

**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 No. 91-00005
	)	
Case No. 39576	)	Basin-Wide Issue 5
	)	(Conjunctive Management
_____	)	General Provision)

**ORDER APPOINTING ROBERT E. BAKES AS MEDIATOR: BASIN-WIDE  
ISSUE 5 ON REMAND (CONJUNCTIVE MANAGEMENT GENERAL  
PROVISIONS)**

**I.**

**BACKGROUND**

1. On May 26, 2000, this Court issued an *Order Setting Trial Date, Final Pre-Trial Conference, Discovery Deadlines, Pre-Trial Motions and Briefing Schedule for Basin-Wide Issue 5 (Conjunctive Management General Provision) and Order for Alternative Dispute Resolution – I.R.C.P. 16.*
2. On June 14, 2000, this Court issued an *Order for Mediation; Order Appointing Professor Douglas L. Grant as Mediator; and Order Re: Protective Order for Mediation: Basin-Wide Issue 5 on Remand (Conjunctive Management General Provisions).*
3. On June 19, 2000, this Court received an e-mail from Professor Grant in which he withdrew as mediator.
4. On June 20, 2000, this Court issued an *Order Rescinding Appointment of Professor Douglas L. Grant as Mediator: Basin-Wide Issue 5 on Remand (Conjunctive*

***Management General Provisions) and Notice Re: Court's Contact with Robert E. Bakes.***

**II.**

**APPOINTMENT OF MEDIATOR**

**IT IS HEREBY ORDERED:**

1. Pursuant to I.R.C.P. 16(k), Robert E. Bakes is appointed as Mediator for the purpose of conducting non-binding mediation in Basin-Wide Issue 5 on remand (Conjunctive Management General Provision), along with such other matters that necessarily relate to the resolution thereof. The parties are reminded that pursuant to this Court's May 26, 2000 Order, good faith participation in this mediation is mandatory, and because the matter involves questions of law, that any agreed upon resolution is subject to the Court's approval.

Mr. Bakes can be contacted at:

Address:      Robert Eldon Bakes  
Moffat, Thomas, Barrett, Rock & Fields  
PO Box 829  
Boise, ID 83701

Telephone:    (208) 345-2000  
Fax:            (208) 385-5384

2. This appointment shall continue until further order of this Court.
3. Pursuant to I.R.C.P. 16(k)(8), Mr. Bakes shall be compensated for all reasonable costs and fees associated with the mediation through assessments to the parties to Basin-Wide Issue 5. Each party listed on the Court's Certificate of Mailing for Basin-Wide Issue 5 shall be assessed an equitable share of the costs and fees. By "equitable," it seems logical that those with a larger interest should be required to pay more than an individual water right holder.

Mr. Clive Strong, Chief, Natural Resources Division Office of the Idaho Attorney General, shall file with the Court a proposal regarding the equitable apportionment of the

costs and fees for which each party is responsible. Subject to approval by the Court, this proposal shall govern unless Mr. Bakes recommends and the Court approves otherwise or if all the parties to Basin-Wide Issue 5 stipulate to a different apportionment which is accepted by the Court. Mr. Strong shall also serve as the collection and disbursement agent to ensure proper payment to Mr. Bakes.

4. Consistent with the May 26, 2000 Order, the mediation ordered herein shall not stay the litigation in Basin-Wide Issue 5. All discovery and preparation necessary for trial in Basin-Wide Issue 5 is governed by the May 26, 2000 Order.

### **III.**

#### **SCOPE OF MEDIATION**

In the May 26, 2000 Order, the Court discussed its current perception of the issues to be resolved regarding a conjunctive management general provision. In an effort to define and limit the scope of the issues to be mediated, the parties should refer to the guidelines therein presented on the matter. As previously discussed, the Court presently views the resolution of the conjunctive management general provision issue as a three-step process (this view is subject to change as the matter progresses). Only the first two steps are the subject of the mediation ordered herein, and the last step remains for a later date. Briefly, those steps are: 1) a determination of whether the proposed general provisions on conjunctive management are necessary to either define or to efficiently administer the water rights decreed by the Court, which the Court perceives to be primarily a factual question; and 2) wording the general provision in a manner so as to accomplish IDWR's purposes for recommending conjunctive management but at the same time dispel concerns that the selected wording for the general provision can be interpreted to diminish the scope of the water right. Again, the Court views this second step as an issue of law, and hence the specific language recommended by IDWR for the general provision is not afforded a *prima facie* presumption under Idaho Code § 42-1411(4). *State v. United States*, 128 Idaho 246, 256, 912 P.2d 614, 624

(1995)(presumption goes to **facts** set forth in Director's Report). Finally, as stated in the May 26, 2000 Order, the parties should keep in mind that the Court cannot order that vague or ambiguous provisions, or provisions that can be interpreted to alter existing Idaho law, be contained in the decree.

#### **IV. INVOLVEMENT OF IDWR**

The Court recognizes that IDWR is not a party in the SRBA. However, IDWR is the proponent of the subject general provision which is included in the *Supplemental Director's Report* because the Director deems it appropriate and proper to define and administer all water rights. I.C. § 42-1411(3). Additionally, although the Director of IDWR is not a party in the SRBA, he is an “independent expert and technical assistant [who] assure[s] that claims to water rights acquired under state law are accurately reported . . .” I.C. § 42-1402B(1). As such, it presently seems appropriate that the Director and/or his designee should be permitted to attend and participate as appropriate in the mediation process if the Director, in his discretion, deems such participation to be appropriate.

Idaho Rules of Evidence 408 and 507 shall apply to the participation by IDWR, if any.

#### **V. CONFLICTS OF INTEREST**

Mr. Bakes is a practicing attorney with the firm of Moffat, Thomas, Barrett, Rock & Fields, and as such he is ethically required to ascertain whether there are any conflicts of interest between himself or other members of his firm and any of the parties involved in the mediation. However, due to the large number of parties and lawyers involved, the typical conflicts check run by his office may be inadequate to discover all potential conflicts. Therefore, IT IS HEREBY ORDERED that any party who is aware of any actual or potential conflict of interest shall notify Mr. Bakes thereof in writing within 10

days of the date this Order is served. Any such notice shall also be filed with this Court. Failure to timely notify Mr. Bakes shall constitute a waiver of any such conflict. If any conflict of interest is disclosed, any party may knowingly waive, in writing to Mr. Bakes, any alleged conflict of interest. A copy of any such waiver shall also be filed with this Court.

## VI.

### **COMMUNICATION BETWEEN THE COURT AND THE MEDIATOR**

In addition to the communication between the Court and Mr. Bakes disclosed in the June 20, 2000, *Notice Re: Court's Contact with Robert E. Bakes*, the Court further discloses to the parties that on June 27, 2000, the Court spoke with Mr. Bakes via telephone and the subject of whether he would act as mediator was briefly discussed. Mr. Bakes agreed to accept responsibility to attempt to mediate the issue. The Court advised Mr. Bakes that with the exception of this order of appointment and the materials previously sent to him, there would be no further communication between the Court and Mr. Bakes regarding the subject matter of Basin-Wide Issue 5, except along the guidelines provided in Rule 16(j)(8)(A)(i-v)<sup>1</sup>, or as provided in Section seven hereafter, or if the Court determines that additional communication with Mr. Bakes is necessary and upon notice to the parties.

## VII.

### **MEDIATION SCHEDULING AND NOTICE THEREOF**

During the June 27, 2000, telephone call, Mr. Bakes requested that the parties send to him via facsimile the dates in July and August 2000 when they will be available to conduct the mediation. Therefore, IT IS HEREBY ORDERED that within 10 days of the date this Order is served, the parties shall transmit to Mr. Bakes their available dates to the following fax number: (208) 385-5784.

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<sup>1</sup> The Court recognizes that Rule 16(j) deals with mediation of child custody and visitation disputes, but by way of analogy offers clear guidance on what is proper communication between a court and a mediator.

When Mr. Bakes determines the time and place for each mediation session, notice thereof will be provided to the parties as follows: 1) Mr. Bakes will communicate to the Clerk of the Court as to the time and place of each mediation session; and 2) the Clerk of the Court will send notice thereof to each party listed on the Court's Certificate of Mailing for Basin-Wide Issue 5.

## **VIII.**

### **TRANSMITTAL OF OPENING BRIEFS TO MR. BAKES**

Pursuant to the May 26, 2000, Order, the parties to Basin-Wide Issue 5 are required to submit opening briefs to the Court no later than 5:00 p.m., June 30, 2000. At Mr. Bakes request, IT IS HEREBY ORDERED that the parties will also submit a copy of their opening briefs to Mr. Bakes by that date.

## **IX.**

### **OBJECTIONS TO APPOINTMENT OR THIS ORDER**

If any party objects to the appointment of Robert E. Bakes ordered herein, or any other provision of this order, that party must file with the Court and serve on the parties an objection together with an affidavit demonstrating good cause therefor within 10 days of the date this Order is served.

IT IS SO ORDERED:

DATED: Thursday, June 29, 2000.

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BARRY WOOD  
Administrative District Judge and  
Presiding Judge of The  
Snake River Basin Adjudication