



1 at the same time confer rights or approve practices which do not exist.

2 With regard to the provisions enumerated above, these claimants concur in  
3 the arguments of Hagerman Water Rights Owners, Inc. and Clear Spring Foods, Inc.  
4 concerning the criteria for determining what is necessary and what may be included in a  
5 decree.

#### 6 I. BASIN 34: GENERAL PROVISION 2.

7 General Provision 2 begins by stating that all surface waters shall be  
8 administered as a single source, except as provided in the provision. These claimants object  
9 to the provisions because the exceptions are incomplete, inaccurate, and ambiguous and  
10 would, therefore, extinguish the unmentioned historical practices and uses which the  
11 claimants have the right to continue. As such, the provision is not necessary to define or  
12 administer rights, but instead would curtail rights and fail to resolve ongoing disputes.

13 Subpart a. is derived from an ambiguous provision in the Utah Construction  
14 decree which declares that administration of surface flows above Mackay Dam will occur  
15 as a single system with those below the Dam when the flows at the Howell Gauge increase  
16 to 750 cfs until they recede to 300 cfs. Under IDWR's recent directions to the water master,  
17 that means that junior users above the Dam will be shut off whenever seniors below make  
18 a call and the flows have reached 750 and not dropped to 300.

19 That practice contravenes historical practice and use, and is not, as subpart a.  
20 states, based on "conditions existing as of commencement of the SRBA." Furthermore,  
21 conditions existing at commencement are not the conditions which a court uses to define  
22 the rights. Conditions existing when the rights were created by appropriation are the ones  
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1 under which the claimants are entitled to have their rights administered. Beecher v. Cassia  
2 Creek Irr. Co., 66 Idaho 1, 154 P.2d 507 (1944); Crockett v. Jones, 42 Idaho 652, 249 P.  
3 483 (1926).

4 These claimants hold flow rights above the Dam which predate construction  
5 of the Dam. Before the Dam, even when the river flowed above 750 cfs, but had not  
6 receded below 300, it was futile to shut those rights off to get water some 30 or 40 miles  
7 downriver to seniors near Arco. Now, with the use of storage water from the Dam in  
8 combination with rotation practices and bypassing the river channel by use of canals such  
9 as the East Side Canal and other improvements below the Dam, what was once futile has  
10 become possible. It may be argued that shutoffs above the Dam benefit senior flow rights  
11 below. However, that would be a new practice, and one which ignores the intervening  
12 improvements and practices below the Dam which, in essence, move the points of diversion  
13 upstream to the Dam, through the reduction of shrink and use of "flush" water.

14 Thus, while these claimants acknowledge the 750/300 formula is important  
15 and applicable to determine when all the flow rights below the reservoir "turn on and off"  
16 and to determine whether water flowing into the reservoir is flow water available to those  
17 seniors or water which may be captured and stored or rotated, they deny that shutoffs above  
18 the reservoir may occur under this provision.

19 The affidavits of Vic Johnson, Herb Witworth, Sr., and David Nelson establish  
20 that "no shutoffs above the reservoir" was the state of affairs when the SRBA commenced  
21 and since at least the 1930's. Since that time, on only a couple of occasions have shutoffs  
22 been attempted; once when a new water master who was unfamiliar with the practices and  
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1 hydrology took office more than four decades ago; and in 1994, after commencement of the  
2 SRBA, when IDWR directed the water master to do so.

3 In sum, provision 2.a. ignores or avoids resolution of an issue necessary to  
4 properly define the historical use of water rights and to administer them. It does not  
5 understandably fix the rights and obligations of the parties. It is a conclusion which is  
6 unsupported and contradicted by fact. And it does not apply to all rights. Hence, it should  
7 be rejected by the Court and appropriate provisions should be adopted either as General  
8 Provisions or as matters particular to individual rights.

9 Subpart b. of provision 2 states that several listed streams shall be administered  
10 separately from the Big Lost River. These claimants object to this provision, because, to the  
11 extent it is necessary, it is incomplete. The affidavit of David Nelson (and those of Wiley  
12 and Frances Smith) are submitted in support of inclusion of Arenson Creek, Upper Thousand  
13 Springs and Bartlett Creek, each of which does not connect with the Big Lost River and has  
14 not been administered as tributary to it.

15 General Provision 2. c. addresses control of flows at the Back Channel, which  
16 is below the Howell gauge and above the reservoir. By stating the flows into the Back  
17 Channel "shall be kept as near as practicable to" certain flows, the provision evades the  
18 dispute about whether controlling or measuring works may be required, even though it is  
19 part of the natural stream where several channels flow through the flood plain to the Dam.  
20 Because statutes (I.C. 42-701, et. seq.) and IDWR require measuring and control of  
21 diversions, a question is created as to whether one is required at the Back Channel,  
22 especially given the fact that it would be physically impractical, if not impossible, to install  
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1           General Provision 4.b. addresses the privileges and limitations of the ongoing  
2 practice of "rotation" of flow rights. Rotation is a practice where users accumulate flows and  
3 then use that accumulated water to "flush" with the larger flow from the Dam to the place  
4 of use, downstream, in order to minimize "shrink" from conveyance of the water to the  
5 place of use. These claimants do not object to rotation, but do object to its use in  
6 combination with practices that began after their rights above the reservoir vested. In other  
7 words, shutting off juniors above the Dam contravenes their historic rights and uses when  
8 that water is shut off to provide it to those users below who use improvements and practices  
9 such as rotating, combining flow rights with junior storage rights, and transporting that water  
10 through canals rather than the river channel. The claimants above the reservoir are entitled  
11 to continue their uses, including early and late season diversion, uninterrupted diversion  
12 during the season, and diversion of additional spring runoff, because those practices have  
13 been followed since the inception of the rights, except as discussed in the briefing  
14 concerning provisions 2 and 6 for Basin 34.

15           The changes in historic use that this and other provisions portend are contrary  
16 to law, including the right to maintain uses under conditions existing when the rights were  
17 obtained, and are contrary to fact, as set forth in the affidavits by David Nelson, Herb  
18 Witworth, Sr., and Victor Johnson. They also take away the water users' right to use water  
19 on a different parcel of land to which the user also holds rights in order to save the more  
20 valuable crops. (Affidavit of Arthur Quist).

21           Therefore, the provisions are inadequate and unnecessary and should be  
22 rewritten. Alternatively, accurate provisions should be decreed as matters necessary to  
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1 define or administer particular rights under I.C. §42-1411(2)(k).

2 IV. CONCLUSION

3 For the foregoing reasons, the general provisions are unnecessary, incomplete  
4 and inaccurate. They are not general, and inappropriately limit the exercise of established  
5 rights, as proved by the affidavits submitted in support of this brief. Therefore, the  
6 provisions should not be decreed as written. However, after a full presentation of the facts  
7 which establish historical practices and uses, the court should enter general provisions  
8 and/or provisions particular to individual rights which fix the rights and obligations of the  
9 parties to the SRBA, and do so consistent with prior appropriation and the other applicable  
10 law.

11 Dated this 12<sup>th</sup> day of February, 1996.

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13 HEPWORTH, LEZAMIZ & HOHNHORST,  
14 CHARTERED

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