BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS FOR DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN UPSTREAM FROM MILNER DAM	)	MORATORIUM ORDER

The Director of the Department of Water Resources, having responsibility for administration of the appropriation of the water of the State of Idaho, the protection of rights to the use of water within the state, the protection of the public interest in the waters of the state and the conservation of the water resources of the state, enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. The Snake River Basin in Idaho has experienced six consecutive years of drought, and a drought emergency exists within the Snake River Basin.

2. The Director entered on May 15, 1992 a Moratorium Order regarding applications for permits for diversion and use of surface and ground water within the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser in response to the drought emergency.

3. The term "nontrust water area" means that area depicted as such on Exhibit "A" attached hereto and by this reference incorporated herein.

4. The Director entered on January 6, 1993 an Order Amending Moratorium Order Dated May 15, 1992 to exclude the non-trust water area from its geographic scope. This present Moratorium Order is entered to replace the May 15, 1992 Moratorium Order for the non-trust water area.

5. During the 1992 irrigation season, flows in many streams, springs and rivers in the non-trust water area were at or near record low levels.

6. Ground water aquifers have been stressed by the reduction in natural recharge, from reduced recharge due to changes in diversion and use of surface waters throughout the basin and by the increased volume of pumping. As a consequence, ground water levels have fallen. The lowered water levels in the aquifers of the non-trust water area have resulted in numerous wells, often used for domestic and municipal water supply

purposes, becoming unusable. Lowered ground water levels also reduce spring discharge needed to maintain stream and river flows.

7. In order to supplement or replace inadequate surface supplies, many waterusers have been prompted to pursue ground water as an alternate source of supply. Many more users are likely to seek to do likewise in response to continuing drought and competition for water supplies.

8. The Twin Falls Canal Company and the North Side Canal Company filed a COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION in *Twin Falls Canal Company and the North Side Canal Company v. The Idaho Department of Water Resources, an agency of the State of Idaho* on July 24, 1992. This Complaint, in part, requested:

> That the District Court issue a preliminary injunction pursuant to Idaho Rule of Civil Procedure 65, ordering the IDWR, its officers, agents, employees, successors, attorneys, and all those in active concert or participation with IDWR to refrain immediately, pending final hearing in determination of this action, from taking any action that would impact the natural flow or storage rights of the TFCC [Twin Falls Canal Company] and NSCC [North Side Canal Company], including, but not limited to, the processing, approval or issuance of or action upon presently pending and new permit applications for ground or surface waters for other than domestic, commercial, municipal or industrial use ("DCMI") in the non-trust water area of the Snake Plain Aquifer . . . ."

Complaint at 11.

9. The position of the IDWR is that it can approve additional permits within the non-trust water area without injury to the claimed water rights of TFCC and NSCC.

10. Both parties recognize that a substantial factual dispute exists and that additional technical studies are needed to resolve this dispute.

11. Both parties agree that a study period of up to five years would be sufficient to complete the necessary studies, if adequately funded.

12. The parties agree that the criteria set forth in paragraph 9 of the order sets a procedure for approval of water diversions which minimizes the potential injury to the water rights of TFCC and NSCC.

13. The IDWR held public information meetings on the proposed settlement agreement and draft moratoriums on December 21, 22, 1992 in Twin Falls, Pocatello, and Rexburg.

CONCLUSIONS OF LAW

1. The Director of the Department of Water Resources is responsible for administration of the appropriation and use of the water of the State of Idaho. Section 42-202, Idaho Code, reads, in pertinent part:

> For the purpose of regulating the use of the public waters and of establishing by direct means the priority right to such use, any person, association or corporation hereafter intending to acquire the right to the beneficial use of the waters of any natural streams, springs or seepage waters, lakes or ground water, or other public waters in the state of Idaho, shall, before commencing of the construction, enlargement or extension of the ditch, canal, well, or other distributing works, or performing any work in connection with said construction or proposed appropriation or the diversion of any waters into a natural channel, make an application to the department of water resources for a permit to make such appropriation.

2. Section 42-237a, Idaho Code, provides, in part, as follows:

> g. To supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters and in the exercise of this power he may by summary order, prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist the director of the department of water resources in the administration and enforcement of this act, and in making determinations upon which said orders shall be based, he may establish a ground water pumping level or levels in an area or areas having a common ground water supply as determined by him as hereinafter provided. Water in a well shall not be deemed available to fill a water right therein if withdrawal therefrom of the amount called for by such right would affect, contrary to the declared policy of this act, the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated rate of future natural recharge. However, the director may allow withdrawal at a rate exceeding the reasonably anticipated rate of future natural recharge if the

director finds it is in the public interest and if it satisfies the following criteria:

> 1. A program exists or likely will exist which will increase recharge or decrease withdrawals within a time period acceptable to the director to bring withdrawals into balance with recharge.
>
> 2. Holders of senior rights to use ground water will not be caused thereby to pump water from below the established reasonable pumping level or levels.
>
> In connection with his supervision and control of the exercise of ground water rights the director of the department of water resources shall also have the power to determine what areas of the state have a common ground water supply and whenever it is determined that any area has a ground water supply which affects the flow of water in any stream or streams in an organized water district, to incorporate such area in said water district . . . . The administration of water rights within water districts created or enlarged pursuant to this act shall be carried out in accordance with the provisions of title 42, Idaho Code, as the same have been or may hereafter be amended . . . .

3. The Director of the Department of Water Resources is responsible for supervision of water distribution in the state of Idaho. Section 42-602, Idaho Code, reads, in pertinent part:

> It shall be the duty of the department of water resources to have immediate direction and control of the distribution of water from all of the streams to the canals and ditches diverting therefrom. The department must execute the laws relative to the distribution of water in accordance with rights of prior appropriation.

4. Section 42-1805(7), Idaho Code, authorizes the Director of the Department of Water Resources as follows:

> After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

5. Rules 7,1 and 7,1,2,1 of the Department of Water Resources Rules and Regulations for Water Appropriation provide that a moratorium on processing of applications for permit shall be entered by issuance of an order of the Director of the Department of Water Resources. Notice of the order shall be sent

by certified mail to affected applicants by publishing a legal notice in newspapers of general circulation in the area.

6. A moratorium on issuance of permits to divert and use water from the Snake River Basin upstream from Milner Dam in the non-trust water area for new consumptive uses should be established to protect existing water rights and established minimum stream flows because of the need to conduct studies regarding the interrelationship between the Snake Plain Aquifer and the Snake River and because of the present drought emergency.

ORDER

IT IS, THEREFORE, HEREBY ORDERED THAT a moratorium is established on the processing and approval of presently-pending and new applications for permits to appropriate water from all surface and ground water sources in the non-trust water area. The following provisions apply to administration of the moratorium:

1. The moratorium shall be in effect on and after its entry and shall remain in effect until December 31, 1997.

2. The moratorium includes applications filed on all public water sources, including surface and ground water, located in the non-trust water area.

3. The moratorium applies to all applications proposing a consumptive use of water filed after the date of the order and to all applications filed prior to the entry of the order for which approval has not been given, except as herein provided.

4. The moratorium does not affect the authorization to continue development of any existing approved application (permit).

5. The moratorium does not apply to any application for domestic purposes as such term is defined in Section 42-111, Idaho Code. For the purposes of this exception, applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks will be considered a domestic use provided each unit satisfies the definition for the exception to the requirement to file an application for permit as described in said code section.

6. The moratorium does not apply to any application proposing a nonconsumptive use of water as that term is used in Section 42-605A, Idaho Code.

7. The moratorium does not apply to applications for drilling permits to replace or deepen existing wells having valid existing water rights, to applications for transfer of existing water rights, or to applications for amendments to permits.

8(a). The moratorium does not apply to applications to appropriate ground water as a supplemental water supply for irrigation or other consumptive beneficial use on lands which have an existing normally-full water supply from a surface water source. Approval of such applications, which also comply with Idaho Code Section 42-203, will be conditioned:

(1) To allow the use of the water only when and to the extent that the original sources are not available due to drought conditions;

(2) To allow the diversion of only the amount of ground water necessary for the customary use on the land, after the application of accepted conservation practices;

(3) To require, as the director determines necessary, monitoring of the effect of pumping of the new well or wells on nearby domestic wells, if any;

(4) To require mitigation or compensation as necessary for such affected domestic wells;

(5) To expire at the conclusion of the irrigation season for which such approval was given; and

(6). To not exceed the annual limitation contained in Paragraph 9(a).

(b) The provisions of paragraph 8(a) shall apply until the Director has issued an Order declaring an end to the drought emergency for the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser.

9. After the Director has issued an Order declaring an end to the drought emergency for the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser, the following criteria shall apply to approval of applications to appropriate ground water for any consumptive use, except for domestic uses, from the non-trust water area:

a. The amount annually authorized by approved applications for consumptive use will not exceed 10,000 acre feet in any one year. In the event that the annual amount approved for new consumptive use is less than 10,000 acre feet in any one year, the difference between the amount authorized for consumptive use and 10,000 acre feet shall not carry over into subsequent years so as to exceed the annual allotment authorized for consumptive use in any one calendar year.

b. The IDWR will submit an annual report to the TFCC and NSCC of the number of permits issued and amount of water authorized for diversion.

10. The moratorium does not change or affect the administration of any area that has been previously designated as a critical ground water area pursuant to Section 42-233a, Idaho

Code or a ground water management area pursuant to Section 42-233b, Idaho Code.

Dated this 6th day of January, 1993.

R. KEITH HIGGINSON
Director

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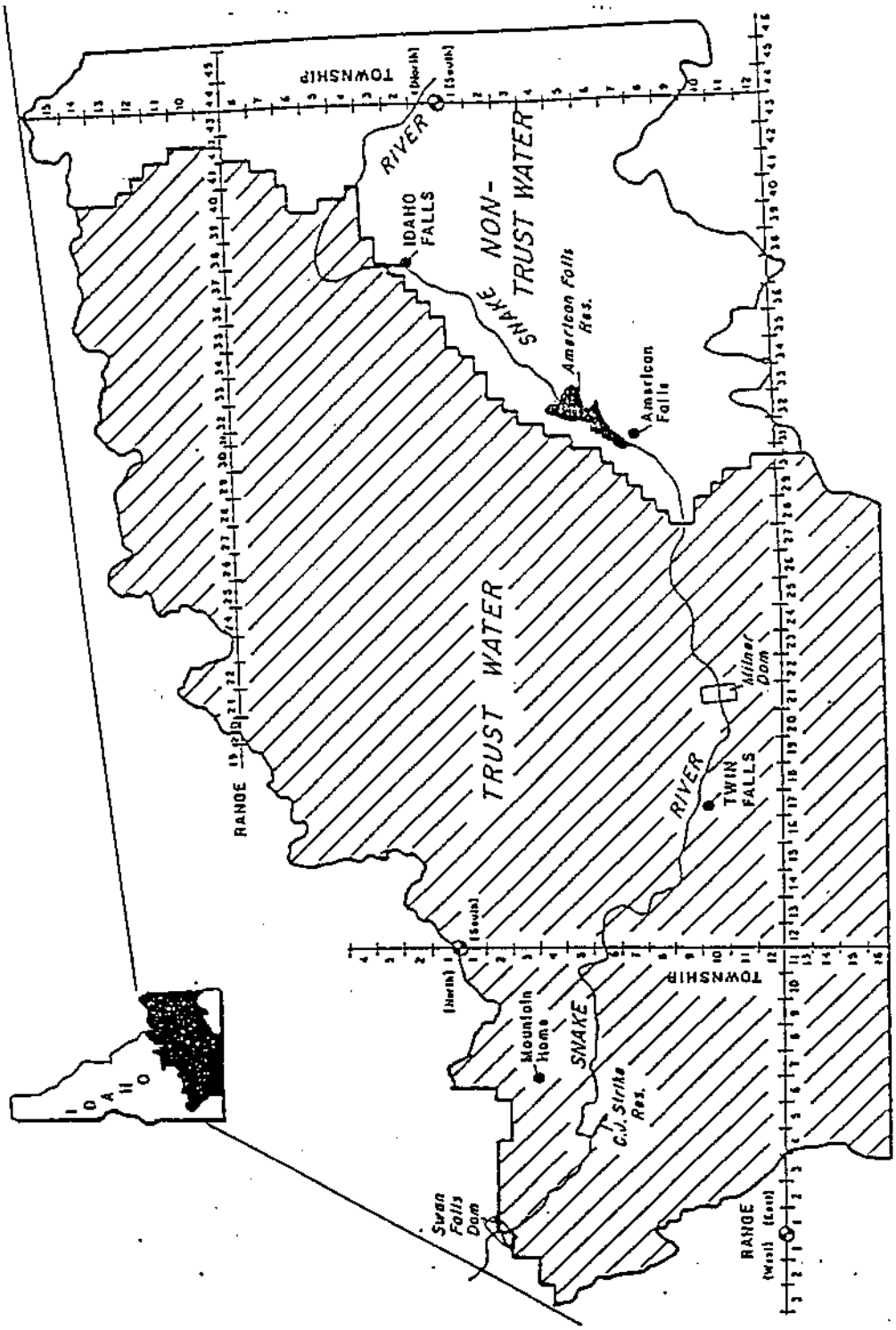
TOWNSHIP
(North)
(South)
RIVER
IDAHO FALLS
SNAKE
NON-TRUST WATER
American Falls Res.
American Falls
TRUST WATER
Milner Dam
RIVER
TWIN FALLS
RANGE
TOWNSHIP
(North)
(South)
Mountain Home
SNAKE
C.J. Strike Res.
Swan Falls Dam
RANGE
(West)
(East)
IDAHO

EXHIBIT A