RECEIVED
FEB 15 1996
Department of Water Resources
Adjudication Bureau

RECEIVED
FEB 14 1996
OFFICE OF
ATTORNEY GENERAL

Claimants: G. David Nelson and San Felipe Ranches

Attorney Name and Address: HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED
133 Shoshone St. North
P.O. Box 389
Twin Falls, ID 83303-0389
Telephone: (208)734-7510

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	)	Case No. 91-00005B
Case No. 39576	)	**BRIEF IN OPPOSITION TO GENERAL PROVISIONS**

* * * * * * * * * * *

COME NOW, G. David Nelson and San Felipe Ranches, through their counsel of Hepworth, Lezamiz and Hohnhorst and argue that General Provisions 2 and 4 for Basin 34 are not necessary to define or administer rights.[1] As explained below, those provisions inaccurately and incompletely define the nature, extent, and priority of Basin 34 rights; impermissibly limit the nature and extent of the rights; and the "administrative" provisions

[1]Through separate counsel, James R. Bennetts, these claimants also challenge the necessity of other general provisions in Basin 34.

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

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

I. BASIN 34: GENERAL PROVISION 2.

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

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

That practice contravenes historical practice and use, and is not, as subpart a. states, based on "conditions existing as of commencement of the SRBA." Furthermore, conditions existing at commencement are not the conditions which a court uses to define the rights. Conditions existing when the rights were created by appropriation are the ones

under which the claimants are entitled to have their rights administered. Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 154 P.2d 507 (1944); Crockett v. Jones, 42 Idaho 652, 249 P. 483 (1926).

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

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

The affidavits of Vic Johnson, Herb Witworth, Sr., and David Nelson establish that "no shutoffs above the reservoir" was the state of affairs when the SRBA commenced and since at least the 1930's. Since that time, on only a couple of occasions have shutoffs been attempted; once when a new water master who was unfamiliar with the practices and

hydrology took office more than four decades ago; and in 1994, after commencement of the SRBA, when IDWR directed the water master to do so.

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

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

General Provision 2. c. addresses control of flows at the Back Channel, which is below the Howell gauge and above the reservoir. By stating the flows into the Back Channel "shall be kept as near as practicable to" certain flows, the provision evades the dispute about whether controlling or measuring works may be required, even though it is part of the natural stream where several channels flow through the flood plain to the Dam. Because statutes (I.C. 42-701, et. seq.) and IDWR require measuring and control of diversions, a question is created as to whether one is required at the Back Channel, especially given the fact that it would be physically impractical, if not impossible, to install

and maintain those works. (Affidavit of Vic Johnson).

Additionally, while some provision is necessary to resolve continuing disputes, this provision fails to follow or recognize the historic practices of using additional flows that naturally and inevitably go down the Back Channel during the spring runoff. Consequently, subpart c. is incomplete and inaccurate, and fails to fix the rights and obligations of the parties or resolve disputes about how or whether to control and measure flows. Because this subpart does not define rights or resolve administration as is necessary to provide the parties an adequate remedy, it should be rejected.

II. BASIN 34: GENERAL PROVISION 4.

Like the other General Provisions, this one inadequately describes the historical use of water. Subpart a. states that 50 cfs at the 2-B gauge below the Dam shall be a minimum flow, unavailable for delivery outside of the irrigation season. While the flow amount originates in the Utah Construction decree, a portion of that water has been historically diverted below the 2-B gauge to provide winter stockwater for ranches below the Dam. (Affidavit of David Nelson).

For the Court to decree the provision as written would do nothing less than raise a dispute about where winter stockwater will come from, rather than resolve questions concerning the amount of water which must be allowed to pass through the reservoir in order to satisfy stock needs of those with rights senior to the dam storage rights. Accordingly, while some provision resolving that question in necessary to define and administer rights, as written subpart a. is unnecessary, inadequate, and raises rather than resolves issues about the rights and obligations of the parties.

General Provision 4.b. addresses the privileges and limitations of the ongoing practice of "rotation" of flow rights. Rotation is a practice where users accumulate flows and then use that accumulated water to "flush" with the larger flow from the Dam to the place of use, downstream, in order to minimize "shrink" from conveyance of the water to the place of use. These claimants do not object to rotation, but do object to its use in combination with practices that began after their rights above the reservoir vested. In other words, shutting off juniors above the Dam contravenes their historic rights and uses when that water is shut off to provide it to those users below who use improvements and practices such as rotating, combining flow rights with junior storage rights, and transporting that water through canals rather than the river channel. The claimants above the reservoir are entitled to continue their uses, including early and late season diversion, uninterrupted diversion during the season, and diversion of additional spring runoff, because those practices have been followed since the inception of the rights, except as discussed in the briefing concerning provisions 2 and 6 for Basin 34.

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

Therefore, the provisions are inadequate and unnecessary and should be rewritten. Alternatively, accurate provisions should be decreed as matters necessary to

define or administer particular rights under I.C. §42-1411(2)(k).

IV. CONCLUSION

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

Dated this 12th day of February, 1996.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: _____
Patrick D. Brown
Attorneys for Claimants