BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF A PETITION)
TO MODIFY THE BOUNDARIES OF) **FINAL ORDER**
WATER DISTRICT NO. 63-S)
)

Terteling Trust No. 7 filed a petition with the Idaho Department of Water Resources (Department) to modify the boundaries of Water District No. 63-S, also known as Stewart Gulch. The petition was filed on January 25, 1995, and a hearing for water district members and interested parties was conducted on May 16, 1995.

The four regulated water right users within the water district participated in the hearing. These water users include the following in the order of senior to junior water right priority: Flora Company (Flora), Edwards Greenhouses (Edwards), Terteling Trust No. 7 (Petitioner) and Quail Hollow Golf Course (Golf Course).

At the conclusion of the hearing, the record was left open until June 6, 1995, to accommodate additional information. Briefs by attorneys were also due by that date. Response briefs were due by June 16, 1995. Additional information was submitted by the Petitioner, Flora and Edwards in a timely manner.

A Recommended Order was issued by the Idaho Department of Water Resources (Department) on September 21, 1995, and served by mail on September 27, 1995. No exceptions to the Recommended Order were filed with the Department.

Based upon his understanding of the law, the Director makes the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. Water District No. 63-S (District) is a low temperature geothermal resource district composed of four regulated water users. The regulated District members use "hot water" wells primarily for commercial (greenhouses) and irrigation (crops and a golf course) purposes. Minor or domestic uses exempt from water right permitting requirements remain unregulated within the District absent a showing of cause for regulation.

2. The District was established by the Final Order Adopting Proposed Memorandum Decision and Order issued by the Director of the Department (Director) on December 5, 1989. That order recognized the terms of Silkey v. Tiegs, et al., Ada County Case No. 11748, June 13, 1930. Pursuant to a request for ground water regulation within the District, the Director issued a subsequent order (Final Memorandum Decision and Order) on December 1, 1992, to implement watermaster administration of pertinent water rights. The Department initiated District operations by organizing the first annual District meeting in February, 1993.

3. Guidelines for the administration of water rights within the District were further modified by the Director's October 27, 1993 Order Denying Petitions for Rehearing and Amended Final Memorandum Decision and Order.

4. District procedures facilitated calls by the senior water right owner, Flora, for water deliveries in the late summers of 1993 and 1994 (around Labor Day). In each regulated period as water shortages developed, senior rights were authorized to divert while junior rights were curtailed. Watermaster control included, but was not limited to, Petitioner's Windsock well (TWS well) located in the NW¼SW¼ Section 22, T4N, R2E, B.M., whereby use of the well was curtailed as needed.

5. Petitioner's evidence established a definite link between the TWS well and other low temperature geothermal wells that are found down-gradient in the District. These other wells include those used by Flora, Edwards and the Golf Course; these wells are located as follows in T4N, R2E, B.M.:

a) Flora well no. 1 in the NW¼SW¼ Section 28 and well no. 2 in the NE¼SE¼ Section 29;

b) Edwards well in the SW¼NE¼ Section 29; and

c) Golf Course well no. 1 in the SW¼SE¼ Section 21 and well no. 2 in the NW¼NE¼ Section 28.

6. Petitioner's Motorcycle Club well (TMC well) is located in the NW¼NE¼ Section 22, T4N, R2E, B.M. and falls within current District boundaries but has not been in use during any periods of watermaster regulation.

7. The TMC well has been reconstructed to provide a viable source of low temperature geothermal water for beneficial use. Irrigation use from this well is authorized by License No. 63-07595 as most recently defined in Transfer No. 4202, approved by the Director's Final Order dated October 27, 1993. License No. 63-07595 provides for irrigation of 103 acres within Sections 21 and 22, T4N, R2E, B.M.

8. The hydrologic consultant for the Petitioner conducted three aquifer tests to determine if the TWS well and down-gradient low temperature geothermal wells are hydraulically connected to the TMC well. The tests occurred in June 1993, March 1994, and May through June 1994. Results from the three tests showed that the TWS, Golf Course, Flora, and Edwards wells do not demonstrate such a connection with the TMC well.

9. The Petitioner's conclusion that a hydrological barrier exists between the TMC well and the other down-gradient low temperature geothermal wells, including the TWS well, is based on the following six factors:

a) three aquifer tests in 1993 and 1994;

b) observable faults from land surface analysis (road cuts, etc.);

c) the Chevron Seismic Line data estimated to be dated from the 1970's or 1980's (faulting trends);

d) substrata differences northwest and southwest of the barrier (lithology);

e) hydrological analysis of nearby surface springs, primarily the Terteling Springs between and west/northwest of the TWS and TMC wells;

f) ground water temperature differences encountered on either side of the barrier.

Testimony of the Petitioner's consultant concluded that the most significant of these six was factor (a), the three recent aquifer tests.

10. Faults can act as either conduits or barriers to the flow of water, and if the latter, are rarely 100% effective. Existing data indicate that a barrier fault(s) is located between the TWS and TMC wells. Because the low temperature geothermal wells down-gradient (southwest) from the TWS well are interconnected with the TWS well and because none of these wells are connected with the TMC well, the barrier restricts communication between the areas northeast and southwest of the barrier.

11. The precise location, path and extent of the barrier cannot be determined from existing data. Faulting in this location most likely matches the northwest-southeast trending faults of the Boise Front. The barrier appears to bisect Section 22, T4N, R2E B.M. in a northwest-southeast manner from a point 700 feet south of the northwest section corner to a point 700 feet west of the southeast section corner (Petitioner's Exhibit B).

12. Characterization of the hydrological barrier is more general than specific. Nonetheless, the barrier separates aquifer functions between the TMC well and the wells found down-gradient.

13. No aquifer communication between the low temperature geothermal wells within the District and those outside of the District has been documented. Therefore, no foundation exists to modify the District boundaries in any outward direction from the current boundaries established by the Director's previous orders (Finding of Fact Nos. 2 and 3).

14. In addition to the testimony and exhibits presented at the May 16, 1995 hearing and subsequent information submitted while the record remained open, the Department takes official notice of the following:

a) Silkey v. Tiegs decree;

b) previous Department proceedings and subsequent orders issued by the Director establishing the District;

c) Water District No. 63-S file information;

d) official water right files, Snake River Basin Adjudication files, and well logs for the water rights within the District;

e) all data, hydrographs, seismic information, and similar types of information whether found in print or electronic formats that are contained in Department files and that are related to aquifer monitoring or other testing within the District and/or the Boise Front Ground Water Management Area; and

f) other correspondence, memoranda, and similar documents located in the Department files that pertain to low temperature geothermal wells in and around the District.

CONCLUSIONS OF LAW

1. Idaho's Constitution provides that all waters within the state are subject to state regulation and control. Idaho Constitution Article XV § 1, defines:

> **Use of waters is a public use.** - The use of all waters now appropriated, or that may hereafter be appropriated .... is hereby declared to be a public use, and subject to the regulations and control of the state in the manner prescribed

2. A statutory duty exists for the state to supervise the appropriation and allotment of the water resources of the state to water users who divert for beneficial use as prescribed in part in I. C. § 42-101:

> **Nature of property in water.** - Water being essential to the industrial prosperity of the state .... All the waters of the state .... within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose ....

3. The state's duty to supervise the appropriation of water applies to all subterranean waters as well as to surface waters within the state. I. C. § 42-103.

4. The Director must control water distribution within water districts prescribed in part by I. C. § 42-602:

> **Director to supervise water distribution.** - The Director of the department of water resources shall have direction and control of the distribution of water from all natural sources within a water district to .... facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

5. The Director retains authority to revise water district boundaries through the hearing and order process described in I. C. § 42-604:

> **Creation of water districts.** - The director of the department of water resources shall divide the state into water districts in such a manner .... where the use of waters .... by appropriators in one district does not affect or conflict with the use of the waters .... by appropriators outside such district .... The director may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required to properly administer uses of the water resource. .... Before entering an order creating, modifying, or abolishing a district .... the hearing shall be held within

the district or proposed district, or at some nearby location convenient to the affected water users.

Each water district created hereunder shall be considered an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.

6. Based upon the information presented to the Department regarding the existence and effect of the hydrological barrier, the Department should modify the boundaries of the District and should exclude the TMC well from control of the District watermaster.

7. The low temperature geothermal wells that should remain subject to watermaster control include six wells situated down-gradient from the barrier. The regulated wells include those operated by the Petitioner (TWS well), the Golf Course (two wells), Flora (two wells), and Edwards (one well) as previously identified by legal location herein. Low temperature geothermal wells found within the District and utilized for domestic use defined in I. C. § 42-111 remain excused from watermaster regulation.

ORDER

IT IS HEREBY ORDERED that Water District No. 63-S shall be managed under the following provisions:

1. The boundaries of the District are modified to include the area as shown on attached Figure 1 and described as follows:

Beginning at a point 700 feet west of the southeast corner of Section 22, T4N, R2E, B.M., thence west seven-eighths mile to the southwest corner of Section 22, thence south one-half mile to the east quarter corner of Section 28, thence west one-half mile to the center of Section 28, thence south one-half mile to the south quarter corner of Section 28, thence west one and one-half miles to the southwest corner of Section 29, thence north one mile to the northwest corner of Section 29, thence east one mile to the northeast corner of Section 29, thence north one-half mile to the west quarter corner of Section 21,

thence east one-half mile to the center of Section 21, thence north one-half mile to the north quarter corner of Section 21, thence east three-eighths mile to a point 700 feet west of the northeast corner of Section 21, thence southeast one and four-tenths miles through Section 22 in a line intersecting Cartwright Road, Stewart Gulch, and Miller Gulch to the point of beginning, all in T4N, R2E, B.M.

2. The area north and east of the new boundary line as shown on attached Figure 1 is excluded from Water District No. 63-S, and the Terteling Motorcycle Club well located within the excluded zone is no longer subject to control by the watermaster of said District based on the revised District boundary.

3. The Department will consider additional alterations to the boundaries of Water District No. 63-S to eliminate regulation of a well if its owners demonstrate to the satisfaction of the Director of the Department that regulation of the well will not impact the water availability to another well in the aquifer having a senior right and should not, therefore, be regulated within the District. Similarly, the Department will consider additional alterations to the boundaries of the District to add regulation of a well if it can be shown, to the satisfaction of the Director, that the well adversely affects the water availability to another well in the aquifer having a senior right and should, therefore, be regulated within Water District 63-S.

4. This Final Order shall only govern the administration of low temperature geothermal ground water from the District until such time as the water rights are adjudicated and all other relevant matters necessary to define the rights are addressed in Twin Falls County Case No. 39576 (Snake River Basin Adjudication).

Furthermore, this order is not intended to preclude or limit any water user from advancing any legal argument or defense before the District Court in Twin Falls County Case No. 39576 involving any issue raised or ruled upon by the Department in this Final Order.

Furthermore, all other aspects of previous orders issued by the Director and referenced in Finding of Fact Nos. 2 and 3, that are not addressed herein remain in effect.

DATED this 8th day of December, 1995.

KARL J. DREHER, Director

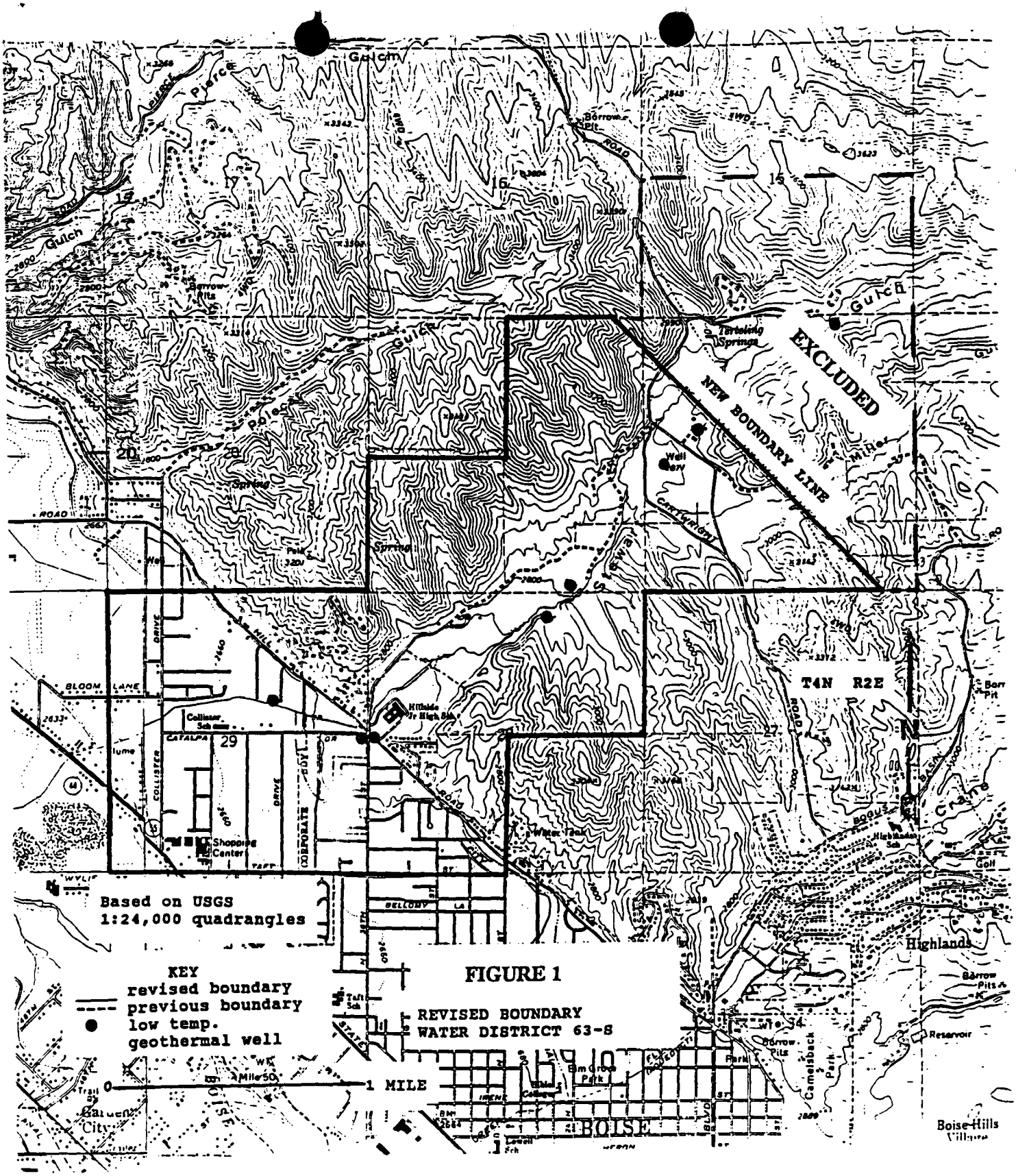

EXCLUDED
NEW BOUNDARY LINE
T4N R2E
Based on USGS
1:24,000 quadrangles
KEY
revised boundary
previous boundary
low temp.
geothermal well
0
1 MILE
REVISED BOUNDARY
WATER DISTRICT 63-S
BOISE
Highlands
Boise Hills

FIGURE 1

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of December, 1995, I mailed a true and correct copy, postage prepaid, of the foregoing **FINAL ORDER** to the following:

D. See & E. Tullis
Flora Co.
3823 N 36th
Boise, ID 83703

Sherman Nelson
4015 Whitehead St.
Boise, ID 83703

William D. Collins
WESTBERG MCCABE & COLLINS
P.O. Box 2836
Boise, ID 83701

W.F. Ringert
RINGERT CLARK CHARTERED
P.O. Box 2773
Boise, ID 83701-2773

William A. Harenberg
Watermaster 63-S
3927 Garnet St.
Boise, ID 93703-5107

Mary & Rose Ryan
4504 Foothills Dr.
Boise, ID 83703

Susan D. Miner
HAWLEY TROXELL ET AL
P.O. Box 1617
Boise, ID 83701

Edwards Greenhouses
Attn: M. or G. Monnie
4106 Sand Creek
Boise, ID 83703

Kenneth R. Arment
1770 W. State STE 339
Boise, ID 83702

Dave Hendrickson
4520 N 36th
Boise, ID 83703

J. Fereday & M. Creamer
GIVENS PURSLEY ET AL
P.O. Box 2720
Boise, ID 83701

Terteling Trust No. 7
877 W Main STE 706
Boise, ID 83702

William R. Snyder
P.O. Box 961
Boise, ID 83701

Ed Squires
1530 Knights Dr.
Boise, ID 83712

Julie L. Yarbrough

JULIE L. YARBROUGH
Senior Secretary

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

December 11, 1995

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RE: In the Matter of a Petition to Modify the Boundaries of Water District No. 63-S

Dear Interested Party:

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 nonparty 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. 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 67-5246(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.

Sincerely,

L. Glen Saxton

L. GLEN SAXTON
Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region