

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF CREATING)	
WATER DISTRICT 129, PORTNEUF)	
RIVER BASIN AREA, AND MODIFYING)	PRELIMINARY ORDER CREATING
WATER DISTRICT 13T, BANCROFT)	WATER DISTRICT 129 AND MODIFYING
LUND AREA)	WATER DISTRICT 13T
_____)	

COURSE OF PROCEEDINGS

The Director of the Idaho Department of Water Resources (“Department”) is statutorily required to divide the state into water districts for the purpose of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009) (hereinafter “*In re Water Dist. No. 170*”). Idaho Code § 42-604 authorizes the Director to create or revise the boundaries of water districts to properly administer the uses of water resources. The authority to create, revise, or expand the boundaries of water districts applies to surface and ground water sources for which the priorities of appropriation have been adjudicated by court decree. I.C. § 42-604. Before entering an order creating or modifying a water district, the Department must provide notice by mail to each water user in the district or proposed district describing the proposed action, providing the time and place of a hearing on the proposed action, and establishing a time period for submission of written comments. *Id.*

On January 17, 2024, the Department issued a *Notice of Proposed Action, Public Hearing, and Written Comment Period in the Matter of the Proposed Creation of Water District 129, Portneuf River Basin, and Revision of the Boundary of Water District 13T, Bancroft-Lund* (“Notice”) to surface and ground water users in Administrative Basin 29 (“Basin 29”) and Water District 13T (“WD13T”).¹ The Notice proposed the following actions (“Proposed Actions”):

- Create a new water district in a portion of the Portneuf River Basin, Basin 29. The proposed water district, Water District 129 (“WD129”), includes all ground water rights except for ground water domestic and stockwater rights as defined by Idaho Code §§ 42-111 and 42-1401A(11). WD129 also excludes any ground water rights administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement; and
- Revise the existing boundary of WD13T, Bancroft-Lund, splitting WD13T along the administrative boundary line between Administrative Basin 13 (“Basin 13”) and Basin 29, changing Basin 29 ground water rights from WD13T to WD129.

¹ Notices were sent by regular U.S. Mail to all current owners of ground water and surface water rights that have an authorized point of diversion within the proposed water district and ground water rights in WD13T, except domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11). In addition to sending notice to individual right holders, the Department posted the hearing notice on its website and the Townhall Idaho website.

On February 1, 2024, the Department held a public hearing regarding the Proposed Actions. Department hearing officer Cherie Palmer (“hearing officer”) presided over the hearing. Approximately seventy-eight people attended the hearing.

Steve Visosky and Brian Ragan (“Department representatives”) presented the Proposed Actions and the reasons for them, which included:

- Create a water district because the Snake River Basin Adjudication (“SRBA”) is complete;
- Administer and distribute ground water rights according to the prior appropriation doctrine;
- Measure, report, and monitor ground water diversions to ensure diversions do not exceed authorized water right diversion limits;
- Facilitate water right management such as providing assistance in water right ownership records, maintaining water right descriptions such as points of diversion and places of use, and providing watermaster review and comments for water right transfers, water supply bank transactions, and new water right applications; and
- Properly administer Basin 29 ground water rights that are within WD13T in the new water district.

Department representatives then answered questions from the public and provided additional information regarding the Proposed Actions.

The hearing officer provided an opportunity for attendees to make public testimony. Additionally, the hearing officer allowed parties to submit written comments by February 12, 2024.

The following individuals offered public testimony for the record at the hearing: Candice Symons, Randy Wheatley, Lytton Bastian (on behalf of Bastian Family Enterprises), and Kirk Jackson.

Four individuals submitted written comments to the Department on or before the deadline: Bart Christensen, Candice and Lynden Symons (“Symons”), Bradie Hansen on behalf of the Board of Directors for the Portneuf-Marsh Valley Canal Co., Ltd. (“Portneuf-Marsh Valley Canal Co.”), and a group of water users in WD13T. The group of water users in WD13T submitted one comment letter, making one collective statement (“WD13T Collective Statement”). The following parties signed the WD13T Collective Statement: Stoddard Farms of Grace, Yost & Yost Farms, Jerry and Kim Welch, John Welch, Rindlisbaker Farms, T & M Land Holding, R & R Enterprises, Jorgensen Farms, Stoddard Farms Properties, and Gem Valley Farms, Inc.

The Department also takes official notice of WD13T Water District records, including: annual reports; water right records in Basin 13 and Basin 29; Order, *In the Matter of Designating the Bancroft-Lund Ground Water Management Area* (Oct. 21, 1991); Preliminary Order, *In the Matter of the Proposed Formation of a Water District in the Bancroft-Lund Area* (May 26, 1995); Final Moratorium Order and Final Order, *In the Matter of Dissolving the Bancroft-Lund Ground Water Management Area* (Aug. 31, 2004); and Amended Snake River Basin Moratorium Order, *In the Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water Within the Snake River Basin* (Oct. 21, 2022).

Based upon the record in this matter, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On October 21, 1991, the Department established the Bancroft-Lund Ground Water Management Area (“BLGWMA”) that encompassed a subset of Basin 13 and Basin 29 water rights. *In the Matter of Designating the Bancroft-Lund Ground Water Management Area*. There is an interrelationship between ground water levels in the BLGWMA and Bear River flows. *Id.*
2. On May 26, 1995, the Department created a water district with the same boundary as the BLGWMA. *In the Matter of the Proposed Formation of a Water District in the Bancroft-Lund Area*. Today, the water district is known as WD13T. In 1995, ground water users indicated the Department should administer ground water in the BLGWMA due to unauthorized ground water diversions. *Id.* at 1–2. The Department’s order creating WD13T required the water district administer ground water diverted and used for irrigation purposes only and water users install and maintain measuring devices and controlling works. *Id.* at 6–7.
3. On August 31, 2004, the Department issued an order dissolving the BLGWMA and establishing a moratorium on the approval of applications to appropriate ground water. *In the Matter of Dissolving the Bancroft-Lund Ground Water Management Area*. The Department recognized that WD13T provides the organizational structure for measurement and reporting of diversions for existing ground water rights, making the BLGWMA unnecessary. *Id.* at 3–4.
4. On August 25, 2014, the SRBA District Court issued its *Final Unified Decree*, finalizing the judicial determination of surface and ground water rights in the Snake River Basin. The SRBA included all water rights within Basin 29, including those in WD13T that are within Basin 29.
5. On June 15, 2021, the Fifth Judicial District Court issued a commencement order for the Bear River Basin Adjudication (“BRBA”). The BRBA includes surface and ground water rights in the Bear River Basin, including the portion of WD13T that is within Basin 13. The BRBA is on-going and has not decreed any Basin 13 water rights.
6. On October 21, 2022, the Department issued the Amended Snake River Basin Moratorium Order (“Moratorium Order”). The Moratorium Order contains a provision that says it applies to applications to appropriate water within WD13T but shall only apply to that portion within Basin 29. *In re Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Snake River Basin*.
7. Basin 29 is divided into several different surface water districts. Some of these water districts are 29-Portneuf River, 29A-Pocatello Creek, 29B-Garden Creek, 29D-Lower Portneuf River, 29G-Birch Creek, and 29H-Marsh Creek. Once created, WD129’s boundary will overlap most if not all of the water district boundaries listed above.
8. Idaho Code § 42-606 requires watermasters to prepare and submit an annual report to the Department. The watermaster’s annual report must include “the total volume of water delivered by the watermaster during the preceding year, the volume delivered to each water user, and the total expense of delivery and the apportionment of expenses among the [water] users” Historically, WD13T’s annual reports only include ground water levels in seven select wells within the water district and do not include the statutorily required information.
9. Beginning in 2023, the Department, the Idaho Water Resource Board, and the United States Geological Survey began a project to characterize the Portneuf River Basin's surface and ground

water hydrology. The following tasks are planned for the project:

- Develop a conceptual hydrogeologic framework;
- Develop ground water budgets;
- Conduct ground water level mass measurement events; and
- Install stream gages and perform multi-year seepage studies to examine surface water-ground water interactions.

10. A swath of land in Basin 29, adjoining the northwestern portion of the WD129 proposed boundary (“Boundary Extension Lands”), is not in a water district. The Boundary Extension Lands are depicted in Attachment A.

11. The Department did not include the Boundary Extension Lands in the Proposed Actions. Currently, there are no ground water rights in the Boundary Extension Lands other than some domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11).

12. The Boundary Extension Lands are located within the Moratorium Order area. The Moratorium Order says the moratorium does not apply to applications for transfer, including applications to add points of diversion to valid, existing water rights. *In re Matter of Applications for Permits for the Diversion and Use of Surface and Ground Water within the Snake River Basin.*

RELEVANT LEGAL PROVISIONS

Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. *See* I.C. §§ 42-101, 42-103, 42-226.

The Director, acting on behalf of the state of Idaho, has the statutory authority to control the appropriation and use of all surface water and ground water within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602.

Idaho Code §§ 42-226 and 42-237a.g. assign the authority and responsibility to the Director for the administration of ground water rights in the state in accordance with the prior appropriation doctrine as established by Idaho law to protect prior surface and ground water rights.

Idaho Code § 42-602 assigns responsibility to the Director to direct and control the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in Chapter 6, Title 42, Idaho Code.

Idaho Code § 42-604 authorizes the Director to form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which the priorities of appropriation have been adjudicated by court decree. The Director has discretion to determine how the “mandatory water districts shall be structured” and may “create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources.” *In re Water Dist. No. 170, 148 Idaho* at 211, 220 P.3d at 329.

ANALYSIS

The Proposed Actions include two primary ideas: (1) create WD129 so the majority of ground water within Basin 29 is brought into one water district; and (2) revise WD13T's boundary, dividing WD13T into two water districts since it spans two different Administrative Basins.

Water District 129 Creation

Idaho law authorizes the Director to create water districts for all water sources once adjudicated. These districts are responsible for managing and distributing water rights according to the established priority date at the local level. The state has nearly 100 water districts, and the Department continues to create water districts where water districts are absent. As for ground water administration in Basin 29, the Department faces two options: (1) incorporate ground water rights into several smaller, existing surface water districts; or (2) create a single large district that administers ground water only. Based on its experience working with water districts throughout the state, the Department has observed larger water districts operate more efficiently than smaller ones.

The Department discussed the concept of economies of scale at the hearing and explained why larger districts are typically more successful in completing the required duties. A larger water district is more efficient, compared to several smaller districts, because it can reduce the redundancy in operational tasks and costs. Also, larger water districts typically have a broader assessment base and can employ full-time watermasters, whereas smaller districts usually employ part-time watermasters. The Department has seen job announcements for full-time watermaster positions draw larger pools of applicants because larger water districts have more resources to pay competitive wages. Competitive wages attract individuals who are more committed to the job and are typically more engaged.

Response to Testimony and Written Comments

The Department invited surface water users within the proposed WD129 area to the hearing so they may voice their preference for adding ground water administration to surface water districts.

Three parties who provided testimony at the hearing own surface water rights in Water District 29H-Marsh Creek ("WD29H"): Mr. Wheatley, Mr. Bastian, and Mr. Jackson. In addition to surface water rights, the record shows Mr. Wheatley and Mr. Bastian own ground water rights as well.

Mr. Wheatley's and Mr. Bastian's public testimony generally centered around surface water users taking ground water away from water users in Basin 29. Mr. Wheatley testified about proposed legislation and, if approved, how there would be a "dramatic effect on water users before data was collected." Mr. Bastian testified, "this is a pre-cursor to the Coalition² taking our water . . . we all need to be together in fighting this to make sure that we ensure our future in our water."

Mr. Jackson stated he was not opposed to adding ground water to WD29H and testified the water is "better in our hands than in the states." Mr. Jackson is the only water user in WD29H who testified or commented on how the Proposed Actions relate to WD29H.

Mr. Wheatley did not include a specific bill number or bill language when testifying about the

² The Surface Water Coalition or the Coalition was formed in 2008 to represent the interests of the senior water right holders in Southern Idaho and is comprised of A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company.

proposed legislation. It appears that Mr. Wheatly was referring to Senate Bill No. 1341 (“Bill”).³ At the time of the hearing, the Bill was not introduced into committee and Department representatives were largely unaware of its specific language. The Bill contains language where the Director may expand common ground water supply for the Eastern Snake River Plain aquifer to include tributary basins after holding a hearing. The hearing and subsequent order for creating WD129 is part of a separate process from any administrative action that may arise from the Bill that is passed into law. If and when the Director holds a hearing in accordance with a new law, that would be the appropriate time and place to express these concerns.

Mr. Wheatly, Mr. Bastian, and Mr. Jackson’s comments do not clearly establish reasons why the Department should not create WD129. All waters of the state belong to Idaho, whose duty it is to supervise the appropriation and allotment of the water in accordance with the prior appropriation doctrine to protect prior surface and ground water rights. I.C. § 42-101. The Director has responsibility for direction and control over the distribution of water through water districts, which is accomplished through local watermasters supervised by the Director. I.C. § 42-602. A water district will provide the framework to track water diverted from the ground and administer water according to the prior appropriation doctrine and Idaho law.

Two water users from Water District 29-Portneuf River (“WD29”) provided public testimony: Mrs. Symons and Portneuf-Marsh Valley Canal Co.

In addition to Mrs. Symons’ public testimony, Mrs. Symons provided timely written comments along with Lynden Symons. The public testimony and written comments mirror each other. The Symons’ interest lay in ground water levels and whether their domestic well will run dry. The Symons say in their written comment that while balancing development in Idaho and providing for historical agriculture, it is important “to protect water of those family homesteads that are first in time.”⁴

Portneuf-Marsh Valley Canal Co. comments state, in substantial part: “[W]e would prefer to see the new WD129 ground water district and the District 29 [sic]⁵ surface water districts managed together as one unit instead of 3 [sic] separate units as proposed. We believe it would be a more efficient management team and help reduce administrative costs.”

Portneuf-Marsh Valley Canal Co. is a large water user among many other water users in WD29. Portneuf-Marsh Valley Canal Co. may be correct when it says adding ground water to WD29 would be more efficient and would reduce administrative costs. However, no one else in WD29 provided testimony or comment, including one collective voice from WD29’s advisory committee, watermaster, or other water users. It has not been established that all other water users in WD29 believe it is appropriate to bring ground water administration into their surface water district.

WD129 Creation Summary

The Department did not receive compelling testimony or written statements that would cause the Department to delay creating WD129. The word “delay” is used purposefully here because water districts will eventually administer all waters of the state per Idaho Code § 42-604.

³ Senate Bill 1341 was introduced on February 12, 2024, signed by the Governor on March 10, 2024, and will be effective July 1, 2024. S.B. 1341, 67th Leg., 2d Reg. Sess. (Idaho 2024) (to be codified at I.C. § 42-233c).

⁴ Mr. and Mrs. Symons hold a 1/1/1905 domestic and stockwater ground water right.

⁵ District 29 appears to refer to Water District 29-Portneuf River

Furthermore, the Department did not receive cohesive collective testimony or written comment from surface water users on whether ground water administration is added to their surface water district's administration.

Revising the Boundary of WD13T

The Department is interested in revising WD13T because: (1) WD13T spans two Administrative Basins, one tributary to the Bear River (Basin 13) and the other tributary to the Portneuf River (Basin 29); (2) water uses in Basin 13 are pending adjudication in the BRBA, meanwhile Basin 29 has already been adjudicated; (3) WD13T does not complete all the required water district functions and administrative requirements; and (4) WD13T should include all Basin 29 ground water rights within its boundary, not just irrigation water rights.

Response to Written Comments

Mr. Christensen submitted the following written comments: "As a representative of the advisor [sic] committee of WD13T I would submit our request to revise existing boundary with WD 29. We would like it separated along the administrative boundary . . . WD13T would only include the basin 13 water rights." Mr. Christensen asked the Department to recant his statement before the written comment period ended.

The WD13T Collective Statement states, in relevant part:

We write as ground water users in [WD13T] to express concerns with the proposal put forth at the February 1, 2024, hearing to split WD13T. The proposal would split WD13T based on an arbitrary "administrative boundary line." The line is not based on hydrologic science. It simply follows a county road. We respectfully request the [Department] to table the proposal for a year until the study scheduled for this spring/summer is complete. . . .

Earlier in this process while we were still gathering information, the groundwater users in WD13T held a formal meeting and voted to stay together and not split the water district. Members of WD13T met together again on February 9th to discuss what we now understood having attended the February 1st hearing. . . . [T]he majority of those in attendance were opposed to splitting WD13T. . . . The Department can move forward in requiring measuring devices to be installed within the stated 1-2 year timeframe for those WD13T users within Basin 29

Department records show those who signed the WD13T Collective Statement own water rights as follows:

- Yost & Yost Farms: Water rights in Basin 29
- Jerry and Kim Welch: Water rights in Basin 29
- John Welch: Water rights in Basin 29
- Jorgensen Farms: Water rights in Basin 29
- Stoddard Farms Properties: Water rights in Basin 13 and Basin 29
- Gem Valley Farms, Inc.: Water rights in Basin 13 and 29

The remaining water users that signed the WD13T Collective Statement, Stoddard Farms of Grace, Rindlisbaker Farms, T & M Land Holding, R & R Enterprises, may own water rights, but Department records do not reflect these individuals as current water right owners.

The record reflects that WD13T does not complete its administrative requirements. The Department proposed to revise WD13T's boundary so WD129 could properly administer those ground water uses within Basin 29. However, as a result of the testimony made in the Collective Statement, the Department determines that the boundary of WD13T should not be revised at this time. The Department agrees that future hydrological studies or information collected during the BRBA process may clarify the direction in which the ground water underlying WD13T flows, which may influence water district boundaries.

WD13T Boundary Revision Summary

Future hydrologic water studies, the pending BRBA, and comments provided by water users in WD13T are compelling reasons for the Department to leave WD13T's boundary intact for now. The Department expects that WD13T will begin proper administration of all applicable Basin 29 water rights within its existing boundary.

Boundary Extension Lands

The Department has identified no ground water diversions that would be subject to water district administration in the Boundary Extension Lands. However, future water right filings could authorize new ground water diversions requiring water district administration. The Department is required to divide the state into water districts and should do so in an efficient manner. Now is an efficient and practical time to extend the proposed WD129's boundary to include the Boundary Extension Lands, due to its proximity.

The Department is required to notify water users within the proposed water district when creating a new water district. I.C. § 42-604. No additional water users would have been notified had the Boundary Extension Lands been included in the original Proposed Actions.

CONCLUSIONS OF LAW

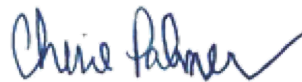
1. The Department completed all tasks required to create a water district or modify an existing water district. The Department sent notice to each affected water user in the districts describing the Proposed Actions, providing the time and place of a hearing and establishing a time period for submission of written comments.
2. The Department should create WD129 to properly administer ground water rights within the boundary depicted in Attachment A, to facilitate the measurement and reporting of ground water diversions, and to administer water rights consistent with Idaho law.
3. The Department should ensure all Basin 29 ground water rights, not just irrigation water rights, within WD13T's boundary are administered properly by WD13T, except for certain domestic and stockwater rights.

ORDER

IT IS HEREBY ORDERED that:

1. WD129 is created to include all ground water rights in a portion of Basin 29, as shown in Attachment A, except for the following:
 - a. Ground water rights for domestic and stockwater purposes, as defined by Idaho Code §§ 42-111 and 42-1401A(11); and
 - b. Ground water rights administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement.
2. The holders of ground water rights within WD129 shall meet annually to elect a watermaster, adopt a budget, and otherwise operate in a manner consistent with the provisions of Chapter 6, Title 42, Idaho Code. WD129 will hold its first annual meeting at a date, time, and place to be announced by the Director.
3. WD13T is modified to include all Basin 29 ground water rights within its existing boundary, as shown in Attachment A, except for ground water rights for domestic and stockwater purposes, as defined by Idaho Code §§ 42-111 and 42-1401A(11).
4. The Director shall issue separate orders requiring the installation of measuring devices and controlling works for ground water right diversions within WD129 and WD13T.

DATED this 1st day of May 2024.



Cherie Palmer
Hearing Officer

ATTACHMENT A

