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Cases, Regulations and Statutes

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[15] I.R.C. § 2033A(a).

[16] I.R.C. § 2033A(c)(1).

[17] I.R.C. §§ 2033A(c)(2)(A)(i), 2033A(b)(3).

[18] I.R.C. § 2033A(c)(2)(A)(ii).

[19] I.R.C. § 2033A(c)(2)(A)(iii).

[20] I.R.C. § 2033A(c)(2)(B).

[21] I.R.C. § 2033A(b)(1)(C).

[22] I.R.C. § 2033A(b)(1).

[23] See I.R.C. § 2033A(b)(1)(C).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

ADVERSE POSSESSION. The previous owner of the disputed land owned all 640 acres and sold several one acre parcels to third parties. In 1962, the plaintiff purchased the previous owner's rights in all 640 acres and built a fence around the entire parcel and a fence through the middle of the entire parcel. The plaintiff used almost all of the land for grazing and crop production from the date of purchase through the time of trial. The defendant negotiated an oil and gas drilling lease with the plaintiff. The lease included a provision to allow the defendant to negotiate leases with the title owners of the one-acre parcels but not to the detriment of the plaintiff's title. The plaintiff claimed title to the entire 640 acres under adverse possession. The plaintiff sued for slander of title after the defendant entered into leases with the title owners of the one-acre parcels, arguing that the plaintiff had title to the entire 640 acres. The plaintiff obtained a jury verdict which found that the plaintiff had title by adverse possession for over 25 years. The court found that the plaintiff had purchased several of the parcels from the title owners, but held that, because title by adverse possession had already occurred prior to the purchases, the purchases did not defeat the plaintiff's claim by adverse possession. **Santa Fe Energy Operating Partners v. Carrillo, 948 S.W.2d 780 (Tex. Ct. App. 1997)**.

ANIMALS

HORSES. The plaintiff was injured while riding a horse owned by the defendants. The plaintiff had ridden the horse before with dressage tack. The day of the accident, the horse was equipped with hunter-jumper tack and the plaintiff claimed that the defendants were at fault for allowing the plaintiff to ride the horse when equipped with unfamiliar tack. A jury awarded the plaintiff damages of $250,000. The defendants had claimed the defense of assumption of risk which was rejected by the trial court which allowed the case to go to the jury. The appellate court reversed, holding that, as a matter of law, the plaintiff has assumed the known risks of riding the horse. The appellate court found that the plaintiff was an experienced horse rider, was aware of the equipment on the horse, and was aware of the inherent risks of horseriding. **Young v. Brandt, 485 S.E.2d 519 (Ga. Ct. App. 1997)**.

The plaintiff was a nine year old who was invited to the defendants' home by the child of the defendants for play. The defendants' child started training with a lunge line a horse on the property and asked the plaintiff to help. The plaintiff was kicked by the horse while trying to help the defendants' child control the horse. The plaintiff sued for negligence and the defendants countered that the Nebraska Recreation Liability Act, Neb. Rev. Stat. § 37-1001 et seq., barred any liability for the accident. The trial court ruled that the Act did apply and dismissed the case. The appellate court reversed, holding that a nine year old child invited to the defendants' house by their child was not a member of the public to which the Act applied. The court noted that the purpose of the Act was to encourage the open use of rural lands for the general public and did not apply to residential and family situations such as the accident involved here. **Brown v. Wilson, 567 N.W.2d 124 (Neb. 1997)**.

BANKRUPTCY

CHAPTER 12-*ALM* § 13.03.*

DISMISSAL. The debtors had filed two previous Chapter 12 cases and all three cases were filed on the eve of a foreclosure sale of the debtors' farm. In the first case the debtors and the farm mortgage holder entered into a court-approved stipulation that, if the debtors defaulted on any plan payments on the bank's claim, the bank would be allowed to foreclose against the farm without interference of a subsequent bankruptcy filing. The debtors defaulted on the plan payments in the first two cases, causing dismissal of the cases, and filed a new Chapter 12 case when the bank sought to foreclose. The bank filed a motion to dismiss the current case for cause because (1) the filing of the second and third cases violated the agreement and (2) the debtors could not propose a feasible plan. The court dismissed the debtors' case for cause because (1) the filing of the second and third cases violated the court-ordered stipulation, (2) the three cases were filed primarily to stop the foreclosure sales, and (3) the debtors' plans were not feasible, given that the debtors had delayed the foreclosure for over four years and still could not meet their projected income and expenses. The court held that the third plan had unreasonable projections of income and expense, based on the performance of the farm during the bankruptcy cases. ***In re* Wald, 211 B.R. 359 (Bankr. D. N.D. 1997)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

DISCHARGE. The debtor had filed three previous Chapter 13 cases and sought to discharge taxes due more than three years before the current Chapter 13 case. The IRS argued that the three previous cases tolled the three year limitation period of Section 507(a)(8)(A) during the pendency of the three previous cases. The court determined the dischargeability of the tax claims by tolling the Section 507(a)(8)(A) period during each bankruptcy case plus 60 days; thus, tax claims which were not tolled during a total of 1095 days from the date the return was due until the filing of the current case were not discharged. ***In re*** **Zecco, 211 B.R. 109 (Bankr. D. Mass. 1997)**.

ENVIRONMENT

CLEAN WATER ACT. The EPA filed a claim in the debtor's Chapter 12 case for violations of the Clean Water Act resulting from dredging of wetlands. However, the evidence showed that the debtor did not do the dredging or own the land when the dredging occurred. The debtor was leasing land form the owner and managed the project. The dredging was specifically designed and ordered by the then owner of the land. The debtor purchased the land after the dredging occurred. The court found that the debtor was engaged in farming on the land which was used for llama and horse raising, entitling the debtor to an exemption from the permit requirement under the CWA. The court also found that the dredging actually increased the wetlands character of the land and fostered the purposes of the CWA in increasing the wildlife usefulness of the land. Therefore, because the debtor did not have control over the project, was entitled to a farmer exemption, and did not harm the wetlands character of the land, the EPA claim was disallowed. ***In re*** **Carsten, 211 B.R. 719 (Bankr. D. Mont. 1997)**.

FEDERAL AGRICULTURAL PROGRAMS

BRUCELLOSIS. The APHIS has issued proposed regulations concerning the interstate movement of cattle by changing the classification of California from Class A to Class Free. **62 Fed. Reg. 53531 (Oct. 15, 1997)**.

DISASTER ASSISTANCE. The CCC has issued interim regulations amending the Noninsured Crop Disaster Assistance Program (NAP) for: aquacultural species; floriculture; forage; ornamental nursery; seed crops; reseeding or replanting of the same crop; and value loss crops. The amendments include redefining some existing terms and adding new terms and changes of applicability, eligibility, assistance, yield determinations, acreage and production reports, loss requirements, and payments for reduced yields and prevented planting. The changes include: (1) specifying that, except for ornamental nursery and species or types and varieties of forage determined by CCC to be predominantly grazed, different species or types and varieties may be treated as separate crops; (2) establishing a method for CCC to determine the value of an animal unit day; (3) specifying that CCC will establish expected area yields, or an equivalent measure in the event yield data are not available; (4) including that, for forage, acreage reports must include the species or type and variety of forage reported, and the intended harvest method, i.e. grazing or mechanically harvested; (5) requiring reseeding or replanting where it is practicable; and (6) including payments for losses of forage determined by CCC to be predominantly grazed. **62 Fed. Reg. 53929 (Oct. 17, 1997)**.

PESTICIDES. See the following case under Products Liability, *infra*. **Deshotel v. Rhone-Poulenc, Inc., 969 F. Supp. 397 (W.D. La. 1997)**.

PRODUCTION LOANS. The CCC has issued proposed regulations under the production flexibility contract regulations.

The proposed regulations add a final date for producers to designate payment shares and provide supporting documentation to be eligible to earn contract payments in a given fiscal year when payment shares have not been designated in such fiscal year. All producers sharing in the contract payment on a farm, whose payment shares have not been designated for such fiscal year must sign a new contract designating payment shares, and provide supporting documentation no later than August 1 of such fiscal year to be eligible to earn a contract payment in such fiscal year.

The proposed regulations change the dates a producer or owner must inform the county committee of changes in interest. A producer or owner must inform the county committee of changes in interest by August 1 of the fiscal year in which the change is made if producers on the contract remain the same but payment shares change; or no later than August 1 of such fiscal year, if a new producer is being added to the contract.

The proposed regulations add a final date to request advance payments for fiscal year 1998 and each subsequent fiscal year. To receive the advance payment for fiscal year 1998, and each subsequent fiscal year, all producers sharing in the contract payment on the farm must, no later than 15 days prior to the final date to issue the advance payment: (1) sign the contract designating payment shares and provide supporting documentation, if applicable; and (2) request the advance payment.

The proposed regulations clarify that a lease is a cash lease, if the lessor receives only a guaranteed sum certain cash payment, or fixed quantity of the crop. This rule also changes provisions with respect to combination leases. Combination leases are leases that contain provisions for both a guaranteed amount such as a fixed dollar amount, or quantity and a share of a crop or crop proceeds. Combination leases include those leases that provide for the greater of a guaranteed amount, or share of the crop or crop proceeds. The amendment provides that all combination leases shall be considered share leases for fiscal year 1998, and later fiscal years.

The proposed regulations change the date by which all landowners, tenants and sharecroppers failing to reach an agreement regarding the division of contract payments for a fiscal year, must execute a contract to be eligible to receive the contract payment for such fiscal year. If the landowners, tenants and sharecroppers on a farm fail to reach an agreement regarding the division of contract payments for a fiscal year, the county committee shall make the payment at a later date if all persons eligible to receive a share of the contract payment, have executed a contract no later than August 1 of that fiscal year, and subsequently agreed to the division of contract payment. **62 Fed. Reg. 55150 (Oct. 23, 1997)**.

FEDERAL ESTATE AND GIFT TAX

DISCLAIMERS-*ALM* § 5.02[6].* In order to increase the marital deduction, the surviving spouse asked several legatees of the decedent's will to disclaim their interests in the devises. Although no specific promises were made, the legatees testified that they understood that the surviving spouse would recompense them for the disclaimers, and indeed, these legatees did receive money or property equal to or exceeding the value of the disclaimed interests a short time after filing the disclaimers. The Tax Court held that the marital deduction could not include the disclaimed property because the disclaimers were not effective since the legatees still received a benefit from the estate. The appellate court reversed, holding that the mere expectation that a disclaimant will receive the disclaimed property from the party who receives the disclaimed property was insufficient consideration for the disclaimer to make the disclaimer unqualified for federal estate tax purposes. The court then reviewed each disclaimer as to whether the disclaimant received sufficient consideration, in whatever form, for the disclaimer. The court remanded the case for the lower court to determine if some disclaimers were mutually bargained for which would disqualify the disclaimers. One of the three judge panel dissented. **Monroe v. Comm'r, 97-2 U.S. Tax Cas. (CCH) ¶ 60,292 (5th Cir. 1997), *rev'g*, 104 T.C. 352 (1995)**.

DISTRIBUTABLE NET INCOME. The taxpayer was the spouse of the decedent and elected the Florida elective share instead of taking under the decedent's will. The elective share was determined as of the date of the decedent's death but the share was not paid until late in the tax year of the decedent's death. During the year after the decedent's death, the estate had income from interest and dividends accrued and received after the decedent's death, capital gains from the post-death sale of estate property and distributions of income from an IRA. The post-death income was used by the estate to pay the taxpayer's elective share and the issue was whether the taxable income nature of the funds was recognized as income to the taxpayer. The court held that the payment of the elective share was a distribution of estate property not taxable to the taxpayer because the elective share was determined as of the date of death and did not benefit from any of the items of income. **Deutsch v. Comm'r, T.C. Memo. 1997-470**.

POWER OF APPOINTMENT. A decedent established a trust for a spouse which named the spouse and an independent company as co-trustees. The trust paid the spouse from net trust income amounts, in the co-trustees' discretion, for the spouse's support and maintenance. The trust also provided, however, that the independent trustee alone had the discretion to make distributions to the spouse from trust principal. The trust allowed the spouse to be the sole trustee if the independent trustee could not serve but did not give the spouse authority to distribute trust principal. The IRS ruled that, because the trust specifically did not grant the spouse any power to distribute trust corpus, the spouse did not have a general power of appointment over trust principal. The IRS noted that, under state law, although the trust did not provide for a successor trustee, a state court had the power to appoint a successor trustee. **Ltr. Rul. 9742024, July 18, 1997**.

TRANSFERS WITH RETAINED INTERESTS. In January 1989, the decedent executed a durable power of attorney naming the decedent's son as attorney-in-fact and giving the son the power to "sell, purchase, mortgage and convey" any property owned by the decedent. In September 1990, the son donated some of the decedent's property to a charitable organization. The decedent died in March 1991. The IRS disallowed a gift tax charitable deduction for the donation because the son exceeded the authority of the power of attorney, since the son did not have any expressed power to donate the decedent's property. The court denied the IRS motion for summary judgment, holding that the power of attorney document was ambiguous. The court also held that the estate could submit evidence of the decedent's intent as to the authority of the son to donate the decedent's property. **Estate of Smith, 97-2 U.S. Tax Cas. (CCH) ¶ 60, 291 (D. Vt. 1997)**.

TRUSTS. A parent established a trust for a child with trustee discretion to distribute trust income to the child at least annually. The parent's spouse served as co-trustee with an attorney. The trust provided for passing of a portion of trust principal to the child at the death of the parent. At the death of the child, the trust could pass under a limited power of appointment to the issue of the child. A second attorney was named as a first successor co-trustee. The parties entered into an agreement giving the spouse a right to refuse the appointment of any successor co-trustee after the successor co-trustee named in the trust agreement. The IRS ruled that the right of the spouse to refuse the appointment of further successor co-trustees was not a general power of appointment over the trust corpus and did not subject the trust to GSTT. **Ltr. Rul. 9741009, July 8, 1997**.

FEDERAL INCOME TAXATION

CORPORATIONS-*ALM* § 7.02[3][a].*

CONSTRUCTIVE DIVIDENDS. The taxpayer owned a corporation which owned a ranch. The taxpayer wanted to sell the ranch and decided to have the ranch transferred to the taxpayer to facilitate the sale. The corporation transferred the ranch to the taxpayer in exchange for a promissory note equal to the book value of the ranch;

however, no note was executed at the time of transfer. The ranch was sold two years later, at which time it was discovered that no note had been executed. A note was written, dated as of the date of the original transfer but the debtor made no payments due under the new written note until the IRS initiated an audit of the transaction. The IRS argued that the transfer of the ranch to the taxpayer was a dividend payment because the note was not bona fide. The court held that the debt was not bona fide because (1) the note was not executed until two years after the transfer and after the ranch was sold to other parties, (2) no payments were made on the note until an audit was started, and (3) the note was back dated to make it appear to be contemporaneous with the ranch transfer to the taxpayer. **Sweatman v. Comm'r, T.C. Memo. 1997-468**.

LIKE-KIND EXCHANGES. The taxpayer was a company which owned rental real properties. Two brothers each own a one-half interest in the taxpayer. The properties were managed by a corporation in which the brothers also each owned 50 percent shares. The brothers were not employees of the corporation and did not provide the management services. The brothers had not executed a partnership agreement as to the taxpayer, but the taxpayer filed Form 1065s for five years, although the brothers considered themselves as equal owners of the properties, not the company. Because of management disputes, the brothers agreed to exchange their partial interests in all the properties for full interests in some of the properties. The IRS noted that *Rev. Rul. 75-374, 1975-2 C.B. 261* held, under similar facts, that the ownership of the properties was not a partnership. The IRS ruled, however, that, because the taxpayer filed Form 1065s for five years, the taxpayer was considered a partnership and the exchange involved an exchange of interests in a partnership which do not qualify for like-kind exchange treatment. **Ltr. Rul. 9741017, July 10, 1997**.

PASSIVE INVESTMENT LOSSES. The taxpayer owned interests in several passive activities and disposed of several interests which had current year and suspended past year passive activity losses. The dispositions were elected to be qualified under I.R.C. § 469(g)(1)(A). The taxpayer realized no gain on the dispositions. The IRS ruled that where the taxpayer disposed of interests in passive activities without gain and with current and suspended passive activity losses, the taxpayer must first net current and suspended passive activity income and losses from the remaining passive activities before netting the remaining current passive activity income with the passive activity losses attributable to the disposed interests. **Ltr. Rul. 9742002, July 3, 1997**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

ELECTION. The IRS has issued a revenue procedure providing for automatic allowance of late election by a corporation to be taxed as an S corporation. The automatic relief can be obtained in two situations: (1) the corporation intended to be an S corporation, the corporation and shareholders have reported their income consistent with S corporation status for the taxable year the election was first intended and all subsequent years, and the corporation did not receive notification from the IRS within six months after the due date for the return for the first tax year as an S corporation that any problem existed with S corporation status; and (2) for elections involving periods prior to January 1, 1997, the corporation intended to be an S corporation, the corporation was not permitted an S corporation election because the election was filed late, and the relevant tax years for the corporation and all shareholders are still open. The procedure does not provide relief for late shareholder elections such as QSST elections or the small business trust election. **Rev. Proc. 97-48, I.R.B. 1997-, __**.

The taxpayer was a corporation form in 1992 as a C corporation. In March 1993, the corporation filed a Form 1120S and the shareholders filed individual income tax returns reflecting pass-through of corporation income. The IRS claimed that the Form 2553 for the S corporation election was not received by the IRS and provided testimony of its employees that the IRS had no record of receipt of the form. The corporation presented testimony of the employees of its accountant that the form was prepared, placed in an envelop with sufficient postage and mailed at a post office. The court held that proof of mailing required proof of the postmark; therefore, the corporation failed to prove receipt by the IRS and could not file as an S corporation. **McLane Land & Timber Co. v. United States, 97-2 U.S. Tax Cas. (CCH) ¶ 50,817 (W.D. Ark. 1997)**.

TAX LIEN. In 1993, the IRS assessed taxes against the taxpayer, creating a tax lien. In May 1995, the taxpayer became a distributee under a will of a deceased parent. In August 1995, the taxpayer disclaimed, in a disclaimer effective under Texas law as of the date of the decedent's death, any interest in the estate and sought to remove any tax lien against the disclaimed property. The District Court held that the taxpayer's disclaimer of bequeathed property under Texas law had no effect on a federal tax lien that previously attached to the property. The appellate court reversed, holding that the tax lien did not attach to the disclaimed property because the taxpayer did not ever take possession of the bequeathed property, the property did not immediately pass to the taxpayer at the death of the decedent under state law, and the disclaimer was effective under state law as of the date of death. **Leggett v. United States, 120 F.3d 592 (5th Cir. 1997), *rev'g*, 78 AFTR2d ¶ 96-5339 (S.D. Tex. 1996)**.

SAFE HARBOR INTEREST RATES
November 1997

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	5.69	5.61	5.57	5.55
110% AFR	6.27	6.17	6.12	6.09
120% AFR	6.84	6.73	6.67	6.64
		Mid-term		
AFR	6.10	6.01	5.97	5.94
110% AFR	6.72	6.61	6.56	6.52
120% AFR	7.34	7.21	7.15	7.10
		Long-term		
AFR	6.42	6.32	6.27	6.24
110% AFR	7.07	6.95	6.89	6.85
120% AFR	7.72	7.58	7.51	7.46

***_Agricultural Law Manual_ (ALM). For information about ordering the _Manual_, see the last page of this issue.**

LANDLORD AND TENANT

REPLACEMENT LEASE. The defendant had entered into a lease of the plaintiffs' farm with the plaintiffs' parents for 1992 through 1997. The parents died in 1992 and 1994, with the farm passing to the plaintiffs. The defendant approached the plaintiffs and offered to enter into a lease for 1995. The defendant produced a typed lease which was signed by both parties. The new lease did not mention the previous lease and the plaintiffs testified that the new lease was meant to replace the old lease with the parents. The plaintiffs sold the farm to a third party, effective at the end of the new lease. The defendant claimed that the old lease was still effective for 1997, that the old lease gave the defendant equity rights in the farm and that the old lease gave the defendant a right of first refusal on any sale of the farm. The trial court ruled for the plaintiffs after the defendant, representing himself, failed to present any evidence. The appellate court affirmed, holding that the new lease was intended to replace the lease with the parents. **Evenstad v. Buchholz, 567 N.W.2d 194 (N.D. 1997)**.

PRODUCTS LIABILITY

ANIMAL FEED. The plaintiff was a dairy farmer who purchased cattle feed from one defendant and manufactured by the other defendant. The plaintiff claimed that the feed was contaminated with metal pieces which caused the dairy cows to suffer "hardware disease." The plaintiff discovered metal pieces in the feed by running the feed under a magnet which removed some of the metal. A jury found that the feed was contaminated and caused damage to the plaintiff's entire 200 head herd of dairy cows. The appellate court remanded the case, holding that the plaintiff failed to provide sufficient evidence to support the jury verdict as to all the cows. The court found that the plaintiff had presented evidence of only eleven cows diagnosed with diseases caused by metal contamination and that the evidence of future diseases and other sick animals was not sufficiently linked to the metal contamination. **Purina Mills v. Odell, 948 S.W.2d 927 (Tex. Ct. App. 1997)**.

PESTICIDE. The plaintiff owned and operated a sweet potato farm and applied to the crop a pesticide manufactured by the defendant. The plaintiff brought suit for insect damage to the crop under theories of failure to warn of a known defect, breach of express warranty and strict liability. The evidence demonstrated that the plaintiff failed to follow label directions and industry standards as to the time of application of the pesticide and that the damage was caused by insects controlled by the pesticide. The court held that all of the actions were pre-empted by FIFRA except the strict liability theory of liability. However, because the plaintiff failed to demonstrate that the pesticide was applied properly or that the damage was caused by insects controlled by the pesticide, the court held for the defendant. **Deshotel v. Rhone-Poulenc, Inc., 969 F. Supp. 397 (W.D. La. 1997)**.

TRESPASS

ABANDONED RIGHT-OF-WAY. In March 1982 a railroad abandoned a rail line running adjacent to the plaintiff's farm property. The railroad removed the rails in December 1985. In October 1988, the railroad entered into a licensing agreement allowing the defendant access to the rail line for installation and operation of a fiber optic communications system. In July 1989, the defendant installed the system on the abandoned rail line adjacent to the plaintiff's land. The plaintiff sought a judgment quieting title in the plaintiff and for damages for trespass by the defendant. The plaintiff argued that title vested in the plaintiff immediately after the rail lines were removed. The defendant argued that title did not vest in the plaintiff because, under Ind. Code §§ 8-4-35-6, -7, the plaintiff was required to first file an affidavit of title or to record the title claim, neither of which was done by the plaintiff. The court held that during the existence of the railroad's right-of-way, the plaintiff held title to the land up to the centerline of the right-of-way, subject to the right-of-way held by the railroad. When the railroad abandoned the right-of-way, the burden on the plaintiff's title disappeared and full title revested in the plaintiff. Because the railroad had no interest in the plaintiff's portion of the right-of-way, the railroad could not convey any portion of the land in a licensing agreement. Therefore, the defendant had no right to install the system on the plaintiff's portion of the right-of-way. **Calumet Nat'l Bank v. AT & T, 682 N.E.2d 785 (Ind. 1997)**.

CITATION UPDATES

Swain v. U.S., 969 F. Supp. 515 (C.D. Ill. 1997) (transfers with retained powers) see p. 141 *supra*.

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Here are the major topics to be covered:

- Introduction to estate and business planning.
- Liquidity planning with emphasis on 15-year installment payment of federal estate tax.
- Co-ownership of property, including discounts, taxation and special problems.
- Federal estate tax, including alternate valuation date, special use valuation, family-owned business exclusion, handling life insurance, marital deduction planning, disclaimers, planning to minimize tax over deaths of both spouses, and generation skipping transfer tax.
- Gifts and federal gift tax, including problems with future interests, handling estate freezes, and "hidden" gifts.
- Income tax aspects of property transfer, including income in respect of decedent, installment sales, private annuities, self-canceling installment notes, and part gift/part sale transactions.
- Using trusts, including funding of revocable living trusts.
- Organizing the farm business--one entity or two, corporations, general and limited partnerships and limited liability companies.
- Ethics (2 hours).

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If you have not yet received a registration packet call Robert Achenbach at 1-541-302-1958.

ISSUE INDEX

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