

**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	)	<b>ORDER OF PARTIAL DECREE FOR</b>
	)	<b>GENERAL PROVISION IN BASIN 31</b>
Case No. 39576	)	<b>REGARDING OBSTRUCTIONS IN</b>
<hr/>	)	<b>CAMAS CREEK AND TRIBUTARIES</b>

**I.**

**PROCEDURAL BACKGROUND**

1. On September 1, 2003, the Special Master issued an *Order Recommending General Provisions in Basin 31 Regarding Obstructions in Channels (Special Master's Recommendation)*, including findings of fact and conclusions of law.

2. The *Special Master's Recommendation* recommended the following general provision:

No dam or other obstruction to the natural flow of Camas Creek or its tributaries shall be maintained so as to divert water from the channel of the stream, except through ditches, canals or other works provided with head gates, control works and measuring devices. Holders of water rights that were previously decreed in *Suave v. Abbott* to divert water from Camas Creek or any of its tributaries, their successors, agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water through head gates equipped with measuring devices. In case any water right holder shall fail to remove any obstruction from the channel of Camas Creek or any of its tributaries within 7 days after receiving notice from the watermaster, who has determined that the obstruction interferes with water delivery, the watermaster may authorize a water user to remove such obstruction in accordance with applicable federal and state laws and regulations. The expense thereof shall be the responsibility of the water right holder requesting the removal.

3. The general provision was not initially recommended in the *Director's Report for Basin, 31, Reporting Area 8*, filed by the Director on May 10, 2001. The general provision proposal originated from an objection filed to the absence of a recommended general provision. The general provision is based on a similar provision contained in a prior federal decree entered in the case of *Suave v. Abbott*, Case No. 635 (D. Idaho. Nov. 1, 1930).

4. All surface right claimants in Basin 31, including those with the rights to which the general provision directly applies, were properly served with notice of the proposed general provision raised by the objection and were afforded the opportunity to participate in and be heard in the subcase.

5. Ultimately, all parties participating in the subcase reached a settlement regarding the proposed general provision language and filed a *Standard Form 5*, with IDWR's concurrence.

## II.

### LEGAL AUTHORITY AND BASIS FOR GENERAL PROVISION

Idaho Code § 42-1411 provides that the director of IDWR shall prepare a report on the water system. "The director may include such general provisions in the director's report, as the director deems appropriate and proper, to define and administer all water rights." I.C. § 42-1411 (2000). "The decree shall also contain an express statement that the partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights." I.C. § 42-1412(6). In *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998), the Idaho Supreme Court stated:

A general provision is a provision that is included in a water right decree regarding the administration of water rights that applies generally to water rights, is not an element of the water right, or is necessary for the efficient administration of the water right decreed. A general provision is an administrative provision that generally applies to water rights but it need not apply to every water right.

*Id.* at 421, 958 P.2d at 578 (citations omitted).

Historical or customary practices of administration of water rights can serve as the basis for a general provision. In *State v. Idaho Conservation League*, 131 Idaho 329, 945 P.2d 1108

(1998), the Idaho Supreme Court held that a general provision based on historical administrative practices could be necessary for the efficient administration of a water right “because it avoids controversy among the water rights holders by clearly notifying them of the mechanism [of administration].” *Id.* at 3334-35, 955 P.2d at 1113-14 (discussing “excess flow” general provision); *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998) (discussing “rotation for credit” general provision). Historical practices notwithstanding, the Court is not compelled to decree a general provision based on historical administrative practices to the extent such practices are determined to be contrary to law or authorize the administration of rights in a “vacuum” without regard for other rights that are part of the same hydrologic system. i.e the “sweetheart decree.”

Although parties may not propose a general provision in a director’s report, parties as objectors, as part of the objection, have the right to propose general provisions for entry where the director recommended none. ***Order Re: General Provisions and I.A.R. 12(c)(2)***, (subcase 91-0005) (Sept. 22, 1998).

### III.

#### EVIDENTIARY VALUE OF IDWR’S CONCURRENCE ON A *STANDARD FORM 5*

Idaho Code § 42-1411(4) provides that the filing of the director’s report shall “constitute prima facie evidence of the nature and extent of the water rights . . . .” I.C. § 42-1411(4) (2000). Additionally, as applied to settlement agreements, IDWR’s role in the SRBA “is an independent expert and technical assistant [who] assure[s] that claims to water rights acquired under state law are accurately reported . . . .” I.C. § 42-1401B(1) (1996). Therefore, when IDWR’s representative signs a *Standard Form 5* or otherwise signs off on an agreement and states that its contents are true, IDWR’s concurrence provides evidentiary value on which the Court is entitled to rely. ***Memorandum Decision and Order on Challenge***, subcases 36-00061, *et al.* (Sept. 27, 1998) (“*Morris*”) at 17.

#### IV.

#### REVIEW OF GENERAL PROVISION LANGUAGE BY COURT

Although the agreement reached by the parties represents final settlement of all pending issues, the Court is still charged with the duty of reviewing the contents of the agreement to ensure compliance with the law. The Court is not required to “rubberstamp” either the recommendations contained in the director’s report or any agreement reached by the parties to the extent either is contrary to law. *State v. United States*, 128 Idaho 246, 258-59, 912 P.2d 614, 626-27 (1995). The Court’s role, however, is somewhat limited when a trial was not conducted on the merits and when IDWR concurs with the settlement. The Presiding Judge or Special Master is not required by statute to conduct an evidentiary hearing in order to accept a stipulation as final resolution. *Morris* at 14. Thus, the Court’s review is limited to the existing record and therefore may not be able to ascertain from the face of the record all of the potential problems the general provision is crafted to eliminate.

In reviewing the general provision language, the Court notes that the issues addressed in the general provision language appear on its face to be regulated by both state and federal legislation. For example, I.C. § 42-701 requires that all non domestic and stock water diversion works already be equipped with head gates and measuring devices. IDWR is charged with the enforcement of this regulation. Idaho Code § 42-3801 *et seq.* regulates the alteration of natural stream channels. The federal Clean Water Act, 33 U.S.C. § 1344, requires a dredge and fill permit for the alteration of a natural stream channels in navigable waters. Finally, even without a general provision allocating removal costs, it would seem that under the current state of the law any party seeking to have a channel dredged or other natural obstructions removed could not compel another water user on the system to pay for such costs. Although most of these issues were properly addressed in the *Special Master’s Recommendation*, the *Recommendation* did not specifically address the necessity of the general provision in light of the applicable regulations.

However, despite the applicable state and federal regulations, the Court relies on the following criteria in finding that the general provision is necessary for the efficient administration of water rights and in ordering the general provision decreed. First, all affected parties were provided proper notice and all affected parties stipulated to the entry of the general provision language. Parties can stipulate as to how their rights should be administered so long as

the rights of other water right holders not made a party to the proceedings are unaffected. In *Idaho Power Company v. State*, 104 Idaho 575, 661 P.2d 741 (1983), the Idaho Supreme Court stated:

[W]e find nothing in the law of this State which precludes a person from voluntarily obtaining less than the full panoply of rights associated with the ownership of real property. Agreements not to assert ownership rights to their fullest are common in today's society, e.g. restrictive covenants and equitable servitudes.

*Id.* at 587, 661 P.2d at 753.

Next, this Court relies on the evidentiary value of IDWR's concurrence in the *SF5 Morris* at 17. A general provision is an administrative provision that is necessary for the efficient administration of a water right. *A & B Irrigation District* at 411, 95 P.2d at 568; *Idaho Conservation League* at 334-35, 95 P.2d at 1113-14. Historical or customary administrative practices can be the basis for a general provision. *State v. Idaho Conservation League, supra*. IDWR is not only the state agency charged with administering the water rights, but IDWR's role in the SRBA is also that of an independent expert to the Court. I.C. § 42-1401B(1). Therefore the Court can also rely on IDWR's concurrence in the *SF5* in determining whether such a general provision is necessary for the efficient administration of water rights.

Finally, the part of the general provision dealing with the removal of any obstructions is not intended to be applied in any manner inconsistent with applicable state or federal law. This avoids any ambiguity in the intended scope and application of the provision.

Therefore, based on the foregoing criteria this Court will not "second – guess" the necessity of the general provision. However, this determination is limited to the facts and circumstances of this subcase and should not be construed as an endorsement that historical practices, prior decrees or settlement agreements create a *per se* valid basis for general provisions in all situations.

#### IV.

**ADOPTION OF SPECIAL MASTER'S FINDINGS  
OF FACT AND CONCLUSIONS OF LAW**

Pursuant to I.R.C.P. 53(e)(2) and *SRBA Administrative Order 1*, Section 13f, this Court has reviewed the Findings of Fact and Conclusions of Law contained in the *Special Master's Recommendation* and wholly adopts them as its own.

**V.**

**ORDER OF PARTIAL DECREE FOR GENERAL PROVISION**

Therefore, IT IS ORDERED that the general provision for **BASIN 31 REGARDING OBSTRUCTIONS IN CAMAS CREEK AND TRIBUTARIES**, is hereby decreed as set forth in **EXHIBIT A**, together with the list of water rights to which the general provision is intended to apply as set forth in **EXHIBIT B**.

**RULE 54(b) CERTIFICATE**

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated February 18, 2004

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JOHN M. MELANSON  
Presiding Judge  
Snake River Basin Adjudication