

**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: 91-0005-57
)	
Case No. 39576)	SPECIAL MASTER’S REPORT AND RECOMMENDATION
)	
)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
)	
)	FOR GENERAL PROVISIONS IN BASIN 57 DESIGNATED AS BASIN-WIDE ISSUE 5-57

I.

INTRODUCTION

This *Special Master’s Report* pertains to the general provisions recommended by the Idaho Department of Water Resources (IDWR) regarding the distribution of water rights in the Reynolds Creek Basin located in IDWR administrative Basin 57. These general provisions were previously designated by the SRBA District Court as Basin-Wide Issue 5-57, and the matter was referred to this Special Master for a recommendation.

II.

FINDINGS OF FACT

1. The water right claims in the Reynolds Creek Basin were initially recommended in the 1992 *Director’s Report, Part I, Reporting Area 2 (Basin 57)*. An *Amended Director’s Report* for these rights was issued in 1995 following the 1994

amendments to the adjudication statutes. The 1995 *Amended Director's Report* also recommended General Provision 2, which provided for the administration of water rights on the Reynolds Creek Basin water system. General Provision 2 is based on language contained in a stipulation that was incorporated into the *Reynolds Creek Decree* filed March 23, 1988, Third Judicial District of Idaho for Owyhee County. A general adjudication for Reynolds Creek was commenced in 1978 to determine the respective water rights in that basin. A final decree was issued in 1988. The *Reynolds Creek Decree* determined the respective rights of water users in the Reynolds Creek Basin and also decreed rights to “excess water” and the practice of rotation irrigation between water users based on the stipulation of the parties.

2. The term “excess water” refers to a condition occurring during spring run-off when the flow of Reynolds Creek is high and contains more water than can be used under the established rights during periods of high flows. The stipulation on which General Provision 2 was based represented the resolution of an historical dispute between the water users in the Upper Reynolds Creek Basin and the water users in the Lower Reynolds Creek Basin. General Provision 2 delineated under what conditions Upper Basin water users are permitted to divert water in excess of their respective water rights or “excess water.”

3. Historically, irrigators in the Reynolds Creek Basin also implemented a system of rotation irrigation during times of shortage. Seasonal fluctuations of water flows in the Reynolds Creek Basin are highly variable. A system of rotation irrigation provides for efficient use of the water between users given the attendant circumstances. General Provision 2 also provided for the historical practice of rotation irrigation during times of shortage.

4. On December 21, 1995, the SRBA District Court designated Basin-Wide Issue 5, which concerned whether certain recommended general provisions, including those recommended in Basin 57, were necessary to define or efficiently administer water rights. By *Order* dated April 26, 1996, the SRBA District Court ruled that the general provisions recommended in Basin 57 were not necessary to define or efficiently administer water rights. The District Court also ruled that the period of use element for irrigation rights

should be “irrigation season” as opposed to specific dates. The Supreme Court reversed the decision of the District Court concerning the period of use element and remanded the remaining general provisions for evidentiary hearings. *See A&B Irr. Dist. v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d 568 (1998).

5. The SRBA District Court, in a separate *Order*, also ruled that the general provisions regarding “excess water” were not necessary for the definition or efficient administration of water rights. The decision was appealed and the Idaho Supreme Court ruled that the “excess flow” portion of General Provision 2 omitted the necessary elements of a water right and therefore did not establish a water right. However, the Supreme Court ruled that General Provision 2 may be necessary for the efficient administration of water rights in the Reynolds Creek Basin. *State of Idaho v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998).

6. On remand, IDWR filed a *Supplemental Directors Report, Reporting Area 2, IDWR Basin 57, Reporting Revision of the Following: Period of Use (for irrigation water uses)*, recommending specific dates for the irrigation rights in Basin 57. At the close of the objection and response period, the SRBA District Court issued a series of orders consolidating, separating, and re-designating the issues on remand according to administrative basin. Those remaining issues pertaining to Basin 57 were re-designated as Basin-Wide Issue 5-57. Because the issues regarding period of use were fact specific to individual water rights, and could no longer be resolved collectively as “irrigation season,” the subcases where objections were filed to the period of use element were referred to this Special Master for resolution on an individual basis. The issues regarding General Provision 2 remained under the Basin Wide 5-57 designation.

7. Also following remand in *State of Idaho v. Idaho Conservation League*, the parties claiming use of “excess water” under General Provision 2 filed individual late claims for the “excess water” in an attempt to comply with the holding of the Supreme Court. IDWR recommended these late claims in a March 5, 2001, late claims report. Following the objection and response period the contested claims were referred this Special Master on December 21, 2001. The individual late claims for the “excess water” were either uncontested or any objections have now been resolved via SF-5’s.

8. Because the “excess water” issue was no longer being pursued as a general provision, this Special Master ordered that IDWR prepare a *Supplemental Director’s Report* recommending the remaining portions of General provision 2, if any, that were necessary in light of the individual claims for the “excess water.” IDWR filed its *Supplemental Director’s Report* on June 19, 2002. According to the *Supplemental Report*, the only remaining portion of General Provision 2 recommended following the filing of the individual late claims is portions of paragraph 5(b), which address the historical practice of rotation irrigation. This recommendation is set forth in **EXHIBIT A**. No objections were filed to this recommendation.

9. This Special Master finds that a general provision on the practice of rotation irrigation as set forth in **EXHIBIT A** is necessary to define, and for the efficient administration of, water rights in the Reynolds Creek Basin in Basin 57. This practice allows for the efficient administration of water rights during times of water shortages in light of the unique circumstances in the Reynolds Creek Basin.

10. The remaining provisions contained in General Provision 2, which address “excess water” are not necessary to either define or administer water rights in the Reynolds Creek Basin because separate claims have been filed for the use of “excess water.” IDWR’s recommendations for these rights contain all the elements of a water right. Accordingly, the issue of “excess water” no longer needs to be addressed via a general provision.

11. Prior to the individual late claims being filed for the “excess water,” IDWR’s recommendations in the *Supplemental Directors Report, Reporting Area 2, IDWR Basin 57, Reporting Revision of the Following: Period of Use (for irrigation water uses)* for the period of use element for water rights in the Reynolds Creek Basin also contained the following “subordination language”.

DIVERTING WATER BEFORE OR AFTER THE PERIOD OF USE UNDER
THIS RIGHT IS ALLOWED PROVIDED:

- A. THE WATERS SO DIVERTED ARE APPLIED TO A BENEFICIAL USE, AND
- B. THE EXISTING RIGHTS AND FUTURE APPROPRIATIONS ARE FIRST SATISFIED.

This “subordination language” was recommended in an attempt to satisfy the issues raised by the Idaho Supreme Court in *State of Idaho v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998), regarding “excess water.” However, because the use of “excess water” is no longer being recommended as a general provision, this Special Master finds that the subordination language is no longer necessary and should not be included in the *Special Master’s Report and Recommendation* or *Partial Decree*.

III.

CONCLUSIONS OF LAW

1. The filing of the director’s report constitutes *prima facie* evidence of the nature and extent of a water right. I.C. § 42-1411(4). In addition, IDWR’s role in the SRBA is that of an independent expert and technical assistant who assures that claim to water rights acquired under state law are accurately reported. I.C. § 42-1401B(1996). Accordingly, when IDWR files an expert’s report pursuant to I.R.E. 706, said report provides evidentiary value on which this Special Master is entitled to rely.

2. 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 to administer all water rights.” I.C. § 42-1411 (1996). “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 rights 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).

3. Historical practices of administration of water rights can be the basis for a general provision. In *State v. Idaho Conservation League*, 131 Idaho 329, 955 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 334-35, 955 P.2d at 1113-14.

4. The practice of rotation irrigation is not contrary to law. In *State v. Nelson*, 131 Idaho 12, 951 P.2d 943 (1998), the Idaho Supreme Court acknowledged that a similar practice of rotation for credit should be included as a general provision if necessary for the efficient administration of water. The SRBA District Court also issued a *Partial Decree* for rotation for credit in Basin 34 based on historical practices and the unique conditions in Basin 34. *Order of Partial Decree for General Provision in Administrative Basin 34, Subcase No. 91-00005-34* (May 9, 2001).

5. In *State v. Idaho Conservation League*, 131 Idaho 329, 955 P.2d 1108 (1998), in addressing General Provision 2, including the provision on rotation that is being recommended herein, the Idaho Supreme Court held that General Provision 2 should be included as a general provision necessary for the efficient administration of water rights. Although the portions of General Provision 2 dealing with the use of “excess water” are no longer being recommended by IDWR, those portions of General Provision 2 which pertain to rotation irrigation are the same as those upheld by the Supreme Court.

6. This Special Master concludes as a matter of law that the general provision on rotation irrigation as set forth in **EXHIBIT A** is necessary to define, and for the efficient administration of, water rights in the Reynolds Creek Basin.

7. This Special Master concludes as a matter of law that the remaining portions of General Provision 2 as originally recommended by IDWR are no longer necessary to define water rights or for the efficient administration of water rights in the Reynolds Creek Basin and should not be included as a general provision.

8. This Special Master concludes as a matter of law that the “subordination language” included in the *Supplemental Director’s Report* for the period of use element

for those parties in the Reynolds Creek Basin claiming “excess water,” is no longer necessary and should not be included in the *Special Master’s Report and Recommendation* or *Partial Decree*.

IV.

RECOMMENDATION

Therefore, based on the file and the record herein and the foregoing findings of fact and conclusions of law IT IS RECOMMENDED that the general provision as set forth in **EXHIBIT A** attached hereto be included as a general provision in Basin 57, and that the SRBA District Court issue a partial decree thereon. The only other general provision applicable to Basin 57 is the general provision on connected sources, which was previously decreed February 27, 2002, as part of Basin-Wide Issue 5. IT IS FURTHER RECOMMENDED that the “subordination language” contained in the *Supplemental Director’s Report* for the period of use element not be included in the *Special Master’s Report and Recommendation* or the *Partial Decrees* ultimately issued for any Reynolds Creek water rights.

Dated _____

THOMAS R. CUSHMAN
Special Master for the
Snake River Basin Adjudication

2. A historical practice of rotation irrigation during times of water shortage has allowed for more efficient use of water in the Reynolds Creek basin. This practice applies only to a water right that has more than one point of diversion, or to contiguous parcels of property owned by the same person(s) or entity where there are multiple water rights with multiple points of diversion. Under these conditions, the full amount of water diverted may be diverted through less than all of the points of diversion decreed for the water right or less than all of the points of diversion decreed for multiple water rights and applied to a place of use decreed for multiple water rights, so long as the places of use are contiguous and owned by the same owner. The amount of water that may be diverted is determined according to priority. This practice results in the point of diversion or the place of use for a specific water right or multiple water rights owned by the same person(s) or entity being different from the point of diversion and/or the place of use listed in the Director's Report.