. A copy was not received by counsel for the Objectors until two days before the hearing. At the request of counsel for the Objectors, the Special Master provided an opportunity for the Objectors to file a responsive brief on or before July 9, 1999.

ARGUMENT

The motions to file late objections filed by Michael Poulton, Gary Poulton, Scott Bedke, Bruce Bedke and Jared Bedke should be granted. Good cause exists to allow the filing of these objections. In addition, granting of the motions would allow the issues raised by the objections to be tried on their merits.

1. The Objectors have Not Ignored the SRBA Process.

The United States argues that the Objectors have ignored "the requirements set by the Legislature and this court" and should not be allowed to file late objections. The Objectors have not ignored the SRBA process. If anything, the SRBA process has ignored them.

When the Department decided to bifurcate stockwater claims, it had major procedural ramifications for the Objectors. This point has been confirmed by the Idaho Department of Water

⁶ Scott Bedke, Bruce Bedke, Jared Bedke, Mike Poulton and Gary Poulton filed separate motions to file late objections to the United States' overlapping claims in Basin 45. A hearing on these motions was held on June 7, 1999. A map depicting the location of the "Westside" Grazing Allotment, which includes portions of Basin 45 and 47, was provided to the Special Master and the parties at the July 1 hearing for illustrative purposes.

Resources.⁷ Even the United States has acknowledged that this bifurcation has caused confusion among the private parties.⁸ Despite this change in the process, however, the Objectors were not notified that the federal stockwater claims would be reported on an earlier track than their own private stockwater claims. The Objectors fully expected, and reasonably so, that the "conflicting" stockwater claims would be reported and considered together. Of course, this is not what happened. To make matters worse, the Objectors were informed by the Department that the "conflicting" stockwater claims would be considered together at a later date, after the private claims are reported. However, the United States' claims have since progressed on an earlier track than the private claims. Other than through the efforts of the Objectors, there has been no real attempt to put these claims back on the same track.

Upon learning of the accelerated status of the United States' claims in the SRBA process, the Objectors researched the matter to determine which United States claims overlapped with their own private claims and prepared late objections. This is a process allowed under Administrative Order 1, which governs proceedings in the SRBA. SRBA Administrative Order 1, Sec. 10.j. (Amended 10/16/97). The Objectors have not ignored the SRBA process. They have instead sought to utilize the existing procedures (i.e., motions to file late objections) to enter the process.

⁷ See, Transcript of June 7, 1999 Hearing on Joint Motion and Motions to File Late Objections to U.S. Claims in Basin 45, Subcase Nos. 45-02769 et al., pp. 44-46 (Exhibit "I" to the United States' Memorandum in Opposition to Motions to File Late Objections) (statement of Mr. Tuthill).

⁸ See, Transcript of April 7, 1999 Initial Hearing on Objections to U.S. Claims in Basin 45, Subcase Nos. 45-02769 et al., pp. 50-51 (Exhibit "M" to United States' Memorandum in Opposition to Motions to File Late Objections) (counsel for the United States: "I think given the confusion that these folks have had with their water rights in the South Hills. . .you're going to hear over and over again there's been a great deal of confusion. . .I think there's some confusion here. . .").

2. The Objectors have Demonstrated Good Cause and a Meritorious Position.

The United States argues that the Objectors have failed to meet the test for filing late objections under IRCP Rules 55(c) and 60(b). These rules require demonstration of: (1) mistake, inadvertence, excusable neglect, newly discovered evidence, fraud or misconduct, a void judgment, a judgment that is no longer equitable, or any other reason justifying relief; and (2) a meritorious position. In considering the question, the court "must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt". Johnson v. Pioneer Title Co., 104 Idaho 727, 733 (Ct. App. 1983).

The reason that the Objectors have filed late objections is straightforward and simple and has been adequately demonstrated by the Objectors and the explanations provided to the Court by the Department regarding the process for stockwater claims. The Objectors mistakenly believed that their private stockwater claims and the United States' claims would be considered together, at the same time, as part of the same process. Since the vast majority of private claims have not yet been recommended by the SRBA Court, and no notice has in fact been provided by IDWR regarding the private stockwater claims, the private claimants mistakenly believed that the United States' claims for the same stockwater were proceeding on the same time schedule. In light of this lack of notice, or at best, ineffective and confusing notice caused by the bifurcation of Basin 45 and 47 stockwater claims, the Objectors' failure to file objections to the U.S. claims was the result of a mistaken belief regarding the reporting of these claims. This was a mistake of fact, not of law.

The failure to file objections can also be attributed to inadvertence (not knowing that the U.S. claims had been reported), surprise (that the U.S. claims were reported early) or excusable neglect (in failing to ascertain that the U.S. claims had already been reported). As further confirmation on this point, the Department indicated during the June 7 and July 1 hearings that

the bifurcated reporting schedule for Basin 45 and 47 stockwater claims has caused problems and confusion. While these problems may have been expected by the Department and the SRBA Court, they were not made known to the Objectors and have resulted in chaos for them. This situation needs to be rectified by allowing the late objections to be filed.

At the time that the Director's Reports for Basin 45 and 47 were issued and the objection deadlines passed, the Objectors were without legal counsel. Only recently have some of the Objectors retained counsel for purposes of pursuing their late objections.

Where pro se litigants erroneously interpret acts (like the bifurcated reporting schedule for Basin 45 and 47 stockwater claims), despite notice that may have been provided to them (like general notice of the issuance of the Director's Reports), they are entitled to relief. See e.g., Schraufnagel v. Quinowski, 113 Idaho 753 (Ct. App. 1987) (pro se defendant entitled to relief when he erroneously interpreted court order fixing trial and pretrial conference dates despite notice he had received about summary judgment hearing).

The United States seems to suggest that neglect or confusion about the legal process should not be excused simply because the Objectors were pro se at the time of the objection deadlines. The authority on this point is to the contrary, however. A pro se litigant's misunderstanding of procedure can constitute excusable neglect or mistake justifying relief. Schraufnagel, 113 Idaho at 755-56. The test is not what the Objectors would have done if they had hired an attorney to oversee stockwater issues in the SRBA, but rather what a reasonably prudent person would have done under the circumstances. Johnson, supra; Schraufnagel, supra. Given the complicated procedural matters regarding bifurcation of the stockwater claims in this case, it was reasonable for the Objectors to fail to file objections until now.

The Objectors were obviously mistaken about the reporting of the federal stockwater claims. They interpreted the non-recommendation of their claims as a sign that the stockwater

RESPONSE TO MEMORANDUM IN OPPOSITION TO MOTIONS TO FILE LATE OBJECTIONS - 7

ownership issue vis-a-vis the United States would be determined at a later date. They were even told this by the Department. When it was discovered and understood that the U.S. claims had indeed been reported on a different schedule than the private claims for the same stockwater, the Objectors promptly filed their motions.

Newly discovered evidence, in learning about the actual reporting schedule, is also an applicable ground for relief. Finally, given the insufficient and misleading notice provided to date regarding the effects of bifurcating the reporting process for stockwater claims, any objection deadline, partial decree or other proceeding involving the United States' claims should be deemed void, providing a further ground for granting the motions. Certainly, under these circumstances, it is not equitable to bar the Objectors from filing their objections.

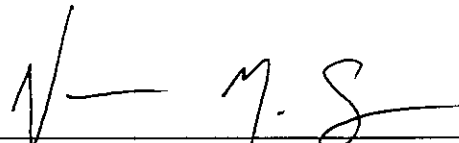
In addition, the Objectors have demonstrated a meritorious position. It is a position that the United States may not agree with, but this does not mean that it is without merit. On the face of their proposed objections, and as explained at the June 7 and July 1 hearings, the Objectors assert that the stockwater rights claimed by the United States should not be held by the United States, but rather by the private parties that graze cattle on the grazing allotments. The theory espoused is that the actual beneficial use of stockwater in the grazing allotments is attributable to the private grazer, not the United States, and should be decreed accordingly. The United States has not put the water to beneficial use. The court should allow the issues to be decided on the merits. "Judgments by default are not favored and the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits." Johnson, 104 Idaho at 732; see also, Baldwin v. Baldwin, 114 Idaho 525 (Ct. App. 1988) (relief from a default judgment is favored in doubtful cases). These arguments regarding good cause and a meritorious defense are equally applicable for any partial decrees that have been issued in Basins 45 and 47. AO1, Sec. 14.d.

CONCLUSION

For the reasons set forth above, the Objectors' motions to file late objections should be granted.

DATED this 9th day of July, 1999.

ROSHOLT, ROBERTSON & TUCKER



NORMAN M. SEMANKO

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 1999, I served a true and correct copy of the foregoing RESPONSE TO MEMORANDUM IN OPPOSITION TO MOTION TO FILE LATE OBJECTIONS upon the following individuals by placing the document in the United States mail, postage prepaid, addressed as follows:

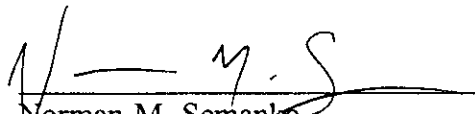
United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
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Bruce Bedke
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Jared Bedke
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Norman M. Semanko

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2003 I served a true and correct copy of the foregoing MOTION TO ALTER OR AMEND ORDER VACATING STAYS and ORDER DENYING MOTIONS TO FILE LATE OBJECTIONS upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

GARY R. POULTON
MICHAEL A. POULTON
SCOTT C. BEDKE

Represented by:
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Phone: 208-733-0700

USDA FOREST SERVICE

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BOISE, ID 83724

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Jared K. Bedke