DECREE10014

BEFORE THE DIRECTOR OF THE
IDAHO DEPARTMENT OF WATER RESOURCES

In the Matter of the Administration of the Use of the Surface and Ground Waters of the Big Lost River Basin, Water District 34	)	FINAL ORDER

On May 7, 1990 the Director of the Department of Water Resources issued a Notice and Proposed Order in the matter of the administration of the use of the surface and ground waters of the Big Lost River Basin. A hearing concerning the Proposed Order was held at Mackay, Idaho, May 30, 1990. Some 106 persons signed the hearing register and of these five made oral statements. Subsequently, written statements were received from six persons.

The Director now finds and determines as follows:

FINDINGS AND CONCLUSIONS

1) The Big Lost River basin is located in central Idaho in parts of Butte and Custer Counties. The principal communities within the basin are Arco at the southern end of the basin and Mackay located near the basin center. The Big Lost River is the principal stream. Major tributary streams include Antelope Creek, Lower Cedar Creek, Pass Creek and Alder Creek although water from some of these does not reach the Big Lost River at all times each year.

2) The name, "Big Lost River" properly describes this unusual water system. During the course of its travel from the mountain watershed to the place of discharge onto the Snake Plain the water of the river sinks then rises again at several locations. The result is a closely interconnected surface and ground water system within the basin. These surface and ground waters are, for the most part, one single water source. Diversion and consumptive use of water, whether from a surface diversion or from a well, decreases the total water supply available and can have an effect on other uses of the r

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3) Where water was available in the surface streams, it was used early in the settlement of the basin. As a result water rights were established to the use of surface water for the irrigation of some 23,000 acres of land with priorities generally from 1880 to 1900. In low streamflow periods, the holders of these rights divert and use the entire available water supply of the river. However, during most years, only the very earliest priority surface water rights are able to receive water throughout the entire irrigation season.

4) The Mackay dam and reservoir was originally constructed in 1917-1918. It currently has an active storage capacity of 44,370 acre feet and is operated by the Big Lost River Irrigation District under water right priorities of 1905 and 1916.

5) Rights to the use of water pumped from wells within the basin have been established with priorities generally subsequent in time and inferior to the early direct flow and storage surface water rights. Several hundred wells have been drilled within the basin and the water from these is used for domestic, municipal and agricultural purposes, including irrigation and livestock watering. These wells intercept part of the total water supply of the basin and, except as hereafter noted, have an impact on the quantity of water available to those diverting surface water from the Big Lost River and its tributaries. There is only a finite quantity of water within the system and any increase in consumptive use of surface or ground water at one location results in a decrease in the water supply available for use at another location either inside or outside the basin at some later time. Some of these wells have operated for as long as 30 years without objection from surface right holders.

6) The flow of the Big Lost River fluctuates widely from year to year. As measured at the USGS gaging station near Arco it has annually totalled as much as 395,900 acre feet in water year 1984 and as little as only 4,900 acre feet in 1988. The gaging station reported zero flow for the entire water year of 1989.

7) A number of studies and estimates have been made of the ground water resources of the basin. An estimate by the U.S. Geological Survey based on data collected in 1968 indicated that the underflow of ground water past Arco in a southerly direction toward the Snake Plain ground water system was in the range of 300,000 acre feet per year

(425 cfs). This indicates that there was then a substantial resource which had been partially developed and was being used to supplement and augment the widely fluctuating surface water supplies of the basin. There has been considerable development of the ground water since that time and the present quantity of unused ground water exiting from the basin is unknown.

8) Idaho water law provides that "first in time is first in right" (Section 42-106, Idaho Code). The surface water rights in the Big Lost River basin generally have the senior priorities as against those using ground water. Strict adherence to the priority of right system could require that whenever any of the prior surface water rights is unable to receive its full entitlement, all subsequent priority uses, including uses of the interconnected ground water, be curtailed. Such priority system, if strictly enforced would protect the use of the limited surface water supplies of the basin while large quantities of ground water would flow unused out of the basin.

9) Section 42-237a, Idaho Code provides, in part, as follows:

> 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, except that in the administration of ground water rights either the director of the department of water resources or the watermaster in a water district ... shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided....

10) Under the provisions cited in paragraph 9 it is possible for the Director to include the rights to the use of ground water which have an effect upon the flow of the Big Lost River within the jurisdiction of the watermaster of Water District 34 (Big Lost River). Before doing so however, the water rights must first be adjudicated as provided in Section 42-604, Idaho Code which reads, in part, as follows:

The department of water resources shall divide the state into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district: ... provided, that this section shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.

11) The necessity for adjudication of water rights within a proposed combined water district was further emphasized by the Idaho Supreme Court in the case of Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977). Since the ground water rights within the Big Lost River drainage have not been quantified it is necessary to complete an adjudication covering the basin before the rights can be combined within a single district for the purpose of administration by the department or a watermaster.

12) The Big Lost River basin water rights (both surface and ground water) are subject to adjudication in the Snake River Basin General Adjudication of Water Rights currently pending in the District Court of the Fifth Judicial District of Idaho. The Director has determined that the report which is required to be filed with the court under the provisions of Section 42-1411, Idaho Code, covering rights within the Big Lost River sub-basin of the Snake River basin will be the first such report submitted to the court in this matter due to the concerns and conflicts within the area. The Director plans to file this report with the court in 1991. Through this adjudication the water users, the Department and the court can address the legal relationships and priorities of surface and ground water rights within the Big Lost River basin.

13) Section 42-1409(9), Idaho Code, provides that the holders of permits or licenses from the water system within which rights are being adjudicated, and who submit proof of appropriation of water after the date of the commencement of the adjudication may be given notice of the requirement to file an adjudication claim covering such rights. Such notice is required to be furnished at least 120 days prior to the filing of the Director's Report.

14) Section 42-1417, Idaho Code provides for interim administration of water rights at any time after the filing of the Director's report in a water rights adjudication proceeding upon order of the court. An order allowing such administration may be entered

by the court only upon a) a motion by the director or a claimant in such adjudication, b) notice to all claimants who could be adversely affected by the order, and c) a determination by the court that interim administration of water rights is reasonably necessary to protect senior water rights.

15) The 1990 session of the Idaho Centennial Legislature appropriated $50,000 to the Department "for the purpose of conducting a water management study for the (Big) Lost River Basin for the period July 1, 1990, to June 30, 1991." The results of studies conducted using such funding will not be available until some time in 1991. It is not possible at this time to determine whether the studies to be conducted using this funding will provide information needed to resolve all conflicts over use of Big Lost River basin water.

16) As of the date of this order, the Big Lost River drainage basin is in its fourth consecutive season with below-average water supplies. As a result, ground water levels have declined throughout the basin and streamflow has decreased. Information is not currently available to determine the extent to which the operation of specific wells has had an effect upon streamflow and upon ground water levels.

17) There are currently pending before the Department some sixty (60) applications for new permits to divert and use 600 cfs of surface and ground water within the Big Lost River basin for irrigation of approximately 26,000 acres of land. In addition there are 10 outstanding permits for the diversion of 42 cfs of surface and ground water for irrigation of 2,200 acres and for which proof of appropriation of water has not been submitted to the Department. Some of these permits are subject to and are currently undergoing the review provisions of Section 42-203D, Idaho Code.

18) Petitions have been filed seeking a moratorium on the issuance of additional permits and prohibiting further development under existing permits for the diversion and use of ground water within the Big Lost River basin under the provisions of Section 42-

1805(7), Idaho Code, which includes among the powers and duties of the Director the following:

> (7) 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 ....

19) Petitions have been filed opposing the imposition of a moratorium on the consideration of the pending applications and further development under permits to divert ground water within the basin. Said petitions recommend a cooperative effort among the entire Big Lost River community to formulate a method for utilizing the ground water supplies of the basin while still protecting vested rights.

20) Unless some action is taken at this time, Big Lost River water users may not be able to respond in a timely manner to water administration requirements which may result from the ongoing adjudication and to information obtained through proposed studies.

IT IS THEREFORE, HEREBY ORDERED AS FOLLOWS:

1) The rights to the use of ground water within the Big Lost River drainage basin will be incorporated into Water District 34 and shall become subject to the administrative supervision of the Water District 34 watermaster, upon satisfaction of the following conditions:

a. The Director has filed with the court his report in the Snake River Basin Adjudication pursuant to Section 42-1411, Idaho Code covering all water rights within Water District 34.

b. The court has issued either (1) an order pursuant to Section 42-1417, Idaho Code, permitting interim administration or (2) its final decree of the water rights of the Big Lost River drainage pursuant to Section 42-1412, Idaho Code.

c. The Director's report shall have identified each well the operation and/or use of which, in the opinion of the Director, has an effect upon the flow of the Big Lost River upstream from the USGS gaging station near Arco and also identifies each well

which, in the opinion of the Director, has no such effect.

d. The Director's report shall include findings and recommendations, as appropriate, concerning the relationship between the early priority surface water rights and subsequent ground water rights as to whether certain legal principles apply including, but not limited to adverse possession, equitable estoppel, estoppel by laches, forfeiture, and abandonment.

e. Those ground water rights which the Director's report finds and recommends and the court determines have an effect upon the flow of the Big Lost River and which are subject to the prior rights of the surface water users after consideration of the legal principles affecting the relationship of surface and ground water rights will become part of the Water District 34.

f. The Director's report shall include findings and recommendations concerning all previously adjudicated water rights in the Big Lost River basin which are rebuttably presumed to have been applied to beneficial use under the provisions of Section 42-1416(1), Idaho Code.

g. The Director's report shall include findings and recommendations concerning the validity of rights claimed to have been created as an expansion of a valid (previously) unadjudicated water right under the provisions of Section 42-1416(2), Idaho Code.

h. The Director's report shall include findings and recommendations concerning rights (surface and ground water) claimed to have been changed without having first obtained approval of a required application for change pursuant to Section 42-222, Idaho Code as necessary to satisfy the substantive criteria of said code section for approval of such changes as provided in Section 42-1416A, Idaho Code.

i. The Director shall give notice to the holders of all permits and licenses to appropriate water within the Big Lost River basin and in connection with which proof of appropriation was submitted after the date of the commencement of the Snake River Basin Adjudication of the requirement to file a claim to such permitted or licensed right in the

adjudication, and such claimed rights shall be evaluated along with all other claimed rights being adjudicated.

2. A moratorium on the consideration and issuance of new permits to appropriate surface and ground water within the Big Lost River drainage is imposed pursuant to the provisions of Section 42-1805(7), Idaho Code. This moratorium shall remain in place until revoked by the Director after the Director's report for the basin is filed with the court in the Snake River Basin Adjudication. This moratorium shall not apply to applications for drilling permits to replace or deepen existing wells nor to applications to transfer existing rights.

3. This order providing for the future combining of ground water rights into Water District 34 and establishing a moratorium on the consideration and issuance of new ground water permits shall not apply to any well used solely for "domestic" purposes as such term is defined by Section 42-111, Idaho Code, as amended by the 1990 Idaho Legislature. An exception will also be considered for any well proposed to be used for municipal purposes.

4. No moratorium is imposed on development under outstanding permits to appropriate water, provided, however, that such permits remain subject to all water law provisions including the requirement for reprocessing under Section 42-203D, Idaho Code. Any risks associated with development under such permits prior to the completion of the reprocessing is borne by the permittees.

5. In lieu of strict administration of affected ground water rights according to water right priority the holders of such rights may propose, either individually or with others similarly situated, a program of compensation or water replacement to assure that the senior water rights in the basin are not affected by the operation of wells which are found in the Director's report to have an effect upon the flow of the Big Lost River upstream from the USGS gaging station near Arco. Such program may include consideration of artificial ground water recharge to mitigate the effects of ground water pumping and to make use of

the waters which otherwise escape from the basin during periods of high runoff.

ISSUED THIS 7TH DAY OF AUGUST, 1990

R. KEITH HIGGINSON
Director