BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF CREATING THE UPPER SALMON RIVER BASIN WATER DISTRICT (DESIGNATED AS WATER DISTRICT NO. 170) FOR ADMINISTRATION OF RIGHTS TO THE USE OF SURFACE WATER AND GROUND WATER IN ADMINISTRATIVE BASINS 71 AND 72	))))))	**FINAL ORDER CREATING WATER DISTRICT NO. 170**

The Director of the Idaho Department of Water Resources ("Director" or "Department") is required by Idaho statutes 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 requirement to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. By statute, during the pendency of a water rights adjudication, the district court having jurisdiction for the adjudication can authorize interim administration of the water rights by the Director if reasonably necessary to protect senior water rights. The district court may authorize 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 one or more Director's Reports as may be modified by the court's order.

FINDINGS OF FACT

1. On May 16, 2005, the State of Idaho ("State") filed a motion requesting an order authorizing the interim administration of water rights by the Director in the Department's Administrative Basins 71 and 72 with the Snake River Basin Adjudication ("SRBA") District Court. The State served copies of its motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on May 13, 2005. The State's motion included a Notice of Hearing setting the matter for hearing by the SRBA District Court on September 20, 2005. The SRBA District Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State's motion and supporting briefing and affidavits are a part of the public record in the matter of creating the Upper Salmon River Basin Water District within the Department's Administrative Basins ("Basins") 71 and 72.

2. The State's motion for interim administration described in Finding 1 above states that "interim administration of water rights in Basins 71 and 72 is reasonably necessary because an efficient means of administering water rights from ground water sources and some surface water sources in these basins does not exist. The establishment of water districts in these basins will provide watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law."

3. All of the water rights claimed in Basins 71 and 72 have been reported or partially decreed in the SRBA as required under Idaho Code § 42-1417.

4. On November 16, 2004, the SRBA District Court entered a partial decree for water rights no. 75-13316 and no. 77-11941. These year-round water rights are held by the United States of America on the Salmon River to fulfill the purposes of the Wild and Scenic Rivers Act, Pub.L. 90-542, 82 Stat. 906, Oct. 2, 1968 (codified as amended at 16 U.S.C. §§ 1271, et seq.), and the Central Idaho Wilderness Act of 1980, Pub.L. 96-312, 94 Stat. 948, July 23, 1980 (codified as amended at 16 U.S.C. §§ 1132, 1274, 1281). Water rights no. 75-13316 and no. 77-11941 are downstream of all of the water rights in Basins 71 and 72.

5. On September 20, 2005, the SRBA District Court held a hearing on the State's motion. No objections were filed in opposition to the motion, and no party appeared in opposition to the State's motion.

6. On September 29, 2005, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in Basins 71 and 72, pursuant to chapter 6, title 42, Idaho Code, based upon a determination that such interim administration is necessary to protect senior water rights.

7. On October 7, 2005, the Director signed a notice proposing to establish a water district in the Upper Salmon River Basin within Basins 71 and 72, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed on October 11, 2005, by regular mail, to each holder of a water right within the boundaries of the proposed water district. The notice described the water district proposed to be established, the reasons therefor, the time and place for a public information meeting to be held on October 24, 2005, and the time and place for a hearing to be held on November 9, 2005, concerning establishment of the proposed water district. The notice also provided a time period within which written comments on the proposed action would be accepted.

8. In addition, the Director caused notice to be published of the proposed action establishing the Upper Salmon River Basin Water District ("Upper Salmon Water District"), designated Water District No. 170, once a week for two (2) weeks in the following newspapers having general circulation within the area of the proposed water district: *The Challis Messenger* of Challis, Idaho, on October 13 and 20, 2005; and the *Wood River Journal* of Hailey, Idaho, on October 12 and 19, 2005.

9. The notice mailed to water right holders proposed that establishment of the Upper Salmon Water District would include all water rights authorizing the use of surface water and ground water with points of diversion located within the boundaries of Basins 71 and 72, except those used solely for domestic or stock water purposes as defined under Idaho Code §§ 42-111 and 42-1401A(11). The Director's notice advised that a meeting of the holders of water rights within the district be held during the spring of 2006 for the purpose of electing a watermaster and conducting other business necessary to initiate operation of the district. The Director also proposed that the water district watermaster be responsible for certain duties under the direction and supervision of the Director including: (1) collection, recording, and reporting of diversion

data; (2) enforcement of water rights in priority; and (3) curtailment and enforcement of unauthorized or excessive diversions, as necessary.

10. The Director's notice also included a description of the Director's proposal to expand the Upper Salmon Water District by 2007 to encompass all of Basins 73, 74, and 75, after the water rights in those basins have been decreed by the SRBA District Court or included in one or more Director's Reports anticipated to be filed with the SRBA District Court in 2006, provided the SRBA District Court grants the Director authority for interim administration in those basins.

11. The Director proposes to include existing water districts in the Upper Salmon River sub-basins as sub-districts within the proposed Upper Salmon Water District. There are currently three existing water districts within Basin 72 and the boundaries of the proposed Upper Salmon Water District: Water District No. 72-B, Garden Creek and tributaries; Water District No. 72-C, Challis Creek and tributaries; and Water District No. 72-F, Morgan Creek and tributaries. These districts include only water rights from surface water sources, and do not include any water rights from ground water. There are no existing water districts located within Basin 71.

12. Water districts 72-B and 72-C do not administer water rights from surface water sources outside the irrigation season for those rights included within the districts, nor do these districts administer water rights during the irrigation season when the surface water sources are not under watermaster regulation. Water District 72-F has not been active until recently and has not evolved to effectively administer water rights from surface water sources either during or outside of the irrigation season for those rights included within the district.

13. The Director conducted a hearing on the proposed establishment of the Upper Salmon Water District at the Challis High School Cafeteria in Challis, Idaho, at 7:00 pm on November 9, 2005. Approximately forty people attended the hearing.

14. Prior to commencing the hearing, the Director described factors he considered in proposing to establish the Upper Salmon Water District and answered questions about the establishment of the proposed water district and how the district was envisioned to function, both over a period of approximately 60 minutes.

15. Persons attending the hearing were provided an opportunity to make oral statements for the record. In addition, the Director held the record open through November 21, 2005, for the submittal of written comments.

16. Five individuals gave oral statements for the record at the hearing in Challis, Idaho. Three written statements were submitted to the Department on or before the deadline of November 21, 2005.

17. Mr. Jack Challis of Challis, Idaho, testified on his own behalf as a water right holder on Challis Creek in Basin 72. He also stated that he is the acting secretary-treasurer for both water districts 72-B and 72-C, Garden and Challis Creeks, respectively. In past years, Mr. Challis served as the watermaster for both districts. He also currently serves as a lateral

manager on the Warm Springs Canal near Challis, Idaho. Mr. Challis testified that water districts 72-B and 72-C are already in compliance with all state water district requirements, and that other areas in the Upper Salmon River Basin should comply with similar standards before districts 72-B and 72-C participate in funding a watermaster for the proposed Upper Salmon Water District.

18. Mr. Jerry Hawkins of Challis, Idaho, testified on behalf of Water District No. 72-F, Morgan Creek and tributaries. Mr. Hawkins stated that Water District No. 72-F does not agree with the Director's proposal for a basin-wide water district that provides for a watermaster having oversight for existing water districts, such as district 72-F. Mr. Hawkins stated that Water District No. 72-F has a watermaster and secretary-treasurer, and that if district 72-F needs to answer to the Department, then it can do so through the existing Department employee based in Salmon, Idaho, rather than the water right holders contributing to the funding for a watermaster of a basin-wide water district. Mr. Hawkins also stated that Water District No. 72-F concurs with prior written comments submitted to the Department by certain water right holders from existing water districts in Basins 73, 74, and 75, which recommended that if the Upper Salmon Water District is established the watermaster should be a direct employee of the Department and paid by the State of Idaho.

19. Mr. Blair Kauer of Leadore, Idaho, testified on his own behalf. Mr. Kauer stated that he holds water rights in water districts 74, 74-W, and 74-Q, all in Basin 74. Mr. Kauer stated that he agreed with the need for water districts, but that it is not necessary to have another watermaster with oversight for other existing water districts in the Upper Salmon River Basin. He further stated that water districts in Basin 74 do not need to be in the proposed Upper Salmon Water District, or any proposed expansion of such district. Mr. Kauer also stated that water district assessments should be based on water rights held, not the amount of water diverted.

20. Mr. James Whittaker of Leadore, Idaho, testified on his own behalf but stated for the record that he is an advisory committee member for both Water District No. 74-W and Water District No. 74-Z. Mr. Whittaker stated that most water districts in Basin 74 do an adequate job of regulating themselves. Mr. Whittaker did not oppose appointment of a watermaster for the proposed Upper Salmon Water District at the Department's expense for a period of two years, as proposed by the Director, but that after two years there should not be a need for a basin-wide watermaster that has oversight for existing water districts because watermasters in those districts should be better trained and any problems after that point in time could be addressed by those watermasters and Department staff, including the Department's employee based in Salmon, Idaho.

21. Ms. Katie Breckenridge of Picabo, Idaho, testified on her own behalf. Ms. Breckenridge holds water rights in Basin 71. In her testimony, Ms. Breckenridge distinguished between areas in the Upper Salmon River Basin, like sub-basin 71, where diversions of water are not being measured or administered, and other areas within Basin 72 and 74 where existing water districts may be adequately measuring and regulating diversions of water. Ms. Breckenridge recommended that areas in Basin 71 and 72 that are not currently included in any water district where there are no watermasters measuring and reporting diversions be prioritized for inclusion in any new water district. She recommended that areas not currently within a water district be brought into compliance within two years, and then the

Department and Upper Salmon River Basin water right holders could re-evaluate whether to organize under one district.

22. The Director received written comments from Mr. Scott Campbell, attorney for Thompson Creek Mining Company ("Thompson Creek"). Thompson Creek comments are summarized as follows:

a. The Director failed to comply with the mandatory notice requirements of Idaho Code § 42-604, because the notice gave no explanation of the reasons for creating the water district;

b. The public record does not support a determination by the Director that creation of the district is "required in order to properly administer uses of the water resource" as required by Idaho Code § 42-604;

c. The Director cannot legally determine that a water district is "required in order to properly administer uses of the water resource" because an SRBA District Court order dated November 18, 2004, provides that a stipulated agreement involving the State of Idaho, the United States of America, and other parties in the matter of the Wild and Scenic Rivers Act Claims (Consolidated Subcase No. 75-13316), "shall not affect the rights of Thompson Creek or any other non-signatory party to participate in and object to any motion for interim administration, proceeding for creation of a water district, or other administrative action or other judicial action proceeding affecting their water rights or their use, diversion, or measurement of water;"

d. The Director has no legally supportable basis for creation of the proposed water district because he cannot rely upon the provisions of the SRBA Wild and Scenic Rivers Agreement between the United States and the State of Idaho to justify creation of the district, and because the order of the SRBA District Court dated November 18, 2004, provided that the provisions in the Wild and Scenic Rivers agreement relative to water rights administration "shall not affect the disposition or review of such proceedings;" and

e. No administration of the Thompson Creek water rights is necessary "to properly administer the uses of the water resource" because the rights held by the United States for the purposes of the Wild and Scenic Rivers Act are subordinated to Thompson Creek's rights.

23. The Department also received written comments from Mr. James Hawkins of Water District No. 72-F, Morgan Creek and tributaries. The Department received a petition from Mr. Hawkins dated May 19, 2005, on behalf of Water District No. 72-F seeking 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. Mr. Hawkins submitted additional comments to the Department dated November 21, 2005, and received by the

Department on November 28, 2005. The latter comments expressed concerns about overlapping duties with existing watermasters and additional costs resulting from appointment of a "super" watermaster. Mr. Hawkins' second letter urges using local watermasters to collect data; encourages the Director to look at creating water district boundaries that go beyond the "normal" boundary of a drainage area such as Morgan Creek or Challis Creek; and recommends that "lockable" measuring device requirements be phased in over a reasonable period of time, such as two to three years.

24. The Department also received written comments from representatives of existing water districts in Basins 73, 74, and 75 on September 26, 2005. The comments were submitted in response to a steering committee meeting organized by the Department in September of 2005 with representatives of water right holders in the Upper Salmon River Basin regarding establishment of the Upper Salmon Water District. The comments submitted by the water districts' representatives recommends that the watermaster for the Upper Salmon Water District be a direct employee of the Department at no additional costs to either the Department or water right holders who are affected by creation of the water district. The comments further recommend creation of sub-districts where deputy watermasters are elected and compensated by water right holders in each sub-district. A number of other detailed recommendations were proposed regarding watermaster and deputy watermaster duties, as well as headgate and measuring device requirements.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all surface and 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 the statutory responsibility to administer the use of surface and 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, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

4. The Director is authorized to form 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. The Director may also revise the boundaries of a water district, 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. *See* Idaho Code § 42-604.

5. In addition, the district court having jurisdiction over a general water rights adjudication may authorize 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, with or without modification by the court, or in accordance with partial decrees that have superseded the Director's Reports. *See* Idaho Code § 42-1417.

Response to Testimony and Written Comments

6. Most of the testimony at the hearing in Challis Idaho conducted on November 9, 2005, and written comments submitted to the Department, raised concerns about inclusion of existing water districts as sub-districts in the proposed Upper Salmon Water District. Concerns about the funding required for the watermaster of the Upper Salmon Water District and the oversight of watermasters for existing water districts were stated. Additional concerns regarding the duties of the Upper Salmon Water District watermaster with respect to the duties of existing watermasters were also identified, and the need to include existing water districts in the Upper Salmon Water District was questioned. Much of the testimony asserted that existing districts are already compliant with state law and Department requirements. Recommendations were made both in oral testimony at the hearing and in written comments to the Department that the costs for the Upper Salmon Water District watermaster should be borne by the Department.

7. In response to the hearing testimony, the written comments submitted on behalf of Water District No. 72-F, and the written comments submitted on behalf of holders of water rights in existing water districts in Basins 73, 74, and 75, the Director concludes that during the irrigation season for the water rights in some of the existing water districts in Basins 72, 73, 74, and 75, the statutory requirements of Chapter 6, Title 42, Idaho Code, are mostly being met, while in other water districts in the Upper Salmon River Basin some or many of the statutory requirements are not being satisfied. For example, surface water diversions in some of the existing districts lack adequate measuring devices and controlling headgates, are not measured or recorded on a regular basis, or are not monitored or regulated during portions of the irrigation season. Additionally, some of the existing water districts do not maintain adequate measurement records, annual watermaster reports are not always complete or timely submitted, and some existing water districts have been inactive for many years. None of the existing water districts enforce limitations of surface water rights outside of the irrigation season for the rights, and none of the existing water districts regulate water rights diverting from ground water.

8. Given that: (1) there are no water districts in Basin 71; (2) the administration of surface water rights in the existing water districts in Basin 72 is often inconsistent; (3) none of the existing water districts in Basin 72 administer surface water rights outside of the irrigation season for those rights or during the irrigation season when the surface water sources are not in regulation; and (4) none of the existing water districts in Basin 72 regulate diversions from ground water; the Director concludes that there should be one water district created that encompasses all of the water rights within the Upper Salmon River Basin, and that the existing surface water districts in Basin 72 should be designated as sub-districts, in order to provide consistent and effective administration of water rights from both surface water sources and ground water sources year-round throughout the Upper Salmon River Basin.

9. Existing water districts in Basin 72, which now will be sub-districts within the Upper Salmon Water District, will each continue to elect their own watermasters, who will serve as deputy watermasters under the watermaster for the Upper Salmon Water District, and adopt their own budgets for purposes of measuring, recording, reporting, and regulating surface water diversions within their districts. A sub-district that adequately measures, records, reports, and controls diversions should not be subject to future assessments to fund the watermaster for the Upper Salmon Water District for purposes of measuring, recording, reporting, and regulating surface water diversions within that sub-district. However, each sub-district may be subject to future assessments for costs associated with oversight of that sub-district. Oversight costs may include, but may not be limited to, technical assistance, enforcement assistance, training of deputy watermasters, collection and quality control review of diversion data, periodic field checks of diversions, periodic or miscellaneous field calibration measurements of measuring devices, review of annual sub-district and budget reports, coordinating distribution of water to the Wild and Scenic River minimum instream flow water rights for the Salmon River as necessary, and general coordination with federal, state, and local agencies regarding water district operations, water use, and water right administration issues.

10. The written comments submitted by Thompson Creek raise several legal or administrative issues. First, Thompson Creek alleges that the Director failed to comply with the mandatory notice requirements of Idaho Code § 42-604 because the notice gave no explanation of the reasons for creating the Upper Salmon Water District. As required by Idaho Code § 42-602, the notice described the proposed action, the reasons for the proposed action, and the time and place of a public hearing concerning the proposed action. The notice stated that the reason for the hearing was to consider the proposal to create a permanent water district in order to protect senior water rights. The notice referenced the SRBA District Court order that approved interim administration of the rights by the Director to protect senior water rights. The notice also provided a website link to a copy of the SRBA District Court order. The court's order found that the Director had sent individual notice of the State's Motion for Interim Administration and supporting documents, as well as notice of the SRBA Court's scheduled hearing on the matter, to all affected right holders in Basins 71 and 72.

11. Based on the State's motion for interim administration described in Finding 1 and its presentation to the SRBA District Court on September 20, 2005, the court made the following findings of fact and conclusions of law in its *Order Granting State's Motion for Order of Interim Administration of Water Rights in Basins 71 and 72*, dated September 29, 2005:

> The State of Idaho has complied with the notice and service requirements of Idaho Code §§ 1417(2)(b) by serving of the State's *Motion* and related documents on those claimants in IDWR Basins 71 and 72 reasonably determined to be adversely affected by entry of the requested ***Order***. Interim Administration in IDWR Basins 71 and 72 in accordance with the *Director's Reports* and ***Partial Decrees*** for water rights is reasonably necessary to efficiently administer water rights and protect senior water rights. The establishment of Water Districts for Basins 71 and 72 will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law.
>
> The creation of water districts will provide for a mechanism for administration, regulation, and enforcement of water rights, including ground and surface water rights.

12. The Director's notice also provided the following information regarding the necessity for creating a water district in Basins 71 and 72:

> The Director proposes that the water district watermaster be responsible for certain duties under the direction and supervision of the Director including: (1) collection and recording of diversion data; (2) enforcement of water rights in priority; and (3) curtailment and enforcement of unauthorized or excessive diversions, as necessary.

13. The Director concludes that the notice required by Idaho Code § 42-604 was sufficient. The notice gave the time and place of a hearing, and provided a time period within which written comments could be submitted. The notice stated that the proposed hearing was to consider the creation of a permanent water district in order to protect senior water rights. The notice informed affected right holders that the SRBA District Court had issued an order for interim administration of water rights in Basins 71 and 72 and provided a reference to a copy of the order. Finally, the notice listed specific watermaster duties in the proposed water district.

14. Thompson Creek's second allegation is that the public record does not support a determination by the Director that creation of the district is "required in order to properly administer uses of the water resource" as required by Idaho Code § 42-604.

15. The public record in this case includes the State's motion for Order of Interim Administration of Water Rights in Basins 71 and 72, together with supporting documentation, dated May 16, 2005; the SRBA District Court's transcript of the hearing on the State's motion for Order of Interim Administration of Water Rights in Basins 71 and 72, held on September 20, 2005; the SRBA District Court *Order Granting the State of Idaho's Motion for Order of Interim Administration of Water Rights in Basins 71 and 72*, dated September 29, 2005; the Director's Notice of Public Information Meeting and Hearing in the Matter of the Proposed Creation of a Water District in the Upper Salmon River Basin Area in Administrative Basins 71 and 72, signed by the Director on October 7, 2005, and mailed on October 11, 2005; the transcript of the Director's hearing regarding creation of the proposed water district held on November 9, 2005, in Challis, Idaho; and written comments submitted for the record on or before November 21, 2005.

16. As described in Conclusion of Law 11, justification for creation of the proposed district "to efficiently administer water rights and protect senior water rights" is provided in the Department's Notice of Hearing, the SRBA District Court's *Order Granting Interim Administration*, and the State's motion for interim administration. Therefore, the Director concludes that the public record supports a determination that creation of the district is "required in order to properly administer uses of the water resource" as required by Idaho Code § 42-604.

17. Thompson Creek next alleges that the Director cannot legally determine that a water district is required because an SRBA District Court order dated November 18, 2004, provides that a stipulated agreement between the State of Idaho, the United States of America, and other parties in the matter of the Wild and Scenic Rivers Act Claims does not "affect the rights of Thompson Creek or any other non-signatory party to participate in and object to any motion for interim administration, proceeding for creation of a water district, or other

administrative action or other judicial action proceeding affecting their water rights or their use, diversion, or measurement of water."

18. The SRBA District Court's order dated November 18, 2004, provides only that Thompson Creek or other non-signatory parties of the Wild and Scenic Rivers agreement may participate in and object to a motion for interim administration, or other administrative proceeding for creation of a water district. The court's order does not prohibit the Director from determining that a water district is necessary. The court in fact determined just the opposite by granting an order for the State's motion for order of interim administration. Thompson Creek's argument is without merit.

19. Thompson Creek further argues that the Director has no legally supportable basis for creation of the proposed water district because he cannot rely upon the provisions of the SRBA Wild and Scenic Rivers Agreement between the United States and the State of Idaho to justify creation of the district, and because the SRBA District Court's Order dated November 18, 2004, provided that the provisions in the Wild and Scenic Rivers agreement relative to water rights administration "shall not affect the disposition or review of such proceedings."

20. The Director is relying on the authority provided by Idaho Code § 42-604 for creation of the proposed water district, not the provisions of the SRBA Wild and Scenic Rivers Agreement as alleged by Thompson Creek. Idaho Code § 42-604 authorizes the Director to create a water district for streams or water supplies for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. As stated in Finding 3, all of the water rights claimed in Basins 71 and 72 have been reported or partially decreed in the SRBA as required under Idaho Code § 42-1417. The Director proposes creation of a water district in Basins 71 and 72 for the reasons provided in the State's motion for Order of Interim Administration of Water Rights, and the Director's Notice of Hearing.

21. Finally, Thompson Creek alleges that administration of Thompson Creek's water rights is not necessary "to properly administer the uses of the water resource" because the United States' Wild and Scenic River rights are subordinated to Thompson Creek's rights.

22. The Director finds that Thompson Creek is the holder of water rights to which the United States' Wild and Scenic River rights that have been partially decreed by the SRBA District Court are subordinated. This fact alone, however, does not preclude the need for creation of a water district, nor does it provide a reason to eliminate Thompson Creek's rights or other water rights to which the United States' Wild and Scenic River rights are subordinated. On the contrary, creation of the proposed water district is intended to fulfill the Director's statutory responsibilities to administer water rights for the purpose of protecting all prior water rights and distributing water in accordance with the prior appropriation doctrine as established by Idaho law.

District Creation

23. Based on the statutory authorities described in preceding conclusions of law, the order of the SRBA District Court authorizing the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the Director should create

the Upper Salmon Water District to administer water rights within Administrative Basins 71 and 72, as shown on the map appended hereto as Attachment A.

24. The Director concludes that the Upper Salmon Water District should be formed on a permanent basis and operated to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

25. The Director concludes that immediate administration of water rights, other than de minimis domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), pursuant to chapter 6, title 42, Idaho Code, is necessary for the protection of prior surface and ground water rights.

26. The Director concludes that the watermaster for the Upper Salmon Water District created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Measure, record, and report the diversions under water rights;

b. Enforce the water rights in priority;

c. 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

d. Consult with and coordinate the work activities of deputy watermasters, including the elected and appointed watermasters for sub-districts within the Upper Salmon Water District.

27. The Director concludes that the Upper Salmon Water District created by this order shall include the following organizational features:

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

b. Designation of existing water districts in Basin 72 as sub-districts of the Upper Salmon Water District, or as otherwise determined by the Director.

c. Selection of a Water District Advisory Committee that includes, but need not be limited to, representation from advisory committees of existing water districts.

d. Appointment of deputy watermasters by the watermaster, with approval by the Director. Deputy watermasters shall work pursuant to instructions of the watermaster. Deputy watermasters may be other Department employees, or watermasters elected by sub-districts.

e. Water rights not included in an existing water district shall be assessed the costs for operating the Upper Salmon Water District directly by the water district watermaster, unless the rights are located within a sub-district that is subsequently created by the Director.

f. Water districts that are organized as sub-districts may collect assessments to pay the pro-rata expenses of the Upper Salmon Water District, if any, on behalf of the diversions and water right holders within their respective sub-district to avoid individual water right holders being assessed by both the sub-district and the Upper Salmon Water District.

g. The Department will not require compensation for providing watermaster services during 2006 and 2007 if the water right holders elect to have the Upper Salmon Water District contract with the Department to provide watermaster services.

ORDER

The Director enters the following Order for the reasons stated in the foregoing Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED as follows:

1. The Upper Salmon River Basin Water District, designated as Water District No. 170, is hereby established 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 under Idaho Code § 42-111 and 42-1401A(11), within the area depicted on the map appended hereto as Attachment A and incorporated herein by reference.

2. Water District No. 72-B (Garden Creek and tributaries), Water District No. 72-C (Challis Creek and tributaries), and Water District No. 72-F (Morgan Creek and tributaries), are hereby designated as sub-districts within Water District No. 170. These sub-districts shall continue to meet annually to elect a sub-district watermaster (who shall serve as a deputy watermaster for Water District No. 170), adopt a budget, and select an advisory committee. These sub-districts shall be responsible for distribution of surface water rights that have been reported or partially decreed in the SRBA and located within the respective sub-districts. For 2006, water right holders within the sub-districts shall meet at a time and place as normally determined by the district.

3. For 2006, the water right holders within Water District No. 170 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.

4. The watermaster for Water District No. 170 shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

a. Measure, record, and report the diversions under water rights;

b. Enforce the water rights in priority;

c. 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

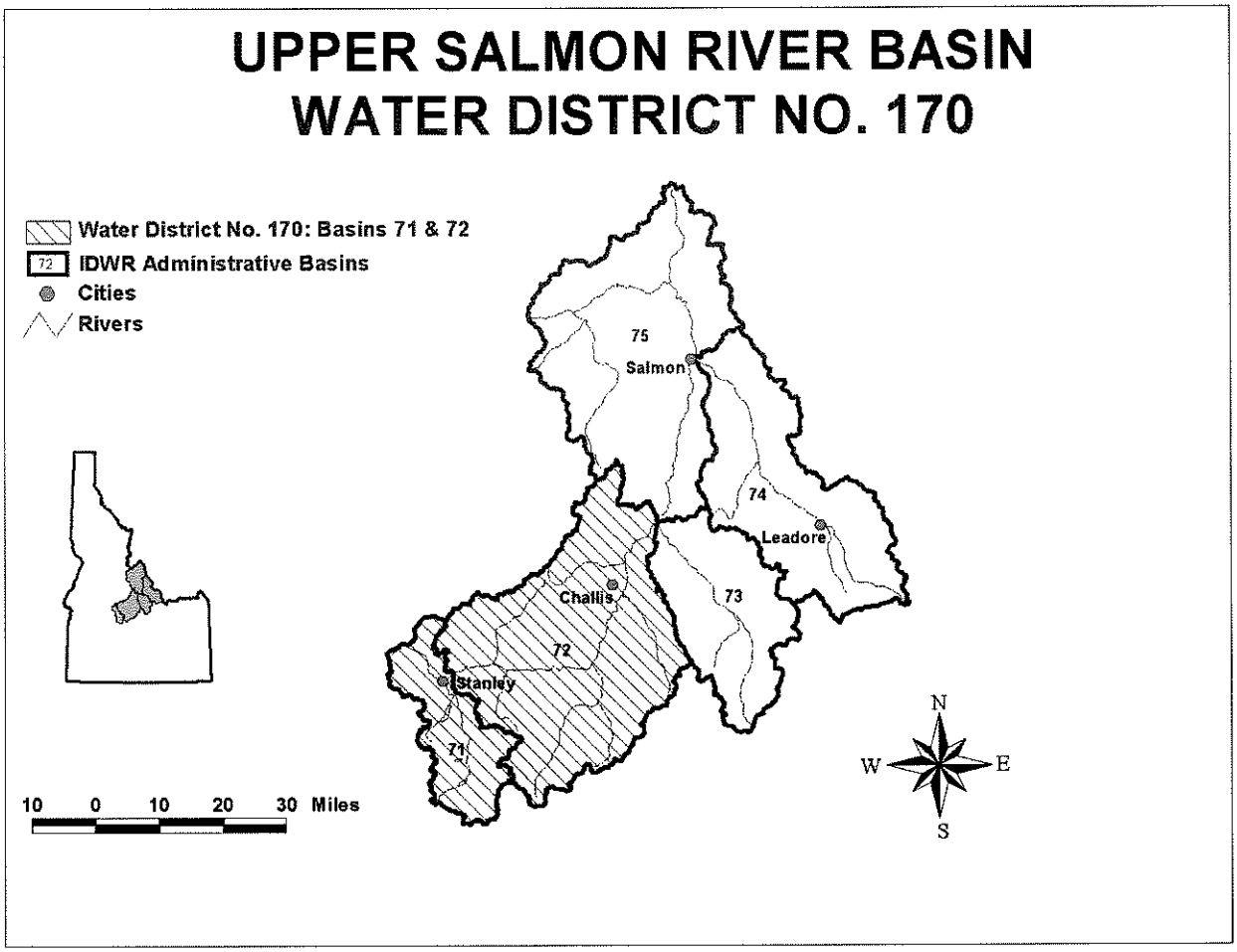
d. Consult with and coordinate the work activities of deputy watermasters, including the elected and appointed watermasters for sub-districts within the Water District No. 170.

5. The Director shall issue separate orders, as necessary, requiring the installation of measuring devices and lockable controlling works for diversions within Water District No. 170. Such orders will allow installations to be phased in over a period of one to two years from the date of issuance, thereby allowing a sufficient period of time in which to comply with such orders. Water right holders will be responsible for all costs associated with the installation of measuring devices and controlling works.

DATED this 6th day of March 2006.

KARL J. DREHER
Director

ATTACHMENT 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 service date of the final order, b) 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.

State of Idaho
DEPARTMENT OF WATER RESOURCES
322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

March 7, 2006

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

Re: Final Order Creating Upper Salmon River Water District in Administrative Basins 71 & 72

Dear Water Right Holder:

The records of the Idaho Department of Water Resources ("IDWR") show that you are the holder of one or more water rights with points of diversion within the Upper Salmon River Basin in IDWR Administrative Basins 71 and 72. The Director of IDWR signed a notice of hearing and public information meeting regarding creation of a water district in this area on October 7, 2005. A copy of this notice was sent to all water right holders within the proposed districts except owners of small domestic and stock water rights. IDWR held a public information meeting concerning the proposal on October 24, 2005 in Challis, ID, and the Director of IDWR held a hearing on the matter on November 9, 2005 in Challis, ID. A ten-day written comment period was provided after the hearing as required by law.

Enclosed please find a copy of the Final Order Creating the Upper Salmon River Basin Water District No. 170. Also enclosed is an informational sheet that explains options for responding to final orders. Please note that any party subject to the 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.

The Water District No. 170 2006 annual meeting will be held as follows:

7:00 p.m., Tuesday, April 11, 2006
at the American Legion Memorial Building
221 Main St., Challis, Idaho

The water district meeting is necessary to elect a watermaster, select an advisory committee and adopt a budget for the operation of the district.

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,

Tim Luke
Manager, Water Distribution Section

Enclosures

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of March, 2006, 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.

Victoria Wigle

Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

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WDW LLC
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HAILEY, ID 83333

VERSALLES REAL ESTATE CORP
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FOREST SERVICE
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USDA FOREST SERVICE
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BOISE, ID 83724

UNITED STATES OF AMERICA ACTING
THROUGH
USDI BUREAU OF LAND MANAGEMENT
IDAHO STATE OFFICE
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USDI FISH AND WILDLIFE SERVICE
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C/O ERNEST DAY
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STATE OF IDAHO
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