



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)	
MODIFICATION OF THE MORGAN CREEK)	FINAL ORDER
SUB-DISTRICT WITHIN)	MODIFYING
<u>WATER DISTRICT NO. 170</u>)	SUB-DISTRICT NO. 72-F

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). That 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 met with representatives of Sub-district 72-F to discuss modifying the sub-district to include additional water rights from the Salmon River and tributaries in the vicinity of Morgan Creek and downstream to the confluence with the Pahsimeroi River. Representatives of Morgan Creek had suggested to IDWR previously that the Department consider expanding the sub-district. Furthermore, the 72-F watermaster has been delivering water and assessing some of the users in the proposed expansion area in anticipation of an expansion.

On January 13, 2010 Gary Spackman, Interim Director of the Idaho Department of Water Resources conducted a public hearing in Challis, Idaho regarding the proposed modification of Sub-district 72-F. This Final Order revises the boundaries of Sub-district 72-F within Water District No. 170 and refines the description of the water rights administered by that sub-district.

FINDINGS OF FACT

1. In a January 27, 1971 order re-designating the water district boundaries and numbering system, the Director of the Idaho Department of Water Administration (the predecessor of the Idaho Department of Water Resources) described Water District 72-F as follows:

“Water District 72-F is composed of the entire Morgan Creek drainage basin to its junction with the Salmon River and is located in Custer County”

2. Water District 72-F had become inactive for a number of years before becoming active in 2005, at which time the 72-F watermaster began administering water rights from the Morgan Creek drainage, as well as certain water rights from the Salmon River near the mouth of Morgan Creek that are not within the boundaries of the district.

3. Since 2005, the annual budget for the 72-F district has included funds to deliver water to, and has been collected from the owners of, the Morgan Creek and tributary water rights, as well as the Salmon River water rights.

4. On May 23, 2005, the Department received a petition from Mr. James Hawkins dated May 19, 2005, on behalf of Water District No. 72-F. The petition from Mr. Hawkins sought inclusion of certain water rights and diversions from the Salmon River near its confluence with Morgan Creek. This petition was submitted to the Department following a meeting that the Department held with representatives of existing water districts in the Upper Salmon River Basin in February of 2005 regarding the potential establishment of the Upper Salmon Water District.

5. On April 6, 2006, the Director of the Idaho Department of Water Resources issued *Amended Final Order Creating Water District No. 170*.

6. 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).

7. The Morgan Creek drainage basin is within administrative basin no. 72. The April 6, 2006 order creating Water District 170 stated that existing water districts within water district 170 would become sub-districts of the larger upper Salmon River Water District. Water District 72-F became a sub-district of Water District 170 by action of that order.

8. The April 6, 2006 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.

9. On December 22, 2009 the interim director signed a notice proposing to modify Sub-district 72-F to include water rights in basin 72 downstream of the confluence of the Salmon River with Challis Creek. 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 proposed sub-district modifications, the reasons therefore, and the time and place for a hearing to be held on January 13, 2010 concerning the proposed sub-district modification. The notice also provided a time period within which written comments on the proposed action would be accepted.

10. In addition, the interim director caused notice of the proposed sub-district modification 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 action. The notice was published in that newspaper on December 24 and 31, 2009.

11. The notice mailed to water right holders proposed that the sub-district would be modified to include all water rights administered by Water District No. 170 with points of diversion located downstream of the confluence of the Salmon River with Challis Creek. The modified sub-district would include 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).

12. On January 13, 2010, at approximately 9:00 a.m. at the Custer County Courthouse in Challis, Idaho, the interim director conducted a hearing concerning the proposed modification of the sub-district. Approximately 8 people attended the hearing.

13. 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 10-minute presentation by Nick Miller, an employee of IDWR and the watermaster for Water District No. 170. Mr. Miller's presentation provided a general description of the proposed sub-district modification. During and following the presentation, Mr. Miller and the interim director answered questions from the meeting attendees prior to taking testimony.

14. 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 22, 2010, for the submittal of written comments.

15. Due to the small number of hearing attendees, oral testimony at the hearing took the form of an open discussion that was recorded for the record. Additionally, one (1) person submitted a written statement to the Department on or before the deadline of January 22, 2010.

16. The oral testimony did not oppose the modification of the sub-district and centered primarily on two issues; 1) whether two of the most downstream diversions should be included in 72-F, and 2) questions regarding administration/assessment of diversions that are not equipped with measuring devices.

17. The written comment submitted to the Department was a request from Clay A. Jones that water right 75-2169 be included in Sub-district 72-F. Water Right 75-2169 is diverted from Panther Creek in Administrative Basin 75 (outside the Water District No. 170 boundary) into Morgan Creek and is rediverted at several locations from Morgan Creek by the 72-F watermaster. Although the Sub-district 72-F watermaster delivers the water to the rediversions, the sub-district has not historically charged the owner of that water right for such delivery.

CONCLUSIONS OF LAW

1. Idaho Code Section 42-604 states, in pertinent part:

The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource. Copies of the order shall be sent by regular mail to all holders of rights in the waters affect by the order. The director's order is subject to judicial review as provided in section 42-1701A, Idaho Code.

Before entering an order creating, modifying, or abolishing a district, the director

shall, by regular mail, send notice of the proposed action to each water user in the district or proposed district. The notice shall describe the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held concerning the proposed action, and provide a time period within which written comment on the action will be accepted.

2. 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 modify 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, located in the Northwest $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section 35, Township 15 North, Range 19 East, 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.

3. Water right 75-2169 is diverted from a source not administered by Water District No. 170 watermaster, but is injected into, commingled with, and rediverted from a source that is administered by the Water District No. 170 watermaster. The water right is not a part of Water District No. 170, but the sub-district has and will incur expense in delivering the right at the points of rediversion from Morgan Creek and should be compensated for that expense.

4. The Director concludes that the sub-district as modified 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.

5. The Director further concludes the following with respect to the sub-district as modified 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.

ORDER

IT IS HEREBY ORDERED that:

1. Sub-district 72-F shall administer 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 ground water sources with points of diversion from the Main Salmon or tributaries in Basin 72 downstream of McNabbs Point, located in the Northwest $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section 35, Township 15 North, Range 19 East. This 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 sub-district 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:

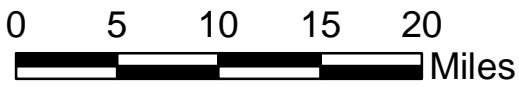
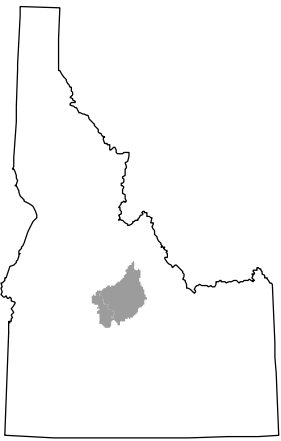
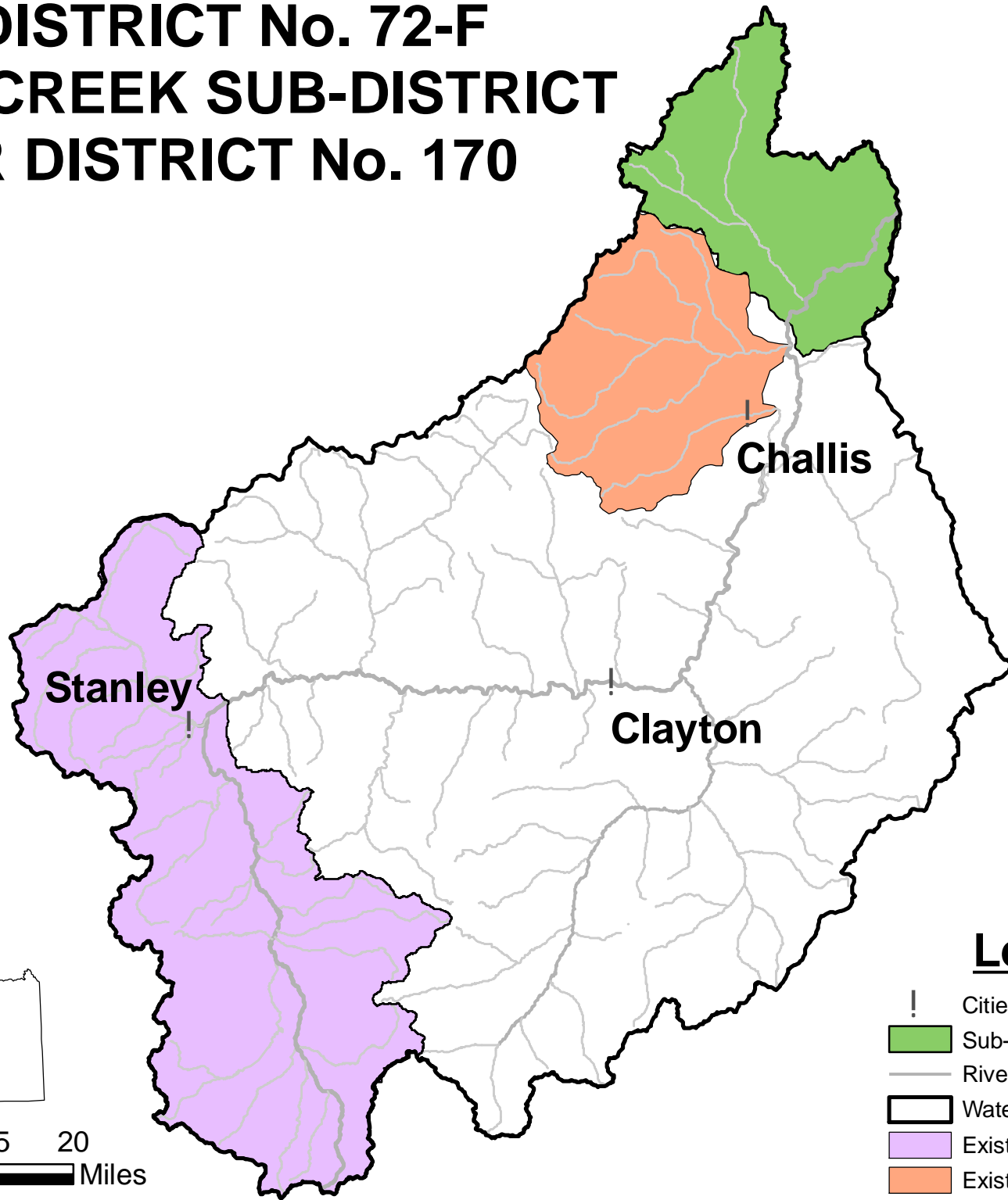
- a. Administer and enforce water rights in priority;
- b. Measure and report the diversions under water rights;
- c. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- d. Curtail out-of-priority diversions determined 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.

DATED this 10th day of February, 2010.



Gary Spackman
Interim Director

SUB-DISTRICT No. 72-F MORGAN CREEK SUB-DISTRICT WATER DISTRICT No. 170

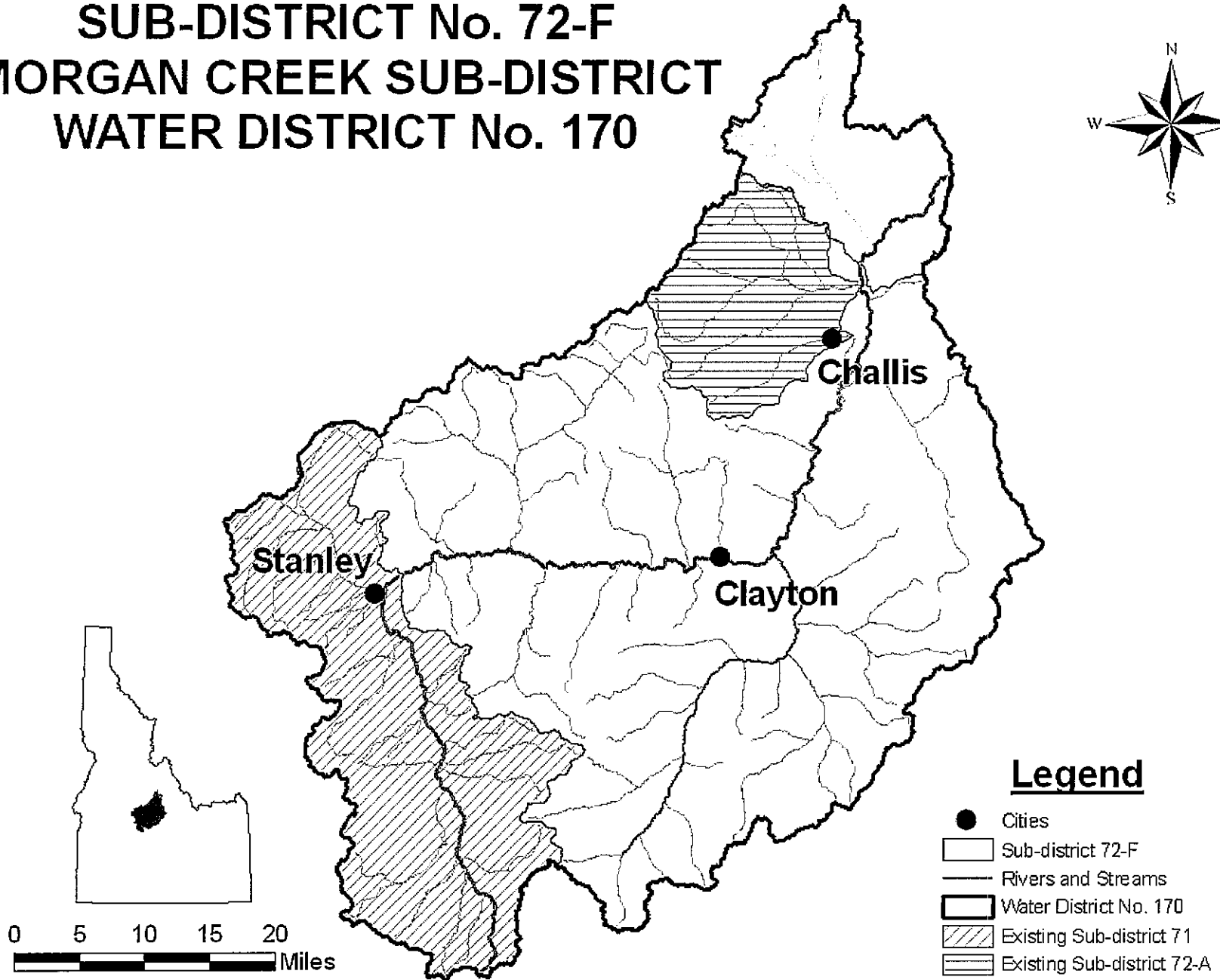
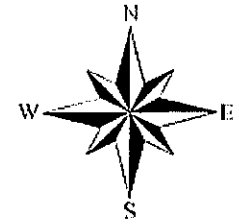


Legend

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

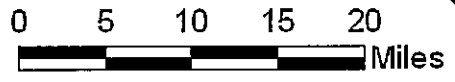
ATTACHMENT A

**SUB-DISTRICT No. 72-F
MORGAN CREEK SUB-DISTRICT
WATER DISTRICT No. 170**



Legend

- Cities
- Sub-district 72-F
- Rivers and Streams
- ▭ Water District No. 170
- ▨ Existing Sub-district 71
- ▧ Existing Sub-district 72-A



**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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