

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

Case No. 39576

)
) Subcases: 00-92021-73 & 00-92021-75
)
) ORDER SETTING HEARING ON
) STATE OF IDAHO'S MOTIONS FOR
) ORDER OF INTERIM
) ADMINISTRATION AND REQUESTS
) FOR EXPEDITED HEARING
)

On April 19, 2010, the State of Idaho filed *Motions for Order of Interim Administration and Requests for Expedited Hearing*, pursuant to I.C. § 42-1417, seeking administration of water rights located in all or portions of Administrative Basins 73 and 75, in accordance with the *Director's Reports* for those water rights or in accordance with the *Partial Decrees* that have superseded the Director's Reports.¹ A *Request for Expedited Hearing*, pursuant to AO1 6f(2), for each basin was also included with the *Motions*.

Because of the unusually large number of parties requiring service of these *Motions*, and in an effort accomplish service in a single-round by including a copy of this *Order* with the service of the *Motions*, the State of Idaho filed these *Motions* with the Court prior to serving copies on other parties. This practice is customarily used in the SRBA with respect to *Motions for Interim Administration*. The Court, in exercising its discretion, finds this to be a reasonable manner of proceeding provided compliance with the service requirements set forth below. I.R.C.P. 5(d)(1).

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

¹ The State of Idaho's *Motions* exclude small domestic and stockwater rights.

1) **Service of the *Motions* and this *Order* by the State of Idaho:** In serving copies of the *Motions for Order of Interim Administration and Requests for Expedited Hearing*, and any supporting briefing and affidavits on all affected parties, the State of Idaho shall forthwith comply with service requirements of I.C. § 42-1417(2)(b)(service requirements for interim administration) and *AOI* 6f(2)(expedited hearings); and file a certificate of service of the same with the Court. **A copy of this *Order* shall be served with the copies of the *Motions*.**

2) **Hearing on *Requests for Expedited Hearing*:** The *Requests for Expedited Hearing* shall be heard on **Tuesday, May 18, 2010, at 2:00 p.m. at the SRBA District Court, 253 – 3rd Avenue North, Twin Falls, Idaho.** Parties may participate by telephone by dialing the number **1-215-446-0193** and when prompted entering code **406128, followed by the # sign.** Any party objecting to the *Motion for Order of Interim Administration* proceeding on an expedited basis will have the opportunity to state objections and present argument at said hearing.

3) **Hearing on *Motions for Order of Interim Administration*:** The *Motions for Order of Interim Administration* shall be heard on **Tuesday, May 18, 2010, at 2:00 p.m., with telephone participation as outlined above.** In the event objections are filed to hearing the *Motions* on an expedited basis and the Court grants the relief at the hearing, then hearing on the *Motions for Interim Administration* will be according to docket sheet notice and will be heard on Tuesday, July 20, 2010, at 3:00 p.m., with telephone participation as outlined above.

4) **Objections and/or Briefing in Opposition:** Any party seeking to file an objection to the State of Idaho's *Requests for Expedited Hearing* and/or *Motions for Order of Interim Administration* or lodge any briefing in opposition shall file/lodge the same with the Court no later than 5:00 p.m., on May 14, 2010. Copies shall be served on the State of Idaho, the Idaho Department of Water Resources, and the United States Department of Justice. See *AOI* § 6e(2)(a)-(c). In accordance with I.R.C.P. 5(c), which establishes alternative service requirements in actions involving large numbers of defendants, service of copies on other parties will not be required at this time, as the State of Idaho's representation in responding at the hearing to any pre-filed objections will be deemed sufficient to represent the interests of other parties also supporting the State of

Idaho's *Motions*. Following the hearing on the merits, if deemed necessary, the Court will determine whether to allow any post-hearing or responses by participating parties.

5) **Subcase number designation for *Motions*:** For purposes of identifying documents in the above-captioned matter, documents shall be filed/lodged under the subcase number designations of **00-92021-73** and **00-92021-75** respectively.

DATED: April 20, 2010.



ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

ORIGINAL

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
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Chief, Natural Resources Division
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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. 92-00021-75
)	
)	
Case No. 39576	)	MOTION FOR ORDER OF
	)	INTERIM ADMINISTRATION OF WATER
	)	RIGHTS IN BASIN 75 AND REQUEST FOR
	)	EXPEDITED HEARING
)	

The State of Idaho moves this Court for an order of interim administration of water rights¹ in Snake River Basin Adjudication for Basin 75, pursuant to Idaho Code § 42-1417 and to paragraph 2(b)(1) of the *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees*, Consolidated Subcase No. 75-13316 Wild & Scenic Rivers Act Claims, in accordance with the Director's Reports for Snake River Basin Adjudication Basin 75 filed with

¹ This motion does not seek authorization for interim administration of domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

the Court and partial decrees that supersede the Director's Reports. The grounds for this motion are as follows:

1. Idaho Code § 42-1417 provides that the district court may, by order, permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, through water districts in accordance with the Director's Report and the partial decrees for water rights acquired under state law or established under federal law. Idaho Code § 42-1417 provides that the district court may enter the order after notice and hearing, if the district court determines that interim administration of water rights is reasonably necessary to protect senior water rights.
2. Interim administration of water rights in Basin 75 is reasonably necessary because an efficient means of administering water rights from ground water sources and some surface water sources in this basin does not exist. The establishment or enlargement of water districts for this basin will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
3. In accordance with Idaho Code § 42-1417(2)(b), notice of this motion is being provided to all affected claimants in Basin 75 by mailed notice.

THEREFORE, the State respectfully moves this Court for an order authorizing interim administration of water rights in Basin 75 in accordance with the Director's Report for this Basin and the partial decrees that supersede the Director's Reports. The *Affidavit Of Timothy J. Luke In Support Of Motion For Order Of Interim Administration* and a brief in support of this motion are submitted herewith. The State respectfully requests an expedited hearing on this motion.

///

///

RESPECTFULLY SUBMITTED this 19th day of April, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division


SHASTA KILMINSTER-HADLEY

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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. 92-00021-75
	)	BRIEF IN SUPPORT OF MOTION FOR
Case No. 39576	)	ORDER OF INTERIM ADMINISTRATION
	)	FOR WATER RIGHTS IN BASIN 75
_____)	

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 administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basin 75 in accordance with the most current Director's Report,¹ or in accordance with partial decrees that have superseded the Director's Reports.

¹ The Director's Report for Basin 75 was filed with the SRBA district court on January 11, 2007.

BRIEF

I. INTERIM ADMINISTRATION OF WATER RIGHTS IS REASONABLY NECESSARY TO PROTECT SENIOR WATER RIGHTS.

A. Introduction

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. The primary statutory mechanism for distribution of water in accordance with the prior appropriation doctrine in Idaho is through creation of a water district and the office of watermaster within that district under the supervision of the Director (hereinafter “Director”) of the Idaho Department of Water Resources (hereinafter “IDWR”). Idaho Code § 42-602 *et seq.*

The Director has the authority to create a water district upon entry of a court decree that determines the water rights within the geographic boundaries of the proposed water district, Idaho Code § 42-604, or upon entry of an order from the district court that authorizes the use of a Director’s Report for purposes of interim administration. Idaho Code § 42-1417. Under Idaho Code § 42-1417, the SRBA district court may order interim administration in accordance with the Director’s Report upon a determination that administration is reasonably necessary to protect senior water rights. As demonstrated below, the purpose for seeking interim administration is to provide a legal mechanism for the Director to administer both surface and ground water rights pursuant to chapter 6, title 42, Idaho Code,

B. Interim Administration is Reasonably Necessary for Efficient Administration of Water Rights.

Interim administration of water rights in Basin 75 is reasonably necessary because an efficient means of administering water rights from ground water sources in this basin does not exist. The establishment of water districts for this basin will provide the watermasters with the

ability to protect senior water rights through administration of water rights in accordance with the prior appropriation doctrine as established by Idaho law. In order to fully and adequately deliver water rights, the Director needs to have all ground water rights and surface water rights organized into water districts pursuant to chapter 6 of title 42, Idaho Code. The purpose of this motion is to combine ground water rights and surface water rights in Basin 75 into a water district or districts so that they may be administered conjunctively.²

C. Facilitating the Implementation of Conjunctive Administration is a Major Purpose of the SRBA.

Resolving the legal relationship between ground and surface waters was one of the main reasons for commencement of the SRBA. In the 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication the Committee stated the following goals for the SRBA:

All water rights within the Snake River Basin should be defined in accordance with Chapter 14, Title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation.

1994 *Interim Legislative Committee on the Snake River Basin Adjudication* at 32. The Committee went on to state, "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* at 36.

It was initially expected that upon completion of the SRBA, water districts would 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

² 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).

sources within the Snake River Basin in Idaho. The legislature recognized 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.

D. Creation or Enlargement of Water Districts is Reasonably Necessary to Protect Senior Water Rights.

As Tim Luke, Section Manager for the Water Distribution Section for IDWR, states in his affidavit, the existing water districts in Basin 75 include only rights from surface sources and few or none of the rights from ground water sources. *Affidavit of Timothy J. Luke*, at 3. Certain water rights and sources (primarily ground water) within the boundaries of existing water districts in Basin 75 have not been subject to administration or regulation by water districts *Id.* at 3. The formation or enlargement of water districts will allow water to be distributed in accordance with the prior appropriation doctrine as established by Idaho law.

The creation or enlargement of water districts is an important step in the administration of water rights. Water districts provide mechanisms for administration, regulation, and enforcement of all water rights. *Id.* They also provide a means for incorporating regular measurement and reporting of diversions, including ground water diversions. *Id.* Water districts provide for local and timely response to general calls for water distribution and provide a system whereby a 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.* Finally, water districts will provide protection of senior water rights. *Id.*

Because all of the water rights in this basin are either recommended Director's Reports or superseded with the partial decrees in the SRBA, it is appropriate that water districts be established or enlarged to administer all the water rights within Basin 75. 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 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; and (3) curtail out-of-priority diversions determined by the Director to be causing injury to senior water.

E. Interim Administration is necessary for proper administration of the Wild & Scenic River Act Claims.

Paragraph 2(b)(1) of the *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees*, Consolidated Subcase No. 75-13316 Wild & Scenic Rivers Act Claims, provides that within the 6 months of filing of the Director's Report for administrative basin 75, the parties file a joint petition with the SRBA Court, pursuant to Idaho Code § 42-1417, for an order of interim administration of those basins, and IDWR will incorporate those basins into the Upper Salmon Water District. The SRBA Court approved this stipulation in its *Amended Order Approving Stipulation and Entry of Partial Decree* issued on November 17, 2004. Interim Administration is necessary to fulfill the terms of the stipulation and subsequent Order of the SRBA Court. The State of Idaho has contacted the parties to the Stipulation, and all parties are in concurrence with the *Motion for Order of Interim Administration of Water Rights in Basin 75* and the present brief in support of.

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, it 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 or enlargement 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 may 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 protect senior water rights in Basin 75 as required by Idaho Code § 42-1417. The Director’s Reports for this basin 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 Basin 75 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 April 2010.

LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

A handwritten signature in black ink, appearing to read 'SHASTA KILMINSTER-HADLEY', written over a horizontal line.

SHASTA KILMINSTER-HADLEY
Deputy Attorney General

ORIGINAL

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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. 92-00021-75
)	
Case No. 39576	)	AFFIDAVIT OF TIMOTHY J. LUKE
	)	IN SUPPORT OF MOTION FOR ORDER
	)	OF INTERIM ADMINISTRATION
_____)	

STATE OF IDAHO)
) ss.
County of Ada)

Timothy J. Luke, being first duly sworn upon oath deposes and states as follows:

1. My name is Timothy J. Luke. I am the Section Manager for the Water Distribution Section for the Idaho Department of Water Resources (IDWR). My work address is Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho 83720-0098. I reside in Boise, Idaho.
2. My education background includes a Bachelor of Arts degree in Geography from West Virginia University in 1982 and a Master of Science degree in Geography and Natural Resource Management from the University of Idaho in 1992. My education/training since college has included, but is not limited to, participation in seminars and courses

related to water management such as Ground Water and Surface Water Relationships, Hydraulics, Field Hydrogeology, Irrigation System Design and several water law and water management workshops.

3. I worked from September 1988 to August 1991 for IDWR as a Senior Water Rights Agent. My duties included, but were not limited to the review, analysis, recommendation and processing of water right transfers, and the review and processing of applications to reallocate water held in trust under the Swan Falls agreement.
4. From September 1991 to February 1992, I worked for IDWR as a Hydrologist-in-Training, in the Water Permits Section. My duties included, but were not limited to water district assistance, field inventory and measurement of diversions, and water right analysis.
5. I worked from March 1992 to February 1997 for IDWR as a Hydrologist in the Water Permits and Water Distribution Sections. My duties included, but were not limited to, assisting in the implementation of the water measurement program, field inventory and measurement of diversions, water district assistance, water right analysis, reduction and analysis of hydrologic data and preparation of reports, and investigation of water distribution complaints and water right disputes.
6. From March 1997 to the present, I have served as the Section Manager for the Water Distribution Section. My primary responsibilities are the implementation and management of the water measurement program, provide assistance to water districts, periodic training of watermasters, and assistance or resolution of water distribution/water right disputes.
7. I have personal knowledge of the water supply conditions and water rights in Basin 75 through my work with IDWR's Water Distribution Section.

8. Basin 75 is IDWR's designated administrative basin for the main Salmon River and tributaries from the confluence of the Salmon and Pahsimeroi Rivers downstream to the confluence of the Salmon and Middle Fork Salmon Rivers, excluding the Lemhi River and tributaries (Basin 74). Basin 75 is located within Lemhi County. There are several existing and active water districts in Basin 75 on streams tributary to the Salmon River which are responsible for the delivery of surface water rights. With the exception of these few water districts, most surface water rights in Basin 75 are not included within a water district. Ground water rights in Basin 75 are not included in any water district.

9. The general reasons for inclusion of water rights and water sources in a water district are:

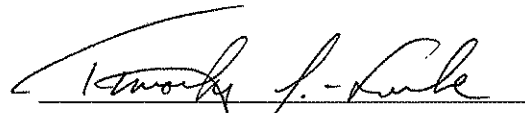
- Provide a mechanism for administration, regulation and enforcement of all water rights;
- Provide a means for regular measurement and reporting of diversions, including ground water diversions;
- Provide for improved management of water rights and keeping water rights current with respect to ownership and water use;
- Provide a system whereby local watermasters or deputy watermasters can provide for local and timely response to general calls for water distribution; and
- Water district administration and regulation can be accomplished by assessing water users directly through the districts.

10. The specific reasons for inclusion of additional water rights and water sources in water districts in Basin 75 are:

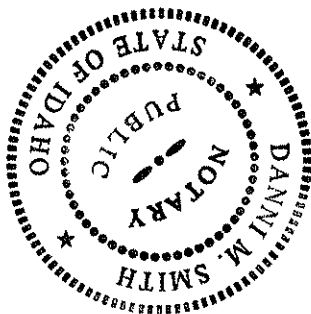
- Existing water districts in this basin are limited to surface water sources and do not include ground water sources.
- All of the water rights claimed in Basin 75 have been reported or partially decreed in the SRBA as required under I.C. § 42-1417.

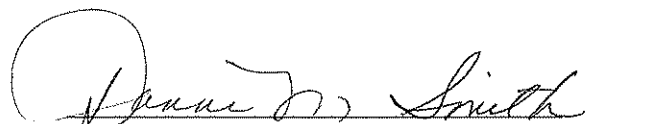
- Certain water rights and sources (primarily ground water) within the boundaries of existing water districts in Basin 75 have not been subject to administration or regulation by water districts.
 - Water districts will provide watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
 - Water districts will provide protection of senior water rights.
11. Interim administration from the SRBA District Court is necessary so that both IDWR and watermasters within any existing water districts and any new water districts have certainty with respect to delivery and administration of water rights that have been reported to the SRBA Court but not yet partially decreed by the Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


TIMOTHY J. LUKE

SUBSCRIBED AND SWORN to before me this 19th day of April, 2010.




Notary Public for Idaho
Residing at: Boise, Idaho
My commission expires: Dec 12, 2012

ORIGINAL

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
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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. 92-00021-73
)	
)	
Case No. 39576	)	MOTION FOR ORDER OF
	)	INTERIM ADMINISTRATION OF WATER
	)	RIGHTS IN BASIN 73 AND REQUEST FOR
	)	EXPEDITED HEARING
_____)	

The State of Idaho moves this Court for an order of interim administration of water rights¹ in Snake River Basin Adjudication for Basin 73, pursuant to Idaho Code § 42-1417, and to paragraph 2(b)(1) of the *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees*, Consolidated Subcase No. 75-13316 Wild & Scenic Rivers Act Claims, in accordance with the Director's Reports for Snake River Basin Adjudication Basin 73

¹ This motion does not seek authorization for interim administration of domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

filed with the Court and partial decrees that supersede the Director's Reports. The grounds for this motion are as follows:

1. Idaho Code § 42-1417 provides that the district court may, by order, permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, through water districts in accordance with the Director's Report and the partial decrees for water rights acquired under state law or established under federal law. Idaho Code § 42-1417 provides that the district court may enter the order after notice and hearing, if the district court determines that interim administration of water rights is reasonably necessary to protect senior water rights.
2. Interim administration of water rights in Basin 73 is reasonably necessary because an efficient means of administering water rights from ground water sources and some surface water sources in this basin does not exist. The establishment or enlargement of water districts for this basin will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
3. In accordance with Idaho Code § 42-1417(2)(b), notice of this motion is being provided to all affected claimants in Basin 73 by mailed notice.

THEREFORE, the State respectfully moves this Court for an order authorizing interim administration of water rights in Basin 73 in accordance with the Director's Report for this Basin and the partial decrees that supersede the Director's Reports. The *Affidavit Of Timothy J. Luke In Support Of Motion For Order Of Interim Administration* and a brief in support of this motion are submitted herewith. The State respectfully requests an expedited hearing on this motion.

RESPECTFULLY SUBMITTED this 19th day of April, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



SHASTA KILMINSTER-HADLEY
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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. 92-00021-73
	)	BRIEF IN SUPPORT OF MOTION FOR
Case No. 39576	)	ORDER OF INTERIM ADMINISTRATION
	)	FOR WATER RIGHTS IN BASIN 73
_____)	

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 administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basin 73 in accordance with the most current Director's Report,¹ or in accordance with partial decrees that have superseded the Director's Reports.

¹ The Director's Report for Basin 73 was filed with the SRBA district court on January 25, 2007.

BRIEF

I. INTERIM ADMINISTRATION OF WATER RIGHTS IS REASONABLY NECESSARY TO PROTECT SENIOR WATER RIGHTS.

A. Introduction

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. The primary statutory mechanism for distribution of water in accordance with the prior appropriation doctrine in Idaho is through creation of a water district and the office of watermaster within that district under the supervision of the Director (hereinafter "Director") of the Idaho Department of Water Resources (hereinafter "IDWR"). Idaho Code § 42-602 *et seq.*

The Director has the authority to create a water district upon entry of a court decree that determines the water rights within the geographic boundaries of the proposed water district, Idaho Code § 42-604, or upon entry of an order from the district court that authorizes the use of a Director's Report for purposes of interim administration. Idaho Code § 42-1417. Under Idaho Code § 42-1417, the SRBA district court may order interim administration in accordance with the Director's Report upon a determination that administration is reasonably necessary to protect senior water rights. As demonstrated below, the purpose for seeking interim administration is to provide a legal mechanism for the Director to administer both surface and ground water rights pursuant to chapter 6, title 42, Idaho Code,

B. Interim Administration is Reasonably Necessary for Efficient Administration of Water Rights.

Interim administration of water rights in Basin 73 is reasonably necessary because an efficient means of administering water rights from ground water sources in this basin does not exist. The establishment of water districts for this basin will provide the watermasters with the

ability to protect senior water rights through administration of water rights in accordance with the prior appropriation doctrine as established by Idaho law. In order to fully and adequately deliver water rights, the Director needs to have all ground water rights and surface water rights organized into water districts pursuant to chapter 6 of title 42, Idaho Code. The purpose of this motion is to combine ground water rights and surface water rights in Basin 73 into a water district or districts so that they may be administered conjunctively.²

C. Facilitating the Implementation of Conjunctive Administration is a Major Purpose of the SRBA.

Resolving the legal relationship between ground and surface waters was one of the main reasons for commencement of the SRBA. In the 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication the Committee stated the following goals for the SRBA:

All water rights within the Snake River Basin should be defined in accordance with Chapter 14, Title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation.

1994 *Interim Legislative Committee on the Snake River Basin Adjudication* at 32. The Committee went on to state, "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* at 36.

It was initially expected that upon completion of the SRBA, water districts would 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

² 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).

sources within the Snake River Basin in Idaho. The legislature recognized 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.

D. Creation or Enlargement of Water Districts is Reasonably Necessary to Protect Senior Water Rights.

As Tim Luke, Section Manager for the Water Distribution Section for IDWR, states in his affidavit, the existing water districts in Basin 73 include only rights from surface sources and few or none of the rights from ground water sources. *Affidavit of Timothy J. Luke*, at 3. Certain water rights and sources (primarily ground water) within the boundaries of existing water districts in Basin 73 have not been subject to administration or regulation by water districts *Id.* at 3. The formation or enlargement of water districts will allow water to be distributed in accordance with the prior appropriation doctrine as established by Idaho law.

The creation or enlargement of water districts is an important step in the administration of water rights. Water districts provide mechanisms for administration, regulation, and enforcement of all water rights. *Id.* They also provide a means for incorporating regular measurement and reporting of diversions, including ground water diversions. *Id.* Water districts provide for local and timely response to general calls for water distribution and provide a system whereby a 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.* Finally, water districts will provide protection of senior water rights. *Id.*

Because all of the water rights in this basin are either recommended Director's Reports or superseded with the partial decrees in the SRBA, it is appropriate that water districts be established or enlarged to administer all the water rights within Basin 73. 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 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; and (3) curtail out-of-priority diversions determined by the Director to be causing injury to senior water.

E. Interim Administration is necessary for proper administration of the Wild & Scenic River Act Claims.

Paragraph 2(b)(1) of the *Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees*, Consolidated Subcase No. 75-13316 Wild & Scenic Rivers Act Claims, provides that within the 6 months of filing of the Director's Report for administrative basin 73, the parties file a joint petition with the SRBA Court, pursuant to Idaho Code § 42-1417, for an order of interim administration of those basins, and IDWR will incorporate those basins into the Upper Salmon Water District. The SRBA Court approved this stipulation in its *Amended Order Approving Stipulation and Entry of Partial Decree* issued on November 17, 2004. Interim Administration is necessary to fulfill the terms of the stipulation and subsequent Order of the SRBA Court. The State of Idaho has contacted the parties to the Stipulation, and all parties are in concurrence with the *Motion for Order of Interim Administration of Water Rights in Basin 73* and the present brief in support of.

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, it 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 or enlargement 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 may 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 protect senior water rights in Basin 73 as required by Idaho Code § 42-1417. The Director’s Reports for this basin 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 Basin 73 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 April 2010.

LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



SHASTA KILMINSTER-HADLEY
Deputy Attorney General

related to water management such as Ground Water and Surface Water Relationships, Hydraulics, Field Hydrogeology, Irrigation System Design and several water law and water management workshops.

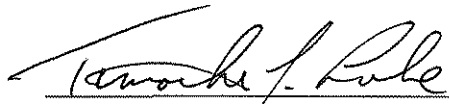
3. I worked from September 1988 to August 1991 for IDWR as a Senior Water Rights Agent. My duties included, but were not limited to the review, analysis, recommendation and processing of water right transfers, and the review and processing of applications to reallocate water held in trust under the Swan Falls agreement.
4. From September 1991 to February 1992, I worked for IDWR as a Hydrologist-in-Training, in the Water Permits Section. My duties included, but were not limited to water district assistance, field inventory and measurement of diversions, and water right analysis.
5. I worked from March 1992 to February 1997 for IDWR as a Hydrologist in the Water Permits and Water Distribution Sections. My duties included, but were not limited to, assisting in the implementation of the water measurement program, field inventory and measurement of diversions, water district assistance, water right analysis, reduction and analysis of hydrologic data and preparation of reports, and investigation of water distribution complaints and water right disputes.
6. From March 1997 to the present, I have served as the Section Manager for the Water Distribution Section. My primary responsibilities are the implementation and management of the water measurement program, provide assistance to water districts, periodic training of watermasters, and assistance or resolution of water distribution/water right disputes.
7. I have personal knowledge of the water supply conditions and water rights in Basin 73 through my work with IDWR's Water Distribution Section.

8. Basin 73 is IDWR's designated administrative basin for the Pahsimeroi River and tributaries. Basin 73 is located within Custer and Lemhi Counties. Water District No. 73 is an existing water district in Basin 73 that is responsible for the delivery of surface water rights in the Pahsimeroi River drainage. The water district has been active for many years and a watermaster is elected annually, but the district has not traditionally administered surface water rights in the lower end of the basin near its confluence with the Salmon River. Ground water rights in Basin 73 are not included in Water District 73 or any other water district.
9. The general reasons for inclusion of water rights and water sources in a water district are:
- Provide a mechanism for administration, regulation and enforcement of all water rights;
 - Provide a means for regular measurement and reporting of diversions, including ground water diversions;
 - Provide for improved management of water rights and keeping water rights current with respect to ownership and water use;
 - Provide a system whereby local watermasters or deputy watermasters can provide for local and timely response to general calls for water distribution; and
 - Water district administration and regulation can be accomplished by assessing water users directly through the districts.
10. The specific reasons for inclusion of additional water rights and water sources in water districts in Basin 73 are:
- The only existing water district in this basin, Water District 73, is limited to surface water sources and does not include ground water sources.
 - All of the water rights claimed in Basin 73 have been reported or partially decreed in the Snake River Basin Adjudication (SRBA) as required under I.C. § 42-1417.
 - Certain water rights and sources (primarily ground water) within the boundaries of Water District 73 and Basin 73 have not been subject to administration or regulation by the water district.

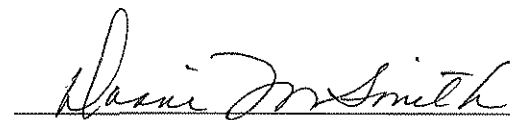
- Water districts will provide watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
- Water districts will provide protection of senior water rights.

11. Interim administration from the SRBA District Court is necessary so that both IDWR and the Water District 73 watermaster has certainty with respect to delivery and administration of water rights that have been reported to the SRBA Court but not yet partially decreed by the Court.

FURTHER YOUR AFFIANT SAYETH NAUGHT.


TIMOTHY J. LUKE

SUBSCRIBED AND SWORN to before me this 19th day of April, 2010.


Notary Public for Idaho
Residing at: Boise, Idaho
My commission expires: Dec 12, 2012

