**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| IN THE MATTER OF CREATING THE AMERICAN FALLS AREA WATER DISTRICT, DESIGNATED AS WATER DISTRICT NO. 120, FOR THE ADMINISTRATION OF RIGHTS TO THE USE OF GROUND WATER FROM THE EASTERN SNAKE PLAIN AQUIFER IN ADMINISTRATIVE BASINS 35 AND 41. | ) | **FINAL ORDER CREATING WATER DISTRICT NO. 120** |

The Director of the Idaho Department of Water Resources ("Director") 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. During the pendency of a water rights adjudication, the district court 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 as modified by the court's order.

## FINDINGS OF FACT

1. On August 3, 2001, the Director established the American Falls Ground Water Management Area ("American Falls GWMA") pursuant to Idaho Code § 42-233b. The Director designated the American Falls GWMA due to concerns about the depletionary effects of ground water withdrawals under junior priority water rights and the availability of water supplies for senior priority water rights from connected surface and ground water sources during the severe drought conditions experienced across the Snake River Basin. The Director issued the order in response to his recognition that he has a responsibility, subject to the confines of existing knowledge and technology, to exercise his statutory authorities to administer water rights for the use of ground water in a manner that recognizes and protects senior priority surface water and ground water rights in accordance with the provisions of Idaho law. In establishing the American Falls GWMA, the Director stated his intent to curtail diversions under certain junior ground water rights that caused significant depletions to hydraulically connected surface water sources thereby causing injury to senior priority water rights.

2. On August 31, 2001, the Director was advised by representatives of holders of

junior priority ground water rights and holders of senior priority surface water rights that agreements in principle had been reached that would provide replacement surface water for the next two irrigation seasons equal in amount to what would have resulted from the intended curtailment of certain junior ground water diversions within the American Falls GWMA.

3. Based upon the representations that agreements in principle had been reached, the Director announced on August 31, 2001, that no curtailment orders would be issued for the American Falls GWMA, provided the agreements in principle were implemented through detailed written agreements.

4. After August 31, 2001, representatives of holders of most of the affected ground water rights entered into detailed written stipulated Agreements with representatives of most holders of senior priority surface water rights. The Agreements were submitted to the Director for approval. The Director approved the Agreements on January 18, 2002.

5. Under the Agreements, the represented holders of senior priority surface water rights agreed not to exercise their senior priorities against the represented holders of junior priority ground water rights in exchange for commitments by the ground water right holders to provide specific quantities of replacement water during the two-year term of the stipulated Agreements. In the event the replacement water cannot be provided, the Agreements require an appropriate reduction of diversion under ground water rights or require that other mitigation be provided.

6. The signatories to the Agreements agreed to work with the Director to expeditiously create water districts to implement the terms of the Agreements.

7. Under the Agreements, the parties requested that the Director notify holders of ground water rights subject to interim administration who are not party to the Agreements, or other similar agreements or approved mitigation plans, that they may be subject to curtailment under the prior appropriation doctrine as established by Idaho law.

8. On November 19, 2001, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 35 and 41 overlying the Eastern Snake Plain Aquifer ("ESPA") in the American Falls area.

9. On November 19, 2001, the SRBA District Court issued an order setting the State's motion for order authorizing interim administration for hearing on January 8, 2002. The Court designated the matter as SRBA Subcase 92-00021 (Interim Administration). The State of Idaho served copies of the Court's November 19, 2001, order and the State's motion and supporting briefing and affidavits on all affected parties by regular U. S. Mail on November 26, 2001.

10. On January 8, 2002, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in all, or parts, of Administrative Basins 35 and 41 overlying the ESPA, pursuant to chapter 6, title 42, Idaho Code, based upon a

determination that such interim administration is necessary to protect senior water rights.

11. On January 14, 2002, the Director mailed notice, by regular mail, of the proposed action creating a water district in the American Falls area within the ESPA in Administrative Basins 35 and 41, pursuant to the provisions of Idaho Code § 42-604. Notice was mailed to each water user in the proposed district affected by the creation of the water district (herein established as Water District No. 120). The notice described the proposed action to be taken, the reasons therefore, the time and place of a hearing to be held on February 4, 2002, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

12. In addition, the Director published notice of the proposed action creating the water district once a week for two (2) weeks in the following newspapers having general circulation within the area covered by the proposed district: the Idaho Falls *Post-Register* on January 17 and 24, 2002; the Blackfoot *Morning News* on January 17 and 24, 2002; the Pocatello *Idaho State Journal* on January 17 and 24, 2002; the Rigby *Jefferson Star* on January 16 and 23, 2002; the *Shelley Pioneer* on January 17 and 24, 2002; and the *Aberdeen Times* on January 16 and 23, 2002.

13. The Director conducted the hearing concerning the proposed creation of the water district at the Blackfoot Civic Center in Blackfoot, Idaho, at 1:00 pm on February 4, 2002. Approximately seventy-five people attended the hearing.

14. Prior to commencing the hearing, the Director made a presentation and answered questions for approximately two hours addressing the reasons for creation of the proposed water district and how the district would operate.

15. 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 February 14, 2002, for the submission of written comments.

16. Only two persons presented oral statements for the record at the Blackfoot hearing. No one testified in opposition to the creation of the proposed water district. Tim Deeg of American Falls testified as a Director of the Aberdeen American Falls Ground Water District, and as President of the Idaho Ground Water Appropriators, Inc., which represents six ground water districts, three municipal users and three industrial users. Steven T. Howser testified as the General Manager of the Aberdeen-Springfield Canal Company.

17. Mr. Deeg stated that ground water users have several concerns regarding the operation of the proposed water district, and the interrelationship that will exist between the operation of the water district and the existing ground water districts. Mr. Howser stated that provision should be made to ensure that ground water may be diverted where the effects of the diversion have been fully mitigated.

18. The Director received written comments from six affected water users prior to the close of the February 14, 2002, comment period. None of the written comments oppose

creation of the water district. The comments raise issues and concerns about the types of functions that the water district will perform, how those responsibilities will be carried out, and how the costs of the water district will be allocated among water users. The United States Fish and Wildlife Service submitted comments relating to future arrangements that may be made for the measuring and reporting of ground water usage at its affected facilities.

19. The water supply in the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. One of the locations at which a direct hydraulic connection exists between the ESPA and the Snake River, including tributary surface water sources, is in the Shelley to Minidoka reach of the river, sometimes termed the "American Falls reach" located along the southeastern edge of the ESPA in the vicinity of the American Falls Reservoir.

20. The available water supply in all or portions of Administrative Basins 35 and 41 is currently not adequate to satisfy some senior priority water rights and is projected in the future to be insufficient, at times, to satisfy these water rights.

21. The administration of ground water rights within the portion of Administrative Basins 35 and 41 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. 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 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 establish 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, 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.

District Creation

6. Based upon the above statutory authorities, 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 a water district to administer water rights within those portions of Administrative Basins 35 and 41 overlying the ESPA, as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

7. The Director concludes that the water district should be formed on a permanent basis and 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

8. The Director concludes that immediate administration of water rights, other than 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.

9. The Director concludes that compliance with the provisions of the interim stipulated Agreements will provide adequate replacement water to satisfy the need for any mitigation or curtailment of the rights to the use of ground water held by persons who are party to the Agreements or are represented by a party to the Agreements during the term of the stipulated Agreements.

10. The Director concludes that the watermaster of the water district created by this order shall perform the following duties in accordance with guidelines, direction, and supervision provided by 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 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 if not covered by a stipulated agreement or a mitigation plan approved by the Director.

11. Additional instructions to the watermaster for the administration of water

rights from hydraulically connected sources will be based upon available data, models, and the Director's best professional judgment.

12. The Director concludes that the 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 users may elect to have the district contract with IDWR to provide watermaster services. Under a district contract with IDWR, the watermaster will be a direct employee of IDWR.

b. Creation of subdistricts that match boundaries of existing ground water districts and irrigation districts, or as otherwise determined by the Director.

c. Selection of Water District Advisory Committee that includes, but need not be limited to, representation from boards of directors of ground water districts and irrigation districts.

d. Appointment of deputy watermasters by the watermaster, with approval from the Director. Deputy watermasters shall 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. Water rights not included in an existing ground water district or irrigation district shall be assessed costs directly by the water district 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 diversions and users within their respective district (this will avoid billing of individual water rights or diversions by both the subdistrict and the water district).

## ORDER

IT IS ORDERED that:

1. The American Falls Area Water District, designated as Water District No. 120, is hereby created to include all ground water rights, other than small 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.

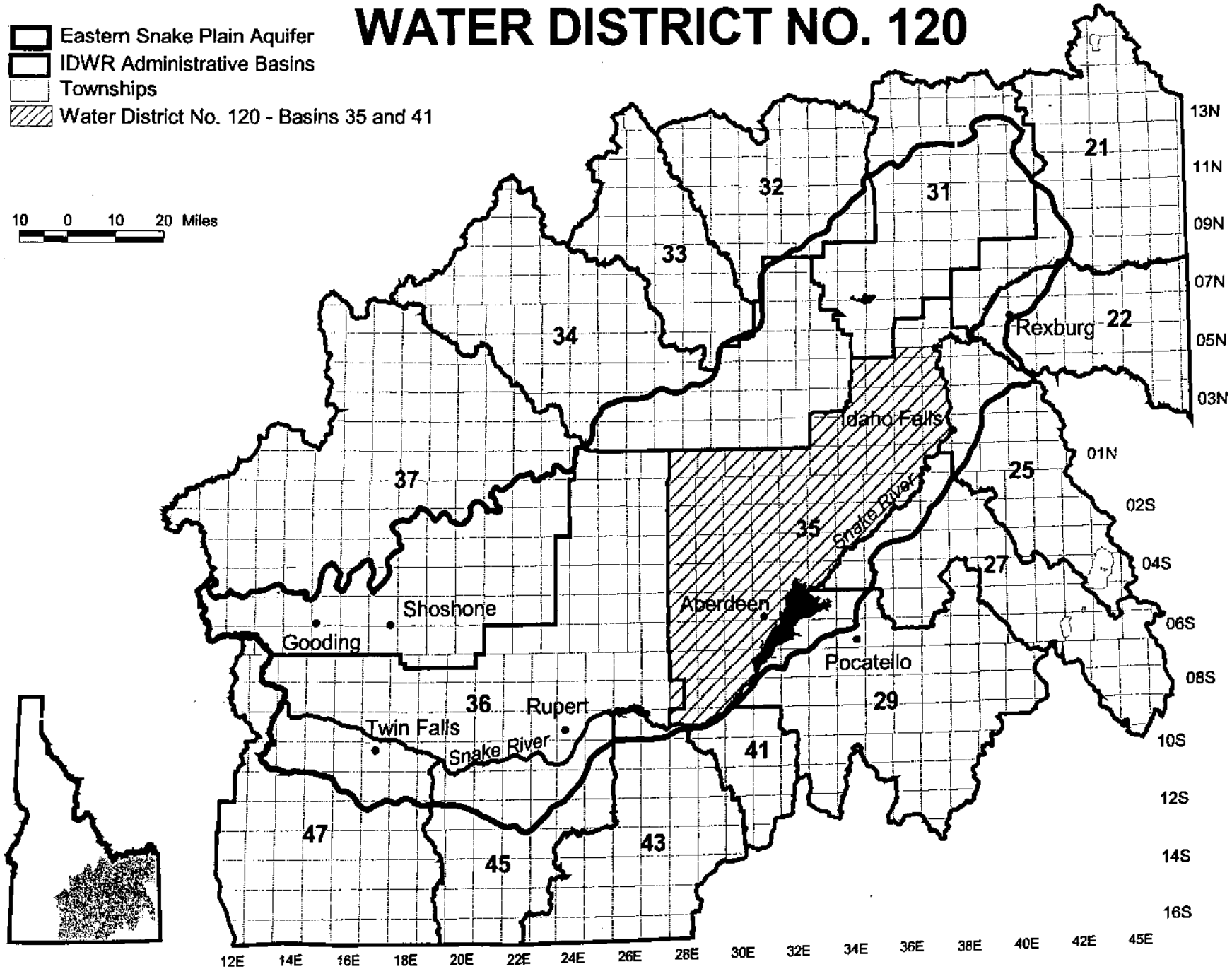
2. For 2002, the water right holders within the American Falls Area Water District No. 120 shall meet at a time and place to be announced by the Director to elect a

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 19th day of February 2002.

KARL J. DREHER
Director

# AMERICAN FALLS AREA WATER DISTRICT NO. 120




ATTACHMENT A