

**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)	Subcase 91-00005
)	
Case No. 39576)	BASIN WIDE ISSUE NO. 5
)	
)	(Connected Sources General Provision;
)	previously designated as "Conjunctive
)	Management")
)	
)	ORDER TO SHOW CAUSE WHY GENERAL
)	PROVISION SHOULD NOT BE PARTIALLY
)	DECREED IN ACCORDANCE WITH
)	STIPULATION OF THE PARTIES

TO: ALL PARTIES OF RECORD TO BASIN-WIDE ISSUE 5

ALL OTHER PARTIES TO THE SNAKE RIVER BASIN ADJUDICATION

I

PROCEDURAL BACKGROUND

Basin-Wide Issue 5 was scheduled for a pre-trial conference on August 28, 2001, with an evidentiary hearing on the merits scheduled to commence on September 24, 2001. On August 24, 2001, at a status conference set by the Court, the Parties participating in Basin-Wide Issue 5 (i.e. the Parties to subcase 91-00005, hereinafter referred to as "Parties" --*See Administrative Order1* § 2(p)) notified the Court that a tentative agreement had been reached in the matter.

On August 27, 2001, the Parties filed with the Court a document entitled *Settlement Agreement and Stipulation for Entry of Agreed Findings of Fact, Conclusions of Law, and Partial Judgment on Basin-Wide Issue 5 (Connected Sources General Provision)* ("*Stipulation*"). The Idaho Department of Water Resources ("IDWR") concurred with this *Stipulation*. The *Stipulation*, a copy of which is attached hereto, sets forth agreed upon general provision language and procedure for resolving Basin-Wide Issue 5, thereby eliminating the need

to proceed with the scheduled evidentiary hearing. The Court, upon the filing of the signed *Stipulation* vacated both the pre-trial and evidentiary hearing settings.

II

REVIEW AND PRELIMINARY ACCEPTANCE BY THE COURT

A. ROLE OF COURT.

Although the agreement reached by the Parties represents potential settlement of Basin-Wide Issue 5, the Court is still charged with the duty of reviewing the contents of the agreement to ensure compliance with the law. The Court is not required to "rubberstamp" either the recommendations contained in the director's report or any agreement reached by the Parties to the extent they are contrary to law. *State v. United States*, 128 Idaho 246, 258-59, 912 P.2d 614, 626-27 (1995). The Court's role however, is somewhat limited because a trial was not conducted on the merits and the Court is not required by statute to conduct an evidentiary hearing in order to accept a stipulation as final resolution. *Memorandum Decision and Order on Challenge*, subcases 36-00061, *et al.* (Sept. 27, 1999) ("*Morris*") at 17. Thus, the Court's review is limited to the existing record.

B. APPLICABLE LAW.

1. Evidentiary Value of Director's Report and/or Agreement of the Parties.

Idaho Code § 42-1411(4) provides that the filing of the director's report shall "constitute prima facie evidence of the nature and extent of the water rights . . ." I.C. § 42-1411(4). Additionally, as applied to settlement agreements, IDWR's role in the SRBA "is an independent expert and technical assistant [who] assure[s] that claims to water rights acquired under state law are accurately reported . . ." I.C. § 42-1401B(1). Therefore, when IDWR's representative signs a *Standard Form 5* or otherwise signs off on an agreement and states that its contents are true, IDWR's concurrence provides evidentiary value on which the Court is entitled to rely. *Morris* at 14. In addition to the foregoing, the state of the record also includes the pre-filed testimony of Karl Dreher, the Director of IDWR and the cross-examination testimony of David Tuthill, the Adjudication Bureau Chief for IDWR, relative to the pre-filed testimony of Karl Dreher. Thus there is substantiated evidence in the record regarding the necessity of a general provision on connected ground and surface water sources. However, the record does not contain any

controverting evidence, if any, that was intended to be introduced by the parties at the scheduled evidentiary hearing.

2. Legal Authority and the Basis for General Provisions.

Idaho Code § 42-1411 provides that the director of IDWR shall prepare a report on the water system. "The director may include such general provisions in the director's report, as the director deems appropriate and proper, to define and administer all water rights." I.C. § 42-1411(3). "The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." I.C. § 42-1412(6). In *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998), the Idaho Supreme Court stated:

A general provision is a provision that is included in a water right decree regarding the administration of water rights that applies generally to water rights, is not an element of the water right, or is necessary for the efficient administration of the water rights decreed. A general provision is an administrative provision that generally applies to water rights but it need not apply to every water right.

Id. at 421, 958 P.2d at 578 (citations omitted).

In *A & B*, the Idaho Supreme Court remanded to this Court with express directive to hold an evidentiary hearing to determine factually whether the recommended general provisions on "conjunctive management" in each of the three test basins are necessary to define or to efficiently administer water rights in any of those particular basins. *Id.* at 425.

3. The Court's Order on Cross-Motions for Summary Judgment.

On July 2, 2001, this Court issued a memorandum decision and order entitled *Order on Cross-Motions for Summary Judgment; Order on Motion to Strike Affidavits*. ("*Order on Cross-Motions*"). The *Order on Cross-Motions* identified and narrowed the issues in Basin-Wide Issue 5, made preliminary factual findings based on the state of the record, set forth applicable legal standards, and otherwise provided an in-depth discussion of Basin-Wide Issue 5. All parties to the adjudication, as defined in AO1 § 2(q), not having reviewed the *Order on Cross-Motions* are encouraged to review the *Stipulation* in the context of the *Order on Cross-Motions* prior to the hearing on this *Order to Show Cause*. Copies of the *Order on Cross-Motions* can be obtained from the SRBA Court or downloaded off the SRBA website at www.srba.state.id.us.

C. REVIEW, FINDINGS AND PRELIMINARY CONCLUSIONS.

1. The Court has reviewed the stipulated language for the general provision regarding connected sources as well as the proposed findings of fact and conclusions of law and the procedure for adjudicating the connected sources to be identified within the general provision.

2. The Court finds that there is a legal and factual basis for the stipulated general provision and that the stipulated general provision is not contrary to law or inconsistent with the Court's ruling in the *Order on Cross-Motions*. All parties to the adjudication will be given the opportunity to rebut these preliminary findings and conclusions on the record at the hearing on this *Order to Show Cause*.

D. FURTHER PROCEEDINGS: IDENTIFICATION OF SOURCES.

Following the hearing and ruling on this *Order to Show Cause*, depending on the outcome, the Court will hold a status conference for the purpose of determining a reporting schedule for the identification of connected and non-connected sources. All parties to the adjudication will then be given an opportunity to file objections and responses to IDWR's recommendations.

III

ORDER TO SHOW CAUSE

In accordance with the foregoing discussion, IT IS HEREBY ORDERED that any party to the adjudication objecting to any of the terms set forth in the *Stipulation* appear before this Court on **Wednesday, November 14, 2001, at 1:30 p.m. at the Federal Building, Borah Post Office, Corner of 8th and Bannock, Boise, Idaho**, to show cause why the Court should not enter the general provision as stipulated and proceed in the manner set forth in the *Stipulation*. Any party to the adjudication who did not participate in Basin-Wide Issue 5 will also be required to show cause as to why they should now be heard on the matter. Parties who are signatories to the *Stipulation* will be required to show cause why they shall not be bound by the same. Any parties who would like to participate by telephone must contact the clerk of the SRBA Court no later than 5:00 p.m. on Tuesday, November 13, 2001. Those parties who will be producing evidence or testimony and who will be examining or cross-examining witnesses or those individuals who will be called to testify, must appear in person.

All parties to the adjudication ARE HEREBY NOTIFIED, pursuant to I.R.C.P. 6(c)(4), that any party has the right to elect to produce testimony and evidence at the hearing, or to cross-examine the adverse party or the adverse party's affiants, by first giving at least 24 hours' notice to the Court and opposing counsel before the show cause hearing.

Attendance at the *Show Cause Hearing* is not mandatory and failure to appear will not result in contempt of Court. However, the non-attending party will be deemed to have waived any objections to the *Stipulation* as well as any partial decree entered by the Court based on the *Stipulation* and will be bound by the same.

A copy of this *Order to Show Cause Why General Provision Should Not Be Partially Decreed In Accordance With The Stipulation Of The Parties* shall be served upon all parties of record to Basin-Wide Issue 5, in accordance with I.R.C.P. 5(5) and 6(1)(2) and shall also appear in the SRBA Docket Sheet pursuant to docket sheet notice in accordance with *Administrative Order* 1 § 6.

IT IS SO ORDERED.

DATED: _____

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication