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Department of Water Resources

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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.: 51-02283, et al.: <i>See</i> attached Exhibit
	)	"A"
	)	
	)	REPLY BRIEF TO MEMORANDUM IN
	)	OPPOSITION TO BRACKETTS' MOTION
	)	ON CHALLENGE
	)	
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I. INTRODUCTION

The fundamental problem with the position taken by the United States Bureau of Land Management (“United States” or “BLM”) with respect to the underlying motion by the Bracketts to set aside partial decrees is that you cannot treat the Bracketts and their related entities as “parties” to the SRBA litigation for purposes of invoking the Docket Sheet Procedures and Administrative Order No. 1 (“AO-1”) as they relate to notice of claims filed by the United States on the one hand and, at the same time, declare that the Bracketts are “non-parties” because they did not file a competing claim to the United States’ claims with respect to which the Bracketts had no actual notice. Underlying this concept is the fundamental uncontested fact that the Bracketts and their related entities were known to be existing permittees on BLM administered land comprising in excess of 1,500 square miles of rangeland for a consecutive period of time which predates the enactment of the Taylor Grazing Act. The United States had actual knowledge that the Bracketts were appropriating and using water which is the same water which is the subject matter of the claims which have been decreed by default in favor of the United States’.¹

The United States and, in fact, this Court have significantly relied on the proposition that the Directors’ Reports issued to the Bracketts AS TO THEIR OWN CLAIMS provide adequate

¹The same argument holds true with respect to the “licenses” or “permits” which the United States has obtained under Title 42 of the Idaho statutes. Chapter Five, and specifically, Section 42:501 specifically provides that the “[T]he Bureau of Land Management of the Department of Interior of the United States may appropriate for purposes of watering livestock any water not otherwise appropriated, on the public domain.” The fact simply is that the United States misrepresented to the State of Idaho that the water which is the subject matter of their licenses or permits was water which was not previously appropriated by the Bracketts and their predecessors.

notice to the Bracketts that they should search the entire SRBA docket sheet in order to ascertain whether or not an adverse claim has been filed on any water source within their grazing allotments. It is respectfully submitted that the Director's Report provides no notice beyond the specific claim of the individual applicant with respect to investigation of any potentially unrelated adverse claims by the U.S.. What is even more perplexing and, it is submitted, egregious with respect to due process issues, is that the procedures adopted in the SRBA for filing an "objection" includes the requirement that copies of the objection be served upon the claimant whereas the underlying claim, in the first instance, need not be served on a known adverse user or appropriator of the same water rights (*see* SF-1 Standard Form Objection). Since the United States is the only claimant which receives copies of all claims and objections, the rights of all actual appropriators are compromised.

Finally, the argument by the United States that the Notice of Director's Report for Small Domestic and Stockwater Rights which is sent to all claimants in the SRBA by the Idaho Department of Water Resources ("IDWR") meets minimum due process requirements with respect to giving actual notice of the entry of a default judgment or decree is not sustainable under IRCP 55(b)(2). The fact that the instructions indicate that uncontested recommendations will be heard at the courthouse and partial decrees will be issued following that hearing does not meet minimum statutory requirements. This is particularly true under circumstances where, as in all of these cases, the United States has actual knowledge that the Bracketts and their predecessors have been grazing cattle on the allotments with respect to which the United States purports to have a stockwater right. This is also true under circumstances where the Bracketts would not have even suspected that the United States would claim a stockwater right in view of

the fact that the United States owns no livestock, nor is there any existing agency agreement between the United States and the Bracketts whereby the United States could acquire such a right.

II. ARGUMENT

A. **The Fact That the Bracketts and Their Related Entities Filed Claims in SRBA Does Not Validate the AO-1 or Docket Sheet Procedures**

It is not in dispute that the Bracketts and their related entities filed water right claims in the SRBA. It is equally undisputed that the claims originally filed by the Bracketts were with respect to irrigation and, in some instances, irrigation/stockwater rights primarily located on privately owned land and, stockwater rights with respect to sources located on privately owned land (Pence Spring) as well as related pipelines and troughs located on BLM administered land within properly permitted allotments. It is equally true that the United States did not file competing claims with respect to those filed by the Bracketts.² The United States did file a multitude of claims, primarily on instream flows, PWR 107 sources, and stockwater rights with respect to which the United States had ostensibly received a permit or license from the State of Idaho. Accordingly, under the docket sheet notice procedure, the Bracketts would not have identified any competing claim filed by the United States, particularly under circumstances where the Bracketts were aware and have so testified in their affidavits of the “Deferral Order” with respect to filing on *de minimus* claims. Accordingly, it was not until several months, if not years, later when the Bracketts began to file stockwater claims on instream flows that it was discovered, either directly by the Bracketts or, by counsel for the Bracketts, that the United States had not

² As noted in its’ Response, the United States did file objections to these Brackett claims.

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only filed claims on these sources but that those claims had been converted to partial decrees, having not been objected to. Notwithstanding the fact that the Bracketts were “parties,” having received service of the underlying SRBA litigation, and where known appropriators of the subject water, these partial decrees were entered by default without notice. What is even more egregious under the circumstances is that this Court has already found that the United States cannot acquire a stockwater right on federally administered grazing allotments under Idaho state law unless it can establish an appropriation and beneficial use of the water source at issue, or establish either that it is a successor in interest to an actual appropriator; or, in the alternative, that it was the actual owner based upon an express agency relationship with an actual appropriator. See February 6, 1999 Order on Motion and Cross-motion for Summary Judgment, subcase 72-15929C, and April 15, 1998 Order Denying Motion to Alter or Amend (Amended Order on State’s Motion for Summary Judgment), subcase 72-15929C, confirmed by September 30, 1998 Order Denying Challenges and Adopting Special Master’s Reports and Recommendations, subcase 57-04028B, 57-10587B, 57-10588B, 57-10598B, 57-10770B, and 72-15929C. The United States, by its own admission in related litigation, cannot meet any of these criteria and it has not even alleged that it can do so with respect to the subcases which are the subject matter of this motion. (See U.S. Opposition to Motions for Summary Judgment by Joyce Livestock Co., Subcase Nos. 55-11061 and 55-10135 under submission before Special Master Dolan). The fact simply is that the United States has acquired a stockwater right by default against “parties” under circumstances where it cannot make a *prima facie* showing that it has appropriated or beneficially used water for livestock purposes, nor has it acquired a stockwater right from a third party, which by definition in these cases would have to be the Bracketts or their predecessors.

Thus, it is submitted that the United States has acquired by default judgment that which it may not otherwise establish in a contested litigation as a matter of law and fact.

Since the Bracketts relied on the Deferral Order and did not file any instream stockwater right claims for several months, if not years, after they filed their initial irrigation/stockwater claims as above-referenced, even if the notice provided in the Director's Report meets minimum due process requirements, which the Bracketts deny, it would have been unlikely that the Bracketts would have identified the competing claims filed by the United States at various times spanning a period of over two years, beginning in the mid-1990's with respect to instream flows wholly unrelated to the Brackett claims. The docket sheet procedure, as well as AO-1, do not even remotely meet any test of the due process requirements established under any United States Supreme Court or State of Idaho Supreme Court decisions cited and does not even comply with the only recognized alternative to personal service, publication and posting. By filing a specific claim, the United States becomes a cross-complainant to a specific quiet title action against a known adverse user and appropriator of stockwater. As a practical matter, the alleged due process protections provided under the docket procedure is tantamount to looking for the proverbial legal description needle in a haystack of legal descriptions. The United States has literally filed thousands of claims in the SRBA. In fact, initially, the United States filed claims on hundreds of water rights which even IDWR, as well as this Court, subsequently determined were claims on water rights which did not, as a practical matter, exist. This onerous requirement being placed upon hundreds of citizens of the State of Idaho cannot be justified under any circumstances. To justify this procedure, however, this Court has previously found that the alternative of filing and serving pleadings within the SRBA on every person who has been served

in the underlying litigation would lead to a situation wherein individual litigants as well as this Court would be inundated with mountains of paperwork and expenses so outrageous that the average individual could not afford to prosecute his claim. This argument is fatally flawed. Neither the Bracketts, nor anyone else, has asserted that every pleading must be filed on every party to the SRBA litigation. The only requirement is that which is imposed under the constitutions of the United States and the State of Idaho as interpreted by the United States Supreme Court. Specifically, if there is a known defendant or, in this case, adverse claimant, the constitutional due process requirements mandate that the plaintiff or, in this case the claimant, serve KNOWN adverse claimants with a copy of, in this case, the claim. It is undisputed that the United States knows every single individual who is authorized to graze cattle on publically administered land. In fact, as in the case of the Bracketts, there are several “cooperative agreements” wherein the United States has allowed the Bracketts to make improvement to the rangeland, including the installation of pipelines, troughs, reservoirs, tanks and other modifications to instream flows over a period now extending approximately eighty years in duration. Accordingly, the United States is keenly aware of the grazing activities of the Bracketts on the publicly administered land, and are specifically aware that the Bracketts and their predecessors have historically appropriated water throughout the allotments upon which their herds graze. Additionally, the United States billed the Bracketts on an annual or in some cases semi-annual basis for the grazing permit fees. Serving the Bracketts with a claim by the United States to a stockwater right on their allotment is as simple as inserting a copy of the claim with the annual or semi-annual billing. When weighed against the onerous task of spending hours, if not days, examining public records at the courthouse to ascertain whether or not the United

States has filed an adverse claim on the Bracketts' allotment, the time and expense of filing and serving a claim against the Bracketts, or against any other permitted rancher within Idaho, is insignificant. What is more egregious is the fact that the United States has received copies of every single claim filed by an individual or non-governmental institution in the SRBA. Contrary to expressed concerns by this Court that procedures requiring the service of claims on known appropriators will lead to more court time dealing with due process issues, the likely result will be that the Court will spend more time actually adjudicating water rights to actual Decrees which will sustain future judicial attack. Is it not true that this is the intended result of the SRBA?

B. Partial Decrees do Violate IRCP § 55(b)(2) and are Voidable

The United States inaccurately claims that the Bracketts are raising the violation of IRCP § 55(b)(2) for the first time in their brief before this Court. A review of the previous pleadings in this case will contradict that allegation.

More importantly, however, is the fact that once again the United States conveniently misconstrues the express language of § 55(b)(2). The United States argues that “[T]he Bracketts did not file timely objections, thus there was no party to the subcase against whom judgment by default [was] sought . . . ” (citing § 55(b)(2)). The Bracketts did not file timely objections because they were never served by the United States with a copy of the competing claims. The docket sheet procedure does not provide reasonable notice in that, as discussed in detail above, the Bracketts, and for that matter, every other potential adverse claimant in the SRBA, would be required to make countless searches of reams and reams of documentation consisting of legal descriptions in order to ascertain whether or not the United States has filed an adverse claim against a water right which the Bracketts, in this case, were actively relying upon for instream

stockwater purposes. Even assuming, however, that the Bracketts received constitutionally sufficient notice of the United States' claim, they, of necessity, must be considered "parties" to the SRBA litigation and thus entitled to notice that a default was being entered. This is particularly true when the United States has freely admitted and in fact argued that the Bracketts were "parties" to the SRBA litigation and accordingly, were bound to follow all of the rules and procedures with respect to the Docket Sheet Procedures and A.O.-1. As indicated in our opening brief, you cannot treat the Bracketts as a "party" in the underlying action for purposes of service of process and at the same time declare that they are not parties when the United States seeks and obtains a judgment by default, particularly under circumstances where the United States clearly knows that the Bracketts are actual appropriators and users of the stockwater right being decreed. Since the Bracketts filed their own claims, the United States had actual knowledge that they had participated in this litigation in order to assert their rights and claims.

C. Bracketts Have Alleged a Meritorious Defense to the Claims of the United States Including Claims Based upon a State Issued License.

The United States is correct when it asserts that the Bracketts have raised affirmative defenses to the United States' claims for a decreed water right based upon several facts including, but not limited to, the fact that the United States does not own a stockwater right in that it owns no livestock and accordingly cannot have appropriated and put the water to a beneficial use. The pleadings filed by the Bracketts giving rise to this Motion on Challenge are replete with allegations setting forth affirmative defenses which additionally assert that the United States did not acquire a stockwater right as a result of obtaining an assignment of those rights from the original appropriator nor can it establish a water right pursuant to a specific agency agreement.

The Bracketts acknowledge that without any notice to them in the first instance, the United States has acquired a license or permit from the State of Idaho with respect to various water rights on the allotment which is under permit to the Bracketts. Apparently, the United States applied for and acquired a permit or a license. While this challenge does not specifically attack the validity of those licenses, it does attack the ability of the United States to in addition convert that license into a decreed right by default under the SRBA. To that extent, the defenses remain equally applicable regardless of the fact that the United States acquired a “license.” What is particularly egregious however, is that Title 42, Section 501 of the Idaho Statutes specifically provides that the Bureau of Land Management may appropriate for the purpose of watering livestock any water not otherwise appropriated, on the public domain. The same section limits the use of water so appropriated to the watering of livestock without any charge therefore on the public domain. It is respectfully submitted that the United States had to have filed their application for such a license with the full knowledge that the water rights which were the subject matter thereof were located on land being grazed actively by the Bracketts, their related entities and predecessors-in-interest dating back to prior to 1900. This fact is evidenced by the filings by the Bracketts of claims in the SRBA for the same water rights which claims were filed subsequent to the competing claims which had already been decreed in favor of the United States and are the subject matter of this challenge.

Whether or not the permits or licenses were validly issued by IDWR in light of the knowledge of the United States at the time they filed for those licenses is really a consideration independent of this challenge except to the extent that it raises additional issues which would constitute a valid defense to the issuance of a decreed water right in the SRBA. Whether or not

the decrees were properly entered is an independent legal issue subject to the same defenses which the Bracketts have raised relative to other BLM claims which have been decreed by default.

III. CONCLUSION

Let there be no misunderstanding, the Bracketts by and through the undersigned are keenly aware that this Court has addressed many of the issues which are the subject matter of this challenge and the Court's ensuing Order with respect to the LU Ranching Motion to Set Aside Default Decrees is currently pending before the Supreme Court. The arguments presented on behalf of the Bracketts however, include an additional critical issue dealing with the specific issue as to whether or not Default Decrees were properly entered consistent with the provisions of IRCP § 55(b)(2). As specifically cited in our Opening Brief, it has already been determined that the SRBA is bound by the provisions of that code section. The burden is upon the claimant seeking a default decree to provide the Court with a name and address of the known individual or entity with respect to whom property rights will be adversely affected by the entry of a decree by default. The United States, with actual knowledge of competing rights to stockwater duly appropriated historically by the Bracketts was specifically obligated to advise the Court as to the identity and address of the Bracketts and their related entities who were under any definition "parties" to the SRBA. It is in this broader context that the Bracketts respectfully request that this Court reexamine its prior rulings with respect to the procedural aspects of insuring under the SRBA that water right appropriators on publicly administered grazing land are afforded at least minimum due process considerations and sufficient notice to defend their specific rights in and to valuable property rights.

The undersigned, on occasion has been asked by the Special Masters whether or not a procedure could be adopted even at this stage in the proceedings which would assure adequate opportunity for individuals to protect their property rights without completely dismantling what has already occurred in this adjudication. The undersigned believes that this can be accomplished in a manner which would preserve the due process rights of the citizens of the State of Idaho and at the same time allow this Court to proceed judicially and timely with respect to the ultimate objective of adjudicating all water rights tributary to the Snake River in Idaho. The United States can simply give notice to its permittees that the United States has obtained a decreed right to stockwater on their respective allotments and provide those permittees with a reasonable opportunity to move the Court to set those decrees aside provided that they do so within a reasonable period of time. If any permittee fails to take advantage of the opportunity to appear and set aside the decrees within that period of time, the decrees would be deemed to have been finally decreed. The due process deficiencies would thus be cured to the extent that any particular appropriator does not timely act and, to the extent that any individual or entity takes advantage of the opportunity, this Court will be able to timely and efficiently adjudicate those rights consistent with constitutional guarantees.

For these reasons, the undersigned on behalf of the Bracketts respectfully requests this Court to reevaluate its position with respect to these critical issues involving fundamental rights

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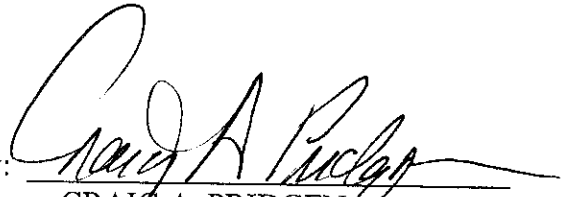
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involving valuable property interests.

DATED: June 25, 2002

Respectfully submitted,
McQUAID, METZLER, BEDFORD &
VAN ZANDT, LLP

By: 
CRAIG A. PRIDGEN

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

LING & ROBINSON

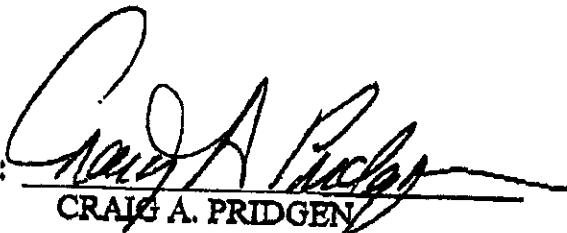
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involving valuable property interests.

DATED: June 25, 2002

Respectfully submitted,
McQUAID, METZLER, BEDFORD &
VAN ZANDT, LLP

By:


CRAIG A. PRIDGEN

As local counsel, having reviewed the foregoing Motion on Challenge, I hereby execute
the same this 25th day of June, 2002.

LING & ROBINSON

By:


TIMOTHY J. SCHNEIDER
Attorneys for Brackett Livestock,
Inc., Brackett Ranches, Ltd., and
C.E. Brackett Cattle Co.

CERTIFICATE OF MAILING

I certify that on June 25, 2002, I served a true and correct copy of the foregoing ***Reply Brief to Memorandum in Opposition to Bracketts' Motion on Challenge*** upon the following persons by U.S. Mail, postage paid and addressed as follows:

1. Original to:

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Twin Falls, ID 83303-2707
[Via Federal Express]

2. Copies to:

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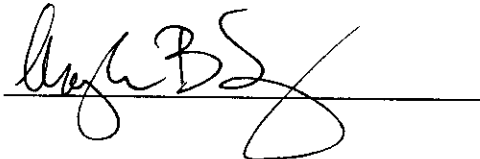


EXHIBIT A

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