

**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)	
)	
Case No. 39576)	ORDER RECOMMENDING GENERAL PROVISIONS IN BASIN 31 REGARDING OBSTRUCTIONS IN CHANNELS
)	
)	SUBCASE NO. 92-31
<hr/>)	(General Provision in Basin 31)

I. PROCEDURAL HISTORY

A. Private Party Proposes General Provision

The procedural history of this subcase is unique in the SRBA and is set forth in detail. Although administrative provisions such as the general provision proposed here are not new to the SRBA, this is the first general provision proposed by a party. Subcase 92-31 deals with a proposed general provision intended to define administration of some surface water rights in Basin 31. The Idaho Department of Water Resources (IDWR) did not propose this general provision. The general provision originated with an *Objection* filed in Subcase 31-184. At a status conference held in subcase 31-184, the Mud Lake Water Users, Inc. (hereafter “Mud Lake”), stated its intent to propose a general provision for Basin 31. On April 8, 2002, Mud Lake filed a *Petition Proposing General Provision*. The Court set deadlines regarding the proposed general provision, including deadlines for IDWR to file an Amended Director’s Report and for all parties to the SRBA to file Notices of Intent to Participate in the issue on the general provision. *See, Order Setting Subcase Deadlines and Hearing* (April 10, 2002). Several parties filed *Notices of Intent to Participate* including Mud Lake, United States of America, and Margaret, David and James Hagenbarth.

B. IDWR Signs SF5 on General Provision

Subsequently, IDWR filed a *Standard Form 5* withdrawing its disagreement with the proposed general provision. Mud Lake, the Hagenbarths, and IDWR thus proposed the following language.

No dam or other obstruction to the natural flow of Camas Creek or its tributaries shall be maintained so as to divert water from the channel of the stream, except through ditches, canals or other works provided with head gates, control works and measuring devices. Holders of water rights to divert water from Camas Creek or any of its tributaries, their successors, agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water through head gates equipped with measuring devices. In case any water right holder shall fail to remove any obstruction from the natural channel of Camas Creek or any of its tributaries within 7 days after receiving notice from the watermaster, who has determined that the obstruction interferes with water delivery, the watermaster may authorize a water user to remove such obstruction in accordance with applicable law. The expense thereof shall be the responsibility of the water right holder requesting the removal.

Standard Form 5 (Subcase 31-00184) (June 27, 2002).

C. Service of Proposed General Provision

A scheduling conference and hearing on service of the proposed general provision was held July 17, 2002. The Court ordered that IDWR serve the proposed general provision on all surface water users in Basin 31 that were part of the Basin 31 *Director's Report for Irrigation and Other Water Rights* filed May 2000. See, *Order Setting Subcase Deadlines and Trial Schedule* (July 26, 2002). The Court then assigned the new subcase number 92-31 for the proposed general provision. The assignment of a new number allowed the elements of subcase 31-184 to go forward separately while enabling the parties to pursue the general provision issue. See, *Order Assigning Subcase Number for Proposed General Provision* (Aug. 16, 2002).

IDWR served an *Affidavit of Service of Court Ordered Notice of Proposed Additional General Provision for IDWR Reporting Area 8, Basin 31* on September 5, 2002. The *Affidavit* states that *Notice* and the *Standard Form 5* containing the proposed language were mailed to the claimants of surface water rights who received the *Director's Report for Irrigation and Other Water Rights* for Basin 31.

D. Objections and Responses Filed

Following service of the proposed general provision on those parties, *Objections* were filed by the U.S. Fish and Wildlife Service, USDA Agricultural Research Service, U.S. Bureau of Land Management, the USDA, the U.S. Forest Service, and Enid Hunter. Mrs. Hunter participated, but later withdrew her *Objection*. See, *Order Granting Motion to Withdraw Objection* (Jan. 27, 2003). Responses were filed by many parties, including Gregory C. Peck; the State of Idaho; Dorine J. Potter; Joyce Garner; Gary K. Christensen; Robert M. Coleman; Blaine Larsen; Larry Taylor; Roy Yearsley; Mickelsen Farms; Russell Osborne; Todd Simmons; N. LaVar Summers; Fredericksen Ranch; Independent Water Users, Inc.; Keith Shuldberg; Margaret, David, and James Hagenbarth; and William Shively. Respondents Gregory C. Peck, Dorine J. Potter, Joyce Garner, Gary K. Christensen, Robert M. Coleman, Blaine Larsen, Larry Taylor, Roy Yearsley, Mickelsen Farms, Russell Osborne, Todd Simmons, N.LaVar Summers, Fredericksen Ranch, Keith Shuldberg, and William Shively all withdrew their *Responses*. See, *Order Granting Motion to Withdraw Response* (Jan. 27, 2003; Jan. 28, 2003; Jan. 29, 2003; Feb. 3, 2003; Feb. 27, 2003). The parties that remained were Mud Lake; Margaret, David and James Hagenbarth; the United States; the State of Idaho; and Independent Water Users, Inc.

E. Settlement

A trial was set for October 7, 2003. *Amended Scheduling Order* (Dec. 20, 2002) However, the parties were able to reach a settlement that was set forth in a *Standard Form 5*. The parties agreed to the following language:

No dam or other obstruction to the natural flow of Camas Creek or its tributaries shall be maintained so as to divert water from the channel of the stream, except through ditches, canals or other works provided with head gates, control works and measuring devices. Holders of water rights that were previously decreed in *Suave v. Abbott* to divert water from Camas Creek or any of its tributaries, their successors, agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water through head gates equipped with measuring devices. In case any water right holder shall fail to remove any obstruction from the natural channel of Camas Creek or any of its tributaries within 7 days after receiving notice from the watermaster, who has determined that the obstruction interferes with water delivery, the watermaster may authorize a water user to remove such obstruction in accordance with applicable federal and state laws and

regulations. The expense thereof shall be the responsibility of the water right holder requesting the removal.

Standard Form 5 (Mar. 26, 2003). The language contained in the *Standard Form 5* differs in some ways from the language originally proposed.

F. Hearing on Proposed General Provision

A hearing was held May 14, 2003, regarding the language contained in the *Standard Form 5*. Counsel for Mud Lake and Independent Water Users, Inc., explained the historical and factual basis for the proposed general provision. The Hagenbarths and the State of Idaho concurred in the explanation offered at the hearing. The United States did not attend the hearing. The Court then set a deadline for parties to submit written briefs on the meaning of the proposed general provision and on the necessity of the proposed general provision. Mud Lake and Independent Water Users, Inc., submitted a brief, and the State of Idaho and James Hagenbarth joined in the brief. The United States did not submit any brief regarding the general provision.

G. IDWR Identification of Water Rights to which General Provision Applies

Finally, on July 29, 2003, IDWR submitted a *List of Water Right Numbers to Which the Basin 31 General Provision Concerning Obstructions in Channels Applies* (July 29, 2003) and a *Notice of Addendum to List of Water Right Numbers to Which the Basin 31 General Provision Concerning Obstructions In Channels Applies* (Sept. 8, 2003). This list was requested by the Court in order to provide notice to all water users to whom the general provision was to apply. IDWR described the list as including those water right numbers in Basin 31 that were derived from rights previously decreed in *Suave v. Abbott* that are currently recommended as valid water rights.

II. DISCUSSION

A. Prior Federal Decree

The proposed general provision is based on an administrative provision contained in a prior decree governing water rights in the Camas Creek area. The Federal District Court in *Suave v. Abbott*, Case No. 635 (D. Idaho, Nov. 1, 1930), decreed an administrative provision that addressed the historical problem of natural and man-made obstructions that interfere with irrigation uses. The parties cited the following language from *Suave v. Abbott* as the basis for the language now proposed:

All such headgates, control works and measuring devices and gauges shall at all times be subject to the inspection of any party to this suit and the public officials or the water master having jurisdiction over the distribution and diversion of water; and no dam or other obstruction to the natural flow of the stream shall be maintained so as to divert water from the channel of the stream, except through ditches, canals or other works provided with such headgates, control works and measuring devices; and each of the parties hereto, their successors agents, servants and employees are hereby perpetually enjoined from diverting from the channel of any stream, lake, slough or the tributaries thereof any water through any ditch, conduit or other device not provided with such headgates, control works and measuring devices. Each of the parties hereto and their agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water as herein permitted through headgates equipped with measuring device.

In case any user shall fail to install any headgate, measuring or control device as in this decree prescribed, within thirty days after the official in charge of the administration of this decree has notified him so to do, or, after like notice, to remove any obstruction required herein to be removed, where the date for removal is not specified, the said commissioner or other official may install such headgate or measuring device or remove such obstruction and charge the expense thereof to the use of his water as herein decreed until he has repaid to said official the expense of such work; the expense of removal of obstruction on public land shall be taxed as ordinary expense of administration by the watermaster.

Objection (Subcase No. 31-00184) (Sept. 13, 2001) *See*, portion of *Suave v. Abbott* P. 10, & 6, P. 11, & 6, attached to *Objection*.

B. Administrative Language Addressed Historical Problems

The administrative provisions in *Suave v. Abbott* were apparently aimed at resolving two recurring problems. Beaver dams and sediment in Camas Creek and its tributaries have apparently affected irrigation since before the issuance of *Suave v. Abbott*. Beaver dams are built annually within the Camas Creek channel, often constructed near headgates or in other areas that impede water usage for irrigation. The *Suave v. Abbott* language was apparently used to permit removal of beaver dams and other obstructions.

Sediment build up is another recurring problem in Camas Creek and its tributaries. Nearly every decade, a high water year will cause sediment at the low lying areas near the property now owned by the U.S. and on which a National Wildlife Refuge is located. At the time *Suave v.*

Abbott was issued, the land where the sediment collects was privately owned. The *Suave v. Abbott* language was apparently used to permit removal of sediment by cleaning the channel of Camas Creek. Without removal of the sediment, Camas Creek would flow into Mud Lake, a natural lake now used as a storage facility.

C. Historic Removal of Obstruction and Cost Allocation

Sediment removal and beaver dam removal have occurred periodically when needed to assure continued delivery of irrigation rights. The language from *Suave v. Abbott* was modified in the proposed general provision to reflect modern historical practices of allocating the costs of sediment removal.

D. Analysis of Current Proposed Language

1. Removal of Obstructions is Allowed. The primary purpose of the proposed general provision is to allow removal of obstructions. The second sentence of the proposed general provision is derived from language in *Suave V. Abbot*. That sentence states:

Holders of water rights that were previously decreed in *Suave v. Abbott* to divert water from Camas Creek or any of its tributaries, their successors, agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water through head gates equipped with measuring devices.

Removal of obstructions including sediment, beaver dams, and man-made structures has been done historically. The language in the proposed general provision is substantially similar to the language in *Suave v. Abbott*.

2. Removal of Obstructions Must Comply With Existing Laws. There are current statutory restrictions on making stream alterations, such as those in I.C. §42-3801. Other state and federal statutes may also apply. For example, the Clean Water Act of 1982 may give the U.S. Army Corps of Engineers jurisdiction over the waters of the United States. The water master in Basin 31 currently holds a permit from the Corps to do channel maintenance. The third sentence of the proposed general provision included an important caveat regarding complying with existing laws. The third sentence states:

In case any water right holder shall fail to remove any obstruction from the natural channel of Camas Creek or any of its tributaries within 7 days after receiving notice from the watermaster, who has determined that the obstruction interferes with

water delivery, the watermaster may authorize a water user to remove such obstruction in accordance with applicable federal and state laws and regulations.

The parties to the general provision made it clear that any action done in the context of this general provision must be done in accordance with existing state and federal laws. The language is consistent with the intent of the parties.

3. Man-Made & Natural Obstructions. Although the most significant removals of obstructions historically have been natural obstructions such as beaver dams and sediment, the language of this general provision applies to man-made structures as well.

4. Costs. The language in the proposed general provision establishes that the water master determine whether there is a need for cleaning the channel or removing the obstruction. Although the water master makes the determination of whether the interference of delivery is occurring, IDWR does not conduct or pay for the clean up. The water users requesting the cleaning are responsible for the cost.

III. CONCLUSION

THEREFORE, IT IS RECOMMENDED that the proposed general provision attached hereto as Exhibit A, be decreed for all rights identified by IDWR as derivative of these rights from *Suave v. Abbott*. The list of subcases to which this general provision should apply is attached as Exhibit B.

DATED September 23, 2003.

BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

EXHIBIT A

No dam or other obstruction to the natural flow of Camas Creek or its tributaries shall be maintained so as to divert water from the channel of the stream, except through ditches, canals or other works provided with head gates, control works and measuring devices. Holders of water rights that were previously decreed in *Suave v. Abbott* to divert water from Camas Creek or any of its tributaries, their successors, agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water through head gates equipped with measuring devices. In case any water right holder shall fail to remove any obstruction from the natural channel of Camas Creek or any of its tributaries within 7 days after receiving notice from the watermaster, who has determined that the obstruction interferes with water delivery, the watermaster may authorize a water user to remove such obstruction in accordance with applicable federal and state laws and regulations. The expense thereof shall be the responsibility of the water right holder requesting the removal.

EXHIBIT B

For a list of water right numbers, refer to the *Notice of Addendum to List of Water Right Numbers to Which the Basin 31 General Provisions Concerning Obstructions in Channels Applies*, filed by the Idaho Department of Water Resources on September 8, 2003.