

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PROPOSED)
COMBINATION OF WATER DISTRICT NOS.)
37, 37A, 37C AND 37M AND THE INCLUSION)
OF BOTH SURFACE WATER AND GROUND)
WATER RIGHTS IN THE COMBINED WATER)
WATER DISTRICT; AND IN THE MATTER OF)
ABOLISHING THE UPPER WOOD RIVERS)
WATER MEASUREMENT DISTRICT)
_____)

PRELIMINARY ORDER

The Director (“Director”) of the Idaho Department of Water Resources (“Department”) is required 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. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Idaho Code § 42-604 provides the Director with discretion in determining how these mandatory water districts shall be structured, allowing the Director to create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources. *Id.* Idaho Code § 42-706 authorizes the Director to create or abolish a water measurement district if such action is required to properly administer water uses. Based upon the record in this matter, the Department finds, concludes and orders as follows:

FINDINGS OF FACT

1. Water District No. 37 (“WD37”) includes surface water sources and water rights in the Big Wood and Malad River drainages excluding Water District Nos. 37M, 37A and 37C, and is located within portions of Blaine, Camas, Lincoln and Gooding Counties. WD37 annually elects a watermaster and adopts a budget to provide for the distribution of water from the Big Wood River and tributaries in accordance with the priorities of the water rights from those sources. WD37 has provided annual water delivery reports since 1920.

2. Water District No. 37M (“WD37M”) includes surface water sources and water rights in the Little Wood River drainage area from the mouth of Silver Creek to the confluence of the Big Wood River, including the Silver Creek drainage, and is located within portions of Blaine, Camas, Lincoln and Gooding Counties. WD37M annually elects a watermaster and adopts a budget to provide for the distribution of water from the Little Wood River and Silver Creek drainage in accordance with the priorities of the water rights from those sources. WD37M has provided annual water delivery reports since 1920.

3. WD37 and WD37M share the same watermaster, administrative staff and office. This practice of sharing staff and office resources along with submittal of combined annual reports for the two districts has occurred since 1921. Although the two districts still maintain separate budgets, they have in recent years combined their annual meetings to jointly adopt the same resolutions and select a common advisory committee.

4. Water District No. 37A (“WD37A”) includes surface water sources and water rights in the Corral Creek drainage located in Camas County. Corral Creek is tributary to Camas Creek. WD37A has been an inactive water district for over 33 years.

5. Water District No. 37C (“WD37C”) includes surface water sources and water rights in the Soldier Creek drainage located in Camas County. Soldier Creek is tributary to Camas Creek. WD37C has been an active water district over the past twenty years. The district holds annual meetings and elects a watermaster but does not consistently provide annual meeting minutes or other reports required of water districts pursuant to chapter 6, title 42, Idaho Code.

6. In 1980, the Director issued a policy memorandum declaring surface water in the Big Wood River basin upstream from Magic Reservoir, including Camas Creek, was fully appropriated.

7. On June 28, 1991, the Director issued an order creating the Big Wood River Ground Water Management Area pursuant to Idaho Code § 42-233b. The management area included ground water located within the Wood River Valley and the Camas Creek drainage above Magic Reservoir, and the Silver Creek/Bellevue triangle area. Finding of Fact 2 from the order stated the following:

The surface and ground waters of the Big Wood River drainage are interconnected. Diversion of ground water from wells can deplete the surface water flow in streams and rivers. New ground water uses can also deplete available supplies for other users and affect basin underflow which presently accumulates in the Magic Reservoir.

8. On September 21, 2011, the Department created the Upper Wood Rivers Water Measurement District (“UWRWMD”) for the purpose of measuring and reporting ground water diversions located within the Department’s Administrative Basin No. 37 (“Basin 37”) and the Upper Big and Little Wood River drainages outside of the Eastern Snake Plain Aquifer (“ESPA”).¹ The measurement district included ground water rights in the Camas Creek drainage area. Camas Creek is tributary to the Big Wood River at Magic Reservoir.

9. On February 20, 2013, the Snake River Basin Adjudication (“SRBA”) District Court issued an order authorizing the Director to distribute water pursuant to chapter 6, title 42, Idaho Code, in accordance with the Director’s Reports and partial decrees that have superseded the Director’s Reports for those surface and ground water rights located in Basin 37, part 2 (Camas and Clover Creek drainage areas) and part 3 (Upper Big and Little Wood River drainage areas). The District Court’s order found that “interim administration ... is reasonably necessary to efficiently administer water rights and to protect senior water rights.”

10. On July 10, 2013, the Director prepared a notice of public hearing proposing the following actions pursuant to the provisions of Idaho Code §§ 42-604 and 42-706:

- i. Combine WD37, WD37M, WD37A and WD37C;
- ii. Include surface water rights from the Camas Creek drainage in the combined water district, except surface water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A(11) and surface water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113;

¹ The UWRWMD included ground water rights located within the Snake River Basin Adjudication reporting areas of Basin 37, Parts 2 and 3.

- iii. Include in the combined water district ground water rights from the UWRWMD overlying the combined district in that portion of Basin 37 outside of the ESPA, except ground water rights for domestic and stock water uses as defined by Idaho Code §§ 42-111 and 42-1401A(11); and,
- iv. Abolish the UWRWMD.

The notice was sent by regular U.S. Mail on July 12, 2013, to each holder of a water right affected by the proposed actions above except holders of ground water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A(11), and surface water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The hearing notice described the proposed actions, the reasons therefore, and the time and place for a hearing to be held on July 30, 2013 concerning the proposed actions. The notice also provided a time period within which written comments on the proposed action would be accepted.

11. The notice explained that the proposed combination and revision of water districts is necessary in order to properly administer the water uses and water rights from both surface water and ground water sources in the combined water district area. The notice also explained that the UWRWMD was created in 2011 for the purpose of measuring and reporting ground water right diversions only and that regulation of ground water rights within the UWRWMD can only be accomplished through a water district created or modified pursuant to Idaho Code § 42-604.

12. On July 30, 2013, commencing at approximately 6:30 p.m. at the Blaine County School District Community Campus Auditorium in Hailey, Idaho, the Department conducted a public hearing concerning the proposed combination and revisions of water districts, and the abolishment of the UWRWMD. Allen Merritt, the Department's Southern Regional Manager, presided as hearing officer. Approximately 65 people attended the hearing.

13. The hearing officer initiated the hearing by explaining the hearing process. Department representative Tim Luke gave a presentation that described the proposed water district combination and revisions, the features and operation of water districts, the reasons for the proposed actions, and the rights and uses proposed to be included in the combined water district. The Department presented the following reasons for the proposed actions:

- Combining surface water rights from WD37 and WD37M will formalize a merger that has essentially been accomplished for a number of years. Combining the two districts will promote efficiency by eliminating dual budgets and duplication of certain processes.
- Ground water rights in the UWRWMD and most surface water rights in the Camas Creek drainage are not currently included in a water district subject to administration by a watermaster in an active water district. The UWRWMD has no authority to regulate ground water rights and is limited to measurement and reporting of ground water diversions only. Water rights not currently included in a water district whose sources of water have been adjudicated must be placed in a water district pursuant to Idaho Code § 42-604 "to properly administer uses of the water resource."
- The proposed combination of water districts and inclusion of surface water and ground water rights in one water district will provide for proper conjunctive administration of surface and ground water rights and the protection of senior priority water rights.
- The proposed combination of water districts and inclusion of surface water and ground water rights in one water district will provide for consistent, cost effective and efficient water district operations.
- Maintaining all of the ground water rights from the UWRWMD in one water district with surface water rights from WD37/37M will provide a consistent organizational structure

that can manage the measurement of ground water diversions as required by the Department.

- About 100 ground water rights in the Wood River Valley above Magic Reservoir and in the Silver Creek drainage are already regulated by the WD37/WD37M watermaster. Most of these rights require WD37/37M watermaster control because they are mitigated by surface water rights or because ground water is commingled with surface water sources. The Department believes it is more efficient and practical for all the ground water rights in the same area to be administered by one water district rather than separate water districts. It is not practical to remove the approximate 100 ground water rights in WD37 and WD37M to a separate water district given the existing watermaster control conditions and relationship with surface water rights and sources.
- The proposed combination of water districts and inclusion of surface water and ground water rights in one water district would simplify administration of the SRBA General Provisions for Basin 37, Part 2. These provisions stipulate that a large number of surface water rights in the Camas drainage are to be administered separately from all other rights in Basin 37. An additional but much smaller group of surface water rights are to be administered separately from all other water rights in Basin 37 but certain rights held by the Big Wood Canal Company may call for water delivery of water against this smaller group. All other Camas drainage surface water rights not listed in these General Provisions, and all Camas drainage ground water rights are to be administered with other water rights in Basin 37.
- Abolishing the UWRWMD is necessary if ground water rights in the UWRWMD are placed in a water district.

14. Following the presentation, the hearing officer provided time for hearing participants to ask questions' regarding the Department's proposed actions.

15. Persons attending the hearing were provided an opportunity to make oral statements for the record. In addition, the hearing officer held the record open through August 9, 2013 to receive written testimony.

16. Eleven (11) individuals testified at the hearing. Thirteen (13) individuals submitted written comments, including four (4) of the individuals who testified at the July 30, 2013 public hearing. One of the individuals submitting both oral testimony and written comments represented two separate groups of affected water users.

17. Five (5) individuals holding water rights or representing the holders of water rights within the Camas drainage testified against the Department's proposal to include the Camas drainage in a combined water district with water rights from WD37/37M and ground water rights from the Big Wood River Valley upstream of Magic Reservoir and the Silver Creek drainage. These five individuals proposed a single water district for the Camas drainage composed of both surface water and ground water rights, including rights from WD37A and WD37C. Four (4) additional individuals submitted written comments in supporting a separate Camas drainage water district.

18. Jim Speck, one of the five individuals who testified in support of a separate Camas drainage water district, spoke as a representative of numerous surface water and ground water right holders in the Camas drainage who had signed petitions requesting the Department "to create a new and separate water district for the administration of our rights and not add them to Water District 37." Copies of the signed petitions with associated water right owner names and water right identification

numbers were submitted to the Department before the close of the written comment period. Mr. Speck testified that fifty-four (54) of seventy-seven (77) surface water users, and thirty-nine (39) of forty-one (41) ground water users in the Camas drainage had signed petitions supporting a separate water district. Mr. Speck further testified that the users signing the petitions supported the merger or inclusion of WD37A and WD37C with all other surface and ground water rights in the Camas drainage under one water district separate from WD37.

19. Reasons cited by the supporters of a separate water district for surface water and ground water rights in the Camas Creek drainage, including rights from WD37A and WD37C include:

- The Camas drainage area aquifer is different and separate from the Wood River Valley aquifer and the two aquifers are not connected. The two aquifers may be considered “independent” sources of water supply in accordance with Idaho Code § 42-604, thereby justifying creation of separate water districts.
- A ground water model is currently being developed for the Wood River Valley and Silver Creek/Bellevue triangle area (most of Basin 37, part 3). This model does not include the Camas Creek area aquifer (most of Basin 37, part 2) and no effort is currently being made to develop a model for the Camas Creek area aquifer. Lack of a ground water model for the Camas drainage aquifer prohibits the ability to implement conjunctive administration of water rights from that portion of Basin 37. Moreover, mitigation that might be provided from the Camas drainage would be completely separate from mitigation that might be developed in the Upper Wood River Valley and the Silver Creek/Bellevue triangle area.
- Upper Wood River Valley water issues are not present or do not exist in the Camas Creek drainage area. There are almost no common water administration issues between Basin 37, parts 2 and 3.
- The SRBA General Provisions for Basin 37, part 2 stipulate that many surface water sources are to be administered separately from all of the water rights in Basin 37.
- A separate water district for the Camas drainage area would better serve the right holders in the area due to local control and supervision. A bigger water district does not necessarily translate to a better water district. Users in the area are willing to pay some additional costs if necessary for the benefit of local control.
- Water users in the Camas drainage would not be adequately represented in a larger combined water district because water use in the Camas drainage may be relatively smaller than other areas of the proposed combined district.
- Ground water pumping in the Camas drainage has minimal impact on the Big Wood River, and the surface water in the drainage is intermittent or separate from the Big Wood River after the early spring snow melt and high flow runoff.

20. In accordance with the SRBA General Provisions for Basin 37, part 2, nearly all of the consumptive use surface water rights in the Camas drainage (about 215 out of 267 rights) are to be administered separately from all other water rights in Basin 37. There are about seventeen (17) rights in the Camas drainage that are to be administered separately from all other rights in Basin 37 but these seventeen rights may be subject to a delivery call of certain rights held by the Big Wood Canal Company. This leaves only about thirty-five (35) rights in the drainage that do not enjoy the benefits of any separate administration provisions.

21. Ground water rights in the Camas drainage are subject to administration with other rights in Basin 37 and are also subject to measurement and reporting requirements established by the Department when it created the UWRWMD. There are approximately 80 ground water diversions in the

UWRWMD and Camas drainage. Many of the owners of these 80 ground water diversions and associated ground water rights also hold surface water rights in the Camas drainage.

22. Three (3) individuals holding ground water rights or representing the holders of ground water rights within the Big Wood River drainage above Magic Reservoir or within the Silver Creek drainage area testified against the Department's proposal to include ground water rights with surface water rights in a combined WD37. These individuals instead supported a separate water district for the holders of ground water rights. One of these three individuals also voiced support for formation of a ground water sub-district within a combined WD37.

23. Five (5) individuals submitted written comments opposing the inclusion of ground water rights in the same water district as surface water rights, including Mr. Speck; Mike Creamer, representing the City of Hailey; Bruce Smith, representing the City of Ketchum; Evan Robertson, representing the Sun Valley Water and Sewer District; and James Laski, representing himself as the owner of a small surface water right. Two (2) of these five individuals (Speck and Creamer) provided oral testimony at the hearing. Mr. Speck testified at the hearing that he represented nine (9) ground water users in the Big Wood Valley or Silver Creek area but he submitted written comments on behalf of twenty-seven (27) ground water right holders. The written comments submitted by Mr. Speck and Mr. Robertson stated support for the testimony and comments provided by Mr. Creamer. Mr. Creamer's written comments supported a separate water district of ground water rights located within Basin 37, part 3. The written comments submitted by Mr. Laski also voiced opposition to include water rights from the Camas drainage with those from the Wood River Valley in one combined water district. The comments submitted by Mr. Smith on behalf of the City of Ketchum also opposed the abolishment of the UWRWMD.

24. Reasons cited by those opposing the inclusion of ground water rights in a water district with surface water rights include:

- Adversarial interests between ground water users and surface water users resulting from any potential conjunctive administration process would compromise the operations of a water district where surface and ground water rights are combined. Conflicts between surface and ground water users may negatively impact the ability of the combined district to function efficiently and cooperatively.
- Ground water right holders would be out voted in a combined water district because the amount of ground water use is significantly less than the amount of surface water use in the proposed water district.
- Ground water users may not be adequately represented on an advisory committee selected for the proposed water district.
- Ground water users may bear a disproportionate cost of water district operations because the budget of the UWRWMD is significantly less than the combined budgets of WD37 and 37M.
- Water districts have been created in the ESPA that are composed primarily of ground water rights. Those water districts have worked well and provide a good model for Basin 37, parts 2 and 3.
- The ground water model for Upper Wood River and Silver Creek/Bellevue triangle area must be completed before ground water and surface water rights can be combined in a single water district.
- The Department should have presented a budget for the proposed water district as part of its' hearing notice or hearing presentation. Costs, management and potential

administrative conflicts between ground and surface users should be explained before combining surface and ground water rights in one district.

- It may be difficult or legally impossible to address potential delivery calls from holders of senior surface water rights and potential mitigation requirements of junior ground water right holders if surface and ground water users are combined in one water district.

25. Two (2) individuals owning surface water rights in WD37 or WD37M testified at the hearing in support of the Department's proposal of a combined water district for both surface water and ground water rights. One of these 2 individuals, Fred Brossy, spoke on both his own behalf and on behalf of the WD37 and WD37M Advisory Committee. Mr. Brossy is the chairman of the WD37/WD37M Advisory Committee.

26. One (1) individual owning several small irrigation ground water rights in the Upper Wood River Valley and the UWRWMD submitted written comments supporting the Department's proposal for combining surface water and ground water rights in one water district.

27. Reasons cited by those supporting the Department's proposal include:

- The WD37/37M advisory committee has long supported the administration of ground water rights above Magic Reservoir (including the Camas drainage) and the Silver Creek drainage with surface water rights in WD37/37M. The committee petitioned the Director to begin administration of ground water rights many years ago.
- Ground water and surface water sources within Basin 37, parts 2 and 3 are connected as one water source so administration of rights in one district is reasonable.
- Combining surface water and ground water rights in one water district will generally provide for more effective, efficient, lawful and equitable administration of water rights.
- More effort is needed to complete the measurement of ground water diversions in the area. Ground water measurement compliance may be accomplished under one water district.
- Cost assessments to ground water users and surface water users under one combined water district should not be more than the current level of assessments.
- A combined water district will promote an opportunity for ground water and surface water users to work together on problems affecting the two groups. A single district will create a more regional approach to water management and resolution of basin wide issues whereas separate districts may provide more local control but result in more local conflicts.
- Delays in combining surface water rights and ground water rights in one water district may delay effective conjunctive administration of water resources.

28. The watermaster of WD37 and WD37M, Kevin Lakey, submitted written comments that addressed some of the testimony at the hearing regarding concerns about conjunctive management. Mr. Lakey noted that water users at annual water district meetings only vote on district "budget, hiring and resolutions" and not "on how conjunctive management will be enforced." Mr. Lakey also noted that representation on the WD37/37M advisory committee is not based on the amount of water delivered but rather on geographical areas and types of beneficial use. Mr. Lakey believed that a fair representation of water users can be established in a combined water district.

29. One (1) individual representing himself as the owner of a small irrigation ground water right in the Bellevue triangle area testified at the hearing that he did not support the Department's proposal and generally did not support the inclusion of his ground water right in any water district because such action will derive no benefit to him. This individual however did state that he was more

supportive of smaller units of administration because his right and interests “would not be lost in the shuffle.”

CONCLUSIONS OF LAW

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within 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 §§ 42-101, 42-103, and 42-226.

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 *et seq.*

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. Idaho Code § 42-604 mandates the Director 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. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). Efficient distribution of water, in accordance with the legislative mandate, requires that IDWR implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users. *Id.* The combination and revision of water districts within Basin 37, parts 2 and 3 is necessary for the reasons set forth in Finding of Fact 13 and for the efficient administration of water rights in general.

5. Idaho Code § 42-1417 provides that 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.

6. All of the surface and ground water rights claimed in the SRBA and within Basin 37, parts 2 and 3, have been partially decreed or reported to the SRBA District Court.

7. Idaho Code § 42-227 provides that a water right permit may be issued, but shall not be required for appropriation of ground water for domestic and stock water purposes as defined under Idaho Code § 42-111.

8. Idaho Code § 42-113 provides that a water right permit may be issued, but shall not be required for appropriation of water for the in-stream watering of livestock.

9. Idaho Code § 42-706 provides that the Director may create, revise the boundaries of, or abolish a water measurement district or combine two or more water measurement districts by entry of an order if such action is required in order to properly administer uses of the water resource.

10. Much of the oral testimony from the hearing and the written testimony received after the hearing focused on the creation of a separate water district for the Camas drainage that would include both surface and ground water rights, including rights from WD37A and WD37C. Reasons that water users cited for creation of a separate district are listed in Finding of Fact 19.

11. The Department concludes that a separate water district for the Camas Creek drainage composed of surface water rights may provide for proper administration of surface water rights. The Department concludes that the small number of surface water rights in the drainage that are required to be administered with other rights in Basin 37 as described in Finding of Fact 20 may not justify including Camas drainage surface water rights in a large water district. The Department concludes that administration of these limited numbers of rights can be accomplished by a watermaster in a separate Camas drainage water district working in coordination with the watermaster from WD37 and with both watermasters working under the direction of the Director.

12. The Department concludes that the Camas drainage aquifer system is characteristically different from the Upper Wood River Valley aquifer system but the aquifer systems are hydraulically connected to each other and the Big Wood River². The Department agrees with testimony that the amount of ground water use from the two aquifer systems are different and water resource issues in the two areas may vary. The Department also agrees with testimony that conjunctive administration of surface and ground water rights in the Wood River basin is likely imminent. The Department does not conclude that ground water rights in the Camas drainage are immune to conjunctive administration simply because ground water use is less or because the drainage has not yet been included in the development of a ground water model.

13. Although ground water rights in both the Camas drainage and the Upper Wood River Valley and Silver Creek drainages may need to be conjunctively administered together with surface water rights in Basin 37, the Department concludes that the limited number of ground water rights and wells in the Camas drainage can be administered properly by including them with surface water rights in a separate Camas drainage water district that is under the direction and control of the Director.

14. The Department adopts this structure with some hesitation because conjunctive administration of water rights in Basin 37 may be more challenging when the water rights are in separate water districts and because many ground water diversions in the Camas drainage are not yet in full compliance with Department measurement orders. The Department would prefer to place the Camas drainage in a well established operational water district such as WD37 that has experienced staff, equipment and other resources rather than start a new water district that has no existing staff or resources. If ground water or surface water rights in the Camas drainage cannot be administered or properly measured in a separate water district, then the Director may abolish the district, revise the boundaries of the district or combine the district with another water district in accordance with Idaho Code §42-604.

15. Much of the oral testimony from the hearing and the written testimony received after the hearing also focused on the creation of a separate water district for ground water rights in the Upper

² Bartolino and Adkins, 2012. Hydrogeologic Framework of the Wood River Valley Aquifer System, South-Central Idaho, USGS Report 2012-5053, p. 26; and Wlaton, W.C., 1962. Ground Water Resources of Camas Prairie, Camas and Elmore Counties, Idaho, USGS Water Supply Paper 1609, pp. 1, 20, and 42-43.

Wood River Valley and the Silver Creek/Bellevue triangle drainage area. Reasons that water users cited for creation of a separate district are listed in Finding of Fact 24.

16. Testimony was provided opposing the proposed combination of ground water and surface water rights in a water district due to concerns that “conjunctive administration of surface and ground water rights is imminent and is an inherently adversarial process” which will “bleed over into the business of WD37.” Water districts are limited to administration of water rights, including measurement and regulation of diversions. Adversarial tensions between ground water and surface water users resulting from potential conjunctive administration of water rights should not negatively affect water district operations given the limited regulatory scope of the water district and the fact that conjunctive administration is guided by separate processes outlined in the Conjunctive Management Rules (CMR’s) (IDAPA 37.03.11). The Department agrees with the testimony of Kevin Lakey, WD37 watermaster, which notes that decisions regarding conjunctive administration will be made and enforced by the Director. Conjunctive administration will not be resolved within the venues or forums of a combined water district. Moreover, the CMRs have been implemented and mitigation has been successfully implemented within WD130 without disruption to the operations of that water district despite the fact that both surface water and ground water rights are included in the district.³

17. Additional testimony suggested that it may be “legally impossible to address potential delivery calls from holders of senior surface water rights and potential mitigation requirements of junior ground water right holders if surface and ground water users are combined in one water district” and that “management and potential administrative conflicts should be explained before combining surface and ground water rights in one district.” This testimony appears to confuse conjunctive administration issues with the narrow and limited regulatory scope of water district operations. Again, conjunctive administration and mitigation has been implemented “legally” in WD130 where surface water and ground water rights coexist. The Department proposed combining ground water rights and surface water rights in one district for the reasons stated in Finding of Fact 13. The Department is statutorily obligated to create or modify water districts largely to provide a regulatory structure to address water distribution problems and minimize potential conflicts. Water districts are not authorized to address potential mitigation requirements of junior ground water right holders but they are authorized to enforce mitigation requirements that may be required pursuant to orders of the Director under the CMRs. Potential mitigation requirements must be addressed by the holders of junior ground water rights working independent from a water district and preferably through a ground water district organized in accordance with chapter 52, title 42, Idaho Code.

18. Witnesses opposed combining ground water rights with surface water rights in a water district because surface water use is significantly more than ground water use in the proposed district and surface water users may out vote ground water users under the alternative method of voting allowed under Idaho Code § 42-605(4). The testimony cited concerns that the interests of ground water users will not be represented “because implementing conjunctive administration in the Big Wood River Basin will be contentious.” The Department notes that voting at annual water district meetings is limited to the adoption of a budget, election of a watermaster and treasurer, selection of an advisory committee and adoption of resolutions related to the operation of the water district. Conjunctive administration issues and decisions will not be subject to voting at annual water district meetings. Moreover, the concern that ground water users will be outvoted or “unrepresented” discounts the fact that about 100 ground water rights have been included in WD37 and WD37M for a number of years. The Department is not aware of complaints or concerns from those ground water users regarding “unrepresented” interests or control by

³ WD130 includes ground water rights in the ESPA overlying Basins 36, 37 and 41 and surface water rights from the Thousand Springs area overlying the ESPA and Basins 36 and 37.

surface water users. Additionally, the holders of many ground water rights in the proposed combined water district also hold surface water rights in WD37 or WD37M.⁴ It is not clear that the interests of ground water users would be poorly represented when so many ground water users also own surface water rights that are presently administered by WD37/37M.

19. Witnesses opposed the proposed combination of ground water and surface water rights in a water district because ground water users may not be adequately represented on an advisory committee due primarily to the disparity in the amount of water use between surface and ground water users. Idaho law does not vest specific power in an advisory committee. The committee provides advice to the watermaster, the Director and the water users of the water district. The WD37/37M watermaster testified that the WD37/37M advisory committee representation is not based on the amount of water diverted but rather on geographical regions and types of beneficial water use. He added that if a combined district is formed, a steering committee will be selected to recommend, among other things, the organization of an advisory committee. The steering committee concept is consistent with the recommendation made by the Department during its presentation at the public hearing. The WD37/37M advisory committee chairman testified at the public hearing that he was confident that concerns about representation of ground water users on an advisory committee could be addressed. The Department concludes that an advisory committee can be selected that provides adequate representation of all water users in the proposed water district comprised of both surface water and ground water rights.

20. Witnesses testified that ground water rights in the Upper Wood River Valley and Silver Creek drainage should be placed in a separate water district because several water districts already exist in the ESPA that are composed primarily of ground water rights which provide a good model for ground water administration in the Big Wood River Basin. The Department acknowledges that there are several ESPA water districts that are limited to ground water rights but there is at least one ESPA water district, WD130, which includes both surface water and ground water rights. WD130 was created in 2002 when conjunctive administration of surface water and ground water rights within the district was imminent. Subsequently, conjunctive administration delivery calls have been made and the CMRs have been implemented. WD130 has functioned successfully despite contention among surface water and ground water users in the district. The Department recommends that ground water rights in the Upper Wood River Valley and Silver Creek drainage be combined with WD37 and WD37M because administration of the rights would be more efficient.

21. Witnesses testified that ground water rights in the Upper Wood River Valley and Silver Creek drainage should be placed in a separate water district due to concerns that water district administration costs can't be fairly allocated in a combined district. Specifically, a concern was expressed that ground water users "would wind up bearing a disproportionate cost of water district operations." In accordance with Idaho Code §42-610, water district costs are assessed to individual users based on the amount of water delivered. The WD37/37M advisory committee chairman testified at the public hearing that the current advisory committee members are concerned that surface water users could actually end up paying a disproportionate share of district costs because the costs of measuring the wells may be higher than expected since so many wells are not yet in compliance with the Department's ground water measurement order. The committee chairman testified that the WD37/37M advisory committee wishes to maintain the water district assessment rates. The Department's limited analysis indicates that if the WD37 2013 assessment rate were adopted and applied to both surface water and ground water deliveries in a combined water district, most ground water users would have an

⁴ Assessment records of the UWRWMD and WD37/37M show that about 41% of the water users assessed by the UWRWMD are also assessed by WD37/37M. A majority of the holders of large irrigation ground water rights in the UWRWMD also hold surface water rights in WD37/37M.

assessment that is less than or roughly equivalent to their 2013 UWRWMD assessment.⁵ While the testimony raised concerns about ground water users bearing a disproportionate share of district costs, no evidence was given to substantiate the concern.

22. Written testimony suggested that suggested the Department should have presented a budget for the proposed combined water district. Chapter 6, title 42, Idaho Code does not require the Department to present a proposed budget when creating a water district, modifying the boundaries of a water district or combining two or more water districts. Rather, Idaho Code § 42-605 requires that the water users at an annual water district meeting must adopt a budget. The Department presented information at the hearing suggesting that a steering committee be formed consisting of affected ground water users and members from the WD37/37M advisory committee to consider a budget that could be presented at the first annual meeting of a combined water district. Department representatives at the public hearing cautioned about the appropriateness of the Director dictating a budget to the users in contrast with the requirements of § 42-605. The Department representative stated at the hearing that the current budgets for WD37/37M were adequate for administration of surface water rights, but the budget needed for administration and on-going measurement of ground water rights might need to be somewhat higher than the 2013 UWRWMD budget. The Department finds that combining the 2013 WD37/37M and UWRWMD budgets and deliveries, or estimate of deliveries for the UWRWMD, would result in an assessment rate that is similar to the 2013 WD37/37M and UWRWMD assessment rates.

23. Witnesses suggested the ground water model for the Upper Wood River and Silver Creek/Bellevue triangle area must be completed before ground water and surface water rights can be combined in a single water district. Again, this testimony appears to confuse conjunctive administration issues with the narrow and limited regulatory scope of water district operations. Completion of a ground water model is not a legal requirement or prerequisite for including both surface water and ground water rights in one water district. The Department has created several water districts in the State that include both surface and ground water rights without having a ground water model completed.

24. 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 take the following actions:

- i. Combine WD37 and WD37M into one water district to be designated as WD37;
- ii. Combine ground water rights in the Upper Wood River Valley and the Silver Creek/Bellevue triangle area with surface water rights in a combined WD37 to regulate water rights, and protect senior priority water rights in Basin 37;
- iii. Create a separate water district to administer both surface and ground water rights in the Camas Creek drainage including water rights from WD37A and WD37C to regulate water rights, and protect senior priority water rights in Basin 37; and
- iv. Abolish the UWRWMD.

ORDER

⁵ This was determined by applying the WD37 2013 assessment rate to reported annual water use from certain municipal providers and 2013 water use from several UWRWMD metered ground water irrigation wells. The 2013 minimum assessment rate for the UWRWMD was over \$50 whereas the minimum assessment rate in WD37 and WD37M was only \$40. Given the significantly larger proportion of surface water use in a combined district, many of the smaller ground water users would be subject to a minimum rate assessment not to exceed \$50.

IT IS HEREBY ORDERED that:

1. Water District No. 37 and Water District No. 37M are hereby combined as one water district together with all ground water rights located within the boundaries of the combined water district but outside the boundaries of the ESPA and Water District No. 130 as shown in the map appended hereto as Attachment A, except water rights used for domestic and stock water purposes as defined by Idaho §§ 42-111 and 42-1401A(11) and water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The combined water district shall be designated as Water District No. 37, Big and Little Wood Rivers, and shall become effective January 6, 2014. The map attached hereto as Attachment B shows the boundaries of Water District Nos. 37 and 37M prior to the districts being combined pursuant to this Preliminary Order.

2. Water District No. 37 shall include ground water and all streams tributary to the Big Wood River and Little Wood River except Camas Creek and tributaries, and shall exclude Water District No. 37N (Upper Little Wood River and tributaries), Water District No. 37-O (Muldoon Creek and tributaries) and Water District No. 37U (Fish Creek and tributaries), and the lower portion of the Malad River and tributaries downstream and west of the point where the boundary common to Township 6 South and Range 13 East and Township 6 South and Range 14 East crosses the Malad River (approximately where Interstate 84 crosses the Malad River). The map attached hereto as Attachment B shows the locations of Water District Nos. 37-N, 37-O and 37-U.

3. The annual meeting of Water District No. 37 shall be held on January 6, 2014 to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district. The Director will send a separate notice to the holders of water rights in the water district providing a reminder of the meeting date and announcing the time and location for the meeting.

4. The water users attending the Water District 37 annual meeting shall adopt one budget for administration and measurement of both surface water rights and ground water rights. Ground water rights that are subject to assessment shall be assessed in the same manner as surface water rights and in accordance with the provision of chapter 6, title 42, Idaho Code. In cases where water delivery records do not exist for water rights, the assessments must be based on a reasonable estimate of water use during the previous season or seasons, not exceeding five seasons.

5. Water District No. 37-B is created to include all surface water and ground water rights in the Camas Creek drainage in Basin 37 as shown in the map appended hereto as Attachment A. Water District No. 37A and Water District No. 37C shall be merged with Water District 37-B. Water District 37-B shall exclude water rights used for domestic and stock water purposes as defined by Idaho §§ 42-111 and 42-1401A(11) and water rights used for in-stream watering of livestock as defined by Idaho Code § 42-113. The map attached here to as Attachment B shows the boundaries of former Water District Nos. 37-A and 37-C.

6. As soon as practicable in calendar year 2014, the holders of water rights within Water District No. 37-B shall meet at a date, time and place to be announced by the Director to conduct its annual meeting to elect a watermaster, select an advisory committee, if desired, and set a budget for operating the district.

7. The Director shall issue a separate order requiring the installation of measuring devices and controlling works for surface water right diversions within Water District No. 37-B.

8. The Director shall consider combining all or portions of Water District No. 37-B with Water District No. 37 if Water District No. 37-B does not comply with the provisions of chapter 6, title 42, Idaho Code or if a majority of water users in the water district do not comply with existing or future orders of the Department requiring water measurement devices or controlling works.

9. The watermasters for Water District Nos. 37 and 37-B shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

- a. Measure, collect, and record the diversions under water rights;
- b. Administer and enforce water rights in priority; and
- 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).
- d. Coordinate delivery by priority of rights that do not enjoy the benefits of any separate administration provisions as decreed in the SRBA.

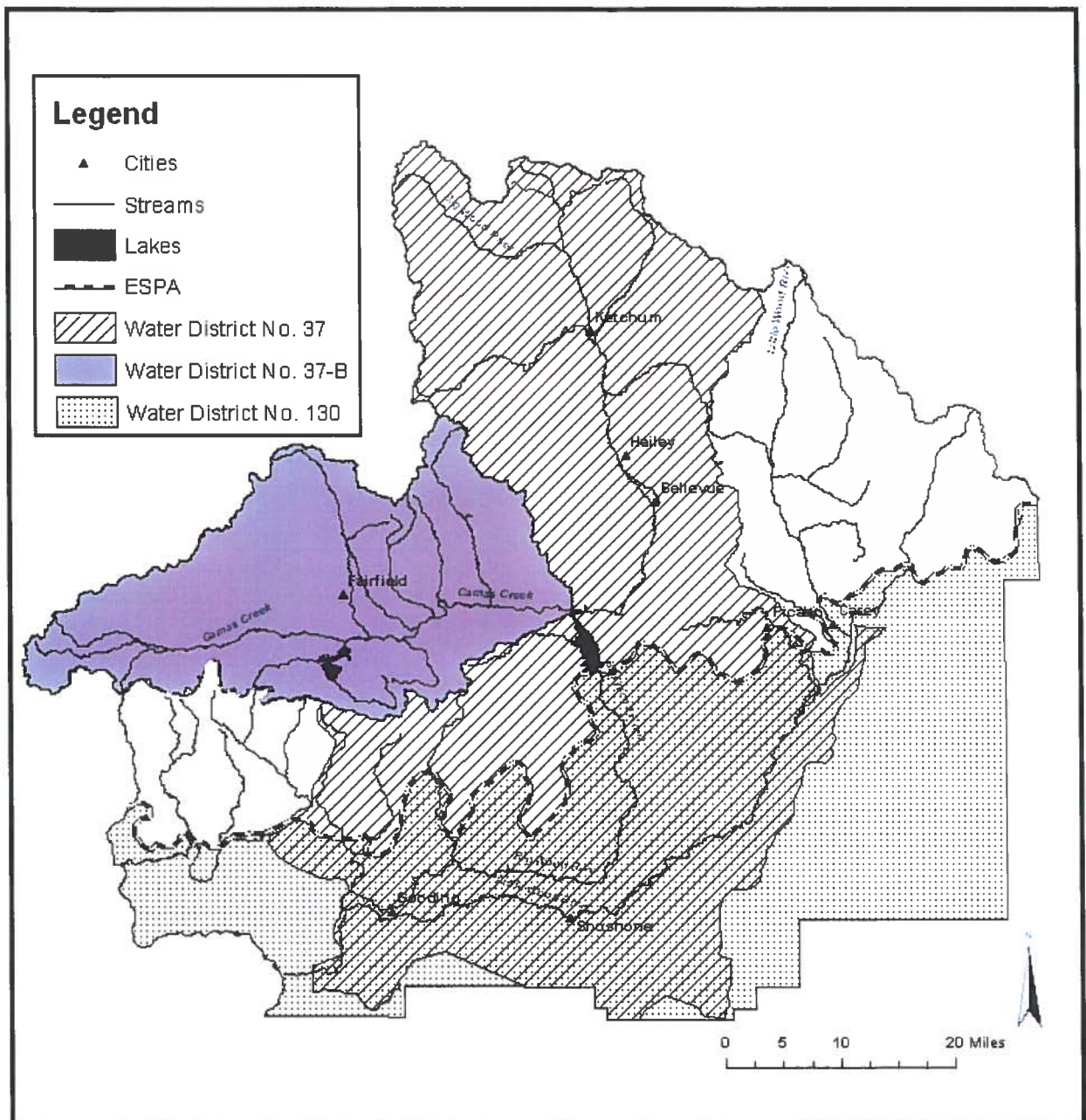
IT IS FURTHER HEREBY ORDERED that:

1. The Upper Wood Rivers Water Measurement District is hereby abolished effective December 31, 2013. The measurement district will continue to operate in accordance with chapter 7, title 42, Idaho Code, until December 31, 2013. The map attached hereto as Attachment B shows the boundaries of the measurement district.

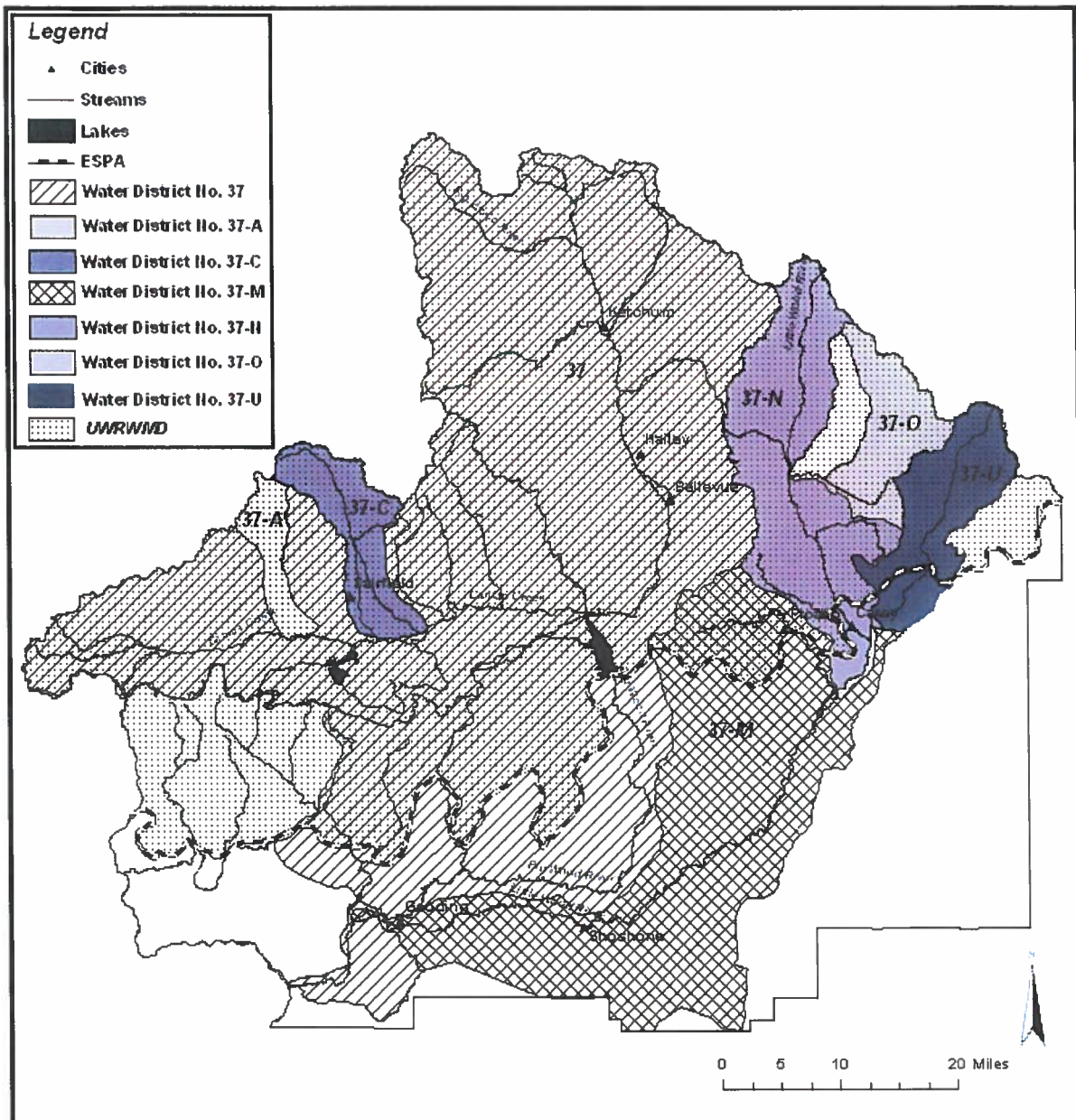
DATED this 17th day of September, 2013.


Allen Merritt
Hearing Officer

ATTACHMENT A
Water District No. 37 and Water District 37-B Pursuant to Preliminary Order



Attachment B
Basin 37 Water Districts and Measurement District Prior to Preliminary Order



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of September, 2013, 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.

Sarah Garceau
Office Records Specialist
Idaho Department of Water Resources