

**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. 91-00005-34
)	
Case No. 39576)	(Basin-Wide Issues, Basin 34
)	
_____)	

**ORDER REQUIRING SUPPLEMENTAL REPORT (“706 REPORT”) FROM
IDWR ON CERTAIN ISSUES IN BASIN-WIDE ISSUES 5-34; I.R.E. 703, 705, 706,
I.C. § 42-1412(4)**

**ORDER APPOINTING SPECIAL MASTER CUSHMAN AS SETTLEMENT
JUDGE FOR “SEPARATE STREAMS” ISSUE**

**I.
REQUEST FOR SUPPLEMENTAL REPORT**

IDWR has reported that seven proposed general provisions are necessary to define, clarify, or administer water rights within Administrative Basin 34. A shorthand list¹ of these general provisions is as follows:

1. Definitions
2. 2-B Gage and Stock Watering during the Non-Irrigation Season
3. Rotation with Storage
4. Back Channel
5. Separate Streams
6. Howell Gage -- Connected/Non-Connected River
7. Conjunctive Management

¹ The details of these general provisions can be found in the Supplemental Director’s Report, Basin 34 (filed June 24, 1999).

At the status conference in this matter on January 13, 2000, in Arco, Idaho, the parties to the Basin-Wide Issues 5-34 proceedings and IDWR recommended to the Court that IDWR issue a supplemental report providing the basis and necessity for proposed general provisions 1, 2, 3, 4, 5, and 6.² No objections were raised regarding the recommendation.

Therefore; pursuant to I.C. § 42-1412(4) and I.R.E. 706, and on the recommendation of IDWR and the parties, the Court hereby appoints IDWR as an expert witness in the above-entitled matter. IDWR is hereby ordered to prepare a written report which sets forth any recommendations and expert opinions regarding the necessity for establishing the proposed general provisions. Said report shall include the facts, data and legal basis upon which each opinion and recommendation relies. At the request of the parties, the supplemental report should also disclose the following for each of the proposed general provisions:

- a. The identity of each person who, on behalf of IDWR, participated in the preparation of the subject proposed general provision and a description of the extent and significance of that person's participation.
- b. The identity of each person whom IDWR may have testify regarding the subject proposed general provision.
- c. All factual, legal, or other basis IDWR has or will rely upon for any opinion it holds that the proposed general provision, alone or in combination with other

² With respect to the conjunctive management general provision (number 7 above), this Court has previously ordered that this issue is no longer part of Basin-Wide Issues 5-34. Accordingly, this *Order* does not concern conjunctive management. See *Second amended Order of Consolidation/Separation of Issues (Realignment and Redesignation of Issues) of Basin-Wide Issues 5, 5A, and 5B; AOI §11* (December 20, 1999). With respect to the separate streams general provision (number 5 above), the parties indicated to the Court at the January 13 status conference that a supplemental report from IDWR is not presently needed on this issue. Nevertheless, in this Court's opinion it would be prudent to have IDWR include this issue as part of the 706 report so that it may be used if settlement of the separate streams issue should fail.

proposed provisions, is necessary to define, clarify, or administer water rights in Basin 34.

- d. The identity of each document or exhibit, including summaries of other evidence, that IDWR may present at trial.

- f. Specify the legal and/or hydrological reason(s) for recommending the general provision.

- g. Specify how the general provision defines the water right and/or provides for the efficient administration of the water right.

- h. Specify whether the efficient administration of water rights includes IDWR's statutory duty to protect senior water rights and encourages the full and optimum use of the water resource.

- i. Specify the how the general provision will affect the distribution of effected water rights.

- j. Specify why IDWR chose the particular wording that was used for describing the general provision.

For purposes of the "efficient administration of a water right", the Court understands the phrase to mean the delivery of a water right in accordance with its priority date during periods of shortages. If IDWR interprets the meaning differently than the Court's understanding, the report shall also include how IDWR defines the term, "the efficient administration of a water right."

The report may, at the option of the Director, also include the following to assist the Court and the parties in understanding the report:

- a. For each of the subject proposed general provisions, a statement of the legal and factual history pertaining to why the provision is necessary.
- b. A discussion of why administration cannot occur according to law if the subject proposed general provision is not included in a final decree in the SRBA.
- c. A discussion of whether, and to what extent, any of the subject proposed general provisions are based on historic customs and practices in Basin 34.
- d. A statement of the law under which IDWR believes the Court has authority to decree any proposed provisions based on such historic customs and practices.
- e. Any additional, pertinent information IDWR may have concerning the propriety of alternative provisions proposed by parties or otherwise identified by IDWR.

The procedures established below shall be followed in the filing and service of the supplemental report:

1. IDWR will file the supplemental report within sixty (60) days of the date of this *Order*, with an attached Certificate of service.
2. IDWR will serve its supplemental report on the parties to Basin-Wide Issues 5-34, and indicate compliance with this requirement in the certificate of service filed with the supplemental report.

II.
**ORDER APPOINTING SPECIAL MASTER CUSHMAN AS SETTLEMENT
JUDGE FOR THE SEPARATE STREAMS ISSUE**

At the January 13, 2000, status conference, the parties, IDWR, and the Court discussed the possibility of separating out the “separate streams issue” (number 5 above), based on the representation by some of those present that this issue may be resolved

through settlement. See e.g. *Letter Requesting the Court to Separate the Issues in 91-00005-34* (Lodged December 17, 1999)(letter from Wiley F. Smith requesting the separate streams issue be separated). In the interest of maintaining a timely resolution of all of the Basin 34 general provisions by keeping all the provisions on the same litigation track, the Court declines to bifurcate the proceedings relative to the separate streams issue. However, based on the representations made by the parties regarding the potential for settlement of the separate streams issue, the Court finds that the appointment of a settlement judge may facilitate the settlement of the issue.

Therefore, in accordance with *Administrative Order 1, section 12*, the parties are hereby ordered to participate in a settlement conference regarding the “separate streams issue” (issue number 5 above). It is further ordered that Special Master Thomas Cushman is hereby appointed as the settlement judge for purposes of moderating settlement negotiations. **Parties shall submit available dates for a settlement conference to Special Master Cushman no later than February 10, 1999.** Absent settlement, or unless otherwise ordered, the separate streams issue will proceed on the same litigation course as the other general provisions listed above.

IT IS SO ORDERED:

DATED: JANUARY 27, 2000.

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