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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

Case No. 39576

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Subcases 47-16433, *et al.*
See Attachment A

**MOTION FOR RECONSIDERATION OF
PRESIDING JUDGE'S MEMORANDUM
DECISION AND ORDER ON CHALLENGE**

Pursuant to Idaho Rules Civ. Pro. 11(a)(2)(B), the United States of America, through the

MOTION FOR RECONSIDERATION OF PRESIDING JUDGE'S MEMORANDUM DECISION
AND ORDER ON CHALLENGE – Subcase nos. 47-16433, *et al.* – Page 1

United States Department of Agriculture, Forest Service, moves this Court for reconsideration of its *Memorandum Decision and Order on Challenge and Order of Recommitment* issued in these subcases on March 22, 2005 ("Order"). As explained further below, the Court's Order is not supported by the record in this case.

The water right claims underlying these subcases were filed on National Forest System land for stockwater purposes ("United States' Claims" or "Claims"). These Claims were reported by the Idaho Department of Water Resources ("IDWR") in its "Director's Report For Domestic and Stockwater For Reporting Area 12 (Basin 47)" on August 7, 1998 ("Basin 47 Director's Report" or "Director's Report"). No timely objections were filed to the Claims. The Court's Order allows the filing of late objections by Bruce and Jared Bedke ("Bedkes").

1. The Court's Order.

In its Order, the Court reversed the Special Master's decision denying the Bedkes' Motions to File Late Objections. At several points in its Order, the Court emphasized that the Bedkes' stockwater claims had not been reported and that the United States' Claims had been reported prior to the Bedkes' claims. *E.g.*, Order at 3 ("On July 3, 2003, prior to the Bedke's claims being reported"), Order at 3 n. 2 ("The reason for the United States' claims being reported prior to those of the permittees"). The Court also stated that prejudice to the United States was minimal because the United States was prepared to wait until the Bedkes' claims were reported before proceeding with resolving these subcases.

[T]he parties were initially set to wait until the Bedkes' rights were to be reported out before the issues were resolved. This is a period of over five years. Given this extensive length of time the parties were prepared to wait to resolve their disputes, this Court has difficulty in finding any true degree of prejudice to the claimant.

Order at 13.

In fact, the only water right claims of the Bedke which are pertinent – the stockwater claims filed by the Bedkes which “compete”¹ with the claims at issue in these subcases – were reported out at the same time as the United States’ Claims in the Basin 47 Director’s Report. In addition, the United States was not prepared to wait for over five years to resolve these subcases, requesting that the subcases proceed expeditiously. Instead, these subcases were delayed for a period of over five years, not by agreement of the parties as asserted by the Court, but to accommodate the Bedkes.

Based on these factual errors, the Court should reconsider its Order.

2. The Bedkes’ competing stockwater claims were reported at the same time as the United States’ Claims.

Bruce Bedke made five stockwater claims located on National Forest System lands which were included in the August 7, 1998, Basin 47 Director’s Report.² These are the only water right claims filed by the Bedkes which compete with the United States’ Claims.³ They were reported

¹ As explained in the Court’s Order, the term “competing claims” is used in the SRBA to describe federal and private stockwater claims for the same sources and based on the same use.

² These stockwater claims are 47-14923A (Cherry Creek, Piney Creek, and Goose Creek), 47-14923B (Thoroughbred Creek, East Fork Thoroughbred Creek, West Fork Thoroughbred Creek, and Goose Creek), 47-14923C (Humphrey Creek, Little Piney Creek, South Fork Little Piney Creek, and Goose Creek), 47-14923D (Goose Creek), and 47-14923E (Humphrey Spring, Little Willow Spring, Right Hand Fork Spring, Thoroughbred Pond Springs, Thoroughbred Spring #1, Thoroughbred Spring #2, Whitey Davis Spring, WPA Spring, and two additional unnamed springs). See Basin 47 Director’s Report, pp. C-214 and C-215. These claims have since been renumbered by IDWR as 47-17138, 47-17132, 47-17134, 47-17136, and 47-17130, respectively, to segregate Bruce Bedkes’ claims from those of other parties.

³ Bruce Bedke has one additional stockwater claim in Basin 47 for Cabin Spring which
(continued...)

out at the same time and in the same director's report as the United States' Claims. Although the Bedkes have other stockwater claims in Basin 45 that have yet to be reported, those claims do not compete with the United States' Claims.

3. These subcases were delayed to accommodate the Bedkes and contrary to the position of the United States.

The Court states in its Order that the parties, including the United States, "were initially set to wait until the Bedkes' rights were to be reported out before the issues were resolved," and that there was an "extensive length of time the parties were prepared to wait to resolve their disputes." Order at 13.

In the Special Master's Order Partially Staying Subcases (August 6, 1999) ("Stay Order"), he clearly states that the stay was issued at the request of the private claimants. Stay Order at p. 5. The Special Master recognized that the United States was generally opposed to a stay of the litigation. *Id.*⁴

In response to a question from the Court at the hearing on Challenge, undersigned counsel represented to the Court that the delay in the subcases in front of the Special Master occurred at the request of the Bedkes. Exhibit A (Feb. 17, 2005 transcript) at 32-33. Furthermore, such delay was made despite the United States' requests that the subcases be decided. *Id.* Jared

³(...continued)

has not yet been reported and for which the United States does not have a competing claim. *See* Response to Memorandum in Opposition to Motions to File Late Objections, p.2 n.2, filed in these subcases on or about July 9, 1999. This claim is for only one water source. The five claims reported out contain twenty-two sources.

⁴ The Special Master issued an Amended Order Partially Staying subcases three days later which amended the previous order only to correct typographical errors.

Bedke agreed, stating at the same hearing that the delay occurred “to accommodate the private claimants.” *Id.* at 43-44.

In previous hearings concerning additional subcases, the United States has agreed that it might be appropriate to stay subcases in which competing claims were not yet reported. That, however, has never been the posture of these subcases. As noted above, the federal and competing private claims relevant to these subcases were all reported in the same director’s report in 1998.

The delay of these subcases occurred at the request of and to accommodate the Bedkes. The United States was not, contrary to the Court’s Order, prepared to wait over five years to resolve these subcases.⁵

4. The significance of the factual errors.

The fact that the Bedkes’ competing claims were reported out years ago in the same Director’s Report which contained the United States’ Claims undercuts one of the primary holdings in the Court’s Order:

The Bedkes have consistently alleged that they were confused by the process. Their confusion, for whatever reason, may have not been reasonably prudent, but it does not appear to have been willful.

Order at 12.

Although the Court failed to consider the basis for the Bedkes’ purported confusion, they

⁵ The Bedkes have filed stockwater claims on federal land in Basin 45 that have not yet been reported. These claims have been the basis for the Bedkes’ requests to stay the subcases at issue here. There has never, however, been an issue of waiting for claims which compete with the United States’ Claims at issue in these subcases. In fact, the subcases at issue are now on a trial schedule, along with the Bedkes’ competing claims, despite the fact that the Basin 45 subcases still have not been reported.

have described it in their briefs and at oral argument – advice allegedly received from an unnamed IDWR employee that they might not need to object to the United States' claims if they had a competing claim. For instance:

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 those of the private claimants, 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.

Opening Brief in support of Notice of Challenge of Special Masters Report and Recommendation at 6 (emphasis added).

The Bedkes' claim of confusion does not hold up for several reasons. First, even the Bedkes concede that this purported advice did not conclusively tell them that they need not object.

Second, any advice that they need not object is directly contradicted by the written notice they received:

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 February 12, 1999.

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.

See Exhibit A, United States Response Brief in Opposition to Challenge to Special Master's Decision on Motion to Alter or Amend.

Most importantly, though, the very fact that the Bedkes' competing stockwater claims were contained in the Basin 47 Director's Report demonstrates convincingly why their unsupported assertion of confusion should not be credited by this Court. The bad advice purportedly provided to the Bedkes – that they might not need to object to federal claims because the federal and private claims would be reported to the court as one water right – is simply irrelevant to these subcases. In reviewing their own claims, the Bedkes would immediately understand that the federal and private rights had not been reported as one right.

In a recent decision, Special Master Bilyeu held that “failing to review the Director's Report is essentially a willful default.” Order on Motion to File Late Objection, subcase no. 23-0009B (January 18, 2005), at 3-4. The Special Master reasoned that good cause for a late objection exists where a party has a systematic process of reviewing claims and Director's Reports, but that where a movant fails to attempt to protect his water rights with a system of reviewing competing claims, the failure is willful. *Id.*

In contrast, the Order's good cause standard is in reality no standard at all, as any party to any court case can easily claim “confusion.” In these subcases, the Bedkes claim of confusion does not even hold up internally. The predicate for their confusion – that they need not object if federal and private water rights are reported as one right – does not exist because the rights were reported separately. To determine that the claims were not reported as one, the Bedkes needed only to examine their own claims. Surely the Court does not mean to absolve them of even this level of diligence. This attempt by litigants to blame others for their neglect should be rejected by the Court in any context. In light of the facts surrounding these subcases, the notice provided to the Bedkes, and the reporting in the Director's Report of their own competing stockwater

claims, allowing the Bedkes' late objections reduces the SRBA's deadlines to a nullity.

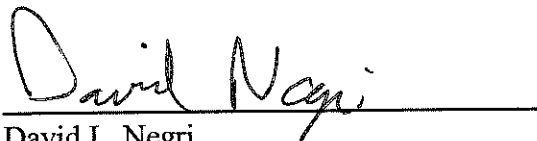
In addition, because of the delay in resolving these subcases, the Court implied that the Bedkes had been treated unfairly, *see* Exhibit A at 31-32, and ruled in its Order that the United States had not been prejudiced. The record instead shows that, just as the Bedkes delayed in filing their objections in these subcases, they were successful in delaying any resolution of these subcases. This delay was not brought about by the actions of the United States and, accordingly, the Court should reconsider its finding on prejudice.⁶

5. Conclusion.

For all of these reasons, the Court should reconsider its Order and deny the Bedkes' Challenge.

DATED this 19 day of May, 2005.

UNITED STATES OF AMERICA



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⁶ Regardless of the Court's ruling on prejudice, though, the Bedkes' willful failure to object is grounds alone to deny the late objections.

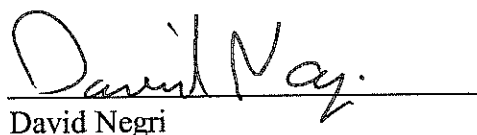
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19 day of May, 2005, I served a true and correct copy of the foregoing MOTION FOR RECONSIDERATION OF PRESIDING JUDGE'S MEMORANDUM DECISION AND ORDER ON CHALLENGE by depositing a copy thereof in the U.S. mail, postage prepaid, or by other service where indicated, upon the following:

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

Bruce Byron Bedke
in care of: 42 East Basin Road
United States Post Office
Oakley, Idaho 83346

Jared K. Bedke
in care of: 69 West Basin Road
United States Post Office
Oakley, Idaho 83346


David Negri

Attachment A

47-16433
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Page 1 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))) REPORTER'S TRANSCRIPT Case No. 47-16433))) HEARING HON. JOHN M. MELANSON District Judge, Presiding DATE: February 17, 2005 TIME: 1:30 p.m. PLACE: COURTROOM OF THE DISTRICT COURT SNAKE RIVER BASIN ADJUDICATION BUILDING - 253 3RD AVE. NORTH TWIN FALLS, IDAHO Reported by: Maureen Newton, C.S.R. No. 321 P.O. Box 368 Rupert, ID 83350 (208) 436-9041	Page 2 THE COURT: We're on record in Twin Falls County Case Number 39576, In the Matter of the Snake River Basin Adjudication. Before the court this afternoon is oral argument on a challenge and also a motion to strike asseverations in Subcase Number 47-16433 and other subcases listed in the court's docket. The Motion to Strike is brought by the United States and is a matter probably which should be heard first, so let's proceed with that. Mr. Negri is present representing the United States Forest Service, and who's that with you, Mr. Negri? MR. NEGRI: Steve Spencer with the Forest Service is present in court. I believe on the phone also is Randy Braemer with the USDA's office of general counsel and Jamie Gough, who also works for the Forest Service. THE COURT: Just for the record, present for the Bedkes -- actually the Bedkes are representing themselves in this case pro se. We have Mr. Bruce Bedke. Good afternoon, sir. And Mr. Jared Bedke. And who's that with you? MS. BEDKE: Martha Bedke. THE COURT: Good afternoon, ma'am. Go ahead, Mr. Negri, with argument on the motion to strike then. MR. NEGRI: Thank you, Your Honor. Your Honor,
Page 3 I'll be brief on this. There's really two basis for our motion and they're laid out in the memorandum which is part of the motion. The first is that this is simply not the stage of proceedings to be presenting evidence to the court. As with the motion to alter or amend stage, evidence should not be presented at this point. And I cite Judge Burdick's facility volume and additional evidence opinion that's noted in the memorandum where Judge Burdick notes that AO1 rules are very clear that the motion to amend or amend statement is not the proper time for developing a factual record. That case -- Judge Burdick's case, which is 36-02708, that actually involved the United States and I believe the United States was attempting to get in some evidence at the challenge stage. Judge Burdick denied that request. He noted that Rule 53(e)(2) does allow the court to supplement the record, but stated that the rule does not give a party carte blanche to introduce additional evidence on challenge. I think what that means is that perhaps if the court believes that taking evidence might be useful, the court has some discretion to order that that occur; but a party on its own initiative cannot present evidence without that occurring. Judge Burdick ruled in the case that it	Page 4 was not appropriate in that case. I don't think it's -- I think it's equally inappropriate at this point in this case, and that is the first basis for our motion. The second is that basically these asseverations are not properly sworn and we do have procedures for presenting affidavits or declarations to the court. Proper swearing and notarization is always part of that. The Idaho statutes and rules are clear on that, and for that reason also they should not be allowed in. The same with Exhibit 6 and 7. I mean, the transcripts are obviously the transcripts and we don't have any problem there. But, again, there's factual assertions in those exhibits. They haven't been -- they aren't properly part of evidence in this case, and for all of those reasons we would ask the court to strike the asseverations, as well as Exhibits 6 and 7. THE COURT: Thank you, Mr. Negri. Mr. Bedke, whoever chooses to respond, go ahead. MR. JARED BEDKE: This is Jared Bedke, Your Honor. I guess my only response to that is when Judge Burdick ruled that new evidence can't be presented at the alter or amend or challenge stage, I believe that was following a trial where that opportunity had already taken place. What we have here, we've got a unique circumstance

1 here: We've got a motion to file objections which was not
2 granted, therefore we've never been able to go to trial.
3 Now the trial is where you would establish evidence and
4 present it and therefore that's why the evidence would be
5 subject to the rules of evidence at that time. I don't see
6 how it could be now for that fact.

7 Second of all the asseverations, basically that
8 argument can be summed up on the United States' part in one
9 simple phrase: They're looking at form over substance,
10 meaning that it didn't follow the proper form, we didn't do
11 this, we didn't do that, it wasn't sworn. But as I pointed
12 out in our response to the motion to strike, in Gordon v.
13 Idaho, the Ninth Circuit Court of Appeals said that
14 basically all that was really required was that the person
15 attesting have his conscience burdened in such a way that
16 it imposed an awakening on him of the need to tell the
17 truth. Asseveration does so, and any notice by notary at
18 that point would be just no more than a witness to the
19 signature. It wouldn't bind his conscience anymore because
20 it doesn't impose any greater awakening than already
21 exists.

22 So I guess that would be my response to both of
23 those.

24 THE COURT: All right, sir. Thank you. Anything
25 further, Mr. Negri?

1 MR. NEGRI: Yes, Your Honor. Very briefly.

2 There is a proper way to get evidence into the
3 record and that can be done short of a full-scale trial.
4 One way it could have occurred during the Special Master
5 proceedings is to properly present evidence to the Special
6 Master. That can be done by requesting evidentiary
7 hearings, that can be done by filing sworn affidavits. Of
8 course you need to give notice to the other party, so it
9 certainly can occur at the Special Master situation, but we
10 have rules to be fair to all parties.

11 There have been a number of unsupported factual
12 assertions being made throughout this case. None of that
13 has been properly submitted as evidence, none of it should
14 be considered. It can be done, but it hasn't occurred in
15 this case. The fact that we haven't had a full-scale trial
16 is, quite frankly, besides the point.

17 THE COURT: Thank you, sir. I think I can
18 explain the reasons for my ruling better in a written
19 order, so I will take the matter under advisement for that
20 purpose. I will observe that this is not, at this stage of
21 the proceedings, a time to be presenting evidence to the
22 court, and that I frankly don't know what asseverations
23 are, but I don't think they're sworn statements under oath.
24 So those are my thoughts in a really preliminary way at
25 this point. I will issue a written order after I study the

1 matter further and consider it.

2 The next matter we'll take up then are the
3 matters on challenge to the Special Master's addition on
4 Motion to Alter or Amend. I have read the briefs in this
5 case, or on these cases, and we'll hear first from the
6 Bedkes on their challenge.

7 MR. JARED BEDKE: I really have nothing more to
8 add than what is contained within the pleadings at this
9 time, but I would entertain any questions the court might
10 have.

11 THE COURT: I do have a few questions actually,
12 and some of these questions have to do with the global
13 stipulation I think everyone's aware of now.

14 At one place in the record or in the briefs,
15 Mr. Bedke, or perhaps it's in an area where the Special
16 Master was referring to something -- I can't remember
17 exactly where I saw this -- but there was a discussion
18 regarding the stipulation and there was a question about
19 why you folks had not entered into that stipulation. And
20 there was a reference to paragraph seven, which provides
21 that the decreed water right shall not alter the rights of
22 a permittee under a valid grazing permit, nor impede the
23 authority of the United States to manage federal lands.

24 And the question I've got for you is this: Is
25 this the only reason for rejecting the stipulation? Or if

1 not, I guess you don't need to explain that further than
2 that, but I guess that's what I need to know. Is that the
3 only reason that you decided not to enter into this
4 stipulation?

5 MR. JARED BEDKE: No, it was not.

6 THE COURT: So at this point are there changes
7 that could be made in the stipulation that would be make it
8 acceptable to you or --

9 MR. JARED BEDKE: There was language in there
10 that we couldn't agree with. During the settlement
11 negotiations we talked about those. I don't really want to
12 get into much because of the settlement discussions, but
13 what it boiled down to is that was a firm position from the
14 United States; ours was kind of firm the other way. The
15 other parties thought they could reach an agreement by
16 agreeing to that. We felt like that was a deal breaker,
17 basically, because of the burden imposed upon the property.

18 THE COURT: Well, if that was left out would the
19 stipulation be acceptable?

20 MR. JARED BEDKE: I'd have to read through it
21 again.

22 THE COURT: Okay.

23 MR. JARED BEDKE: Because I don't know what
24 further terms were added to the stipulation after we
25 elected not to.

1 THE COURT: All right.

2 MR. JARED BEDKE: So as I told Special Master
3 Dolan, we always entertain settlement, but the devil's in
4 the details. So that's the way I'd leave that.

5 THE COURT: Well, the stipulation was entered
6 into after the late objection was filed. How would the
7 terms of that settlement affect your water rights? I mean,
8 let's say things are as they are now: You haven't entered
9 into the settlement, but the settlement's been filed with
10 the court, presumably decrees will be issued in accordance
11 with it. How does that harm you?

12 MR. JARED BEDKE: How does it harm me? In the
13 fact that the United States is granted a water right
14 without having proved their merits, is basically what I'm
15 getting down to.

16 Second of all Basin 45, the rest of the subcases,
17 have been issued -- a report and recommendation has been
18 issued by the IDWR. I should say the director's report has
19 been issued. The objection deadline was in January, the
20 response deadline's coming up. But in the objections that
21 the United States filed to our claims, specifically my
22 dad's, they put on there that these claims are located on
23 the United States' property. I can read the exact language
24 if I have to.

25 The second reason was the United States has

1 already filed claims on the waters contained within these
2 allotments. So what I'm looking at that is, and it's been
3 our position all along, that we don't want to get into a
4 position of: Wait a minute, Your Honor, one use, one cow.
5 It's an either/or situation. Since you gave it to us as
6 the United States, that precludes any other use out there
7 by private party. So that's how we would be injured if
8 that went through.

9 THE COURT: But the settlement would give you a
10 senior priority date, wouldn't it?

11 MR. JARED BEDKE: It's possible, but the rest of
12 the terms contained within the settlement is what we were
13 hung up on. It's not the one-day prior use or as far back
14 as you can show your patent chain. It was other terms
15 contained within the settlement.

16 THE COURT: Well, Mr. Bedke, if you don't want to
17 answer this, I understand. I don't intend to press you on
18 this. As you've mentioned, it is part of the settlement
19 negotiations, but it might help me in reaching a decision,
20 so I'll go ahead and ask and if you tell me it's none of my
21 business, I'll understand that. But if the settlement
22 would give you senior priority to the federal government's
23 claims, what else is it about the agreement that would
24 cause harm to you?

25 MR. JARED BEDKE: There is a paragraph in there

1 that basically -- the best way to sum it up is this, and
2 it's by using another analogy: There are several of us
3 here and all of us have one home except for you. You
4 happen to have two homes. Well, a homeless guy sues all of
5 us, okay? Now in part of the settlement negotiations we
6 look at one another and we say: Well, we've only got one
7 house each except for you, you've got two. So in order to
8 make this all go away why don't you give him your house
9 because that gives all of us one.

10 Well, the others looked at that and they said:
11 Yeah, that's a great idea. But you're the only one that's
12 really out anything. Now one of the paragraphs in there
13 contains -- says -- I'm paraphrasing here, I don't know the
14 exact language off the top of my head -- but it basically
15 says you will agree never to run more than your permitted
16 numbers.

17 Now, while that sounds good on the surface, the
18 property that exists out there, and the court has ruled in
19 the takings court, in the United States Court of Federal
20 Claims, is that in the Hage case, Mr. Hage owns the feed to
21 all of his allotments, meaning the inheritable right to use
22 the surface. That's without constraints and without
23 restrictions because of his predecessors in interest that
24 secured that way back in the early 1860s.

25 Now our chain of title goes back not quite that

1 far, but it does go back to the 1870s, long before any
2 restraints or restrictions were on that. Now any burdens
3 imposed upon the property from that point forward, since it
4 vested within the parties and the predecessors in interest,
5 becomes a taking of that property. This would be a
6 voluntary burden placed upon such a property, therefore
7 there would be no takings implications should it be imposed
8 upon you because you voluntarily signed your rights away to
9 that.

10 Now while that may seem harmless, suppose next
11 time the permit, as they call it, is issued for two cows
12 instead of the normal 500. Well, we've already agreed that
13 we can't run more than our permitted number. There is no
14 takings implication, I'm broke because I've signed away my
15 ability to exercise my property. Very simply, that is how
16 the stipulation in its current form was a deal breaker.

17 This was discussed up at the settlement
18 discussions. Mr. Negri and the United States weren't party
19 to this as, of course, it was a mediation, but that's
20 basically the feeling and the philosophy that comes down
21 from this, and because of that language and such, that's
22 why I couldn't sign off.

23 THE COURT: The United States could change your
24 permit notwithstanding the stipulation, though; couldn't
25 they?

1 MR. JARED BEDKE: They can, but as the court
2 ruled, the United States can do anything they want to. But
3 if it takes your property, they've got to pay you for it.

4 THE COURT: It's a question of taking it then?

5 MR. JARED BEDKE: Exactly.

6 THE COURT: I appreciate that.

7 MR. JARED BEDKE: I can't defeat any further
8 position I might have down the road by just trying to get
9 an expediency out of the SRBA.

10 THE COURT: I appreciate your willingness to
11 respond to that, and I understand your concerns about the
12 fact that it's part of settlement. It seems like that
13 settlement agreement is sort of a great big really that
14 we've just got to deal with.

15 I have one more question for you and it doesn't
16 have to do with the settlement agreement. Part of the
17 confusion that's been alleged as a reason for filing the
18 late claim deals with how you folks filed your claims as
19 compared to how the United States filed its claims. On
20 what basis did you make the decision to file your claims
21 cumulatively for the whole allotment, instead of claims to
22 individual sources within the allotment? Why did you
23 decide to do it that way?

24 MR. JARED BEDKE: If I may?

25 THE COURT: Sure.

1 You may proceed then, Mr. Bedke.

2 MR. JARED BEDKE: Anyway, it's basically filing a
3 water right for dummies. If you want to go through that
4 it says: Go through this, go through that, and it
5 basically took you through the entire filing form and the
6 filing process. And what it says is it comes over here to
7 a certain point and it says: Purpose and use, and then it
8 comes down and says: Calculation of the amount diverted.
9 And then on page six of that document it actually gives you
10 a recommended diversion rate for stock water. And that's
11 what Exhibit 6 was, was a copy of this page. So what it
12 does is it goes through and it says for zero to 25 head,
13 and then gives you the breakdown of how much water you
14 should have filed on.

15 What happened was on these allotments we were
16 running from 1000 to 2000 head and the chart went up to
17 1000 head, which was .23 cfs, and further on an explanation
18 that says: If you exceed the 1000 head, just go ahead and
19 tack on -- just make it cumulative, basically. So that's
20 why it was done that way. It was done that way because
21 that option was offered at the time. Subsequent to that is
22 when the court ruled that all the stock water is de
23 minimus. So this is why it was filed that way.

24 And the reasoning was is they wanted it to file
25 -- if I remember what the IDWR said -- they wanted you to

1 MR. JARED BEDKE: This was the instruction
2 booklet given at the time in 1989 on how to file over at
3 the IDWR office. It's public record, I'm sure the court
4 has access to it as it was -- you know, it's part and
5 imperative to the SRBA. This is also subject to the motion
6 to strike. I believe this was Exhibit 6, that specific
7 page in the attachment here, so you've already had a chance
8 to review that.

9 MR. NEGRI: Your Honor, if I could speak to that.
10 These don't work through the phones?

11 THE COURT: They don't, so if you want everyone
12 to be able to hear -- it's all right if you both stand up
13 there.

14 MR. NEGRI: Just real quick. My objection to, I
15 believe it's Exhibit 6, it's the paper that Mr. Bedke's
16 referring to, I mean, if that is a matter of public record
17 and if it's truly part of the SRBA process, the United
18 States doesn't have an objection to it and we believe it's
19 appropriate for the court to consider it. But our
20 objection again goes to, there's a process to establish
21 that for the court, and we just don't believe that the
22 process has been established in this case.

23 But again as far as matters of public record, we
24 don't have an objection there.

25 THE COURT: All right, sir. Thank you.

1 file on everything that the cattle had access to in that
2 unit. Where ours was broken up into five or six pastures,
3 they filed broke down on pastures. So everything the
4 cattle had access to, and why that's they came in in such
5 large filings.

6 THE COURT: All right. I appreciate that.
7 Anything else you wish to add then to argument in this
8 matter at this point? You'll have a chance to respond to
9 Mr. Negri.

10 MR. JARED BEDKE: Not at this time. Thank you.

11 THE COURT: Mr. Negri.

12 MR. NEGRI: Thank you, Your Honor.

13 Your Honor, David Negri for the United States in
14 this matter. Initially I'd just like to quickly respond to
15 a couple things stated by Mr. Bedke. I may have
16 misunderstood his characterization of the Hage case, but
17 I'd just like to note for the court that's a case the
18 United States is involved in in the Court of Federal Claim.
19 There's been some preliminary opinions, but not a final
20 opinion issued. I thought I heard Mr. Bedke say that the
21 judge in that case has ruled that Mr. Hage owns fee of some
22 sort to federal land and that's just simply not what Hage
23 stands for.

24 There's a lot of misunderstanding, unfortunately,
25 about what Hage does and doesn't say. That's one of the

1 common problems. But that is not the case, and in fact the
2 Hage case has ruled exactly the opposite. I'm not sure
3 that's neither here nor there as to this case, but just by
4 way of explanation.

5 The other thing, very quickly, regarding -- I
6 believe the court's question was why actually Mr. Bruce
7 Bedke -- Mr. Jared Bedke doesn't have stock water claims,
8 that I'm aware of, on these federal grazing allotments. I
9 believe Mr. Bruce Bedke has filed those claims, but
10 obviously his son Jared has been very involved in that
11 process. I think Mr. Bedke was mixing up apples and
12 oranges in the answer to the question. The problem didn't
13 arise because of quantities claimed by the grazing permits;
14 the problem arose because multiple sources were bundled
15 together into one claim. And that's the big distinction
16 between the private claims and the federal claims.

17 The United States has submitted a separate claim
18 for each water source. Many of the private claims would
19 include, for instance, all the water sources on an
20 allotment or a portion of an allotment. And it's my
21 understanding, at least, that that's what created some of
22 the issues we have here.

23 If I could speak to the challenge now directly --
24 and I'd just like to give the court a little bit of a recap
25 of our argument and emphasize a couple of things. I think

1 this challenge can be resolved, Your Honor, by review of
2 the notice of director's reports which was provided for the
3 Bedkes, that's Exhibit A to our brief. And the question I
4 think that's appropriate to ask is: After receiving that
5 notice does good cause exist for the Bedke's failure to
6 timely file objections in this case.

7 And our position, of course, is that no such good
8 cause exists. And if you look at the notice that's
9 eminently clear. Again, this is Exhibit A I'm looking at,
10 and I'd just like to highlight a couple of statements out
11 of the notice. This is mentioned in our brief, but it's
12 important to focus on it. On the cover letter to the
13 notice, in the second paragraph -- this is from Mr. Dreher,
14 the director of the Idaho Department of Water Resources --
15 it says: Note that you have 180 days in which to file any
16 objections to our recommendation and to review the domestic
17 and stock water rights of other claimants, including those
18 of the United States. That's page one of Exhibit A.

19 If we go to the next page we get to the actual
20 notice. Underneath the big heading: Instructions for
21 reviewing the water rights of others, it says: The
22 complete director's report contains recommendations to the
23 SRBA court on your water right and all other small domestic
24 and stock water rights in your area.

25 We proceed to the next page, page three of the

1 exhibit, and on the very top it says: Also included in the
2 complete director's report are descriptions of the United
3 States' claims for domestic and stock water rights under
4 federal law. It goes on two sentences later to say:
5 Sometimes the United States claims one right under both
6 Federal and State law. Now although that particular
7 paragraph is focusing on Federal law, obviously it's
8 talking about claims under State law, too, and it provides
9 some pretty clear notice. That page goes on to say: If
10 you want to review someone else's water right you need to
11 look at the complete director's report, which is available
12 at the SRBA courthouse in Twin Falls and the locations
13 listed on the third page of this notice. If you go to the
14 third page you'll see that of course the Cassia County
15 Courthouse in Burley is also included.

16 Continuing with that page, a couple other points.
17 It says: If you disagree with any element of the
18 recommendation for your water right or anyone else's water
19 right and want to be heard in court, file an objection with
20 the SRBA court. Your objection must be received by the
21 SRBA court on or before February 12, 1999. And finally it
22 says a little further down the page: If you want to be
23 involved in the court case on any water right in the
24 director's report, you must file either an objection or a
25 response by the dates listed above.

1 This is all pretty clear, I would say. It
2 clearly informs people what they should do. And after
3 reading this the question is, what would a reasonable
4 person do. The answer is clear: If they lived somewhere
5 in the Burley area they would have went to the Cassia
6 County Courthouse and they would have reviewed the
7 director's report.

8 A side issue that's been raised is Jared Bedke's
9 assertion that his father may have received a notice, but
10 he didn't. And while it may be true that Mr. Jared Bedke
11 may not have been mailed this notice, it's actually very
12 hard to believe that he wasn't aware of it and that he
13 didn't review it. Jared Bedke's been handling this
14 litigation, quite frankly, from the start. He's present in
15 the courtroom today, he's talking on these subcases for his
16 father. He's been present at every hearing I've been
17 present in these subcases. If you review the transcripts,
18 he shows up at every hearing held on these subcases.
19 Referring in particular to Exhibit G to our brief, this is
20 the June 7, 1999 transcript. Quoting Mr. Bedke, he talks
21 about his and his father as a team in this, quite frankly.
22 On page 80 of that transcript he says: We were informed
23 about the claims process. He goes on to say: We filed
24 claims on May 24. On page 81 he talks about -- he says:
25 We went to IDWR, and he goes on to say: We filed. On page

1 83 he says: After March of this year we were informed, and
 2 he talks about certain things supposedly said by IDWR. He
 3 goes on to say: We were assured of other things. And
 4 there's more of that in the transcripts. I won't go
 5 through it all.

6 But my point, Your Honor, is, given Jared Bedke's
 7 active and quite competent roll in this case, it's
 8 incredible to believe that he was not aware of the notice.
 9 And in fact in the transcript he talks about him being
 10 involved in this process years before the notice came out,
 11 when the original claims were filed. So it appears to me
 12 that both Mr. Jared Bedke and Mr. Bruce Bedke received the
 13 notice we were talking about, had actual knowledge of it.
 14 And I think that's the only inference you can draw from
 15 what we have in the record.

16 Another point I'd like to make right now before
 17 going through the elements of good cause is -- it concerns
 18 the arguments that the Bedkes are making in support of
 19 their attempt to file late objections. And I'd note for
 20 the court that these arguments have been shifting since
 21 this litigation started some years ago.

22 Your Honor, I'm referring to the rebuttal brief
 23 recently filed by the Bedkes in regards to this challenge.
 24 It's dated January 26, 2005. On page six of this brief --
 25 well, they take issue with our argument that their claim is

1 Late Objections. And although Mr. Semanko was not
 2 representing Bruce and Jared Bedke at that point, he was
 3 representing Scott Bedke, Michael Poulton and Gary Russell
 4 Poulton. They were a larger group of objectors at that
 5 time. But Mr. Jared and Bruce Bedke have essentially
 6 adopted his brief. They attached it to their opening brief
 7 in this case -- excuse me, they attached it to the motion
 8 to alter or amend vacating stay dated July 14, '03. That
 9 occurred before the Special Master. It was a prior
 10 pleading by the Bedkes. Again, it's dated July 14, '03,
 11 entitled: Motion to Alter or Amend Order to Vacate Stays,
 12 and by way of making their arguments to the Special Master
 13 they attached Mr. Semanko's brief and essentially claimed
 14 it as their own. So I think it's a very fair description
 15 of what the approach of all the objectors in this case was
 16 at that time.

17 And on page five of that brief, I'm just going to
 18 quote a couple sentences from Mr. Semanko, and he's talking
 19 about the bifurcation process, which, again, that's been
 20 the complaint in many of these stock water cases. The
 21 brief says: Despite this change in the process, however,
 22 the objector's were not notified that the Federal stock
 23 water claims would be reported on an earlier -- underline
 24 -- than their own private stock water claims.

25 The objectors fully expected, and reasonably so,

1 that they were confused by the bifurcation process, and
 2 they now say that that's not the case: That challenger's
 3 confusion came from the advice they received subsequent to
 4 the bifurcation process on whether objections had to be
 5 filed to conflicting claims. Quite frankly, what has
 6 happened since this issue arose and now is there's been
 7 case law developed in the SRBA court and in the State
 8 Supreme Court. Your Honor is aware of that case law: It's
 9 the AL Cattle decisions by Judge Burdick, both his initial
 10 decision and their reconsideration, and it's the LU
 11 decision by the Supreme Court. And in a nutshell those
 12 decisions say, Hey, this supposed confusion about
 13 bifurcation is simply not a good reason to ignore rules and
 14 procedure.

15 So what I think is occurring in these subcases is
 16 the Bedkes realize that's not a good argument anymore, so
 17 now they're shifting to focus on some advice they
 18 supposedly received from some unnamed person at IDWR. And
 19 just to highlight that that's not been how this case has
 20 been framed, I would like to refer to a couple of documents
 21 in the record.

22 Your Honor, the first document I'm going to refer
 23 to is a brief filed by Mr. Norm Semanko. Let me get a date
 24 on that. It's dated July 9, 1999 and it's entitled:
 25 Response to Memorandum in Opposition to Motions to File

1 that the conflicting stock water claims would be recorded
 2 and considered together. So that's their argument at that
 3 point: Gee, it's not fair that the United States' claims
 4 came out before ours. Ours weren't in that director's
 5 report so we thought theirs wouldn't be either, so we
 6 didn't do anything.

7 Again, that's the argument rejected by Judge
 8 Burdick and by the State Supreme Court. If you read that
 9 brief there's more language, but it's clear that that's the
 10 argument. It also doesn't fit the facts in this case
 11 because Mr. Bruce Bedke's stock water claims are in the
 12 same director's reports. But at this point they are -- the
 13 Bedkes are trying to back peddle on that one because they
 14 realize that it's not a tenable argument anymore.

15 I'd also note then in that -- and I think this is
 16 somewhat illuminating also -- in that same brief of Bruce
 17 and Jared Bedke I was just referring to -- again, this is
 18 the motion to alter or amend order vacating stays, dated
 19 July 14, '03 -- if you go to page four -- and this is their
 20 attempt in front of the Special Master to distinguish the
 21 LU case -- let me just read a short paragraph or paraphrase
 22 some of it: LU Ranching Co filed several domestic de
 23 minimus water right claims -- this is the Bedkes
 24 speaking -- as these claims were de minimus in nature, they
 25 were included in the director's first domestic and stock

1 water report for the reporting basin and LU Ranching
 2 Company was not a procedural victim of the bifurcated
 3 recording process. Now here's the Bedke's attempt to
 4 distinguish LU: Petitioners, the Bedkes, water claims
 5 weren't included in the director's first domestic and stock
 6 water report for basins 45 and 47, and as such petitioners
 7 are procedural victims of the bifurcated reporting process,
 8 and as such remedy needs to be granted.

9 Again, that's just not true, and that's clearly
 10 laid out by the attachments to our brief. Mr. Bedke has a
 11 number of water right claims that were reported out in that
 12 director's report for the same sources -- the exact same
 13 sources as the federal claims at issue, and that's what,
 14 quite frankly, makes the argument that somehow they had no
 15 obligation to review that director's report, difficult to
 16 give any validity to. So that's where we've been in this
 17 case I think.

18 And I'd like to briefly turn to the good cause
 19 standard and whether they've established good cause or not.
 20 According to the case law there's three considerations:
 21 Whether the default was willful; whether there's prejudice
 22 to the United States and others; and whether there's a
 23 meritorious defense.

24 I think the first of those three factors is
 25 controlling in this case: Whether the default was willful.

1 ignored the instructions -- the written instructions given
 2 to them by the Director of Water Resources, and on that
 3 basis alone the challenge should be denied in this case.

4 The second factor is the prejudice to the United
 5 States. Again in our brief we point out the prejudice is
 6 potentially huge. And this again relates to the global
 7 stock water settlement that the court has made note of
 8 already. That water right settlement provides that the
 9 United States will get certain water rights that are going
 10 to look a certain way, and if they don't, the settlement
 11 can be voided. So that's a very real possibility. I think
 12 the prejudice goes way beyond -- I cited a decision by
 13 Special Master Cushman. The potential prejudice in this
 14 case goes way beyond anything that occurred in that case,
 15 and the United States thinks it's appropriate to consider
 16 that.

17 Finally on the meritorious defense, Judge
 18 Burdick's AL Cattle holding says the allegations of the
 19 challengers in this case are not enough to raise a
 20 meritorious defense. And on that basis also the challenge
 21 should be denied.

22 The Bedkes, Your Honor, also raise a substantive
 23 challenge to the water rights of the United States in this
 24 case and we explain at length in our brief why even if you
 25 reach the substance, that challenge should be denied also.

1 The Bedkes received notice. They chose to ignore the very
 2 clear directions in that notice. They chose not to follow
 3 those explicit directions and they chose not to file the
 4 objections. Nobody made that decision except themselves.
 5 They made those decisions. They decided to ignore the very
 6 clear directions in a written document from the director of
 7 the Idaho Department of Water Resources based on some
 8 assertion supposedly made at the IDWR that they didn't have
 9 to file objections.

10 Even if that occurred, Your Honor, even if
 11 somebody at IDWR had told me something to the effect of --
 12 or that I believed meant I did not have to file
 13 objections -- and that, as far as I can tell from the
 14 transcripts, the contention is that occurred a year or so
 15 before they got the notice -- then I get the notice from
 16 Mr. Dreher, what do I as a reasonable person do? Do I rely
 17 on my recollection of some previous conversation with
 18 somebody from IDWR, or do I look at this written document,
 19 written official document from the Director of Water
 20 Resources, and do I follow what that document says?

21 If I'm a reasonable person, I mean, the answer is
 22 obvious. It's unreasonable to fail to make further
 23 inquiry, and that's exactly what Judge Burdick decided in
 24 the AL Cattle cases. So in that regard, Your Honor, the
 25 default in this case was willful. The Bedkes willfully

1 I'd just like to highlight, though, that the
 2 United States believes that that challenge should not be
 3 considered, as we point out in our brief, because it was
 4 not raised at the motion to alter or amend stage. This is
 5 a challenge to the Special Master's decision on motion to
 6 amend or amend that wasn't raised at that stage. I don't
 7 see how it can possibly be raised in this case.

8 We would, Your Honor, ask that the challenge be
 9 denied. What the court has in front it is the stock water
 10 claims made by the United States on federal land, on
 11 national forest system land. These claims are made in
 12 support of their grazing program.

13 This is not some sort of federal water grab out
 14 of Washington DC or something. These claims are made for
 15 people in Idaho, for permittees in Idaho. The Forest
 16 Service has over a thousand grazing permittees in this
 17 state. They've made many claims so that water will be
 18 available for that cattle. They care about these claims
 19 and they care about the grazing program.

20 Mr. Spencer, who's the lead for the Forest
 21 Service on this, has a background in range. He was a range
 22 con for a number of years with the Forest Service. That's
 23 why the claims are made. The claims are for stock water,
 24 they're not used for anything else, and they're made in
 25 support of the United States' grazing program. Quite

1 frankly, a federal grazing program cannot go forward
2 without water. And the only way to assure that that water
3 is available is if the United States has water rights
4 available, not just for today's permittees, but for
5 permittees in five, ten, a hundred, two hundred years.

6 On all these grounds we would ask the court to
7 deny the challenge, and I'd be glad to answer any questions
8 if the court has any.

9 THE COURT: Thank you, Mr. Negri. I do have a
10 couple questions.

11 It sounds from your argument as if you do allege
12 and assert that if the court grants the Bedke's motion,
13 that that would subject the settlement agreement to perhaps
14 being void at some point; is that correct?

15 MR. NEGRI: That could occur. I'm not telling
16 the court that that definitely will; but I'm saying we
17 would have to look at our options, because that provision
18 was included in the stock water settlement for exactly that
19 reason. And again, we're not -- as is obvious to the
20 court, we're not talking about Jared and Bruce Bedke's
21 water rights here. We're just talking about the water
22 right claims of the United States. And obviously a big
23 reason the United States entered into that settlement was
24 to get finality as far as the status of its own water right
25 claims.

1 does the court consider prejudice? Does it end -- does the
2 time end, I guess, when the objections are filed? The late
3 objections? Or does the court consider prejudice that
4 comes up later on? What's your take on that, Mr. Negri?

5 MR. NEGRI: I'm not sure I could articulate any
6 hard and fast rule. I guess I would only say I think it's
7 appropriate for the court to consider all factors in
8 looking at prejudice. And in that regard I think it's
9 appropriate for the court to consider exactly what we're
10 discussing here.

11 THE COURT: You know, I'm not positive I can
12 really phrase this next question to you in a fair way, and
13 it may not be consistent with the argument that you have to
14 make, and if you don't want to respond, that's okay with
15 me. As I said to Mr. Bedke, some of these question I think
16 are ones that might be useful to me, but are not
17 necessarily ones that either of the parties need to answer
18 here. But as you know, I recently came onto the SRBA court
19 and I've looked at this case and looked at what happened,
20 and as I mentioned, the Special Master really, essentially,
21 let the Bedkes into the case. Gave them party status by
22 telling them they could go ahead and negotiate after the
23 motion to file late claim was filed, but he didn't decide
24 the motion to file a late claim then. And the basis for
25 the stay was to wait until the Bedke's claims were

1 THE COURT: And that is the prejudice that's
2 alleged by the United States that would result if the
3 motion were granted; correct?

4 MR. NEGRI: Yes, Your Honor.

5 THE COURT: Is there other prejudice?

6 MR. NEGRI: I think there is, especially since we
7 have allegations about conversations that supposedly
8 occurred five or six years ago. Quite frankly, it's going
9 to be a little harder to get to the root of that now. Had
10 this -- I mean had these claims been properly filed, well,
11 we just wouldn't have that issue. So we have a
12 complication now that we otherwise wouldn't have. But I do
13 think the procedural prejudice, when you look at the
14 posture of these subcases and many others, is enough to
15 make the point.

16 THE COURT: The Bedkes filed their late
17 objections, then the Special Master, arguably, let them
18 into the case by staying action on the objections, but
19 allowing the subcase to proceed for negotiation purposes.
20 And everybody negotiated and everybody except the Bedkes
21 entered into the stipulation, and the stipulation now is
22 something that occurred after the Bedkes objected. The
23 stipulation now is what has led to the prejudice to the
24 United States.

25 And the thing that I'm concerned about is, when

1 reported, but then the Bedkes, as I said, they participated
2 in the negotiations, but they didn't sign onto the
3 stipulation. And then the Special Master lifts the stay
4 and denies the motion to file a late objection, in part,
5 because of prejudice to the parties that signed the
6 stipulation that came up after the Bedkes filed their
7 motion to file late claims.

8 And part of this smells, you know? It looks to
9 me like the Bedkes might have been led down the Primrose
10 path a little bit. Do you wish to respond to that?

11 MR. NEGRI: I do, Your Honor, because I think
12 there's another factor here. I have -- and other federal
13 attorneys -- I have stood in this courtroom with Mr. Dolan
14 -- I'm sorry, Special Master Dolan, and the United States
15 has requested that these cases move along, that rulings
16 occur, and that we litigate the cases, if that's going to
17 happen. The Bedkes have consistently opposed that request
18 because they wanted everything in Basin 47 and everything
19 in Basin 45 together. Basin 47 is essentially complete,
20 and it has been since these were reported out some years
21 ago.

22 I believe there may be one other water right
23 claim that's for a cabin on this allotment. It's not even
24 really a stock watering claim. There may be something else
25 I'm missing, but that's my understanding. So my point is,

1 to the degree Special Master Dolan made some calls, they
 2 were made in large part, at times, at the request of the
 3 Bedkes. And to be honest, Your Honor, in the last year or
 4 so I've changed my approach, and my approach has been:
 5 Well, okay, if everybody wants to get everything together
 6 then let's do it. And the transcripts will reflect this
 7 out. When I first came on to the SRBA in 2000, I stood up
 8 at a couple of hearings and I said: No, we want to bring
 9 things to resolution. Let's decide this.

10 The Bedkes opposed us on that, and quite frankly,
 11 I think Special Master Dolan did not want to disadvantage
 12 them, because they've said all along what an incredible
 13 burden it would be to have to do Basin 47 before Basin 45
 14 came out. Well, Basin 45 is just coming out now, and quite
 15 frankly, we will have everything together later this year.
 16 But we could have went forward earlier with 47, and again,
 17 I'd just stress that the stays were at the request of the
 18 Bedkes. So it wasn't just a call made by the Special
 19 Master.

20 The other thing I'd like to highlight, too,
 21 though, Your Honor, I think regardless of this issue of
 22 prejudice, given the surrounding facts and given what I can
 23 only characterize as a willful decision not to file, I
 24 don't think reaching the issue of prejudice is necessary.

25 THE COURT: You're saying the court could just

1 those rules.

2 THE COURT: That was the AL Ranch and the LU
 3 Ranching cases?

4 MR. NEGRI: Yes.

5 Your Honor, I also cite in my brief, and I think
 6 -- the sites are in my brief and probably everybody in the
 7 courtroom is more familiar with this case than I am since I
 8 was involved -- I think it was the Smith Springs case, but
 9 it went up to the State Supreme Court, and there's hard
 10 language in that case saying rules are rules and there's no
 11 way around it.

12 Since then the SRBA court seems to have evolved
 13 away from that, but to me it's very interesting that I've
 14 never seen that language referenced in any of the SRBA
 15 court opinions. And I think it's a pretty strong
 16 pronouncement from the State Supreme Court that these
 17 deadlines are important.

18 THE COURT: Thanks very much, Mr. Negri. Once
 19 again I appreciate your answer to the question.

20 MR. NEGRI: Thank you, Your Honor. And I
 21 appreciate you giving me the option not to answer, too.

22 THE COURT: Anything further, Mr. Bedke?

23 MR. JARED BEDKE: Oh, yeah.

24 THE COURT: Go ahead, sir.

25 MR. JARED BEDKE: I'd first like to address what

1 draw the line when the objections were filed and decide
 2 then? And in part that's what Special Master Dolan did:
 3 He made a decision, but then he went on to talk about the
 4 prejudice that resulted from the stipulation.

5 MR. NEGRI: I think it's an alternative basis for
 6 the ruling.

7 THE COURT: I really appreciate your candor in
 8 answering the questions. It helps me. I've just got one
 9 more and it has to do with the policy that, as you know,
 10 exists that favors deciding cases on the merits. I presume
 11 that applies to motions to file late objections. And at
 12 the time late objections were filed in this case, what
 13 reasons then existed that would overcome that policy?

14 MR. NEGRI: I think the willful failure to file.
 15 And when you look at the notice and how direct it is, it's
 16 just -- I don't think you can reach any other conclusion in
 17 that sort of a situation. Particularly in the SRBA, I
 18 think looking at the bigger picture is appropriate. And I
 19 think that's exactly what former presiding Judge Burdick
 20 did in some cases. There has to be finality at some point.
 21 We're talking about thousands of water right claims. Yes,
 22 it's unfortunate when people don't get their day in court,
 23 but deadlines are there for a reason and at some point they
 24 have to be imposed. And if the State of Idaho is entered
 25 in finality, I think there's very good reason to enforce

1 Mr. Negri said about the Hage decision. He said we got no
 2 final opinions, however the presiding judge in that matter
 3 has issued a final opinion, findings of fact. The reason I
 4 know that is because that's what it says on the document:
 5 Final Opinion Findings of Facts. All the facts in that
 6 case have been concluded, and they are included within a
 7 final opinion.

8 The only thing that was still at large is did the
 9 government's actions take his property, and if so, how much
 10 is it worth? Those are the only two rulings we're waiting
 11 on now. It's no longer a basis of one property of Mr.
 12 Jones. That's of court record. And I believe I do cite
 13 that in my brief as well.

14 He then cites the notice of a director's report
 15 and went through it in great detail and he argues: What
 16 would a reasonable person do in this case? Well, we've
 17 always said a reasonable person would do what they've
 18 always done: They would contacted the IDWR whom they dealt
 19 with. So we did so. We received some advice. And I'm not
 20 here to lay blame on anybody. What I'm saying is this is
 21 our good cause. This is why it worked the way it did. It
 22 wasn't willful. It was because we were assured, I guess
 23 for lack of a better term, that, Hey, if there are
 24 conflicting claims, we'll both go to the judge together and
 25 we'll find out who owns them.

1 Now, he went through notice of me, Jared Bedke,
2 and he referenced where I say "we" in a bunch of different
3 cases. Well, I guess the only thing I can say is that was
4 the generic or global we. It wasn't Dad and I. At the time
5 there about six of us attending the same hearing and we
6 were all making similar arguments. So that's why it boiled
7 down to that.

8 Now, his four points was that we have made a
9 slight change of argument. We've shifted feet, in essence.
10 All I can do is I can draw the court's attention to the
11 transcript, which is Exhibit 1. I believe it was July 1st,
12 1999, on page 26 we go through this and I'll start on line
13 15, page 26 -- the court can read the whole thing if it
14 desires to: Now we asked the IDWR in the spring of 1998 if
15 we needed to object to the filings of the government or
16 other conflicting claims and we were told we did not need
17 to file an objection to these conflicting claims because
18 the conflicting status would be enough to get it before the
19 court.

20 As I understand at this time, or as I understood
21 it at that time, the IDWR's philosophy was to recommend
22 both claims and let the court determine who indeed owned
23 the disputed water right, so objections really weren't
24 necessary. Then it goes on from there, Special Master
25 Dolan asks a few more questions.

1 on any of the United States' claims that they have done
2 this on an agency relationship. So that's AL.

3 The other important thing to notice on AL is
4 throughout the whole ruling the judge basically said the
5 ones that have already gone to partial decree and are
6 subject to the higher 60(b)(1), he denied the motions to
7 file objections on. On all those that were not -- had not
8 gone to partial decree, he remanded them to Special Master
9 Cushman for further determination to see whether or not
10 there existed good cause under 55(c). AL Cattle is part of
11 a global stipulation and they entered into the stipulation
12 before Special Master Cushman could make such a decision.

13 So it's not really analogous, AL and us are not,
14 because none of these have proceeded to partial decree.
15 They are all still under the 55(c) standard, which the
16 court hadn't ever determined anything on.

17 LU Ranching was much the same way. They actually
18 are one of the ones that brought up a constitutional
19 provision of notice of the (inaudible) process and that's
20 what they were defeated on. They, too, were also seeking
21 to overturn partial decrees, so they were subject to the
22 higher 60(b)(1) standard.

23 Now Mr. Negri, he cites a brief that I attached
24 by Norm Semanko, and in that brief it says that none of
25 these claimants have their water rights recommended in

1 The point of the matter was this was my argument
2 in 1999, July 1st. And even though I'm a heck of a lot
3 smarter than I was then, now, in regard to this process,
4 it's still our argument today. It's unfortunate that
5 things worked out the way they did, but as the court ruled
6 in one of the cases: Did we act solely and prudently as to
7 deny us remedy. In that case they said no, in this case
8 I'm asking you to say no that we were that imprudent.

9 He then cites AL Cattle and he cites LU Ranch.
10 Now I'm going to address AL Cattle, much as did I in my
11 briefs here, but the AL Cattle decision is wide and varied
12 on the reconsideration. That was for a different subject.
13 Mr. Semanko in the case argued originally under a 60(b)(4),
14 I believe it was, with a constitutional notice provision,
15 and then on the motion for reconsideration it says, Hey,
16 you never did talk about our 60(b)(1). The judge responded
17 that, Well, merely the allegation that the United States
18 doesn't own cattle isn't enough to keep them from having a
19 water right because they can obtain one through an agency
20 relationship with somebody, as enumerated by this court.

21 In this case we have no agency relationship.
22 We've never claimed that the United States cannot own a
23 water right. We've only alleged as part of our meritorious
24 defense that the United States cannot prove where they have
25 earned a beneficial use right. There is no assertion here

1 their stock water. It's kind of important to note that Mr.
2 Semanko's brief was originally filed in our Basin 45
3 subcases. Not in Basin 47. The United States attached it
4 as an exhibit during one of their briefings, I believe it
5 was in response -- in their reply memorandum in opposition
6 to the motions to filed late objections. I can find that
7 in my file, if I need to, for the court. But that's where
8 that brief became drawn in to the trial record here in
9 Basin 47, and so that's why it was attached. What it was
10 doing was showing -- it was addressing arguments that we
11 had never presented anything to the court and we were
12 saying basically what it says in our brief, and that's why
13 it was attached.

14 As well as the default being willful, I think
15 I've addressed that. We did not know that that was the
16 case and there was no willful act on our part. In fact as
17 soon as we found out we needed to make objections, we went
18 ahead and filed them. Now the response deadline in the
19 Basin 47 subcases was April 16th, I believe, of 1999. We
20 filed these late objections -- or motions to file
21 objections on June 4 of 1999. Not even two months after
22 the response deadline.

23 So what happened is there was an initial hearing
24 in Basin 45, which is alluded to throughout the briefs, on
25 April 7, I believe, of 1999, and those were for the Basin

1 45 subcases. At that point in time, as I say in the brief,
 2 we did investigation; determined which claims the United
 3 States in Basin 47 we needed to object to; we submitted
 4 those objections; and then we had our first hearing on the
 5 matter on June 7, after our June 4 submission.

6 As far as prejudice to the United States goes, in
 7 the Special Master Cushman decision that Mr. Negri briefs
 8 up, what happened is Bracketts, who was involved in the
 9 case, they were the ones that filed the motion to file late
 10 objections. But the State of Idaho had objected to the
 11 United States' claims in that instance. That objection had
 12 gone through trial. It worked out the United States and
 13 the government had settled, and that was the settlement --
 14 the priority date, as I understand it.

15 But anyway, after that ruling had been made, then
 16 Bracketts came in after trial and made motions to file late
 17 objections. If you read the case what happens is, is
 18 Special Master says: Were you aware in the affidavits, and
 19 they say, Yes, we were aware that this trial was going on,
 20 but we were kind of hoping the State would carry our water
 21 for us and we wouldn't have to file an objection. When we
 22 could see they weren't, yeah, we want to get in and file
 23 our objection. Special Master Cushman said, I don't think
 24 you demonstrated good cause. It would be undue prejudice.
 25 However, he did rule that they had shown a meritorious

1 right simply because they own land or they manage it in
 2 public domain. Subsequent to that I believe the director's
 3 report for Basin 47 was issued in August of 1998. I say
 4 that that should be accountable because that ruling of the
 5 court should have impacted the initial recommendation.

6 Third of all the issue here is not permits or
 7 whose permit or this permit or some other recommendation or
 8 that by the United States. The issue here is property and
 9 water and whether or not these reports of recommendations
 10 are actually following State law with regard to the
 11 property.

12 Now I'll answer a couple of your questions about
 13 the prejudice. I don't see how there can be any prejudice
 14 against the United States. By granting these motions we
 15 have still got to come up with all the evidence to rebut
 16 the prima facie presumption of the director's report. Even
 17 though we know that it's wrong, the burden of proof is
 18 still on us.

19 Now if the United States cannot obtain a water
 20 right based on their merits -- or let's put it in reverse,
 21 since the water right was recommended, the United States
 22 should be able to overcome any of my challenges based on
 23 the merits of the original report by the director.

24 And last, a lot of the rulings in this case were
 25 made to accommodate the private claimants simply for

1 position. So he denied their motion based on the fact that
 2 good cause didn't exist; not that they couldn't show
 3 meritorious position.

4 Again then he addressed the meritorious defense
 5 and cited AL Cattle, stating that simply because the United
 6 States doesn't own cattle doesn't mean the United States
 7 can't obtain a water right. But the court went on to say
 8 in AL Cattle, it was very definitive, that specifically the
 9 water right -- the way they could obtain one was either --
 10 in that case he said through an agency status. There are
 11 other ways they could acquire them, buying them and such,
 12 but for that case he was referring merely to the agency
 13 status. And the fact that they didn't know cattle was not
 14 enough to defeat an agency relationship. It had nothing to
 15 do with the beneficial use claim.

16 Now I'll get on to the substantive challenge. He
 17 says that these rights are going to be for permittees by
 18 the use of the permittees. What I'm saying is the private
 19 parties have already made claims to this water.

20 On the substantive challenge, the second thing
 21 is, I've addressed it well in my brief, Special Master
 22 Hammerle ruled that the United States does not get a water
 23 right simply because it manages the public domain, after
 24 multiple theories of ownership that he goes through in his
 25 order of 2-6-1998 that they should not receive a water

1 judicial efficiency. What it boiled down to was we wanted
 2 to consolidate all of these into a single trial, because it
 3 was looked at by us that there's a single use out there and
 4 that is for stock water. Now it can either vest in the
 5 private parties who own the livestock or it vests in the
 6 United States through some other relationship. That is why
 7 everything was delayed slightly in that. We could see that
 8 all of the chain of evidence and things of that nature
 9 should be addressed simultaneously because it all applied
 10 to one water right. And that was why those kind of were
 11 done with the Special Master.

12 That's pretty well all I have here, Your Honor.
 13 I would address any further questions.

14 THE COURT: Just one thing. So you wanted in?
 15 Back when you filed the motion for late objection, you
 16 wanted to be involved so you could negotiate and
 17 participate in the lawsuit at that point?

18 MR. JARED BEDKE: Me specifically or us?

19 We wanted to be able to challenge the underlying
 20 merits of the United States' claims. We wanted to say:
 21 Hey, we don't think they have a water right. Prove it to
 22 us, you know. We didn't really understand then, but it
 23 didn't take long to understand the prima facie weight of
 24 the director's report and that we need to overcome that.
 25 So what we've attempted to do is just say, hey, let's have

1 a trial based on the merits. Give us our best shot. If we
2 can do it, we win; if we can't, the director's report
3 stands as good.

4 THE COURT: Okay. Thanks a lot, Mr. Bedke.

5 The court will consider the matter submitted for
6 a decision then and I will issue a written opinion in this
7 case. Thank you both very much for the really excellent
8 briefing and argument in this case. I appreciate that and
9 your candid responses to my questions as well. That will
10 be big a help. I appreciate it.

11 Court will be in recess.

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14 End of hearing.
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1 REPORTER'S CERTIFICATE
2
3

4 STATE OF IDAHO)

5)

6 COUNTY OF MINIDOKA)
7

8 I, MAUREEN NEWTON, Official Court Reporter and
9 Notary Public, in and for the Fifth Judicial District of
10 Minidoka County, Idaho, do hereby certify that the above
11 and foregoing typewritten pages contain a true and correct
12 transcription of my shorthand notes taken upon the occasion
13 set forth in the caption hereof, as reduced by means of
14 computer-aided transcription by me or under my direction.

15
16 Witness my hand, this the 15th day of April,
17 2005.
18
19
20
21

22 _____
23 MAUREEN NEWTON, CSR #321
24 Court Reporter and Notary Public
25 For the State of Idaho
My commission expires 9-10-2006