

## MEMORANDUM

TO: Norman C. Young, Administrator, Water Management Division

FROM: Phillip J. Rassier, Deputy Attorney General *PSZ*

RE: Petitions for Delivery of Ground Water within Water District 13T, Bancroft-Lund Area

DATE: April 16, 1996

You have requested a preliminary review of three Petitions For Delivery Call ("petitions") filed with the Department of Water Resources (department) by Warren P. Lloyd and David Lloyd on March 11, 1996, and by Paul N. Christensen on March 18, 1996. The three petitions are similar in form and each requests the administration of water rights by priority within Water District 13T located in the Bancroft-Lund Area in Caribou County, Idaho.

Water District 13T was established pursuant to section 42-604, Idaho Code, by an order of the department dated May 26, 1995. The water district became active following its first meeting on August 7, 1995. The district held its annual meeting for the current year on March 5, 1996 at Bancroft, Idaho. The district is responsible for regulating the diversion of water under 67 separate spring and ground water rights which includes diversions from about 50 wells. Approximately 13,542 acres of land are irrigated within the district.

The Bancroft-Lund area covered by Water District 13T is also administered by the department as a Ground Water Management Area designated by order of the department dated October 21, 1991 and issued pursuant to section 42-233b, Idaho Code. A ground water management area is defined as any ground water basin or designated part thereof which the director of the department has determined may be approaching the conditions of a critical ground water area. Designation of a ground water management area requires the director to exercise added caution in the approval of any new permit to appropriate water, and authorizes the director to require the reporting of water use information. Within a ground water management area the director may order the reduction or cessation of withdrawals on a time priority basis upon a determination that the ground water supply is not sufficient to meet the demands of water rights within all or portions of a water management area, provided that the order must be made before September 1 to be effective for the following growing season.

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*The Petitions.* Each of the three petitions states that it is a "delivery call" filed under Rule 40 of the department's Rules Governing Conjunctive Management of Surface and Ground Water. IDAPA 37.03.11.040.

*IDWR Procedure.* Response to the petitions requires a determination that the petitions are in proper form and that they meet all the requirements of the department's rules and the Idaho Administrative Procedure Act (APA). I.C. §§ 67-5240 to 67-5255. The petitions should also satisfy the requirements of the department's Rules of Procedure, IDAPA 37.01.01, and the previously referenced Conjunctive Management Rules of the department. Rule 40 of the Conjunctive Management Rules addresses the requirements for petitions making calls for water delivery within areas of the state located within an organized water district. Rule 41 of the Conjunctive Management Rules governs the department's response to a delivery call made within a ground water management area.

*Contested Case.* The petitions must be treated as a contested case under the APA to the extent that they may result in the issuance of an order by the department. I.C. § 67-5240 provides that, "[a] proceeding by an agency . . . that may result in the issuance of an order is a contested case and is governed by the provisions of this chapter, except as provided by other provision of law." I.C. § 67-5201(1) defines "order" as an "agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons."

*Requirements for Petitions.* Rule 230 of the department's Rules of Procedure provides that petitions **should** satisfy the following criteria:

- a. Fully state the facts upon which they are based;
- b. Refer to the particular provisions of statute, rule, order or other controlling law upon which they are based;
- c. State the relief desired; and
- d. State the name of the person petitioned against (the respondent), if any.

Rule 40.01 of the department's Conjunctive Management Rules addressing calls made within an organized water district provides as follows:

01. *Responding to a Delivery Call.* When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common

ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

- a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over no more than a five-year period to lessen the economic impact of immediate and complete curtailment; or
- b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

Rule 41.01 of the Conjunctive Management Rules addressing calls made within a ground water management area provides as follows:

O1. *Responding to a Delivery Call.* When a delivery call is made by the holder of a senior-priority ground water right against holders of junior-priority ground water rights in a designated ground water management area alleging that the ground water supply is insufficient to meet the demands of water rights within all or portions of the ground water management area and requesting the Director to order water right holders, on a time priority basis, to cease or reduce withdrawal of water, the Director shall proceed as follows:

- a. The petitioner shall be required to submit all information available to petitioner on which the claim is based that the water supply is insufficient.
- b. The Director shall conduct a fact-finding hearing on the petition at which the petitioner and respondents may present evidence on the water supply, and the diversion and use of water from the ground water management area.

Because Rule of Procedure 230 identifies criteria that "should" rather than "must" be satisfied by a petition, the agency may exercise its discretion in determining whether the

petitions fully comply with, or are in substantial compliance with, the provisions of the rule.

*Petition Review.* The petitions state adequate facts to give the department and potential respondents notice of the issues raised. In satisfaction of the requirements of Rule of Procedure 230 and Conjunctive Management Rules 40.01 and 41.01, the petitions summarily describe the water rights of the petitioners; generally describe, but do not name, the junior ground water pumpers alleged to be causing material injury to the rights of the petitioners; summarily alleges facts in support of the claim of material injury; and generally describe the Bancroft-Lund Area as the area of common ground water supply within which petitioners desire junior-priority ground water withdrawals to be regulated.

*Controlling Law.* The petitions refer to the specific provisions of Rule 40 of the department's Conjunctive Management Rules governing delivery calls made within an organized water district. The petitions do not make reference to Rule 41 which governs the making of calls within a ground water management area.

*Relief Requested.* The petitions request that the director administer water rights under the prior appropriation doctrine within Water District 13T, Bancroft-Lund Area, during the 1996 irrigation season in accordance with Rule 40 of the Conjunctive Management Rules. The petitions constitute a request that the director regulate ground water use in the Bancroft-Lund Area in a manner that will allow for the delivery of ground water under petitioners' water rights. The petitions state that the petitioners are in a position to accept mitigation from junior-priority ground water right holders.

*Respondents.* The petitions do not state the names of the respondents petitioned against. Because the petitions request the administration of ground water rights by priority within Water District 13T, it must be considered that the holders of water rights within the district having priority dates junior to the rights asserted by the three petitioners are potential respondents in these proceedings.

*Conclusion.* Review of the three petitions indicates they are in substantial compliance with the requirements of the department's rules and that the petitions should be acted upon in accordance with the provisions of those rules, the APA and other applicable law.

*Recommendation for Proceeding.* It is recommended that the department consolidate consideration of the three petitions into one proceeding and that after notice is given the department proceed by seeking an informal resolution of the contested case under the provisions of I.C. § 67-5241, Idaho Code, and the procedural and substantive rules of the department. Note that under Conjunctive Management Rule 40 the director first is required

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to determine that material injury is occurring before directing the watermaster to regulate the diversion of water in accordance with the priorities of the rights and the order of the director.

*Method of Notice.* Pursuant to Rule 203 of the department's Rules of Procedure the department could require that notice of the petitions be sent by the petitioners to all water right holders potentially affected by the petitions. Because of the existence of an organized water district and the relatively small number of potential respondents it might be more appropriate for the department to provide notice to the water users within the district.

*Future Proceedings.* The department's rules appear to provide considerable flexibility to the director in proceeding with action on the petitions. Under the department's Procedural Rules 100 through 103 informal proceedings to resolve a contested case may be conducted without the necessity for preserving a record and without the other formal procedures required for formal proceedings such as taking the appearances of the parties. Because the area of common ground supply affected by the petitions is both a designated ground water management area and an organized water district, it will be necessary for the department to determine whether to proceed in accordance with Rule 40 or Rule 41 of the Conjunctive Management Rules, or whether provisions of both rules should be used.