

Notes

By: Shelley W. Keen

Date: May 17, 2013

Subject: Legal and procedural questions pertaining to the Scheff delivery call

In addition to the factual questions and issues that may arise from the Scheff petition for delivery call, the following are some legal and procedural questions that may arise.

1. If the Scheffs are relying on the SRBA partial decree to define their water right, then must IDWR have the SRBA court's permission for interim administration before regulation could occur?

See Judge Wildman's December 19, 2012, *Order Granting Motions for Order of Interim Administration of Water Rights in A Portion of Basin 29 (Bannock Creek Drainage)*["Order"]. It says:

Idaho Code § 42-1417 . . . permits the court to authorize the distribution of water pursuant to Chapter 6, Title 42, Idaho Code, even though the subject water source has not been adjudicated, but rather is in the process of being adjudicated. (Order, Page 5)

If IDWR does need the SRBA court's permission for interim administration, does it make sense from an administrative efficiency standpoint to go through a delivery call process if the court hasn't granted permission for interim administration?

2. If interim administration authority is necessary and is granted by the court, what is the path to actual administration? In granting interim administration for Bannock Creek in Basin 29, the SRBA court ruled that Rule 30 of the *Rules for Conjunctive Management of Surface and ground Water Resources* is the path to administration.

This Court's holding in this respect does not mean that Williams is not entitled to have his water right(s) administered according to priority if he is being materially injured by junior use. However, his remedy is found in Rule 30 of the *Rules for Conjunctive Management of Surface and ground Water Resources*, IDAPA 37.03.11, which permits the holder of a senior right to file a petition . . . seeking conjunctive administration of that senior right in areas of the state in which no water district has been established. (Order, Page 6)

3. If Rule 30 of the *Rules for Conjunctive Management of Surface and ground Water Resources* is the path to administration, how does the rule function? IDWR has no experience with Rule 30. Idaho Code § 42-1417 provides a path to administration, including formation of a water district pursuant to Idaho Code § 42-604, if one does not already exist. Doesn't the existence

of a clear path imply we should follow it? Can IDWR apply Rule 30.07.g and Idaho Code § 42-237a.g without forming a water district?

4. How much water are the Scheffs entitled to under Right 61-11833? What does condition N11 mean?

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

Will the Scheffs will have to go back to the SRBA court to have their right defined?

5. Does Rule 30.07.g of the *Rules for Conjunctive Management of Surface and Ground Water Sources* apply if the Ground Water Act does not apply to pre-1978 domestic water rights, according to *Parker v. Wallentine*? This question arises from the reference in Rule 30.07.g to reasonable pumping levels. The notion of reasonable pumping levels was implemented via the Ground Water Act.
6. Is the forfeiture provision of Idaho Code § 42-222(2) applicable if a resumption of use has occurred? Right 61-11833, the Scheffs' right, has a 1976 priority date. Right 61-12112 has a 1979 priority date. Regulation by priority is the usual mechanism for preventing a junior water user from injuring a senior water user. Is it more appropriate to pursue regulation by priority than to pursue forfeiture?