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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	)	Subcase Nos.: <i>See</i> Exhibit "A"
	)	
	)	MOTION ON CHALLENGE
	)	(Bracketts v. The United States of America)
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I. INTRODUCTION

C.E. Brackett Cattle Co., Brackett Ranches Ltd., and Brackett Livestock, Inc., (collectively referred to as “Bracketts” or “Brackett entities”) hereby challenges Special Master Cushman’s Recommendation Denying Motion to Set Aside Partial Decrees dated June 21, 2001, and the subsequent Order Denying Motion to Alter or Amend dated March 12, 2002. This challenge is brought based upon the fact that there are material due process violations under the Constitution of the State of Idaho and the United States Constitution in that the Bracketts were not properly served with notice of the claims by the United States of America, Bureau of Land Management (herein “United States” or “BLM”) which effectively constitute actions to quiet title to “stockwater rights” on publicly administered BLM land occupied by the Bracketts under valid grazing permits. Accordingly, it is submitted that the Bracketts having not been properly served, at least by mail, of these claims, cannot be treated as “parties” with respect thereto for purposes of supporting a judgment entered by way of the default. Alternatively, in the event, as Special Master Cushman has ruled, the Bracketts are “parties” with respect to the adjudication of BLM stockwater right claims on their allotment, then, in such event, the decrees entered by default against them must be set aside in that they were entered in violation of the specific provisions set forth in I.R.C.P. Rule 55(b)(2).

II. STATEMENT OF ISSUES ON CHALLENGE

What is fundamentally at issue in this case is whether partial decrees entered against the Brackett entities should be set aside because they were obtained in violation of the Bracketts’ due

process rights under the constitutions of the United States and the State of Idaho.¹ Further, and in the alternative, the Brackett entities allege that the default decrees entered in the subcases identified in Exhibit A hereto, were obtained in specific violation of I.R.C.P. Rule 55(b)(2) and accordingly are void or voidable. The specific matters at issue are as follows:

1. Whether the Special Master erred in failing to find that the notice procedures governing service of process in the SRBA fail to meet the minimum due process requirements under both the United States and Idaho Constitutions.
2. Whether the Special Master erred in refusing to find that failure to provide notice to a known adverse claimant, as in the case of the Bracketts, violates the United States and Idaho Constitutions especially when the identities, addresses, and interests of the adverse parties are either known or can be determined through reasonable means.
3. Whether the Special Master erred in failing to hold that the United States' failure to mail notice of their claims to the Bracketts violated the United States and Idaho Constitutions particularly given the United States' status as a sovereign and given the fact that the United States has enjoyed special

¹ The movants recognize that the issues raised in this Notice of Challenge will be briefed pursuant to AO1 13.e. Without waiving the right to such briefing, the Bracketts hereby reference, and incorporate herein, the issues and substantive analysis previously briefed by the Bracketts and raised during hearings held in this matter. *See* Notice of Motion and Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(b) and the United States and Idaho Constitutions; Reply Brief Filed Jointly Against the Opposition of the United States and the Response to Bracketts' Notice of Motion and Motion to Set Aside Partial Decrees; Motion to Alter or Amend Special Master's Recommendation Denying Motions to Set Aside Partial Decrees; and Reply Brief to Memorandum in Opposition to Bracketts Motion to Alter or Amend.

status in the SRBA and has failed to comply with certain of the procedural requirements including but not limited to the requirements that claims be verified under oath and that claimants identify other water rights used at the same place and for the same purpose as those claimed by the claimant.

4. Whether the Special Master erred in failing to hold that the Default Decrees should be set aside because they were obtained in violation of I.R.C.P. 55 which requires, in part, that “any application for a default judgment must contain written certification of the name of the party against whom the judgment is requested and the address most likely to give the party notice of such default judgment and the clerk shall use such address in giving such party notice of judgment.” *See* I.R.C.P. 55.
5. Whether the Special Master’s reliance on the Memorandum Decision and Order on Motion to Set Aside Partial Decrees (Subcases 55-02373 et al.) (the “LU Ranching Decision”), currently on appeal to the Idaho Supreme Court, was misplaced particularly when the LU Ranching Decision relies heavily on In re Rights to the Use of the Gila River, 830 P.2d 442 (Ariz. 1992), an out-of-state decision limited to the sufficiency of notice of the initiation of a general adjudication as opposed to the issue of whether claimants must provide notice of their individual claims to known adverse claimants in order to satisfy minimum Constitutional due process requirements.
6. Whether alternative means of notification, including notice by publication

or posting of the docket sheet procedures in the SRBA, are inadequate means of providing notice of pending claims where there are adverse claimants or claimants with competing claims whose interests or whereabouts are either known to the claimant or, with due diligence, can be ascertained.

7. Whether the Special Master erred in holding that receipt of a Director's Report on the Bracketts' own claims or the receipt or availability of the SRBA docket sheet provide Constitutionally adequate notice of adverse claims.
8. Whether, for purposes of evaluating the sufficiency of the notice of individual claims, the SRBA is a single piece of litigation or separate and distinct actions and, therefore, notice of individual claims is Constitutionally required.
9. Whether the Special Master erred in refusing to grant the Motions to Set Aside Partial Decrees given the Bracketts' reliance on Judge Hurlbutt's Deferral Order staying the time for filing *de minimus* stockwater claims .
10. Whether the Special Master erred in recommending that the Bracketts' Notice of Motion and Motion to Set Aside Partial Decrees pursuant to I.R.C.P. 60(b) and the United States and Idaho Constitutions be denied.
11. Whether, in denying the Motion to Set Aside Partial Decrees, the Special Master misconstrued or misapplied the legal authority, evidence and affidavits produced in this action.

12. Whether the facts and legal authority presented in this case justify a departure from the District Court's *Memorandum Decision and Order on Motion to Set Aside Partial Decrees, Subcases 55-2373 et al.* ("LU Ranching Decision"), currently on appeal to the Idaho Supreme Court.

III. PROCEDURAL BACKGROUND

On November 19, 1987, the "Commencement Order" was issued allegedly joining all water right claimants as parties to the Snake River Basin Adjudication. On February 19, 1988, the Idaho Supreme Court issued Supreme Court No. 99143 "Supplemental Order Granting Powers to District Judge." On February 23, 1988, an Order was issued by the then presiding Judge Daniel C. Hurlbutt, Jr., setting forth the procedure for filing of service of pleadings and providing notice of hearings in the Snake River Basin Adjudication sometimes referred to "the Docket Sheet Order." A commencement notice was subsequently given with respect to the filing of claims within Owyhee County and Twin Falls County. Subsequently, as noted by Special Master Cushman in his June 21, 2001 Recommendation Denying Motions to Set Aside Partial Decrees, Bert Brackett, Brackett Livestock, Inc., Brackett Ranches Ltd. and C.E. Brackett Cattle Co., did file a series of claims in the SRBA in January 11 and 13, 1989; however, a review of those claims readily reveals that they were primarily "irrigation" claims intended to cover places of diversion on privately owned land by the Brackett entities.

On January 17, 1989, the Court issued Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stockwater Uses (Deferral Order). The Deferral Order stated that the election of the deferral procedure would not result in the loss of the domestic or stockwater claims and that a deferring claimant would not be precluded from

establishing the requisite elements of the deferred claims at a subsequent proceeding. The affidavits submitted in support of the underlying Motion to Set Aside Default Decrees by Bert Brackett and Chet Brackett evidence that the Bracketts and thus their entities were aware of the “Deferral Order” based upon conversations which they had with representatives at IDWR and that they relied upon that information resulting in the delay in filing “stockwater claims” in the SRBA. Further, the testimony by the Brackett entities by and through affidavits of the Bracketts indicate that they did not file stockwater claims until 1998 and, under advice of counsel, first discovered that the United States - BLM had not only filed stockwater claims on allotments duly permitted to the Brackett entities for stockgrazing purposes; but, more importantly that default decrees had been entered against the Brackett entities and/or the period of time within which to file objections had expired.

Accordingly, the Brackett entities filed an appropriate Motion to Set Aside Default Decrees on November 10, 1999, with respect to the subcases identified in Exhibit A.² Special Master Cushman entered his Recommendation Denying Motions to Set Aside Partial Decrees on June 21, 2001. The Brackett entities subsequently filed the appropriate Motion to Alter or Amend on July 24, 2001. Special Master Cushman entered his Order Denying the Motion to Alter or Amend on March 12, 2002, and the Brackett entities’ Notice of Challenge was filed on March 26, 2002.

² In the Special Master’s Recommendation Denying Motions to Set Aside Partial Decrees, he references a filing date of the Notice of Motion and Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. section 60(b), etc., as being February 2 and February 3, 2000.

IV. STANDARD OF REVIEW OF A SPECIAL MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. FINDINGS OF FACT OF A SPECIAL MASTER

In Idaho, the district court is required to adopt a special master's findings of fact unless they are clearly erroneous. I.R.C.P. 53(e)(2); Rodriguez v. Oakley Valley Stone, Inc., 120 Idaho 370, 377, 816 P.2d 326, 333 (1991); Higley v. Woodard, 124 Idaho 531, 534, 861 P.2d 101, 104 (Ct. App. 1993). The United States Supreme Court has stated that "[a] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

A special master's findings, which a district court adopts in a non-jury action, are considered to be the findings of the district court. I.R.C.P. 52(a); Seccumbe, 115 Idaho at 435, 115 Idaho at 435, 767 P.2d at 278; Higley, 124 Idaho at 534, 861 P.2d at 104. Consequently, a district court's standard for reviewing a special master's findings of fact is to determine whether they are supported by substantial, although perhaps conflicting, evidence. Seccumbe, 115 Idaho at 435, 767 P.2d at 278; Higley, 124 Idaho at 534, 861 P.2d at 104.

In other words, a referring district court reviews a district court's findings of fact in a non-jury action. An appellate court, in reviewing findings of fact, does not consider and weigh the evidence de novo. Wright and Miller, Federal Practice and Procedure § 2614 (1995); Zenith Radio Corp. v. Hazletine Research, Inc., 395 U.S. 100, 123 (1969). A reviewing court may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or was induced by an erroneous view of the law. Wright and Miller, *supra*, §§ 2585.

The parties are entitled to an actual review and examination of all of the evidence in the record, by the referring district court, to determine whether the findings of fact are clearly erroneous. Locklin v. Day-Gb Color Corp., 4429 F.2d 873, 876 (7th Cir. 1970), cert. denied, 91 S.Ct. 582 (1971).

Under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are mas much a prerogative of the finder of fact as inferences as to the credibility of witnesses. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). The rule in Idaho is less clear. Professor D. Craig Lewis states that “[u]nlike Fed.R.Civ.P. 52(a), I.R.C.P. 52(a) does not explicitly state that the ‘clearly erroneous’ standard of review applies to findings based on documentary as well as testimonial evidence. However, the Court of appeals has held that it does, relying on the Idaho Appellate Handbook.” Lewis, Idaho Trial Handbook, §§35.14 (1995), (citing Treasure Valley Plumbing & Heating v. Earth Resources Co., 115 Idaho 373, 766 P.2d 1254 (Ct. App. 1988), citing Idaho Appellate Handbook §§ 3.3.4.2).

2. CONCLUSIONS OF LAW OF A SPECIAL MASTER

A special master’s conclusions of law are not binding upon a district court, although they are expected to be persuasive. This permits a district court to adopt a special master’s conclusions of law only to the extent they correctly state the law. Oakley Valley Stone, Inc., 120 Idaho at 378, 816 P.2d at 334; Higley, 124 Idaho at 534, 861 P.2d at 104. Accordingly, a district court’s standard of review of a trial court’s (special master’s) conclusions of law is one of free review. Higley, 124 Idaho at 534, 861 P.2d at 104. Stated another way, the conclusions of law of a special master are not protected by or cloaked with the “clearly erroneous” standard. Further, the label put on a determination by a special master is not decisive. If a finding is

designated as one of fact, but is in reality a conclusion of law, it is freely reviewable. Wright and Miller, supra, §§ 2588; East v. Romine, Inc., 518 F.2d 332, 338 (5th Cir. 1975).

The bottom line is that findings of fact supported by competent and substantial evidence, and conclusions of law correctly applying legal principles to the facts found will be sustained on challenge or review. MH&H Implement, Inc. v. Massey-Ferguson, Inc., 108 Idaho 879, 881, 702 P.2d 917, 919 (Ct. App. 1985).

VI. ARGUMENT

A. Even if *arguendo*, the Bracketts are "parties" in the SRBA litigation as a result of having filed "claims" in the SRBA, the default judgments entered against them on the subject subcases violated I.R.C.P. 55(b)(2) and are voidable.

As argued below, the Bracketts' due process rights were violated when they were not served with the claims at the time the BLM filed literally hundreds of claims asserting competing stockwater rights within the Bracketts' allotments. Special Master Cushman rejected the argument that the Bracketts should have been served, at a minimum by mail, with each claim filed by BLM asserting a "stockwater right" which once decreed adversely affects and ultimately deprives the Bracketts' of water rights historically put to a beneficial use by livestock owned by the Bracketts and their predecessors. It is beyond dispute that the Bracketts were known entities which had actually beneficially used the water rights for decades in their ranching operations.

Assuming, *arguendo*, however, that the Special Master's interpretation of the notice requirements do not violate the due process rights guaranteed to the Bracketts by the Idaho and United States Constitutions and that they are nonetheless "parties" to the SRBA litigation, the Bracketts are entitled to the protection provided by Rule 55(b)(2). Specifically, Bracketts cannot be treated as a "party" with respect to receiving notice of a competing claim under the docket

sheet analysis or Administrative Order 1 and, simultaneously, be denied the due process protection set forth in Rule 55(b)(2). There is no record in any of the Court files of each subcase which is the subject matter of this motion on challenge which evidences that the adverse claimant seeking a Default Decree - BLM provided the requisite notice to the Court consisting of a written certification of the name of the party against whom the judgment is requested and the address most likely to give that party notice of such default judgment; nor, that the Clerk complied with that Rule which requires that said address shall be used in giving such party notice of the judgment. Rule 55(b)(2) provides that a party "shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application." Further, there is no evidence that any hearing on the application for default decree was held.

It is respectfully submitted that the Bracketts cannot be treated as a "party" for purposes of underlying jurisdiction by the Court in the SRBA litigation when they received notice of the underlying case and at the same time treated as a "non-party" with respect to compliance with the notice mandated as a prerequisite for the entry of default judgment by Rule 55(b)(2). In SRBA Case No. 39576; Higginson v. The United States of America, 128 Idaho 246, 258; 912 P.2d 614 (1995), the Idaho Supreme Court specifically determined that I.R.C.P. Rule 55(b)(2) applies to all cases in this water right adjudication. The Supreme Court specifically held "[T]he procedure to be followed by the District Court where no objection has been raised is established by the rules of entering default judgment in civil actions, set out in I.R.C.P. Rule 55." Failure to comply with I.R.C.P. Rule 55(b)(2) is a jurisdictional defect.

Pursuant to Special Master Cushman's Order Setting Deadlines entered on February 10, 2000, affidavits were filed on behalf of the Bracketts including an affidavit by Bert Brackett filed

on March 15, 2000. In paragraph 4 of that Affidavit, Mr. Brackett affirmed as follows:

"I did not receive actual notice of these claims having been submitted by the United States nor with respect to the fact that Default Decrees had been entered until after I retained the services of legal counsel and on his advice went to the Idaho Department of Water Resources to examine all records that relate to my private and permitted grazing land within Basin 51. I never received a Director's Report concerning stockwater claims filed in Basin 51 on BLM land other than the ones mentioned above. I first discovered the existence of the BLM claims and the Default Decrees at the beginning of August 1999."

Based upon the records before this Court, the docket sheet of the SRBA and the Affidavit above-referenced of Bert Brackett, no notice was ever given to the Brackett entities or their individual owners not only with respect to the initiation of the adverse claims by the United States even under circumstances where the United States clearly was aware that the Bracketts were accessing the very water sources with respect to which the United States filed its claims and ultimately obtained defaults; but, more egregiously, the United States failed to comply with the provisions of Rule 55(b)(2) thus making it impossible for the Clerk to use such addresses in giving such alleged "parties" notice of the judgment entered by default as therein specifically mandated.

In the case of Catledge v. Transport Tire Company, Inc., 107 Idaho 602; 691 P.2d 1271 (1984), the Court specifically addressed the circumstances under which a default judgment would have to be set aside as void pursuant to I.R.C.P. 60(b)(4) based upon a failure to give the requisite notice pursuant to I.R.C.P. 55(b)(2). The Supreme Court held that the requirement of a 3-day notice to a party that default judgment would be sought against him is triggered when the party or its representative has appeared in the action or when the conduct on the part of the

defendant indicates an intent to defend against the action. (107 Id. 602, 606)

The Supreme Court went on to hold that in order for a judgment to be void, there generally must be some jurisdictional defect in the Court's authority to enter judgment, because the Court lacks either personal jurisdiction or subject matter jurisdiction. (Additional citations omitted). (107 Id. 607).

Similarly, in Newbold v. Arvidson, 105 Id. 663; 672 P.2d 231 (1983), the Idaho Supreme Court addressed the specific issue as to what constitutes an appearance in the action for purposes of invoking the notice requirements Rule 55(b)(2). The Supreme Court made the following observations:

[T]he appearance required to trigger the 3-day notice requirement has been broadly defined, and is not limited to a formal court appearance. (citations omitted). Conduct on the part of the defendant which indicates an intent to defend against the action can constitute an appearance within the meaning of I.R.C.P. Rule 55(b)(2)... Rule 55(b)(2) affords an extra measure of protection to those parties who have in some way shown an intention to defend their interests in the action. (105 Id. 663,665.)

The failure to comply with due process requirements, and notice requirements in particular, with respect to the treatment of individual subcases within the SRBA is clearly demonstrated by the fact that there is no evidence that the BLM ever complied with I.R.C.P. Rule 55(b)(2). This is particularly true when one considers that the Bracketts were known adverse claimants to the same water sources with respect to which the BLM filed claims in the first instance. Special Master Cushman correctly notes that prior to the "Deferral Order," the Bracketts filed claims for irrigation water rights primarily on their private land. If the Bracketts became a "party" when they made an appearance by filing an irrigation claim, the Special Master

opines that they became a "party" with respect to all claims filed by the BLM subsequently within the allotment permitted in the name of the Bracketts dealing with stockwater rights. The Bracketts disagree; however, under the Supreme Court's decisions interpreting Rule 55(b), if the Bracketts became a "party" when they make an "appearance" in the action, they must be given notice.

As a known adverse claimant, the Bracketts are accordingly only afforded the due process protections when they are also served with claims by the BLM to stockwater rights within the allotment with respect to which the Bracketts and their related entities are permittees. It is submitted that the whole purpose of the Rule 55(b) procedures are to afford defendants or, in the case of the SRBA, adverse claimants with an opportunity to be advised that a default decree is about to be entered against them in order to trigger whatever procedural remedies they have to set aside the notice of default and/or the ensuing judgment. Rule 55(b) recognizes the same basic due process procedural requirements which must be invoked in the first instance when an action is initiated directly affecting the rights, title and interest in and to a valuable property right with respect to which the proposed defendant or adverse claimant is known to possess a claim and adverse interest or right. The Bracketts are protected by constitutionally mandated due process rights of service of process at the initialization of the claim and statutorily mandated notice in the event of a default.

B. The default decrees should be set aside given the Bracketts' reasonable reliance on statements by the IDWR and the related Deferral Order.

Individuals are entitled to rely upon the representations of the Court and the Idaho Department of Water Resources ("IDWR") and should not be denied access to the judicial

process because of their reliance upon those representations. In the present case, on January 17, 1989, Judge Hurlbutt issued Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses (the “Deferral Order”), the effect of which was to lead the Bracketts and others to believe that their stockwater rights would not be compromised by waiting to file de minimus claims as provided in the Order. That this was the intended effect of the Deferral Order was confirmed through statements by a representative of the IDWR to Bert Brackett in 1991 that stockwater claims under 13,000 per day were considered de minimus and claims did not have to be filed with respect to such sources. See, Affidavit of Bert Brackett, filed March 15, 2000. What was not disclosed either in the Deferral Order or by the IDWR was that in the interim, the United States was filing hundreds of stockwater claims and obtaining default decrees against the Bracketts and other parties without giving notice of those claims nor notice of the default proceedings. Based on the statements by the IDWR representative, the Bracketts had no reason to believe that the United States was filing stockwater claims against them and, thus, no reason to monitor on a daily, weekly, or monthly basis the posted Director’s Reports and docket sheet in order to determine whether the United States was filing stockwater claims because it was represented to them that such claims were being deferred. Grounds exist, therefore, for setting aside the partial decrees based on the Bracketts’ reasonable reliance on these representations. See e.g., Pugmire v. Johnson, 643 P.2d 832, 833-834 (1982) (parties entitled to rely on representations of government officials.)

C. The Bracketts’ case presents facts which, regardless of the outcome of the LU Ranching case, support a ruling setting aside the default decrees.

In the Special Master’s Recommendation Denying Motions to Set Aside Partial Decrees,

the Special Master states that “all issued (sic) raised by the Brackett entities in the instant *Motions* have been addressed by Judge Burdick in LU Ranching and the cases cited therein, and are dispositive of such *Motions*.” See, Special Master’s Recommendation Denying Motions to Set Aside Partial Decrees, p. 9-10. While the Bracketts recognize that the law of the case doctrine is applicable, the Bracketts disagree that the LU Ranching decision effectively disposes of all of the issues and facts presented in this case. Specifically, the LU Ranching decision does not address the factual situation involved in the present case, namely the Bracketts’ actual reliance on the Deferral Order and IDWR representations regarding the effect of that Order, nor does the LU Ranching decision address the second prong of the notice requirement that advance notice of default proceedings is required pursuant to I.R.C.P. 55(b)(2).

As argued, below, it is the Bracketts’ position that the LU Ranching decision is erroneous and the docket sheet “notice” procedures relied upon by the Court do not meet the minimum due process requirements mandated by the United States and Idaho Constitutions. However, even if this Court chooses to uphold that portion of the LU Ranching decision, there are independent reasons justifying the setting aside of partial decrees entered against the Bracketts. In the present case, evidence of the Bracketts’ reliance on statements by the IDWR regarding the Deferral Order has been presented by way of affidavit, and that reliance provides an independent basis for setting aside the partial decrees at issue. Similarly, the LU Ranching decision ignores the fact that not only does due process require that notice of claims be served on individuals, but that advance notice of default proceedings also must be given. Accordingly, the LU Ranching decision cannot be used as justification to automatically dismiss the Bracketts’ *Motions*.

D. Failure to given notice to known, adverse claimants violates due process

requirements set forth in both the Idaho and United States Constitutions.

As previously briefed, at length, the failure to provide notice of claims to known adverse parties violates the United States and Idaho Constitutions.³ Because of the failure to comply with Constitutionally mandated notice requirements, the default decrees at issue are void and must be set aside.

The Constitutional minimum in proceedings where a party may be deprived of a property right is notice reasonably calculated to apprise interested parties of the pendency of the action and to give them the opportunity to be heard and to present their objections. See, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). When the identities and addresses of potentially adverse claimants are known, then they must be either be personally served or, minimally, mailed notice of the adverse claims being brought against them in order to comply with due process requirements. It is only where the identities of adverse claimants are unknown that alternative means of service of process, like posting, can be considered. See, Mullane, 339 U.S. at 318 (“Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency”); see also, Mennonite Board of Missions v. Adams, 462 U.S. 791, 798-799 (1983) (use of less reliable forms of notice, including posting, is not reasonable where the mortgagee’s address could have been ascertained by reasonably diligent efforts and an inexpensive and

³ The Bracketts hereby incorporate by reference, without limitation, the following briefs filed in this matter: Notice of Motion and Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(b) and United States and Idaho Constitutions, Reply Brief Filed Jointly Against the Opposition of the United States and the Response to Bracketts’ Notice of Motion and Motion to Set Aside Partial Decrees, and Motion to Alter or Amend Special Master’s Recommendation Denying Motions to Set Aside Partial Decrees, as well as matters raised on behalf of the Bracketts in hearings conducted in this case.

efficient mechanism such as mail service was available); Schroeder v. City of New York, 371 U.S. 208, 212-214 (1962) (notice by publication is not enough with respect to a person whose name and address are known or easily ascertainable and whose legally protected interests are directly affected by the proceedings; the city was constitutionally obliged to make at least a good faith effort to give notice personally to appellant, an obligation which the mailing of a single letter would have discharged). Utilization of alternative means of service of process also fails to meet minimum due process standards under the Idaho Constitution where the identities and locations of affected parties are known. See, Bear Lake County v. Budge, 703 P. 614, 616 (1904).

In an attempt to avoid application of the above, the Special Master relied on the erroneous conclusion that the SRBA is a single piece of litigation for purposes of applying due process analysis. However, the practical reality is that each subcase is a separate and distinct action to determine the water rights of individuals. In sum, calling the SRBA a “single case” does not make it so. In almost every respect, each subcase is separate from the other. Each has its own discovery schedule, scheduling orders, and trial, and each culminates in the issuance of separate and distinct final decrees or judgments, each of which is separately appealable. See, AO1 10.c., 14, and 15. Nowhere is the separate nature of these cases more apparent than when you consider the rules regulating participation in the individual subcases. Once a claim is filed, it is given a subcase number, and another person cannot answer or oppose that claim or participate in that subcase unless that person files a motion to participate and demonstrates that he or she has standing to be a party to that subcase; being a party to the general adjudication is not enough. See, AO1 2.p. (defining “party to a subcase”), see also AO1 10.k. (Motion to Participate). If it

takes an affirmative act by a party to the general adjudication to become a party to a particular subcase (filing a motion to participate and demonstrating standing), then it stands to reason that the reverse also must be true: in order to bind someone to a judgment obtained in a subcase, you must also do something affirmative to bring that person within the jurisdiction of the court with respect to that particular subcase. Under our system of jurisprudence in the United States, the mechanism for bringing a person into a suit involves the filing of a complaint or claim and personal service of that claim on the individual who stands to be affected by the eventual judgment. Under the Constitutions of the United States and the State of Idaho, where identities of the persons to be brought into the suit are ascertainable, and their locations known, service of process must be direct and, minimally, the claim must be delivered by mail to the individual in order for the Court to have personal jurisdiction over that person and to enforce a judgment against him.

In the present case, there is simply no excuse for the failure to give the Bracketts notice of the claims being brought against them by the United States. The identities and addresses of each of the Brackett entities were known to the United States by virtue of the United States' contractual relationships with the Bracketts. Given that, the docket sheet and posting procedures, both alternative means of service of process, are Constitutionally insufficient to give the Bracketts notice of the individual claims filed against them.

Notwithstanding the above, the Special Master relied heavily on the fact that some of the Brackett entities received a Notice of Filing Director's Report. However, neither the docket sheet procedures, nor mailing "notice" that Director's Reports are posted, nor posting the Director's Reports are sufficient means to satisfy due process requirements. As addressed at

length, above, alternative forms of service of process, such as those listed above, do not meet minimum due process standards where the identities and location of adverse claimants are known. This is especially true given the fact that neither the generalized Notice advising that Director's Reports are posted nor the Docket Sheet notations do anything to put parties on notice of whether any of the claims that are the subject of the posted Director's Reports have any relevance to them. Neither document identifies the specific source or location of the reported claims, nor does either document identify whether any of the reported claims are competing or overlapping. In sum, the form letter ("Notice") and docket sheet leave parties in the exact same position they would have been had they never been mailed the form letter or seen the docket sheet in the first instance: faced with the practically impossible task of searching through the legal descriptions contained in the hundreds of Director's reports, comparing each of them to the legal descriptions for their own water sources, making individualized determinations of whether and to what extent the reported claims are competing, and continuing this arduous process as new Director's reports are issued and posted in such a time and in such a manner as to comply with the time restrictions currently imposed by the rules.

In addition to the above, even if the form letter ("Notice of Filing Director's Report") is held to be sufficient to put parties on notice of adverse claims filed against them, the "notice" comes too late. The letter advises parties that Director's Reports have been issued. The Director's Reports are *prima facie* evidence that the claim at issue should be decreed as reported. See, I.C. § 42-1411(4), (5). Accordingly, even if a party is able to discover that a Director's report recommends a claim that is adverse to his interests, when that party chooses to challenge the claim and file an objection to the Director's Report, he does so with one strike already against

him. In contrast, if parties are provided with actual notice, for example by mail, that competing claims have been filed against them, and they receive this notice prior to the issuance of the Director's Report, then they will have the opportunity to participate in the investigative process leading up to the issuance of the Director's Report and, importantly, will have the opportunity to advocate their position. See, I.C. §§ 42-1410, and 42-1411. Absent actual notice of claims being filed against them, they will be left with a potentially damning Director's Report that can be used as *prima facie* evidence against them without ever having the opportunity to defend their position during the investigatory phase.

The failure to give notice of claims filed to the Bracketts is even more egregious given the United States' status as a sovereign and the special treatment it receives in each of the subcases. Unlike other parties to the adjudication, the United States has not been required to comply with the statutory requirement of verifying the substance of its claims by signing the claims under oath. See, I.C. § 42-1409 (3); see also, IDAPA 37.03.01, Rule 060.03(p). The United States also has not been required to comply with the requirement that all parties identify other water rights used at the same place and for the same purpose as the right claimed. See, IDAPA 37.03.01, Rule 060.03(m). Unlike other parties to the adjudication, the United States has been permitted to file its claims electronically, using a form that materially differs from that prescribed by statute. See, I.C. § 42-1409; see also, IDAPA 37.03.01, Rule 060. Finally, the United States is given actual, direct notice through mailing of all claims and Director's Reports filed in the SRBA. See, AO1 6(e).

The nature of the relief sought by the Bracketts is simple: they are asking for their day in Court. The worst case scenario in granting the requested relief is that each case gets tried on its

merits. In this respect, there is no real prejudice to the United States because the United States still will have the opportunity to attempt to prove up its claims. However, there will be very real consequences and very real prejudice to the Bracketts if they are denied their opportunity to defend their interests. Particularly where, as in the present case, the Bracketts possess legitimate defenses to the United States' claims, the opportunity to defend their interests should be granted.⁴

IV. CONCLUSION

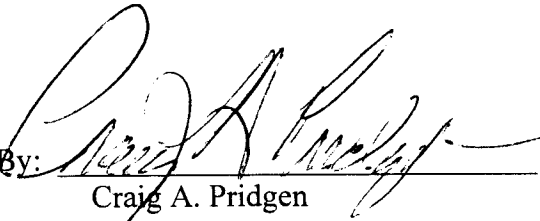
Each claim filed in the SRBA to adjudicate and obtain a decreed stockwater right is a separate and distinct action quieting title to a valuable property right. Constitutional due process mandates that any known adverse claimant is a party to any such adjudication and minimally must be served with the claim filed by the United States particularly when the United States knows the identity and address of the individual or entity actually beneficially using the water for stockwater purposes. The Bracketts and their related entities were not properly served and accordingly were not "parties" with respect to the adjudication of the water rights which they and their predecessors-in-interest have historically diverted and put to a beneficial use for generations. The default decrees entered in the subcases identified in Exhibit A hereto must be set aside in order to provide the Bracketts and their entities with the constitutionally guaranteed

⁴ It should be noted that Idaho law requires actual beneficial use of water to support a water law claim based on constitutional appropriations. See, In Re SRBA Case No. 39576, Minidoka National Wildlife Refuge v. United States, 996 P.2d 806, 811 (2000). Stockwater rights are no exception. Accordingly, the government's non-diversionary act of managing the rangeland, coupled with the fact that it does not now nor has it ever owned livestock, fail to support the water rights claimed by the United States under the doctrine of prior appropriation in the subcases at issue. See e.g., Minidoka National Wildlife Refuge, 996 P.2d at 812; see also, R.T. subcase 72-15929C, Order Denying Motion to Alter or Amend, subsequently adopted and incorporated by reference by the District Court in its September 30, 1998 Order Denying Challenges and Adopting Special Master's Reports and Recommendations.

right to participate as a party in the adjudication and defend their rights. Alternatively, if this Court upholds the Special Master's determination that the Bracketts were in fact "parties" to the SRBA subcases which are the subject matter of this motion then, in such event, the default decrees must be set aside in that the mandatory requirements of I.R.C.P. 55(b)(2) have not been complied with and the decrees are void under I.R.C.P. 60(b)(4) in that the requirements of I.R.C.P. 55(b)(2) are jurisdictional.

DATED: May 30, 2002

Respectfully submitted,
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By: 
Craig A. Pridgen

As local counsel, having reviewed the foregoing Motion on Challenge, I hereby execute the same this ____ day of May, 2002.

LING & ROBINSON

By: _____
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Attorneys for Brackett Livestock, Inc.,
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C.E. Brackett Cattle Co.

EXHIBIT A

Subcase Nos:

51-02283
51-02289
51-02299
51-02300
51-02301
51-02302
51-02313
51-02317
51-02318
51-02326
51-02328
51-02356
51-02358
51-02360
51-02393
51-04062
51-04063
51-04064
51-04065
51-04066
51-04067
51-04068
51-04070
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51-04082
51-11889
51-11899
51-11901
51-11903
51-11904
51-11905
51-11920
51-11953
51-11954
51-11958
51-12094
51-12097
51-12167
51-12376
51-12451
51-12452
51-12834
51-12835

CERTIFICATE OF MAILING

I certify that on May 30, 2002, I served a true and correct copy of the foregoing ***Motion on Challenge*** upon the following persons by U.S. Mail, postage paid and addressed as follows:

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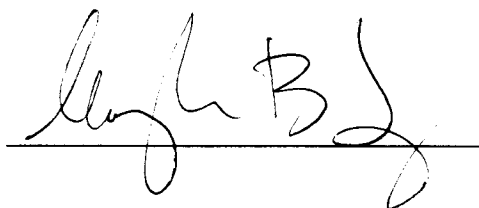
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