

**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)	91-00005, 91-00005A and 91-00005B
)	(In the future: 91-00005-34, 91-00005-36 and 91-00005-57)
)	ORDER OF CONSOLIDATION/SEPARATION
)	OF ISSUES (REALIGNMENT AND
Case No. 39576)	REDESIGNATION OF ISSUES) OF BASIN-
<hr style="width: 250px; margin-left: 0;"/>)	WIDE ISSUES 5, 5A and 5B; AO1 § 11

**I.
PROCEDURAL HISTORY
BASIN-WIDE 5 ISSUES
(BASINS 34, 36 AND 57)**

Basin-Wide Issue 5 was designated by the SRBA Court in 1995. Then presiding Judge Daniel C. Hurlbutt, Jr. described Basin-Wide Issue 5 as whether certain general provisions were necessary for the definition of or for the efficient administration of the respective water rights.¹ *Amended Order Designating Basin-Wide Issue 5* (Dec. 21, 1995). Judge Hurlbutt ultimately

¹ For purposes of clarification as it relates to this Order, the issue in Basin-Wide Issue 5 was whether each of the Test Basins, Director’s Reporting Areas 1 (Basin 34), 2 (Basin 36), and 3 (Basin 57), should be subject to general provisions regarding firefighting purposes, irrigation uses, and conjunctive management.

Basin-Wide Issue 5 addressed many general provisions proposed for hydrologic basins 34, 36, and 57. By number designation of the respective general provisions, firefighting was #5 in Basin 34, #2 in Basin 36 and #1 in Basin 57. Irrigation uses was designated as general provision #6 in Basin 34, #3 in Basin 36 and #3 in Basin 57. Conjunctive management was designated as General Provision #3 in Basin 34, #1 in Basin 36 and #4 in Basin 57.

Several general provisions were thereafter designated separately from Basin-Wide 5 issues. Basin-Wide Issue 5A addressed proposed general provision #2 in Basin 57 which dealt with a proposed general provision regarding “excess” water. Also separated from the designated Basin-Wide 5 issues was Basin-Wide Issue 5B which addressed proposed General Provisions #2 and #4 in Basin 34. General Provision #2 dealt with the administration of surface water and #4 dealt with storage water in Mackay Reservoir.

held that the general provisions were not necessary to define or administer water rights and ruled that the period of use for irrigation rights should be “the irrigation season” rather than listing specific dates for the beginning and ending of the irrigation season. ***Memorandum Decision and Order Re: Basin-Wide 5*** (April 26, 1996). On appeal, the Idaho Supreme Court reversed, including a holding that water rights must list a specific date for the beginning and ending of the irrigation season and that the District Court must hold an evidentiary hearing on the conjunctive management issues. The holdings are discussed at more length in the next section. The Idaho Supreme Court remanded Basin-Wide Issue 5 to the SRBA District Court for evidentiary hearing. *A & B Irrigation v. Idaho Conservation*, 131 Idaho 411, 958 P.2d 568 (1998).

After remand, Judge Hurlbutt ordered IDWR to file Supplemental Director’s Reports with recommendations as to specific dates for the beginning and ending of the irrigation season and as to conjunctive management. ***Order Requesting Supplemental Director’s Reports from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provisions in Reporting Areas 1, 2 and 3*** (Dec. 9, 1998). The SRBA Court set the due date for the Supplemental Director’s Reports as previously ordered by Judge Hurlbutt. ***Amended Order Requesting Supplemental Director’s Reports from Idaho Department of Water Resources for Irrigation Season and Conjunctive Management General Provisions in Reporting Areas 1, 2 and 3*** (May 5, 1999). On June 24, 1999, IDWR filed its *Supplemental Director’s Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director’s Report)* which set forth specific dates for the irrigation season, included a recommendation on conjunctive management, and established the deadline for Objections to the irrigation season as July 30, 1999.

On July 26, 1999, IDWR filed its *Supplemental Director’s Report, Reporting Area 2, IDWR Basin 57, Regarding Revision of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director’s Report)* which set forth specific dates for the irrigation season, included a recommendation on conjunctive management, and established the deadline for Objections to the irrigation season as September 3, 1999.

On August 2, 1999, IDWR filed its *Supplemental Director's Report, Reporting Area 3, IDWR Basin 36, Regarding Revision of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions (Supplemental Director's Report)* which set forth specific dates for the irrigation season, included a recommendation on conjunctive management, and established the deadline for Objections to the irrigation season as September 10, 1999.

II. PRESENT POSTURE OF BASIN-WIDE 5 ISSUES BASINS 34, 36 AND 57

FIREFIGHTING: As to this proposed general provision in all three of the Test Basins (34, 36 and 57), the Idaho Supreme Court held that a general provision allowing for the use of water with or without a water right for the limited and beneficial use of firefighting is necessary to define or efficiently administer water rights. The Supreme Court held as a matter of law that the proposed provision regarding firefighting should be included as a general provision in the decrees issued in the SRBA. *A & B Irrigation* at 414.

Therefore, this general provision for firefighting shall be included in the final SRBA decree. As such, IDWR has not rerecommended such a provision.

IRRIGATION SEASON OF USE: As to the proposed general provision in all three of the Test Basins for the period of use of irrigation water, the Supreme Court held that decrees which simply specify the period of use of water for irrigation as the "irrigation season" conflict with Idaho law. The Supreme Court held that the applicable statutes require that the period of use for each irrigation water right be identified by specific dates setting forth a beginning date and an ending date and remanded back to the SRBA Court to resolve the factual question of what these dates should be. *A & B Irrigation* at 423, 424.

CONJUNCTIVE MANAGEMENT: As to the proposed general provision in all three Test Basins regarding conjunctive management, the Supreme Court reversed and remanded to the SRBA Court for the purpose of holding an evidentiary hearing to determine factually whether the proposed general provisions for each of the respective Basins are necessary either to define or to efficiently administer the water rights decreed by the SRBA Court in the adjudication process.

The Supreme Court also stated that the SRBA Court should determine the ultimate source of the ground and surface rights being adjudicated and, further, that the SRBA Court must determine the relative priority between surface and ground water rights.

In so holding, the Court emphasized that the SRBA Court must discretely consider the proposed conjunctive management provisions as applied to each hydrologic basin:

Because each of the proposed general provisions regarding interconnection and conjunctive management in Basins 34, 36 and 57 is separate and distinct, each Basin's conjunctive management provision must be discretely considered in reaching the factual determination whether the respective general provision is necessary either to define or to more efficiently administer water rights in that particular Basin.

A & B Irrigation, 131 Idaho at 423.

INCIDENTAL STOCK WATERING: The Idaho Supreme Court affirmed the SRBA Court in holding that a general provision regarding incidental stockwater is not necessary for the definition of the rights or for the efficient administration of the water rights issued in the SRBA.

Therefore this general provision is no longer at issue as a Basin-Wide 5 matter and shall not be included in the final SRBA decree. *A & B Irrigation* at 416.

USE OF "EXCESS" WATER: The Idaho Supreme Court held that a general provision for the use of "excess" water or "high flow" did not establish any right to a water right. Therefore the Court held that the general provision was not necessary to define or administer a water right. *A & B Irrigation* at 416. (However, see the discussion following on Basin-Wide Issue 5A.)

III. PROCEDURAL HISTORY BASIN-WIDE 5A ISSUE (BASIN 57)

Basin-Wide issue 5A was designated by the SRBA Court in 1996. Judge Daniel C. Hurlbutt, Jr., described Basin-Wide Issue 5A as whether General Provision 2 in the Director's Report for Reporting Area 2 (Basin 57) was necessary for the definition of or for the efficient administration of water rights. General Provision 2 concerned the administration of "excess" flow water in the Reynolds Creek Basin. Basin-Wide Issue 5A was then referred to Special Master Fritz Haemmerle. Special Master Haemmerle ruled that General Provision 2 should not be

decreed. On challenge to the SRBA District Court, Judge Hurlbutt adopted the *Special Master's Report and Recommendation* as well as its findings of fact and conclusions of law. On appeal, the Idaho Supreme Court affirmed in part, vacated and remanded in part. *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998).

IV.
PRESENT POSTURE OF BASIN-WIDE 5A ISSUES
GENERAL PROVISION 2, BASIN 57

The phrase “excess” water as set forth in General Provision 2 in Basin 57 referred to the times during spring runoff when the flow of Reynolds Creek was high and the creek contained more water than could be used. The Idaho Supreme Court held that General Provision 2 did not establish a water right for excess water, but that it did provide for efficient administration of water rights in the Reynolds Creek area:

General Provision 2 does not contain the necessary elements of a water right, and those in the Reynolds Creek Basin therefore do not have a water right to “excess” water. However, those who have other water rights in that basin are part of a long-standing practice of utilizing “excess” water, and to that extent, [the Court held] that General Provision 2 is necessary to the efficient administration of water rights in that basin.

State v. Idaho Conservation League, 131 Idaho at 335.

Therefore, the Supreme Court affirmed the judgment of the district court in part, vacated in part, and remanded for further proceedings in accordance with its opinion.

Simply stated, General Provision 2 does not establish any rights to a water right to “excess” water. But, because of historical practices, it is necessary for the efficient administration of the water rights and must be included in the appropriate decrees.

Therefore, General Provision 2 in Basin 57 shall be included in the final SRBA decree. The Idaho Supreme Court has decided the legal issue that this provision is necessary for administration in Basin 57. On remand, the factual question remains as to which individual rights in Basin 57 the provision applies.

V.
PROCEDURAL HISTORY
BASIN-WIDE 5B ISSUES
(BASIN 34)

Basin-Wide Issue 5B was designated by this Court in 1996. Judge Daniel C. Hurlbutt, Jr., described Basin-Wide Issue 5B as whether General Provisions 2 and 4 in the *Director's Report for Reporting Area 1 (Basin 34)* were necessary for the definition or for the efficient administration of water rights. *Order Designating Basin-Wide Issue No. 5B* (Jan. 18, 1996). Basin-Wide Issue 5B was then referred to Special Master Brigette Bilyeu. Special Master Bilyeu determined that General Provisions 2 and 4 were not necessary to define or administer water rights in Basin 34. *Special Master's Report and Recommendation* (June 28, 1996). Judge Hurlbutt adopted the *Special Master's Report and Recommendation* in full. *Memorandum Decision* (Feb. 12, 1997). On appeal, the Idaho Supreme Court reversed and remanded the case for factual findings as to whether the general provisions are necessary for the efficient administration of a water right or to define a water right. *State v. Nelson*, 131 Idaho 12, 15, 951 P.2d 943, 946 (1998).

After remand, Judge Hurlbutt ordered IDWR to file Supplemental Director's Reports with updated recommendations on general provisions for Basin 34. On June 24, 1999, IDWR filed its *Supplemental Director's Report, Reporting Area 1, IDWR Basin 34, Regarding Revision of the Following: Period of Use (for Irrigation Water Uses), Conjunctive Management General Provisions* which set forth IDWR's recommendations on administrative provisions for Basin 34 and established the deadline for Objections to general provisions as July 30, 1999.

VI.
PRESENT POSTURE OF BASIN-WIDE 5B ISSUES
BASIN 34

General Provision 2 (Basin 34) dealt with the administration of surface sources:

- a. Division of the Big Lost River
- b. Separate streams
- c. Back channel

General Provision 4 (Basin 34) dealt with storage:

- a. Flow below Mackay Dam
- b. Rotation with storage

Each general provision was remanded by the Idaho Supreme Court to the SRBA District Court for factual findings as to whether each provision is necessary for the efficient administration of a water right **or** is necessary to define a water right. The Supreme Court stated, as to each respective provision, it should be included in the decree **if** it is necessary under either standard.

VII.

DIRECTIONS ON REMAND AND REALIGNMENT

Because the directions on remand require an evidentiary hearing specific to each hydrologic basin as it relates to the respective proposed general provisions for that Basin, this Court upon its own initiative realigns the issues by Basin and designates them henceforth as follows:

Basin-Wide Issue 5-34, all remaining issues in Basin 34 which are:

- **Beginning and ending dates of irrigation period of use**
- **Conjunctive management**
- **Administration of surface rights**
 - **Division of Big Lost River**
 - **Separate stream**
 - **Back channel**
- **Storage rights**
 - **Flow below Mackay Dam**
 - **Rotation with storage**

Basin-Wide Issue 5-36, all remaining issues in Basin 36 which are:

- **Beginning and ending dates of the irrigation period of use**
- **Conjunctive management**

Basin-Wide Issue 5-57, all remaining issues in Basin 57 which are:

- **Beginning and ending dates of irrigation period of use**
- **Conjunctive management**
- **Which specific decrees should contain “excess” water provisions**

In other words, it is the Court’s intent to have all general provision issues now existing in Basin 34 to be designated as Basin-Wide Issue 5-34, all in Basin 36 to be designated as Basin-Wide Issue 5-36 and all in Basin 57 to be designated as Basin-Wide Issue 5-57. As noted in footnote 1, all of these issues were once in Basin-Wide Issue 5. For clarity, it makes more sense to designate the remaining issues on remand by the particular basins to which they are at issue.

**VIII.
OBJECTIONS TO THE SUPPLEMENTAL DIRECTOR’S REPORTS
AND NOTICE OF INTENT TO PARTICIPATE**

Following remand, the Director filed Supplemental Director’s Reports for each of the three Test Basins (34, 36 and 57). The objection period in Basin 34 (now designated Basin-Wide Issue 5-34) expired July 30, 1999. A separate scheduling order is set for all of those objections. The objection period for Basin 57 (now designated Basin-Wide Issue 5-57) will expire September 3, 1999, and the objection period for Basin 36 (now designated Basin-Wide Issue 5-36) will expire on September 10, 1999.

Any party to the SRBA who files a timely objection to the Supplemental Director’s Reports shall be a party to the redesignated basin-wide issue and shall be included on the certificate of mailing. Any other party to the SRBA may become a party to a Basin-Wide Issue in each respective Basin by filing a Notice of Intent to Participate for the respective Basins. *AOI* § 16.6.

IX.
USE OF HISTORICAL APPELLANT RECORD
IN THE EVENT OF AN APPEAL

Because this Court has “realigned” the issues and designated those applicable to a particular basin, if on future appeal, any party wishes to utilize any portion of the record prior to realignment, the party will have to designate those portions on appeal.

IT IS SO ORDERED.

DATED August 31, 1999.

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

CERTIFICATE OF MAILING

I certify that true and correct copies of the **ORDER OF CONSOLIDATION/SEPARATION OF ISSUES** were mailed on August 31, 1999, by first-class mail to the following:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
PO Box 44449
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United States Department of Justice
Environment & Natural Resources Div.
550 West Fort Street, MSC 033
Boise, ID 83724

Court Certificate of Mailing for Expedited
Hearings

Court Certificate of Mailing for Basin-Wide
Issues 5, 5A and 5B

All claimants to water rights in Basin 34, 36 and
57

Deputy Clerk