

**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 FOR MEDIATION; ORDER APPOINTING PROFESSOR DOUGLAS L.
GRANT AS MEDIATOR; AND ORDER RE: PROTECTIVE ORDER FOR
MEDIATION: BASIN-WIDE ISSUE 5 ON REMAND (CONJUNCTIVE
MANAGEMENT GENERAL PROVISIONS)**

I.

BACKGROUND

On May 26, 2000, this Court issued an *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*. Pursuant to that Order, the parties were to have submitted suggestions as to who should be appointed as settlement moderator, and their preference regarding the specific method of alternative dispute resolution (“ADR”). Several responses were filed. Additionally, the State of Idaho concurrently filed a *Motion for Entry of Protective Order*, which is supported and joined by the North Snake Ground Water District.

As to the method of ADR, the clear consensus of the parties who submitted responses is non-binding mediation pursuant to I.R.C.P. 16(k). As to who should be

appointed as mediator, a total of eleven names were submitted to the Court for consideration. Although a few of the names were submitted by more than one of the parties, there was no clear consensus on who should ultimately be appointed by the Court, but Professor Grant received the most nominations.

The Court recognizes that Professor Grant is not on the Idaho Supreme Court's roster of civil case mediators. I.R.C.P. 16(k)(5). However, due to the subject matter of this mediation, this Court in its discretion determines that a comprehensive knowledge of the subject matter is far more important than formal training in mediation. Professor Grant taught water law at the University of Idaho, College of Law from 1968 to 1999.

II.

APPOINTMENT OF MEDIATOR AND METHOD OF MEDIATION

IT IS HEREBY ORDERED:

1. Pursuant to I.R.C.P. 16(k), Professor Douglas L. Grant is appointed as Mediator for the purpose of conducting non-binding mediation in Basin-Wide Issue 5 on remand (Conjunctive Management General Provision), along with such other matters that necessarily relate to the resolution thereof. The parties are reminded that pursuant to this Court's May 26, 2000 Order, good faith participation in this mediation is mandatory, and because the matter involves questions of law, that any agreed upon resolution is subject to the Court's approval.

2. This appointment shall continue until further order of this Court.

3. Pursuant to I.R.C.P. 16(k)(8), Professor Grant shall be compensated for all reasonable costs and fees associated with the mediation through assessments to the parties to Basin-Wide Issue 5. Each party listed on the Court's Certificate of Mailing for Basin-Wide Issue 5 shall be assessed an equitable share of the costs and fees. By "equitable," it seems logical that those with a larger interest should be required to pay more than an individual water right holder.

Mr. Clive Strong, Chief, Natural Resources Division Office of the Idaho Attorney General, shall file with the Court a proposal regarding the equitable apportionment of the costs and fees for which each party is responsible. Subject to approval by the Court, this proposal shall govern unless Professor Grant recommends and the Court approves otherwise or if all the parties to Basin-Wide Issue 5 stipulate to a different apportionment which is accepted by the Court. Mr. Strong shall also serve as the collection and disbursement agent to ensure proper payment to Professor Grant.

4. Consistent with the May 26, 2000 Order, the mediation ordered herein shall not stay the litigation in Basin-Wide Issue 5. All discovery and preparation necessary for trial in Basin-Wide Issue 5 is governed by the May 26, 2000 Order.

III.

SCOPE OF MEDIATION

In the May 26, 2000 Order, the Court discussed its current perception of the issues to be resolved regarding a conjunctive management general provision. In an effort to define and limit the scope of the issues to be mediated, the parties should refer to the guidelines therein presented on the matter. As previously discussed, 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). Only the first two steps are the subject of the mediation ordered herein, and the last step remains for a later date. Briefly, those steps are: 1) a determination of whether the proposed general provisions on conjunctive management are necessary to either define or to efficiently administer the water rights decreed by the Court, which the Court perceives to be primarily a factual question; and 2) wording 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. Again, the Court the views this second step as an issue of law, and hence the specific language recommended by IDWR

for the general provision is not afforded a *prima facie* presumption under Idaho Code § 42-1411(4). *State v. United States*, 128 Idaho 246, 256, 912 P.2d 614, 624 (1995)(presumption goes to **facts** set forth in Director's Report). Finally, as stated in the May 26, 2000 Order, the parties should keep in mind that 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.

IV. INVOLVEMENT OF IDWR

The Court recognizes that IDWR is not a party in the SRBA. However, IDWR is the proponent of the subject general provision which is included in the *Supplemental Director's Report* because the Director deems it appropriate and proper to define and administer all water rights. I.C. § 42-1411(3). Additionally, although the Director of IDWR is not a party in the SRBA, he is an "independent expert and technical assistant [who] assure[s] that claims to water rights acquired under state law are accurately reported . . ." I.C. § 42-1402B(1). As such, it presently seems appropriate that the Director and/or his designee should be permitted to attend and participate as appropriate in the mediation process if the Director, in his discretion, deems such participation to be appropriate.

Idaho Rules of Evidence 408 and 507 shall apply to the participation by IDWR, if any.

V. ORDER RE: PROTECTIVE ORDER

Together with its response, the State of Idaho filed a *Motion for Entry of Protective Order* and attached proposed order, which is supported and joined by the North Snake Ground Water District. The rule which governs the confidentiality of information disclosed in conjunction with mediation is Idaho Rule of Civil Procedure 16(k)(11), which states:

“The mediator shall abide by the confidentiality rules agreed to by the parties. Confidentiality protections of I.R.E. 408 and 507 shall extend to mediation under this Rule.”

I.R.C.P. 16(k)(11). Because there is no indication that the confidentiality rules proposed by the State of Idaho have been agreed to by the parties, the State’s motion IS HEREBY DENIED without prejudice until such time as the parties, or a substantial consensus thereof, agree to an order which is acceptable to the Court. The parties are encouraged to reach an agreement regarding confidentiality, and thereafter move the Court for entry of an order.

VI.

MATERIALS THE COURT HAS FORWARDED WITH THIS ORDER TO PROFESSOR GRANT

The Court has sent with a copy of this order of appointment the following materials to Professor Grant:

1. A copy of Rules 16(j) and (k) of the Idaho Rules of Civil Procedure.
2. A copy of Rules 408 and 507 of the Idaho Rules of Evidence.
3. A copy of the May 26, 2000 Order, including the Court’s Certificate of Mailing for Basin-Wide Issue 5.
4. A copy of the December 30, 1999 *Supplemental Director’s Report* regarding Basin-Wide Issue 5, together with the *Affidavit of Karl J. Dreher*, filed December 30, 1999.
5. A copy of the Idaho Administrative Code, Agency 37, Department of Water Resources, Title 03, Chapter 11 (Rules Governing Conjunctive Management of Surface and Ground Water) referenced in the December 30, 1999 *Supplemental Director’s Report* at page 3.
6. A copy of the transcript of the hearing held February 24, 2000, in Boise, Idaho.

VII.

COMMUNICATION BETWEEN THE COURT AND THE MEDIATOR

The Court discloses to the parties that on June 13, 2000, the Court left a message for Professor Grant at the William S. Boyd School of Law to please contact the Court regarding whether he would accept the appointment as mediator in this matter. Later that day, Professor Grant contacted the Court by telephone and the subject of whether he would act as mediator was briefly discussed. Professor Grant agreed to accept responsibility to attempt to mediate the issue. The Court advised Professor Grant that with the exception of this order of appointment and the materials listed in section six above, there would be no further communication between the Court and Professor Grant regarding the subject matter of Basin-Wide Issue 5, except along the guidelines provided in Rule 16(j)(A)(i-v)¹, or unless the Court determines that additional communication with Professor Grant is necessary and upon notice to the parties.

Lastly, it was agreed that the parties need to contact Professor Grant directly to commence the mediation process. Mr. Clive Strong or his designee is to promptly organize a conference call between the parties and Professor Grant to fix a schedule and to determine what additional materials Professor Grant needs and how to get those materials to him.

Professor Grant provided the following information:

Mailing Address: 1745 Warrington Drive
Henderson, NV 89052-6801

Telephone: (702) 895-2439 (William S. Boyd School of Law)
(702) 270-3866 (home)

e-mail: dgrant@cmail.nevada.edu

¹ The Court recognizes that Rule 16(j) deals with mediation of child custody and visitation disputes, but by way of analogy offers clear guidance on what is proper communication between a court and a mediator.

VIII.

OBJECTIONS TO APPOINTMENT OR THIS ORDER

If any party objects to the appointment of Professor Grant ordered herein, or any other provision of this order, that party must file with the Court and serve on the parties an objection together with an affidavit demonstrating good cause therefor within 10 days of the date this order is served.

IT IS SO ORDERED:

DATED: Wednesday, June 14, 2000.

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