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WATER RESOURCES

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UNITED STATES OF AMERICA

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

In Re SRBA	)	Subcase Numbers: See attached Exhibit A
	)	
Case No. 39576	)	UNITED STATES' RESPONSIVE
_____	)	BRIEF

I. INTRODUCTION

On March 16, 2005, Bruce Byron Bedke and Jared K. Bedke (hereinafter "Bedkes") filed Objector's Opening Brief in the above-captioned subcases arguing that the Special Master erred in denying Motions to File Late Objections to 64 claims for stockwater filed by the United States Department of the Interior, Bureau of Land Management (the "BLM"). Even though Bruce Bedke was specifically notified that the BLM's stockwater claims were reported by the Idaho Department of Water Resources (the "IDWR") and that objections had to be filed by July 3,

1998, the Bedkes' failed to review the Director's Reports and file timely objections. The Bedkes' have failed to show good cause for filing objections over nine months after the time for filing objections expired and have failed to plead detailed facts that constitute a meritorious position. Therefore, the District Court should deny the Bedkes' motions.

II. FACTUAL BACKGROUND.

The BLM filed numerous *de minimis* stockwater claims in Basin 45 for water sources located on public lands^{1/} in order to provide a reliable source of water for the care and management of livestock authorized to use the public lands for livestock grazing. On March 20, 1998, IDWR filed an Affidavit of Service: Notice of Filing Director's Report for Domestic and Stockwater for Reporting Areas 7 and 10 (IDWR BASINS 41, 43, and 45). Memorandum In Opposition to Motions to File Late Objections, In Re SRBA, Case No. 39576, Subcases 45-12475 *et al.*, Attachment 1.^{2/} The BLM's Basin 45 *de minimis* stockwater claims were reported in the Director's Report. Six of Bruce Bedke's *de minimis* water right claims were reported in the Director's Report. Attachment 1 at 10. IDWR's Adjudication Bureau Chief attested as follows:

The Notice and IDWR's individual recommendation for each claimant's domestic and stockwater right(s), were served on each of the persons on the Affidavit of Mailing, attached as Exhibit 2 and incorporated by this reference

Attachment 1 at 3. Bruce Bedke was served with the Notice of Director's Report Reporting

^{1/} "The term 'public lands' means any land and interest in land owned by the United States . . . and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership" 43 U.S.C. § 1702(e).

^{2/} Attachments to this previous Memorandum are hereinafter referred to as "Attachment 1, Attachment 2, etc."

Areas 7 and 10 for Small Domestic and Stock Water Rights (Affidavit of Service, Exhibit 1 (the "Notice")) on March 2, 1998. Attachment 1 at 10.

Jared Bedke became an SRBA party on May 28, 1999 when he filed water right claim numbers 45-12891^{3/} and 45-12892. Jared Bedke's address is identical to Bruce Bedke's address. See Attachment 1 at 10, Attachment 4 at 2, and Objector's Opening Brief at 1. To the best of BLM's knowledge, Jared Bedke is not an authorized grazing permittee on public lands.

The Notice states:

INSTRUCTIONS FOR REVIEWING THE RIGHTS OF OTHERS

The complete Director's Report contains recommendations to the SRBA Court on your water right and all other small domestic and stock water rights in your area. The Court will decide how it will decree all water rights. The Director's recommendations in the full report are listed in two sections of the report:

- 1) **List of Recommended Water Rights - -**
Water right recommendations are listed alphabetically by source and then chronologically by priority date within each source.
- 2) **List of Claims Recommended to Be Disallowed - -** Water rights recommended to be disallowed are listed numerically by water right number. A short statement of the reason for IDWR's recommendation for disallowance is provided.

^{3/} This is a *de minimis* stockwater claim located on land owned by Bruce Bedke. If Jared Bedke contends that a stockwater Claimant must own the livestock that actually consume the water, then he did not comply with his own standards because he did not provide proof to IDWR that he owned the livestock that actually consume the water from the source he claimed. See Memorandum Decision and Order on Challenge; Order or Recommitment, In Re SRBA, Case No. 39576, Subcases 47-16433 *et al.* (March 22, 2005) at 2 and 14. Furthermore, Jared Bedke filed these claims nearly 15 months after the Director's Report for small domestic and stockwater rights in Basin 45 was filed with the SRBA Court.

Also included in the complete Director's Report are descriptions of the United States' claims for domestic and stockwater under federal law. The Director does not investigate these claims and makes no recommendation whether they should be granted or not. Sometimes the United States claims one right under both federal and state law. These are called "dual based" claims.

If you want to review someone else's water right you need to look at the complete Director's Report, which is available at the SRBA courthouse in Twin Falls and the locations listed on the third page of this notice. Copies of the report can be made, but you may be charged for copying and mailing.

INSTRUCTIONS FOR TAKING A WATER RIGHT CLAIM TO COURT

What do I do if I disagree with a recommendation or a federal water right claim?

If you disagree with any element of the recommendation for your water right or anyone else's water right and want to be heard in court, file an objection with the SRBA Court. Objections must be made on the standard objection form available from any IDWR office or from the SRBA Court.

Your objection must be **received** by the SRBA Court on or before **July 3, 1998**.

What do I do if someone else objects to my water right recommendation?

If someone files an objection to your water right, or anyone else's water right, you may file a response to that objection. Responses to objections must be made on the standard response form available from any IDWR office or from the SRBA Court.

Your response must be **received** by the SRBA Court on or before **September 1, 1998**.

What do I do if I want to participate in the court case on someone else's water right?

If you want to be involved in the court case on any water right in the Director's Report, you must file either an objection or a response by the dates listed above.

What happens if there are no objections to a water right?

After the deadline for filing objections, IDWR will file a list of all water right recommendations with no objections. The SRBA Court will hear the uncontested recommendations on **September 1, 1998, at 10:00 A.M.** at the **SRBA Courthouse**. Partial decrees will be issued following this hearing.

How will I know about the proceedings on water right recommendations to which objections were filed?

A notice will be mailed to you for court dates on your water right or for those where you filed an objection or response. You will not receive notice of court dates on any other water right recommendations. (See Note on following page.)

Note: The SRBA Court publishes a monthly Docket Sheet listing all objections and responses filed. It does not list court dates for individual water right cases, but provides general information helpful to all participants in the SRBA.

The Docket Sheet is available at your county courthouse and all IDWR offices, or you may subscribe by contacting the SRBA Court or IDWR. The annual subscription is \$7.50.

Attachment 1 at 6-8. The Bedkes did not file timely objections to any of BLM's *de minimis* stockwater claims in the Basin 45 small domestic and stockwater Director's Report at issue here.

Bruce Bedke's water right claim numbers 45-10505 and 45-10506 are listed on the Affidavit of Service (Attachment 1 at 10), and IDWR's Adjudication Bureau Chief attested that IDWR's individual recommendations for these claims were properly served on March 2, 1998 (Attachment 1 at 3). Water right claim numbers 45-10505 and 45-10506 are two of Bruce Bedke's *de minimis* stockwater claims that designate public lands as places of use. Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10505 at 5 and Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10506 at 5. On July 2, 1998, the BLM mailed original objections to Bruce Bedke's stockwater right claim numbers 45-10505 and 45-10506 to the SRBA District Court for filing. See Domestic and Stock

Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10505 at 4 and Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10506 at 4.^{4/} On July 2, 1998 copies of the objections were mailed to Bruce Bedke. Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10505 at 4 and Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10506 at 4.

On April 7, 1999, over nine months after the mandatory date for filing objections had elapsed, the Bedkes filed documents purporting to object to the subcases listed on attached Exhibit A. See Attachments 2, 3, 4, and 5.^{5/} In letters to the District Court, the Bedkes stated:

After having been informed in 1987 that all water rights in the Snake River basin had to be filed upon for the new adjudication, I did so on May 24, 1989. I filed according to the directions set forth at the time. It has recently come to my attention that since my filing, the IDWR changed the format. Since my filings were filed under the original format, they were set aside and did not make the current directors report.^{6/} I have been assured by the IDWR that my filings will be included in a subsequent directors report when the irrigation claims are decided for my basin (45). The Federal Government's claims to the same waters were, however, included on the current directors report. I feel that this doesn't place me on equal footing with the Federal Government, since their filings will have been partially decreed before mine have even been presented to the court. At this time I am requesting permission to file late objections to these disputed claims in order

^{4/} Both objections state: "The United States of America, through the Bureau of Land Management, is the owner of the land upon which use is claimed. The claimant does not have a valid water right with the elements claimed." Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10505 at 2 and Domestic and Stock Water Right Objection, In Re SRBA, Case No. 39576, Subcase 45-10506 at 2.

^{5/} Bedkes' Reasons Supporting Objections are: (1) "Priority Date Discrepancy; Cannot Claim Stockwater under Idaho Statute (42-114); License's (sic) issued on prior appropriated waters." Attachment 3 at 3; and, (2) "Priority Date Discrepancy; Beneficial use (Stockwater) cannot be claimed under Idaho Statute (42-114); Licenses Issued on prior appropriated waters." Attachment 5 at 3.

^{6/} At least two of Bruce Bedke's *de minimis* stockwater claims on public lands were reported in the Basin 45 Director's Report, thus, this statement is clearly erroneous.

to show the court that these Federal claims are disputed and should not be decreed as a matter of course.

Attachments 2 and 4 at 2.⁷ The Special Master considered the documents to be Motions to File Late Objections. See Attachment 9. The Motions to File Late Objections were briefed, argued, and taken under advisement. On January 5, 2004, after a lengthy stay of proceedings on Bedkes' Motions to File Late Objections, the Special Master lifted the stay and denied the Motions. Order Vacating Stay, Order Denying Motions to File Late Objections and Recommendation of Permissive Review, In Re SRBA, Case No. 39576, Subcases 45-12475 *et al.* (hereinafter "Recommendation"). On January 19, 2005, the District Court granted permissive review, set the schedule, and set a hearing on permissive review. Order Granting Permissive Review of Special Master's Order Denying Motion to file Late Objection; AO 1 9.e.; Scheduling Order and Notice of Hearing on Permissive Review, In Re SRBA, Case No. 39576, Subcases 45-12475 *et al.*

III. ARGUMENT

A. Standard of Review for Filing Late Objections

The Idaho legislature provided specific instructions governing the filing of objections to water rights in IDWR's Director's Reports:

(1) Any Claimant who desires to object to a water right . . . shall file an objection with the district court within the time specified in the notice of filing of the director's report.

IDAHO CODE § 42-1412 (emphasis added); Administrative Order 1 (hereinafter "AO1"),

4.d.(1)(d) ("The objection or response must be received by the court by the deadline

⁷ Curiously, Jared Bedke did not file water right claims in the SRBA until about six weeks after he filed his letter and objections to BLM's claims with the District Court.

specified.”)⁸ The words “shall file” leave no doubt that the Idaho legislature specifically and purposefully provided a short time frame for SRBA parties to review Director’s Reports and file objections. The legislative requirement to file a timely objection is mandatory.⁹ Furthermore, the District Court specifically provided:

Any objections which a de minimis claimant or any other claimant may have to any and all claims being adjudicated in this proceeding must be timely raised in this proceeding in accordance with Idaho Code § 42-1412 (Supp. 1988) or forever be barred.

Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses, *In Re SRBA*, Case No. 39576 (Jan. 17, 1989) at 3. The District Court strictly applied the mandatory requirement to file timely objections when it summarily denied the United States’ motion for an extension of time to file objections in Reporting Area 6 (Basins 51, 55, 61). *Order Denying United States’ Motion for Extension of Time to File Objections, In Re SRBA*, Case No. 39576 (Basins 51, 55, and 61) (Dec. 4, 1997).

The District Court has traditionally applied the following standard to motions for leave to file late objections:

⁸ In 2000, the Idaho Supreme Court recognized that “A.O.1 § 4b provides an *absolute* rule for responses: ‘The objection or response must be *received* by the court by the deadline specified.’” *State v. United States*, 996 P.2d 806, 809 (Idaho 2000) (quoting AO1).

⁹ “Ordinarily in construing a statute, words will be given their common and ordinarily understood meaning. . . . This Court has interpreted the meaning of the word ‘may’ appearing in legislation, as having the meaning or expressing the right to exercise discretion. . . . When used in a statute, the word ‘may’ is permissive rather than the imperative or mandatory meaning of ‘must’ or ‘shall.’” *Rife v. Long*, 908 P.2d 143, 150 (Idaho 1995) (citations omitted). “The word *shall*, when used in a statute, is mandatory.” *Goff v. H.J.J. Co.*, 521 P.2d 661, 663 (Idaho 1974). “A statute should be construed so that effect is given to its provisions, and no part is rendered superfluous or insignificant.” *Petersen v. Franklin County*, 938 P.2d 1214, 1219 (Idaho 1997).

In subcases for which partial decrees have not been entered, the legal standard for filing a late objection to a water right claim in the SRBA has been historically determined pursuant to the standard set forth in AO1 for filing late claims since AO1 does not expressly provide a standard for reviewing late objections. A motion to file late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *See* AO1 § 4(d)(2)(d) (sic) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho courts apply a “good cause” for untimeliness standard. I.R.C.P. 55(c). The “good cause” standard is a more lenient threshold than the Rule 60(b) standard. [*McFarland v. Curtis*, 854 P.2d 274, 279 (Idaho 1993)]. The I.R.C.P. 55 (c) standard takes into account the following factors:

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

Memorandum Decision and Order on Motion to Set Aside Partial Decrees, *In Re SRBA*, Case No. 39576, Subcases 55-02373 *et al.* (hereinafter “LU Ranching”) (May 1, 2001) at 12; see also Order on Motion to Set Aside Partial Decrees and File late Objections; Order of Reference to Special Master Cushman, *In Re SRBA*, Case No. 39576, Subcases 65-07267 *et al.* (hereinafter “A.L. Cattle”) (January 31, 2001) at 6-7 and Memorandum Decision and Order on Challenge; Order of Recommitment, *In Re SRBA*, Case No. 39576, Subcases 47-16433 *et al.* (hereinafter “Bedke I”) (March 22, 2005) at 6. As demonstrated below, even under the standard traditionally applied to motions to file late objections, the Bedkes are not entitled to relief from the time requirements for filing objections imposed by the SRBA statutes and AO1.

B. Even If The Special Master Applied The Incorrect Standard, The District Court Should Decide The Issue On The Evidence In The Record

In Bedke I, the District Court held that the Special Master “applied incorrect criteria in determining whether good cause existed.” Id. at 11. The Special Master applied identical criteria when he denied the Bedkes’ Motions to File Late Objections in these subcases.

Recommendation at 5. However, there is no need to remand these subcases to the Special Master. The District Court may decide the issue on the evidence before it by applying the criteria set forth in Bedke I at 11-14. See Idaho R. Civ. P. 53(e)(2) and AO1, 13.f. Even when the Bedke I criteria for reviewing the Bedkes’ motions are applied to the facts in the record, the Bedkes are still not entitled to file untimely objections to BLM’s stockwater claims.

C. The Bedkes Have Not Established Good Cause For Filing Untimely Objections

The Bedkes assert that they were confused by the entire SRBA process, and therefore they should be excused from complying with the mandatory requirement of filing timely objections. Objector’s Opening Brief at 2-6. The totality of the circumstances counsel otherwise. Indeed, the facts show that the Bedkes’ failure to file timely objections was willful. See Bedke I at 12.

Jared Bedke was not even an SRBA party until May 28, 1999, which is nearly 15 months after the Director’s Report for Basin 45 was filed with the SRBA District Court. Bruce Bedke could not have been overly confused by the process since he filed *de minimis* claims for stockwater located on public lands, and those claims were reported in the Basin 45 Director’s Report along with the BLM’s *de minimis* stockwater claims that are at issue here. Bruce Bedke was served with the Notice and the Notice specifically stated that United States’ claims were reported in the Director’s Report for Basin 45 domestic and stockwater. The Notice stated that in

order to be heard in court, a timely objection “must” be filed, and the “objection must be received by the SRBA Court on or before **July 3, 1998.**” Attachment 1 at 7. The BLM filed timely objections to Bruce Bedke’s *de minimis* Basin 45 stockwater claims located on public lands, and stated that because the United States owns the land on which the claims are located, the claims are not valid. Given the totality of the circumstances, the Bedkes’ contention that, for several reasons, they remained blissfully ignorant of the BLM’s stockwater claims has little merit. Cf. LU Ranching at 28. The Bedkes should have reviewed the Director’s Report and filed timely objections. They did not. Therefore, the absolute rule provided in AO1 and the mandatory legislative requirement to file timely objections should be applied to the Bedkes’ motions because they have completely failed to show good cause for filing untimely objections.

Without a doubt, Bruce Bedke was notified that stockwater claims in Basin 45 had been reported. He was notified of the proper process for filing objections. He was notified of the date objections had to be filed. He was notified that the claims of others, including the claims by the United States, were reported. He was notified of where he could review copies of the Basin 45 Director’s Report, and he was notified where he could obtain objection forms. Moreover, at the time the BLM filed timely objections to Bruce Bedke’s reported *de minimis* stockwater claims, he was aware that stockwater claims on public lands were at issue.¹⁰ Instead of reviewing the

¹⁰ “Furthermore, although LU did not file objections to the United States’ claims, the United States filed objections to fifteen of LU’s claims to water rights located on grazing allotment lands. In accordance with SRBA procedure, LU was served with actual notice of the United States’ objections. The stated basis for the objections was that [the] United States owned the land on which the grazing allotments were situated and therefore LU did not have valid water rights as to those particular lands. The objections were filed December 5, 1997. Based on the reasoning contained in the United States’ objections, it should have become apparent to LU that the ownership of water rights on all of LU’s grazing allotments in basin 55 would be at issue.” LU Decision at 27. The same reasoning applies here. Based upon BLM’s objections to Bruce

Basin 45 Director's Report and filing timely objections, the Bedkes waited over nine months to review the Director's Report and discover BLM's *de minimis* stockwater claims, then file motions to file late objection. The Bedkes' conduct shows indifference to actual notice, unreasonable delay in reviewing the Director's Report, and a complete lack of diligence in promptly seeking relief. Most assuredly, the Bedkes' irrefutable failure to file timely objections was a willful disregard of the requirements set forth in the Notice, the absolute rules set forth in AO1, and the mandatory deadlines set forth in SRBA statutes. Thus, the Bedkes' conduct lacks the requisite showing of good cause for filing late objections. Therefore, the District Court should summarily deny the Bedkes' Motions to File Late Objections and allow the stockwater claims at issue here to proceed towards partial decree, as it should have done over six years ago. See Attachment 1 at 7 ("The SRBA Court will hear the uncontested recommendations on September 1, 1998, at 10:00 A.M. at the SRBA Courthouse. Partial decrees will be issued following the hearing.").

**D. The Bedkes' Motions Should Be Denied Because
They Failed To Allege A Meritorious Position**

1. The BLM's claims based upon PWR 107 are undoubtedly valid, therefore, the Bedkes could not allege a meritorious position

In order to be entitled to the relief sought, the Bedkes are required to plead detailed facts which, if established, would constitute a meritorious defense to the entry of default. Reeves v. Wisenor, 629 P.2d 667 (Idaho 1981); McFarland, 854 P.2d at 277; Hearst Corp. v. Keller, 592

Bedke's *de minimis* stockwatering claims on a BLM grazing allotment, it should have become apparent to the Bedkes that the ownership of stockwatering rights on all grazing allotments would be at issue. Thus, the Bedkes have no excuse for waiting nine months to review the Basin 45 Director's Report, discover BLM's stockwatering claims, then file untimely objections.

P.2d 66, 68 (Idaho 1979). Because the Idaho Supreme Court has already determined that claims based upon Public Water Reserve 107 ("PWR 107") are valid, the Bedkes did not, and could not, allege a meritorious position that challenges BLM's stockwater claims based upon PWR 107.

See United States v. State, 959 P.2d 449 (Idaho 1998); LU Ranching at 30-31. Therefore, even if the Bedkes' had met the "good cause" standard for filing untimely objections, which they did not, the District Court should deny the Bedkes' motions in the subcases where water right claims are based upon PWR 107.

The following BLM claims were reported in the Basin 45 Director's Report as dual based claims:

45-12475	45-12550	45-12780	45-12797	45-12813
45-12493	45-12551	45-12781	45-12801	45-12814
45-12495	45-12613	45-12782	45-12802	45-12819
45-12499	45-12615	45-12783	45-12803	45-12820
45-12515	45-12632	45-12786	45-12808	45-12821
45-12517	45-12636	45-12787	45-12809	45-12822
45-12527	45-12654	45-12788	45-12810	45-12823
45-12549	45-12656	45-12790	45-12811	45-12827

The state law basis is prior appropriation and beneficial use with a priority date of Jan. 1, 1873, modified to June 28, 1934 under settlement with the State of Idaho and others. See Stipulation to Resolve Objections, In Re SRBA, Case No. 39576, Consolidated Subcase Numbers 23-10859 *et al.* at 3; see also Stipulation and Joint Motion for Order Approving Stipulation, In Re SRBA, Case No. 39576, Subcase Numbers 37-02809 *et al.* at 4. The federal reserve basis is PWR 107 with a priority date of April 17, 1926. Because the federal reserve basis is valid, the Bedkes did not, and could not have, alleged detailed facts which, if established, would constitute a meritorious defense to the entry of default. Thus, the District Court should deny the Bedkes' Motions in the above-identified PWR 107 claims.

2. The BLM's prior appropriation and beneficial use stockwater claims are valid, therefore the Bedkes could not allege a meritorious position

The Bedkes allege, "Priority Date Discrepancy; Cannot Claim Stockwater under Idaho Statute (42-114); License's (sic) issued on prior appropriated waters," Attachment 3 at 3; and "Priority Date Discrepancy; Beneficial use (Stockwater) cannot be claimed under Idaho Statute (42-114); Licenses Issued on prior appropriated waters," Attachment 5 at 3. These allegations state bare conclusions that fail to meet the requirement to allege detailed facts that constitute a meritorious position. See LU Ranching at 30-31 (objector's motion to set aside partial decrees denied because "motion is bereft of any facts or legal argument" that would establish a meritorious position). Moreover, none of the late objections are to BLM stockwater claims based upon license and none of the late objections are to BLM stockwater claims based upon IDAHO CODE § 42-114. There are no priority date discrepancies because BLM's priority dates were established in United States v. State, 959 P.2d 449 (Idaho 1998) (holding PWR 107 was a valid federal reservation of stockwater), in the District Court's Order Denying Challenges and Adopting Special Master's Reports and Recommendations, In Re SRBA, Case No. 39576, Subcase Numbers 57-04028B, 57-10587B, 57-10598B, 57-10770B and 72-15929C (September 30, 1998) (hereinafter "1998 Basin 57 Order") (holding that BLM's appropriative stockwatering claims would be decreed with a June 28, 1934 priority date), and in the BLM and State of Idaho's Stipulation to Resolve Objections, In Re SRBA, Case No. 39576, Consolidated Subcase Numbers 23-10859 *et al.* at 3 (agreeing, among other things, that the majority of BLM's appropriative in-stream stockwatering claims would be awarded a June 28, 1934 priority date). See also Stipulation and Joint Motion for Order Approving Stipulation, In Re SRBA, Case No. 39576, Subcase Numbers 37-02809 *et al.* at 4 (agreeing that BLM's appropriative in-stream

stockwatering claims would be awarded a June 28, 1934 priority date). Thus, the Bedkes have failed to allege detailed facts that constitute a meritorious position.

Nearly six years after filing their last pleadings, the Bedkes would now like to add facts to the record, see Objector's Opening Brief at 8-11 and at 15-18, and they now argue that because the BLM does not own the livestock that actually drink the water, the BLM is not entitled to an appropriative stockwatering right, see id. at 9-10, 16-18. The fact that the BLM does not own the livestock which actually consume the water claimed is irrelevant. State water law specifically authorizes the BLM "to appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain." IDAHO CODE § 42-501. Not only did the Idaho Legislature expressly provide for the BLM to be a valid appropriator of livestock water, it did not limit the methods for the BLM to obtain a stockwatering right. IDAHO CODE § 42-503. Moreover, in 1984, the legislature enacted IDAHO CODE § 42-113, which addressed in-stream and other livestock water use. Even though the legislature amended this Act in 1998, there is no legislative pronouncement in this, or in any other statute that requires livestock ownership as a condition precedent for owning stockwatering rights. The statute states:

No change in use of any water rights used for watering of livestock whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.

IDAHO CODE § 42-113(4). Thus, the Idaho legislature implicitly recognized that a water right may be held by the federal government. It would make no sense to give the permittee a right of refusal for a proposed change of use unless the issuer of the grazing permit, as the owner of the stockwatering right, could seek such a change of use. There simply is no Idaho law that requires ownership of livestock as a condition precedent to ownership of a livestock water right, even if

the landowner who claims the stockwatering right leases his land to another for the grazing of livestock. Idaho Op. Atty. Gen. No. 88-6, 1988 WL 385554 (Idaho A.G.). The Bedkes' argument, i.e., that the BLM does not own or graze livestock on grazing allotments for the purposes of appropriating a stockwater, is not the basis of a meritorious position. See A.L. Cattle at 14.

Furthermore, the District Court's 1998 Basin 57 Order is law of the case that holds the BLM can appropriate livestock water on the public lands with a priority date of June 28, 1934. 1998 Basin 57 Order at 7; see Order Denying Motion to Alter or Amend (Amended Order on State's Motion for Summary Judgment), In Re SRBA, Case No. 39576, Subcase 72-15929C (April 10, 1998) at 14. Thus, the District Court specifically decided that the BLM appropriated a stockwatering right on public lands with a June 28, 1934 priority date. The Bedkes have not pleaded detailed facts that refute the holding in the 1998 Basin 57 Order.

Literally hundreds of private landowners in Idaho who make their land available to others for the pasturage of livestock are similarly situated and have likewise established valid livestock watering rights in streams running through their own property. The BLM is not aware of any case where IDWR or the SRBA District Court has denied a stockwatering right to those landowners because they did not prove they owned the livestock that actually drink the water.^{11/}

^{11/} "Director's reports that are uncontested are typically decreed as reported. . . . Although this is normally what occurs, the SRBA Court retains discretion to apply law to the facts and render its own conclusion regarding uncontested water rights. . . . The district court can also delay entry of a partial decree for the uncontested portions of the director's report if the court determines that the unobjected claim may be affected by the outcome of a pending contested matter. . . . Ultimately, the claim is subject to a final review by the court prior to the entry of the partial decree." LU Ranching at 11 (citations omitted). Because tens of thousands of partial decrees for stockwater have been awarded to SRBA parties who did not prove ownership of the livestock that actually drink the water they claimed, the District Court has, since the time the first small

The BLM, like similarly situated private landowners in Idaho, appropriated thousands of similar stockwatering rights on public lands with a June 28, 1934 priority date because making land available to others for livestock grazing constitutes a valid appropriation of stockwater by the landowner under Idaho law. There are no allegations that constitute a meritorious position that would negate such stockwater claims and prior issued partial decrees. Therefore, the Bedkes' Motions to File Late Objection should be denied.

IV. CONCLUSION

Like the ranchers in Basin 45, the United States recognizes the critical need to provide water for the care and management of livestock using public lands for grazing. This need drove the establishment of public water reserves in 1926. This need has been the impetus for ranchers and the BLM to enter into hundreds of cooperative agreements to develop and maintain watering sources on public lands in Idaho. And it is with this need in mind that the BLM has filed for the stockwater rights at issue here.

Given the common interest between the ranching community and the BLM in ensuring the availability of water for all permittees, it is not surprising that in the vast majority of subcases in this adjudication the BLM's stockwater claims have either been uncontested or resolved amicably through negotiation. Unfortunately, the parties in the present subcases have not yet been able to resolve their differences, thus necessitating the filing of this responsive brief opposing motions to file late objections to BLM's stockwatering claims.

domestic and stockwater partial decree was filed, consistently recognized that livestock ownership is not a condition precedent to owning, or even applying for, a stockwatering right.

The Bedkes argue that they alone are entitled to stockwater rights on public lands and that any stockwater claims by the BLM must be rejected as a matter of law. Moreover, the Bedkes assert they alone have complied with state law in asserting pre-1934 priority dates. Bedke I at 8-11. The United States does not deny that, under appropriate circumstances, a private party may acquire a water right on public lands. But it is equally true that the United States may also hold a water right on land it owns and makes available to others for the pasturage of livestock, just like any other private landowner in Idaho who also makes private land available to others for the pasturage of livestock. To argue otherwise, as the Bedkes do here, is to reject the thousands of water licenses, permits, and certificates issued by the State of Idaho, and other states, to the United States for stockwatering, is to ignore the state statute enacted in 1939 recognizing that the Bureau of Land Management “may appropriate for the purpose of watering livestock any water not otherwise appropriated on the public domain” (IDAHO CODE § 42-501), and is to ignore the tens of thousands of partial decrees for stockwater already issued by this Court to the United States and to others who own lands chiefly valuable for grazing in this very proceeding who make their land available to others for the pasturage of livestock. The Bedkes are thus simply wrong to assert that the United States can never hold stockwater rights on its own land simply because it does not own the livestock that actually drink the water claimed.

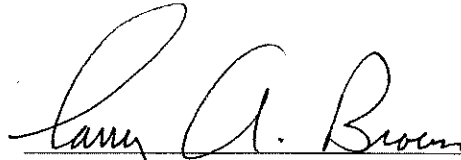
As demonstrated above, the Bedkes are not entitled to relief from the mandatory requirements of the Notice, AO1, and SRBA statutes. They have failed to show good cause for filing objections over 9 months after the mandatory date for filing such objections had elapsed. They have failed to allege a meritorious position because the Idaho Supreme Court has previously held that BLM’s PWR 107 claims are valid federal reservations of stockwater, and

because this Court has consistently filed partial decrees allowing appropriative stockwatering claims by public and private appropriators, even where the claimants have not shown they own the livestock that actually drink the water. Therefore, the Bedkes' motions should be denied.

DATED this 5th day of April, 2005.

Respectfully submitted,

UNITED STATES OF AMERICA

A handwritten signature in cursive script, reading "Larry A. Brown", written over a horizontal line.

Larry A. Brown

Of Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that on April 5, 2005, I served a true and correct copy of foregoing **UNITED STATES' RESPONSIVE BRIEF; SUBCASES 45-12475 ET AL.** upon the following individuals by placing the document in the United States Mail in Washington D.C., postage paid, and addressed as follows:

U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

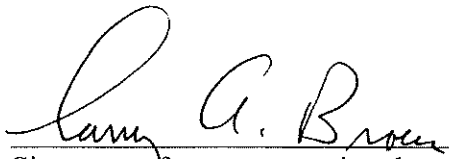
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EXHIBIT A

45-12475	45-12790
45-12493	45-12794
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45-12499	45-12796
45-12515	45-12797
45-12517	45-12801
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