

**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
)	
)	ORDER ON UNITED STATES' MOTION
)	FOR CLARIFICATION (SECOND ORDER
)	RE: ORDER TO SHOW CAUSE)

I. BRIEF PROCEDURAL BACKGROUND

On May 26, 2000, Judge Wood entered an *Order Setting Trial Date, Final Pre-Trial Conference, 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*, which established a litigation and mediation track for Basin-Wide Issue 5. Pursuant to the *Order*, the parties to Basin-Wide Issue 5 (hereinafter “Parties”) were ordered to participate in mandatory, good faith mediation of the issues involved therein.

On January 16, 2001, at a status and scheduling conference, some of the Parties represented to the Court that the scope of issues needed to be narrowed in order to effectively prepare for trial. On January 19, 2001, the State of Idaho filed a *Motion for Summary Judgment* seeking to have the general provision on conjunctive management decreed as recommended in the *Director’s Report*. A *Cross-Motion for Summary Judgment* was then filed in agreement to the necessity of a general provision but seeking modification of the recommended language. Parties were then given the opportunity to submit briefing in support of, or in opposition to, the respective motions. The Court made it clear however, that in order to comply with the Supreme Court’s directive on remand that short of settlement an evidentiary hearing would have to be conducted and the matter could not be entirely decided entirely on summary judgment. The Court issued a scheduling order instructing the Parties to approach the summary judgment proceedings as a means for narrowing the issues for trial. On July 2, 2001, the Court entered an

Order on Cross-Motions for Summary Judgment; Order on Motions to Strike Affidavits, addressing the issues raised by the parties and narrowing the issues for the pending trial. The United States did not participate in the summary judgment proceedings.

On August 27, 2001 the Parties 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***”). Although, the United States was not a signatory to the *Stipulation*, based on the United States prior level of participation in the litigation proceedings, the Court vacated the September 24, 2001, trial date. The United States did not object to the trial date being vacated.

Following remand from the Idaho Supreme Court, all parties intending to participate in Basin-Wide Issue 5 were ordered by the Court to file statements of interests for purposes of identifying issues and aligning the respective interests of the Parties. The United States in its statement of interest notified the Court that: “The United States does not plan to introduce evidence or otherwise participate in the upcoming evidentiary hearings on Basin-Wide Issue 5 (Conjunctive Management). The United States files this statement merely as a place-holder to preserve its right to participate in the future briefing of any legal issues that may arise in the litigation of this Basin-Wide Issue.” *United States’ Statement of Interest* (Mar. 24, 2000). Based on this early representation by the United States regarding its intended level of future participation, the fact that the United States did not participate in the summary judgment proceedings, which was the appropriate stage for raising and briefing any legal issues pertaining to Basin-Wide Issue 5, and the fact that the United States did not object to the trial being vacated, the Court could see no reason to proceed with the trial despite the United States’ failure to sign the *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. At the hearing, counsel for the United States orally raised a *Motion for Clarification*, but the Court declined to hear the *Motion* at that time due to the fact that the United States failed to provide notice to the Court or other counsel. As a result, the Court continued the matter to allow for a written motion and briefing to be filed. Following the hearing, on December 19, 2001, this Court issued a ***First Order Re: Order to Show Cause*** (“***First Order***”).

On December 31, 2001, the United States filed a *Motion for Clarification*, together with a memorandum in support thereof. The United States also filed four affidavits for the purpose of demonstrating the extent of the United States' participation in the negotiations that ultimately resulted in the *Stipulation*.

On January 11, 2002, the State of Idaho, Twin Falls Canal Company, *et al.*, Pioneer Irrigation District *et al.*, the North Snake Ground Water District, and the Aberdeen-American Falls Ground Water District, *et al.*, filed or joined in objections to the United States' *Motion*. Oral argument on the United States' *Motion* was heard in open court on January 22, 2002.

II. DISCUSSION

The form of the conjunctive management general provision proposed by the Parties in the *Stipulation* contains the phrase: “in accordance with the prior appropriation doctrine **as established by Idaho law.**” (emphasis added). In the instant *Motion*, the United States expresses concern that this language could be construed as a waiver that would preclude the application of federal law in the administration of federal water rights (both federal reserve and state-law based) in the event that such federal law became applicable at some future point in time. Accordingly, the United States is asking this Court to re-fashion the proposed language to protect the United States from this perceived eventuality. For the reasons expressed below, this Court declines to alter the proposed language based upon the arguments made by the United States.

A. THE UNITED STATES SHOULD HAVE RAISED THIS ISSUE EARLIER.

As stated in the *First Order*, the *Order to Show Cause* was not intended as a procedure for raising new legal issues by Parties already participating in the proceedings. The *Motion for Summary Judgment* was the appropriate proceeding for the Parties to have addressed any legal issues pertaining to Basin-Wide Issue 5. At the January 22, 2002, hearing on this matter, counsel for the United States tried to rationalize this untimeliness by arguing that issues regarding whether water rights in Idaho will be administered according to state law or federal law were not raised in the motions for summary judgment. The United States further asserted that at the time the *Stipulation* was negotiated, “the United States didn't have a position” on the matter.

Transcript at p. 15.

This argument is without merit. One of the primary issues raised on summary judgment was concern that the recommended language of the conjunctive management general provision could be read to incorporate into the general provision the Idaho Department of Water Resources' administrative rules on conjunctive management and that such administrative rules were inconsistent with prior appropriation doctrine principles. Hence, the issue regarding the applicable law for administering water rights was not only squarely implicated in the summary judgment proceedings but has always been an issue in Basin-Wide Issue 5.

In Idaho, the Idaho Department of Water Resources is the state agency responsible for the administration of water rights in accordance with Idaho law, a fundamental aspect of which is the doctrine of prior appropriation. In the Snake River Basin Adjudication, every water right decree, including those owned by the federal government (both federal reserved and state-law based), has or will have a priority date assigned to it as one of the basic elements of the water right. The purpose of this priority date is to allow IDWR to tabulate and administer water rights from connected sources according to the prior appropriation doctrine. *See e.g., Cappaert v. United States*, 426 U.S. 128, 138 (1976) (“United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.”) Contrary to the assertion of counsel for the United States, it is not the operation of the aforementioned phrase in the proposed general provision that makes federally owned water rights subject to state law with respect to the administration of those water rights nor is that the intent of the provision. The intent of the provision is to ensure that for purposes of administration hydraulically connected ground and surface water rights are legally treated the same as hydraulically connected surface rights.

Nevertheless, any issue regarding the applicable law governing administration should have been raised by the United States at some point other than the very last minute of the lengthy¹ conjunctive management proceedings in the SRBA. Indeed, it is disingenuous for counsel for the United States to suggest that the issue of governing law never occurred to him until after settlement had been reached.

¹ The *Motion to Designate Basin-Wide Issue* was filed on September 5, 1995.

B. THE UNITED STATES HAS NOT DEMONSTRATED GOOD CAUSE.

This Court understands that there may be aspects of federal law that potentially affect how the state of Idaho conducts the administration of water rights within the state. *See e.g. California v. United States*, 438 U.S. 645 (1978)(holding that a state may impose conditions on federal water rights that are not inconsistent with clear congressional directives). That being said, the United States, in its current motion, has not even attempted to demonstrate how a particular aspect of federal law affects the administration of any particular federally owned water right in Idaho. The United States cites no examples or any legal authority. In fact, the United States admitted at the hearing on this motion that “We are not contending that there is a comprehensive federal law system of administration, nor or we asking the court to rule that federal law always trumps state law.” Transcript at p. 16. ll. 9-12. The United States is asking this Court to peer into the future and fashion some language that will protect the United States in the event that a “governing law” issue arises at some indefinite point in time.

In this Court’s opinion, the concern of the United States with respect to “waiver” and “preclusion of federal law” based on the language of the proposed conjunctive management general provision is misplaced. First, the phrase “in accordance with the prior appropriation doctrine as established by Idaho law” is not a declaration that water rights in Idaho will be administered solely pursuant to state law for all purposes. Rather, the proposed conjunctive management general provision containing this phrase applies to the much narrower purpose of defining the legal relationship between surface water rights and ground water rights derived from connected sources. Furthermore, the phrase “established by Idaho law” simply modifies the term “prior appropriation doctrine” in the proposed general provision. It is difficult to see how the proposed language could possibly be used to preclude the application of federal law that might otherwise be applicable in the administration of federally owned water rights in Idaho.

At the very foundation of water rights administration in Idaho is the prior appropriation doctrine as the principle has developed since well before statehood. If the language which is causing the United States to be concerned were left out of the conjunctive management general provision, indeed if there were no conjunctive management general provision, the current law in Idaho is that hydraulically connected water rights, including those owned by the federal government, will be administered according to priority. The federal government’s water rights,

just like all other water rights, have been or will be assigned a priority date for the very purpose of administering the water rights under Idaho's prior appropriation doctrine.

This Court does not know what the future holds with respect to federal law altering Idaho's current scheme of water rights administration. What is clear, however, is that the Parties to Basin-Wide Issue 5 have come up with a negotiated settlement of the issues, and the *Stipulation* will not be binding on those Parties if the Court undertakes to modify the proposed language. The Court is not willing to do this at this late stage of the proceedings for the sole purpose of protecting the United States from some vaguely articulated and remote eventuality. The Court is also unwilling to modify the proposed language to address issues that could have been timely brought before the Court at various stages throughout the Basin-Wide Issue 5 proceedings. In this regard, the United States has not demonstrated good cause for altering the proposed general provision.

C. THE UNITED STATES SHOULD FILE OBJECTIONS IN EACH WATER RIGHT CLAIM.

The proposed conjunctive management general provision set forth in the *Stipulation* simply provides the format of the conjunctive management partial decree to be issued in each basin in the SRBA. For many basins, IDWR has not yet made any recommendations as to which water rights should be administered separately. Accordingly, the United States still has the opportunity to file objections in individual water rights claims with respect to whether those water rights claims will be administered as if from separate sources or from connected sources. Presumably, such an objection could be made not only on a factual basis (i.e. there is no significant hydraulic connection between certain water rights), or on a legal basis (e.g. there is some aspect of federal law which is inconsistent with a particular water right being administered according to priority). In this regard, the United States still has the opportunity to protect its rights in each individual water right claim.

III. ORDER

Based on the foregoing, the United States' *Motion for Clarification* is **denied**.

IT IS SO ORDERED.

DATED: _____

ROGER S. BURDICK
Presiding Judge
Snake River Basin Adjudication