IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

	)	**Subcases 55-02373 *et al.***
In Re SRBA	)	**(LU Ranching Co.)**
	)	
Case No. 39576	)	**MEMORANDUM DECISION AND**
	)	**ORDER ON MOTION TO SET ASIDE**
_____	)	**PARTIAL DECREES**

APPEARANCES:

Craig Pridgen and Richard Harris, representing LU Ranching Co., appeared in support of the motion.

Larry Brown, representing the United States, appeared in opposition to the motion.

Peter Ampe, representing the State of Idaho, appeared in opposition to the motion.

I.
SUMMARY

On August 18, 2000, LU Ranching Co. (LU) filed a motion entitled *LU Ranching Co.'s Notice of Motion and Motion to Set Aside Partial Decrees Pursuant to I.R.C.P. 60(b)(4) and the United States and Idaho Constitutions, File Late Claims, Late Objections, and to Consolidate Subcases and Memorandum of Points and Authorities in Support Thereof* (hereinafter, "*Motion to Set Aside*" or "*Motion*"). For the reasons discussed below, LU's motion is DENIED.

II.
MATTER DEEMED FULLY SUBMITTED FOR DECISION

Oral argument was heard on this matter on Tuesday, March 27, 2001. At the close of the hearing, the Court took the matter under advisement. No party requested the opportunity to file additional briefing, nor does the Court require additional briefing. Therefore, this

matter is deemed fully submitted for decision the next business day, or Wednesday, March 28, 2001.

III.
PROCEDURAL AND FACTUAL BACKGROUND

1. On March 25, 1993, the United States of America (United States) filed numerous water right claims for small or *de minimis* stockwater sources[1] on federal grazing allotments located on lands owned by the United States and managed by the U.S. Department of the Interior, Bureau of Land Management (BLM). The claims are all located in the Idaho Department of Water Resources (IDWR) Reporting Area 6, which includes Basins 51, 55 and 61. LU holds the grazing permits to these allotments used in conjunction with its ranching operation.

2. Previously, on April 3, 1992, LU filed 17 small domestic and stockwater claims, some for use on grazing allotments in Basin 55, also used in conjunction with its ranching operation. *See United States' Memorandum in Opposition*, Exhibit 3. Although these claims are not now part of LU's *Motion*, the claims impact the *Notice* received by LU and the position taken by LU in support of its *Motion*.[2]

3. On March 22, 1995, the Honorable Daniel C. Hurlbutt, then Presiding Judge of the Snake River Basin Adjudication (SRBA), entered an order entitled ***Order Governing Procedures in the SRBA for Domestic and Stockwater Uses***. In that document, Judge Hurlbutt ordered different procedures for those areas where a director's report had been filed versus where a director's report had not been filed. This ***Order*** was based upon the Court's earlier ***Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*** (Jan. 17, 1989) ("***Deferral Order***") and superceded the same. In those areas where a director's report had not been filed, claimants who wished to reinstate their notice of claim needed to comply with Idaho Code § 42-1409(8) (1990). The ***Order*** indicated that there would be no late filing for the claiming of those uses. That was to include any of those uses in which no notice of claim had been filed

[1] A claim is considered small or *de minimis* if it fits within the definition of domestic and stockwater uses contained in Idaho Code § 42-1401A(4) and (11).

[2] These claims are listed in Exhibit B to LU's *Motion to Set Aside*. Pursuant to a stipulation and order, these claims are no longer included in the *Motion to Set Aside*.

and those domestic and stockwater uses which had been acquired after the commencement of the SRBA. In those areas where a director's report had been filed, persons who wished to file a notice of claim for domestic or stockwater use and later deferred or withdrew claims could now reinstate that notice of claim by filing a *Standard Form 4, Motion to File a Late Notice of Claim*. There were to be no late charges, nor was there to be an appearance fee for claimants who reinstated their notice of claim. Finally, Judge Hurlbutt indicated that use of the deferral procedure did not constitute forfeiture nor abandonment of the domestic or stockwater claims deferred pursuant to the 1989 ***Deferral Order***.

4. The 1989 ***Deferral Order*** made it plain that election of this deferral procedure would not result in a loss of the domestic or stockwater claim and that a deferring claimant would not be precluded from establishing the requisite elements of his or her claims at a subsequent proceeding. ***Deferral Order*** at 5. The ***Deferral Order*** also states: "Any objections which a *de minimus* [sic] claimant or any other claimant may have to any and all claims being adjudicated in this proceeding must be timely raised in the proceeding in accordance with Idaho Code § 42-1412 (supp. 1988) or be forever barred." ***Deferral Order*** at 3. In addition, the December 20, 1988, *Stipulation for Establishment Of Procedures for the Adjudication Of Domestic And Stockwater Claims*, which formed the basis of the 1989 ***Deferral Order***, states in paragraph 4:

> Counsel for the United States is entering into this stipulation in order to accommodate the State of Idaho's desire to streamline the instant phase of the adjudication. Counsel for the United States and the State of Idaho agree that the proposed procedures meet the requirements of the McCarran Amendment, 43 U.S.C. 666, because all water users, including those claiming *de minimus* [sic] domestic and stock watering rights will be served and made parties to this adjudication, and will eventually have their rights adjudicated, either in this phase of the proceeding or pursuant to the procedures set forth in this stipulation. It should not be inferred, however, that by signing this stipulation, the United States recommends or otherwise encourages any water user to elect to defer the adjudication of his or her water right.

5. On July 31, 1997, IDWR filed the *Director's Report Reporting Area 6 (IDWR Basins 51, 55 and 61) for Small Domestic and Stockwater Rights* (hereinafter, "*Director's Report*"). The *Director's Report* contained recommendations for pending small domestic

and stockwater claims in Basins 51, 55 and 61 including recommendations for the subject claims filed by the United States and recommendations for the claims filed by LU.

6. On July 30, 1997, IDWR mailed a letter along with a *Notice of Director's Report* to each claimant whose claim(s) had been recommended in the *Director's Report*. *See United States' Memorandum in Opposition,* Exhibits 1 and 2. Because LU also had claims recommended in the *Director's Report*, the letter and *Notice*, as well as recommendations for LU's claims, were sent to LU via first class mail.

7. The letter informed LU that the recommendations for its claims were enclosed. The letter also notified LU that instructions for reviewing its recommendation(s) as well as recommendations for other claimants in the reporting area were enclosed. The letter informed LU that it had "120 days in which to file any objection to our recommendation and to review the domestic and stockwater water rights of other claimants, including those of the United States." The *Notice* informed LU that a complete copy of the *Director's Report* listing all small domestic and stockwater rights claimed under both state and federal law was available at the SRBA Courthouse in Twin Falls, Idaho, and listed the other locations where copies were provided.[3] The *Notice* also informed LU that objections must be received by the SRBA Court on or before December 5, 1997. The letter and *Notice* also informed LU that recommendations for which no objection was filed would be decreed as recommended. LU does not contend that it did not receive the letter and *Notice* nor does LU contend that the *Notice* fails to comply with the criteria set forth in I.C. § 42-1411(6).

8. On August 7, 1997, the SRBA Court published a ***Docket Sheet*** listing "all documents filed with the SRBA District Court during the month of July 1997." The ***Docket Sheet*** informed all SRBA parties that the *Director's Report* for Reporting Area 6, Basins 51, 55 and 61 was filed with the SRBA Court on July 31, 1997.

9. The license based claims listed in Exhibit A to LU's *Motion* were uncontested and received partial decrees. The claims based on beneficial use and the federal reserved claims based on PWR 107, both also listed in Exhibit A, were initially contested by the State of Idaho (the State). The State's objections were ultimately resolved pursuant to a stipulation

[3] Claimants are only sent copies of their recommendation(s). To review the recommendations of others, the *Notice* provides the locations of the complete *Director's Report*. *See* I.C. § 41-1411(6).

between the State and the United States. The claims then received partial decrees. *See* Part IV below.

10. LU did not file timely objections to any of the United States' claims that are the subject of LU's *Motion*. On December 5, 1997, the United States timely filed objections to LU's small domestic and stockwater claims filed in Basin 55. The reason stated in the objections was "[t]he United States of America, through the Bureau of Land Management, is the owner of the land upon which use is claimed. The claimant does not have a valid water right with the elements claimed." *See e.g. Objection* filed in subcase 55-10288. These subcases were listed in Exhibit B to LU's *Motion* and are currently pending before the Special Master pursuant to an order of reference. *See* Part IV below.

11. On August 17, 2000, LU filed the instant *Motion* seeking to set aside the partial decrees issued for the United States' claims, to file late objections to those same claims and to file late claims for water rights (listed in Exhibit C to the *Motion*) that shared common water sources with certain of the United States' claims.

12. On the date set for hearing on this matter, the parties stipulated that LU could amend its *Motion* to include subcase number 55-12126 which all parties had discovered to be in the same status as those noticed in the exhibits.

IV.
UNDERLYING BASIS, PROCEDURAL POSTURE, AND RELIEF SOUGHT AS TO THE RESPECTIVE CLAIMS

A. LICENSE BASED RIGHTS.

The following claims contained in Exhibit A to LU's *Motion* are based on licenses: 55-02373, 55-02415, 55-02416, 55-02419, 55-07069, 55-07072, 55-07323, 55-07368, 55-07370, 55-07380, and 55-07382.

The claims were contested and partial decrees were entered in the name of the United States on January 30, 1998. LU seeks to have the partial decrees aside and to file late objections to the claims.

B. BENEFICIAL USE RIGHTS.

The following claims contained in Exhibit A to LU's *Motion* are based on beneficial use: 55-10572, 55-10575, 55-10576, 55-10577, 55-10578, 55-10579, 55-10580, 55-10592, 55-10596, 55-10665, 55-11062, 55-11063, 55-11070, 55-11112, 55-11139, 55-11290, 55-11295, 55-11390, 55-11429, 55-11669, 55-11670, 55-11878, 55-11891, 55-11892, 55-11893, 55-12144, 55-12146, 55-12147, 55-12148, 55-12149, 55-12150, 55-12171, 55-12174, 55-12175, 55-12176, 55-12177, 55-12193, 55-12225, and 55-12519.

The State filed objections to these claims. The objections were settled by stipulation filed July 1, 1999. Partial decrees were entered in the name of the United States on January 3, 2000. LU also seeks to have the partial decrees set aside and to file late objections.

C. FEDERAL RESERVED WATER RIGHTS BASED ON PWR 107.

The following claims contained on Exhibit A to LU's motion are federal reserved water rights based on Public Water Reserve (PWR) 107: 55-10470, 55-10701, 55-11023, 55-11025, 55-11166, 55-11320, 55-11322, 55-11324, 55-11381, 55-11442, 55-11529, 55-11531, 55-12186, 55-12188, 55-12199, 55-12494, and 55-12126.

The State filed objections to these claims. The objections were settled by a stipulation filed August 10, 1999. Partial decrees were entered in the name of the United States on April 10, 2000.

D. CLAIMS LISTED IN EXHIBIT B TO LU'S *MOTION*.

The claims listed in Exhibit B to LU's *Motion* consist of the claims filed by LU. These claims have been recommitted to the Special Master and are no longer consolidated with the *Motion*. *See* ***Order Pursuant to Stipulation of the Parties*** (Dec. 8, 2000). The claims, however, represent the stockwater claims filed by LU in Basin 55 and provide circumstances relevant to the level of notice received by LU.

E. CLAIMS LISTED ON EXHIBIT C TO LU'S *MOTION*.

The claims listed in Exhibit C to LU's *Motion* are the same as certain of the claim numbers listed in Exhibit A to LU's *Motion*. LU seeks leave to file late claims for these same sources.

V.
ISSUES PRESENTED

The water right claims at issue are located on federal grazing allotments. The United States owns the land on which the claims are situated. LU holds the permits for these grazing allotments and grazes cattle on the allotments. The underlying issue that LU seeks to get before the Court in the event the partial decrees are ultimately set aside is the ownership of the water rights. The subject claims were filed by the United States. The State filed objections to some of the claims, which were eventually resolved via stipulation. LU did not timely object to the claims. LU argues that had it known of the claims it would have filed timely objections. LU raises two legal arguments in support of setting aside the partial decrees.

First, LU asserts that it did not receive personalized notice of the filing of the United States' claims, arguing that the United States' failure to serve LU through the mail with notice of the claims violated LU's right to due process under the state and federal constitutions. LU asserts that the partial decrees are void and seeks relief pursuant to I.R.C.P. 64(b)(4).

Second, LU also asserts that the partial decrees entered on April 10, 2000, should be set aside based upon mistake, inadvertence, surprise, and excusable mistake pursuant to Rule 60(b)(1). LU contends the partial decrees were entered approximately one month after LU had the opportunity to review the Director's Report for Basin 55 and, therefore, LU did not have adequate time to investigate the claims. LU asserts that its motion is timely with respect to the six-month time limit.

Finally, in addition to setting aside the partial decrees, LU also argues that it should be permitted to file late claims as to certain claims where LU shares the same water source as the United States' claims.

VI.
STANDARD OF REVIEW

A. I.R.C.P. 60(b).

In the SRBA, a motion to set aside a partial decree is treated similar to a motion to set aside a default judgment and determined in accordance with the criteria set forth in I.R.C.P. 60(b). ***AO1*** § 14d ("Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b)"). I.R.C.P. 60(b) permits a court to relieve a party from a final judgment, order, or proceeding because of:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial;
>
> (3) Fraud, misrepresentation or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released or discharged; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

I.R.C.P. 60(b).

B. TIME LIMITATIONS.

I.R.C.P. 60(b) also requires that a motion to set aside be made within a reasonable time and, for I.R.C.P. 60(b)(1), (2), (3) and (6), not more than six months after the judgment, order, or decree. The Idaho Supreme Court has held that the time limits in Rule 60(b) are mandatory and, consequently, any attempt to modify or set aside a judgment or order pursuant to subdivisions (1), (2), (3), or (6) will not be allowed where the applicable time limit under the rule has clearly expired. *Gordon v. Gordon*, 118 Idaho 804, 800 P.2d 1018 (1990) (citing *Catledge v. Transport Tire Co.*, 107 Idaho 602, 691 P.2d 1217 (1984)). The time limit is also applied as a matter of course in the SRBA.

C. MERITORIOUS DEFENSE STANDARD.

In addition to satisfying one of the criteria set forth in I.R.C.P. 60(b), the movant must also allege facts which, if established, would constitute a meritorious defense. The legal standard of what must be shown to satisfy the meritorious defense requirement has been discussed several times by the Idaho Appellate Courts. *See McFarland v. Curtis*, 123 Idaho

931, 854 P.2d 274 (1993); *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979); *Thomas v. Stevens*, 78 Idaho 266 (1956). The meritorious defense standard requires that a movant:

(1) Allege facts,

(2) Which if established,

(3) Would constitute a defense to the action, and

(4) The facts supporting the defense must be detailed.

The detailed factual requirement also goes beyond the mere general notice requirement that would ordinarily be sufficient if pled prior to default. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). The policy behind pleading a meritorious defense is founded on the doctrine that "it would be an idle exercise for a court to set aside a default judgment if there is in fact no justifiable controversy." *McFarland*, 123 Idaho at 934, 854 P.2d at 277 (quoting *Hearst Corp.*, 100 Idaho at 12, 592 P.2d at 68).

D. MISTAKE, INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLECT; I.R.C.P. 60(b)(1).

Pursuant to I.R.C.P. 60(b)(1) whether a party's conduct in allowing a default to be entered constitutes "excusable neglect" is determined by comparing the alleged "excusable neglect" against what might be expected of a reasonably prudent person under similar circumstances. *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983)(citing *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981)). The Court must weigh each case in light of its unique facts. *Id.* (citing *Orange Transportation Co., Inc. v. Taylor*, 71 Idaho 275, 230 P.2d 689 (1951)). Where "mistake" is alleged as grounds for relief, the mistake must be factual rather than legal and must also be conduct that might be expected of a reasonably prudent person under the circumstances. *Reeves v. Wisenor*, 102 Idaho at 272, 629 P.2d at 668.

E. JUDGMENT IS VOID—I.R.C.P. 60(b)(4).

The Fifth Amendment to the United States Constitution prohibits the federal government from depriving any person of life, liberty or property without due process of law. U.S. CONST. amend. V. The 14th Amendment to the United States Constitution prohibits the states from depriving any person of life, liberty or property without due process of law. U.S.

CONST. amend. XIV, § 1. The Idaho Constitution also provides that no person "be deprived of life, liberty or property without due process of law." IDAHO CONST. Art. I § 13. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted).

"[A] default judgment taken in an action where service of process was not made, or improperly made, is void and may be vacated pursuant to I.R.C.P. 60(b)(4)." *Thiel v. Stradley*, 118 Idaho 86, 87, 794 P.2d 1142, 1143 (1990). A party seeking relief from a default judgment generally must demonstrate the existence of a meritorious defense, *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981), but such a showing is not required where the party seeks to set aside the default because of improper service of process or lack of actual notice of the action. D. CRAIG LEWIS, IDAHO TRIAL HANDBOOK § 3.16 (1995) (citing *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988)). The decision whether to grant a motion to set aside a default judgment is committed to the sound discretion of the trial court. *Newbold v. Arvidson*, 105 Idaho 663, 664, 672 P.2d 231, 232 (1983).

F. CONSIDERATION FOR DECIDING A CASE ON THE MERITS.

The standards for setting aside a default and setting aside a default judgment both take into account the preference for having a case decided on its merits. In making the determination, the Court must take into consideration that judgments by default are not favored and that the general rule in doubtful cases is to grant relief from the default in order to reach a judgment on the merits and that procedural rules other than those which are jurisdictional should be applied to promote disposition on the merits. *Reeves*, 102 Idaho at 272, 629 P.2d at 668 (citing *Hearst Corp. v. Keller*, 100 Idaho 10, 592 P.2d 66 (1979)). This is a factual determination and is discretionary with the Court. *Johnson*, 104 Idaho at 732, 662 P.2d at 1176.

The SRBA presents it own unique set of circumstances. In a non-SRBA case, the entry of a default or default judgment typically occurs when a party fails to take some required action. Although ***AO1*** incorporates the standards for setting aside a default and a

default judgment and applies these standards by analogy, water right claims that proceed uncontested through the SRBA are not entirely analogous to a default situation. First, uncontested claims are prosecuted by claimants who are usually active in their subcase but face no objectors. Second, although uncontested, the claims are still in fact "decided on the merits." Idaho's statutory scheme for the SRBA, together with ***AO1***, set forth a comprehensive process for adjudicating both uncontested and contested state based claims. This process affords additional procedures and safeguards not otherwise present in non-SRBA cases.

To illustrate, a claim of a water right is filed in accordance with Idaho Code § 42-1409. IDWR then investigates the nature and extent of the claim. I.C. § 42-1410. The director then prepares and files a director's report for the claim. I.C. § 42-1411. The director's report constitutes *prima facie* evidence of the nature and extent of the water right. I.C. § 42-1411(4).[4] Either the claimant or any other party to the SRBA can file objections and/or responses to objections to the director's report. I.C. § 42-1412. The objecting party has the burden of going forward with evidence to rebut the director's report as to all issues raised by the objection. I.C. § 42-1411(5).

Director's reports that are uncontested are typically decreed as reported. I.C. § 42-1411(4). Although this is normally what occurs, the SRBA Court retains discretion to apply law to the facts and render its own conclusion regarding uncontested water rights. *State v. United States*, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995). The district court can also delay entry of a partial decree for the uncontested portions of the director's report if the court determines that the unobjected claim may be affected by the outcome of a pending contested matter. I.C. § 42-1412(7). Ultimately, the claim is subject to a final review by the court prior to the entry of the partial decree.

If a water right is contested, ***AO1*** provides several opportunities for parties to participate in the case at different levels of the proceedings prior to the entry of a partial decree. Some occur as a matter of right and others are subject to discretion. *See e.g.* ***AO1*** § 4(d)(1)(d) (objections and responses); ***AO1*** § 13(a) (motion to alter or amend special

[4] This analysis does not apply to federal reserved water right claims, which are not investigated by IDWR. However, federal claims that are state law based are investigated and reported by IDWR as outlined above.

master's recommendation); ***AO1*** § 10(k) (timely motion to participate); and ***AO1*** § 10(j) (motion to file late objection). Ultimately, the district court also reviews the special master's report and recommendation prior to the entry of the partial decree.

In sum, although there is a preference for having a case decided on its merits, an uncontested water right that proceeds to partial decree is subject to more scrutiny than in a typical non-SRBA case where a default judgment is ultimately entered. In contested cases, parties to the SRBA that do not initially become involved in the subcase are afforded several different opportunities to participate.

G. I.R.C.P 55(c) STANDARDS.

In subcases for which partial decrees have not been entered, the legal standard for filing a late objection to a water right claim in the SRBA has been historically determined pursuant to the standard set forth in ***AO1*** for filing late claims since ***AO1*** does not expressly provide a standard for reviewing late objections. A motion to file a late claim is determined pursuant to I.R.C.P. 55(c), which provides the standard for setting aside the entry of a default. *See* ***AO1*** § 4(d)(2)(d) (late claims reviewed under I.R.C.P. 55(c) criteria) and (k) (leave to amend a notice of claim shall be freely given when justice so requires). In determining whether to set aside the entry of a default under I.R.C.P. 55(c), Idaho Courts apply a "good cause" for untimeliness standard. I.R.C.P. 55(c). The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland*, 123 Idaho at 935, 854 P.2d at 279. The I.R.C.P. 55(c) standard takes into account the following factors:

(1) Whether the default was willful;

(2) Whether setting aside the judgment would prejudice the opponent; and

(3) As with a Rule 60(b) motion, whether a meritorious position has been presented. *McFarland*, 123 Idaho at 936, 854 P.2d at 279.

VII.
DECISION

A. LU RANCHING RECEIVED NOTICE SUFFICIENT TO MEET THE REQUIREMENTS OF DUE PROCESS.

1. LU's Argument.

LU seeks to set aside partial decrees entered by the Court as to those claims listed in Exhibit A to its *Motion* (as amended), pursuant to Rule 60(b)(4) of the Idaho Rules of Civil Procedure. LU asserts that those partial decrees are void because LU is an adverse claimant but did not receive proper or sufficient notice of the United States' claims in violation of LU's constitutional due process rights under the Fifth Amendment to the United States Constitution and Art. I, § 13 of the Idaho Constitution.[5] LU does not contend that it did not receive notice of the commencement of the SRBA, nor does it contend that the United States failed to follow SRBA procedure. Instead, LU argues that because the United States knew that LU had an interest in water located on the grazing allotments in which LU holds a preference, LU was a "reasonably ascertainable adverse party" and should have received actual notice by mail of the United States' claims. LU relies on the holdings in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), and *Bear Lake County v. Budge*, 9 Idaho 703, 75 P. 614 (1904).

LU contends that it is not challenging the constitutionality of the notice process for the SRBA, but is only contesting how the process relates to LU's particular circumstances. However, because the United States fully complied with the required procedures for filing claims in the SRBA process, LU is essentially putting at issue the constitutionality of Idaho's statutory framework, and the Court's administrative order of procedure, for providing notice of claims in the SRBA. The adjudication statutes provide for notice of claims to be filed with IDWR without serving actual notice on other parties to the SRBA. The notice of pending claims to other parties in the SRBA is provided through the director's report. Parties with recommended claims in the director's report are provided with notice of the filing of the director's report together with instructions for reviewing the recommendations of others and

[5] LU does not claim a violation of its due process rights under the 14th Amendment to the United States Constitution.

where copies of the entire director's report is located. Parties without recommended claims must rely on the Docket Sheet Procedure for notice of the filing of the director's report.

As set forth below, the notice process in the SRBA not only satisfies the minimum constitutional due process requirements generally but also as applied to LU's particular circumstances. In the context of the SRBA, the minimum due process requirements suggested by LU are entirely unworkable and impracticable given the number of claims in the SRBA and the inherently adverse nature of water right claims on a particular system.

2. The Fundamental Requirements of Due Process.

The United States Supreme Court has recognized that due process can be a cryptic and nebulous concept, but that at a minimum due process requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In *Mullane*, the Court acknowledged that personal service of written notice within the jurisdiction is always adequate in any type of proceeding but is not indispensable in all circumstances. *Id*. The Court instead focused on the general principles of due process.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15 (citations omitted). The Court noted that when notice is due, "process which is a mere gesture is not due process," but "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. Thus, "where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Id.* In *Mullane*, Central Hanover Bank & Trust sought an accounting as to a common trust fund it managed, but, in compliance with New York law, only provided notice by publication to the beneficiaries of the trust fund. The Court concluded that for those

beneficiaries where the bank had their addresses, "we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses." *Id.* at 318. *See also Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983) (holding that due process requires, at a minimum, notice by mail to a known mortgagee of an impending tax sale of the mortgaged property). However, it is not "unreasonable for the State to dispense with more certain notice to those [parties] whose interests are either conjectural or future," or whose whereabouts are unknown. *Mullane*, 339 U.S. at 317. Nevertheless, it is impossible to set up "a rigid formula as to the kind of notice that must be given; [the] notice required will vary with circumstances and conditions." *Walker v. City of Hutchinson,* 352 U.S. 112, 115 (1956). In other words, "due process is flexible and calls for such procedural protections as the particular situation demands," but "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

The Idaho Supreme Court has similarly held that "due process requirements are satisfied if the notice given is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Evans v. Galloway*, 108 Idaho 711, 712, 701 P.2d 659, 660 (1985) (quoting *Mullane,* 339 U.S. at 314)). In *Bear Lake County v. Budge,* 9 Idaho 703, 75 P. 614 (1904), the Court found unconstitutional the provisions of a statute authorizing notice by publication of a pending general adjudication of Dairy Canyon Creek in Bear Lake County. The Court explained:

> The state as well as the federal constitution prohibits the deprivation of private property without due process of law. They contemplate reasonable service of summons upon all defendants. And reasonable service of summons is actual service upon all known defendants who reside in and can be found in the county when the suit is brought; and we think it requires personal service upon all known defendants residing within the state if such defendants can be found therein . . . . The summons in said action designates the defendants in the same manner and does not contain the name of any defendant and provides for constructive service thereof without any showing whatever for its necessity. No doubt personal service might be had upon many of the defendants, if not all of them, in the county, where such suit is pending or through which the decreed stream runs. We know of no precedent for service of summons as provided in this act where the title to property is directly involved between private individuals.

Id. at 711.[6] However, like the U.S. Supreme Court, the Idaho Supreme Court has recognized that "due process is not a concept to be applied rigidly in every matter. Rather, it 'is a flexible concept calling for such procedural protections as are warranted by the particular situation.'" *City of Boise v. Industrial Commission,* 129 Idaho 906, 910, 935 P.2d 169, 173 (1997) (citing *Matter of Wilson,* 128 Idaho 161, 167, 911 P.2d 754, 760 (1996)).

Recognizing that "[d]ue process is not a static concept, but must account for 'the practicalities and peculiarities of the case,'" *In re Rights to the Use of the Gila River,* 830 P.2d 442, 453 (Ariz. 1992) ("*Gila River*"), the Arizona Supreme Court found that in a large general adjudication of the Gila River system, while notice by mail of the commencement of the adjudication was required for those water users that could be identified, notice of subsequent pleadings and filings was not required to be served on every possible claimant. The Court's opinion described the system of notice used by the Arizona court presiding over the adjudication:

> The Pretrial Order [governing procedural matters in the adjudication] provides detailed procedures for the filing and service of pleadings, motions, and all other documents, except the statements of claimant [sic]. Each party is required, as in other cases, to file a copy of any document with the clerk of the trial court. Documents need not, however, be served on every party to the adjudication, but must only be mailed to all parties on the trial court's approved mailing list. There are two ways that the other parties may receive notice of the documents filed. First, parties may file a written request with the court to be included on the court-approved mailing list. Second, parties may keep abreast of all filings through the docket system instituted by the Pretrial Order.
>
> The docket system functions as follows. The clerk of the trial court assigns a docket number to each document filed by any party to the adjudication. The clerk then adds the docket number, the title of the document, and any descriptive summary contained in the document to the docket sheet. On the first day of each month, the clerk provides a copy of the docket sheet identifying all documents filed during the proceeding month to the clerk of the superior court in each county except Mohave County. The clerk of each of these superior courts must post, in a conspicuous location in the clerk's office, either the complete docket sheet or a notice indicating the location in the clerk's office of the complete docket sheet available for inspection. The docket sheet, or a notice indicating where the complete docket sheet is

[6] While *Bear Lake County* requires personal service, the Idaho Supreme Court has recognized that due process is satisfied by service of a summons by mail. *See Evans v. Galloway*, 108 Idaho 711, 701 P.2d 659 (1985).

> available for inspection, is also to be posted in [the Department of Water Resources'] Phoenix office and the Pinal, Prescott and Tucson Active Management Area offices. In addition, the Pretrial Order mandated the establishment of a subscription system, through which any party that has appeared can receive a copy of the Pretrial Order and of each month's docket sheet in the mail by paying a fee to cover actual expenses.

Gila River, 830 P.2d at 452 (footnotes omitted).

In finding that the procedure contained in the Arizona trial court's Pretrial Order gave sufficient notice of subsequent filings, the Court explained:

> The most significant factor in this case is the sheer multitude of the parties to the adjudication. In response to the summons and public notices, over 23,900 persons filed a total of more than 65,000 individual statements of claims.
> . . .
>
> If each party were required to serve a copy of every document filed on each of the 24,000 other parties to the litigation, the cost of actively litigating a claim would be prohibitive to all but the largest water users. Such a result could not be required by due process, for, as we have already noted, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, 339 U.S. at 313-14, 70 S.Ct. at 657.
> . . .
>
> [T]he cost of having to serve each document on 24,000 parties is so prohibitive that it would impair or prevent, rather than promote, the assertion of claims. Requiring service of every document on every party would not further the ability of individuals to litigate their claims, but would instead place insurmountable obstacles in their paths. We therefore conclude that the filing and service provisions of the Pretrial Order are well-designed under the circumstances to afford the litigants adequate notice of all filings in the adjudication.

Id. at 453. The Arizona court's decision upholds the constitutionality of a system of notice adapted for the unique circumstances of a general water adjudication involving a multitude of parties. Personal service by mail was required as to the commencement of the water adjudication, but not required as to each document filed within the adjudication. This is also consistent with the state and federal cases relied on by LU. The cases of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (requiring actual notice for an action for an accounting); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (requiring actual notice prior to a tax sale); and *Bear Lake County v. Budge*, 9 Idaho 703, 75 P. 614 (1904)

(requiring actual notice of the general adjudication of a stream) concern the type of notice or service required upon the commencement of an action. None of the cited cases discuss the notice required of the parties or the court once the lawsuit has commenced and progressing, particularly as to issues or motions not concerning all parties in the suit. This concept was focused on in *Weigner v. City of New York*, 852 F.2d 646 (2nd Cir. 1988), a case involving a tax foreclosure action relied on by the United States. In *Weigner*, the appellant challenged the sufficiency of the notice provided by administrative code that was provided following the notification of the commencement of the action by actual notice. The Court, citing to both *Mullane* and *Mennonite Board of Missions* held that "due process only requires notice of the 'pendency of the action' and an opportunity to respond" and that once the city had sent notice that the foreclosure proceeding had been initiated, it was not required to send additional notices as to each step in the foreclosure proceeding. *Id*. at 652 (citations omitted). Similar in principle to that of the Gila River Adjudication, the statutory framework for providing notice in the SRBA was structured to handle the attendant complexities of the SRBA.

3. The SRBA: Scope of Adjudication, Notice of Commencement, and Notice Procedure for Claims Filed Following Commencement.

a. Scope of the Snake River Basin Adjudication.

The Snake River Basin Adjudication (SRBA) arose from a dispute between Idaho Power Company (Idaho Power) and the State regarding Idaho Power's rights to water on the Snake River above Swan Falls. In 1984, the State and Idaho Power were able to negotiate a settlement to the Snake River water rights conflict (the Swan Falls Agreement). Among other requirements, the Swan Falls Agreement required an adjudication of the water rights in the Snake River Basin. DAVID B. SHAW, SNAKE RIVER BASIN WATER RIGHT ADJUDICATION at 1 (Idaho Department of Water Resources, 1988). Pursuant to Idaho Code § 42-1406A, the Director of IDWR filed a petition for a general adjudication of the Snake River Basin; this Court issued an order of commencement on November 19, 1987. *See* I.C. § 42-1406A; *Order Appointing District Judge and Determining Venue of Petition for General Adjudication of Water Rights in Snake River Basin,* Supreme Court No. 99143 (June 19, 1987); and ***Commencement Order*** (Nov. 19, 1987). The existence of federal and tribal claims to water rights required that the United States be joined as a party, both for itself and

on behalf of the tribal interests. Pursuant to the McCarran Amendment, 43 U.S.C. § 666, in order to subject the United States to the jurisdiction of the State of Idaho for purposes of the general stream adjudication, the entire Snake River system, including its tributaries and connected groundwater sources, were also required to be included in the SRBA. *State v. United States*, 115 Idaho 1, 6, 764 P.2d 78, 83 (1988). Thus, a "piecemeal approach" to the SRBA was not possible.

The Snake River Basin Adjudication is one of the largest, if not the largest, general stream adjudications in United States history. The adjudication includes all or part of 38 of Idaho's 44 counties, or about 87 percent of the geographic area of the state. IDAHO DEPARTMENT OF WATER RESOURCES, SNAKE RIVER BASIN ADJUDICATION—MAJOR EVENTS THROUGH NOVEMBER, 1992 at 1 (1992). The SRBA involves approximately 100,000 claimants (parties) making approximately 150,000 claims for water rights. ***Response to United States' Motion for Status Conference and Order On Nez Perce Tribe's Motion to Set Aside All Decisions, Judgments and Orders On Instream Flow Claims Entered In Consolidated Subcase 03-10022 By Judge R. Barry Wood, and Motion to Disqualify Judge Wood*** at 10 (March 23, 2000) ("***Order on Motion to Disqualify***"). It is expected that over 170,000 claims will eventually be filed. IDAHO DEPARTMENT OF WATER RESOURCES, FREQUENTLY ASKED QUESTIONS (Jan. 23, 2000). The claimants include the State of Idaho, the United States, various Indian tribes, Idaho Power, and numerous other municipalities, corporate entities, mining interests, irrigation districts, and individuals. ***Order on Motion to Disqualify*** at 10-11. On March 25, 1993, the United States alone filed over 50,000 claims. *IDWR Status Report*, Appendix 5 (Jan. 15, 2000). The number of parties to the SRBA makes it readily apparent that a usual means of providing notice to parties is unworkable.

b. Notice to Potential Claimants of Commencement of the SRBA.

Personal service of notice of the commencement of the SRBA was served on all potential claimants. The form of the notice of the commencement of the SRBA is governed by Idaho Code § 42-1408,[7] which provides that "[u]pon entry of a district court's order commencing a general adjudication, the director [of IDWR] shall prepare a notice of order [of commencement], using plain and concise language," containing certain information

[7] The current I.C. § 42-1408 was originally codified as I.C. § 42-1408A, but was amended and redesignated as § 42-1408 by § 14 of S.L. 1994, ch. 454.

concerning the adjudication, the filing of a notice of claim, and associated fees. I.C. § 42-1408(1). The notice of order was to be served to potential claimants in two rounds of service. I.C. § 42-1408(2)-(4)

In the first round, IDWR was required to serve a copy of the notice of order to the State of Idaho and the United States, as well as by ordinary mail to all persons who had submitted a written request to IDWR to be notified of the commencement. I.C. § 42-1408(2)(a) and (3). IDWR was also to publish the notice of order for three consecutive weeks in a newspaper of general circulation in each county in which any part was within the boundaries of the SRBA; post a copy of the notice of order in the courthouse, recorder's office, and assessor's office of each county that fell wholly or partly within the boundaries of the adjudication; and file a copy with the county recorder of each county that fell wholly or partly within the boundaries of the adjudication. I.C. § 42-1408(2)(b), (c), and (e). Finally, IDWR was to serve by ordinary mail a copy of the notice of order to "each person listed as owning real property on the real property assessment roll within the boundaries of the water system to be adjudicated at the address listed on the real property assessment roll." I.C. § 42-1408(2)(d).

In the second round, following the expiration of the period for filing notices of claim, IDWR was required to compare its records of water rights against the claims received to identify those water rights for which no notice of claim had been filed. IDWR was to "make a reasonably diligent effort" to determine the appurtenant land to that water right and the last known owner of that land, and serve the notice of order upon that person. I.C. § 42-1408(4).

On November 19, 1987, the SRBA Court issued a ***Commencement Order*** which delineated the boundaries of the adjudication and listed those counties that were either wholly or partially within the boundaries of the adjudication. Notice was subsequently made per the statutory requirements for the first round of notice. During the two-year period ending in February 1990, 441,744 Round 1 notices were mailed to potential claimants in all of the 38 counties within the SRBA. *IDWR Status Report* (May 15, 1990).

On April 2, 1991, the SRBA Court signed its ***Amended Second Round Service Order*** approving and adopting IDWR's *Amended SRBA Plan for Second Round Service*. That order required IDWR to identify unclaimed water rights or, where a water

right had been split, to identify if any portion of the water right had not been claim. IDWR also was to identify from Landsat data any irrigated acreage for which a water right had not been claimed. In addition, IDWR was required to identify unclaimed water rights by comparing its water right records with its records of geothermal permits, storage certificates, injection well permits, and irrigation district and flood control district files. Finally, IDWR was to attempt to identify potential water users that had not filed a notice of claim by comparing the list of claim filers with lists of water corporations on record with the Secretary of State, the Idaho Soil Conservation Commission directory of soil conservation districts, the Idaho Department of Education list of school districts, the Idaho Association of Cities directory of local government officials (to identify cities or counties that had failed to file claims), the Idaho Department of Health and Welfare list of public water suppliers, the U.S. Environmental Protection Agency list of NPDES permit holders, and the U.S. Federal Energy Regulatory Commission list of FERC licensees. Notice was to be sent via certified mail to potential claimants identified by these means that had not filed a notice of claim with IDWR. Notice was also to be sent to those entities listed on the Idaho Department of Finance list of lending institutions, as IDWR recognized that these entities might have security interests in property with an appurtenant water right. The mailing of Round 2 notices is an ongoing process performed sub-basin by sub-basin. IDWR's May 15, 1999, *Status Report* reports that 17,326 Round 2 notices have been sent out. Since that time, an additional 259 Round 2 notices have been sent out to persons in sub-basin 67 and additional mailings are pending for sub-basin 29.

In addition to the above, the SRBA Court approved IDWR's plan to serve notice in a "Round 1.5 Service." In this round, IDWR sent notice via first class mail to entities that had not filed notices of claim with IDWR but were listed on the U.S. Bureau of Reclamation roster of water user organizations, the Idaho Water Users Association directory of water user associations, the Idaho Department of Lands list of mining claims and lists of state permittees/licensees/lessees, and the United States' lists of mining claims and lists of permittees/licensees/lessees. Although IDWR has not kept statistics as to the exact number, the Department estimates that between 4,000 and 5,000 Round 1.5 notices have been sent out.

In light of the circumstances posed by the SRBA, extraordinary measures were taken to notify potential claimants of the pendency of the SRBA. However, once the adjudication commenced, parties had the obligation of engaging in SRBA procedure for obtaining notice.

c. Notice Procedure as to Individual Claims Filed in SRBA Following Commencement

Following the notice of commencement of the SRBA, a notice procedure was implemented to accommodate the unique circumstances presented by the SRBA. In order for a claim to be brought before the SRBA, a notice of claim of a water right must be filed with IDWR. I.C. § 42-1409. A claimant filing a notice of claim with IDWR is not required to serve notice of that claim upon any other claimant in the SRBA. Rather, IDWR investigates the claim and issues a director's report for the claim setting forth the Director's recommendation as to the claimed water right. I.C. §§ 42-1410 and 42-1411. Claims based upon federal law (i.e., federal reserved water rights) are handled differently in that such claims are reported in the director's report without an investigation by IDWR. *See* I.C. § 42-1411A(12).

An original of the director's report is filed with the SRBA District Court. I.C. § 42-1411(6). Copies of the director's report are distributed for display and inspection to the clerk of the district court for each county within the boundaries of the SRBA. *Id.* Furthermore, each claimant with a reportable claim in the reporting area receives a notice of filing of the director's report notifying the claimant of the Director's recommendation as to that claimant's water right, as well as information as to where copies of the director's report may be found or how to order a copy, and the process for objecting to a recommended claim. I.C. § 42-1411(6)(b)-(e). The notice of filing also contains information regarding how to review the claimant's own water right as well as the water rights of others, and any necessary filing deadlines. I.C. § 42-1411(6)(f). The SRBA District Court's receipt of a director's report is also noticed on the docket sheet. Thus, even if a party had not received a notice of filing from IDWR of a director's report for a particular reporting region, a party will have notice that a director's report has been filed with the Court.

Objections or responses to the recommendation contained in the director's report may be filed by the claimant or any other party to the SRBA. I.C. §§ 42-1411(5) and 42-1412. *See also* I.C. § 42-1411A(8) (setting forth the process of objecting to claims made under federal law). If objections to the claim are filed, the claim becomes a contested subcase, which may be referred to a special master. *See* ***AO1*** §§ 2(y), 10(a) - (b). Uncontested claims may be partially decreed as recommended following review by the Court. *See* I.C. § 42-1411(6)(i). (However, a claimant claiming a water right under federal law must make a *prima facie* case for the water right at a hearing before the SRBA Court even if the claim is unopposed). I.C. § 42-1411A(12).

Parties that have involved themselves in a subcase are then served actual notice of the filings of orders, pleadings, memoranda, etc., filed by any party as to that subcase. Claimants or interested individuals that are not party to a subcase are given notice of the filing of certain documents through the Docket Sheet Procedure. ***AO1*** § 6(a). Besides the notice of the filing of a director's report, the docket sheet contains a chronological list of all orders, pleadings and other documents filed with the Court since the last docket sheet that are not part of a subcase. ***AO1*** § 6(b). It also contains a chronological list of all objections and responses, hearings scheduled for the next three months, a list of all special master's reports and recommendations, amended director's reports, and all partial decrees since the last docket sheet. *Id.* Copies of the docket sheet are sent to the clerk of the district court in each county within the boundaries of the SRBA. It is required that the docket sheet be posted by the clerk of the court in each of those counties, or that a notice be posted as to where in the county building the docket sheet is available for inspection. ***AO1*** § 6(c). A copy of the docket sheet is sent to IDWR and must be made available for inspection at its central and regional offices. *Id.* Finally, the docket sheet is available for inspection at the SRBA District Courthouse or an interested party may subscribe to the docket sheet and be mailed copies. ***AO1*** § 6(d).

Claimants in the SRBA do not serve each and every other claimant. As discussed above, a claimant files his notice of claim with IDWR, which, after a period of investigation, issues a director's report giving the Director's recommendation as to that claim. If the claimant or any other interested party wishes to object, an objection is filed with this Court and the claim becomes a subcase.

All pleadings (including objections) and other documents must be filed with this Court and copies sent to IDWR, the Idaho Attorney General's Office, the United States Department of Justice, and all parties identified in the pleading. ***AO1*** § 6(e). Compliance with the Docket Sheet Procedure constitutes notice to all parties to the adjudication. ***AO1*** § 6(f)(3)(b).

4. The SRBA's Statutory Notice Requirements Do Not Violate Due Process As Guaranteed by the U.S. and Idaho Constitutions.

a. General Mailing of Service of a Notice of Claim is Not Required to Satisfy Due Process.

As counsel for the State has pointed out, actual notice by mailing would require the mailing of billions of documents just to provide notice of the claims.[8] Because of the sheer size of the SRBA, the cost of mailing documents to 100,000 parties would prohibit all but the wealthiest claimants from complying with such a requirement. This was one of the same concerns shared by the Arizona Supreme Court in the Gila River Adjudication. Furthermore, the individual claimant would be so inundated with mailings that most would not be able to sort through and discern those claims or court filings that would actually impact his or her water right. Thus, the inundation of claims being served on the respective parties would not provide a more effective system of notice. Finally, as to the notice of claim of a water right, it is not the notice of claim to which a party responds, but rather the recommendation in the director's report. The filing of the director's report triggers the objection and response period. Because IDWR could recommend different elements of a water right or recommend no water right at all, service of the notice of claim would in many cases be pointless.[9] Simply put, there is no point in other parties to the SRBA initiating proceedings or devoting resources to contest a particular claim until it has been investigated and recommended by IDWR. In sum, service on every claimant "would not further the ability

[8] Assuming 100,000 claimants, for each claimant to mail a claim to each of the other 99,999 claimants would require 9,999,900,000 mailings.

[9] Additionally, confusion would further be compounded because the claim typically precedes the director's report, and ultimately the objection and response period, by many years. In this case the subject claims were filed in 1993 (LU filed its claims in 1992). The *Director's Report* was filed in 1997. Thus, a period of approximately four years elapsed between the time the claim was filed and the time for filing objections.

of individuals to litigate their claims, but would instead place insurmountable obstacles in their paths." *Gila River*, 830 P.2d 442, 453 (Ariz. 1992). Accordingly, because of the total number of claimants in the SRBA, claimants are not required to serve notice of a claim or any other pleading or document on every other claimant within the SRBA. The system in place provides an orderly framework for reviewing pending claims. Only where a claim is contested and a subcase created is personal service to parties to the individual subcase required.

Previously, Judge Hurlbutt ruled on a due process challenge to SRBA procedures established by statute. Judge Hurlbutt cited to the Idaho Supreme Court in upholding the constitutionality of such procedures.

> The Idaho Supreme Court has also held that a general water adjudication may 'require special procedures for bringing all potential claimants into court and commencing the adjudication.' For this purpose, the state legislature has established by statute the procedural rules for initiating and completing SRBA litigation. *See, for example,* I.C. §§ 42-1410-1428. If this court is providing the level of due process required by the statutes, then the procedures in the SRBA are constitutional.

Memorandum Decision and Order Granting, in Part, and Denying, in Part, Motion to Stay Subcases (Feb. 13, 1998) (citing *In Re SRBA Case No. 39576*, 128 Idaho 246, 254, 912 P.2d 614, 622 (1995)). This Court concurs with Judge Hurlbutt's ruling.

This process is consistent with the process adopted and upheld in the *Gila River* Adjudication. It is also consistent with established general due process principles under both the state and federal constitutions. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties *of the pendency of the action* and afford them the opportunity to present their objections." *Mullane* at 314 (emphasis added). Although personal service of notice is always adequate it is not indispensable. *Mullane* at 313. However, due process does not require personal service as to each and every pleading filed within the action. Due process can take into account a balance between the interest sought to be protected and due regard for the practicalities and peculiarities of the case. "A construction of due process that would place impossible or impractical obstacles in the way could not be justified." *Mullane* at 313; *see also e.g.*

Weigner v. City of New York, 852 F.2d 646, 652 (1988). In the SRBA the personal service of individual notices of claim on all adverse parties would be an impractical obstacle.

b. Because LU Has Failed to Show the Statute Facially Invalid In All Cases, Notice Under the Statute is Sufficient for Due Process.

In order to show that a statute is facially violative of the claimant's procedural due process rights, the claimant must show that the provisions were wholly inadequate to protect his due process rights: that is, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987); *Nelson v. Diversified Collection Services, Inc.,* 961 F.Supp. 863, 868 (D. Maryland 1997). In this case, because individual mailing of notice of the claims is not practicable, and therefore not required in order to satisfy due process, LU has failed to show that there is no set of circumstances under which the statutes are invalid.

5. Due Process As Applied to LU's Particular Circumstances.

a. LU was provided notice sufficient for satisfying the minimum requirements of Due Process.

LU does not contend that it was not served with the notice of the commencement of the SRBA. In fact, LU timely filed claims in the SRBA for water rights in the same Basin as the subject claims filed by the United States. As such, LU's claims were reported in the same *Director's Report* as that of the claims filed by the United States. Accordingly, in addition to the notice of the filing of *Director's Report* for Basin 55 being included in the ***Docket Sheet***, LU was provided with actual notice by mail that the *Director's Report* had been filed. LU does not dispute that it received this notice. This is not a situation where LU's notice relied solely on the ***Docket Sheet***. Admittedly, the notice did not define which individual claims were included in the *Director's Report*. However, the form letter and *Notice* contained *inter alia* the following information: 1) that the *Director's Report Reporting Area 6 (IDWR Basins 51, 55 and 61) For Small Domestic and Stockwater Rights* had been filed; 2) that in addition to recommendations for LU's claims, the recommendations for other small domestic and stockwater claims in the same reporting area were also contained in the *Director's Report*, including those of the federal government; 3) the

instructions for reviewing LU's recommendation as well as the recommendations of others; 4) the various locations where the complete *Director's Report* could be obtained for review; 5) the deadlines for filing objections to recommendations; 6) that recommendations that were not contested would be decreed as recommended; 7) that the *Director's Report* for the irrigation and all other state law based claims would be filed at a later date; and finally, 8) a list of offices and phone numbers for obtaining assistance or answering questions. The Court finds that this notice clearly goes beyond those minimum requirements enunciated in *Mullane*.

Pursuant to the *Notice*, LU should have reasonably understood that if the United States or any other claimant had filed claims for stockwater in Basin 55, they would be included in the *Director's Report*. The *Notice* indicated that the *Director's Report* contained recommendations for all pending small domestic and stockwater claims in Basin 55. Thus, unless the United States deferred filing its claims (addressed below), the claims would be included in the *Director's Report*. Furthermore, although LU did not file objections to the United States' claims, the United States filed objections to fifteen of LU's claims to water rights located on grazing allotment lands. In accordance with SRBA procedure, LU was served with actual notice of the United State's objections. The stated basis for the objections was that United States owned the land on which the grazing allotments were situated and therefore LU did not have valid water rights as to those particular lands. These objections were filed December 5, 1997. Based on the reasoning contained in the United States' objections, it should have become apparent to LU that the ownership of water rights on all of LU's grazing allotments in Basin 55 would be at issue. In the August 18, 2000, *Affidavit of Tim Lowery*, filed in support of LU's *Motion*, Mr. Lowery states:

> On or about March 6 or 7, on the advice of counsel, I began examining the entire Basin 55 Director's report for the first time, for the purpose of identifying any stockwater claims filed by the United States in this proceeding which conflict with claims that LU has filed . . . . Until March 7, 2000, I had no knowledge that the United States had filed the water rights claims listed in Exhibit A.

However, in a prior affidavit filed by Mr. Lowery on October 29, 1998, in support of the claims that were timely filed by LU (subcases 55-10288 *et seq*.), and to which the United States filed objections, Mr. Lowery states that:

> Prior to the filing of the claims and objections in this Adjudication, no representative of the United States or any of its agencies ever made a claim to me that the government had made an appropriation of and beneficial use of the stockwater which LU Ranching Company has claimed on the federal lands making up the allotments which form part of our ranching operation. No representative of the United States or any of its agencies ever told me that the government claimed such stockwater as a right in the name of the United States.

Thus, as of the time the United States filed its objections (December 5, 1997) to LU's claims, LU was aware that the United States was claiming water rights on federally administered grazing allotments in Basin 55, including LU's grazing allotments. The Court finds little merit in the contention by LU that it only recently discovered on March 7, 2000, that it had no knowledge that the United States had filed claims on the grazing allotments listed in Exhibit A to its *Motion*. While it may not have been apprised as to the particulars of each claim, it was aware the United States was filing for claims on the same grazing allotments. At that time, in accordance with the *Notice* received by LU regarding the filing of the *Director's Report*, LU should have checked the claims filed in the *Director's Report*. According to the *Notice*, all claims for domestic and stockwater were included in the *Director's Report*.

LU's argument that the United States should have personally served LU with its claims because LU was a known adverse party ignores the realities of the SRBA. All parties on a particular stream system are potentially adverse to one another. Furthermore, because of hydraulic interconnectivity of water sources the scope of a particular stream system can be difficult to define. As such, it would be impossible to fashion a "bright-line" rule regarding when actual service of a particular claim is due. In some cases the adverse relationship may be more obvious than in others. While it may be more obvious with respect to LU's situation, notice requirements cannot be administered on an *ad hoc* basis. This Court would spend more time deciding due process and equal protection issues than deciding the elements of a water right. In essence, the burden is on the parties to the SRBA to determine whether or not they are adverse to a particular claim. In this regard the SRBA rules are

extremely liberal with respect to standing requirements and the filing of objections. A party can file an objection to another party's claim despite the seeming absence of direct connectivity between water rights.

b. Deferment of domestic and stockwater claims did not apply to objections.

A related issue deals with the deferral process for small domestic and stockwater claims. As indicated in Part III, ¶¶ 3-4, claimants of *de minimis* stockwater and domestic water rights had the option of filing their claims within the same time limits set forth for irrigation and other water right claims or deferring their claims to a later date. *See* ***Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*** (Jan. 17, 1989); and ***SRBA Administration Order No. 10, Order Governing Procedures in the SRBA for Domestic and Stock Water Uses*** (March 22, 1995). However, deferment of a *de minimis* claim was not mandatory. In 1997, in furtherance of the recommendations set forth by the Interim Legislative Committee on the SRBA, IDWR implemented a policy of bifurcating the issuance of the director's reports whereby director's reports for small domestic and stockwater claims were issued in advance of the director's report for irrigation and other water rights. The *Notice* sent to claimants, including LU, indicated that the *Director's Report* was only for small domestic and stockwater claims, up to 13,000 gallons per day and that an additional director's report for irrigation and other state law based claims would be filed at a future date.

Tim Lowry, vice-president for LU, states in his affidavit that: "Prior to March 6, 2000, it had been my understanding that my filing of water right claims would put any competing claims at issue automatically, and that either the SRBA court or the Idaho Department of Water Resources would identify such competing claims automatically, advise me of them, and consolidate them with mine for adjudication." *Affidavit of Tim Lowry In Support of I.R.C.P. § 60(b) Motion to Set Aside Partial Decree Entered by Default*, ¶ 6. Mr. Lowry does not elaborate on the basis of this belief.

This Court previously held that the deferral order did not apply to filing objections to claims that had been filed and reported. *See* ***Order on Motion to Set Aside Partial Decrees and File Late Objections; Order of Reference to Special Master Cushman***,

subcase 65-07267 *et al.* (Jan. 31, 2001) ("***A.L. Cattle***"). To the extent a claim was not deferred, it proceeds according to SRBA procedure. *See* ***A.L. Cattle*** at 11-12. As such, the claimant needs to keep apprised of SRBA proceedings.

6. Conclusion As To Due Process.

Because the Court finds the SRBA notice statutes comply with the requirements of due process under the Fifth Amendment to the United States Constitution and Art. I, § 13 of the Idaho Constitution, and because the United States satisfied the statutory requirements for notice for filing a notice of a claim in the SRBA, the United States' notice satisfied the requirements of due process as to LU.

B. MOTION TO SET ASIDE BASED ON I.R.C.P. 60(b)(1): "MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT."

Alternatively, LU seeks to set aside the partial decrees entered on April 10, 2000, listed in Exhibit A, pursuant to I.R.C.P. 60(b)(1), based on surprise. LU contends that it had only a little over a month to conduct its investigation of the claims after discovering the existence of the claims prior to the entry of the decrees. LU also contends that the typical objection period of 120-180 days is insufficient given the time and effort required to investigate the claims.

1. LU Has Not Alleged a Meritorious Defense.

The partial decrees entered on April 10, 2000, are for federal reserved water rights based on PWR 107. The claims were contested by the State of Idaho and proceeded before a special master. Hence, a hearing was conducted and a ruling issued on the merits. This is not a situation where the claims proceeded uncontested to decree. LU's stated basis for setting aside the decrees is limited to the following:

> LU is informed and believes that the claimed water sources do not qualify for recognition as federal reserved water rights under the so-called PWR 107, and that sources claimed had never been the subject of any of the administrative actions taken by the United States to identify lands subject to PWR 107.

Motion to Set Aside at 5. The Idaho Supreme Court has already ruled that PWR 107 is a valid basis for a federal reserved water right. *United States v. State,* 131 Idaho 468, 959 P.2d 468 (1998) (PWR 107). These subcases were litigated on the merits.

This Court is unwilling to set aside partial decrees and have the parties relitigate the merits based on the conclusory statement that the rights do not qualify as federal reserved rights under PWR 107.

In addition to satisfying the criteria of I.R.C.P. 60(b)(1), a party seeking to set aside a default judgment must allege detailed facts that if established would constitute a meritorious defense. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981). LU's motion is bereft of any facts or legal argument on the issue.

2. LU's Conduct Under the Circumstances Was Not That of a Reasonably Prudent Person.

In order to set aside a default judgment under I.R.C.P. 60(b)(1), the party's conduct must be that of a reasonably prudent person under the circumstances. *Reeves v. Wisenor*, 102 Idaho 271, 629 P.2d 667 (1981); *Johnson v. Pioneer Title Co.*, 104 Idaho 727, 662 P.2d 1171 (Ct. App. 1983).

For the reasons already addressed, LU was provided with notice that the *Director's Report* had been filed. LU should have also reasonably understood that the United States would be filing claims for the grazing allotments by at least the time the United States filed objections to LU's claims. It was unreasonable for LU to ignore the notice and fail to review the *Director's Report*.

Additionally, because the claims were contested, the partial decrees were not entered at the close of the objection and response period, but were entered approximately two and one half years after the *Director's Report* was filed. Furthermore, after the objection and response period had expired, there was still a period of two years within which LU could have investigated the claims and filed late objections in the subcases. The legal standard for filing a late objection is significantly less than the standard for setting aside partial decrees.

C. PROCEDURE FOR FILING THE CLAIMS IN EXHIBIT C.

LU also seeks leave to file late claims to those decreed rights listed in Exhibit C to its *Motion to Set Aside*. LU alleges that it has claims sharing common sources with the United States' decreed rights. Based on the ***Deferral Order***, *de minimis* domestic and stockwater claims are not considered "late," although *Standard Form 4—Motion to File Late Notice of*

Claim must be filed for each claim. The fact that the Court will not set aside the partial decrees does not preclude LU from filing its own claims to those same sources. A particular water source can have more than a single water right. Judge Wood previously ruled that competing claimants in the SRBA do not waive their right to file a claim by failing to object to a competing claim. ***Memorandum Decision and Order on Challenge***, subcases 36-00003A, *et al.* (Nov. 23, 1999) at 35-36. "To the contrary, competing claimants to a property right in Idaho are required to demonstrate their ownership of the property right on the strength of their own title, and not on the weakness of the competitor's title." *Id.* at 36 (citing *Rice v. Hill City Stock Yards Co.*, 121 Idaho 576, 582, 826 P.2d 1288 (1991); *Nelson v. Enders*, 82 Idaho 285, 353 P.2d 401 (1960)). As such, LU must follow the correct procedures as set forth in the ***Deferral Order***. LU's current procedure is nothing more than a creative way of filing a late objection to the United States' claims.

VIII.
CONCLUSION

In conclusion, the Court finds that because the Idaho notice statutes for the SRBA satisfy the requirements of due process and that the United States complied with those statutes, LU's right to due process was not violated by the lack of actual notice as to the United States' claims. Thus, LU is not entitled to have the partial decrees set aside as being void pursuant to I.R.C.P. 60(b)(4). The Court also finds that LU is not entitled to have the partial decrees set aside pursuant to I.R.C.P. 60(b)(1) because LU did not allege a meritorious defense, nor act as would a reasonably prudent person in this matter. Finally, LU is not required to seek leave of the Court to file the desired *de minimis* domestic and stockwater claims. Accordingly, LU's *Motion to Set Aside* is DENIED.

IT IS SO ORDERED.

DATED May 1, 2001.

_____

ROGER S. BURDICK
Presiding Judge of the
Snake River Basin Adjudication