

**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")
)	
))	FIRST ORDER RE: ORDER TO SHOW
_____)	CAUSE

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

ALL OTHER PARTIES TO THE SNAKE RIVER BASIN ADJUDICATION

I. PROCEDURAL BACKGROUND

On August 27, 2001, the participating parties to Basin-Wide Issue 5 filed a *Settlement Agreement and Stipulation for Entry of Agreed Findings of Fact, Conclusions of Law, and Partial Judgment on Basin-Wide Issue 5* ("*Stipulation*"). On August 30, 2001, this Court issued an *Order to Show Cause Why General Provision Should Not Be Partially Decreed In Accordance With Stipulation of the Parties* ("*Order to Show Cause*"). The *Order to Show Cause* was heard in open court on December 18, 2001 at the Snake River Basin Courthouse in Twin Falls, Idaho. The purpose of the *Order to Show Cause* was to allow the parties:

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."

At the hearing, the United States of America, by and through its attorney David Gehlert, asked to be heard with respect to an alleged issue of law regarding the stipulated language of the

connected sources general provision. No other party to Basin-Wide Issue 5, and no other party to the Snake River Basin Adjudication, asked to be heard pursuant to the ***Order to Show Cause***.

With respect to the matter attempted to be raised by the United States, the Court did not allow Mr. Gehlert to proceed with the substantive issue he intended to raise due to some procedural infirmities connected therewith. These procedural infirmities include the fact that the United States did not provide any appropriate prior notice to the Court or any other party that the United States intended to raise any issues at the hearing. Furthermore, while the Court's records indicate that the United States is a party to subcase 91-00005¹ (Basin-Wide Issue 5), it is not clear to what extent it actually participated in the negotiations that led to the stipulated agreement. In this regard, the Court intends to allow evidence and make factual findings for the purpose of deciding whether the United States is now precluded from attempting to object to the terms of the agreement reached by the parties to Basin-Wide Issue 5.

What is clear, however, is that the United States only marginally participated in the litigation proceedings in Basin-Wide Issue 5. For example, on March 24, 2000, the United States filed the *United States' Statement of Interest* that stated: "The United States does not plan to introduce evidence or otherwise participate in the upcoming evidentiary hearings on Basin-Wide Issue 5 (Conjunctive Management)." On July 10, 2000, the United States filed the *United States' Response to the Court's June 29, 2000 Order*, that stated: "The United States hereby notifies the Court that the federal government does not anticipate being an active participant in this basin-wide issue subcase [Basin-Wide Issue 5], but rather is participating in this subcase for the limited purpose of protecting federal interests in the event they become implicated in this proceeding in the future." The Court has no record of any filings by the United States after July 10, 2000, including any briefing with respect to the *State of Idaho's Motion for Summary Judgment*, filed January 19, 2001.

The Court viewed the *Motion for Summary Judgment* as the appropriate proceeding for the parties to have addressed any legal issues pertaining to Basin-Wide Issue 5. The underlying purpose of the ***Order to Show Cause*** was to address any potential notice challenges that may have arisen due to the scope of the application of the proposed general provision. The ***Order to Show Cause*** was not intended as a procedure for raising new legal issues by parties already participating in the proceeding.

¹ See *Administrative Order 1* § 2(p) and (q) defining "Party to a Subcase" and "Party to the Adjudication."

II. ORDER

Based on the foregoing, the following are HEREBY ORDERED:

1. With the exception of the United States, all other parties to Basin-Wide Issue 5, and all other parties to the Snake River Basin Adjudication, are hereafter precluded from asserting before this Court that the Court should not enter the general provision as stipulated and proceed in the manner set forth in the *Settlement Agreement and Stipulation for Entry of Agreed Findings of Fact, Conclusions of Law, and Partial Judgment on Basin-Wide Issue 5*.

2. With respect to the issue attempted to be raised by the United States, the United States shall file an appropriate motion supported by briefing, including applicable legal authority, no later than Monday, December 31, 2001. The United States shall serve all parties listed on the Court's certificate of mailing for subcase 91-00005.

3. Any Party to subcase 91-00005 wishing to respond to the United States' filing(s) shall do so no later than Friday, January 11, 2002.

4. The United States shall file affidavit(s), which set forth the scope and extent of its participation in the settlement negotiations conducted by the parties, no later than Monday, December 31, 2001.

5. Any other party to Basin-Wide Issue 5 may file affidavit(s) which set forth the scope and extent of the United States' participation in the settlement negotiations. These affidavits shall be filed no later than Friday, January 11, 2002.

6. A hearing on this matter shall be held on **Tuesday, January 22, 2002, at 1:30 p.m., at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho**. The parties to Basin-Wide Issue 5 should be prepared to discuss the question of whether the United States is precluded from raising any substantive issues at this late stage in the proceedings. The parties should also be prepared to discuss the merits of the position set forth by the United States in any briefing filed or lodged in connection therewith.

IT IS SO ORDERED.

DATED: _____

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication