

2004 FEB 20 PM 4 18

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

)	Subcase: 92-31
In Re SRBA)	
)	ORDER OF PARTIAL DECREE FOR
Case No. 39576)	GENERAL PROVISION IN BASIN 31
)	REGARDING OBSTRUCTIONS IN
)	CAMAS CREEK AND TRIBUTARIES

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, 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 (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 already requires that all non domestic and stock water diversion works 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, 955 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.

V.

**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.

VI.

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 20, 2004

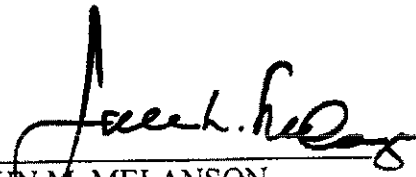

JOHN M. MELANSON
Presiding Judge
Snake River Basin Adjudication

EXHIBIT A

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 natural 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.

EXHIBIT B

LIST OF WATER RIGHT NUMBERS TO WHICH THE
BASIN 31 GENERAL PROVISION
CONCERNING OBSTRUCTIONS IN CHANNELS APPLIES

31-00005	31-00062Q	31-00124
31-00006	31-00062S	31-00125
31-00011	31-00062T	31-00126
31-00012A	31-00062U	31-00127
31-00012B	31-00063A	31-00128
31-00013B	31-00063C	31-00129
31-00018	31-00063F	31-00130
31-00019	31-00063J	31-00133
31-00020	31-00063K	31-00134
31-00022	31-00063L	31-00135
31-00023	31-00063M	31-00141
31-00024	31-00063N	31-00142
31-00025	31-00063P	31-00143
31-00028A	31-00063Q	31-00144
31-00028B	31-00063S	31-00145
31-00029	31-00063T	31-00146
31-00030	31-00063U	31-00147A
31-00031	31-00064	31-00151
31-00032	31-00065	31-00155
31-00033	31-00066C	31-00156
31-00042	31-00067C	31-00157B
31-00043A	31-00078	31-00158
31-00043B	31-00079A	31-00159
31-00046	31-00079B	31-00160A
31-00047	31-00080	31-00160B
31-00048	31-00082	31-00161A
31-00049A	31-00083	31-00161B
31-00049B	31-00084	31-00162
31-00050A	31-00085	31-00163
31-00050B	31-00086	31-00166
31-00051A	31-00087	31-00167
31-00051B	31-00088	31-00168
31-00052	31-00089	31-00169
31-00053A	31-00090	31-00173
31-00053B	31-00095A	31-00174A
31-00054A	31-00095B	31-00175
31-00054B	31-00096	31-00176
31-00055B	31-00097	31-00177
31-00055C	31-00098	31-00178
31-00055D	31-00099	31-00181
31-00056	31-00100	31-00184
31-00057	31-00104	31-00185
31-00058	31-00105	31-00186
31-00059	31-00113	31-00187
31-00060A	31-00115	31-00188
31-00060B	31-00116	31-00189
31-00061	31-00117	31-00190
31-00062A	31-00118A	31-00191
31-00062C	31-00119	31-00192
31-00062F	31-00120	31-00193
31-00062J	31-00121A	31-00194B
31-00062K	31-00121B	31-00195
31-00062L	31-00122A	31-00198
31-00062M	31-00122B	
31-00062N	31-00123A	
31-00062P	31-00123B	

**LIST OF WATER RIGHT NUMBERS TO WHICH THE
BASIN 31 GENERAL PROVISION
CONCERNING OBSTRUCTIONS IN CHANNELS APPLIES**

31-00199	31-00276	31-11465
31-00200	31-00277	31-11468
31-00202	31-00278	31-11709
31-00206	31-00279	31-11710
31-00207	31-00280	31-11711
31-00208	31-00281	31-11712
31-00209	31-00282	31-11713
31-00210	31-00283	31-11714
31-00211	31-00284	31-11768
31-00212A	31-00286	31-11769
31-00213	31-00287	31-11770
31-00214A	31-00290	31-11771
31-00214B	31-00291	31-11772
31-00214C	31-00292	31-11773
31-00215A	31-00293	31-11789
31-00215B	31-00294B	31-11790
31-00216	31-00295	
31-00218	31-00296	
31-00219	31-00297	
31-00220	31-00298	
31-00221	31-00299A	
31-00231	31-00299B	
31-00232	31-00300A	
31-00235	31-00300B	
31-00237	31-00301	
31-00238	31-00302A	
31-00239	31-00302B	
31-00241	31-00304	
31-00242	31-00306	
31-00243	31-00307	
31-00244	31-00309	
31-00245	31-00317	
31-00249	31-00319	
31-00250	31-00321	
31-00251	31-00323	
31-00252A	31-00324	
31-00252B	31-00326	
31-00253	31-00344	
31-00254	31-00345	
31-00255A	31-00354	
31-00255B	31-00355	
31-00255D	31-00360	
31-00255E	31-00361	
31-00256	31-00363	
31-00257	31-00364	
31-00262	31-00373	
31-00263	31-00374	
31-00267	31-10221	
31-00268	31-10499	
31-00269	31-10744	
31-00270	31-10957	
31-00271	31-10958	
31-00272	31-10959	
31-00273	31-10960	
31-00274	31-10961	
31-00275	31-10962	

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER OF PARTIAL DECREE FOR GENERAL PROVISION IN BASIN 31 REGARDING OBSTRUCTION IN CAMAS CREEK AND TRIBUTARIES was mailed on February 20, 2004, with sufficient first-class postage to the following:

INDEPENDENT WATER USERS, INC.
PROPOSED GENERAL PROVISION IN

Represented by:
KENT W FOSTER
PO BOX 50130
IDAHO FALLS, ID 83405
Phone: 208-523-0620

STATE OF IDAHO

Represented by:
LAWRENCE G. WASDEN
DEPUTY ATT. GENERAL
PO BOX 83720
BOISE, ID 83720-0010
Phone: 208-334-2400

JAMES HAGENBARTH

Represented by:
MICHAEL C. CREAMER
PO BOX 2720
BOISE, ID 83701-2720
Phone: 208-388-1200

UNITED STATES OF AMERICA BLM

Represented by:
US DEPARTMENT OF JUSTICE
ENVIRONMENT & NATL' RESOURCES
550 WEST FORT STREET, MSC 033
BOISE, ID 83724

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098