

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF REVISING THE)
BOUNDARIES OF WATER DISTRICT)
No. 130, IN THE AMERICAN FALLS)
AREA)
_____)

TRANSCRIPT OF HEARING
Conducted December 17, 2003, Pocatello, Idaho
Before Presiding Officer Karl J. Dreher
Director, Idaho Department of Water Resources

Transcribed by Patsy McGourty
Administrative Assistant
Department of water Resources

Proceedings transcribed from electronic sound recording.

1 Karl Dreher: Good afternoon. As I indicated prior to the start of this hearing, I am Karl
2 Dreher, Director of the Idaho Department of Water Resources and I'll be serving
3 as the presiding officer in this matter. This matter concerns the proposed
4 expansion of Water District 120 for a portion of the area overlying the Eastern
5 Snake Plain Aquifer within the Department's Administrative Basin 29. The
6 provisions of § 42-604, *Idaho Code* require this hearing to be held prior to the
7 creation of, or prior to making changes to the boundaries of the water district by
8 the Director of the Department of Water Resources.

9 This hearing is being conducted on December 17, 2003, commencing at
10 about 2:20 in the afternoon. The notice was for a hearing commencing at one
11 but we've spent the past hour or so providing general background information
12 and discussing what the need and purpose is for this particular matter. We're at
13 the Ramada Inn which is located at 133 West Burnside in Pocatello, Idaho.
14 Again, the purpose of this hearing is to provide affected water right holders or
15 their representatives an opportunity to make an oral statement on the record
16 stating their position, views, or any concerns they have regarding the proposed
17 expansion of Water District 120. For the purposes of this hearing, persons that
18 make statements do not need to be sworn in nor will they be subject to any
19 cross-examination. All persons that have signed up to speak will be heard, but
20 then at the end we'll give an opportunity for any others that wish to be heard as
21 well. And if for some reason you wish to be heard a second time, that will be
22 possible as well once everyone who wishes to be heard is heard at least once.

23 Notice of this hearing was mailed to each affected water right holder in the
24 proposed Water District 120 as required under the provisions of § 42-604, *Idaho*
25 *Code*. In addition notice was published in several newspapers of general
26 circulation within the area of the proposed district. Now as I indicated prior to
27 going on the record in this matter, I reviewed the reasons for the proposed
28 expansion of Water District 120 and described the duties that the watermaster of
29 the district would be expected to carry out under my supervision. Now, if there
30 are no further questions, we're at the point where we can begin to take
31 statements and comments from those persons who desire to be heard and I'll
32 just use the list that I've been provided. The first individual that's indicated a
33 desire to make a statement is LaVerne Jim or Bim. Jim. Mr. Jim if you would
34 come forward.

35 Laverne Jim: I'm Laverne Jim, from the Fort Hall Water Resource Commission and I'm
36 here on behalf of the Chairman of the Fort Hall Business Council for the
37 Shoshone-Bannock Tribes and this is the verbal testimony I'll give. In 1990 Sho-
38 Ban tribes entered an agreement between the tribes, the State of Idaho, and the
39 United States to quantify rights of the tribes in the Upper Snake River Basin. The
40 agreement is a congressional mandated agreement and was later entered into
41 decree by the Snake River Adjudication District Court. The agreement respects
42 the solidarity to the entities that are a party to the agreement. Within the
43 agreement all parties agreed to cooperate in the administration of water
44 resources. The tribes are to administer all tribal water rights within the
45 reservation, the United States administers the distribution of the Fort Hall Indian

Irrigation Project water rights and the state administers the distribution of the water rights acquired under state law that are not part of the Fort Hall tribal agency or Fort Hall Irrigation Project water rights. It is critical that the previous boundary region of the Water District 120 does not interfere with the tribes' ability to develop and manage future points of ground water diversion or utilization on any Indian land pursuant to the agreement. The agreement provides the tribes, State and the United States will work cooperatively to coordinate and monitor water use to the same extent that they require other users in Idaho. The tribes are willing to work cooperatively with the other parties provided any party benefits equally and protect each party's interest. The tribe believes the inclusion of a portion of the Basin 29 must not interfere with provisions, nature, scope or spirit of the 1990 Fort Hall Water Rights Agreement and the rights decreed under the agreement. The tribes maintain jurisdiction to implement and master water rights on the reservation that will be potentially impacted by this change. The Fort Hall, I mean the Shoshone-Bannock tribes reminds the state and the water users that the tribes have a unique status with the United States government since the Fort Bridger Decree of 1868, a congressional ratified treaty that currently entrusts responsibility to the tribes. The tribes further assert that civil regulatory authority is vested with the Sho-Ban tribes within the exterior boundaries of the Fort Hall Reservation. All monitoring activities will be in cooperation with the tribes and the state relating to non-Indian lands. In closing the tribes request that the state implement enforcement measures on both non-Indian surface water and non-Indian ground water use to ensure that the tribe's ground water rights are

69 preserved. The tribes made a request to the state regarding enforcement issues
70 which have not yet been resolved. That's all I have.

71 Karl Dreher: Mr. Jim, could you state your position with the tribe?

72 Laverne Jim: I'm Chairman of the Fort Hall Water Commission.

73 Karl Dreher: And can you provide an address for the record?

74 Laverne Jim: Box 306, Fort Hall.

75 Karl Dreher: Thank you very much. Next we have Timothy Deeg.

76 Timothy Deeg: I am Timothy P. Deeg. I reside at 2957 Deeg Road, American Falls,
77 Idaho, 83211. I am a member of the Aberdeen-American Falls Ground Water
78 District and served as past secretary, president, and I am currently a board
79 member. I'm also serving as President of the Idaho Ground Water Appropriators,
80 Incorporated, and I am Chairman of Water District 120. The Aberdeen-American
81 Falls Ground Water District adopted the following resolutions at the December
82 Board Meeting. Be it resolved that we hereby support the inclusion of ground
83 water rights in a portion of Basin 29 overlying the Eastern Snake Plain Aquifer.
84 Be it further resolved that we pray that the Director will consider the revision of
85 such southern Water District 120 boundary as to extend the water district
86 boundary to include all of Basin 29 within Power County. Be it further resolved
87 that such action by the Director will allow for consistent, efficient water rights
88 administration within Water District 120 as well as the Aberdeen-American Falls
89 Ground Water District. We believe that the southern Eastern Snake Plain
90 boundary is arbitrary in Basin 29 in that particular area. Be it further resolved
91 that the social and economic benefits derived from inclusion of all of Basin 29

92 within Power County provides continuity and participation. Be it further resolved
93 that such proposed expansion of the Water District 120 be all of Basin 29 within
94 Power County and said expansion is consistent with water rights administration
95 under title 42, Chapter 6. In conclusion I would like to thank Mr. Director for
96 allowing us the opportunity to express our views as water right holders and as
97 the constituents that will come under regulation by the adoption of this order.

98 Karl Dreher: Okay, thank you. Then the last individual that's on the sign up sheet that's
99 indicated they want to speak is Dean Tramer.

100 Dean Tramer: My name is A. Dean Tramer. I'm the city attorney for the City of
101 Pocatello and I'm here representing the municipal corporation known as the City
102 of Pocatello and speaking on behalf of the mayor and the city council for the City
103 of Pocatello. The new boundaries for Water District 120 will include ground
104 water rights which the City of Pocatello uses at the airport. The City of Pocatello
105 has an interesting mix of water rights including surface water rights, ground water
106 rights and also 50,000 acre feet of storage water right in the Palisades Reservoir
107 so we're involved on a lot of fronts in regards to distribution and regulation of
108 water rights. The City of Pocatello did not oppose the State's Motion for Interim
109 Administration in the SRBA Court and does not oppose the revision of the
110 boundaries of Water District 120 to include ground water rights which divert from
111 the Eastern Snake Plain Aquifer in Basin 29. Pocatello believes there are four
112 issues that need to be understood and addressed regarding the administration of
113 water rights in Water District 120. First, the SRBA proceeding did not determine
114 injury to senior priority water rights. The SRBA Court's Order allows the Idaho

115 Department of Water Resources to proceed with interim administration of ground
116 water rights because it's reasonably necessary to protect senior water rights in
117 Water District 120. Again, that doesn't determine injury or the extent of injury.
118 Idaho Department of Water Resources can protect senior water rights we believe
119 in Water District 120 from injury in accordance with IDWR's obligations within the
120 water district's statutes, namely, Chapter 6, Title 42 of the *Idaho Code*. That
121 requires the Director of IDWR to make a finding of injury in an administrative
122 proceeding consistent with the mandates of the prior appropriation doctrine of
123 Idaho. At present, there is no determination of injury in the record of the SRBA
124 Court or in Water District 120. Second the SRBA Court's Order is directed to
125 administration of ground water rights within a water district. This interim
126 administration limits the Idaho Department of Water Resources to its distribution
127 authorities under the water district statutes. Again, Chapter 6, Title 42 of the
128 *Idaho Code*. That means until the entry of a final decree in the SRBA for those
129 ground water rights, for these ground water rights, IDWR may only administer
130 these ground water rights through the normal administrative mechanism provided
131 by the water district statutes. Again, Chapter 6, Title 42, *Idaho Code*. In these
132 water districts, the Idaho Department of Water Resources has the authority to
133 shut and fasten and I'm quoting, or cause to be shut or fastened the head gates
134 of the ditches or other facilities for diversion of water from such streams or water
135 supplies when in times of scarcity of water it's necessary to do so in order to
136 supply the prior rights of others in such stream or water supply. Again, I'm
137 quoting *Idaho Code* 42-607. Since Water District 120 and the Aberdeen-

American Falls Ground Water management area overlap, Pocatello has additional comments about the legal differences between water districts and ground water management areas. Pocatello has supported the formation of water districts in Basins 35, 36, 37, 41 and now 29 to facilitate conjunctive administration of ground water and surface water rights. Administration of existing ground water rights to protect senior surface water rights is not addressed in the critical ground water area statute, *Idaho Code 42-233A* or the ground water management area statute, *Idaho Code 42-233D*. Statutes addressing administration among ground water users are not the appropriate vehicle for conjunctive administration of existing ground water and surface water rights. Further, the mechanisms by which critical ground water areas and ground water management areas are formed do not fit the conjunctive administration paradigms. Both designations have been used historically by IDWR as establishing *de facto* moratoriums on the processing of new ground water right permits. Review of Idaho Department of Water Resource records indicates IDWR designated eight critical ground water areas prior to the passage of the ground water management area statute in 1982. Since 1982, at least 9 ground water management areas have been established. Although a few of the ground water management areas have been designated based on depletion of surface water caused by ground water, the primary impact of those designations was to control additional ground water development and gather data. Since recent extensive ground water level measurements of the Eastern Snake Plain Aquifer indicate that the aquifer is not being mined completely and that, in general,

ground water levels are stable throughout the aquifer. The criteria for establishing a critical ground water area, an area not having sufficient ground water to provide a reasonably safe supply for irrigation, or a ground water management area, an area approaching the conditions of critical ground water area, are not present. Third, the administration of the water within Water District 120 must accord with the legal force and effect of the October, 1984 Swan Falls Agreement, the October, 1985 Swan Falls Contract and the Consent Judgments in the cases of *Idaho Power v. State of Idaho* in the Fourth District and *Idaho Power v. State of Idaho* in the March, 1990 case. They are collectively called the Swan Falls Agreement. The SRBA Court is presently considering the appropriate mechanism to guarantee the SRBA proceedings do not supercede, pre-empt, modify, terminate, extend or otherwise affect the legal force and effect of the Swan Falls Agreement in the Snake River Basin drainage upstream from the Idaho Power Company plant at Swan Falls. The court has not made this a basin-wide issue although the Swan Falls drainage encompasses all of 21 water right basins and portions of three water right basins including all the existing and currently proposed geographic area in Water District 120. The City of Pocatello did file Swan Falls objections in Basin 29 and the SRBA Court has included those objections in the ongoing Swan Falls case. Again, Pocatello's concern is that the SRBA proceedings don't supercede, pre-empt, modify, terminate, extend or otherwise affect the legal force and effect of the Swan Falls Agreement throughout the Swan Falls drainage. Finally, the Director of the Idaho Department of Water Resources proposes that the watermaster of the revised

Water District 120 continue the same duties outlined when Water District 120 was created in February, 2002. Those duties performed under the direction and supervision of the Director include: curtailment of illegal diversions, measurement and reporting of diversions under water rights, enforcement of provisions of stipulated agreements between the holders of senior priority surface water rights and junior priority ground water rights and curtailment of out of priority diversions that are not included in a stipulated agreement or mitigation plan approved by the director and are determined by the director to be causing injury to senior priority water rights. Pocatello wants to comment in more detail about this curtailment of out of priority diversions that are not included in a stipulated agreement or mitigation plan approved by the director and are determined to be causing injury to senior priority water rights. We believe it would be of assistance to the Idaho Department of Water Resources and the public if information relating to the implementation or clarification of this duty to determine injury, were entered into the record. Specifically, Pocatello believes IDWR's instructions to the watermaster must be based on facts from the best evidence available. This includes information on the type of use, priority date, measured diversion rate and measured diverted volume for individual ground water and surface water rights. This in turn allows summary of the cumulative decreed rate versus priority date for ground and surface water rights. These summaries will demonstrate and illustrate the complex inter-relationship of ground and surface water rights in Water District 120. I appreciate the opportunity to provide these comments here today. We will also be providing

some formal written comments prior to December 29, 2003, at 5:00 p.m. We believe that the comment process is vital not only to the economy of the State of Idaho, but also to the vitality of the cities of this state. Thank you.

Karl Dreher: Thank you. Okay, that's all the people that had signed up in advance to speak. Is there anyone else that didn't sign up that wishes to speak at this point? Okay. Any of the three that did speak, do they have any thing further that they would like to offer? All right. That will conclude the record of oral statements in this proceeding. Thank you for your participation and as I indicated earlier, the hearing record will remain open for 12 days through December 29th to allow time for the submittal of additional written comments as provided in the notice of this proceeding and as required by § 42-604, *Idaho Code*. I will issue a final order following the close of the comment period. A copy of the final order will be sent by regular mail to all holders of water rights affected by this order. Any party may file a petition for reconsideration with the Director of the department within 14 days of the service of the final order. Any party feeling aggrieved by the final order may also seek judicial review before the district court within 28 days of the issuance of the final order or within 28 days of the action taken on any petition for reconsideration. Thank you for attending. The record is now closed except for the taking of additional written comments.

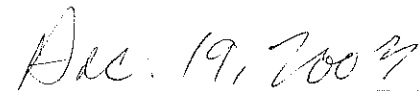
PROCEEDINGS CONCLUDED

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



Patsy McGourty
Transcriber



Date