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JAN 08 2008
DEPARTMENT OF
WATER RESOURCES

Attorneys for Albert & Alvera Fols, Charles & Mary Harling, A.C. & Luella Pilkerton,
Lloyd & Sheryl Tutor, Marci Dixon, and Tracy Marcia

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

In Re SRBA	)	Subcase Nos. See Exhibit A
	)	
Case No. 39576	)	MOTION TO FILE LATE OBJECTIONS
	)	
_____	)	

COME NOW, ALBERT & ALVERA FOLS, CHARLES & MARY HARLING, A.C. & LUELLA PILKERTON, LLOYD & SHERYL TUTOR, MARCI DIXON, AND TRACY MARCIA (hereinafter collectively referred to as the "Carmen Creek Users"), claimants in the SRBA, by and through their attorneys of record, Barker Rosholt & Simpson LLP, and move this Court for an Order Granting Motion to File Late Objections in the above-entitled subcases. This motion is made pursuant to SRBA Administrative Order #1 ("AO1") and the Idaho Rules of Civil Procedure. This motion is supported by the *Affidavits of Albert Fols and Travis L. Thompson* filed together herewith. The reasons for the motion are set forth below.

BACKGROUND

The Carmen Creek Users, like the 16 claimants in the above-referenced subcases (hereinafter collectively referred to as "16 Claimants"), hold water rights to and use water from

MOTION TO FILE LATE OBJECTIONS

Carmen Creek in Basin 75.¹ The water rights appurtenant to the Carmen Creek Users' properties, like the 16 Claimants, were originally decreed in the *McNutt v. Palmer* Decree of 1902 to the original landowner Thomas Palmer.

Part of Thomas Palmer's original homestead, patented in 1901, was the acreage that was included in *McNutt v. Palmer* decree. The Palmer Ranch included other property, Government Lots 1 & 2, Township 22N Range 22E, Section 3, Lemhi County, but that land was not patented until 1912. The Palmer Ranch held four decreed water rights to Carmen Creek with priority dates of 1875, 1882, 1888, and 1892. These water rights were eventually split amongst different landowners when the original ranch was later subdivided into separate tracts of land in the 1980s and 1990s.

Sometime in 2004 or 2005, the Idaho Department of Water Resources ("IDWR") began its investigations into the water right claims to Carmen Creek. IDWR sent "preliminary recommendations" to the Carmen Creek Users and the 16 Claimants recommending the water right claims in November 2006. The Carmen Creek Users filed their *Notice of Error* replies with IDWR, agreeing with the proposed recommendations. See Affidavit of Al Fols (hereinafter "*Fols Affidavit*"). Similar to the Carmen Creek Users, at least some of the 16 Claimants also agreed with IDWR's proposed recommendations for their claims as well. See **Exhibit B** to *Thompson Aff.*

On December 6, 2006 IDWR held a public meeting in Salmon, Idaho to present and explain their preliminary water right recommendations for the Carmen Creek drainage. See *Fols Affidavit*. At that time, the Carmen Creek Users' claims were found to be valid and had received preliminary recommendations. See *id.* Water right claimants attending that meeting were

¹ IDWR recommended the Carmen Creek Users' water right claims be disallowed in the final Director's Report issued on January 8, 2007. The Carmen Creek Users filed timely objections to IDWR's recommendations.

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informed by IDWR that recommended water right claims would likely withstand any legal challenge in the SRBA Court. *See id.*

At some point in time between the “preliminary recommendations” that were sent in November 2006 and the filing of the final Director’s Report with this Court on January 8, 2007, IDWR changed its mind on what should be recommended. Without any notice or an opportunity to discuss the claims, IDWR recommended the Carmen Creek Users’ claims be disallowed in the final Director’s Report. These final recommendations were issued a little over a month after the meeting in Salmon. Al Fols corresponded with IDWR’s water rights agent Gregory Taylor about the sudden change. *See Fols Affidavit*. Mr. Taylor responded and provided Mr. Fols a “draft letter” that was never finalized or sent to the Carmen Creek Users to explain the reason for the about-face and disallowance of their water right claims in the final Director’s Report. *See id.*

In addition to disallowing the Carmen Creek Users’ claims, IDWR increased the diversion rate or quantity of water that would be recommended to 13 of the 16 Claimants. *See Exhibit C to Thompson Aff.* IDWR also reduced the diversion rate or quantity of water that would be recommended to 2 of the 16 Claimants. *See Exhibit D to Thompson Aff.* In essence, IDWR re-allocated the water that was originally recommended to the Carmen Creek Users to most of the other water users in the drainage in a span of less than two months between the preliminary recommendations in November 2006 and the final Director’s Report issued in early January 2007.

The Carmen Creek Users filed timely objections to their own disallowed claims but only recently became aware of the changes to the other 16 Claimants’ water rights and how IDWR increased the majority of the 16 Claimants’ water rights at the expense of the disallowed Carmen Creek Users’ water rights. Accordingly, in order to properly adjudicate the water rights amongst

all claimants, the Carmen Creek Users have been forced to move to file late objections to the recommendations for the 16 Claimants' water rights.

STANDARD OF REVIEW

In the *Memorandum Decision and Order on Challenge* (Subcase Nos. 47-16433 *et al*) (March 22, 2005) ("*Bedke I*"), Presiding Judge Melanson described the standard of review for filing a late objection:

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 *AOI* for filing late claims. [citation omitted]. *AOI* does not expressly provide a standard for reviewing late objections. A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *Id.*, see *AOI* § 4d(2)(d) (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 the *A.L. Cattle* subcase, this Court held that the I.R.C.P. 55(c) standard should be applied to late objections to which partial decrees have not been entered, rather than the I.R.C.P. 60(b) standard.

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*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) good cause standard takes into account the following factors:

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

Bedke I at 5-6.

In doubtful cases, relief should be granted to reach a judgment on the merits. *Bedke I* at 10. This is because default judgments are disfavored. See *Order on Motion to Set Aside Partial Decrees and File Late Objections*, Subcase Nos. 65-07267 *et al.* (Jan. 31, 2001) ("*A.L. Cattle*").

As described below, the Carmen Creek Users' motion meets the above standard, hence it should be granted.

REASONS SUPPORTING MOTION

I. The Carmen Creek Users' Late Objections Are Not "Willful".

The Carmen Creek Users did not file timely objections to the 16 Claimants' water right claims because they were unaware that IDWR's disallowance of their claims had an impact on the 16 Claimants' final recommendations. *See Fols Affidavit*. Since the Carmen Creek Users believed their water right claims were going to be recommended to the Court as indicated in the preliminary recommendations sent to them in November 2006, they were unaware that IDWR had increased the quantity or diversion rate of most of the 16 Claimants' water right claims until recently, after the objection period had expired. *See id.* The Carmen Creek Users did not purposely withhold their objections, hence any delay in filing timely objections was not "willful". *See id.* Given IDWR's last minute changes in the final recommendations of the water right claims involved in these subcases, the obvious errors made in these recommendations, and the confusion created by IDWR's actions, it is obvious the late objections are not "willful".

II. IDWR's Changed Recommendations / Errors / and Effect on Carmen Creek Users' Claims.

The Carmen Creek Users' Motion to File Late Objections is supported by "good cause" and a "meritorious position"; hence, it meets the above standard. First, as explained above, IDWR, without notice to any claimants, changed the Director's Report for the 16 Claimants' water right claims from the preliminary recommendations. *See Fols Affidavit*. Whereas it was the Carmen Creek Users' understanding as of December 2006 that their water rights were being recommended similar to the other claimants' in the drainage, they only recently became aware

that IDWR had increased the diversion rate or quantity to the majority of the 16 Claimants' water rights at the expense of the Carmen Creek Users' disallowed water right claims. *See id.*

The Carmen Creek Users, based upon meetings and discussions with IDWR personnel in 2006, had previously understood that the original recommendations for all claims involved (including those filed by the 16 Claimants) had divided the water rights' quantities proportionately by the total acreage claimed by all claimants. *See Fols Affidavit.* Accordingly, the Carmen Creek Users had no reason to suspect that IDWR increased the diversion rates for most of the 16 Claimants when the final Director's Report was filed. In reviewing the final recommendations for the 16 Claimants' water right claims since the Carmen Creek Users filed timely objections to their own disallowed claims in October 2007, it became evident that IDWR re-allocated that water from the Carmen Creek Users to 13 of the 16 Claimants. *See Fols Affidavit, Thompson Affidavit.* Hence, it is not possible to continue with the objections to the Carmen Creek Users' claims only. Since the total quantity of the originally decreed water rights from the *McNutt v. Palmer* decree (plus additional water) is already being recommended to the other water rights claims, the Carmen Creek Users were forced to file this present motion so that the Court can review all recommendations together in context and remedy the errors made by IDWR in the final Director's Report.

Whereas the Carmen Creek Users, as well as many of the 16 Claimants, were satisfied with the preliminary recommendations made in November 2006, IDWR changed those recommendations without notice, and without any opportunity to cure the mistakes they would eventually make with the final Director's Report in January 2007. The discrepancies between the preliminary recommendations and the final Director's Report, particularly where IDWR had led the Carmen Creek Users to believe their claims had been recommended, without changes to

MOTION TO FILE LATE OBJECTIONS

the other claimants' water rights, satisfies the "good cause" and "meritorious position" standard for granting a motion to file a late objection.

III. IDWR's Errors in the Final Recommendations.

Next, in the reasons IDWR gave in the final Director's Report for disallowing certain of the Carmen Creek Users' claims it is apparent IDWR made additional mistakes in the final report. Notably, in explaining why it disallowed Al Fols' claim #75-14056, IDWR stated that the right was recommended as various other water right numbers, including #75-14375. *See Exhibit D to Thompson Aff.* Confusingly, water right #75-14375 was recommended to be disallowed as well. In essence, IDWR stated that the reason it disallowed Mr. Fols' claim was that his water right had been recommended as another disallowed claim. The same error appears on the following claims of the Carmen Creek Users: #75-10061X, #75-14055, #75-14025, #75-10061N, #75-14058, #75-10062V, #75-14057, #75-14027, #75-10062L, #75-14046, #75-14050, #75-69M, #75-14049, #75-14019, and #75-14038 (listing disallowed claims #75-14375, #75-14377, #75-14371, #74-14376, #75-14378, #75-14372 as a reason for the disallowance of the Carmen Creek Users' claims).

In addition, IDWR also listed certain claims (#75-14737 and #75-14734) that have no information available for them on either IDWR's water right database, or the SRBA Court's on-line docket summary sheet, as reasons why certain Carmen Creek Users' claims were disallowed. IDWR is giving a non-existent water right as a reason for disallowing a Carmen Creek Users' claim. The above errors compounded the confusion that the Carmen Creek Users have endured over the past year and provides yet another basis why timely objections were not filed in these subcases.

Finally, IDWR recommended water rights to other claimants that own property in Lots 1 and 2 (land that was part of the original Thomas Palmer Ranch but was not patented until 1912). These claims, #75-10061J, #75-10062H, #75-69F, and #75-70F, include acres outside of the originally decreed lands in 1902. However, IDWR did not disallow these claims as it did the Carmen Creek Users' claims. Whereas those claims were recognized IDWR failed to explain why the Carmen Creek Users' claims were not recommended as well.

IV. IDWR's Recommended Quantities Do Not Match the Quantities Previously Decreed for the Water Rights in the *McNutt v. Palmer* Decree.

The *McNutt v. Palmer* decree of 1902 decreed four water rights to the Palmer Ranch.

The decreed amounts and priority dates were as follows:

1875 29 inches

1882 16 inches

1888 20 inches

1892 30 inches

Total **95 inches**

The final recommendations for the 16 Claimants' water right claims that were filed with the Court on January 8, 2007, are different:

1875 38.3 inches (9.3 inches more water than was decreed in 1902)

1882 16.9 inches (0.9 inches more water than was decreed in 1902)

1888 19.2 inches (0.8 inches less water than was decreed in 1902)

1892 30.8 inches (0.8 inches more water than was decreed in 1902)

Total **105.2 inches**

See Fols Affidavit.

IDWR has provided no explanation for the above discrepancies which further fail to take into account the water right claims of the Carmen Creek Users. Obviously IDWR's final recommendations for the water right claims involved in these subcases contain errors that must be addressed by the Court. Granting the Carmen Creek Users' motion would provide an opportunity to properly address these errors and ensure the water that was decreed in 1902 is properly allocated and adjudicated here in the SRBA.

V. Carmen Creek Users' Water Use

Consistent with historical practice prior to the time the ranch was subdivided, the Carmen Creek Users have been delivered and continue to use their irrigation water rights on their properties. *See Fols Affidavit*. Past water use and delivery by the Watermaster confirm the water rights that are appurtenant to the Carmen Creek Users' properties. *See id.* IDWR's "preliminary recommendations" in November 2006 initially recognized this fact as well. The Carmen Creek Users' continued water use and delivery of their water rights provide further "good cause" and a "meritorious position" for this Court to grant their motion to file late objections. Given the historical use and reliance upon this water for irrigation, the Carmen Creek Users are particularly concerned about the 2008 irrigation season and the effect of IDWR's disallowed recommendations for their claims. *See Fols Affidavit*. The historical use and reliance upon their water right claims as delivered by the Watermaster provides additional "good cause" and a "meritorious position" for granting the Carmen Creek Users' present motion.

CONCLUSION

Since default judgments are not favored, and there exist clear discrepancies in what IDWR has recommended in these subcases, particularly with the process that unfolded after the "preliminary recommendations" were sent to the Carmen Creek Users and the 16 Claimants, it is

imperative that a meaningful, full, and fair opportunity be provided to properly adjudicate the claims to the Palmer Ranch water rights.

Since the Carmen Creek Users only recently became aware of how IDWR re-allocated the water from their properties to 13 of the 16 Claimants, and it was obvious that pursuing their objections to their own disallowed claims would not resolve the issues, the motion for late objections became necessary. Whereas the Carmen Creek Users originally believed they could resolve their own disallowed claims with IDWR when they filed timely objections in October 2007, it is obvious that decreeing their rights, along with the rest of the 16 Claimants' claims, would result in even more water being decreed than was originally decreed to the Palmer Ranch in 1902. This would further compound IDWR's errors.

Accordingly, the proper resolution affects all claims to these water rights, not just the disallowed Carmen Creek Users' claims. For these reasons, the Carmen Creek Users' respectfully request the Court to grant their motion and accept the objections attached hereto collectively as **Exhibit B**.

DATED this 7th day of January, 2008.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

CERTIFICATE OF MAILING

I certify that on 7th day of January, 2008, I mailed the original and copies of the foregoing motion, including all exhibits, to the following persons:

Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Copies to:

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

U.S. Department of Justice
Environment & Natural Resources
550 West Fort Street, MSC 033
Boise, Idaho 83724

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

John E Burns
Ruth C Burns
PO Box 264
Carmen, ID 83462

Rodney Hugh Edmiston
Susan Francine Edmiston
PO Box 155
Carmen, ID 83462

William W Clementz
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Carmen, ID 83462

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PO Box 173
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Roberta Fadness
Danny E Fadness
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Robert D Mosher
Fransicka Mosher
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Veralyn E Hershey
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Linda Rice
Rick Rice
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Steven K Yowell
3509 Ballance Ct.
Chesapeake, VA 23321


Travis L. Thompson

Exhibit A

75-69A	75-10062P
75-69B	75-10062R
75-69F	75-10062W
75-69H	75-10062X
75-69K	75-10062Y
75-69L	75-10136A
75-69N	75-10136B
75-69P	75-10137A
75-69Q	75-10137B
75-69S	75-10678
75-69W	75-10678
75-69X	75-14387
75-70A	75-14388
75-70B	75-14393
75-70F	75-14441
75-70H	75-14443
75-70K	
75-70L	
75-70N	
75-70P	
75-70Q	
75-70S	
75-70T	
75-70X	
75-70Y	
75-10061A	
75-10061AA	
75-10061AE	
75-10061AM	
75-10061B	
75-10061C	
75-10061J	
75-10061R	
75-10061T	
75-10061Y	
75-10061Z	
75-10062A	
75-10062AB	
75-10062AC	
75-10062AL	
75-10062C	
75-10062H	

EXHIBIT B

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	)	A. Subcase Nos. See Exhibit A (Insert water right number)
	)	
Case No. 39576	)	STANDARD FORM 1
_____	)	OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON(S) OBJECTING

ALBERT C FOLS
ALVERA C FOLS
PO BOX 56
CARMEN, ID 83462

CHARLES E HARLING
MARY N HARLING
PO BOX 283
CARMEN, ID 83462

TRACY MARCIA
PO BOX 80
CARMEN, ID 83462

LLOYD A TUTOR
SHERYL L TUTOR
HC 60 BOX 52E12
ROUND MOUNTAIN, NV 89045

A C PILKERTON
LUELLA PILKERTON
PO BOX 23
CARMEN, ID 83462

MARCI M DIXON
PO BOX 221
CARMEN, ID 83462-0221

Name & Address of Attorney, if any:

Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
Barker Rosholt & Simpson LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

See Exhibit B (complete list of claimants and their water right claims)

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**

Should be: _____

2. ☐ **Source**

Should be: _____

3. ☒ **Quantity**

Should be: _____

4. ☐ **Priority Date**

Should be: _____

5. ☐ **Point of Diversion**

Should be: _____

6. ☐ **Instream Flow Beginning and Ending Point**

Should be: _____

7. ☐ **Purpose(s) of Use**

Should be: _____

8. ☐ **Period of Year**

Should be: _____

9. ☐ **Place of Use**

Should be: _____

10 ☐ **I object because:**

☐ This water right should not exist.

☐ This water right was not recommended, but should be recommended as claimed

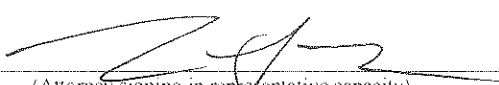
E. REASONS SUPPORTING OBJECTIONS(S):

F. VERIFICATION (must be completed)

State of Idaho)
) ss.
County of Twin Falls)

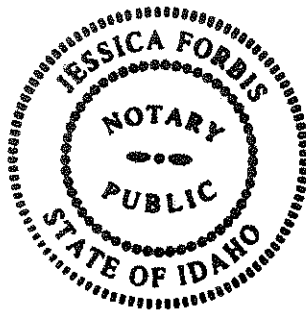
TRAVIS L. THOMPSON, duly sworn, upon oath, deposes and says:
That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and(6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)



(Attorney signing in representative capacity)

Subscribed and sworn to before me on: January 7th, 2008



Notary Public for Idaho
Residing at: Twin Falls
My Commission Expires: 4/3/12

G. CERTIFICATE OF MAILING

I certify that on January 27th 2008, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimants of the water rights at the following address:

See Exhibit B

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449



Travis L. Thompson

Exhibit A

75-69A	75-10061B
75-69B	75-10061C
75-69F	75-10061J
75-69H	75-10061R
75-69K	75-10061T
75-69L	75-10061Y
75-69N	75-10061Z
75-69P	75-10062A
75-69Q	75-10062AB
75-69S	75-10062AC
75-69W	75-10062AL
75-69X	75-10062C
75-70A	75-10062H
75-70B	75-10062P
75-70F	75-10062R
75-70H	75-10062W
75-70K	75-10062X
75-70L	75-10062Y
75-70N	75-10136A
75-70P	75-10136B
75-70Q	75-10137A
75-70S	75-10137B
75-70T	75-10678
75-70X	75-10678
75-70Y	75-14387
75-10061A	75-14388
75-10061AA	75-14393
75-10061AE	75-14441
75-10061AM	75-14443

Exhibit B

List of Claimants (and respective water right claims):

75-10061A; 75-10062A; 75-69A; 75-70A JOHN E BURNS RUTH C BURNS PO BOX 264 CARMEN, ID 83462 (208)756-3645	75-10061AA;75-10062Y;75-69Q; 75-70Q RODNEY HUGH EDMISTON SUSAN FRANCINE EDMISTON PO BOX 155 CARMEN, ID 83462 (208) 756-6160
75-10061AE; 75-10062AC; 75-69S; 75-70T WILLIAM W CLEMENTZ PO BOX 255 CARMEN, ID 83462 (208)756-2347	75-10061B; 75-10062C; 75-69B; 75-70B JAMES PAUL HUDSON PO BOX 173, CARMEN, ID 83462 (208)756-3193
75-10061C; 75-14388; 75-14393; 75-14387 ROBERTA FADNESS, DANNY E FADNESS PO BOX 286, CARMEN, ID 83462 (208)756-6296	75-10061J; 75-10062H; 75-69F; 75-70F CATHLEEN TIPPETT JAMES R TIPPETT PO BOX 15 CARMEN, ID 83462 (208)756-4594
75-10061R; 75-10062P; 75-69H; 75-70H GEORGE MATEJKO PO BOX 129 CARMEN, ID 83462 (208)756-1946	75-10061T; 75-10062R; 75-69K; 75-70K ROBERT D MOSHER FRANSICKA MOSHER PO BOX 213 CARMEN, ID 83462-0213 (208)756-4607
75-10061Y; 75-10062W; 75-69N; 75-70N JACQUELINE D ERNEST ROBERT M ERNEST PO BOX 132 CARMEN, ID 83462 (208)756-3334	75-10061Z; 75-10062X; 75-69P; 75-70P SHIRLEY J MATTIS PO BOX 265 CARMEN, ID 83462 (208)756-3944
75-10137A; 75-10136A; 75-69W; 75-70X PHILLIP G EISENHAUER SHELLEY L ERWIN 1306 W VISTA VIEW WASHINGTON, UT 84780 (435) 688-1680	75-10137B; 75-10136B; 75-69X; 75-70Y TERRY J HERSHEY VERALYN E HERSHEY PO BOX 121 CARMEN, ID 83462 (208)756-5202

75-10062AB; 75-70S
DONNA K JACKSON
THOMAS M JACKSON
PO BOX 47
CARMEN, ID 83462
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75-10678; 75-10678
THOMAS FAMILY TRUST
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CAMARILLO, CA 93012
(805) 529-1639

75-14443; 75-14441; 75-69L; 75-70L
LINDA RICE
RICK RICE
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75-10061AM; 75-10062AL
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3509 BALLANCE CT
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(757)686-8299