

**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 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**

**I.
BACKGROUND**

This matter having come before the Court following the scheduling conference held in the above-captioned subcase on May 16, 2000, and the scheduling proposals submitted by the parties prior to the scheduling conference pursuant to this Court's April 28, 2000, order. At the scheduling conference, and in the scheduling proposals filed by the parties, the consensus of the parties was that the matter may be able to be settled through alternative dispute resolution (mediation) efforts and that the Court should order the matter to mediation. The parties also generally acknowledged, as does this Court, that absent settlement, an evidentiary hearing is required in order to comply with the Idaho Supreme Court's directive on remand in *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d 568, 580 (1998) (holding matter must be vacated and remanded for the purpose of holding an evidentiary hearing).

**PRE-TRIAL ORDER ON BASIN-WIDE ISSUE 5
CONJUNCTIVE MANAGEMENT GENERAL PROVISION**

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II.

SCOPE OF EVIDENTIARY HEARING

In an effort to define the scope of the issues to be litigated at the evidentiary hearing, and to have the parties limit their pre-trial discovery accordingly, the Court offers the following guidelines on the matter. 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). The first two steps are the subject of this evidentiary hearing and the last step remains for a later date.

1. The Necessity of the Proposed General Provisions: The first inquiry is whether the proposed general provisions on conjunctive management are necessary to either define or to efficiently administer the water rights decreed by the court. The Court views this issue primarily as a factual inquiry and determination. The evidentiary hearing should focus on this issue.

The Idaho Department of Water Resources (IDWR) previously filed the testimony of Karl J. Dreher, the Director of IDWR, in the *1999 Supplemental Director's Report to the SRBA District Court on Conjunctive Management for Basin Wide Issue 5 (Supplemental Report)*. The *Supplemental Report* set forth IDWR's explanation for making the conjunctive management recommendations. The parties were then given the opportunity for cross-examination on the *Supplemental Report*.

The *Supplemental Report* indicates that there is likely some degree of hydrological interconnectivity between the ground and surface water of the Snake River Basin. *Supplemental Report* at 5. The *Supplemental Report* also states that at present it is not possible to make accurate determinations regarding the degree of interconnectivity between all ground and surface water sources in the Snake River Basin and that even if the science did in fact exist to make these determinations, future seismic activity has the potential to alter the subsurface conditions as they presently exist. *Id.* at 6. The *Supplemental Report* concludes however, that because of the interconnectivity, the

determination to exclude a general provision on conjunctive management “could be viewed as insulating holders of junior groundwater rights from calls by holders of senior surface rights, essentially decreeing that the surface and groundwater sources are separate for purposes of administration.” *Id.* at 5. In other words, IDWR is stating that without incorporating a general provision for conjunctive management, the prior appropriation doctrine would not apply as between ground and surface water users.

In that regard, an evidentiary hearing affords the objectors the opportunity to offer evidence in the form of expert testimony, etc., to rebut IDWR’s recommendation by proving that a conjunctive management provision is unnecessary to define or efficiently administer a water right. For example, an objector could offer proof that the potential for the water rights of senior surface water users to be affected by junior ground water users is too remote or non-existent. The scope of the hearing however should be limited to the general proposition as opposed to an examination of the degree of interconnectivity surrounding individual water right claims. As discussed below, parties seeking to challenge the degree of interconnectivity with respect to individual water rights would have that opportunity at a later date.

2. The Content/Format of the Proposed General Provision: If the factual determination is made that a general provision on conjunctive management is necessary, then the format or wording of the general provision should be determined. Some of the objections raised do not necessarily dispute that ground and surface water should be treated as if from a common source for purposes of the prior appropriation doctrine. Rather, the objections are to the wording of the general provisions in that the provisions as proposed are vague and leave wide latitude for future interpretation. The general provision which states: “All water rights within Basin ___ are from connected sources of water in the Snake River basin and shall be administered conjunctively” provides such an example. The concern expressed by some of the objectors is that the term “conjunctively” is not defined and would therefore be subject to IDWR’s interpretation of the term. Although IDWR is charged with the sole authority for administering water

rights, such water rights cannot be “administered” in a manner inconsistent with the prior appropriation doctrine. The argument is that subjecting a water right to the undefined term “conjunctively,” could be construed at some point in the future to supercede or modify the concept of prior appropriation.

The other related concern is that IDWR has promulgated administrative rules for conjunctive management and that the proposed general provision as worded can be reasonably interpreted to incorporate by reference these administrative rules into the decree. Since administrative rules are subject to change, every time the rules change, the scope of the water rights affected by the general provision would also change. Also, to the extent the administrative rules, now or in the future, allow IDWR to administer water in a manner inconsistent with the prior appropriation doctrine, the incorporation of the administrative rules into a water right decree effectively diminishes the owner’s property interest.

In light of the foregoing concerns, in the event the Court determines that a general provision on conjunctive management is factually necessary, the Court perceives the next step in the process as formatting 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. Although the Director’s Report is afforded prima facie weight as to factual matters, the specific language used in the general provision in the Court’s view is not afforded such weight. *State v. United States*, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995)(presumption goes to **facts** set forth in Director’s Report). Further, notwithstanding the Director’s Report, 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. The Court views this matter as an issue of law. If and when the Court arrives at this issue, the parties will have the opportunity to present legal argument on the issue. This issue is also within the scope of the evidentiary hearing.

3. Exclusion of Individual Water Rights: In *A & B Irrigation Dist., supra* at 414, 958 P.2d at 571, the Idaho Supreme Court held that a “general provision need not apply to every water right.” Parties seeking to object to the application of a conjunctive management general provision as to individual water right(s), will have the opportunity to raise that objection when the Director’s Report is issued for each sub-basin. At that point in time, evidence of the specific interconnectivity as between certain water rights may become relevant. However, at present, issues regarding specific exclusions to conjunctive management general provisions are beyond the scope of this particular proceeding.

III.

SCHEULING ORDER

1. Date Requirements in this Order: Any date requirement indicated herein which falls on a Saturday, Sunday, or court holiday, the due date shall be the next day which is not a Saturday, Sunday, or court holiday. I.R.C.P. 6(a).

2. Alternative Dispute Resolution: IT IS ORDERED that all parties will be required to engage in mediation or some other agreed on method of alternative dispute resolution (ADR). I.C. § 42-1412(4)(Supp. 1999); I.R.C.P. 16(a). The parties will be given until **June 9, 2000**, to submit to the Court a list of three settlement moderators and that party’s preference as to the method of ADR or to alternatively file a stipulation with the Court specifying an agreed upon settlement moderator and an agreed upon method of ADR. In the event the parties do not file a stipulation, the Court will select a settlement moderator from the lists submitted and specify an appropriate method of ADR.

Participation is mandatory and each party shall participate in good faith. However, because part of the resolution of Basin-Wide Issue 5 also involves issues of law, any agreed upon resolution is subject to the Court’s approval. It is intended that all settlement efforts proceed independently of the litigation schedule or on a “dual track”

basis. **The parties shall attend and complete the ADR ordered herein by August 31, 2000.**

3. Briefing Schedule and IDWR Response:

3.1 Simultaneous Opening Briefs: IT IS ORDERED that the parties, at their option, shall file opening briefs in support of their respective objections and/or responses **no later than 5:00 p.m., June 30, 2000.**

3.2 Director's Response: IT IS ORDERED that the Director, in his discretion, may file a response to the arguments raised in the opening briefs in the form of an explanatory supplemental director's report. It is intended that any material contained in the response include explanatory material only so as to not open a new objection period. I.C. § 42-1411(1). Any response filed by IDWR shall be filed **no later than 5:00 p.m., July 31, 2000.**

3.3 Simultaneous Reply Briefs: IT IS ORDERED that following the close of the Director's response period, the parties shall have the option to file simultaneous reply briefs addressing both the response filed by the Director and/or the arguments raised by the other parties in their opening briefs. Reply briefs shall be filed **no later than 5 p.m. August 31, 2000.**

4. Disclosure of Witnesses: IT IS ORDERED that disclosure of all witnesses, lay and expert, be completed **no later than August 31, 2000.**

5. Pre-Trial Discovery Served and Responses Completed: IT IS ORDERED that with the exception of the schedule for the disclosure of witnesses which is governed by paragraph 4 immediately above, all pre-trial discovery shall be completed and served **no later than October 2, 2000.***

* Parties are reminded that IDWR is not a party to the SRBA or this consolidated subcase and therefore may not be served with interrogatories as a means of discovery pursuant to I.R.C.P. 33(a).

6. Pre-Trial Motions: IT IS ORDERED that all dispositive pre-trial motions be filed and heard **no later than October 10, 2000**. All other motions shall be filed prior to the pre-trial conference.

7. Pre-Trial Conference: IT IS ORDERED that a pre-trial conference shall be held **at 10:00 a.m. on Tuesday, October 10, 2000, at the SRBA District Court, 253 Third Ave N, Twin Falls, Idaho.**

8. Evidentiary Hearing/Trial: IT IS ORDERED that the trial shall commence **at 9:00 a.m. on Monday, October 30, 2000, at the SRBA District Court, 253 Third Ave N, Twin Falls, Idaho, and shall continue each business day thereafter until completed.**

9. Post-Hearing Briefing: Following the evidentiary hearing, the Court will allow time to submit additional briefing at the request of the parties or if the Court concludes that additional briefing would be beneficial.

IV.

SUMMARY OF DEADLINES

- 1. June 9, 2000, 5:00 p.m.: Deadline for filing settlement moderator lists**
- 2. June 30, 2000, 5:00 p.m.: Opening briefs**
- 3. July 31, 2000, 5:00 p.m.: Director's optional response**
- 4. August 31, 2000, 5:00 p.m.: ADR completion**
- 5. August 31, 2000, 5:00 p.m.: Reply briefs**
- 4. August 31, 2000, 5:00 p.m.: Disclosure of witnesses**
- 5. October 2, 2000, 5:00 p.m.: Discovery completed**
- 6. October 10, 2000: Pre-trial motions heard**
- 7. October 10, 2000, 10:a.m.: Pre-trial conference**
- 8. October 30, 2000, 9:00 a.m.: Evidentiary hearing/Trial**
- 9. To be set if necessary: Post Trial Briefing**

IT IS SO ORDERED:

DATED: MAY 26, 2000.

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