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DEPARTMENT OF
WATER RESOURCES

Name of Party Serving Document:

UNITED STATES OF AMERICA

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ISB# 6697

**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

) Subcases 45-12050 *et al.*
) See Attachment A
)
) **UNITED STATES' RESPONSE BRIEF**
) **IN SUPPORT OF ITS RENEWED**
) **OPPOSITION TO MOTIONS TO FILE**
) **LATE OBJECTIONS**
)
)

I. INTRODUCTION

The Bedkes argue in support of their motions for late objections that they were confused by SRBA procedure and that this confusion establishes good cause to grant their motions. They seek to absolve themselves from *any* obligation to review the Director's Report containing the United States' claims, to follow the explicit and clear directions in the Notice of Director's Report, and to take timely action to protect their interests. Granting of late objections in these circumstances would completely eviscerate the good cause standard for late objections and render SRBA deadlines meaningless. Their motions, therefore, must be denied.

II. ARGUMENT

The Bedkes argue that good cause to support their late objection motions exists because they were confused by bifurcation of the SRBA claim reporting procedure and by information received from IDWR concerning the bifurcation. *Memorandum on Bedkes' Motions to File Late Objections* ("Bedke Memo"), at pp. 5-7. They claim that they were told by an unidentified employee of IDWR that "they wouldn't *necessarily* have to object to [the United States' 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." Bedke Memo at 6 (emphasis added).

The Bedkes' arguments do not withstand scrutiny for several reasons. First, in the seven years since the United States' claims were reported, the Bedkes have presented only unsworn statements to support their assertion that some unnamed person at IDWR gave them unreliable

advice. These unsworn statements have no evidentiary value and should not be given any consideration by this Court.^{1/}

Second, the Bedkes' late objection motions and supporting documents make no mention of any erroneous advice from IDWR. In contrast, the Bedkes did reference other discussions with IDWR in their motions: "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)."^{2/} If erroneous advice from IDWR had been the cause of the Bedkes' failure to file objections in a timely manner, it is inconceivable that they would not have mentioned it in their motions, particularly since other discussions with IDWR were included in the motions.

Third, any advice that they need not object is directly contradicted by the written Notice of Director's Report they received:

^{1/} Any factual assertions made by the Bedkes should not be considered by the Court in support of the Bedkes' arguments because they were never properly sworn. *See, e.g.*, IRE 603 (proper oath or affirmation required for testimony), I.C. § 51-109 (oath or affirmation requires a certification by notary public); *Evans v. Twin Falls County*, 796 P.2d 87 (1990) (written statements not subscribed and sworn to as an oath or affirmation by notary public are not under oath as required). In addition, because the Bedkes are representing themselves in this matter, their unsupported assertions, made either orally in court or in their written filings, should be treated the same as any assertions made by an attorney which lack supporting evidence, *i.e.*, they should be ignored.

However, statements made by the Bedkes in court may be relied upon by the United States under the doctrine of judicial admissions. A statement made by a party or attorney in the course of judicial proceedings can be used by the opposing party to establish facts. *Strouse v. K-Tek, Inc.*, 930 P.2d 1361, 1363 (Idaho App. 1997). Judicial admissions may be considered without admission into evidence, and a party making such an admission may not controvert the statement on appeal. *Griff, Inc. v. Curry Bean Co., Inc.*, 63 P.3d 441, 447 (Idaho 2003).

^{2/} Exs. C and D, attached to *United States' Renewed Opposition to Motions to File Late Objections*.

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.^{3/}

The cover letter to the Notice of Director's Report further states:

Note that you have 120 days in which to file any objection to our recommendation and to review the domestic and stockwater rights of other claimants, including those of the United States.^{4/}

Fourth, even the Bedkes concede that they were not conclusively told that they need not object, but only that they might not necessarily have to.

Finally, two of Bruce Bedkes' stockwater claims on federal land were contained in the Basin 45 Director's Report.^{5/} In reviewing these claims, the Bedkes would immediately understand that the federal and private rights were not being reported as one right in most instances and that any advice they might have received to the contrary was suspect. At minimum, this clearly indicates the need to undertake *some* review of the Director's Report. Assuming for the sake of argument that erroneous advice was provided by IDWR, given the facts surrounding this case it was unreasonable for the Bedkes to fail to make further investigation upon the receipt of the Notice of Director's Report. *See Order Denying Motion For Late*

^{3/} *United States' Renewed Opposition to Motions to File Late Objections*, Exhibit B.

^{4/} Exhibit B to the *United States' Renewed Opposition to Motions to File Late Objections* inadvertently omitted the cover letter to the Notice of Director's Report, but it is attached as Exhibit A to this Brief.

^{5/} Water right claims 45-10505 and 45-10506.

Objection, subcase nos. 65-02949A and B (November 6, 2001), at p. 3 (“Regardless of whether [movant] had been given erroneous information by IDWR . . . it would have been reasonable for [movant] to make further inquiry at that time.”).

The Bedkes cite *Johnson v. Pioneer Title Company of Ada County*, 662 P.2d 1171 (Idaho 1983), in support of their argument that their confusion constitutes good cause to set aside entry of default. Bedke’s Memo at 7. In *Johnson*, the court set aside a default judgment based upon ambiguities in the process served upon defendants, ambiguities which were attributable, in part, to the plaintiffs. *Johnson*, 662 P. 2d at 1177.

In the subcases at issue, however, there is nothing ambiguous or the least bit misleading in the Notice of Director’s Report served upon Bruce Bedke: “Note that you have 120 days in which to file any objection to our recommendation and to review the domestic and stockwater rights of other claimants, including those of the United States.” Furthermore, any confusion on the part of the Bedkes was in no way caused by any action by the United States. Accordingly, *Johnson* is easily distinguishable from the facts in these subcases and does not support the Bedkes’ arguments.

The Bedkes note that the SRBA Presiding Judge’s *Order on Permissive Review and Order of Recommitment* (August 3, 2005) in subcase numbers 45-12475 *et al.* (“*Basin 45 BLM Order*”) is applicable to the subcases at issue. The Basin 45 BLM subcases also involved late objections by the Bedkes to federal stockwater claims. The SRBA Court recommitted the Basin 45 BLM subcases for factual findings to determine the willfulness of the late filings. *Basin 45 BLM Order* at 10-11. As part of this inquiry, the Special Master was directed to determine

whether or not the Bedkes' claims on federal land were reported out at the same time as federal claims. *Id.* As explained above, Bedke claims on federal land were included in the Basin 45 Director's Report. This fact, in conjunction with the lack of evidence that the Bedkes made *any* attempt to review the Director's Report to protect their own interests, demonstrates that their failure to file timely objections was willful. *See Order on Motion to File Late Objection*, subcase no. 23-0009B (January 18, 2005) (good cause for a late objection exists where a party has a systematic process of reviewing claims and Director's Reports, but where a movant fails to attempt to protect his water rights with a system of reviewing competing claims, the failure is willful).

The SRBA Presiding Judge also has recently ruled upon late objection motions by the Bedkes to federal stockwater claims in Basin 47. *Memorandum Decision and Order on Challenge; Order of Recommitment*, subcase numbers 47-16433 *et al.* (March 22, 2005) ("*Basin 47 Order*"); *Order on Motion For Reconsideration*, subcase numbers 47-16433 *et al.* (August 29, 2005) ("*Basin 47 Reconsideration Order*"). Although the Court allowed the late objections, the opinion rests on a factual finding that Bedke stockwater claims had not yet been reported in Basin 47. *Basin 47 Order* at 3. The Court held that "[t]he entire procedural posture of the Bedke's [late objection motions] was premised on the basis that the Bedke's claims had not yet been reported." *Basin 47 Reconsideration Order* at 5.⁶ As previously noted, at least two Bedke stockwater claims on federal land were included in the Basin 45 Director's Report.

⁶ In fact, the Bedke Basin 47 claims had been reported out at the same time as the federal claims. The Court recognized that its finding to the contrary was in error, but apparently held that it was too late to cure the error. *Basin 47 Reconsideration Order* at 2-5.

Furthermore, the Court rejected the Special Master's analysis under Idaho R. Civ. Pro. 60(b), ruling on the late objection motions under Idaho R. Civ. Pro. 55(c) without the benefit of factual findings and analysis by the Special Master under Rule 55(c). *Basin 47 Order* at 11. In the subcases at bar, the Special Master can make such factual findings and apply those findings to the Rule 55(c) good cause standard. In this regard, it is particularly important to note that, in their late objection motions, the Bedkes specifically reference discussions with IDWR but make no mention of any advice concerning objections.⁷⁷ In light of this record evidence, any assertion that IDWR misled the Bedkes concerning the need to file objections, particularly when the Bedkes were specifically provided with written information to the contrary, is simply not credible.

In the *Basin 47 Order*, the SRBA Court held that it need not analyze the reasons underlying the Bedkes' purported confusion to reach its decision. *Basin 47 Order* at 3-4. The Court held that the Bedkes' "confusion, for whatever reason, may not have been reasonably prudent, but it does not appear to have been willful." *Basin 47 Order* at 12. In these subcases, however, the record demonstrates that the Bedkes' claimed confusion is at best a smokescreen, and that they chose to disregard the specific directions and deadlines in the Notice of Director's Report and decided to forego any review of the Director's Report. As explained above, their failure to protect their water rights by conducting any review of the Director's Report is a willful default under Rule 55(c). Accordingly, the record demonstrates that the Bedkes cannot establish good cause pursuant to Rule 55(c), and their motions must be denied.

⁷⁷ See *United States' Renewed Opposition to Motions to File Late Objections*, Exs. C, D.

VI. CONCLUSION

The Bedkes' claim that an unidentified employee of IDWR told them that they wouldn't necessarily have to object to federal stockwater claims has no record support and should not be credited by this Court. Their complete failure to conduct any review of the Basin 45 Director's Report constitutes a willful default and demonstrates that they have failed to establish good cause for their late filing of objections. Their motions to file late objections must be denied.

DATED this 15 day of December, 2005.

UNITED STATES OF AMERICA

A handwritten signature in dark ink, appearing to read "David Negri", is written over a horizontal line.

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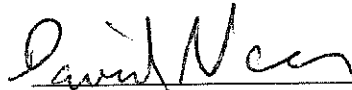
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of December, 2005, I served a true and correct copy of the foregoing UNITED STATES' RESPONSE BRIEF IN SUPPORT OF ITS RENEWED OPPOSITION TO MOTIONS TO FILE LATE OBJECTIONS 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

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83711-4449

Bruce Byron Bedke
Jared K. Bedke
42 East Basin Road
United States Post Office
Oakley, Idaho 83346



David Negri

Attachment A

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EXHIBIT A



State of Idaho

DEPARTMENT OF WATER RESOURCES

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**PHILIP E. BATT
GOVERNOR**

**KARL J. DREHER
DIRECTOR**

**RE: Domestic and/or Stockwater Rights in Basins 41, 43 and 45
Snake River Basin Adjudication (SRBA)**

Dear Water Right Claimant(s):

Please find enclosed the Idaho Department of Water Resources recommendations for your domestic and/or stockwater water right(s) in basins 41, 43 and 45. We have also enclosed instructions for reviewing (1) your recommended water right(s), and (2) other recommended domestic and stockwater right(s) in your area. Water rights for irrigation and other purposes in these basins will be recommended in a later process.

Note that you have 120 days in which to file any objection to our recommendation and to review the domestic and stockwater water rights of other claimants, including those of the United States. Information on the other water rights can be found at the county courthouses in American Falls, Malad City, Burley and Twin Falls, and at all of the Idaho Department of Water Resources offices (see addresses in enclosure).

If the Court does not receive an objection from you about our recommendation, and no other party objects to your water right, your water right will be decreed later this year as recommended. You will receive your decree from the SRBA Court.

Completion of the SRBA is important for the future of water management in Idaho. We invite you to contact our regional offices with any questions that you have about your water right(s) or this adjudication process.

Sincerely,

**Karl J. Dreher
Director**

Enclosures

SUPPLEMENTAL