

Bruce Byron Bedke
in care of: 42 East Basin Road
UNITED STATES POST OFFICE
Oakley, Idaho

Jared K. Bedke
in care of: 69 West Basin Road
UNITED STATES POST OFFICE
Oakley, Idaho

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)
	)	
	)	BRIEF IN SUPPORT OF
	)	MOTION TO ALTER OR AMEND
	)	SPECIAL MASTERS REPORT and
	)	RECOMMENDATION
_____	)	

COMES NOW Bruce Byron Bedke and Jared K. Bedke, pro se litigants, and
hereby make the following BRIEF IN SUPPORT OF MOTION TO ALTER OR
AMEND SPECIAL MASTERS RECOMMENDATION in the above named subcases.

BACKGROUND

On January 7, 2004, Special Master Dolan issued an ORDER DENYING THE
BEDKE'S MOTION TO RECONSIDER and subsequently on January 12, 2004 issued
the SPECIAL MASTERS REPORT in the above named subcases.

DISCUSSION

In its ORDER DENYING THE BEDKE'S MOTION TO RECONSIDER, the court states that "The Bedke's have not presented any compelling reasons for reversal of the Special Master's *Order vacating stays and order denying motions to file late objections.*" (see Order page 2) We disagree. In a hearing on July 1, 1999, oral argument was made by the Bedke's and other claimants who filed motions to file late objections in the above named subcases (see Transcript of hearing 3:45 P.M. July 1, 1999 attached as Exhibit 1). At this hearing, the Bedke's, and others seeking objections, made arguments that the motions to file late objections should be allowed under rule 55(c) of the I.R.C.P. and also under rule 60(b) of the I.R.C.P. The movants explained in great detail the circumstances surrounding their confusion as to the process of whether or not objections had to be filed in what they perceived to be conflicting claims (see Exhibit 1). To further complicate the situation, it was at that July 1, 1999 hearing that the Bedke's first became aware of the strict definition the Idaho Department of Water Resources (IDWR) used in determining conflicting claims (see Exhibit 1, page 53 beginning Line 5). The other parties at the 3:45 P.M. hearing have since withdrawn their motions to file late objections to the above named subcases, but the arguments made at that hearing, still hold as valid. Also in its ORDER of January 7, 2004, the court relies upon the ruling involving A.L. Cattle, Inc. and also the LU Ranching decision as further basis for the courts ruling. We shall address each in turn.

GOOD CAUSE

The Idaho Supreme court has directed:

"[6] Rule 55(c) provides that for good cause shown a court "may set aside an entry of default and, if a judgment by default has been entered,

may likewise set it aside in accordance with rule 60(b)." Under Rule 60(b)(1), a court may relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect" or for "any other reason justifying relief from the operation of the judgment." In addition to meeting the requirements of Rule 60(b)(1), the party moving to set aside a default judgment must plead facts which, if established, would constitute a defense to the action." *JOHNSON v. PIONEER TITLE CO. OF ADA COUNTY* (104 Idaho 727(App.), 732 (1983))

1. CONFUSION

At a hearing on July 1, 1999 at 2:15 P.M. Mr. Spencer of the IDWR explained what the bifurcation of the reporting process actually did.

"I think that the proper perspective to apply here is that this bifurcation has not caused delay. What the bifurcation in effect has done has resulted in some of these rights being reported two years ahead of where they otherwise would have been.

And so it's not a matter that we are delaying the process through the bifurcation. It is a matter that we now have some rights that actually are way out in front of where they would have been had there not been a bifurcation." (See Transcript of July 1, 1999 2:15 P.M. hearing attached as Exhibit 2, Page 37, beginning Line 17)

This acceleration of the above mentioned subcases, created much confusion, and distrust of the process with the Bedke's and others (private claimants). The IDWR advised the private claimants that they wouldn't necessarily have to object to the accelerated claims, because if these claims were in conflict with the private claimants claims, then both would be reported to the court as one water right and the court would then determine which party the water right belonged to (see Exhibit 1, page 8 et. seq.). The private claimants mistakenly interpreted this advice to mean where claims were based on the same water, same use, same cattle, that these water claims would be in direct conflict and therefore would be recommended to the court as one claim the ownership of which would be determined at that point (see Exhibit 1). At the 3:45 P.M. hearing on July 1, 1999, Roxanne Brown of the IDWR explained the strict definition of

conflicting claims that the IDWR used (see Exhibit 1, Ms. Brown page 53 beginning at line 8).

It is undisputed that the IDWR believed that the bifurcation could cause some confusion and difficulties (See Transcript of 2:00 P.M. hearing June 7, 1999, relevant page attached as Exhibit 3, Mr. Tuthill page 44 beginning Line 4). It is also undisputed that the Bedke's were confused by the process as well (See Transcript of 9:00 A.M. hearing April 7, 1999, relevant page attached as Exhibit 4, Mr. Bramer page 50 beginning Line 16).

The Idaho Supreme Court has ruled:

"[10,11] Undoubtedly, Pioneer's manager could have acted *more* prudently by delivering the summons and complaint immediately to Pioneer's attorneys. However, this does not compel a conclusion that he acted so imprudently that relief should be denied. In determining whether to set aside a default judgment, we must apply a standard of liberality rather than strictness and give the party moving to vacate the default the benefit of a genuine doubt. *Stoner b. Turner, supra*. In view of the confusion which existed, we cannot say that Pioneer was guilty of indifference or deliberate delay in failing to answer the complaint. We thus hold that Pioneer's failure to respond was excusable neglect under I.R.C.P. 60(b)(1)." [emphasis unchanged] *Johnson v. Pioneer (supra)*, 733

2. JARED BEDKE RECEIVED NO NOTICE

It is also undisputed that Jared Bedke did not receive any notice of the Directors Reports for Basin 45 or Basin 47 (See Exhibit 1, page 61 Line 20 et. seq.)

3. BEDKE'S ACTED PROMPTLY IN REQUESTING RELIEF

The Bedke's first became aware of the need to file objections to the United States' claims shortly before the April 7, 1999 hearing and immediately sought to identify the above named subcases in Basin 47 and filed their motions to file late objections as soon as they could (See Exhibit 1, page 61 Line 20 et. seq., also See *Schraufnagel v.*

MERITORIOUS POSITION

It is the Bedke's position that the original use of the water in the subcases at issue was made by their predecessors in interest prior to the establishment of the Forest Reserves and Bureau of Land Management, and that the United States has never put the water to any beneficial use, as the only way stockwater could be put to use is by livestock (See Exhibit 1). Further the Bedke's 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. If the Bedke's motions to file late objections are granted, through evidence, witnesses, and testimony they will be able to prove the IDWR did no investigation of the United States claims at issue, that the United States did not ever put the water to beneficial use, the only use of the water at issue was by and for the benefit of private individuals, and therefore the United States should not have the subcases at issue decreed as valid water rights. The Bedke's will also rely on the United States Supreme Court opinion in United States v. New Mexico

438 U.S. 696 (1978) where the court held that “The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.” (at 716)

PREJUDICE TO UNITED STATES

If the motions to file late objections are allowed, the entire burden of overcoming the prima facie weight of the original recommendation would lay with the Bedke’s therefore no undue prejudice to the United States would exist, as it has nothing further to prove.

A.L. CATTLE, INC

A review of the A.L. Cattle decision shows that their motions to file late objections were remanded to Master Cushman for further determination on all subcases that had not gone to partial decree (See Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman (Subcases 65-07267 et al.)A.L. Cattle, Entered January 31, 2001). The parties in the case reached a settlement before Special Master Cushman reached his decision.

Furthermore, in this decision Judge Burdick takes great pains to establish what the standard to be used in deciding whether to grant motions to file late objections where the subcases have not gone to partial decree is. In the decision, he clearly states the motions to file late objections to subcases which haven’t been partially decreed, must only reach the lower standard set by Rule 55(c) of the I.R.C.P. (See January 31, 2001 Order page 7). He also cites well established Idaho case law which plainly states that each case requesting relief under Rule 55(c) of the I.R.C.P. must be tried in light of the facts

presented, and the circumstances surrounding the same (See January 31, 2001 Order page 7).

None of the subcases at issue have gone to partial decree, therefore the lower standard of good cause prevails.

It must also be pointed out that Judge Burdick's *Order on motion for Reconsideration*, dated July 27, 2001 referenced in this Special Masters Order dated January 7, 2004 dealt only with a reconsideration of the motions to file late objections on the subcases that had already gone to partial decree. Therefore the Judge's language in that Order does not apply here as alleged in the Special Masters January 7, 2004 Order.

LU RANCH

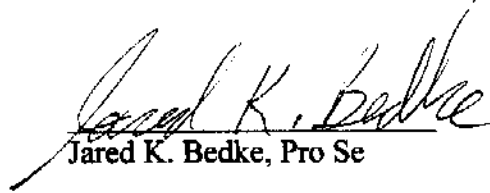
In the LU Ranch decision the Idaho Supreme Court also only dealt with LU Ranch's motion to allow motions to file late objections on subcases that had already gone to partial decree. As the subcases at issue haven't gone to partial decree, the LU Ranch Decision does not apply.

CONCLUSION

The Bedke's in this matter have met all the required elements of Rule 55(c) of the I.R.C.P. They, at various hearings and in other briefs on their motions to file late objections, have established the good causes for their failure to file timely objections, have established their meritorious position in challenge to the subcases at issue, the United States has failed to show how it would be unduly prejudiced if the motions to file late objections are granted, and therefore the Bedke's MOTION TO ALTER OR AMEND THE SPECIAL MASTERS REPORT dated January 12, 2004, should be

granted and the original Motions to File Late Objections to the subcases at issue should also be granted.

Dated this 26th day of February, 2004.


Jared K. Bedke, Pro Se


Bruce Byron Bedke, Pro Se

CERTIFICATE OF SERVICE

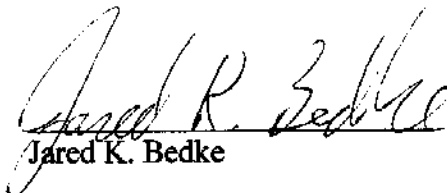
I hereby certify that on this 26th day of February, 2004 I served a true and correct copy of the foregoing MOTION TO ALTER OR AMEND ORDER VACATING STAYS and ORDER DENYING MOTIONS TO FILE LATE OBJECTIONS upon the following individuals by placing the document in the United States Mail, postage prepaid, addressed as follows:

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

Represented by:
TRAVIS L. THOMPSON
233 - 2ND ST N, STE D
TWIN FALLS, ID 83301
Phone: 208-733-0700

USDA FOREST SERVICE
Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098


Jared K. Bedke

ATTACHMENT 1

Subcase Nos:

47-16433
47-16434
47-16435
47-16437
47-16438
47-16440
47-16441
47-16442
47-16443
47-16444
47-16445
47-16446
47-16447
47-16448
47-16449
47-16458
47-16459
47-16460
47-16461
47-16463
47-16464
47-16465
47-16466
47-16470
47-16471
47-16474

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

3 *****

4 In Re SRBA) REPORTER'S TRANSCRIPT
5 Case No. 39576) Subcase No. 47-16433,
6) et al

7
8 *****

11 D-a-t-e: Thursday, July 1, 1999

13 T-i-m-e: 3:45 P.M.

15 P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

17 B-e-f-o-r-e: TERRENCE DOLAN, Special Master

19 H-e-a-r-i-n-g: Motions to File Late Objections

22 *****

Page 1

1 COURTROOM OF THE DISTRICT COURT, SNAKE RIVER
2 BASIN ADJUDICATION COURTHOUSE, 253 Third
3 Avenue North, Twin Falls, Idaho, Thursday,
4 July 1, 1999, 3:45 P.M.

5 *****

6 THE COURT: Good afternoon, counsel. We're
7 now back on the record. This is the date and time set
8 for motions to file late objections filed by
9 Scott Bedke, Michael and Gary Poulton, and Jared and
10 Bruce Bedke.

11 Representing the late objectors is Norm Semanko
12 who is in court. The claimant, the United States
13 Forest Service, represented by Randy Bramer.
14 Representing IDWR is Nick Spencer.

15 And do we have Mr. Ampe representing the State of
16 Idaho? I think we show the State of Idaho being a
17 claimant on one of these or some kind of a party. Did
18 Mr. Ampe get away?

19 MR. SPENCER: I've not seen him this
20 afternoon, Your Honor.

21 THE COURT: I guess we can let him know
22 later on what we did with his water right.

23 Well, Mr. Semanko, do you have any preference on
24 how we proceed?

25 MR. SEMANKO: I would -- let me let you know

Page 2

1 who I'm representing today. That may help. But I'd
2 like to go first.

3 I've entered notices of appearance -- and notices
4 of appearance are great things. I try to file them so
5 people can keep track of who I'm representing. But I
6 did just file these, so let me let everybody know.

7 I filed a notice of appearance today for
8 Gary Poulton in all the Basin 47 subcases. I've not
9 filed a notice of appearance in the Basin 45 subcases
10 for him as of yet.

11 I've filed for Michael Poulton in the Basin 47
12 subcases that he's filed motions to file late
13 objections in. He, Michael Poulton, is not a party to
14 the private claim that we talked about this morning --
15 or earlier today. Gary Poulton is, but Mike Poulton is
16 not.

17 I've filed a notice of appearance for
18 Carl Bedke. As I informed the court of earlier, he is
19 not someone who has filed a motion to file a late
20 objection here. He's only a claimant on the five water
21 rights that have been the one split water right that we
22 talked about earlier today.

23 So I'll be representing the motions on the
24 motions to file late objections filed by Gary Poulton
25 and Mike Poulton. I've entered a notice of appearance

Page 3

1 for Scott Bedke in the Basin 45 subcases, and argued
2 for him, and filed a brief for him in that. He has
3 indicated to me that he would like to make arguments on
4 the Basin 47 motion to file late objections, so he's
5 here. And then Jared Bedke and Bruce Bedke intend to
6 argue their motions.

7 So there's five motions. I'm arguing two.
8 They're arguing the other three individually, if that's
9 right. I think that's right.

10 THE COURT: Well, I understood there would
11 be three separate motions by Scott Bedke. The next one
12 by Michael and Gary Poulton, and then a third by Jared
13 and Bruce Bedke?

14 MR. SEMANKO: I'm looking at the State's --
15 or I'm sorry, the United States' memorandum in
16 opposition. It has attached all of these as exhibits.
17 And I see a motion to file late objections in
18 15 subcases filed by Scott Bedke. So that's the first
19 one.

20 And then you've got one asking to file objections
21 to 26 by Gary Poulton; a separate one to file 26 filed
22 by Michael Poulton, which looks identical; another one
23 by Bruce Bedke for 26; and another one by Jared Bedke
24 for 26; and then Scott's amended motion is in here
25 somewhere to add the other 11 so that he's objecting to

Page 4

1 26 -- or seeking to object to 26 as well.

2 So I've got five separate people filing
3 objections according to the record. And I'm
4 representing two of them today. And the other three
5 are representing themselves individually, if that helps
6 clarify.

7 MR. BRAMER: If I may, Your Honor, that's
8 footnote 2, page 2; and our memorandum in opposition
9 outlines those and gives exhibit numbers for each of
10 those respective motions.

11 THE COURT: I'll try to keep a scorecard of
12 where we go through on these. Do you want to present
13 the arguments in one, go through all of them, and
14 then -- or do you have another preferred order?

15 MR. SEMANKO: We'll argue all 26 collectively
16 for the Poultons, all 26 that they've sought to file
17 late objections in. For Mike Poulton and Gary Poulton,
18 the argument will be basically the same. And then
19 Jared and Bruce will make the argument on their 26.
20 And Scott will make the objection on his 26. The 26
21 are all the same numbers. So there's only 26 subcases
22 that we're seeking to create here by filing the late
23 objections.

24 THE COURT: Let's see. In our list that we
25 prepared here, we had 15 subcases where motion to file

Page 5

1 late objection is filed by Scott Bedke.

2 MR. SEMANKO: That's correct. And then he
3 filed an amended claim -- or amended motion to file
4 late objections that added another 11 and had a list
5 that gave all 26. And that list of 26 should be
6 identical for the other four individuals.

7 Is that not correct? Is that your understanding,
8 Mr. Bramer?

9 MR. BRAMER: That is my understanding,
10 Your Honor. And those are contained respectively --
11 the June 4th Scott Bedke motion is Exhibit K to the
12 brief. And April 28th, 1999 is Exhibit B to our brief
13 in support -- our memorandum in opposition, excuse me.

14 THE COURT: Do you have a preference on who
15 goes first now? You said you wanted to go first?

16 MR. SEMANKO: I'll go ahead and go first, if
17 that's all right.

18 THE COURT: Okay. Mr. Bramer, do you want
19 to save your response to all of these at one time; or
20 do you want to do them individually?

21 MR. BRAMER: Your Honor, I think at this
22 point we would reserve the right to address them
23 individually. I think, however, we'll probably just
24 deal with them once all of the movants have made their
25 arguments, and try to save the court's time.

Page 6

1 THE COURT: Okay.

2 MR. SEMANKO: Your Honor, Norm Semanko
3 appearing for Gary Poulton and Michael Poulton in the
4 26 subcases that are listed with the notice for this
5 hearing.

6 If I could take up a preliminary matter first
7 with regard to the memorandum in opposition to motions
8 to file late objections that was filed by the
9 United States, I did receive that two days ago,
10 June 29th, a little after 3 o'clock by hand carrier,
11 which is about two days ago. And I would request, and
12 I hope the United States would concur in allowing me to
13 file a reply brief by next Friday, July 9th.

14 I've not had sufficient time to review that, let
15 alone write a reply brief. I think this is the same
16 issue we had the last time where we didn't have
17 sufficient time to review the memorandum in
18 opposition. I'd like to take that issue up first and
19 see if we can allow for a reply brief.

20 The other thing I'd like to do in that reply
21 brief is set forth the confusion that was discussed
22 during the previous hearing about who has filed what
23 objections in Basin 45. And I can clarify that in a
24 footnote or in an attachment as well.

25 THE COURT: Mr. Bramer, do you oppose

Page 7

1 Mr. Semanko having until -- see, a week from this
2 Friday?

3 MR. SEMANKO: Yes, Your Honor.

4 MR. BRAMER: No, Your Honor, we don't
5 oppose. We do apologize for the late filing on that
6 brief due to additional objections being filed by
7 Jared Bedke and Bruce Bedke and the Poultons on
8 June 7th. We would have no objection to that.

9 THE COURT: So, Mr. Semanko, your memo will
10 be due -- what date will that be?

11 MR. SEMANKO: July 9th.

12 THE COURT: July 9th. Good. Go ahead.

13 MR. SEMANKO: Your Honor, there certainly is
14 a right to file a motion to file late objection. The
15 United States itself during the last hearing for
16 Western Stock Growers noted that section 10(j)
17 prescribes the method in AO1 for dealing with motions
18 to file late objection.

19 Section 10(j)(1) says they shall be reported in
20 the docket sheet; and then a hearing shall be scheduled
21 by the special master in part 2. So I think we're
22 beyond that question of whether they can be filed. If
23 that is still an issue, it's something we address in
24 our Basin 45 brief for Scott Bedke and will address
25 again in this brief that's due July 9th to the extent

Page 8

1 it's raised again by the United States.
 2 That leads me to -- and if it is argued here,
 3 I'll respond to it in a short reply to the United
 4 States' argument. But I think the real issue here is
 5 whether the standard for filing late objections has
 6 been met.
 7 The standard is twofold under rule 55(c) and
 8 rule 60(b). And that is, number one, whether there's
 9 good cause for filing the late objection; and then,
 10 secondly, whether there's a meritorious defense.
 11 On the second issue of meritorious defense, I've
 12 not detected an argument of the United States in either
 13 the Basin 45 or 47 brief saying that there is no
 14 meritorious defense. The U.S. doesn't appear to have
 15 challenged the motions on this basis.
 16 Moreover, there is a meritorious defense. It's
 17 set forth on the face of the proposed objections to be
 18 filed. And that is that the U.S. is not the one that
 19 put the water to beneficial use. The private
 20 claimants, the grazers, have done that. They own and
 21 run the cattle. And they have appropriated the water
 22 supply, not the United States.
 23 On Scott Bedke's objection, it says, quote, our
 24 cattle put this water to beneficial use; and the water
 25 should be decreed to the owners of the livestock.

Page 9

1 Gary and Michael Poulton's objection say the
 2 same. Bruce Bedke's objection says, quote, my cattle
 3 put the water to beneficial use. The water should be
 4 decreed to the owner of the livestock. Jared Bedke's
 5 objection is substantially the same, a little bit
 6 different words.
 7 So clearly we've set forth what we think is a
 8 meritorious defense. If we're correct about our
 9 defense, we would prevail and obtain a water right for
 10 our clients under their claims for the ones that have
 11 been reported; and for the ones that haven't been
 12 reported, when they are reported. And we would be able
 13 to defeat the United States' claims that have been
 14 reported for the same water.
 15 THE COURT: Mr. Semanko, when you say the
 16 cattle put the water to beneficial use, I know in the
 17 Joyce Livestock business down in Owyhee County there
 18 was the issue about whether the cattlemen could show a
 19 chain of title; and there was a problem there.
 20 Is that going to be an issue here? I assume
 21 you're claiming an early priority date, 18 something.
 22 MR. SEMANKO: 1872. We're mixing apples and
 23 oranges in demonstrating why these need to be granted
 24 and why they need to be considered together. We're
 25 here today to talk about the United States' claims, and

Page 10

1 whether we should be able to object to those. That
 2 won't be an issue for the United States' claims. For
 3 our claims which have one out of twelve been reported,
 4 that will be an issue, and one that we'll be prepared
 5 to address.
 6 I have read the decision. And I know that the
 7 United States is going to rely heavily on that from
 8 talking to them. But it wasn't fatal even in that case
 9 to their getting a water right. They ended up with a
 10 1985 priority. That's only one element of the water
 11 right. The objections by the United States to 14293B,
 12 C, D, and E say that we shouldn't have a water right at
 13 all.
 14 So it's not fatal to showing that we have a water
 15 right. It only goes to the priority-date issue.
 16 You first have to get over the issue of can we
 17 have a water right out on the federal land in a grazing
 18 allotment. And then, of course, we're going to have to
 19 deal with, if there is a water right, what are the
 20 elements. And certainly priority date was the most
 21 problematic one for Joyce in that particular case.
 22 THE COURT: But you're saying for now
 23 you're stating a meritorious defense that you have a
 24 water right out there; and priority date doesn't matter
 25 at this point.

Page 11

1 MR. SEMANKO: Priority date matters; and
 2 we'll have to address that issue. But it doesn't
 3 mean -- even if we lost, even if we had the worst case
 4 scenario as what happened in Joyce and we could only
 5 demonstrate the person that currently is claiming and
 6 using the water, or the entity claiming and using the
 7 water has a priority date as of when they started using
 8 it, we'd still have a water right.
 9 So to us, the meritorious defense has to be that
 10 we indeed have a water right and, more importantly for
 11 purposes of this hearing, that we don't believe the
 12 United States has a water right because they didn't put
 13 the water to beneficial use. The meritorious defense
 14 has to be as to the objection we filed in this
 15 subcase.
 16 So we feel like we have a meritorious position in
 17 filing individual claims that the U.S. has objected to,
 18 certainly in a proceeding we talked about an hour or so
 19 ago. And we also feel like we have a meritorious
 20 position here where we're seeking to file objections to
 21 the United States' recommended claims, and demonstrate
 22 that they don't have a water right.
 23 THE COURT: So you claimed, your
 24 objection, meritorious defense, or position has to do
 25 with the weakness or a defect in the U.S.'s claim.

Page 12

1 MR. SEMANKO: Well, Your Honor, the United
2 States' claim, as I understand the law, is presumed to
3 be correct. It's presumed to be correct because of the
4 prima facie evidence standard in 42-1412. And unless
5 someone comes in and shows otherwise, it will be
6 decreed with very few exceptions because of that prima
7 facie effect.

8 We feel that if we're granted the opportunity to
9 object, we can rebut the prima facie showing of the
10 director's report, burst the bubble so to speak, and
11 show that there isn't a water right there because of
12 the theories that we've set forth. That's all we're
13 saying.

14 We have a meritorious position that we would
15 espouse in the proceeding. We're not going to be
16 wasting the court's time with some frivolous defense or
17 some frivolous argument that the United States
18 shouldn't have a water right.

19 We're not arguing in this particular case that
20 the United States cannot hold a water right. We're
21 saying as to these certain beneficial-use claims
22 certainly, number one, beneficial-use claims, the water
23 right should be decreed to the private claimant under
24 their claim and not to the United States under their
25 claim. That's what we're arguing on those.

Page 13

1 For the licenses, and you can see on the face of
2 the objection there's concern about what the statutes
3 provide. And I know in basin 35 subcases, basin 72
4 subcases, basin 51 subcases the issue came out about
5 does 42-113 and 114 mean that the water right must go
6 to a private claimant all the time. And the court said
7 no. And that's right.

8 And also the federal government, to take liberty
9 with their argument, said 42-501 must mean that water
10 rights should be decreed in the name of the
11 United States. And the court said no, that doesn't
12 mean that they should always be decreed to the
13 United States.

14 Both of those mean that under certain
15 circumstances water rights can go to private
16 claimants. And in other circumstances, for licenses
17 after 1937, I believe it is, they can go to the federal
18 government.

19 But it doesn't have any bearing on the
20 beneficial-use claims because those statutes --
21 certainly 42-501 doesn't apply to beneficial-use
22 claims. It only says the United States can get
23 licensed for a water right as of that date the statute
24 was enacted.

25 So all these issues are going to come before the

Page 14

1 court if we're allowed to come in obviously, not the
2 least of which is if the United States has been
3 licensed a water right, which is, I think, the minority
4 of the cases that we're seeking to object in, can that
5 be challenged? Can the license be attacked in the
6 adjudication?

7 That may go on a separate track. It may go on
8 the same track. But it's an issue that would have to
9 be addressed if our objection was granted.

10 The rest of them are beneficial-use claims. So
11 the issue is going to be: Was there an intent to put
12 the water to beneficial use? Was the water put to
13 beneficial use?

14 Since they're stock water claims, the in-streams
15 won't have to show a diversion under the state law.
16 The other ones would have to show a diversion. So --
17 and then the issue will be who. Who did that? Who put
18 it to beneficial use? Whose water right was it or is
19 it? Are there two water rights out there -- one for
20 the U.S. and one for the private?

21 We don't get to those issues obviously unless our
22 objections are heard. But we have a meritorious
23 position is what we're saying.

24 THE COURT: Well, for purposes of this
25 motion, you're asking me to look at the merits of the

Page 15

1 U.S.'s claim rather than whether you have a claim or
2 not to the same water.

3 MR. SEMANKO: No. No. I understand that to
4 file a late objection you need to show that your
5 objection is meritorious. Not that you would win, but
6 that you have a valid argument, you don't have a
7 frivolous argument.

8 If I came in here and said I want to set aside
9 the United States' decree or I want to file late
10 objection to the United States' recommendation because
11 the sky is blue, and that's my basis that I'm going to
12 argue to the court, that's not a meritorious defense.
13 It's not a meritorious position that I would be
14 advancing.

15 So what we're saying is that we have a
16 meritorious position that we are going to espouse to
17 the court if the objections are granted. I understand
18 that to be the purpose of having to show a meritorious
19 defense.

20 The second issue, and the one that has been
21 raised by the United States, is whether there's good
22 cause to file the late objections. Good cause under
23 rule 55(c) and rule 60(b) could be things like mistake,
24 inadvertence, surprise, excusable neglect.

25 And there's been a lot of case law in the area of

Page 16

1 rule 60(b). The court is to apply a standard of
2 liberality rather than strictness, and give the moving
3 party the benefit of the doubt is what JOHNSON v.
4 PIONEER TITLE COMPANY, 104 Idaho 727, says.

5 The court has also said that judgments by default
6 are not favored. And the general rule in doubtful
7 cases is to grant relief in order to reach a judgment
8 on the merits, which we talked about during the last
9 session with the Western Stock Growers. That's
10 JOHNSON, 104 Idaho at 732, and also BALDWIN, 114 Idaho
11 at 525.

12 Especially in this type of case where, as
13 Mr. Spencer indicated earlier, where water rights are
14 on different tracts, and as Mr. Tuthill said, and I
15 know Mr. Bramer has said before, people are confused
16 about the process and where things are going and the
17 track things are on, there is good cause. There is a
18 mistake in believing that the U.S. claims had not been
19 reported.

20 One of our claimants' water rights has been
21 reported in Basin 47. The other has not. None of our
22 Basin 45 claims in this grazing allotment that I'm
23 aware of have been reported.

24 Inadvertence in not knowing that the U.S. claims
25 were reported, surprise that the U.S. claims were

Page 17

1 reported. Not that they were claimed necessarily, but
2 that they had been reported two years earlier than the
3 de maximus claims, so to speak, were going to be
4 reported.

5 Excusable neglect, certainly, but not ignorance.
6 The United States argues that our clients ignored the
7 SRBA process. Nothing could be further from the
8 truth.

9 The test is not what the movants would have done
10 if they would have had an attorney. The test is what
11 they would have done as a reasonably prudent person who
12 is not represented by an attorney. SCHRAUFNAGEL v.
13 QUINOWSKI, 113 Idaho, 753 at 755, 56, Court of Appeals,
14 1987.

15 What would the reasonably prudent person have
16 done in this case? Would they have attempted to
17 monitor SRBA claims on the Internet? Would they have
18 contacted the department and asked them what's going
19 on? Would they have showed up for a hearing on
20 April 7th in Burley? Would they have started to
21 prepare objections? Would they have started to consult
22 with an attorney and prepared objections and then,
23 after the objections were filed, retain the attorney?

24 I don't think so. The reasonably prudent person
25 is probably sitting in Oakley right now not worrying

Page 18

1 about it.

2 These are the people that have gone beyond what
3 the rest of the folks in that basin have done. They
4 didn't understand; they didn't know what was going on;
5 they were confused about the process. But once they
6 figured it out, albeit with a little assistance, they
7 proceeded to file the objections. They filed them, and
8 they are late. They are late.

9 THE COURT: Did you say that a reasonable
10 prudent person who did not have an attorney is the
11 standard that needs to be applied?

12 MR. SEMANKO: I'm looking at SCHRAUFNAGEL v.
13 QUINOWSKI, 113 Idaho 753. And the basic theme in that
14 case is that a pro se litigant's misunderstanding or
15 mistaken beliefs about procedure can constitute
16 excusable neglect or mistake justifying relief.

17 What happened in that case was there was a notice
18 put out about a trial. A trial scheduling order was
19 set. The trial was going to be set, let's say it was
20 December 1st. In the meantime a summary judgment
21 motion was filed. This particular person was
22 represented pro se. The opposing party filed a motion
23 for summary judgment. It was noticed up. The notice
24 was sent to the pro se claimant or litigant. He
25 ignored it because he didn't understand it.

Page 19

1 He said, well, there's a trial scheduling order,
2 a trial scheduled for December; I'm going to show up
3 for the trial; I don't need to worry about the summary
4 judgment motion.

5 Summary judgment motion gets held. He's in
6 default. Summary judgment is granted. He goes in and
7 asks for relief under rule 60(b), and the court says a
8 pro se litigant's misunderstanding about the process is
9 a basis for relief. And the court says the test is not
10 what the movants would have done if they had had an
11 attorney at that point in time, but rather what a
12 reasonably prudent person would have done under the
13 circumstances.

14 So it goes on is this a mistake of fact, or is it
15 a mistake of law. A mistake of law is not an exception
16 under rule 60(b). Mistake of fact is.

17 Procedure, understanding orders, when things are
18 set, the court recognized in that case, blurs with
19 mistake of fact -- or blurs mistake of fact and mistake
20 of law. In that case they found it was a mistake of
21 fact.

22 And what I'm saying is the reasonably prudent
23 person in this case may or may not have figured it
24 out. Our folks certainly did figure it out, and filed
25 late objections as soon as they reasonably could.

Page 20

1 THE COURT: How do you reconcile that with
2 the cases that hold a pro se litigant to the same
3 standard as an attorney?

4 MR. SEMANKO: I reconcile it by the fact that
5 those cases were discussed; and the court said this is
6 maybe not an exception, but it's distinguishable
7 because there's a misunderstanding about the process, a
8 complication and confusion, and that that constituted
9 an excuse, excusable neglect or fact. They said it
10 could be a mistake of fact or excusable neglect in that
11 case and constitute good cause.

12 THE COURT: So there's a distinction
13 between a mistake in procedures versus a matter of
14 law.

15 MR. SEMANKO: Well, there's certainly in the
16 law a distinction between a mistake of fact and a
17 mistake of law. And in this particular case,
18 SCHRAUFNAGEL, the court found that the
19 misunderstanding, the confusion, the mistake, the
20 excusable neglect with regard to process for a pro se
21 claimant constituted good cause. It was a mistake of
22 fact or excusable neglect. And I urge you to read that
23 case if you haven't because it does deal with the same
24 type of issue.

25 The U.S. complains because Scott Bedke's

Page 21

1 objections were 75 days late, Jared and Bruce Bedke's
2 were 112 days late, and the Poultons were 115 days
3 late. And then they go on to point out, aha, they
4 can't say that they didn't know about the United
5 States' claims or that they didn't even know what the
6 United States' claims numbers were because on our
7 exhibit, Exhibit J, we have an attached list that we
8 attached to each of our objections, United States did.
9 It says for private claim No. 14923B, C, D, and E,
10 which we're objecting to as the United States, the
11 companion United States' claim that it should be
12 decreed in, and it lists all the numbers. Aha, they
13 should have known.

14 This was filed and mailed on the deadline. Is it
15 reasonable to expect that these folks go, oh, geez, now
16 I need to file an objection and file it the day that it
17 was mailed to them, which is the deadline? I don't
18 think so.

19 If you look at it that way, Scott Bedke filed an
20 objection within 75 days of getting that objection and
21 knowing that those water right recommendations squared
22 completely with his recommendations, and that they had
23 been reported. Jared, 112; Bruce, 112; and the
24 Poultons, 115 days after that.

25 So is that the standard to judge it by? Is that

Page 22

1 a reasonable time frame to turn around objections if
2 that's when they found out that they had been
3 recommended and that they in fact were overlapping
4 claims?

5 I think it is reasonable. And I think it is good
6 cause.

7 The June 29th, 1998 letter from the department to
8 Scott Bedke was attached as an exhibit to my Basin 45
9 brief for Scott Bedke, and also was attached as an
10 exhibit to the United States' brief in this proceeding,
11 and tries to make it sound like they all should have
12 known what was going on because Scott got this letter
13 back in 1998.

14 The letter in 1998 acknowledges that we've got a
15 mess on our hands and confusion. Mr. Shaff says,
16 quote, the timetable may have become confusing for
17 basins 45 and 47.

18 Yeah, it has. That's why the objections were
19 filed late.

20 Then he goes on to say, "In Basin 47 the claims
21 may be equally challenging, but the task can have a
22 different outcome."

23 It wasn't different. One of the claims was
24 reported, 14923. Claim No. 14924 was not recommended.
25 We aren't clear why at this point. But it wasn't.

Page 23

1 The court advised these parties, or at least most
2 of them, from my reading of the transcript at an
3 April 7th initial hearing in Burley that, quote,
4 anybody who wants to file an objection after it's
5 initially filed then has to file a motion to file a
6 late objection; and then that has to go to hearing on
7 whether that late objection is going to be allowed or
8 not, on page 38 of the transcript from April 7th. And
9 that's precisely what we're here doing today in
10 Basin 47.

11 The U.S. did not, who was present at that time,
12 object in any manner to the ability to file late
13 objections as they are apparently doing -- not
14 apparently, as they are obviously doing now. Most
15 interesting of all in the Basin 45 -- let me grab the
16 transcript from April 7th.

17 Most disturbing to me of all in the Basin 45
18 initial hearing in Burley after the discussion about
19 the possibility of filing late objections, Mr. Bramer
20 says, quote, I think -- and this is at page 50 and
21 51 -- I think given the confusion that these folks have
22 had with there water rights in the South Hills --
23 Mr. Bedke, Mr. Whiteley, who has now been succeeded by
24 Carl Bedke -- you're going to hear over and over again
25 that there's a great deal of confusion.

Page 24

1 Pretty prophetic.
 2 I think in all fairness to them, even though
 3 we've jumped through all the technical hoops in this
 4 court and should have our water right decreed, that I'm
 5 more than willing, if they would like to file a late
 6 objection and make the objection to our claims so we
 7 can sit down and work through this, that would give
 8 them a full and fair opportunity to make the
 9 objection. I think there's some confusion here. And
 10 rather than drawing a technical line of the law and
 11 saying you should decree this right to us, I think in
 12 all fairness to the claimants we should give them an
 13 opportunity to come in and make an objection here, if
 14 that's what they would like to do.

15 That's all I have, Your Honor. Thank you.

16 THE COURT: Thank you, Mr. Semanko. Let's
 17 see, the next -- shall we have Gary Poulton present --

18 MR. SEMANKO: That was for Gary as well.

19 THE COURT: Oh, sorry. And that was for
 20 Michael Poulton as well?

21 MR. SEMANKO: Yes, Your Honor.

22 THE COURT: Bruce Bedke?

23 BRUCE BEDKE: This is Bruce Bedke. I have
 24 nothing to say.

25 THE COURT: Mr. Bruce Bedke, do you agree

Page 25

1 with Mr. Semanko's arguments and --
 2 BRUCE BEDKE: Oh, yes, wholeheartedly. As I
 3 said before, this whole process in my opinion reeks of
 4 chicanery here. I'm upset with the whole process.
 5 That's all.

6 THE COURT: Thank you. Let's see,
 7 Jared Bedke?

8 JARED BEDKE: Jared Bedke, Your Honor. After
 9 having been informed in 1987 that all the water rights
 10 in the Snake River Basin had to be filed upon for the
 11 new adjudication, we did so on May 24th, 1989. And
 12 that's not in dispute. Our 47 filings, we made two of
 13 them at the time; and one of them got recommended.
 14 That's 14923A, I believe. 14924 was not recommended.

15 Now, we asked the IDWR in the spring of 1998 if
 16 we needed to object to the filings of the government or
 17 the other conflicting claims. And we were told we did
 18 not need to file an objection to these conflicting
 19 claims because the conflicting status would be enough
 20 to get it before the court.

21 As I understand it at this time -- or as I
 22 understood it at that time, the IDWR's philosophy was
 23 to recommend both claims, and let the court determine
 24 who indeed owned the disputed water right. So
 25 objections really weren't necessary.

Page 26

1 THE COURT: When were you told that,
 2 Mr. Bedke?

3 JARED BEDKE: Last year. In the spring of
 4 1998. We became aware after that, of course, that that
 5 is not the case.

6 As I now understand it, if only one party objects
 7 to another's claim and the second party's claim is not
 8 objected to, the legitimacy of the second party's claim
 9 is never addressed before the court even if the two are
 10 in direct conflict. So if these late objections do not
 11 get in, the merits of the Forest's case or the
 12 government's filings in this case will never be
 13 addressed. I believe that is a good cause enough.

14 In glancing through the memorandum in opposition
 15 to the motions from the United States, I don't see that
 16 Mr. Bramer admits if we can show some good cause our
 17 late objections must be allowed. To go on with what
 18 Mr. Semanko said on page 51 again, I can go through
 19 that again; but Mr. Bramer admits that ours should be
 20 allowed in because of the confusion involved in the
 21 bifurcation process.

22 The fact that we were told we didn't even need to
 23 file an objection, I believe, is an excellent cause.
 24 We were not told by the IDWR to ask the court and see
 25 what we needed to do at that time.

Page 27

1 We only dealt with the IDWR. That is the state
 2 water agency. That's where we made our filings.
 3 That's who reported everything to us. We did not have
 4 any idea that we needed to seek the court and find out
 5 the distinction whether or not we needed to file an
 6 objection at that time. When we asked the IDWR, they
 7 told us no, the conflicting status will be enough to
 8 get the two addressed.

9 THE COURT: Well, Mr. Bedke, when you found
 10 out that the U.S. claims were reported and you didn't
 11 file an objection, were you thinking that those would
 12 be held in abeyance until yours came up and then it be
 13 handled together, or --

14 JARED BEDKE: We thought that the conflicting
 15 status -- the claims the Forest made and the claims
 16 that we made were in direct conflict for the same water
 17 at the same time. So we were told that the conflicting
 18 status of the two claims would show up on the court as
 19 a red flag; and that they would look at both cases at
 20 that time, both water claims, and say should it be in
 21 the private claimant's hands; or should it be in the
 22 Forest Service hand.

23 THE COURT: You didn't think the U.S.
 24 claim, being unobjected to, would proceed forward?

25 JARED BEDKE: Not at that time, no.

Page 28

1 THE COURT: Okay.

2 JARED BEDKE: We thought the conflicting
3 status was enough to merit the objection at that time.
4 And later on we found that; and as soon as we found
5 that out, we sought and we filed these late
6 objections.

7 My meritorious position, as Mr. Semanko said, is
8 that we own the water. Our cattle put it to beneficial
9 use.

10 The beneficial-use filings that the
11 Forest Service has, they cannot show a beneficial use
12 unless they rely on our livestock, especially for
13 stockwatering purposes. They own none.

14 Dave Tuthill of the Idaho Department of Water
15 Resources said in the June 7th transcript, if I might
16 quote from him on page 43 -- or excuse me, page 44, he
17 said, "We anticipated, as we bifurcated this process,
18 that there would be some problem areas that could
19 arise. And I can say then that bifurcation process in
20 most basins, it's worked quite well. We have found
21 here in Basin 45, and perhaps Basin 47, that there's a
22 concern."

23 Then he goes on to say that I've had -- because
24 from our perspective I mentioned to him that it would
25 be very appropriate to look at both the Forest Service

Page 29

1 rights and his claims in one forum. So from my
2 standpoint from the git-go in this situation, where we
3 reported some of the claims, the Forest Service claims
4 and where other claims that might be overlapping and
5 influencing those in some way have not been reported,
6 from my standpoint, it's been very appropriate to stay
7 the action in the earlier ones, waiting for the others
8 to catch up.

9 We're asking at this time that our late
10 objections be allowed so that we might proceed with
11 these different cases.

12 That's about all I have at this time. If you
13 have any questions, I can answer them now.

14 THE COURT: Well, Mr. Bedke, Bruce Bedke
15 said that he suspects there's some chicanery going on
16 here.

17 Do you suspect the same thing?

18 JARED BEDKE: Well, the definition of
19 chicanery is legal trickery. So that would mean that
20 using the law to trick us is in essence what we're
21 doing here. We're saying that, oh, you didn't meet the
22 deadline; and that's hard and fast.

23 Rule 60(b), as I understand it, says no. If
24 there's excusable neglect, you know, by -- or something
25 to do with an adverse party, misconduct by an adverse

Page 30

1 party, something to that effect, then our late
2 objection should be or could be allowed in that case.

3 And so the legal trickery of the matter is, is
4 that they're trying to hold us hard and fast where
5 there is not that standard that need to be met.

6 THE COURT: Well, do you -- oh, so you
7 don't suspect IDWR of chicanery?

8 JARED BEDKE: We're suspect because we didn't
9 make the report. But as far as that goes, I can't say
10 what their motives were or anything of that. I think
11 they were just trying to speed along the process the
12 more I get into it.

13 But it's resulted in an unfortunate consequence
14 which we are a party to. And that's why we're seeking
15 the remedy at this time.

16 THE COURT: Thank you.

17 MR. SEMANKO: Now, Your Honor, Scott Bedke
18 had wanted the speak on his motion. I haven't filed a
19 notice for him in Basin 47. I did for Michael and
20 Gary Poulton only.

21 THE COURT: So, Mr. Scott Bedke, you're
22 speaking on Basin 47 objections?

23 SCOTT BEDKE: Right.

24 THE COURT: Motion to file late objection
25 in Basin 47.

Page 31

1 SCOTT BEDKE: To the United States' claims in
2 Basin 47.

3 THE COURT: Okay.

4 SCOTT BEDKE: And most all the salient points
5 have been touched on either by Mr. Semanko and also by
6 Jared.

7 VOICE: Tell us your name.

8 SCOTT BEDKE: Scott Bedke. A couple things
9 I'd like to reiterate, though.

10 The exact same thing happened to us in Basin 45
11 as it did in -- in Basin 47 as it did in 45, is that we
12 made all these filings, as it was previously mentioned,
13 in the spring of 1989. We did so under the complete
14 direction of the department of water resources at the
15 time.

16 During the bifurcation process, our claims were
17 put in limbo, I think as Mr. Shaff described it. And
18 the United States' claims were allowed to proceed.

19 And we were told by the department of water
20 resources at that time that this conflicting claims
21 status would be enough to get our day in court, I think
22 is the term that was used; and that all claims, that
23 these overlapping claims would be considered together,
24 and that the United States' inclusion into the
25 director's report was in no way going to be an

Page 32

1 advantage to them in the final outcome of who ended up
2 with the water right.

3 We did not -- you know, we were, I guess,
4 ignorant to the Joyce case. In fact, the Joyce case is
5 interesting because they were probably one of the first
6 cases out of the chute so to speak; and even in that
7 case where the Joyce people did not file an objection
8 to the BLM's claims, then they were given a water right
9 as a matter of course and never had to argue the merits
10 of their case. Whereas the Joyce people did and, of
11 course, were granted a water right. So this issue has
12 never come before the court to this point.

13 THE COURT: Could you say that again,
14 please? I missed the point.

15 SCOTT BEDKE: The point is that the Joyce,
16 Joyce Livestock did not object to the BLM's claims.

17 THE COURT: When they were first reported.

18 SCOTT BEDKE: When they were first reported.
19 And so they were given a water right as a matter of
20 course. Correct?

21 THE COURT: The U.S. was given a water
22 right without the objection?

23 SCOTT BEDKE: Right. See, they did not
24 understand at that point -- I think they were given
25 some of the same advice that we were, that they did not

Page 33

1 whole thing back to the department of water resources
2 would be a good way; or all these motions, the
3 objections can be granted and bring everybody up to the
4 same point procedurally.

5 And I think that's consistent with what the court
6 has been trying to do. You know, you've reiterated
7 yourself to the Western Stock Growers today that we're
8 not going to play gotcha or hide the ball, that these
9 cases would be decided on the merits. And I think
10 that's consistent with -- you know, so there's several
11 ways we can get everybody to the same point
12 procedurally. And I guess it's up to the court to
13 decide that.

14 But I would, you know, I would plead that we do
15 that; and that the chicanery, I guess, that Bruce
16 refers to may be, you know, where through a procedural
17 or an undotted I or an uncrossed T, then we don't,
18 we're not allowed to have a fair fight, if you will.

19 I guess the overriding principle here is that our
20 intentions in 1989 were to claim all the water, every
21 spring, seep, mud hole on our allotment that our cattle
22 water -- or use for water in the Goose Creek
23 allotment. That was in Basin 45, Basin 47. And that
24 we intended to object to all other claimants that made
25 a claim on that same water for livestock.

Page 35

1 have to object to the BLM's case, or to the BLM's
2 claims. And so they thought that if they argued the
3 merits of their claim that the fact that they had, you
4 know, ended up with the water, you know, if they won
5 the argument, then there would only be one right
6 granted, not two as there turned out to be. Okay.

7 Let's see. I would reiterate Mr. Bramer's quote
8 from the April 7th that this was going to be, you know,
9 that this was very confusing to all. You know, the
10 quickest way, the most simple way to clarify it would,
11 procedurally would be to get everybody up to square one
12 by granting, you know, letting all these objections
13 proceed.

14 It was interesting, Mr. Spencer's comments
15 earlier today -- that's Nick Spencer from the
16 department of water resources -- where he described the
17 United States' claims proceeding, without putting words
18 in his mouth, I guess he could restate it, but the
19 United States' claims proceedings along the legal path
20 where these other ones were meant to proceed at the
21 same point, along the same path at the same rate are
22 now still at square one, where the United States'
23 claims have proceeded. And that we can, you know, we
24 can rectify this one of two ways. You know, we talked
25 about that at the last hearing, where we can remand the

Page 34

1 We do not operate as the United States' agent out
2 there as has been discussed. We are the ones that put
3 this water to beneficial use with our cattle. We are
4 the successors in interest to people that have done it
5 since the 1870s. And that is the overriding
6 principle. That's what guided us in 1989, and that's
7 what guides us today.

8 Thank you.

9 THE COURT: Mr. Bedke, you said you're the
10 successors in interest to water users who have used the
11 water since 18 -- what was that date?

12 SCOTT BEDKE: In the 1870s.

13 THE COURT: 1870s, okay. And when you say
14 "the allotment" out there, do you call it the Goose
15 Creek allotment?

16 SCOTT BEDKE: Well, it goes by several
17 terms. I think the official name is the Goose Creek
18 Cattle and Horse Allotment. But it's the one that is
19 on your map outlined in blue.

20 THE COURT: And have those allotments been
21 in effect since the 1870s?

22 SCOTT BEDKE: The allotments were not put
23 into effect until after the establishment of the land
24 management agencies. Prior to that you might say it
25 was public domain; and it was more or less a, well,

Page 36

1 maybe free-for-all is a little, is a little inaccurate;
2 but that's basically what it amounted to. If you lived
3 in the area, then you let your livestock graze in the
4 range adjacent to where you lived.

5 THE COURT: But the cattle have been using
6 the land, whether it's called an allotment or whatever,
7 the same land.

8 SCOTT BEDKE: Right, since the settlement of
9 this area.

10 THE COURT: And I notice Mr. Pickett has on
11 his claim sheep in there. I assume you mean livestock
12 rather than just cattle.

13 SCOTT BEDKE: Right.

14 THE COURT: Okay.

15 SCOTT BEDKE: I believe the first livestock
16 interests were cattle; but sheep followed soon
17 thereafter, I imagine.

18 THE COURT: Anything further?

19 SCOTT BEDKE: I have nothing.

20 THE COURT: Good. Well, thank you.
21 Appreciate it.

22 Any more Poultons or Bedkes?

23 MR. BROCKMAN: Your Honor, as a former pro se
24 claimant, may I address the court? As a former pro se
25 claimant, Your Honor, may I address the court? I'm

Page 37

1 Bill Brockman from Kimberly.

2 THE COURT: Well, Mr. Brockman, it's not
3 normal for a nonparty to make a statement to the
4 court. But is it something that you want to say
5 briefly or --

6 MR. BROCKMAN: Very briefly, Your Honor.

7 THE COURT: You won't be offering facts or
8 anything like that?

9 MR. BROCKMAN: No, I've been -- I am not an
10 attorney, and I've been scolded about that in court by
11 Judge Hurlbutt. So it was just some comments in
12 general.

13 THE COURT: Well, for background, I suppose
14 there wouldn't be any objection to that.

15 MR. BROCKMAN: This is strictly background
16 information. I believe you and I have become well
17 acquainted over the last five years. I've attended
18 most of the information meetings that IDWR has had
19 here. And I was a pro se claimant. I did file a brief
20 in 1996. So I was involved in the Western Stock
21 Growers until I sold my permit two years ago.

22 But with all the information and all the notes
23 and all the questions that I asked, and I believe you
24 were here at a lot of those hearings, and I know
25 Mr. Bramer was here at all of them, it is extremely,

Page 38

1 extremely difficult for a layman to come into this
2 court and get the information that he needs to carry on
3 all your objections and all your filings in a timely
4 manner. So I am not trying to advise the court; but
5 I'm just trying to make the point that with the 40 or
6 50 meetings, 40 or 50 information sessions that I've
7 sat in on in this courtroom, it is still exceedingly
8 hard to file everything and understand everything and
9 get it in proper perspective.

10 That's all I have.

11 THE COURT: Well, thank you, Mr. Brockman.
12 I appreciate that. Let's see.

13 Anything further on the motions for late
14 objections? In that case, we'll go to Mr. Bramer.

15 Mr. Semanko, you have a quizzical look on your
16 face.

17 MR. SEMANKO: No. I was going to ask if I
18 could reserve time for a short rebuttal, but maybe it
19 won't be necessary.

20 THE COURT: Mr. Bramer.

21 MR. BRAMER: Your Honor, I believe that may
22 be necessary. Your Honor, first of all, let me suggest
23 that what we've heard today is a lot of various
24 allegations that are unsupported by documents. We'll
25 look at the objections. I think what we'll find is

Page 39

1 movants have not shown good cause.

2 But, first, let's clear up a couple factual
3 issues. And the allegations of chicanery and somehow
4 improper behavior greatly disturb me in this matter.

5 My name is Randy Bramer. I'm here on behalf of
6 the United States Forest Service.

7 Earlier today two parties --

8 THE COURT: Well, Mr. Bramer, before you
9 get started on that issue, although the statements have
10 been made about chicanery and that, I take that with a
11 grain of salt. And frankly I have no inkling, I don't
12 even think for a minute that anyone is engaged in any
13 chicanery or any underdog sort of thing here, or
14 underhanded behavior. So that's not an issue.

15 I don't suspect the U.S. are trying to sneak in,
16 and I don't suspect IDWR is trying to steal anybody's
17 water right. I know there was a decision made to
18 divide these water rights into de minimis and
19 non de minimis, or we call them de maximus. And that
20 was, I think, for the convenience of the parties and to
21 get the paperwork flowing, you might say. But I don't
22 suspect any nefarious purpose there.

23 MR. BRAMER: Your Honor, I'm having a hard
24 time when you try to narrow down who they're not
25 accusing of chicanery who is left.

Page 40

1 In any event, let's go first to the allegation of
2 my statement on April 7th, at which time the issue
3 before the court was a water right. And if the court
4 will take the time once the hearing is over to read
5 pages 46 through 52, this particular quote that was
6 attributed to me as being the basis for I'm for
7 allowing all these late objections to come in without
8 cause was directly related to one claim where IDWR
9 confirmed that the water right should have been decreed
10 in the name of Mr. Bedke, Ray Bedke on behalf of
11 Scott Bedke, and was inaccurately put in the name of
12 the United States. That was where that statement was
13 made.

14 It had nothing to do with the late objections.
15 It had nothing to do with the misreporting by IDWR. It
16 in no way was a generalized statement of approval for
17 this process. That particular claim was at issue. And
18 if the court reads this, they will see that statement
19 is totally taken out of context.

20 Your Honor, we've been in this adjudication six
21 years. April 7th to the present date the parties that
22 are in front of this court today, by our preliminary
23 review of this court's records, have filed more late
24 objections than all other parties put together in the
25 adjudication to consumptive-use claims.

Page 41

1 They're coming to this court and they're asking
2 you to say it's impossible to understand; we were
3 confused. The question, Your Honor, is where has
4 everybody else been for all these years. Everybody
5 else read the director's report when they got the
6 notice.

7 There's no dispute here that they didn't get the
8 notice. There's no dispute the notice wasn't clear.
9 The fact is if they would have read the notice, took
10 the necessary steps, gone down and looked at the
11 director's report, or called the department and asked
12 them about claims that they were concerned with, and
13 certainly I think we know they were concerned with the
14 United States' stock water claims, they would have in
15 fact found out these claims were being reported out.
16 And they would have filed objections in a timely
17 fashion just like every other claimant since the
18 adjudication started. No different. No one here has
19 explained why didn't you do the normal activities when
20 you received the director's report that everybody else
21 did.

22 What would a reasonably prudent person have done
23 under Mr. Semanko's situation? Well, first, he would
24 have gotten the notice of a director's report. They
25 would have read it. It would have said if you're

Page 42

1 concerned about someone else's water right, here's what
2 you do. If you want to file an objection, here's what
3 you do. If you have any questions, here's who you
4 call; here's where you can look at the director's
5 report.

6 I suggest to this court a reasonably prudent
7 person would have done those things. No one saying
8 they did. No one saying why they didn't.

9 What else would a reasonably prudent person have
10 done? Okay. First, we have the allegation IDWR told
11 us that we didn't have to file objections.

12 Well, Your Honor, where is the evidence in the
13 record? And even if objections were supported, but
14 there's no evidence of that, they're not naming names
15 or anything. And I'm not saying it wasn't said. But
16 I'm saying even if they were told that, Scott Bedke
17 filed objections in Basin 45 in July. And he did that
18 because he was concerned about the process. And he
19 filed late objections.

20 More importantly, Your Honor, let's say they
21 relied on that representation. Come April 7th all the
22 folks here were in your courtroom. All the folks here
23 were aware at that point that the government claims had
24 been reported out in Basin 45. All the folks here were
25 told by this court that you could file late objections

Page 43

1 if you disagreed with them. April 7th, 1999.

2 What happened next? Scott Bedke filed objections
3 on April 28th to some of these claims. Okay. The rest
4 of the parties in June, June 4th to be precise, come in
5 and file objections. There's no explanation for this
6 delay. They simply didn't do it. They sat in this
7 courtroom during the hearing we had in June and wrote
8 these objections up.

9 And, Your Honor, the bottom line here is there's
10 no good cause shown for that delay. I am sympathetic
11 to the process. I am sympathetic to people not
12 understanding. But this is not a matter of one or two
13 people coming in and saying I missed a couple claims or
14 I didn't understand. There's no allegation we didn't
15 get the director's report. There's no allegation we
16 didn't read it. All right.

17 Rules say you apply liberally. I think that's
18 Mr. Semanko's point earlier. Could this court have
19 been any more liberal than they were on April 7th in
20 allowing these people to file their objections in
21 Basin 45? Has anybody given this court any reason to
22 believe that these claimants did not, shouldn't have
23 reasonably known the same thing was going to happen in
24 Basin 47 and they should have at least checked? Isn't
25 that about as liberal as you get -- nine months after

Page 44

1 the objection deadline saying to these folks you can
2 file late objections if you have this concern?

3 No default should be allowed. This is not a
4 default, Your Honor. This is filing statutory
5 procedures. This is not a default. This is objections
6 they didn't file in a timely fashion. Okay.

7 Now, what is the good cause we're talking about
8 here, Your Honor? I think we should look to the
9 wording of the motions to file late objections. And if
10 we do, you'll see Mr. Scott Bedke — and I'm going to
11 direct the court's attention to Exhibit No. 2 — or
12 excuse me, Exhibit B. And this is an objection by
13 Mr. Bedke dated 4-28-99.

14 And if you look at this, it says the reason for
15 filing the late objection: "I only recently became
16 aware that the U.S. had filed claims to water that I
17 had claimed. I have been following the status of my
18 claims through the Internet and was not aware of the
19 government's conflicting claims due to the fact that
20 all claims are listed by subcase rather than a legal
21 description."

22 Do you know what you don't see there,
23 Your Honor? You don't see any of these reasons these
24 people are arguing now.

25 The fact is there's no evidence to support these

Page 45

1 objections. The fact is it's ad hoc rationalizations.
2 They're coming back and saying let us do this now.
3 Let's look for a second at Mr. Bruce Bedke and
4 Jared Bedke's objection. This would be Exhibit C and
5 D. And I read from Exhibit D signed by Bruce Bedke.
6 "I only recently became aware that the United States
7 had filed claims to water that I had claimed. I have
8 been following the status on my claims through the
9 Internet and was not aware of the government's
10 conflicting claims due to the extreme number of
11 government" — blah, blah, blah.

12 You know what? Three months, excuse me, two
13 months later exactly the same letter is submitted by
14 these claimants as their reasons for filing late
15 objections. That's what's being argued as good cause
16 here. That's what was offered in support.

17 We filed objections as soon as we found out.
18 This reads for itself, Your Honor. Mr. Scott Bedke met
19 with IDWR at June — or in July, June of 1998. He
20 filed objections in July of 1988 because of concerns
21 that the government claims had been reported out and
22 his weren't.

23 Good evidence he was aware. But at a minimum, as
24 of April 7th when they were all there they knew these
25 claims were being reported out. What occurred? They

Page 46

1 didn't do anything until Scott on the 28th filed
2 something. But everybody else came in June 4th and
3 filed all these other objections. These are the stated
4 reasons.

5 Now, let's look at the practical implications of
6 what we have here, Your Honor. This case in 1987 when
7 the statute was passed, this court, the department of
8 water resources was asked to put together a process for
9 timely and efficient adjudication of 170,000 water
10 rights. As part of that process, they had to set
11 procedures and deadlines. And as this court and as the
12 legislature and as IDWR has constantly been criticized
13 for, the importance of deadlines has been constantly
14 emphasized.

15 Part of the procedure for filing deadlines are
16 the procedures for filing objections. Part of the
17 procedures for making sure people meet these deadlines
18 is clear notice to the parties. Okay.

19 Now, oh, why will this hurt? What's the big deal
20 here?

21 Your Honor, what do we have now that we didn't
22 have on April 7th. April 7th I stood in front of you,
23 I had, I believe, 60 objections by Mr. Scott Bedke. At
24 that point in time a bunch of late objections were
25 handed in. I believe there were roughly 196 objections

Page 47

1 from four more people. No reasons stated to speak of.
2 I had four, 500 more.

3 End of April rolls out. We had 11, 12 or more
4 objections. So I got a couple hundred, three, 400 I
5 didn't have. June rolls around. All of a sudden I've
6 got four times 30 new ones, another 120. Okay.

7 So you're saying, well, that's those folks; they
8 don't understand. What happens next? June 24th, I get
9 Mr. Pickett's objections. I didn't know to file these
10 because the United States, until they objected to me, I
11 didn't know I had to file them. What do I get this
12 morning, Your Honor? I get 99 objections from the
13 Western Stock Growers listed under 12 parties.

14 The problem here, Your Honor, is if we don't
15 require people to show good cause, why bother to have
16 deadlines? Why bother to have schedules? And I
17 emphasize to this court this is not fair to everybody
18 else who has been complying with these procedures for
19 six years.

20 Do you know how we determined our objections? We
21 don't go on the Internet. The court hasn't told us
22 that's a reliable device. We get the director's
23 report, we go down to IDWR, and we review the paper.
24 We go through it page by page as has everyone else.

25 By allowing movants to move forward without

Page 48

1 setting a standard and making sure good cause is met,
2 Your Honor, basically guts the process and gives you no
3 certainty and no ability to finish this adjudication.

4 Your Honor, at a minimum, I ask make sure there are
5 clear deadlines and make sure that people are required
6 to meet them. It is necessary to ensure the integrity
7 of the process and to finish this adjudication.

8 With that, Your Honor, I have nothing further.

9 THE COURT: Thank you, Mr. Bramer.

10 Mr. Spencer, do you have anything to offer at
11 this point?

12 MR. SPENCER: Your Honor, if I may, I would
13 like to address one procedural point. And I detect
14 some confusion regarding the nature of the notice that
15 individual claimants received.

16 And I do want to point out for the record that
17 when a director's report is filed, there is docket
18 sheet notice. There is notice in all the county
19 courthouses.

20 But all the claimants in a given basin do not get
21 notice individually in the mail. Only those claimants
22 who have water right recommendations reported in that
23 director's report get individual notice. And so if the
24 given claimant did not have his water rights
25 recommended in the director's report, he would not

Page 49

1 MR. SPENCER: If they have a water right that
2 was recommended in that director's report, right.

3 THE COURT: Right. But would they receive
4 some sort of notice of anybody else's water right other
5 than the statements saying go down and if you want to
6 look at anybody else's water right, you have to do it?

7 MR. SPENCER: No, Your Honor. What they
8 would receive in the package would be a description of
9 their water right recommendation. That would include
10 with it a notice that the director's report for that
11 group of water rights in that basin had been filed.

12 That notice would include within it instructions
13 regarding filing objections to your own water right,
14 and information regarding where to go to review other
15 recommendations in that director's report, and provide
16 information about filing objections to other folks'
17 water right recommendations in that director's report,
18 or filing responses if other folks filed objections to
19 your water right.

20 THE COURT: If the Bedkes received this
21 notice, assuming they had a water right in Basin 47,
22 they got notice about their own water right; but to see
23 what the U.S. had filed or what was reported in the
24 U.S.'s name, they would have to go down to the county
25 courthouse or IDWR offices?

Page 51

1 receive in the mail individual notice that that
2 director's report had been filed.

3 And I just wanted to make that clear for the
4 record.

5 THE COURT: So if the Bedkes rights were
6 not reported in this batch, they would not have
7 received notice of all of the other filings?

8 MR. SPENCER: That is correct, Your Honor.
9 Unless they had a water right recommended in a
10 director's report, they would not get a notice in the
11 mail individually.

12 MR. BRAMER: Your Honor, I believe the
13 appropriate question is: Did they have claims in
14 Basin 45 and Basin 47? And I believe our research has
15 indicated in fact they had at least one claim and would
16 have received such notice.

17 If that's wrong, they want to speak to that, deny
18 ever receiving the notice, this would be the time and
19 the opportunity for them to do so.

20 THE COURT: Well, Mr. Spencer, if they did
21 have a claim filed in basin -- in this case we're
22 talking about Basin 47. If they had a claim in there,
23 what would they receive? They would receive notice
24 that a director's report was filed, and here's what the
25 director is recommending for their water right.

Page 50

1 MR. SPENCER: The SRBA court or to a regional
2 office of the department of water resources.

3 THE COURT: Or on the Internet? Did we
4 have the information on the Internet back then?

5 MR. SPENCER: I don't recall, Your Honor, if
6 our standard notices provide Internet information or
7 not. Okay. I'm just informed by Miss Brown that now
8 we don't provide that information.

9 If Mr. Bedke had a water right that was
10 recommended in the small D&S report for Basin 45, he
11 would have received an individual copy of his
12 recommendation with this notice that would have
13 provided information regarding where to go look to see
14 what all the other recommendations in that basin looked
15 like. If he did not have a water right recommended in
16 that report, he would not have received such individual
17 notice in the mail. His notice would have been docket
18 sheet notice and, of course, the opportunity to check
19 at the court, or to check at a regional office, or to
20 check at a county courthouse.

21 THE COURT: The Bedkes mentioned several
22 times about conflicting water rights and what they were
23 told by IDWR.

24 If a water right is in conflict, if there are
25 multiple claims to the same water right, is there a

Page 52

1 flag that comes up when they receive notice on their
2 claim if they filed it in that basin?

3 MR. SPENCER: No, Your Honor, there would not
4 be.

5 THE COURT: So the claim wouldn't
6 necessarily be reported in two names, the U.S. and
7 the - Miss Brown?

8 MS. BROWN: Thank you, Your Honor. The
9 department -

10 THE COURT: Roxanne Brown for the record.

11 MS. BROWN: Yes. The policy that water
12 resources follows in that regard is that if the claims,
13 let me say a claim by the Forest Service and a claim by
14 one of these parties were identical, completely
15 identical as to priority date, as to source, as to
16 place of use, point of diversion, completely identical,
17 that we would then move those claims together as one
18 with both names listed on them. Assuming - our
19 assumption would be that these two claims, identical
20 claims were for one identical water right, one single
21 water right.

22 If there is any discrepancy between one claim and
23 another, we would assume that these claims are indeed
24 different claims, two different water rights. So we
25 would have a single recommendation for what we assumed

Page 53

1 was a single water right, a claim to a single water
2 right, or several claims to a single water right where
3 we have several recommendations for claims that may be
4 to a same source; but we were unable to discern whether
5 or not they were to a single water right.

6 THE COURT: What are the chances of a claim
7 to a stock water right within an allotment being
8 reported as identical?

9 MS. BROWN: Quite slim, Your Honor. There
10 have been cases where that has occurred. But most
11 often there is some, some difference.

12 One of the problems is that these areas are quite
13 remote; and although more than one party may seek to
14 claim a particular source, they may actually look on
15 the map and have a slightly different name for that
16 source which would kick it out of the identical box.
17 You might have a slightly different legal position or a
18 legal description for that source, slightly different
19 place of use for that source.

20 THE COURT: Do you happen to know if any of
21 these in Basin 47 were reported in both the U.S. and
22 the Bedkes or the Poultons's names?

23 MS. BROWN: In Basin 47, no. I'm unaware
24 of any that were reported with two names on the same
25 claim.

Page 54

1 THE COURT: Okay. Well, Mr. Semanko, I
2 think you had something very important to tell us
3 again?

4 MR. SEMANKO: Are we now on the other side?
5 I'll take two minutes.

6 I just wanted to say, with regard to the argument
7 that reasonable people would have done all the things
8 that Mr. Bramer said they would have done, the
9 reasonable people are here. They did what they did
10 when they found it out. They did it as quickly as they
11 could. And I strongly suspect that a number of people
12 in their position are not as diligent as they were, and
13 they should not be condemned for taking the action and
14 bringing the action to court that they have in asking
15 to have the late objections filed.

16 They feel like they're here. They have a right
17 to be here. And they have a right to be heard.

18 The notice that was sent to these folks, as was
19 touched on a little bit here shortly ago, didn't say,
20 hey, guess what, your stock water rights have not been
21 recommended to you; but they've been recommended to
22 somebody else; and you better get an objection in.
23 They were not in the director's report. Even in 47 one
24 of theirs was not in the director's report. 11 out of
25 12 of the total of their claims were not in 45 or 47's

Page 55

1 director's reports. Yet they're to be expected to
2 figure out that someone else who has filed on the same
3 water's claims have been recommended.

4 And if you get to the substance of what
5 Scott Bedke filed and the others filed, it says that
6 they just became aware that the claims had been filed.
7 And we all know from practicing in the adjudication
8 that the terms "claim" and "recommendation" get
9 confused all the time. I'm not objecting to a claim;
10 I'm objecting to a recommendation that's made to the
11 department. It's pretty obvious that what they became
12 aware of is that the recommendations had been made.

13 Mr. Bramer mentions that at the April 7th hearing
14 everybody knew what was going on and should have got
15 them filed. That was on Basin 45, not 47.

16 The initial hearing for the comparable case here
17 was held two hours ago. They got them filed before
18 that. Scott filed his on April 28th, 21 days within
19 the April 7th hearing. That's not an unreasonable time
20 for him to have prepared the Basin 47 objection, if the
21 April 7th hearing is really the date that he should
22 have been charged with having known about this and
23 couldn't claim mistake or inadvertence or anything
24 anymore.

25 And Jared and Bruce's and Mike's and Gary's were

Page 56

1 all in shorter than 60 days after April 7th. And I
2 think you can read the statements of the wives that
3 were at the hearing that they surely intended to get
4 their husbands in gear and get the objections filed.
5 So I don't think there's any lack of diligence here.
6 And it would be unfortunate if that were the finding of
7 the court.

8 There is an extreme number of claims, and it is
9 confusing. And I know the court knows it's confusing,
10 and we know it's confusing.

11 We're not saying confusion because of the massive
12 size of the adjudication in and of itself should be
13 good cause. But where it's coupled here with -- and I
14 won't call it chicanery. I'll just call it confusion.
15 It's confusion that was caused by the fact that we
16 decided for the good of the entire adjudication to have
17 a bifurcation. There's been confusion. There's been
18 mistake of fact. There's been excusable neglect. And
19 there's no doubting the fact that this happened. And
20 it caused confusion. And it should constitute a part
21 of what is good cause.

22 It is similar perhaps to the event that happened
23 when the department was removed as a party. Oh, geez,
24 we can't remove the department as a party. If you do
25 that, I need to be able to get in late now because they

Page 57

1 where an objection has been filed."

2 That was Scott Bedke's objections, and the late
3 objections had already been granted. I'm glad
4 Mr. Bramer reminded us that those had been granted.

5 But I think what the United States is really
6 concerned about is they're going to have to defend
7 against this and decide -- the court is going to have
8 to decide where you've got a valid federal claim filed
9 with a valid objection filed against it, and you've got
10 a valid private claim with a valid federal objection
11 filed to it, and they are conflicting claims, who owns
12 the water. Whose water right is it?

13 It will be litigated. It will be decided. We
14 want it to be decided in our back yard. Because that's
15 the water and the land that these guys care about. We
16 don't want it to be decided in basin 37 or any of the
17 basins up in the Clearwater or any of the basins where
18 it would still be timely to file an objection. We
19 don't want to go that route. We want to do it in our
20 basin with the water rights that we're concerned
21 about.

22 It's too bad that we missed the deadline. It's
23 unfortunate. We apologize for it. But there is a
24 standard. It is good cause. We've met it. And we
25 think that the motion should be granted.

Page 59

1 were defending my water right.

2 Well, it was a fundamental change in the process
3 that the State legislature decided was for the good of
4 the adjudication and the good of the state; but it
5 caused some unintended consequences for some parties.
6 So the court said we'll let you come in. We'll open up
7 a 60-day window, and we'll let you come in even in the
8 test basins where the objection deadlines have long
9 since run.

10 This is similar. The court, the major parties
11 that are involved all decided, the department, that
12 this would be a good idea to bifurcate to get, as
13 Mr. Nick Spencer mentioned, some of the claims moving
14 along faster and get them decreed faster. And overall
15 it's been good.

16 But we've had some problems because of it. And
17 the folks that have been impacted because of that
18 should not be left behind in the wake. They should be
19 allowed to come up and participate in the process.

20 I submit to you that the concerns of the
21 United States are not so much about procedure, but
22 about substance. Mr. Bramer also said at the hearing
23 in April: "My name is Randy Bramer. I regret to
24 inform this court that notwithstanding my best attempts
25 after six years I finally appeared in a subcase hearing

Page 58

1 Thank you.

2 THE COURT: Mr. Semanko, will you be
3 submitting additional memoranda in this?

4 MR. SEMANKO: Yes. Prior to the -- I think
5 we agreed on July 9th is the deadline for filing a
6 reply brief to what the United States had filed as a
7 memorandum in opposition.

8 THE COURT: Even after the arguments today,
9 though, you still want to go ahead and do that.

10 MR. SEMANKO: Yes. I haven't had time to
11 review the United States' entire brief. And there's a
12 number of arguments outside of the good-cause argument
13 about whether objections can even be filed at all or
14 late objections. So I think I need to be able to
15 address those. But I'll try to incorporate as much of
16 the Basin 45 brief and argument today as I can.

17 THE COURT: One last thing before everybody
18 closes here. There was reference to transcripts. And
19 I don't get those transcripts as a matter of routine.
20 So --

21 MR. SEMANKO: Those would be appended to the
22 United States' brief. Again, they put together a very
23 nice compilation that includes all of the objections,
24 late objections that were filed and the cover letters,
25 i.e., motions. And the two transcripts from April 7th

Page 60

1 and June 7th are both in that packet, and a few other
2 things that Mr. Bramer and I both referred to during
3 our arguments. So it should all be there.

4 THE COURT: So all the transcripts are
5 there. Okay.

6 MR. SEMANKO: Correct, Mr. Bramer? I think
7 that's right.

8 MR. BRAMER: Yeah, Your Honor. April 7th,
9 1999 hearing is attached as Exhibit M. And then the
10 June 7th transcript is attached, I believe, as

11 Exhibit L. There's an index, Your Honor, on the front
12 of your brief. The June 7th transcript would be I.

13 And then the April 7th transcript would be Exhibit M.

14 THE COURT: Good. Well, counsel, is there
15 anything further, then, we need to consider at this
16 point?

17 JARED BEDKE: I would like to respond as
18 well.

19 THE COURT: Oh, please do.

20 JARED BEDKE: This is Jared Bedke once
21 again. I just wanted to reiterate what Norm says.

22 On April 7th it was told that we found out about
23 all this, and our objections were not filed until
24 June 4th. On April 7th I filed all my objections to
25 the Basin 45 hearings. And as Norm said, it was a

Page 61

1 reasonable amount of time before I found out what the
2 47 filings were. And at that time I did file the late
3 objections in Basin 47.

4 Also, I did not get a notice of the director's
5 report. I personally, Jared Bedke, did not. In the
6 memorandum in opposition to the motions that Mr. Bramer
7 conducted, he even concedes that point in his
8 footnote 12 on page 5.

9 He states that "the affidavit does not state that
10 Jared Bedke was served with a copy of the notice.
11 Jared Bedke is a son of Bruce Bedke," and then on and
12 on and on and on.

13 I don't open my dad's mail. And I hope he
14 doesn't open mine. And we don't discuss everything
15 that goes on in the entire world, even though it might
16 be prudent; but we do not.

17 He also stated that there was a numerous amount
18 of claim numbers, some 900, I think his total got to.
19 As far as I can determine, there's only 156 claim
20 numbers in Basin 45 that all four of us have objected
21 to. They're the same numbers. And in 47 there's only
22 26. So I only come up with a total of 182 claim
23 numbers that are in dispute here. Our late objections
24 are only 182.

25 One more thing. He says a reasonable and prudent

Page 62

1 person would have gone down and done this and done that
2 and done that; we do at the office.

3 Well, I move cattle. I irrigate hay. I cut
4 hay. I gather cattle. I feed cattle all winter. I
5 repair machines when they break down. I fix fence. I
6 dig water lines. I dig ditches. I do all kinds of
7 things. All Mr. Bramer and his staff have to do is
8 watch the SRBA. And since April 7th I've also had to
9 become an Idaho water scholar. And that has not been
10 any small task.

11 So I'm wearing multiple, multiple hats here. And
12 so as a reasonable and prudent person with not just one
13 thing on my mind, I feel like I was in a very timely
14 fashion here as soon as I found out and that good cause
15 does exist. And I once again want to state that as
16 soon as we found out we needed to do this, we went down
17 and immediately filed.

18 And I want to thank you for your time.

19 THE COURT: Thank you, Mr. Bedke. Anything
20 further from anyone else?

21 MR. BRAMER: If I may, Your Honor, just one
22 quick point. Your Honor, this adjudication has been
23 going on six years. We've had tens of thousands of
24 partial decrees issued. We are talking about
25 reasonable people. Everyone else has had to do this

Page 63

1 and comply with these deadlines.

2 All of a sudden these folks are saying we're the
3 reasonable people; we didn't do this; that's the right
4 way to view this.

5 I would ask this court to remember that we looked
6 through the director's report. So did Wiley Smith, so
7 did Young Harvey Walker, so did the basin thirty -- so
8 did Mitch Sorensen. These people all looked through
9 the director's reports. They all identified
10 objections. They all got exactly the same notice. It
11 didn't say the claims were competing or not competing.
12 This is the same thing that everybody has gotten for
13 six years.

14 Now all of a sudden we're to believe that we
15 didn't understand; we didn't have any reason to believe
16 this. They're not denied their day in court. They've
17 filed claims. They're going to litigate those claims.
18 If they want to consolidate those claims and our claims
19 and litigate them, let them do so.

20 But let's not forget what we're doing here.
21 We're running an adjudication with 170,000 claims that
22 needs to have some sort of procedure inherent in here.

23 Finally, concerns about substance. As I said
24 earlier, they have filed claims that can be
25 consolidated.

Page 64

1 And finally with respect to Scott Bedke, I'm not
2 saying Scott Bedke became aware in April 7th, 1999.
3 I'm saying he became aware of the problem in July of
4 1998 when he filed objections. So it wasn't like he
5 jumped right on this in three weeks. That's not the
6 point at all.

7 The bigger picture here, Your Honor, is I told
8 you on April 7th I was concerned about opening, quote,
9 the floodgates of litigation with objections. I would
10 submit to this court that those floodgates have
11 opened. And this court is seeing those late
12 objections.

13 They can take Mr. Bedke's count or they can take
14 my count. But when you take in the Bedkes, the
15 Poultons, Western Stock Growers, Pickett Ranches and
16 put all those together and add them up, you're going to
17 see that number is more in the ballpark of what I'm
18 talking about.

19 There are no standards left by this court at this
20 point. Anybody can file anything any time. And I
21 think when the court looks at these motions it has to
22 ask themselves what procedures are we going to use, and
23 what standards do people have to meet.

24 Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Bramer. Well,

Page 65

1 counsel and pro ses --

2 SCOTT BEDKE: Is it my turn?

3 THE COURT: Oh, yes, if you have a
4 response. I keep forgetting you.

5 SCOTT BEDKE: My name is Scott Bedke. I
6 guess I resent to a point the portrayal of us ranchers
7 as being somewhat inept in this. I mean we acted,
8 we've acted in good faith at every turn here. We've
9 done our very best to comply. We've gone to people
10 that we supposed knew what was going on. We've been
11 given bad advice in several instances.

12 But, you know, we -- these are not -- you know,
13 we filed in 1989. We thought we were ahead of the
14 curve here. We thought that we were in compliance at
15 every turn. And we have tried to get to, you know, get
16 right procedurally at every case -- at each and every
17 point.

18 I recall -- or just would reiterate Mr. Shaff's
19 letter, the very last, second to the last paragraph.
20 And, of course, this is after the bifurcation and the
21 problems in Basin 45. He says, "In Basin 47 the claims
22 may be equally as challenging, but the task can have a
23 different outcome."

24 Well, what was the outcome of Basin 45? That was
25 where our claims were not reported, and the United

Page 66

1 States' claims were and had proceeded.

2 Now, so I interpreted that to be that I'm
3 still -- the illusion that I'm laboring under at that
4 point is that a conflicting claim or an overlapping
5 claim is basis enough to get your day in court. We
6 were told several times that we did not have to have
7 reciprocating objections in order to decide who would
8 own the water. And that was reiterated time and time
9 again from the department of water resources.

10 And the same -- in this paragraph we were told
11 that if we, you know, if I went, if we went down to the
12 department of water resources and amended our claims
13 that were non de minimis -- you know, they were filed
14 under the old format, filed in 1989 in Basin 47. And
15 if we'd come down and break them up, thus the A, B, C,
16 D, you know, on the claim numbers, you know, 14923A, B,
17 C, B, E, F, G, I think it is, that that would put us on
18 the same footing or the same position procedurally as
19 the United States' claims.

20 Again, that was bad advice obviously. And so
21 we're trying to rectify that here by getting -- it is
22 not true that we don't have to file reciprocating
23 objections. We do have to file them. And as soon as
24 we found out that we did have to do that, we are.

25 And to portray us as inept and to -- and that we

Page 67

1 just sit back and, you know, don't pay attention to
2 this, we have paid attention. We've done our best to
3 stay abreast, and I think evidenced by our presence
4 here today.

5 But like I say, this is not the -- these have not
6 been the acts of people -- I mean we've acted in good
7 faith. We've tried to stay ahead of the game and
8 procedurally correct from day one; and, you know,
9 unfortunate for us that when the Basin 45 stuff and the
10 Basin 47 stuff came up, the procedures were
11 bifurcated. I mean that was not our fault.

12 And so I just say that if there are any neglect
13 or whatever we've done has been excusable; and
14 there's -- you know, it seems very easily corrected at
15 this point.

16 Thank you.

17 THE COURT: Thank you, Mr. Bedke. Well, if
18 there's nothing further, then, I'll consider the matter
19 under advisement.

20 But now I'll withhold it until you have your
21 responsive memorandum in, Mr. Semanko?

22 MR. SEMANKO: I'll file it by next Friday,
23 Your Honor. And I will also clarify, as I said before,
24 who objected or is seeking to object to what in
25 Basin 45. There's some confusion still on that.

Page 68

1 For the record, Scott Bedke and the Poultons have
 2 objected to 60 claims, water right recommendations in
 3 Basin 45. And the Bedkes, Jared and Bruce Bedke have
 4 objected to 156.

5 In Basin 47 they've each, all of them objected to
 6 the same 26. But I'll try to clarify that in my
 7 brief.

8 Thanks.

9 THE COURT: Thank you. I appreciate it.
 10 If there's nothing further, then, we'll go off the
 11 record. Thank you, folks.

12 (PROCEEDINGS ADJOURNED)

13
14
15
16
17
18
19
20
21
22
23
24
25
Page 69

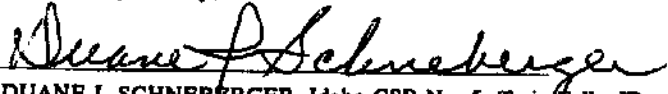
1 TRANSCRIBER'S CERTIFICATE

2 STATE OF IDAHO)
 3) ss

4 County of Twin Falls)
 5
 6

7 I, DUANE J. SCHNEBERGER, duly appointed,
 8 qualified and acting official reporter of the Fifth
 9 Judicial District of the State of Idaho, DO HEREBY
 10 CERTIFY that the foregoing constitutes a complete
 11 transcription of the requested portion of the
 12 proceedings in the foregoing matter from electronic
 13 recording tapes, to the best of my ability, said
 14 transcript consisting of pages 1 through 69, inclusive.

15 IN WITNESS WHEREOF, I have hereunto set my hand
 16 this 8th day of July, 1999.

17 
 18
 19 DUANE J. SCHNEBERGER, Idaho CSR No. 5, Twin Falls, ID
 20
 21
 22
 23
 24
 25

Page 70

1 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF
 2 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS
 3 *****
 4 In Re SRBA) REPORTER'S TRANSCRIPT
 5 Case No. 39576) Subcase No. 47-14923A,
 6) B, C, D & E

7 *****
 8 *****
 9 *****
 10 *****

11 D-a-t-e: Thursday, July 1, 1999

12
 13 T-i-m-e: 2:15 P.M.

14
 15 P-l-a-c-e: SRBA Courthouse, Twin Falls, Idaho

16
 17 B-e-f-o-r-e: TERRENCE DOLAN, Special Master

18
 19 H-e-a-r-i-n-g: Initial Hearing

20
 21 *****
 22 *****
 23 *****
 24 *****
 25 *****

Page 1

1 been succeeded by Scott Bedke; Gary Poulton, who is
 2 present and I've filed a notice of appearance for
 3 today; and Winslow Whiteley. His interest passed on to
 4 Robert Whiteley when Winslow died. And Robert Whiteley
 5 has since conveyed it to Carl Bedke. I filed a notice
 6 of appearance for him today.

7 We don't have an NCAP, notice of completed
 8 administrative proceedings, submitted yet; but there
 9 has been a change of ownership submitted by Carl Bedke
 10 and his wife. So we wanted to be here today to let the
 11 court know that those are the four parties -- or the
 12 four people who are the claimants on these particular
 13 water rights.

14 THE COURT: And you're representing all
 15 four of them.

16 MR. SEMANKO: For purposes of today's initial
 17 hearing and scheduling and those things, I will be
 18 representing all of them today, yes.

19 THE COURT: Good. Thank you. Also present
 20 in the courtroom this afternoon we have
 21 Randall Bramer representing the United States. And we
 22 have Nick Spencer representing IDWR.

23 Since this is an initial hearing, there's a lot
 24 of things we could talk about. Is there anything we
 25 can start it off with here and get the ball rolling?

Page 3

1 COURTROOM OF THE DISTRICT COURT, SNAKE RIVER
 2 BASIN ADJUDICATION COURTHOUSE, 253 Third
 3 Avenue North, Twin Falls, Idaho, Thursday,
 4 July 1, 1999, 2:15 P.M.
 5 *****

6 THE COURT: Good afternoon, counsel, ladies
 7 and gentlemen. We're back on the record. This is the
 8 date and time set for an initial hearing on five
 9 different water rights, Basin 47. They begin with
 10 14923A, B, C, D, and E.

11 In court this afternoon we have Norman Semanko
 12 representing the claimants. The original claimant was
 13 Winslow Whiteley; and I think, Mr. Semanko, you're
 14 going to explain where we are in ownership on all of
 15 these five claims?

16 MR. SEMANKO: Yes, Your Honor. Do you want
 17 me to do that right now?

18 THE COURT: Well, just briefly. You can
 19 use the microphone right there, if you need to.

20 MR. SEMANKO: There are four names on the
 21 claim 47-14923 as it was originally filed. That's
 22 since been split for purposes of recommendation to the
 23 court into an A, B, C, D, and E portion.

24 The original claimants were Bruce Bedke, who is
 25 still a claimant; Ray Bedke, who is deceased and has

Page 2

1 Mr. Semanko?

2 MR. SEMANKO: I may say a few words real
 3 quickly. Mr. Bramer and I did have the opportunity to
 4 speak this morning. He was kind enough to call me and
 5 talk about this ahead of time.

6 I think where we're at, Your Honor, is, in our
 7 mind, is kind of a continuation of the hearing that we
 8 had on June 7th in Basin 45. At that time we expressed
 9 concern about the U.S. claims going forward while the
 10 private claims had not yet been reported and, more
 11 importantly for purposes of today, the fact that we
 12 thought they all ought to be considered together to the
 13 extent they were claiming the same water for the same
 14 purpose.

15 We've got the same basic issue today. 47-14923,
 16 as originally claimed, was for a half a cfs for 2,000
 17 range cattle on several different sources. And for
 18 purposes of being reported, it was chopped up into
 19 de minimis pieces -- as my clients call it,
 20 de minimized -- so that it could be reported. And it
 21 was reported.

22 It overlaps obviously, as you can see from the
 23 objections that the United States filed, with a number
 24 of United States' claims. Those claims are the subject
 25 of a hearing later today as to whether or not our

Page 4

1 clients and others should be able to file late
2 objections in those subcases.

3 I guess the short story is, what we'd like to see
4 happen is that when those are resolved in terms of
5 whether there will be objections and whether there will
6 be subcases or not in the United States' claims, we
7 think they ought to be again proceeding in tandem with
8 these claims so that we -- we'll have common sets of
9 facts about where the cows go, who owns the cows, where
10 they drink water. All those kinds of things are facts
11 that are going to be relevant in both subcases whether
12 it's the private claimants' subcase 14923 or the United
13 States' claims in the 26 subcases where motions to file
14 late objections have been granted.

15 So I guess what I'm asking or suggesting is that
16 we continue this. I also would like to at this time
17 make a motion to reclassify these subcases as Class 2
18 subcases rather than Class 1. They are not the typical
19 minor, small Class 1 type of subcase where the director
20 recommends 1 cfs, the claimant thinks it's supposed to
21 be 1.1 cfs, and they have a battle over that.

22 This is a case where a claim has been recommended
23 by the department to a private claimant. The BLM,
24 Forest Service, the federal government, anyway, have
25 objected. It's Forest Service in this case. And it's

Page 5

1 much more complicated than a standard Class 1 subcase.

2 And I don't know if anyone would have an
3 objection to that. But certainly if it's going to be
4 grouped together with other cases, it's not something
5 that lends itself to a 45-day schedule.

6 We think it's something that should be the
7 subject of a scheduling conference, including
8 opportunity for 16(k) type of resolution, if the court
9 decides that's necessary or if the parties decide that
10 it's time to sit down and talk. Certainly we ought to
11 talk about discovery schedules and consolidation and
12 all those types of issues. And those kinds of things
13 lend themselves much more to a rule 16 scheduling
14 conference than to the initial hearing process. So we
15 would like to get these on a track for a scheduling
16 conference rather than an initial hearing, and would
17 make that motion at this time.

18 Your Honor, I thought it would be helpful -- just
19 briefly, the last time we talked about where these
20 grazing allotments are; and it's kind of hard to
21 understand it just from me talking. I brought a couple
22 maps just for illustrative purposes. If I can -- and
23 if there's no objection, I'll show those to counsel.

24 THE COURT: Mr. Semanko, do you want this
25 marked as an exhibit, or just for illustrative --

Page 6

1 MR. SEMANKO: No, I would just like to
2 provide it for illustrative purposes. I don't think
3 it's fair to ask that it be marked as an exhibit and
4 admitted. I haven't provided it to counsel ahead of
5 time. And certainly this is not an evidentiary
6 hearing.

7 But just for purposes of trying to explain as a
8 continuation of the last hearing where we are, outlined
9 in blue on the map is what we refer to as the West Side
10 Allotment, the Goose Creek Cattle and Horse Grazing
11 Allotment. And this is the allotment that this water
12 right, 14923A, B, C, D, and E is in. It's on the west
13 end of that allotment.

14 The great majority of the claims, the 10 claims
15 that have not been reported in Basin 45, are more on
16 the east side of this same allotment. So when we say
17 it's necessary perhaps to consolidate, and later we
18 probably will, at least the proceedings for Basins 45
19 and 47, we mean it. Because the cows don't know that
20 there's a basin line somewhere in Range 19 East. All
21 they know is that there's this allotment, and maybe
22 there's some fences and things.

23 But the facts are going to be appreciably the
24 same. And the claimants and objectors are going to be
25 appreciably the same for this entire allotment.

Page 7

1 And the grazing allottees in this blue area, in
2 the West Side Allotment are Bruce Bedke, Scott Bedke,
3 Gary Poulton, and Carl Bedke. Those are the four that
4 are here on 14923.

5 The other allotment in the purple -- and also
6 this is the allotment, the blue, where the claims that
7 are the subject of the hearing on motions to file late
8 objections in Basin 45 last month and in Basin 47 this
9 month are located with the exception of some additional
10 objections that Jared and Bruce Bedke filed. They're
11 in this other allotment as well, the purple allotment.
12 That's the east side of Goose Creek grazing allotment.

13 And that's the only extent that those are
14 involved right now, because those private claims have
15 not been reported with only a few exceptions, I
16 believe. Maybe we can speak to that later.

17 But just for illustrative purposes, the claims
18 that we're dealing with right now are in the blue in
19 the West Side Allotment. And I wanted you to know --
20 and basically the dividing line there is Goose Creek.
21 As you can see, the Goose Creek reservoir is right
22 smack in the middle. At the very northeast part of the
23 map is Oakley, so you can orient yourself a little bit
24 there. And there are a number of grazing allotments in
25 this Oakley area.

Page 8

1 THE COURT: Well, Mr. Semanko, do you think
 2 the issues in 45 and 47 are going to be identical?
 3 MR. SEMANKO: They will be, Your Honor.
 4 There will be some issues about licenses and, as
 5 Mr. Pickett was saying during the last hearing, about
 6 the type of water right that's been claimed. But for
 7 the most part, the issue is going to be the issue of
 8 whether the water right is properly -- I don't want to
 9 say held because I'll get in trouble. United States
 10 holds water rights under licenses. But whether the
 11 water right should be decreed in this case to a private
 12 claimant who has claimed it or to the United States
 13 who's claimed it under a different number. And that's
 14 essentially the issue.
 15 And there's a number of theories as to why it
 16 should go to one or the other. And that's the subject
 17 of a later hearing. I'm not going to get into that.
 18 But certainly for purposes of scheduling, this is
 19 a small tail that shouldn't wag the dog. We've got,
 20 out of 12 claims that were filed in this grazing
 21 allotment, and that includes the de maximus claims, all
 22 of those have not been reported yet. Those 11 or so
 23 have not been reported, including one in Basin 47.
 24 47-14924 has not been reported.
 25 I've got my copy of the name and number index

Page 9

1 right here on counsel's table. And I don't see 14924
 2 in there. So by my count, out of the 12 claims that
 3 were filed by these claimants, only 1 has been
 4 reported.
 5 So to let this one -- and then, of course, you
 6 have the issue of all the objections to the
 7 United States' claims for the same water, some one
 8 hundred and -- well, that's not the right number
 9 because that includes the other allotment. But
 10 certainly a number of objections in Basin 47
 11 26 subcases that would have objections in them. To let
 12 this one subcase go forward with all that other pending
 13 and yet to be reported or yet to be decided whether
 14 objections will be filed, I think, would be a huge
 15 waste of judicial resources and certainly my clients'
 16 time.
 17 So we'd hope these could be scheduled at a later
 18 time with whatever survives out of the pile that we've
 19 got in the other hearings and the other reports that
 20 are issued later, and that they be the subject of a
 21 scheduling conference rather than an initial hearing.
 22 I'd stand for any questions.
 23 THE COURT: Well, Mr. Pickett suggested
 24 there might be a difference in treatment between
 25 in-stream flow claims for stockwatering versus

Page 10

1 diversions or improvements at least for stockwatering.
 2 Do you think that's going to be a distinction?
 3 MR. SEMANKO: I haven't had that conversation
 4 with him yet, Your Honor. And I will have that
 5 conversation with him as he indicated.
 6 There may be some difference on how we treat
 7 things because of licenses; but other than that,
 8 there's any number of differences, factual differences
 9 on federally involved water right claims. For example,
 10 the point of diversion could be on private land rather
 11 than public land or federal land in any event; and you
 12 look at it completely different in terms of what the
 13 issues might be or how you might settle it.
 14 So I guess until I know exactly what his claims
 15 look like, and he's in a -- he's not in either one of
 16 these allotments. His allotment is not drawn on here.
 17 I don't know exactly where it is; but it's not either
 18 one of these allotments.
 19 So until I know factually what he has claimed and
 20 what he's seeking to object to -- and he's been
 21 representing himself to date -- it's very difficult for
 22 me to answer the question. But, yeah, there could be
 23 some differences in how we treat some different kinds
 24 of claims. But for the most part, the issue is the
 25 same.

Page 11

1 And I think as Jared Bedke expressed at the
 2 April 7th initial hearing on some water right claims,
 3 there's a couple of different theories that are
 4 floating around. And you can see them expressed in the
 5 late objections that have been filed.
 6 One is the idea that I've already mentioned --
 7 that the beneficial use was made by the private
 8 claimant, and so the water right should be decreed to
 9 the private claimant rather than the United States.
 10 The other is where there are licenses, or even
 11 where there aren't licenses, the United States couldn't
 12 have appropriated the water because it was already
 13 appropriated by the private claimant. And that's
 14 another theory that's out there as well.
 15 And whether those different types of theories
 16 apply in all factual circumstances, I don't know until
 17 I see the factual circumstances. But in our cases
 18 those are the two theories that have been put forward
 19 for the court to look at as far as a meritorious
 20 position.
 21 THE COURT: Do these allotments go into
 22 other states? Or is the state the boundary?
 23 MR. SEMANKO: I'm looking at them for
 24 noddings. They do go into other states?
 25 VOICE: The Utah and Nevada state line

Page 12

1 is the lower boundary of the allotment.

2 THE COURT: So we're not talking about
3 water rights in Nevada or Utah.

4 VOICE: No, sir.

5 MR. SEMANKO: That's somebody else's
6 subcase.

7 THE COURT: Well, Mr. Semanko, since we're
8 here at an initial hearing, some of the other things we
9 need to talk about are settlement possibilities,
10 alignment of parties.

11 Do you have any ideas of where we need to go
12 there, where the court might be able to help move
13 things along?

14 MR. SEMANKO: Much to both counsels for the
15 United States credit, they have approached us about
16 sitting down and talking settlement. Other than
17 counsel shoptalk, we haven't talked about any
18 specifics. We're agreeable to talking with them.

19 Probably what we will do is communicate what
20 would be acceptable to us to them and see if it's worth
21 sitting down at that point, whether they think we're
22 close enough that we should sit down. I don't want to
23 waste either their time or our time; but certainly I
24 personally as counsel for others have settled some of
25 these; and I would be not exercising my role as counsel

Page 13

1 properly if I didn't at least explore that.

2 But, on the other hand, it's entirely up to the
3 client what is acceptable in terms of sitting down and
4 talking. So I've gotten a good idea from my clients
5 over the last couple of weeks what would be acceptable
6 to them; and I'll communicate that to counsel for the
7 United States and see if we can move forward with some
8 kind of discussions. We certainly don't want to have
9 to keep this ball rolling if we don't have to.

10 THE COURT: What do you suggest for our
11 next setting in 14923?

12 MR. SEMANKO: I want to say after we get
13 resolution on the motions to file late objections.
14 Because at a minimum those cases need to be considered,
15 those subcases with this subcase. I'd say at a minimum
16 we'd want it after that. Maybe August 2nd we'll know
17 something; and we can at least talk about it on
18 August 2nd with the status conference or something.
19 But that's at a minimum.

20 At a maximum, I think we're looking at the issues
21 being the same between Basin 45 and 47, and maybe --
22 and a lot of the facts, and maybe consolidating at
23 least procedurally, if not completely, those subcases
24 as well. Now, that, of course, would require the
25 reporting of the Basin 47 -- or 45 water rights that

Page 14

1 have not been reported yet.

2 So that's an issue I haven't had time to think
3 out, and would maybe be something we'd want to brief or
4 have a hearing on rather than trying to figure it out
5 here. But that's at a maximum. I think we'd like to
6 see them all considered together.

7 But at a minimum we've got to have the Basin 47
8 stuff, I think, considered together factually and
9 legally. They're too common to let one go forward and
10 not have the other one go with it. So --

11 THE COURT: Well, we talked about some of
12 the water rights that haven't been reported yet and
13 holding off on these water rights until those are
14 reported. And I think we were talking in the year
15 2000?

16 MR. SEMANKO: Well, that's for Basin 45.
17 It's December of 2000. I'm not sure, and maybe the
18 department can check or maybe they know, what it would
19 be for Basin 47.

20 But if we're right about 14924, 47-14924 not yet
21 having been reported and being in the same grazing
22 allotment -- and I'd note on the claim for that it, one
23 of the remarks is see also reference right A45-10325
24 for other water rights. Well, that's a reference in a
25 Basin 47 claim to a Basin 45 water right and the other

Page 15

1 nine water rights that we talked about last time which
2 haven't been reported. So they are intimately linked.

3 And I think we have to wait for the 45s and this
4 47 to be reported before we truly know what the ball of
5 wax is going to look like. In the meantime we resolve
6 the late objection issue, see if people can get in on
7 late objections or not, and we'll be able to square off
8 and settle the dispute either through the court or, you
9 know, through discussions.

10 THE COURT: Well, assuming the late
11 objections are allowed, using your figure the ball of
12 wax, aren't we getting bigger and bigger and bigger
13 until we can't handle this thing anymore until at least
14 a year from now?

15 MR. SEMANKO: Well, if you went with my
16 suggestion last month of remanding the whole thing back
17 to the department for Basin 45 and perhaps 47, it would
18 be a pretty big ball of wax.

19 But here I'm seeing one claim that's been chopped
20 into five pieces in Basin 47 that's before the court
21 now, 14923, 14924 which hasn't been reported yet, so
22 there's two, in essence two private claims that have
23 been divided into six in Basin 47. There's the
24 26 subcases in which -- Mr. Bramer will characterize it
25 differently, I'm sure, because everybody has filed

Page 16

1 objections; so there's more than 26 objections. But 26
2 subcases in which people are seeking to file objections
3 in Basin 47 that I'm aware of. I haven't talked with
4 Mr. Pickett. There may be more that he's involved with
5 that we're not at this point.

6 So I'm looking at 30 or so there, 32; and then in
7 Basin 45, of course, we know the numbers on
8 Jared Bedke's amended Exhibit A, 156 Basin 45 subcases
9 in which -- of course, all they're asking is to be
10 heard on the merits. But those, if the court decided
11 not to hold those back because of waiting for Basin 45
12 to be reported, I guess, could go forward. We would
13 prefer obviously to have the legal issues made at one
14 time with regard to both kind of claims, private and
15 government claims. But just roughly counting there,
16 it's around 200 subcases.

17 And I guess I don't know what you mean by how big
18 the ball of wax gets, or if you're meaning to address
19 the motion that is to be heard later. But certainly if
20 we wait for Basin 45 and 47 to be reported until we
21 consider the federal claims and this one private claim,
22 it will take a little more time to do it.

23 But, on the other hand, we're going to have to
24 resolve those when they get reported, anyway. The same
25 issues are going to be argued. The same, more

Page 17

1 resources are going to be used. And it just doesn't
2 seem to be a good use of resources to move ahead with
3 some and wait for the others to come later, especially
4 in light of what we all know was overall a good result
5 but had some bad effects of going ahead and splitting
6 things up between de minimis and de maximus water
7 rights. We've created a little bit of a problem.

8 And I've read over the April 7th transcript; and
9 there were references by the court, by counsel for the
10 United States, by the private claimants -- I wasn't
11 involved at that point, but to the fact that there's
12 been a lot of confusion and a lot of problems caused
13 because of the fact that these have been bifurcated.
14 And certainly Mr. Tuthill at the June 7th hearing made
15 that abundantly clear for both Basin 45 and 47.

16 So I think we've got a dilemma. As you stated at
17 the last hearing, we need to figure out how to deal
18 with it. And I sympathize with your struggling to
19 figure out how to deal with that; but I think we have
20 to figure out a way to deal with it rather than letting
21 the ones that have been out of the cage go forward and
22 holding the others back for later.

23 I think we do need to consider them together.
24 And since we don't want to force or try to force the
25 department to pump these all out right now, we're left

Page 18

1 with having to wait until they're reported before we
2 resolve this problem.

3 THE COURT: Well, another alternative might
4 be to pick one of the cases that represents, contains
5 all of the issues that we need to decide eventually and
6 proceed with that one case now instead of waiting for
7 the remainder to be. And then the law of the case
8 would govern the later ones as they're reported.

9 Is that a possibility?

10 MR. SEMANKO: Well, if that were to be done,
11 and I'm thinking it through as I stand here, it would
12 obviously have to be, at least for the ones that I
13 represent, 14923A, B, C, D, and E because that's the
14 only one that's been reported to a private claimant at
15 this point. If their objections are granted, obviously
16 then you got a full plate; and you could decide the
17 issue. And that's up to the court to decide whether
18 that's an efficient way to move.

19 The facts are going to be common among all of the
20 subcases whether reported or not. And I would leave it
21 to the United States to speak to whether the
22 26 subcases that we've sought to object to are
23 representative enough of the other 156 subcases in
24 Basin 45 that we sought to -- as to whether that's a
25 sufficient ball of wax to deal with, if that's a big

Page 19

1 enough ball of wax to deal with the issue and set, I
2 guess, precedent for the others.

3 Although if they're not consolidated, that's not
4 going to be the case. The subcase will, I imagine,
5 stand on its own until the others are litigated later.

6 And that, now standing here and reasoning it
7 through, still means we litigate it twice; we argue it
8 twice; we brief it twice; we discovery schedule it
9 twice; and use a lot of our clients' resources twice.
10 So it may not be the best way to go. But certainly if
11 it was going to happen, it would have to be 14923, I
12 think.

13 THE COURT: Well, I hate to have the court
14 choose which case to go ahead with. And it would be
15 better if the claimants themselves could make that
16 decision. But that's at least a possibility.

17 MR. SEMANKO: Well, again, my suggestion
18 would be at least to wait until August 2nd, see where
19 we are on the motions to file late objections, and then
20 talk about the status of this case and whether we can
21 schedule it now or decide what to do with it. But I
22 think at this point it's abundantly clear that it's
23 premature until we see what happens with our motions to
24 file objections in Basin 47 and perhaps Mr. Pickett's
25 motion and others that may be filed in the interim.

Page 20

1 THE COURT: Okay. That's all I have,
2 Mr. Semanko. Thank you.
3 MR. SEMANKO: Thank you. Sorry I took so
4 long.

5 THE COURT: Mr. Bramer, do you have any
6 initial hearing type statements --

7 MR. BRAMER: Yes, Your Honor.

8 THE COURT: -- rather than arguing the
9 merits?

10 MR. BRAMER: May it please the court, my
11 name is Randy Bramer. I'm here for the United States
12 on behalf of the Forest Service.

13 Your Honor, I have to differ with Mr. Semanko's
14 characterization of what we're doing here today. We
15 have Subcase 47-14923A, B, C, D, and E. They have been
16 reported out in the name of private claimants. We have
17 filed objections.

18 This is not the same situation we had in Basin 45
19 where those claims had not been reported out. This
20 case is perfectly ripe for determination. If we want
21 to go forward on initially the objections we're going
22 to hear today, the late objections will be heard
23 today. They're not scheduled for August 2nd.

24 Once the court makes those determinations, if
25 Mr. Semanko wishes to file a motion to consolidate

Page 21

1 those two claims, that would be the appropriate time to
2 do it. I believe we are in an initial hearing, and
3 we're prepared to schedule a hearing and go forward on
4 these claims.

5 Second, Your Honor, I would oppose any oral
6 motion to reclassify as a Class 2 set of subcases at
7 this point. There are several reasons for that
8 concern, Your Honor.

9 Number one, it is unclear who Mr. Semanko even
10 represents. The last hearing Mr. Semanko was
11 representing Mr. Bedke. This hearing he indicated he's
12 representing several other parties. Mr. Pickett
13 indicated he might be representing him. We are not
14 even clear who Mr. Semanko is representing, let alone
15 the issues before the court, both of which, and
16 particularly the latter, is germane to a Class 2
17 subcase designation.

18 We would ask, should Mr. Semanko and his clients
19 wish to have a Class 2 subcase designation, they would
20 make that motion in writing. We would respond
21 appropriately. At this point we simply don't have
22 enough information to take any position.

23 Further, Your Honor, as to the issues, I'm not
24 sure what the issues are. No one has actually told me
25 what the issues are. I have heard there's no factual

Page 22

1 disputes; I have heard there are factual disputes. The
2 fact is perhaps through the motion to reclassify to a
3 Class 2 subcase we can have in writing the issues as
4 the parties see them.

5 Again, we've made some attempts to initiate
6 settlement discussions to, at a minimum, define those
7 issues. But at this point in time I cannot say that
8 there are clear issues we can resolve that will govern
9 all these cases or would not govern all these cases.

10 Finally, Your Honor, I do have a difference of
11 opinion on how many late objections we have. By my
12 count, by the time we get to 3 o'clock we have well
13 over 700 subcase late objections that have been filed
14 in the three months since April 7th when we first
15 appeared before this court on Mr. Bedke's 60
16 objections.

17 Your Honor, I have nothing further at this point
18 unless you have any questions.

19 THE COURT: Do you have any suggestions of
20 where we go from here?

21 MR. BRAMER: Your Honor, I think we hear the
22 late objections. Should the court choose to grant
23 those late objections and if the court did grant those,
24 we may wish to have them consolidated.

25 The United States, of course, is not going to

Page 23

1 take the step. If Mr. Semanko believes that's the
2 appropriate step, he can file the appropriate motions.

3 At this point, Your Honor, I do not know the
4 court mediated settlement -- or having a settlement
5 mediator come into this process would not be a useful
6 thing to have. I feel like we are attempting to
7 initiate settlement discussions. All due fairness to
8 Mr. Semanko, he has had a group of people he's trying
9 to represent; and it has not been easy to join that
10 group together. So I think that's an alternative we
11 may wish to explore.

12 As far as the August 2nd date, the only thing we
13 have on August 2nd right now is Mr. Pickett's late
14 objections and an initial conference concerning
15 Mr. Pickett. None of these claimants in this
16 particular case are before the court on August 2nd.

17 MR. SEMANKO: That's correct.

18 THE COURT: We've got an independent expert
19 sitting in the court. And we also, of course, have the
20 State available, State of Idaho.

21 Would either of them be good for moderation of a
22 settlement conference?

23 MR. BRAMER: Your Honor, I think what we
24 would like to do, if possible -- I would need to
25 discuss this with Mr. Brown. I've not had a chance to

Page 24

1 discuss it directly to him. But I believe some attempt
2 to get the parties to the table together and to discuss
3 these issues would be useful.

4 If the best vehicle would be the use of IDWR and
5 perhaps one of their administrative judges, we have
6 Mr. Spackman as well as a couple other folks, that may
7 be a good vehicle to do it. Then you would not put the
8 pressure on the department, who are the people who are
9 appearing in court as the court's experts, to have to
10 mediate that sort of dispute. But I think something
11 along that procedure would be something that would be
12 worth pursuing.

13 THE COURT: What I was thinking about,
14 having somebody with some expertise in these fields,
15 you know, that could let everybody know what state law
16 is or isn't.

17 MR. BRAMER: The people I'm suggesting,
18 Your Honor, are the administrative law judges for the
19 department that would hear water rights cases.

20 THE COURT: Sure. Mr. Spackman, I'm sure,
21 has a real wealth of experience.

22 MR. SPENCER: Yes, Your Honor.

23 THE COURT: Another benefit of having a
24 state person moderate, we don't have to pay him
25 anything, do we?

Page 25

1 MR. SPENCER: Your Honor, I believe the
2 department would do its best to accommodate any
3 reasonable requests by the parties.

4 THE COURT: Well, on another matter, what
5 do you think of my great idea about picking one case
6 and proceeding with that?

7 MR. BRAMER: Your Honor, at this point in
8 time I think we take the cases as they're coming in.
9 And you have a case in front of you right now.

10 You also have another case that presents similar
11 issues. I believe Mr. Brown has a case with the
12 Matthews brothers.

13 But I think at this point in time, given the
14 delay – and it appears every time we're delaying these
15 proceedings we seem to be receiving not two or three
16 new late objections, but rather hundreds of late
17 objections. I think we should move forward on this. I
18 think the deadlines have passed. And if the parties
19 can make a good showing – or a good showing of cause
20 as to late objections, they should be granted.
21 However, I do think what we're doing is putting off the
22 inevitable.

23 And Mr. Semanko raised the issue of a claim not
24 being reported out. I think this court focused on it
25 as I did, and that is does that mean we're going to

Page 26

1 stay all of this. Because the director's report for
2 irrigation and others is 2001 rather than 2000.

3 So, again, if we're talking about staying – but,
4 again, here we're not talking about the claims that
5 weren't reported. We're talking about a claim or
6 several claims in Basin 47 which are not before the
7 court weren't reported. The claim before the court has
8 been reported, objections have been filed, and it's
9 ripe for determination.

10 THE COURT: Mr. Semanko, what do you think
11 of the idea of having someone like Mr. Spackman
12 moderate some kind of settlement? Or a special
13 master?

14 MR. SEMANKO: As a court-ordered mediation
15 or –

16 THE COURT: Yes.

17 MR. SEMANKO: I think that's an appropriate
18 subject for a rule 16 settlement conference which -- or
19 a scheduling conference which we would have if this was
20 a Class 2 subcase. I'm not opposed, if we sit down for
21 settlement, to having the department do it, obviously
22 because they would be someone presumably we wouldn't
23 have to pay.

24 But frankly I'd have to ask my clients. I think
25 I said during my comments that we would communicate

Page 27

1 what we thought was a reasonable settlement proposal to
2 the United States; and then if they thought it was
3 worth sitting down to talk about it, we'd do that.

4 That's more than we've done so far. We've just
5 talked over the phone so far.

6 I'd need a couple minutes to talk to my clients
7 to see if they're interested in doing that. I can't
8 make that decision for them, whether they'd like to go
9 to a settlement conference right now or not. I
10 certainly could see its value and benefit.

11 THE COURT: Can you think of someone else
12 who might be able to moderate such a settlement?

13 MR. SEMANKO: There's some guy who is
14 marrying Miss Chenoweth. I think he could do a good
15 job.

16 THE COURT: For free?

17 MR. SEMANKO: I'm sure he would do it for
18 free. But I'm not sure we could get the United States
19 to agree to having Wayne Hage moderate the case,
20 mediate the case.

21 THE COURT: Does he happen to live in
22 Nevada?

23 MR. SEMANKO: Yes. He lives out of state,
24 too. But he does have a daughter who lives in Boise,
25 so he does travel here quite often.

Page 28

1 To be serious, my experience with the special
2 masters has been good. I don't know if they all have
3 experience in this and would not want to participate.

4 And my experience with the department has been
5 good. Mr. Spackman has been one who seems to encourage
6 settlements; and I think he would do a good job if we
7 decide to go that route.

8 I can't think of anyone else other than the
9 special masters at this point that we wouldn't incur
10 additional expense going that route as well as
11 litigation and maybe twice as well.

12 THE COURT: Sure. Well, Mr. Bramer, what
13 do you think we should do next in these five subcases?

14 MR. BRAMER: Your Honor, my suggestion to
15 the court would be: I will submit an initial
16 scheduling order to Mr. Semanko in the next week. We
17 will see if we can jointly agree to a scheduling order
18 for this case. If we cannot, we can submit separate
19 scheduling orders. We can then evaluate, depending on
20 this court's ruling on late objections, whether a
21 motion to consolidate is necessary, and to move forward
22 along those lines.

23 MR. SEMANKO: All I can say is that is not
24 consistent with the conversation that I had with
25 Mr. Bramer this morning. If that's the way he wants to

Page 29

1 August 2nd, but that I had heard that there were some
2 hearings on similar matters going on that day. And it
3 might be a good day to have a status conference or a
4 scheduling conference or whatever the court might want
5 to have. But I think it would be premature to submit
6 scheduling orders at this time.

7 MR. BRAMER: To address Mr. Semanko's
8 concern, if I may, Your Honor, and to clarify, I
9 believe I talked to Mr. Semanko. And what we had
10 agreed to is it seemed sensible for the court to rule
11 on the late objections prior to setting schedules.

12 What I am suggesting here is that we get together
13 and think about a schedule in this subcase, try to
14 agree to dates pending the court ruling on those late
15 objections. Should the court rule and allow those late
16 objections, nonetheless we would be prepared to submit
17 an order to this court to move forward in this
18 subcase.

19 THE COURT: Sure. It sounds like you're
20 right about getting, me getting my order out on the
21 late objections.

22 MR. SEMANKO: With that clarification, that
23 is what we discussed this morning. And that makes
24 sense.

25 THE COURT: Sure.

Page 31

1 proceed, that will be fine.

2 I would just as soon set this off. I can just
3 from the April 7th transcripts cite several instances
4 where the United States asks for 30 days and 60 days to
5 do nothing more than explore whether an SF5 can be
6 entered into, whether a report can be generated by the
7 department. And to suggest that we're trying to delay
8 this thing by asking for a mere 30 days or so to see
9 how this thing proceeds on our motions to file late
10 objections is unbelievable to me.

11 But if we want to go ahead and submit scheduling
12 orders, we can do that. I think it's pretty much a
13 waste of time when we don't have a decision on motions
14 to file late objections yet, and don't know what the
15 train is going to look like yet.

16 Again, this is the tail wagging the dog. This
17 allotment does cover this entire area. There are 12
18 private water right claims that have been claimed,
19 de maximus claims. Only one of those in five parts has
20 been recommended. So -- again, not to mention all the
21 federal claims that we tried to object to.

22 So I think it would be very premature to move
23 forward with this, the same as it was in Mr. Pickett's
24 case to move forward. I mentioned August 2nd not
25 because we're scheduled to come to the court

Page 30

1 MR. SEMANKO: At that time we may decide
2 ourselves whether we want to move to stay until the
3 other report comes out or whatever. But certainly I
4 don't think we can take the next step, whether it's
5 scheduling or us filing a motion to consolidate or
6 whatever, until we see what happens with the late
7 objections. So I agree with that assessment that we --

8 THE COURT: I don't think Mr. Bramer, and I
9 didn't take it to mean that he was trying to delay the
10 matter or you were trying to delay the matter. So I
11 never took it that way.

12 Just a point of clarification, the boundary
13 between 47 and 45 is Goose Creek?

14 MR. SEMANKO: And this is where we could use
15 some technical expertise. No, the boundary between the
16 West Side and the East Side Allotment is Goose Creek.
17 The boundary -- and I don't have it marked on here, but
18 it's somewhere over on the very west side of the map
19 for Basin 45 and 47.

20 I know that, for example, Piney Creek is in
21 Basin 47. It's not included on the claims for
22 Basin 47. So it at least goes over as far as about to
23 where 19 East is shown on the bottom of the map.

24 But I don't have that line -- I didn't use that
25 map to put this, these drawings on. But it is a

Page 32

1 smaller part of basin -- or of that allotment that's in
2 47. That's why there's only two claims filed, whereas
3 there are 10 claims filed in Basin 45 in the same
4 allotment, 10 here and 2 here. And one of the 2 has
5 been chopped up into five pieces.

6 And then Jared and Bruce Bedke's late objections
7 pertain just to the purple area. And then they also
8 have them in the blue area.

9 SCOTT BEDKE: If I may, Your Honor, the line
10 is the Trout Creek Ridge there that differentiates --
11 this is Scott Bedke -- between 47 and 45.

12 THE COURT: Good. Thank you. Is that near
13 Piney Creek?

14 SCOTT BEDKE: Right. Piney Creek would be in
15 47.

16 MR. SEMANKO: So it would be about where that
17 450 is on the bottom, working up from there, maybe a
18 little to the left of that along the line. In any
19 event, it's not all in one basin unfortunately.

20 MR. BRAMER: If I may, Your Honor, I think
21 the court should be careful not to be focused on where
22 the Forest Service draws its grazing allotment
23 boundaries, but rather where the claims at issue have
24 been filed and are before the court. In Basin 45 this
25 court was asked to stay the proceedings on competing

Page 33

1 claims until they were ordered out. That's on that
2 map, too. Basin 47 is on that map, too.

3 But as soon as we get into the administrative
4 boundaries the Forest Service uses and trying to
5 evaluate this process, it gets hopelessly complex. So
6 I would try to caution the court against mixing those
7 things up.

8 I think the department would probably agree with
9 that assessment. They've had to look at these
10 watersheds before.

11 Your Honor, one final comment. You asked about
12 what should you do. And I think a 16(k) order would be
13 appropriate. And if the court wishes to ask the
14 parties to submit their rationale why that would be
15 appropriate, I think it would get settlement
16 discussions off of square one.

17 I don't know that by August 2nd Mr. Semanko may
18 send me a letter; we may say that's not acceptable; he
19 may say too bad or that's not what we want to do.
20 That's that. I don't consider that to be constructive
21 settlement dialogue. I consider parties sitting down
22 across the table from each other potentially with a
23 mediator -- which I think will give some of the
24 claimants a little bit better feeling of fairness, and
25 Mr. Semanko can tell them this is a person who is

Page 34

1 impartial, this is not an United States person, this is
2 not somebody who's got an axe to grind with us -- I
3 think that's a much more constructive dialogue. And I
4 would encourage the court to send us down that road, if
5 we can.

6 MR. SEMANKO: Let's assume we do that. What
7 are we going to be talking about in settlement
8 discussions is my question. They have filed objections
9 to us. We have tried to file objections to them. But
10 certainly we cannot resolve something that we haven't
11 even -- the court hasn't decided whether we can be in
12 on yet.

13 So if we can discuss our objections to the
14 United States, that would certainly be a productive
15 discussion. But short of that, I'm not sure what we'd
16 order under 16(k) at this point. Just these subcases
17 and not anything dealing with the United States claims
18 is my problem, and doing it more than once again.

19 MR. BRAMER: Your Honor, we will be arguing
20 those late objections today. I'm assuming the court
21 will have a decision relatively soon on that. To set
22 up a 16(k) mediation, to make sure the mediator is
23 available, to set up some procedures to do that
24 certainly is going to take 30 to 45 to 60 days.

25 My point is if the process gets started, we may

Page 35

1 get to a result. If we fail to do that, I think we're
2 going to be back in this court on August 2nd with the
3 same arguments, looking at the same issues.

4 I don't believe a Class 2 subcase designation is
5 in any way required to have a 16(k) mediation. And I
6 think what we're going to do there is bog down in
7 additional paper. Now, should Mr. Semanko decide
8 that's the procedure he wants to utilize for whatever
9 other purposes, that's his choice.

10 MR. SEMANKO: My only concern was it didn't
11 look like a Class 1 subcase. And that's the only
12 reason I suggested Class 2. It's a little more
13 complicated than the run-of-the-mill Class 1. But I
14 could be wrong.

15 THE COURT: Well, frankly I'm not sure that
16 differentiation between classes 1 and 2 has a lot of
17 meaning when you get into a contested matter like
18 this. I think that was just for convenience for
19 administration purposes the reason that distinction was
20 made.

21 But when you talk about scope of the issues, we
22 are here. The court will do whatever it has to to
23 resolve the issues. And if it means handling it as you
24 would a Class 2 or Class 1, whatever it takes, we'll
25 take care of that.

Page 36

1 Mr. Spencer, does it make any difference from
2 your position as the independent expert to the court of
3 how these are handled basins together or separate?
4 MR. SPENCER: Well, Your Honor, I think that
5 there have been several routes that have been
6 suggested. I would suggest that if it is a matter that
7 we have such common issues that all the rights ought to
8 be considered together, then I would think that it
9 wouldn't mean much weight until the department has had
10 the opportunity to issue its recommendations on all
11 those rights.

12 And in that regard I would like to make a comment
13 about the discussion regarding delay and the concerns
14 being expressed that one side is trying to delay or the
15 other side is trying to delay or that the department,
16 by failing to recommend all of the rights at the
17 present time, is delaying the process. I think that
18 the proper perspective to apply here is that this
19 bifurcation has not caused delay. What the bifurcation
20 in effect has done has resulted in some of these rights
21 being reported two years ahead of where they otherwise
22 would have been.

23 And so it's not a matter that we are delaying the
24 process through the bifurcation. It is a matter that
25 we now have some rights that actually are way out in

Page 37

1 front of where they would have been had there not been
2 a bifurcation.

3 So I think that the department's perspective here
4 is that we aren't really talking about delay. We're
5 talking about are these proceedings premature at this
6 point. And therefore the department does not share the
7 concerns that we have to hurry up and get all this
8 stuff resolved right now. And I think we have complex
9 issues here that need to be looked at long and hard in
10 terms of how to posture them for the most efficient
11 possible resolution.

12 THE COURT: Well, before we close here, for
13 the record, do we have all of the Bedkes and the
14 Poultons to give me the list of the -- an exact list of
15 all of the claims they're filing a late objection to?
16 Because I think there's some confusion on that.

17 And then we found out our web site was down.
18 We're back up now. Everybody is up to speed.

19 MR. SEMANKO: Yes, Your Honor. And
20 Randy Bramer and I talked about this this morning. I
21 had understood that incorrectly, I guess, from the face
22 of what you asked for at the hearing from reading the
23 transcript.

24 I had understood that the confusion arose because
25 Jared Bedke and Bruce Bedke had used the list from the

Page 38

1 initial hearing on April 7th as the basis for filing
2 their objections; and there was some question because
3 there were a number of State-of-Idaho-objected-to water
4 rights on that, whether they really intended to object
5 to all those.

6 Jared has since provided an updated list, I
7 think, of 156 rather than 196 subcases that he intended
8 to object to. And I attached that to Scott Bedke's
9 reply or responsive brief in Basin 45. So I thought
10 that had resolved it.

11 Scott Bedke's motions were filed with a list
12 attached and, I think, speak for themselves. He didn't
13 intend, and our briefing indicates he didn't intend to
14 file objections to the breadth that the other Bedkes
15 had because he's not in the purple area. Scott is not
16 in the East Side Allotment; he's only in the West
17 Side.

18 So I think -- and we can resubmit that list from
19 what's on the objection that he filed. But that is his
20 list.

21 I understand the Poultons have an updated list;
22 and we can provide that at the 3 o'clock hearing, I
23 believe, if I can check with them. I think it's very
24 similar to Jared and Bruce's list.

25 THE COURT: Okay. What I just want to make

Page 39

1 sure is I've got the current list and they're
2 accurate --

3 MR. SEMANKO: Well, I apologize for the
4 confusion. I thought the confusion was only with
5 regard to what Jared and Bruce had filed, and not with
6 the others. But we'll get that straightened out.

7 THE COURT: Okay. On these five that we're
8 considering now at the initial hearing, I'll certainly
9 take some of these ideas under consideration. And I'll
10 come up with a terrific plan that's going to solve all
11 the problems here. And I'm hoping everybody agrees
12 with it. But if you don't, maybe we can come up with
13 some other later on. But the point is we've got to get
14 these water rights moved along. They can't sit
15 forever.

16 MR. SEMANKO: I agree with that, Your Honor.
17 I just don't want to have to litigate things more than
18 once is all we're asking for.

19 THE COURT: Sure. Well, counsel, is there
20 anything further on these five?

21 MR. BRAMER: Your Honor, I have nothing
22 further.

23 THE COURT: Mr. Semanko?

24 MR. SEMANKO: No. Thank you.

25 THE COURT: Our independent expert?

Page 40

1 MR. SPENCER: Nothing further, Your Honor.
 2 THE COURT: You're pretty independent
 3 today, aren't you? Well, if there's nothing further,
 4 then we'll go off the record. Thank you, counsel.
 5 (PROCEEDINGS ADJOURNED)
 6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25

Page 41

1 TRANSCRIBER'S CERTIFICATE

2 STATE OF IDAHO)
 3)
 4 County of Twin Falls)
 5
 6

7 I, DUANE J. SCHNEBERGER, duly appointed,
 8 qualified and acting official reporter of the Fifth
 9 Judicial District of the State of Idaho, DO HEREBY
 10 CERTIFY that the foregoing constitutes a complete
 11 transcription of the requested portion of the
 12 proceedings in the foregoing matter from electronic
 13 recording tapes, to the best of my ability, said
 14 transcript consisting of pages 1 through 41, inclusive.

15 IN WITNESS WHEREOF, I have hereunto set my hand
 16 this 8th day of July, 1999.

17 
 18
 19 DUANE J. SCHNEBERGER, Idaho CSR No. 5, Twin Falls, ID
 20
 21
 22
 23
 24
 25

Page 42

1 THE COURT: Okay. Thank you. Is there
2 anyone else here who wanted to speak on the motions
3 before we go back to hear from the United States?
4 MR. TUTHILL: Your Honor, this is
5 Dave Tuthill. Could I say some words, please?
6 THE COURT: Well, let's see, Mr. Tuthill,
7 we're going to have to kind of walk carefully here.
8 AO1 and rules of civil procedure prevent any sort of
9 testimony by telephone. I suppose you'd be free to
10 make a statement in support of the letter you sent.
11 MR. TUTHILL: This would be in the form of
12 just an administrative consideration relative to how
13 we're looking at our process on this, Your Honor.
14 THE COURT: Oh, from a pure administrative
15 matter.
16 MR. TUTHILL: That's the way I'm looking at
17 it.
18 THE COURT: Does counsel have any objection
19 to that sort of statement?
20 MR. SEMANKO: No.
21 MR. BRAMER: No objection, Your Honor.
22 THE COURT: Nothing from the United States
23 or from Mr. Semanko.
24 Any of the private parties have any objection to
25 Mr. Tuthill making a statement here?

Page 43

1 (NO RESPONSE)
2 THE COURT: No objection. Go ahead,
3 Mr. Tuthill. We're glad to hear from you.
4 MR. TUTHILL: Thank you, Your Honor. As
5 Norm Semanko said, we anticipated as we bifurcated this
6 process that there would be some problem areas that
7 could arise. And I can say that in the bifurcation
8 process in most basins it's worked quite well. We have
9 found here in basin 45 and perhaps basin 47 that
10 there's a concern.
11 Initially — and I did speak with Mr. Scott Bedke
12 some time ago where he raised the objection to the
13 Forest Service rights. And he actually filed the late
14 motion which I spoke in behalf of when it came before
15 the court. Because from our perspective, I had
16 mentioned to him that it would be very appropriate to
17 look at both the Forest Service rights and his claims
18 in one forum.
19 So from my standpoint from the git-go in this
20 situation where we've reported some of the claims, the
21 Forest Service claims, and where other claims that
22 might be overlapping and influencing those in some way
23 have not been reported, from my standpoint it's been
24 very appropriate to stay the action in the earlier ones
25 waiting for the others to catch up.

Page 44

1 Now, Mr. Semanko suggested another alternative
2 today that, on the remand, that from my standpoint
3 sounds like a reasonable alternative. Mr. Semanko
4 questioned why we didn't discuss it last week. I don't
5 know that it really came up then in our discussion. I
6 think that's been new since then.
7 So from my standpoint, from the department's
8 perspective, either a stay for the Forest Service,
9 action on the Forest Service claims or a remand of some
10 kind back to the department would be fine and very
11 appropriate to allow a review of both of the rights at
12 once. And when I say "a review," it's a review by the
13 parties of both of the rights at once as they go
14 through the objection period. So we would have no
15 problem with that, Your Honor.
16 THE COURT: Well, Mr. Tuthill, I know that
17 you made some gargantuan efforts here to move this SRBA
18 along; and I know you're looking for ways to help
19 matters proceed. And I don't think for a minute that
20 your idea of reporting these separately had any
21 nefarious purposes; and I don't think any of the
22 parties here are suggesting that. I think just that
23 the choice was made back in the old days, and we've had
24 some unintended consequences here. And I guess now the
25 question is how do we resolve these differences of

Page 4.

1 opinions of how we can best proceed.
2 And I appreciate your comments. Anything
3 further, Mr. Tuthill?
4 MR. TUTHILL: No. Thank you, Your Honor.
5 THE COURT: Thank you. Mr. Bramer or
6 Mr. Brown.
7 MR. BRAMER: Thank you, Your Honor. Just a
8 quick question for Mr. Tuthill.
9 I have in front of me a June 29th, 1998 letter by
10 Mr. Shaff. And Mr. Tuthill had referred to
11 conversations with Mr. Bedke, Scott Bedke, that is.
12 Mr. Tuthill, at any time when you talked to
13 Scott Bedke did he mention the name of any of the other
14 claimants to these water rights in either basin 45 or
15 47 who had similar concerns?
16 MR. SEMANKO: I'm going to object. It's — I
17 didn't know he was on the stand.
18 THE COURT: Let's see. Mr. Bramer, I know
19 you're in a tough spot being a lawyer —
20 MR. BRAMER: Your Honor, if I may. My
21 bottom line point is this: This letter — you asked a
22 question did Mr. Bedke expect to come in to this
23 courtroom with these claims all being handled
24 together. Certainly as of June 29th, 1998, after
25 talking with the department, he must have had some

Page 46

1 concerns.

2 If you look at the late objection, it's
3 Scott Bedke, and Scott Bedke only, filed. He's the
4 sole signatory to that objection, not the four people
5 that filed the original claims in 1989. It was on
6 July 13th, 1998, approximately two weeks after this
7 letter, which would suggest, Your Honor, the parties
8 came in here fully aware of what was at issue.

9 Second, Your Honor, I am — how do I put this?
10 Mr. Semanko is outraged? I am outraged and
11 embarrassed.

12 We joined in this motion to try to be fair to
13 Mr. Bedke to get his claims in front of this court. My
14 understanding was the position we were taking is that
15 the department should take these claims and report them
16 out. That was my understanding and the position we
17 were taking.

18 We went into a meeting. I was informed: No; if
19 it's going to be a problem for the department, we
20 rather stay the litigation.

21 We would just as soon of moved forward and not
22 dealt with that issue at all; taken our claims, taken
23 our objection and gone forward with what we had when we
24 were here on April 7th. Rather, we went out of our way
25 to assist the claimants in getting a fair hearing by

Page 47

1 reporting out his claims, coming to this court with a
2 motion to ask the department to report those claims
3 out.

4 And what am I hearing today for the first time
5 from Mr. Semanko? Take the whole thing back; let us
6 file objections. First, let us file claims, claims to
7 sources that were filed 10 years ago by the same
8 claimants who are going to come into this adjudication
9 and come into these subcase hearings and say, and I
10 quote, we've been on this land since 1889; we know it
11 better than the Forest Service; but, however, we have
12 overlooked a bunch of sources; we have no reason for
13 saying why we did that; but rather we want to come in
14 now; and we want you to allow us to file these late
15 claims; and we also want you to file late objections.
16 And they're nine months late; we know that, Your Honor;
17 plus there's a bunch coming because we didn't know
18 because of this convoluted process.

19 What is convoluted here? Has anybody stood up
20 and said they didn't get the director's report? Has
21 anybody stood up and said they didn't read the section
22 that said what if I disagree with this water right?
23 Has anybody given us any reason for not filing late
24 objections? Why didn't they file these claims?

25 The fact is you recommit this, what you're doing

Page 48

1 is opening the door to everybody to just ignore the
2 court procedures that this court and the statutes set
3 years ago. And quite frankly I am sitting here just
4 amazed that I'm put into this position.

5 I tried to be fair. I tried to give Mr. Bedke
6 his best shot. We're going to argue the late
7 objections.

8 But now I have an attorney in here arguing start
9 from scratch; start all over again. It is unfair. It
10 ignores the court procedures. It is unfair to every
11 other claimant who has been in this adjudication since
12 this thing was started. We have court procedures. We
13 have plain English notices. We have had nobody telling
14 us why they didn't understand.

15 Why is this so convoluted? Did people not get
16 notice? Did people not read notice?

17 Clearly Mr. Scott Bedke got it. He knew enough
18 to go down to IDWR and say report my claims out. They
19 said no. He came into the hearing. He understood.
20 Mr. Bramer, I don't think I'm being treated fairly; my
21 claims haven't been reported out.

22 Mr. Bedke, fine; let's take it to the court;
23 maybe — and this is what I thought we were going to do
24 here today. The court would order the department to
25 comply with its statutory obligations to report out the

Page 49

1 claims and move these cases along.

2 Rather, now we're going to sit in a stay. But
3 not only are we going to sit in a stay, the attorney,
4 Mr. Semanko, wants to open the whole thing up to allow
5 everybody who, quote, forgot, for some reason don't
6 know, as is evidenced by the Poultons objections,
7 please find enclosed our motions for late objections
8 with no reason stated, no basis stated, nothing.
9 Simply put, Your Honor: We forgot; it was convoluted;
10 we didn't understand. No affidavits. Nothing to say
11 we were told we had to file these; we didn't; here's
12 why.

13 Your Honor, I would suggest right now — I'm not
14 even going to reserve judgment on this recommitment
15 procedure. First time I heard it today. But I do know
16 one thing. It looks like a thinly veiled attempt to
17 allow people who failed to do their homework,
18 investigate their claims, to file against us even
19 though they've had 10 years.

20 It's been 10 years since those claims were
21 filed. And in 10 years they haven't discovered these
22 errors. Not until the department two days ago hands us
23 this list are all of a sudden people going: Oh, we
24 meant to file on everything; we might have missed
25 something. It has been nine months, Your Honor, on

Page 50

1 be two different names, but the same place.
 2 MS. BROWN: Okay. And what you're telling
 3 me is that some of these co-owners or cooperatives
 4 (inaudible) Owens Corral Creek.
 5 VOICE: Owens Corral Spring would be
 6 the head where we trap the collection boxes and the
 7 (inaudible) and also surface water that doesn't get
 8 into the head (inaudible). But these descriptions
 9 would show that we're tracking it down through its
 10 course as well as the, where the (inaudible) and the
 11 collection box. You aren't going to get all the water
 12 in the pipeline, so --
 13 THE COURT: Miss Brown, do you know the
 14 status of 02789?
 15 VOICE: It should be (inaudible) right
 16 now. Because Scott Bedke has filed an objection to
 17 it.
 18 MS. BROWN: I'll have to look at that.
 19 THE COURT: And who is the claimant of
 20 that --
 21 VOICE: The United States acting
 22 through --
 23 THE COURT: 02789?
 24 VOICE: Yes.
 25 VOICE: There's no private objection to

Page 47

1 that claim.
 2 THE COURT: No private objection, but has
 3 it been decreed, partially decreed?
 4 (Inaudible).
 5 VOICE: There is too a private
 6 objection (inaudible).
 7 THE COURT: We're just looking at our
 8 calendar here. 02789, that was set for hearing at
 9 2 o'clock in another batch.
 10 VOICE: Oh, okay.
 11 THE COURT: 02789 (inaudible). But you
 12 think these three water rights, 10332, 02789 and 07446,
 13 they're all to the same water right?
 14 VOICE: Correct.
 15 MS. BROWN: Your Honor, I believe that the
 16 Forest Service filed individual claims to individual
 17 water rights (inaudible). And this here, what the
 18 Bedkes intended to do was to file for all of those
 19 (inaudible) under one claim.
 20 VOICE: It goes back to what I tried to
 21 bring up earlier and yesterday, is that -- and one of
 22 the same points that Mr. Whiteley brought up this
 23 morning, is that we filed under the old method, you
 24 know, led through the process by IDWR. And then that
 25 method was changed.

Page 48

1 And so when the Forest Service filed, they filed
 2 on each one separately, a separate claim, rather than
 3 have -- and I don't know if that's called de minimis or
 4 non-de minimis. But whatever they did, we did the
 5 other one. And so therefore they were all set -- you
 6 know, they were all set aside. And I think these all
 7 add to the confusion that we're experiencing right
 8 now.
 9 MS. BROWN: This particular water right is
 10 marked set aside. And this particular water right was
 11 recommended as (inaudible) in the Forest Service under
 12 their pipeline.
 13 VOICE: Correct.
 14 MS. BROWN: (Inaudible).
 15 VOICE: All of ours were set aside.
 16 All the private ones were, but the Forest Service's
 17 were put on the director's reports. And so that's
 18 where our objection kinda comes in. Because ours are
 19 still out there in the ozone somewhere to be included
 20 on a subsequent director's report, we were told, when
 21 they were going to handle the irrigation cases.
 22 MS. BROWN: In this particular case,
 23 Your Honor, 45-10332 was recommended in this director
 24 report. It did not (inaudible) to be reported later.
 25 THE COURT: How was it recommended?

Page

1 MS. BROWN: It was recommended as 45-7446
 2 (inaudible).
 3 THE COURT: But 10332 was recommended for
 4 disallowal because it was recommended under 7446.
 5 MS. BROWN: Yes.
 6 THE COURT: Okay.
 7 MS. BROWN: And (inaudible) four claims on
 8 this claim (inaudible) pipelines and Forest Service as
 9 (inaudible).
 10 THE COURT: Mr. Bramer, do you want to add
 11 something?
 12 MR. BRAMER: Your Honor, we filed a claim.
 13 We filed an objection. We worked with the department.
 14 We filed an SF5. Normally that would resolve this
 15 matter.
 16 However, I think given the confusion that these
 17 folks have had with their water rights in the
 18 South Hills, Mr. Bedke, Mr. Whiteley, you're going to
 19 hear over and over again there's a great deal of
 20 confusion. I think in all fairness to them, even
 21 though we've jumped through all the technical hoops in
 22 this court and should have our water right decreed,
 23 that I'm more than willing, if they would like to file
 24 a late objection and make the objection to our claims
 25 so we can sit down and work through this, that would

Page: