BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF REVISING THE BOUNDARIES OF WATER DISTRICT NO. 120, IN THE AMERICAN FALLS AREA	)))))	**FINAL ORDER REVISING THE BOUNDARIES OF WATER DISTRICT NO. 120**

The Director of the Idaho Department of Water Resources ("Director" or "IDWR") is authorized by statute to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The authority to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. The Director is also authorized by statute to revise the boundaries of any water district in order to properly distribute water. During the pendency of a water rights adjudication, the district court having jurisdiction is authorized by statute to approve interim administration of the water rights by the Director, if reasonably necessary to protect senior water rights. The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code, in accordance with partial decrees entered by the court or in accordance with a Director's Report with or without modification by the court's order.

FINDINGS OF FACT

1. On February 19, 2002, the Director issued an order creating Water District No. 120, pursuant to the provisions of Idaho Code § 42-604. The boundaries of Water District No. 120 were limited to ground water rights in Administrative Basins 35 and 41 overlying the Eastern Snake Plain Aquifer ("ESPA") in the American Falls Area. The boundaries were limited to those basins because water rights in those basins had either been included in a Director's Report or partially decreed by the Snake River Basin Adjudication ("SRBA") District Court. In addition, holders of junior priority ground water rights in Basins 25, 27, 29, 35, and 41 overlying the ESPA entered into written stipulated agreements with holders of senior priority surface water rights from the Snake River downstream of the American Falls area. The signatories to those Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

2. On July 10, 2003, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of ground water rights (except those whose use is solely for domestic and/or stockwater purposes) by the Director within that portion of Administrative Basin 29 overlying the ESPA. Copies of this motion were mailed to affected water right holders of record on July 10, 2003.

3. On October 29, 2003, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director within that portion of Basin 29 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code.

4. On December 2, 2003, the Director mailed notice, by regular mail, of the proposed action revising the boundaries of Water District No. 120 to include water rights within Basin 29 overlying the ESPA pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water right holder of record in Basins 29, 35, and 41 overlying the ESPA and affected by the proposed revision of the water district. The notice described the proposed action to be taken, the reasons therefor, the time and place of a hearing to be held on December 17, 2003, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

5. The Director conducted the hearing on the proposed revision of boundaries of Water District No. 120 at the Ramada Inn in Pocatello, Idaho, at 2:20 pm on December 17, 2003. Approximately sixteen people attended the hearing.

6. Prior to commencing the hearing, the Director spent approximately 80 minutes describing the background and purpose of the proposed action and addressing questions. The Director also presented information concerning current and future operations of the district.

7. Persons attending the hearing were provided an opportunity to make an oral statement for the record. In addition, the Director held the record open through December 29, 2003, for the submission of written comments.

8. Five individuals presented oral statements for the record at the Pocatello hearing:

a. Laverne Jim of Pocatello, Idaho, Chairman of the Fort Hall Water Resource Commission, Shoshone-Bannock Tribes, presented a statement on behalf of the Fort Hall Water Resource Commission, the Fort Hall Business Council, and the Shoshone-Bannock Tribes. The statement included factual information about the nature of both the Tribes' water rights and the water rights held by the Fort Hall Indian Irrigation Project, as well as the water right agreements between the Tribes, the State of Idaho, and the United States. The Tribes stated that Water District No. 120 and the proposed boundary revisions must not interfere with the "provisions, nature, scope, or spirit of the1990 Fort Hall Water Rights Agreement and the rights decreed under the Agreement." The Tribes requested that the State of Idaho "implement enforcement measures on both non-Indian surface water and non-Indian ground water to ensure that the tribe's water rights are preserved."

b. Timothy Deeg of American Falls, Idaho, holder of water rights within Water District No. 120 and board member of the Aberdeen-American Falls Ground Water District, presented a statement on behalf of the Aberdeen-American Falls Ground Water District. Mr. Deeg stated that the Aberdeen-American Falls Ground Water District adopted certain resolutions at its 2003 December board meeting supporting the inclusion of ground water rights in that portion of Basin

29 overlying the ESPA. The board, however, also resolved to request that the Director "consider the revision of such southern Water District 120 boundary to include all of Basin 29 within Power County." Mr. Deeg stated that the board felt that such revision would allow for more consistent and efficient water rights administration within both Water District No. 120 and the Aberdeen-American Falls Ground Water District, and that the southern boundary of the ESPA within the Basin 29 area is arbitrary.

c. Dean Tramer, attorney for the City of Pocatello, Idaho, presented a statement on behalf of the mayor and city council for the City of Pocatello in support of the proposed boundary revisions, but noted that there are four issues that should be addressed regarding the administration of water rights in Water District No. 120.

These four issues are:

i. The SRBA District Court order authorizing interim administration within the portion of Basin 29 overlying the ESPA does not determine injury or the extent of injury to senior priority water rights.

ii. The order of the SRBA Court limits IDWR to administration of ground water rights within the boundaries of Water District No. 120 pursuant to Chapter 6, Title 42, Idaho Code. The city supports the formation of water districts over the ESPA to facilitate conjunctive administration of ground water and surface water rights. The city further believes that neither the critical ground water area nor the ground water management area statutes (Idaho Code §§ 42-233a and 42-233b) address conjunctive administration yet the American Falls Ground Water Management Area overlaps a portion of the proposed revised boundaries of Water District No. 120. The city also notes that recent ground water level measurements for the ESPA indicate that ground water levels in the aquifer are stable, and the city asserts that criteria for designation of a ground water management area in the American Falls area are not present.

iii. The order of the SRBA District Court authorizing interim administration and the administration of water rights in Water District No. 120 must not "supersede, modify, pre-empt, terminate, extend or otherwise affect the legal force and effect of the Swan Falls Agreement."

iv. Curtailment by the watermaster for Water District No. 120 of out-of-priority water rights that are not included in a stipulated agreement or mitigation plan and that the Director determines to be causing injury to senior priority water rights "must be based on facts from the best evidence available. This includes information on the type of use, priority date, measured diversion rate, and measured diversion volume for individual ground water and surface water rights, which in turn allows summary of

the cumulative decreed rate versus priority date for ground and surface water rights."

9. The Director received two written comments from affected ground water users prior to the close of the comment period on December 29, 2003. Comments were received from the United States Department of Interior, Bureau of Indian Affairs ("BIA"), in support of the proposed action. The BIA stated that administration of water rights within the proposed boundaries of Water District No. 120 by the State of Idaho does not extend to water rights held by the United States under federal law or water rights held by the Shoshone-Bannock Tribe; that the State is limited to administration of only those water rights within the Shoshone-Bannock Tribal Reservation that were acquired under state law; and that since the Fort Hall Project water rights and the Shoshone-Bannock Tribal water rights were not acquired under state law, those rights are not subject to administration by the watermaster for Water District No. 120.

10. Written comments were also received from Lamond J. Bailey of Pocatello, Idaho, essentially opposing inclusion of ground water rights in Water District No. 120 that are appurtenant to deeded lands within the Shoshone-Bannock Tribal Reservation. Mr. Bailey stated that it would be unfair if deeded land owners within the Reservation have water usage curtailed while water usage on nearby or adjacent tribal lands is not curtailed. Mr. Bailey concluded that the lack of restrictions on his property deed with respect to use of ground water means that the status of ground water use on both tribal and deeded land should be the same. Mr. Bailey also stated that water levels in the proposed water district area "should be monitored before any decisions are made that would affect irrigation in the area."

11. Written comments were also received on December 30, 2003, from the Water Resource Coalition through its attorney, Josephine Beeman. The Water Resource Coalition ("Coalition") is a group of water right holders consisting of Basic American Foods Inc., Lamb Weston Inc., and the City of Pocatello. The comments are essentially identical to the statements provided by the City of Pocatello at the hearing in Pocatello on December 17, 2003. However, the Coalition provided additional comments regarding curtailment of out-of-priority water rights and related instructions to the watermaster. Specifically, the Coalition stated that such watermaster instructions must be based on legal and factual considerations including:

a. Depletions to the Aberdeen-American Falls reach of the Snake River from surface water transfers (water savings, etc.) and surface irrigation efficiencies must be calculated so as not to be attributed to ground water withdrawals in Water District No. 120.

b. Depletions to the Aberdeen-American Falls reach of the Snake River resulting from place-of-use changes in surface water irrigated acreage pursuant to Idaho Code § 42-219 (changes that do not require a transfer pursuant to Idaho Code § 42-222) must be calculated so they are not attributed to ground water withdrawals in Water District No. 120.

c. Administration of water rights in Water District No. 120 must incorporate the protections of and be consistent with the Swan Falls Agreement, the Swan Falls

Contract, the Swan Falls consent decrees, and the accompanying State Water Plan adopted by the Legislature.

12. The United States Geological Survey ("USGS") defined the boundaries of the Eastern Snake Plain based on the 1980 Regional Aquifer System Analysis Study ("RASA"). For administrative purposes, IDWR considers the boundaries of the ESPA to closely approximate the boundaries of the Eastern Snake Plain as determined by the USGS.

13. The administration of ground water rights within the portion of Administrative Basin 29 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all ground waters in the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. See Idaho Code § 42-226.

2. The Director has a statutory responsibility to administer the use of ground water in the state so as to protect prior surface and ground water rights. See Idaho Code §§ 42-226 and 42-237a.g.

3. The Director has the responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to establish water districts or revise the boundaries of water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. See Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may permit the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with director's reports filed with the court or in accordance with partial decrees that have superseded the director's reports. See Idaho Code § 42-1417.

6. The 1990 Fort Hall Indian Water Rights Agreement ("Agreement") provides that except for the Snake River and Blackfoot River, the Shoshone-Bannock Tribes shall administer the distribution of water under all Tribal water rights within the Fort Hall Reservation and that the United States shall administer the distribution of water under water rights for the Fort Hall Indian Irrigation Project and the Fort Hall Agency. The Agreement further provides that the

State of Idaho shall administer all water rights acquired under state law within the Reservation that are not part of the Tribal, Fort Hall Agency, or Fort Hall Indian Irrigation Project water rights. Provisions of the Agreement allow for procedures to monitor, report, and inspect diversions within the boundaries of the Reservation that are administered by the Tribe, the United States, and the State of Idaho. The watermaster for Water District No. 120, acting as an agent of the Director and the State of Idaho, may coordinate with the Tribe and the United States with respect to the monitoring, reporting, and inspection of diversions within the Reservation in accordance with the Agreement.

7. Water rights appurtenant to deeded land within the Shoshone-Bannock Tribal Reservation have the priority determined by the SRBA District Court, and such rights are subject to administration by the State of Idaho through water districts created pursuant to chapter 6, title 42, Idaho Code.

Revision of District Boundaries

8. Based on the above statutory authorities, the order of the SRBA District Court authorizing interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should revise the boundaries of Water District No. 120 to include administration of ground water rights, excluding those rights whose use is solely for domestic and/or stockwater purposes and those water rights that are administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement, in the portion of Administrative Basin 29 overlying the ESPA as shown on the map appended hereto as Attachment A to protect senior priority water rights.

9. The Director cannot revise the boundaries of Water District No. 120 consistent with the boundaries of the Aberdeen-American Falls Ground Water District, or outside of the ESPA boundaries as currently defined by IDWR and the USGS, without first providing notice to affected water users in that area. Moreover, the Director must consider surface water rights in the area that may already be administered by existing water districts.

10. The Director concludes that the revised boundaries of the water district should be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

11. The Director concludes that immediate administration of water rights pursuant to chapter 6, title 42, Idaho Code, is necessary, other than domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), and ground water rights that are administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement.

12. The Director concludes that the watermaster for Water District No. 120, with the boundaries as revised pursuant to this order, shall perform the following duties in accordance with the direction and supervision of the Director:

a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);

b. Measure and report the diversions under water rights;

c. Enforce the provisions of any stipulated Agreements approved by the Director; and

d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director.

13. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, analytic or model studies, and the Director's best professional judgment.

14. The Director concludes that Water District No. 120, with the boundaries as revised by this order, shall include the following organizational features:

a. Election and appointment of a watermaster for the water district. The water users may elect to have the district contract with IDWR to provide watermaster services. Under a contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts whose boundaries match the boundaries of existing ground water districts, irrigation districts, or measurement districts, or other areas as may be proposed by the Director or right holders within the water district and deemed appropriate by the Director.

c. Selection of a Water District Advisory Committee that includes representation from boards of directors of ground water districts, irrigation districts, or from other groups of right holders within the water district as may be appropriate.

d. Appointment of deputy watermasters by the watermaster, with approval from the

Director. Deputy watermasters shall perform work pursuant to instructions of the watermaster. Deputy watermasters may be employees of existing ground water districts or irrigation districts that are located within the water district. Duties of appointed deputy watermasters that are also employees of an existing ground water district or irrigation district shall be limited primarily to measuring and reporting of diversions.

e. Diversions not included in an existing ground water district or irrigation district shall be assessed costs directly by the watermaster.

f. Ground water districts and irrigation districts that are organized as subdistricts may collect and pay the pro-rata expenses on behalf of the water right holders within the respective district to avoid assessing holders of water rights by both the subdistrict and the water district.

ORDER

IT IS ORDERED that:

1. The boundaries of Water District No. 120 in the American Falls Area are hereby revised to include all ground water rights other than small domestic and stockwater rights, as defined under Idaho Code §§ 42-111 and 42-1401A(11), and ground water rights that are administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement within that portion of Administrative Basin 29 overlying the ESPA, as depicted on the map appended hereto as Attachment A and incorporated herein by reference.

2. The watermaster for Water District No. 120 shall perform watermaster duties in accordance with the provisions of Conclusions of Law 12 through 14 of this order. Additionally, the watermaster for Water District No. 120, pursuant to guidance from the Director and in accordance with the 1990 Fort Hall Indian Water Rights Agreement, is to coordinate with the Shoshone-Bannock Tribes and the United States with respect to the monitoring, reporting, and inspection of diversions within the Reservation.

3. For 2004, the water right holders included within the revised boundaries of Water District No. 120 shall meet at a time and place to be announced by the Director to elect a watermaster, select an advisory committee, and set a budget to be collected to operate the district. In future years, the annual meeting shall be held as provided in Idaho Code § 42-605.

DATED this 22nd day of January 2004.

KARL J. DREHER
Director