



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

FEBRUARY 10, 2010

TO: WATER DISTRICT NO. 170 WATER RIGHT HOLDER

RE: FINAL ORDERS CREATING SUB-DISTRICT NO. 72-D AND MODIFYING 72-F

Dear Water Right Holder:

Enclosed please find copies of the Final Order Creating Sub-district No. 72-D and the Final Order Modifying Sub-district 72-F. The first order creates a sub-district within Water District No. 170 for the purpose of administering water rights in the Clayton area, and the second order modifies the Morgan Creek Sub-district to include water rights diverted from the Salmon River and tributaries downstream of McNabbs point. Also enclosed is an informational sheet that explains options for responding to final orders. Please note that any party subject to a final order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

A sub-district is an organizational structure within Water District No. 170 that provides for users within that sub-district to select and fund a local watermaster to administer water rights in the sub-district. When Water District No. 170 was created, existing water districts in the area were designated as sub-districts within the larger district. Additionally, IDWR created a sub-district in the Stanley area that became functional in 2009. Although water rights within a sub-district remain a part of Water District No. 170, the users within a sub-district control how the water district operates in their area. This is beneficial to the users as it provides a measure of local control, and it is beneficial to the water district as a whole in that it provides for consistent and effective administration of water rights through local expertise, while preserving the benefits of the larger water district.

A description of the two enclosed orders is included below.

Order Creating Sub-district 72-D – The Clayton Area Sub-district

Under this order, water rights administered by Water District No. 170 with points of diversion within the boundaries of the sub-district remain under the authority of the Water District No. 170 Watermaster, but a local watermaster selected by the users will perform the day-to-day activities. Water users in the sub-district will meet annually to set a budget, select a local watermaster, and adopt any resolutions necessary to govern operation of the sub-district. This is similar to the existing situation with Challis and Garden Creeks, and Morgan Creek; these areas were formerly water districts, but now operate as sub-districts within Water District No. 170.

Details of the sub-district operation, such as the compensation and specific duties of the local watermaster are to be formulated during one or more meetings of a steering committee in

early 2010 and will be subject to approval by the water users during the first annual meeting. The date of the first annual meeting is anticipated to be March 9, 2010. Notice of the meeting place, date, and time will be sent separately to holders of water rights within the Clayton Area Sub-district.

Order modifying Sub-district 72-F – The Morgan Creek Sub-district

This order modifies Sub-district 72-F to administer those ground water and surface water rights in Administrative Basin 72 administered by Water District No. 170 with points of diversion from the Main Salmon or tributaries below McNabbs Point. Previously, 72-F delivered water to water rights only from surface water sources within the Morgan Creek drainage and to certain water rights from the Salmon River to lands also irrigated by water from Morgan Creek. As a result of this order, the 72-F sub-district will deliver water to ground and surface water rights (except domestic and stockwater rights, as defined by Idaho Code § 42-111 and 42-1401A(11)) from sources tributary to the Salmon River below McNabbs Point and above the confluence of the Salmon River with the Pahsimeroi River. The effect of this order is that the 72-F watermaster will deliver water to an additional four (4) active diversions.

Please contact this office, the IDWR regional office in Twin Falls, or the Salmon Field Office in Salmon if you have any questions concerning this matter.

Sincerely



Gary Spackman
Interim Director, Idaho Department of Water
Resources

Enclosures

- *Final Order Modifying Sub-District No. 72-F*
- *Final Order Creating Sub-District No. 72-D*
- *Explanatory Information To Accompany A Final Order*

Cc: Bob Foster, Salmon Field Office
IDWR Southern Region

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

IN THE MATTER OF THE PROPOSED)	
CREATION OF A CLAYTON AREA)	FINAL ORDER
SUB-DISTRICT WITHIN)	CREATING
<u>WATER DISTRICT NO. 170</u>)	SUB-DISTRICT NO. 72-D

On April 6, 2006, the Director of the Idaho Department of Water Resources (“Department” or “Director”) issued *Amended Final Order Creating Water District No. 170*. A copy of the order is posted on the Department’s website:

<http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/UpperSalmon/UpperSalmon.htm>

The April 6, 2006 order established Water District No. 170 to include all surface water and ground water rights in the Idaho Department of Water Resources Administrative Basins 71 and 72, other than de minimis domestic and stockwater rights as defined by Idaho Code § 42-111 and 42-1401A(11). The order assimilated existing water districts into Water District No. 170, but provided that they would continue to function largely independently as sub-districts of Water District No. 170. Furthermore, the order contemplated additional sub-districts would be created within Water District No. 170 as needed.

On December 16, 2009, Department staff held a public meeting to discuss whether users in the Clayton area would benefit from organizing as a sub-district within Water District No. 170. The majority of those attending the meeting were water right holders in Basin 72. Those users expressed the opinion that the Director should move forward with formally creating a sub-district in the Clayton area.

On January 12, 2010, the Gary Spackman, Interim Director of the Idaho Department of Water Resources, conducted a public hearing in Clayton, Idaho regarding creation of a sub-district in the Clayton area. This Final Order creates a Clayton area sub-district within Water District No. 170.

FINDINGS OF FACT

1. On April 6, 2006, the Director of the Idaho Department of Water Resources issued *Amended Final Order Creating Water District No. 170*.
2. The order created Water District No. 170 to include all surface water and ground water rights in the Idaho Department of Water Resources Administrative Basins 71 and 72, other than de minimis domestic and stockwater rights as defined by Idaho Code § 42-111 and 42-1401A(11).

3. The order states that the watermaster for Water District No. 170 shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director: (1) Measure, record, and report the diversions under water rights; (2) Enforce the water rights in priority; (3) Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); and (4) Consult with and coordinate the work activities of deputy watermasters, including the elected and appointed watermasters for sub-districts within Water District No. 170.

4. Idaho Code § 42-605(3) provides that watermasters may be authorized to employ assistants as deemed necessary by the water users and that such assistants, upon appointment by the Director, shall be responsible for distribution of water within the water district.

5. Conclusion of Law no. 31(d) of the order creating Water District No. 170 authorizes the watermaster to appoint assistants or deputy watermasters as deemed necessary by the water users and that these assistants may be watermasters elected by sub-districts.

6. Water District No. 170 encompasses a large (greater than 2,400 square miles) geographic area and administers water rights from more than 100 different sources of water. The variety in climate, economics, and terrain within Water District No. 170 results in varying regional needs and local interests within Water District No. 170 that are best served through local control.

7. The proposed sub-district area is distinct from other areas of Basin 72 with respect to the water right owners and users (i.e. users and water right holders within the boundaries generally do not own or operate lands in other parts of Water District No. 170).

8. On December 22, 2009, the interim director signed a notice proposing to establish a sub-district within Water District No. 170 to include water rights in the Clayton area. The interim director sent the notice of the proposed action by regular U. S. Mail to each holder of a water right within the boundaries of Water District No. 170. The notice described the sub-district proposed to be established, the reasons therefore, and the time and place for a hearing to be held on January 12, 2010 concerning establishment of the proposed sub-district. The notice also provided a time period within which written comments on the proposed action would be accepted.

9. In addition, the interim director caused notice of the proposed action establishing the sub-district to be published once a week for two (2) weeks in the Challis Messenger, a newspaper having general circulation within the area of the proposed sub-district. The notice was published in that newspaper on December 24 and 31, 2009.

10. The notice mailed to water right holders proposed that the sub-district would include all water rights administered by Water District No. 170 with points of diversion located within the drainage basin of the East Fork Salmon River or from the Main Salmon or tributaries above the Challis Irrigation Company diversion upstream to and including the Warm Springs Creek drainage at Robinson Bar. This includes water rights from all surface and ground water sources within the proposed area, and for all beneficial uses, except water rights used solely for domestic and/or stock water purposes as defined by Idaho Code § 42-111 and 42-1401A(11).

11. The interim director's notice also described that the proposed sub-district will remain a part of Water District No. 170 but will operate similar to an independent water district and will fund one or more seasonal or full-time deputy watermasters who will serve as deputy watermasters under the watermaster for Water District No. 170.

12. The interim director's notice further described that the proposed sub-district would adopt its own budget for purposes of measuring, recording, reporting, and regulating diversions within the sub-district. The notice described that the sub-district would meet annually to adopt a budget and conduct other business necessary to operate the sub-district, such as adopting resolutions and selecting a deputy watermaster.

13. The interim director's notice described also that a sub-district that adequately measures, records, reports, and controls diversions should not be subject to future assessments to fund the Water District No. 170 watermaster for purposes of measuring, recording, reporting, and regulating surface water diversions within that sub-district. However, the sub-district may be subject to future assessments for costs associated with oversight of the sub-district. Oversight costs may include, but may not be limited to, technical assistance, enforcement assistance, training of deputy watermasters, collection and quality control review of diversion data, periodic field checks of diversions, periodic or miscellaneous field-calibration measurements of measuring devices, review of annual sub-district and budget reports, coordinating distribution of water to the Wild and Scenic River minimum instream flow water rights for the Salmon River as necessary, and general coordination with federal, state, and local agencies regarding water district operations, water use, and water right administration issues.

14. On January 12, 2010, at approximately 6:00 p.m. at the Clayton Community Center in Clayton, Idaho, the interim director conducted a hearing concerning the proposed creation of the sub-district. Approximately 10 people attended the hearing.

15. The interim director initiated the hearing with an introduction and a brief description of the purpose of the hearing. This was followed by an approximately 30-minute presentation by Nick Miller, an employee of IDWR and the Watermaster for Water District No. 170. Mr. Miller's presentation provided background information on Water District No. 170 and a general description of the proposed sub-district. During the presentation, Mr. Miller and the Director answered questions from the meeting attendees prior to taking testimony.

16. Persons attending the hearing were provided opportunity to make oral statements for the record. In addition, the interim director held the record open through January 25, 2010, for the submittal of written comments.

17. Seven (7) individuals made oral statements for the record at the hearing. One (1) person who did not testify at the hearing on January 12, 2010, submitted a written statement to the Department on or before the deadline of January 25, 2010.

18. The oral testimony centered on discussions of the upstream boundary of the proposed sub-district, but did not otherwise oppose creation of the proposed sub-district. The users did not support an upstream boundary that included diversions above Thompson Creek, citing an increase in costs associated with administering those diversions that they felt was not offset by the assessments that would be collected by those users.

19. On January 25, 2010, the US Fish and Wildlife Service submitted a written comment to the Department requesting that the water right associated with the Sawtooth Satellite Facility be excluded from the proposed sub-district and from Water District No. 170 because the service believes the water district and sub-district will not provide a benefit to them.

20. The Sawtooth Satellite Facility is a fish hatchery owned by the US Fish and Wildlife Service that is operated by the State of Idaho Department of Fish and Game. The facility is located on the East Fork Salmon River on land owned by the US Bureau of Land Management.

21. Water right number 72-7185 authorizes the diversion of 15 cubic feet per second of water from the East Fork Salmon River for fish propagation at the Sawtooth Satellite Facility and is held in the name of the United States of America Acting through USDI Bureau of Land Management.

CONCLUSIONS OF LAW

1. Based upon the order creating Water District No. 170, the statutory authorities provided by Idaho law, and the record in this proceeding, the Director should create a sub-district to administer those ground water and surface water rights administered by Water District No. 170 with points of diversion from the Main Salmon or tributaries above the Challis Irrigation Company diversion upstream to and including the Thompson Creek drainage, as well as those water rights within the drainage basin of the East Fork Salmon River, as shown on the map appended hereto as Attachment A. Creation of the sub-district will provide users of these water rights with local control and will facilitate consistent and efficient administration within Water District No. 170.

2. Given that: (1) water right 72-7185 is not a de minimis domestic or stockwater right and therefore is included in Water District No. 170 per *Amended Final Order Creating Water District No. 170*; (2) the US Fish and Wildlife Service did not file a petition for reconsideration following issuance of that order; (3) the holders of water right 72-7185 benefit from the measurement and regulation of upstream water rights, whether junior or senior to 72-7185; and (4) existing and future water rights that divert upstream of 72-7185 would be administered by the proposed sub-district watermaster; the Director concludes that water right 72-7185 is a part of Water District No. 170 and that the water right should be included in the proposed sub-district as well.

3. A Clayton area sub-district within Water District No. 170 that is under the authority of the Water District No. 170, but sets and collects its own budget and selects a local watermaster will best serve the needs of the users in that area, and will allow the Water District No. 170 to provide consistent and effective administration of water rights throughout Water District No. 170.

4. The interim director concludes that the sub-district should be formed on a permanent basis and be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

5. The interim director also concludes that the sub-district created by this order is an organizational feature within Water District No. 170 to support a local watermaster that will, on

behalf of, and under the supervision of the Water District No. 170 Watermaster, perform the following duties within the sub-district:

- a. Administer and enforce water rights in priority;
- b. Measure and report the diversions under water rights;
- c. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.

6. The interim director further concludes the following with respect to the sub-district created by this order:

- a. The water users will hold an annual meeting each spring prior to the start of the irrigation season on May 1 to adopt a budget, set the local watermaster's compensation, select a local watermaster, and adopt resolutions as necessary to govern operation of the sub-district.
- b. The local watermaster, with approval from the Director, will be appointed as a deputy watermaster of Water District No. 170. The deputy watermaster shall work pursuant to instructions of the Water District No. 170 Watermaster.
- c. Water rights within the sub-district shall not be subject to assessments from Water District No. 170 unless the Director determines that the sub-district is not providing for adequate distribution of water and the watermaster of Water District No. 170 is required to directly expend time or resources to deliver, measure, report, and/or regulate water in the sub-district.
- d. Operational features of the sub-district will be formulated by a steering committee during meetings to be held in early 2010 and will be subject to approval by the users at the first annual meeting. The steering committee should be composed of water right holders within the sub-district and should consult with the Water District No. 170 Watermaster and IDWR representatives as operational features of the sub-district are developed.

ORDER

IT IS HEREBY ORDERED that:

1. The Clayton Area Sub-district, designated as Sub-district No. 72-D, is created to include all water rights administered by Water District No. 170 with points of diversion located within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference. This includes water rights from all surface and groundwater sources with points of diversion within the Thompson Creek drainage or downstream of the Thompson Creek Drainage and upstream of the Challis Irrigation Company diversion, as well as those water rights within the drainage basin of the East Fork Salmon River, and includes water rights for all beneficial uses, except water rights used solely for domestic and/or stock water purposes as defined by Idaho Code § 42-111 and 42-1401A(11).

2. The sub-district shall meet annually at a time and place to be determined and noticed by the Director for purposes of: (1) selecting a sub-district watermaster; (2) selecting an advisory committee, if desired; and (3) setting a budget and corresponding assessments to be collected for operating the sub-district. For 2010, water right holders within the sub-district shall meet in on or before the third Monday in March, 2010.

3. If the sub-district becomes inactive, water rights in the sub-district shall be administered directly by the watermaster of Water District No. 170 and the water users shall be responsible for their pro-rata share of the Water District No. 170 budget. While the sub-district is active, water rights within the sub-district shall not be subject to assessments from Water District No. 170 unless the Director determines that the sub-district is not providing for adequate distribution of water and the watermaster of Water District No. 170 is required to directly expend time or resources to deliver, measure, report, and/or regulate water in the sub-district.

4. The interim director also concludes that the sub-district created by this order is an organizational feature within Water District No. 170 to support a deputy watermaster that will, on behalf of, and under the supervision of the Water District No. 170 Watermaster, perform the following duties within the boundaries depicted on Attachment A:

- a. Administer and enforce water rights in priority;
- b. Measure and report the diversions under water rights;
- c. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director.

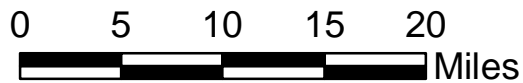
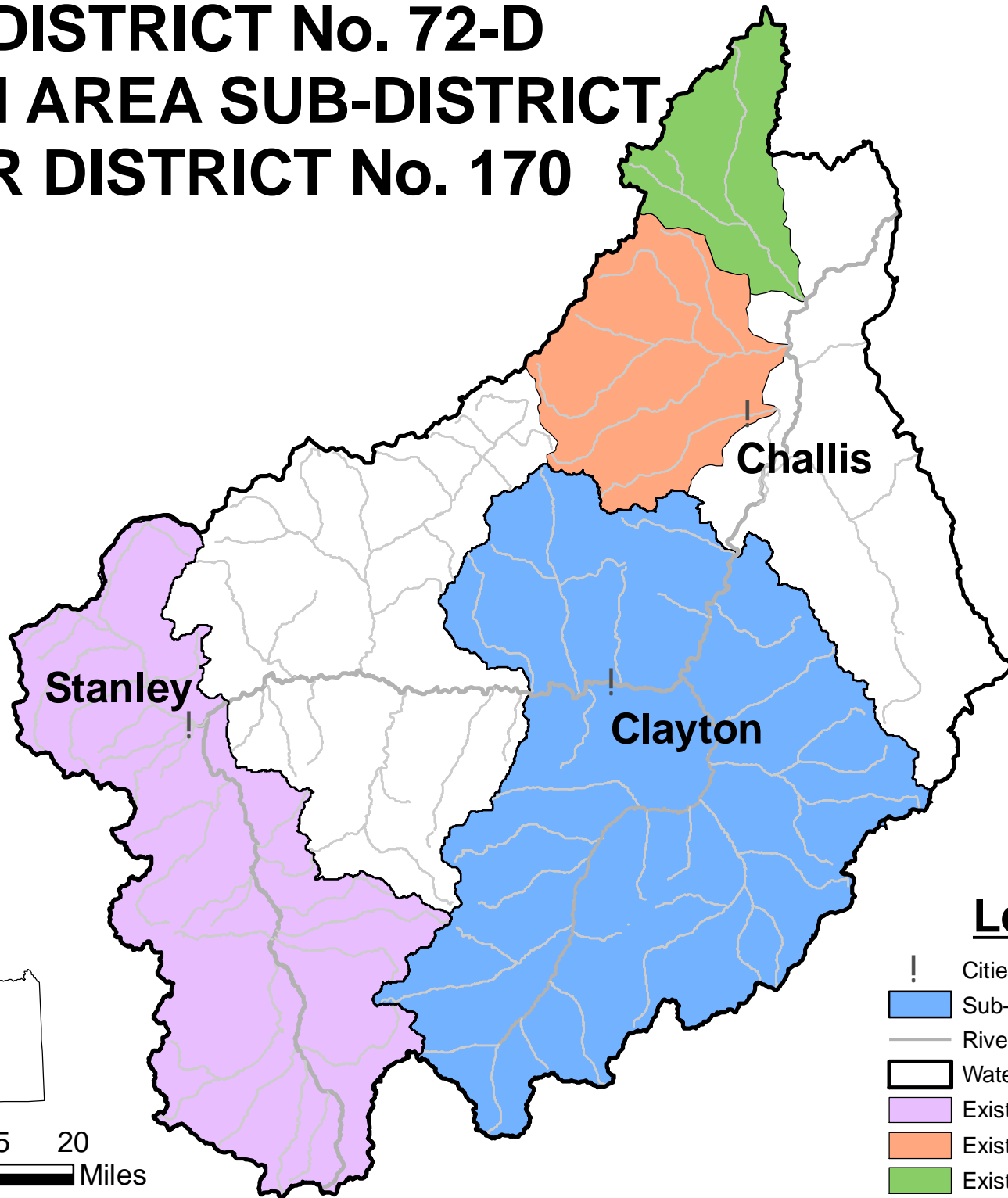
5. The request by US Fish and Wildlife Service to exclude water right 71-7185 from Water District No. 170 and the proposed sub-district, is denied.

DATED this 10th day of February, 2010



Gary Spackman
Interim Director

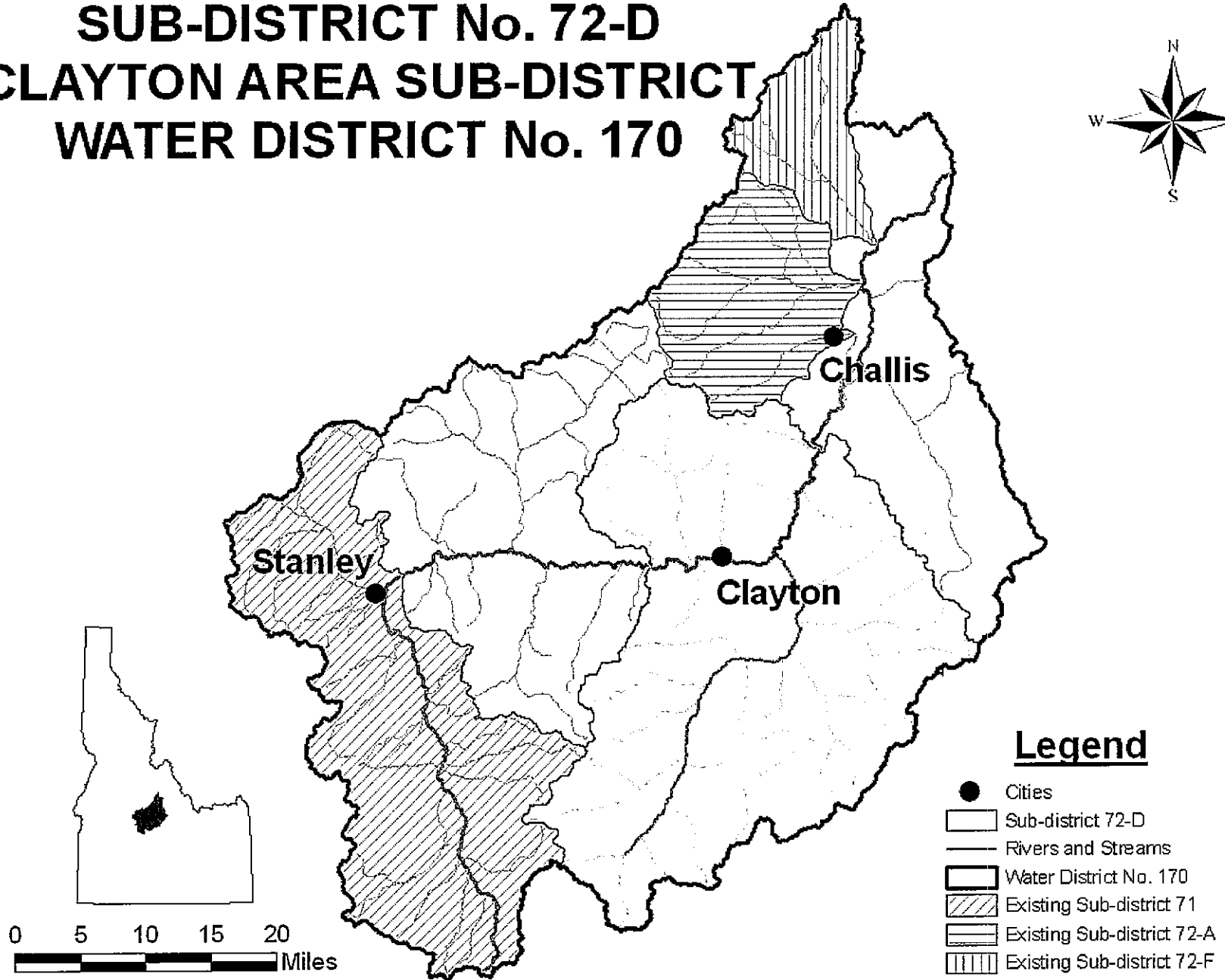
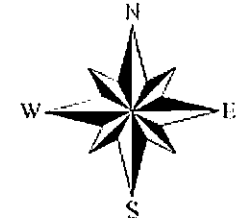
SUB-DISTRICT No. 72-D CLAYTON AREA SUB-DISTRICT WATER DISTRICT No. 170



Legend

- ! Cities
- Sub-district 72-D
- Rivers and Streams
- Water District No. 170
- Existing Sub-district 71
- Existing Sub-district 72-A
- Existing Sub-district 72-F

SUB-DISTRICT No. 72-D CLAYTON AREA SUB-DISTRICT WATER DISTRICT No. 170



**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:
 - (a) the petition for reconsideration is disposed of; or
 - (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the date of issuance (not service) of the final order, b) the date of issuance of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of February, 2010, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.



Christine Roberts
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