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**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)	Subcase No. 92-00021
)	BRIEF IN SUPPORT OF MOTION FOR
Case No. 39576)	ORDER OF INTERIM ADMINISTRATION
)	
_____)	

DESCRIPTIVE SUMMARY

This document is the State of Idaho's brief in support of its Motion for Order of Interim Administration, which seeks authorization for distribution of water rights pursuant to chapter 6, title 42, Idaho Code, in all or parts of Basins 35, 36, 41 and 43 in accordance with the most current Director's Report for Basins 35, 36, 41 and 43,¹ or in accordance with partial decrees that have superseded the Director's Reports.

¹ The Director's Report for Basin 35 was filed with the SRBA district court in three parts: Part I was filed on June 6, 1998, Part II on September 15, 1998, and Part III on January 29, 1999. The Director's Report for Basin 36 was filed on November 2, 1992. The Director's Report for Basin 41 was filed on November 2, 1999, and the Director's Report for Basin 43 was filed on September 28, 2001.

BRIEF

I. INTERIM ADMINISTRATION OF WATER RIGHTS IN PORTIONS OF THE SNAKE PLAIN AQUIFER IS REASONABLY NECESSARY TO PROTECT SENIOR WATER RIGHTS.

A. Introduction

On August 3, 2001, the Director established the American Falls Ground Water Management Area and the Thousand Springs Ground Water Management Area, pursuant to Idaho Code § 42-233b, due in part to the drought conditions being experienced across the Snake River Plain. After the Director stated his intent to curtail diversions under those water rights for ground water within the Ground Water Management Areas causing the significant depletions to hydraulically connected surface water sources, affected ground water right holders entered into written stipulated agreements with certain senior priority surface water right holders. The senior surface right holders agreed not to exercise their senior priorities against the junior ground water right holders in exchange for commitments by the ground water right holders to provide replacement water during the term of the stipulated agreements equal to what would have resulted from curtailment of ground water diversions. In addition, the signatories to these agreements agreed not to oppose a motion by the State seeking an order from the SRBA District Court permitting interim administration of water rights within portions of the Eastern Snake Plain Aquifer (ESPA) in accordance with the provisions of Idaho Code § 42-1417.² The purpose

² The stipulated agreements recognize that interim administration will extend to all or portions of Basins 25, 27, 29, 35, 36, 37, 41, 43 and 45. Because Director's Reports have not been filed with the SRBA District Court for Basins 25, 27, 29, 37 and 45, the State of Idaho is limiting its current motion for interim administration to Basins 35, 36, 41 and 43. As Director's Reports are filed for Basins 25, 27, 29, 37 and 45, the State of Idaho will file motions for interim administration for water rights within those basins, as appropriate.

While the stipulated agreements are for a two-year period, the parties understand that the water districts to be formed are being established on a permanent basis and will be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by state law.

for seeking interim administration is to permit immediate administration of water rights³ in the affected areas pursuant to chapter 6, title 42, Idaho Code, and to enable the Director and participating water right holders to take further steps toward long-term administration of the resource.

B. There Is An Insufficient Water Supply Available to Satisfy Senior Surface Water Rights Supplied By Springs In The American Falls and Thousand Springs Reaches of the Snake River.

The ESPA underlies much of the Eastern Snake River Plain. Natural discharge from the ESPA occurs primarily proximate to American Falls Reservoir, and through the Thousand Springs. The spring discharges have fluctuated significantly over time. The major factor in this fluctuation in spring discharges is irrigated agriculture.

Because of the hydrogeology of the ESPA, the impacts of changes in aquifer recharge and pumping are often not apparent in aquifer discharge and river flows for periods of years, or decades in some cases. This delayed and dispersed effect makes administration of the water rights from the hydraulically connected ground water and surface water sources extremely complex. Resolving this legal relationship was one of the main reasons for commencement of the SRBA. "In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam." 1994 *Interim Legislative Committee on the Snake River Basin Adjudication* at 36. Upon completion of the SRBA, water districts will be created pursuant to chapter 6, title 42, Idaho Code, to, among other functions, protect senior water rights from injury caused by junior water rights diverting from hydraulically connected sources within the Snake River Basin in Idaho. The legislature

³ The State of Idaho's motion for interim administration does not seek administration of domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

recognized, however, that there might be a need for earlier interim administration of water rights during the pendency of the general adjudication and, therefore, authorized the SRBA district court to "permit" the Director to distribute "water pursuant to chapter 6, title 42, Idaho Code" in accordance with applicable partial decree(s) and/or with Director's Report(s) upon a finding that such administration is reasonably necessary to protect senior water rights. Idaho Code § 42-1417.

Recent events demonstrate the immediate need for water districts within portions of the ESPA in order to protect senior water rights. As a result of the drought over the past two years, the water supplies available for use under senior priority surface water rights relying on spring sources in the American Falls and Thousand Springs areas have diminished and are expected to continue to diminish in the coming year. As a result, the Director designated Ground Water Management Areas encompassing portions of the ESPA along the American Falls and Thousand Springs reaches of the Snake River.

Water flows from the American Falls and Thousand Springs reaches of the Snake River are insufficient, at times, to supply some senior surface water rights. See Attachment A, *Affidavit of Timothy J. Luke In Support of Motion for Order of interim Administration*, at 3. Simulations using the Department's calibrated computer model of the ESPA show that ground water depletions from the ESPA for irrigation and other consumptive purposes, which occur in relatively close proximity to the spring sources in the American Falls and Thousand Springs areas, cause significant reductions in spring flows tributary to the Snake River within six (6) months or less from the time the withdrawals occur. Thus, interim administration of water rights in all or portions of Basins 35, 36, 41 and 43 is reasonably necessary because the available water supply is currently not adequate to satisfy some senior priority water rights and is projected, in the future, to be insufficient, at times, to satisfy these water rights.

C. Creation Of Water Districts In All Or Parts Of Basins 35, 36, 41 And 43 Is Reasonably Necessary to Protect Senior Surface Water Rights.

“Administration of water rights” is the distribution of water to water users in accordance with the prior appropriation doctrine as set forth in Idaho law. Chapter 6, title 42, Idaho Code, sets forth the provisions of law that govern such administration in Idaho. Chapter 6 assigns to the Director the responsibility for supervising the distribution of water from all natural water sources. Chapter 6 provides that the Director will exercise this duty through the creation and function of water districts.

As Tim Luke, Section Manager for the Water Distribution Section for IDWR, states in his affidavit, the existing water districts in Basins 35, 36, 41 and 43 include only part of the rights from surface sources and none of the rights from ground water sources. *See Attachment A, Affidavit of Timothy J. Luke In Support of Motion for Order of interim Administration*, at 3. While IDWR has created water measurement districts in these areas, the measurement districts' authority is limited to measurement and reporting of diversions and does not include authority for the administration of water rights, or the enforcement of water right conditions. *Id.* at 3. The formation of water districts will allow water to be distributed in accordance with the prior appropriation doctrine as established by Idaho law.

The creation of water districts is an important step in the administration of water rights. Water districts provide mechanisms for administration, regulation, and enforcement of water rights. *Id.* They also provide a means for incorporating regular measurement and reporting of diversions, including ground water diversions. *Id.* In addition, water districts provide for local and timely response to general calls for water distribution and provide a system whereby a local watermaster can provide timely assistance and expertise to water users and respond to their complaints. *Id.* Furthermore, water districts provide for improved management of water rights

records, specifically maintaining current ownership information. *Id.* Creation of water districts provides an equitable funding mechanism for these services. *Id.* The water users will fund the costs of the watermasters as provided for by Idaho Code §§ 42-605A and 42-612.

Because of the shortage of water to satisfy senior water rights in Basins 35, 36, 41 and 43, when water rights from the springs are considered and because all of the water rights in these basins are partially decreed in the SRBA or recommended in Director's Reports, it is appropriate that water districts be established to administer the water rights within Basins 35, 36, 41 and 43. Establishment of water districts also will enable the Director and participating water right holders to take further steps toward long-term administration of the resource.

The watermaster duties in the new water districts will be to (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; (3) enforce the provisions of the stipulated agreements; and (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

II. THE DIRECTOR'S REPORTS AND PARTIAL DECREES PROVIDE AN ADEQUATE LIST OF WATER RIGHTS FOR PURPOSES OF INTERIM ADMINISTRATION.

Chapter 6 recognizes that distribution of water requires an accurate listing of water rights. Idaho Code § 42-604, providing for the creation of water districts, applies only to "streams or water supplies" whose priorities of appropriation have been adjudicated by courts having jurisdiction thereof. The Idaho Supreme Court has recognized the importance of an accurate list containing the description of the water rights to be administered. In *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), the Idaho Supreme Court stated: "Only by having a specific list reciting the names of water users, with their dates of priority, amounts, and points of diversion

can a system be administered.” *Id.* at 91, 558 P.2d at 1052, quoting *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973).

Before the court can issue the order of interim administration, the court must find that the individual partial decrees that supersede the Director’s Report for individual recommendations and the latest filing of Director’s Reports where partial decrees have not been issued are an adequate listing of the owners of and the elements of the water rights for the purposes of interim administration of a water source. Idaho Code § 42-1417 contemplates that the Director’s Reports constitute an adequate listing, since all the claims have been investigated by state officials and reported to the court. The statute assures procedural due process by requiring notice to the claimants and by allowing the court to modify the Director’s Report for purposes of interim administration. The statute also contemplates that the partial decrees provide an adequate listing of water rights for purposes of interim administration because these rights have not only been investigated by state officials, but have also withstood the scrutiny of court review. Thus, the Director’s Reports and the partial decrees meet the need for administration pending the completion of the adjudication. Upon entry of an order for interim administration, the creation of water districts and the distribution of water thereunder will occur in accordance with the normal administrative mechanism created by chapter 6, title 42, Idaho Code.

III. NOTICE IS BEING PROVIDED TO EACH CLAIMANT THAT WILL BE SUBJECT TO THE INTERIM ADMINISTRATION ORDER.

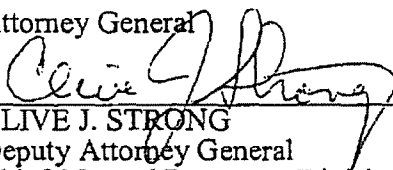
Idaho Code § 42-1417 requires that notice be given to “each claimant of water from the water system or portion thereof that could reasonably be determined to be adversely affected by entry of the order” The State of Idaho is mailing notice of this motion to all claimants who will be subject to interim administration if this motion is granted. Therefore, the notice provisions of Idaho Code § 42-1417 are satisfied.

CONCLUSION

Interim administration, as requested in the State's motion, is reasonably necessary to prevent injury to senior water rights in Basins 35, 36, 41 and 43 as required by Idaho Code § 42-1417. The Director's Reports for Basins 35, 36, 41 and 43 and the partial decrees that supersede the Director's recommendations are based on examination of the claims and the water system as required by Idaho Code § 42-1411. As such, the Director's Reports and the partial decrees constitute an adequate listing of water rights for purposes of administration of water rights pending entry of a final decree of the water rights. Therefore, the State requests that the Court enter an order permitting the administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basins 35, 36, 41 and 43 in accordance with the definition of water rights listed in the Director's Reports and, where superseded, in accordance with the partial decrees.

DATED this 19th day of November 2001.

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