

Movant: State of Idaho

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	)	Subcase No. 92-00021
	)	
Case No. 39576	)	BRIEF IN SUPPORT OF MOTION
	)	FOR ORDER OF INTERIM
	)	ADMINISTRATION
	)	
	)	
_____	)	

SUMMARY OF ARGUMENT

Administration of water rights is the distribution of water to water users in accordance with the prior appropriation doctrine as set forth in Idaho law. The statutory mechanism for

distribution of water in accordance with the prior appropriation doctrine in Idaho is through creation of a water district and the office of watermaster within that district under the supervision of the Director (hereinafter “Director”) of the Idaho Department of Water Resources (hereinafter “IDWR”). The Director has the authority to create a water district upon entry of a court decree that determines the water rights within the geographic boundaries of the proposed water district or upon entry of an order from the district court that authorizes the use of a director’s report for purposes of interim administration. Since a final court decree does not exist for all water rights in Basin 29, the only way for the Director to administer the water in this basin through the use of a water district mechanism is for the district court to enter an order authorizing interim administration. That order is reasonably necessary because the continued drought has created substantial shortages in water needed by senior surface water rights in the Snake River Basin.

STATEMENT OF THE CASE

A. The Nature of the Case

The present motion requests the district court to enter an order authorizing interim administration for water rights in Snake River Basin Adjudication Basin 29, which contains that portion of Basin 29 located within the Eastern Snake Plain Aquifer (hereinafter “ESPA”).¹

B. The Course of the Proceedings

On August 3, 2001, the Director established the American Falls Ground Water Management Area and the Thousand Springs Ground Water Management Area, pursuant to Idaho Code § 42-233b. The primary reason for the creation of the two Ground Water Management Areas was the continued drought condition in surface water supplies. The reduced surface water flows caused two related impacts. First, senior natural flow surface water rights

¹ The State of Idaho’s Motion for Interim Administration does not seek administration of domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

were not being fully satisfied. Second, surface storage supplies did not recover from depletions during previous drought years. Thus, surface storage water was much reduced in availability. After the Director stated his intent to curtail diversions under those water rights for ground water within the Ground Water Management Areas he determined were causing significant depletions to hydraulically connected surface water sources, affected ground water right holders entered into written agreements with certain senior priority surface water right holders. The senior surface right holders agreed not to exercise their senior priorities against the junior ground water right holders in exchange for commitments by the ground water right holders to provide replacement water during the term of the agreements. In addition, the signatories to these agreements agreed not to oppose a motion by the State seeking an order from the SRBA district court authorizing interim administration of water rights within portions of the ESPA in accordance with the provisions of Idaho Code § 42-1417. While these agreements govern the distribution of water to many of the users within Basin 29, not all water users within Basin 29 signed these agreements. Thus, the Director will need to use a watermaster to curtail junior water users within Basin 29 found to be causing injury to senior surface water rights in the event that the drought continues. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 3-4.

The agreements recognize that interim administration will extend to all, or, portions of Basins 25, 27, 29, 35, 36, 37, 41, 43 and 45. *Id.* The State of Idaho previously filed motions for interim administration for all, or portions, of Basins 35, 36, 41, and 43. MOTION FOR ORDER OF INTERIM ADMINISTRATION AND MOTION FOR EXPEDITED HEARING, dated November 19, 2001 (hereinafter "First Interim Administration Motion"). The district court

granted interim administration within these Basins on January 8, 2002. ORDER GRANTING STATE OF IDAHO'S MOTION FOR ORDER OF INTERIM ADMINISTRATION.

The State of Idaho also filed a motion for administration for Basin 37, Part 1, Groundwater. MOTION FOR ORDER OF INTERIM ADMINISTRATION AND NOTICE OF HEARING, dated August 30, 2002 (hereinafter "Second Interim Administration Motion"). The district court granted interim administration within Basin 37, Part I, Groundwater on November 19, 2002. Because Director's Reports have not been filed with the SRBA District Court for Basins 25, 27, and 45, the State of Idaho is limiting its current motion for interim administration to Basin 29. As Director's Reports are filed for Basins 25, 27, 45, and the remaining portion of Basin 37 (surface water rights), the State of Idaho will file motions for interim administration for water rights within those basins, as appropriate.

On February 19, 2002, the Director of IDWR created Water District No. 120 pursuant to chapter 6, title 42, Idaho Code. The district was created for the purpose of administration of rights to the use of ground water and springs discharging from the ESPA in IDWR Administrative Basins 25, 27, 29, 35, and 41. The geographic scope of Water District 120 is currently limited to all or portions of Basins 35 and 41 within the ESPA. *Id.* at 4-5.

On July 10, 2003, IDWR filed with the district court the Director's Report for Basin 29. If the district court enters an order authorizing interim administration for that portion of Basin 29, within the ESPA, the Director intends to enlarge Water District 120 to include that portion of Basin 29 in the ESPA pursuant to the provisions of Sections 42-1417 and 42-604, Idaho Code. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 4-5.

C. The Statement of Facts

The Eastern Snake River Plain is a crescent shaped tract of land beginning near Ashton in Eastern Idaho and extending in a southwesterly direction to the Thousand Springs reach of the Snake River northwest of Twin Falls, Idaho. The ESPA underlies much of the Eastern Snake River Plain. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 3. Efficient management of the water resources of the ESPA is essential to the well being of the entire State of Idaho.

Natural discharge from the ESPA into the Snake River occurs primarily at two sites in Southern Idaho: (1) American Falls Reservoir, and (2) the Thousand Springs reach of the Snake River. Discharges from the ESPA into the Snake River at both sites have fluctuated significantly over the last one hundred years. The major factor in this fluctuation of spring discharges is due to the many effects of irrigated agriculture. Because of the hydrogeology of the ESPA, the impacts of changes in aquifer recharge and pumping are often not apparent in aquifer discharge into the Snake River for periods of years or decades in some cases. This delayed and dispersed effect makes distribution of the water rights in accordance with the prior appropriation doctrine from the hydraulically connected ground water and surface water sources extremely complex. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 3.

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ARGUMENT

I. THE REQUIREMENTS FOR INTERIM ADMINISTRATION OF WATER RIGHTS ARE MET FOR BASIN 29.

Chapter 6, title 42, Idaho Code, sets forth the general provisions of law that govern administration of water rights in Idaho. “Administration of water rights” is the distribution of water to water users in accordance with the prior appropriation doctrine as set forth in Idaho law. Chapter 6 assigns to the Director the responsibility for supervising the distribution of water from all natural water sources and directs that the Director will exercise this duty through the creation and function of water districts with an administrative officer designated as the watermaster under the Director’s supervision. Idaho Code § 42-602. However, chapter 6 only authorizes the creation of water districts where the water sources have been adjudicated by a court having jurisdiction thereof. Idaho Code § 42-604. The single exception to this limitation is a geographic unit where the district court has authorized interim administration in accordance with Idaho Code § 42-1417.

Idaho Code § 42-1417 authorizes interim administration of water rights and provides, in part, as follows:

- (1) The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho:
 - (a) in accordance with the director’s report or as modified by the court’s order;
 - (b) in accordance with applicable partial decree(s) for water rights acquired under state law;
 - (c) in accordance with applicable partial decree(s) for water rights established under federal law.
- (2) The district court may enter the order only:
 - (a) upon a motion by a party;
 - (b) **after notice by the moving party** by mail to the director and **each claimant** from the water system or portion thereof **that could reasonably be determined to be adversely affected by entry of the order;** and
 - (c) **upon a determination by the court, after hearing, that the interim administration of water rights in accordance with the report, or as the report is modified by the court’s order, and in accordance with any**

partial decree(s), is reasonably necessary to protect senior water rights.

Idaho Code § 42-1417 (1996) (emphasis added). Thus, Idaho Code § 42-1417 requires the district court to make the following determinations: (1) a party filed a motion for interim administration, (2) the moving party served by mail each claimant that could reasonably be determined to be adversely affected, (3) interim administration is reasonably necessary to protect senior water rights, and (4) the water rights should be administered in accordance with the director's report, as modified by the district court, or in accordance with partial decrees that supersede the director's report.

Here, the first and second requirements are easily met. Since the State of Idaho is a claimant, and therefore a party to the SRBA, and is the moving party in this matter, the first requirement of Idaho Code § 42-1417 is met.

The notice is being served on all claimants who will be subject to interim administration if the motion is granted. The Certificate of Service for the Motion for Interim Administration demonstrates compliance with this requirement by service of these papers on all claimants in Basin 29, except for the excluded domestic and stockwater rights. Thus, the State of Idaho has demonstrated compliance with the second requirement of Idaho Code § 42-1417. The third and fourth requirements are discussed in more detail in the following sections.

II. INTERIM ADMINISTRATION OF WATER RIGHTS IN THE EASTERN SNAKE PLAIN AQUIFER IN BASIN 29 IS REASONABLY NECESSARY TO PROTECT SENIOR WATER RIGHTS.

- A. Senior surface water rights that rely on natural flow gains of the Snake River and tributary surface water sources in the Shelley to Minidoka reach of the Snake River, herein termed the "American Falls reach", need protection from diversions by junior users of ground water in Basin 29.

Recent events demonstrate the immediate need for water districts within portions of the ESPA in order to protect senior water rights. As a result of the drought over the past several

years, the water supplies available for use under senior priority surface water rights relying on natural flow gains in the American Falls reach have diminished and are expected to continue to diminish in the coming year. As a result, the Director designated a Ground Water Management Area encompassing portions of the ESPA along the American Falls reach of the Snake River. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 4.

Water flows from the American Falls reach of the Snake River are insufficient, at times, to supply some senior surface water rights. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 4, 7. Simulations using the Department's calibrated computer model of the ESPA show that ground water withdrawals from the ESPA for irrigation and other consumptive purposes cause reductions in the gains to the American Falls reach that result from hydraulic connection with the ESPA in the American Falls area. *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 4. Thus, administration is necessary to ensure senior surface water users' rights are protected. The critical question is how best to provide that protection.

B. Interim administration is reasonably necessary for protection of senior surface water rights.

On November 19, 2001, the State of Idaho filed its First Interim Administration Motion and other supporting papers.² At that time the State of Idaho advised the district court that its First Interim Administration Motion was limited to all or portions of Basins 35, 36, 41, and 43, and that supplemental motions would be filed as later Director's Reports were filed with the district court. BRIEF IN SUPPORT OF MOTION FOR ORDER OF INTERIM ADMINISTRATION at 2, n. 2. Following hearing, the district court entered an order authorizing interim administration as requested. Thus, the district court has already decided that

² In considering the State of Idaho's present request the State of Idaho requests the district court to take judicial notice of the pleadings filed in the First Interim Administration Motion filed on November 19, 2001 and in the Second Interim Administration Motion filed on August 30, 2002.

interim administration is the best solution to this continuing distribution problem. Later, the State of Idaho filed its Second Interim Administration Motion for Basin 37, Part I Groundwater on August 30, 2002, and the district court granted this motion on November 19, 2002.

The present motion is the third motion that proposes interim administration involving the ESPA. If the district court enters an order authorizing interim administration of water rights in Basin 29, the Director would then expand existing Water District 120 to include the geographic area of that portion of Basin 29 within the ESPA. The expansion of Water District 120 is an important step in the administration of water rights. Water districts provide mechanisms for administration, regulation, and enforcement of water rights. They also provide a means for incorporating regular measurement and reporting of diversions, including ground water diversions. In addition, water districts provide for timely response to general calls for water distribution and provide a system whereby a watermaster can provide timely assistance and expertise to water users and respond to their complaints. Furthermore, water districts provide for improved management of water rights records, specifically maintaining current ownership information. Creation of water districts provides an equitable funding mechanism for these services. The water users will fund the costs of the watermaster as provided for by Idaho Code § 42-605 and 42-612. State Exhibit 1, *Affidavit of Timothy J. Luke Dated July 10, 2003*, at 5-6.

The watermaster duties in the water districts will be to (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; (3) enforce the provisions of the agreements; and (4) curtail out-of-priority diversions determined by the Director to be causing injury to senior water rights that are not covered by an agreement or a mitigation plan approved by the Director.

C. Conclusion

The need to protect senior water rights that rely on the spring discharges from the American Falls reach of the Snake River is clear. The only effective means to provide that protection is through the use of a water district and a watermaster acting under the supervision of the Director. Because of the shortage of water to satisfy senior water rights in the Snake River Basin and the interrelationship between the ESPA and Basin 29, it is appropriate that the existing Water District 120 be expanded to include the administration of the water rights within Basin 29. Expansion of Water District 120 also will enable the Director and participating water right holders to take further steps toward long-term administration of the resource. Interim administration in Basin 29 is reasonably necessary for the protection of senior surface water rights.

II. THE DIRECTOR'S REPORT AND PARTIAL DECREES PROVIDE AN ADEQUATE LIST OF WATER RIGHTS FOR PURPOSES OF INTERIM ADMINISTRATION.

Chapter 6 recognizes that distribution of water requires an accurate listing of water rights. Idaho Code § 42-604, providing for the creation of water districts, applies only to "streams or water supplies" whose priorities of appropriation have been adjudicated by courts having jurisdiction thereof. The Idaho Supreme Court has recognized the importance of an accurate list containing the description of the water rights to be administered. In *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), the Idaho Supreme Court stated: "Only by having a specific list reciting the names of water users, with their dates of priority, amounts, and points of diversion can such a system be administered." *Id.* at 91, 558 P.2d at 1052, quoting *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973).

Before the court can issue the order of interim administration, the court must find that the individual partial decrees that supersede the Director's Report for individual recommendations

and the latest filing of Director's Report where partial decrees have not been issued are an adequate listing of the owners of and the elements of the water rights for the purposes of interim administration of a water source. Idaho Code § 42-1417 contemplates that the Director's Report constitutes an adequate listing, since all the claims acquired under state law have been investigated by state officials and reported to the district court. The statute assures procedural due process by requiring notice to the claimants and by allowing the court to modify the Director's Report for purposes of interim administration in the event that a claimant establishes an error in the Director's Report at the hearing. The statute also contemplates that the partial decrees provide an adequate listing of water rights for purposes of interim administration because these rights have not only been investigated by state officials, but have also withstood the scrutiny of court review. Thus, the Director's Report and the partial decrees meet the need for administration pending the completion of the adjudication. Upon entry of an order for interim administration, the creation of a water district and the distribution of water thereafter will occur in accordance with the normal administrative mechanism provided by chapter 6, title 42, Idaho Code.

CONCLUSION

Interim administration, as requested in the State's motion, is reasonably necessary to prevent injury to senior water rights in the Snake River Basin as required by Idaho Code § 42 1417. The Director's Report for Basin 29 and the partial decrees that will supersede the Director's recommendations are based on examination of the claims and the water system as required by Idaho Code § 42-1411. As such, the Director's Report and the partial decrees constitute an adequate listing of water rights for purposes of administration of water rights pending entry of a final decree of the water rights. Therefore, the State requests that the district

court enter an order authorizing the administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basin 29 in accordance with the definition of water rights listed in the Director's Report and, where superseded, in accordance with the partial decrees.

DATED this 10th day of July, 2003.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO

A handwritten signature in black ink, appearing to read "David J. Barber", is written over a horizontal line.

DAVID J. BARBER
Deputy Attorney General