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Department of Water Resources

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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED

**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. 91-00005-34
)	(Basin-Wide Issue 5, Basin 34)
)	
Case No. 39576)	ORDER OF PARTIAL DECREE FOR
)	GENERAL PROVISIONS IN
)	ADMINISTRATIVE BASIN 34

**I.
PRE-TRIAL PROCEDURE**

The above-entitled matter came before this Court for a pre-trial conference on April 23, 2001, at 1:30 p.m. At that time, Susan Hamlin from the Idaho Department of Water Resources (hereinafter "IDWR") and Harriet Hensley, representing the State of Idaho, were present by telephone. No other parties appeared. The trial in this matter was originally set for May 14, 2001. As a result of this Court's previous order of March 15, 2001, wherein this Court enforced the settlement previously reached by the parties, and based on the fact that Patrick Brown, on behalf of Mountain Springs Ranch, G. David & Heather M. Nelson, Robert Unger, and Simmons Trust, has withdrawn all season of use objections consolidated with this matter, there is no further necessity for the trial setting on the general provisions.

The Court orders that General Provisions 1-6 are to be included in the decree determining water rights to water from Basin 34. These General Provisions are set forth in Exhibit A, which is attached hereto and incorporated herein by reference.

II.
SCOPE OF BASIN-WIDE ISSUE 5-34

Basin-Wide Issue 5-34 is the collective designation for the issues raised in the objections and responses to IDWR's recommended General Provisions for Basin 34. IDWR recommended six general provisions necessary to define, clarify or administer water rights in Basin 34. These recommended provisions are identified for reference as:

General Provision	1	"Definitions"
General Provision	2	"2-B Gauge and Stockwatering During Non-irrigation Season"
General Provision	3	"Rotation with Storage"
General Provision	4	"Back Channel"
General Provision	5	"Separate Streams"
General Provision	6	"Howell Gauge – Connected and Unconnected River"

The issue of "Conjunctive Management" was consolidated with Basin-Wide Issue 5, which involves recommended conjunctive management provisions for the entire SRBA and is not part of this Order. The procedural history regarding the realignment and re-designation of issues is fully set forth in this Court's March 15, 2001, *Order on Order to Show Cause Hearing Enforcing Settlement Agreement; and Order Staying Discovery and Trial Schedule*.

III.
SETTLEMENT OF ISSUES

On June 19, 2000, pursuant to a mandatory settlement conference ordered by the Court, the parties entered into a stipulation regarding recommended General Provision 5 "Separate Streams." On June 23, 2000, the Court entered an Order accepting the stipulation as final resolution of the matter. *Order Re: Stipulations for Basin 34 General Provision No. 5 (Separate Streams)*, subcase 91-00005-34 (June 23, 2000). On February 13, 2001, also pursuant to a mandatory settlement conference, the parties entered into an agreement regarding the remaining recommended General Provisions. Following a hearing on an Order to Show Cause, the Court issued an Order binding the parties to the agreement reached. *See Order on Order to Show Cause Hearing Enforcing Settlement Agreement; and Order Staying Discovery and Trial Schedule* (Mar. 15, 2001).

**IV.
REVIEW AND ACCEPTANCE OF AGREEMENT BY THE COURT**

A. ROLE OF COURT.

Although the agreement reached by the parties represents final settlement of all pending issues, the Court is still charged with the duty of reviewing the contents of the agreement to ensure compliance with the law. In other words, 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) (2000). 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) (1996). 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.

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 (2000). “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).

Historical practices of administration of water rights can be the basis for a general provision. In *State v. Idaho Conservation League*, 131 Idaho 329, 945 P.2d 1108 (1998), the Idaho Supreme Court held that a general provision based on historical administrative practices could be necessary for the efficient administration of a water right “because it avoids controversy among the water rights holders by clearly notifying them of the mechanism [of administration].” *Id.* at 334-35, 955 P.2d at 1113-14.

C. REVIEW, FINDINGS AND CONCLUSION.

1. IDWR filed a *Supplemental Director’s Report* which recommended general provisions necessary to define water rights and for the necessary administration of irrigation water rights in IDWR’s administrative Basin 34. *Supplemental Director’s Report, Reporting Area 1, IDWR Basin 34, Regarding Revisions of the Following: Period of Use (For Irrigation Water Uses), Conjunctive Management General Provision (Supplemental Director’s Report)* (June 24, 1999), which recommended general provisions necessary for the efficient administration of water in Basin 34.

2. Pursuant to order of the Court, IDWR subsequently filed an expert’s report to the Court in accordance with I.R.E. 706 in the form of a *Supplemental Director’s Report for Basin-Wide Issue 5-34 Regarding Period of Use Explanation* (Sept. 11, 2000) (“706 Report”). See *Order Consolidating Irrigation Period of Use Provision Issue for Basin 34 with Basin-Wide Issues Unique to Basin 34; and Order Requesting Explanatory Supplemental Director’s Report (“706 Report”), I.R.E. 703, 705, 706, I.C. § 42-1412(4)*, subcase no. 91-00005-34 (Aug. 28, 2000). In the *706 Report*, IDWR explained the basis for the recommended General Provisions and responded to questions raised by the objecting and responding parties and the Court.

3. The basis for the recommendation stems from the unique and complex hydrologic conditions in Basin 34. These conditions include a highly variable water supply from year to year, as well as during the year, and a high degree of interaction between ground and surface water.

4. In a prior decree, *Utah Construction Co. v. Abbott*, Equity No. 222 (D.E. 1923) (“*UC Decree*”), the federal district court acknowledged the need for such provisions to provide for the administration of rights in the Big Lost River basin in light of the attendant hydrologic complexity.

5. The plan of operations for the administration of water rights was also confirmed by an order of the State district court. See Findings of Fact and Conclusion of Law, *In the Matter of the Big Lost River Irrigation District* (Idaho Sixth Judicial District, Custer County, Jan. 25, 1936).

6. Since 1936 the water has been administered according to this confirmed plan. Water users subject to the administrative plan have relied on the same since its inception.

7. The current recommended General Provisions are based substantially on the *UC Decree* and the administrative plan confirmed in 1936. Subsequent modifications to the wording as contained in the current recommendations were made by IDWR for the sake of clarity.

8. Substantive modifications to the recommendations were negotiated by the parties and concurred with by IDWR.

9. The Court finds that there is a factual and legal basis for the recommended general provisions and that said general provisions are not contrary to law. *State v. Nelson*, 131 Idaho 2, 951 P.2d 943 (1998). However, this determination is limited to the facts and circumstances as existing in this subcase and should not be construed as an endorsement that historical practices and/or prior decrees *per se* create the basis for general provisions in all circumstances.

V.
**WITHDRAWAL OF CONSOLIDATED ISSUES
PERTAINING TO IRRIGATION PERIOD OF USE**

The Court previously consolidated the issues raised in the objections and responses to the recommendations made for irrigation period of use. *Order Consolidating Irrigation Period of Use Provision Issue for Basin 34 with Basin-Wide Issues Unique to Basin 34; and Order*

Requesting Explanatory Supplemental Director's Report ("706 Report"), I.R.E. 703, 705, 706, I.C. § 42-1412(4), subcase no. 91-00005-34 (Aug. 28, 2000). All objections to the recommendations for irrigation period of use have been withdrawn. The court entered a contemporaneous order dismissing these objections. As such, there is no further legal dispute remaining with respect to this matter.

**VI.
TRIAL SETTING VACATED**


Based on the foregoing, the trial set for May 14, 2001, is hereby vacated.

**VII.
ORDER OF PARTIAL DECREE**

Therefore, based on the foregoing, the general provisions attached hereto as Exhibit A are hereby ordered partially decreed and shall be confirmed in any final unified decree entered in SRBA Case No. 39576, in whatever form that final decree may take or be styled.

IT IS SO ORDERED.

DATED: 5-8-01

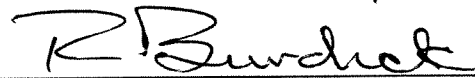


ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for the delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED: 5-8-01



ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication



General Provisions 1-6
as of February 13, 2001

The director recommends that the following general provisions be included in the decree determining rights to water from Basin 34.

1. The following definitions apply to these provisions:
 - a. The "Howell gage" is a stream gaging station on the Big Lost River located upstream from Mackay Reservoir in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 30, Township 8 North, Range 21 East, B.M.
 - b. The "2-B gage" is a stream gaging station on the Big Lost River located downstream from Mackay Dam in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 18, Township 7 North, Range 24 East, B.M.
 - c. Mackay Reservoir is "full" when the water surface elevation of the reservoir is at the spillway crest as it was configured on November 19, 1987.
 - d. The "Back Channel" separates from the main channel of the Big Lost River in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 5, Township 8 North, Range 22 East, B.M.
 - e. "Basin 34" refers to IDWR Administrative Basin 34 as it is described in the Amended Director's Report Part 1 for Reporting Area 1 (Basin 34) dated December 15, 1995.
 - f. As used in these provisions the term "water rights" refers to water rights as decreed in the case In Re SRBA, Fifth Judicial District Court Case No. 39576.
2. During the time period from November 1 of each year to the beginning of the next irrigation season (the "non-irrigation period"), all or a portion of the water of the Big Lost River flowing into Mackay Reservoir may be diverted, according to priority, for storage under water rights nos. 34-00012 and 34-10873 provided the natural flow at the 2-B gage is not less than fifty cubic feet per second. During the non-irrigation period, natural flow water rights downstream of Mackay Dam and senior in priority to water rights numbers 34-00012 and 34-10873 may be diverted for domestic and livestock uses under water rights authorized for these purposes.
3. Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the Big Lost River Irrigation District when such practice improves the efficiency of water use.

Such rotation is subject to the following conditions and review and approval by the Director of the Idaho Department of Water Resources.

- a. Water may only be rotated into storage if it will be beneficially used at the place of use under the water right during the year in which it is stored.
 - b. Rotation into storage cannot occur prior to the reasonable need for irrigation water.
 - c. Rotation into storage can only occur when the water is otherwise deliverable to the place of use under the water right.
 - d. The diversion rate of water rights being rotated into storage shall be included in the calculation of total combined diversion rate limitations.
 - e. If the reservoir fills after water has been rotated into storage, all water in the reservoir at the time it fills becomes storage water of the Big Lost River Irrigation District.
 - f. Any water stored under such rotation that is not used in the same irrigation season in which it is stored shall become storage water of the Big Lost River Irrigation District at the end of the irrigation season.
 - g. When the river is connected as specified in General Provision No. 6, while a right is rotated into storage, it is subordinate to all rights diverted above Mackay Reservoir with a priority date earlier than October 1, 1936.
4. The Back Channel is a natural channel of the river that has been historically regulated to a maximum of 200 cubic feet per second to provide irrigation water. This provision shall not be considered to enlarge the amount of water to which appropriators diverting from the Back Channel are entitled.
 5. The following surface water rights from the following sources of water in Basin 34 shall be administered separately from all other surface water rights in Basin 34:

SEE ATTACHMENT A

6. The following surface water rights from the Big Lost River and its tributaries upstream of Mackay Reservoir shall be administered separately

from all other non-storage, surface water rights from the Big Lost River downstream of Mackay Reservoir during two periods of time as follows:

- a. From the beginning of the irrigation season until the time on the rising stage of the Big Lost River when the maximum flow at the Howell gage reaches at least 750 cubic feet per second at any time for three consecutive days; and
- b. After the time on the falling stage of the Big Lost River when the minimum flow recedes to no more than 450 cubic feet per second at any time for three consecutive days until the end of the irrigation season.
- c. For purposes of determining the amount of water being supplied to Mackay Reservoir from curtailment of diversions upstream from the reservoir, measurements will be made on the Big Lost River at the Pense Bridge located in the T 8 N, R 23 E, S 30, SW $\frac{1}{4}$ NE $\frac{1}{4}$, and on the Donahue Bridge on Parsons Creek located in the T 8 N, R 22 E, S 24, SW $\frac{1}{4}$ SE $\frac{1}{4}$. These measurements will be used by the Watermaster to make futile call determinations.

SEE ATTACHMENT B

ATTACHMENT A

WATER SOURCE: BADY CREEK

34-00002
34-02508
34-13565

WATER SOURCE: CEDAR CREEK

34-00834
34-00835
34-00839
34-02303

WATER SOURCE: ELKHORN CREEK

34-00766

WATER SOURCE: GRANT CREEK

34-00769
34-02245

WATER SOURCE: LEHMAN CREEK

34-00472
34-04068

WATER SOURCE: LOWER CEDAR CREEK

34-00146
34-00153
34-00175
34-00543
34-00582
34-00585
34-00586
34-00808
34-00884
34-00885
34-00886
34-10434
34-10435

WATER SOURCE: PINTO CREEK

34-00341

WATER SOURCE: ROCK CREEK

34-00057

34-00058
34-00836
34-04039
34-10585

WATER SOURCE: ROCK SPRINGS CREEK

34-00352

WATER SOURCE: SAGE CREEK

34-00334
34-00335
34-00336

WATER SOURCE: UPPER CEDAR CREEK

34-10538
34-12399

WATER SOURCE: WILLOW CREEK

34-00057
34-00058

ATTACHMENT B

Big Lost River and Tributaries Above Mackay Dam

WATER SOURCE: BARTLETT CREEK

34-00056

WATER SOURCE: BIG LOST RIVER

34-00004	34-00220	34-00561	34-00760
34-00024	34-00221	34-00562	34-00764
34-00025	34-00222	34-00563	34-00767
34-00026	34-00252	34-00566	34-00768A
34-00030	34-00290A	34-00567	34-00768B
34-00048	34-00290B	34-00568	34-00770
34-00054	34-00291A	34-00573A	34-00771
34-00055A	34-00291B	34-00573B	34-00772
34-00055B	34-00292A	34-00583B	34-00774
34-00084A	34-00292B	34-00583C	34-00775
34-00084B	34-00293A	34-00584D	34-00805
34-00097	34-00293B	34-00584F	34-00859A
34-00099	34-00294A	34-00626B	34-00860A
34-00103	34-00294B	34-00627B	34-00867
34-00125A	34-00297A	34-00628B	34-00868
34-00125B	34-00297B	34-00629B	34-10164
34-00139	34-00298A	34-00630B	34-10165
34-00145	34-00324A	34-00693	34-10166
34-00147B	34-00324B	34-00694	34-10227
34-00147C	34-00325A	34-00699A	34-10228
34-00147D	34-00338	34-00699B	34-10229
34-00148B	34-00339	34-00699C	34-10250
34-00148C	34-00340	34-00700A	34-10282
34-00148D	34-00344	34-00700C	34-10557
34-00151	34-00346	34-00701A	34-10558
34-00152	34-00347	34-00701C	34-10563
34-00154	34-00348	34-00702A	34-10567
34-00155	34-00349	34-00702B	34-10568
34-00156	34-00351	34-00702C	34-10587
34-00158	34-00363	34-00734	34-10619
34-00161A	34-00364	34-00735	34-10688
34-00162A	34-00421	34-00742	34-10920
34-00162B	34-00454	34-00743	34-13566
34-00208A	34-00455	34-00755	
34-00208B	34-00456	34-00757	
34-00211	34-00535	34-00758	

WATER SOURCE: BIG LOST RIVER, EAST FORK

34-00625
34-00662

WATER SOURCE: BIG LOST RIVER, NORTH FORK

34-00053A
34-00053B
34-00053C
34-00053D
34-00053E
34-13550

WATER SOURCE: BIG LOST RIVER AND PARSONS CREEK

34-00142
34-00564
34-00565
34-00611B
34-00612B
34-00613B
34-00626A
34-00627A
34-00628A
34-00629A
34-00630A
34-00773
34-10553

WATER SOURCE: BIG LOST RIVER, PARSONS CREEK AND POLE
STACKYARD CREEK

34-00812
34-00813
34-00815
34-00816
34-00867

WATER SOURCE: BOONE CREEK AND FOX CREEK

34-00529

WATER SOURCE: BRADSHAW SPRINGS

34-00128A
34-10620

WATER SOURCE: DEER CREEK

34-00624

WATER SOURCE: GARDEN CREEK

34-07010

WATER SOURCE: HAMILTON SPRINGS

34-00398

34-00399

34-07034

WATER SOURCE: HOWELL SPRING

34-00337

WATER SOURCE: LONE CEDAR CREEK

34-02144

WATER SOURCE: NAVARRE CREEK

34-00081

34-00820

34-00821

WATER SOURCE: NEWTON CREEK

34-07005

WATER SOURCE: PARSONS CREEK

34-00443
34-00444
34-00445
34-00611A
34-00612A
34-00613A
34-00801
34-00802

WATER SOURCE: PARSONS CREEK AND POLE STACKYARD CREEK

34-10801

WATER SOURCE: POISON SPRING

34-07124

WATER SOURCE: RIDER CREEK

34-04001

WATER SOURCE: SPRING

34-00337
34-04019
34-04137
34-07124
34-10168
34-10251

WATER SOURCE: SPRINGS

34-10635

WATER SOURCE: THOUSAND SPRINGS CREEK

34-04127
34-10167

WATER SOURCE: UNNAMED STREAM

34-04005A
34-04005B

WATER SOURCE: WARM SPRINGS CREEK

34-00123A
34-00123B
34-00124A
34-00124B
34-00236
34-00237
34-00251
34-00353
34-00420
34-00457
34-00458
34-00467
34-00468
34-00469
34-00470A
34-00471
34-00483A
34-00483B
34-00527
34-00528
34-00703A
34-00703B
34-00703C
34-00704A
34-00704B
34-00704C
34-00803
34-00861A
34-00861B
34-00869
34-00870
34-00871
34-10919
34-13564

