

**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)	Subcases: See Attached Exhibits A-E
)	
Case No. 39576)	ORDER DENYING JOINT MOTION
)	TO CONSOLIDATE SUBCASES,
)	VACATE ORDER OF REFERENCE
)	TO SPECIAL MASTER DOLAN
_____)	AND STAY RELATED SUBCASES

I.

APPEARANCES

David L. Negri and Larry A. Brown, Attorneys, United States Department of Justice,
Environment and Natural Resources Division.

Norman M. Semanko, Attorney for Western Stockgrowers Association, *et al.*

Peter J. Ampe, Deputy Attorney General, State of Idaho.

Craig A. Pridgen, McQuaid, Metzler, Bedford & Van Zandt, LLP, San Francisco,
California, appearing *pro hac vice* for Chet Brackett, Bert Brackett, Brackett Livestock
Co., C.E. Brackett Cattle Co., Brackett Ranches Ltd., LU Ranches Co., Joyce Livestock
Co., Tim Lowry, and Paul Nettleton.

Richard L. Harris, Caldwell, Idaho, as local counsel under Idaho Bar Commission Rule
222, for Chet Brackett, Bert Brackett, Brackett Livestock Co., C.E. Brackett Cattle Co.,
Brackett Ranches Ltd., LU Ranches Co., Joyce Livestock Co., Tim Lowry, and Paul
Nettleton.

II.

PROCEDURAL HISTORY

1. On July 31, 2000, the United States of America and the Western Stockgrowers
Association, *et al.*, filed a *Joint Motion to Consolidate Subcases Identified in Attached
Exhibits A, B, and C, Vacate Order of Reference to the Special Master for the Subcases*

Identified in Attached Exhibits A, B, and C, and Stay the Related Subcases Identified in Attached Exhibits D and E (“Joint Motion”). The stated purpose of the *Joint Motion* is to facilitate the resolution of numerous subcases involving overlapping state-based instream stockwater claims located on federal grazing allotments that purport to share common factual and/or legal issues. The underlying issue to be decided by the Court, as phrased in the *Joint Motion*, is "whether the rights should be decreed to the United States, the Western Stockgrowers, neither or both, and what priority date should be decreed?" The *Joint Motion* involves approximately 7,500 subcases.

2. On September 29, 2000, the United States and the Western Stockgrowers Association, *et al.*, jointly filed a *Motion to Amend Exhibit E Attached to the Joint Motion to Consolidate Subcases, Vacate Order of Reference to the Special Master, and Stay the Related Subcases*.

3. On October 27, 2000, the United States filed a proposed scheduling order for the *Joint Motion*.

4. On October 30, 2000, a hearing was held regarding the *Joint Motion* before then-presiding Judge Barry Wood. At the hearing, Judge Wood made it clear that he did not intend to rule on the *Joint Motion* to avoid violating the spirit and intent of the Supreme Court's order removing him as the Presiding Judge of the SRBA. The purpose of the hearing was to keep the matter moving and to facilitate an expeditious ruling by Judge Wood's successor. Parties were asked to address the logistical issue of how a trial on the merits would be conducted so as to allow participation by non-parties to the *Joint Motion* who might ultimately be affected by the Court's ruling. Following the hearing, interested parties were given time to file additional briefing.

5. On November 14, 2000, counsel for Chet Brackett, Bert Brackett, Brackett Livestock Co., C.E. Brackett Cattle Co., Brackett Ranches Ltd., LU Ranches Co., Joyce Livestock Co., Tim Lowry, and Paul Nettleton (hereinafter “Respondents”), filed a *Response Brief in Opposition to Joint Motion to Consolidate Subcases Identified in the Attached Exhibits, Vacate Order of Reference to the Special Master for the Subcases Identified in Attached Exhibits and Stay the Related Subcases Identified in Attached Exhibits*, together with a declaration in support.

6. On November 30, 2000, the United States filed the *United States' Brief in Reply to Responsive Brief in Opposition to Joint Motion to Consolidate Subcases Identified in Attached Exhibits A, B, and C, Vacate Order of Reference to the Special Master for the Subcases Identified in Attached Exhibits A, B, and C, and Stay the Related subcases Identified in Attached Exhibits D and E.*

7. Effective December 15, 2000, pursuant to prior order of the Idaho Supreme Court, the Honorable Roger S. Burdick became Presiding Judge of the SRBA.

III.

MATTER DEEMED FULLY SUBMITTED

The last filing occurred in this matter on November 30, 2000, appointment of the new Presiding Judge became effective December 15, 2000, and for reasons explained below, the Court will not require further oral argument on the *Joint Motion*. This matter is deemed fully submitted the next business day, or December 18, 2000.

IV.

ADDITIONAL ORAL ARGUMENT ON JOINT MOTION IS UNNECESSARY; I.R.C.P. 7(b)(3)

The Court has reviewed the *Joint Motion* and briefing filed in the matter, the transcript from the status conference held on September 18, 2000, as well as the transcript from the initial hearing held on October 30, 2000. In addition, the Court has also reviewed then-presiding Judge Daniel C. Hurlbutt, Jr.'s March 8, 1996, *Order* denying the *Motion to Designate Basin-Wide Issue No. 9A*, and the tape-recorded proceedings from the February 20, 1996, hearing held on the matter. Based on the foregoing review, the fact that the *Joint Motion* did not request oral argument unless the Court deemed it necessary, the Court's familiarity with the general underlying legal issues sought be resolved by the motion, and as a cost saving measure to the parties, pursuant to I.R.C.P. 7(b)(3), the Court determines that additional oral argument on the *Joint Motion* is unnecessary.

V.

DISCUSSION AND ORDER DENYING *JOINT MOTION*

The Court denies the *Joint Motion* based on the following reasons. First, the issues sought to be resolved by the *Joint Motion* are only stated in generalizations and have not been framed by the parties with any degree of specificity. The Court is therefore unable to determine from the face of the *Joint Motion*, whether resolution of the issues sought to be decided are more grounded in fact or in law. Obviously, if the issues are fact specific it would be impractical to include approximately 7,500 subcases in the *Joint Motion*. The parties state in the *Joint Motion* that they have identified subcases that share "the same basic grazing land management history, and facts." Unfortunately, the parties have not identified specific facts, or more importantly the number of factual paradigms or situations into which each subcase could be categorized. For example, if 7,500 subcases could be categorized into a couple of factual scenarios there may be some benefit derived from deviating from standard SRBA procedure and proceeding via the *Joint Motion*. However, to the extent that the subcases fall into a greater number of factual scenarios or have unique facts, the matters are better resolved individually by the Special Masters via standard SRBA procedure. Parties affected by core legal issues can then become involved at the motion to alter or amend stage. The parties stated on the record at the initial hearing that resolution of the issues raised in the *Joint Motion* would not be dispositive of the enumerated subcases because of various factual distinctions. At a minimum, individual fact-finding will be necessary as to the appropriate priority date for each claim. Ultimately, if each subcase is going to involve individual fact-finding anyway, the Court is reluctant to proceed via the *Joint Motion*.

The "core" underlying legal issue regarding the ownership of state-based instream stockwater rights on the public domain closely resembles the issues sought to be designated as Basin-Wide Issue No. 9A in 1996. As stated, this Court reviewed Judge Hurlbutt's *Order* denying the Basin-Wide designation as well as listened to Judge Hurlbutt's comments on the record during the hearing on the matter. Although the *Joint Motion* is not a Basin-Wide Issue, the number of subcases involved and the potential broad reaching impact of the legal issues to be resolved, gives the *Joint Motion* the practical effect of a Basin-Wide Issue. Two of the concerns raised by Judge Hurlbutt in

denying the motion for Basin-Wide designation were the inability of the parties to define with any particularity the issues to be resolved and the overriding concern that each affected water right claim was fact specific. This Court shares those same concerns with the *Joint Motion*.

Another concern this Court has with the *Joint Motion* is that all subcases involved in the *Joint Motion* are not procedurally situated the same. Some of the subcases subject to the *Joint Motion* involve water right claims that have either already been partially decreed or are based on a licensed right. As such, these rights involve threshold issues which are unrelated to the issues raised by the *Joint Motion* and in this Court's view would be inappropriate for consolidation or stay.

Lastly, the core underlying legal issue regarding state-based instream stockwater rights on federal land has been raised, analyzed at length and decided subsequent to Judge Hurlbutt's denial of Basin-Wide Issue 9A designation. The issue was initially addressed in the *Order Denying Challenges and Adopting Special Master's Reports and Recommendations* (Joyce Livestock) (Subcases 57-04028B, 57-10587B, 57-10588B, 57-10770B, and 72-15929C) (Sept. 30, 1998). The same reasoning was adopted by Judge Wood in the *Memorandum Decision and Order on Challenge, Order Denying Motion to File Amicus Curiae Brief; and Order of Recommitment to Special Master Cushman* (LU Ranching) (Subcases 55-10288A & B *et seq.*) (April 25, 2000). Where none of the subcases to which these decision apply have been partially decreed for purposes of appealing the issue, the underlying reasoning offers "law of the case" to the Special Masters.

VI.

CONCLUSION

For the above-stated reasons, the *Joint Motion* is **denied**.

IT IS SO ORDERED.

DATED: January 3, 2001.

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