

CURRENT GROUND WATER ISSUES:
VIEWED FROM THE PERSPECTIVE OF THE
IDAHO DEPARTMENT OF WATER RESOURCES

by

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I. INTRODUCTION

- A. Over the past twenty-five years, few issues have produced more consternation and foreboding among department directors and administrators than the concern over proper control and regulation of ground water development.
- B. Prior to World War II, ground water played a relatively minor role in irrigated agriculture. After the late 1940's ground water development expanded rapidly in Idaho as in other Western states. The expansion continued through the 1970's. The expansion slowed and practically stopped in the 1980's due to a combination of higher power costs, lower market prices and a moratorium on new development in the Snake River Plain due to the Swan Falls controversy.
 - 1. In the late 1940's, ground water provided a ready, economical source of water. Electrical power for pumping ground water was cheap. Ground water represented in most cases the only available source of water for new development.
 - 2. By 1980, approximately one-third of the 3.1 million acres of irrigated acreage in the Snake River Plain was irrigated with 2.3 million acre feet of ground water pumped from 5,300 wells. By contrast, 2.0 million acres were irrigated with 12.7 million acre feet of surface water. An estimated 100,000 acres were irrigated with a combination of surface and ground water.

II. STATE REGULATION OF GROUND WATER

A. Ground Water Act of 1951

The state responded to the increased use of ground water by enacting the Ground Water Act of 1951. See 1951 Idaho Sess. Laws, ch. 200, pp. 423-29.

- 1. **Public Resource** - The Act declared the ground water of the state to be a public resource subject

to appropriation to be put to beneficial use in reasonable amounts under the supervision of the state. See I.C. § 42-226.

2. **Full Economic Development** - The Act was amended in 1953 to provided substantially as it does today. Although the priority system of appropriation applies to ground water, "a reasonable exercise of this right shall not block full economic development of underground water resources." 1953 Idaho Sess. Laws, ch. 182, pp. 278-79, and I.C. § 42-226 (Supp. 1988).
3. **Reasonable Pumping Level** - The 1953 amendment to I.C. § 42-226 provided that while senior appropriators of ground water shall be protected, such protection shall only be in the maintenance of reasonable pumping levels as may be established by the director of the Department of Water Resources. Id.; Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973).
4. **Administration** - I.C. § 42-237a(g) provides that ground water shall not be available to fill a right if withdrawal would affect, contrary to the policy of the Act, "the present or future use of any prior surface or ground water right or result in the withdrawing of the ground water supply at a rate beyond the reasonably anticipated average rate of future natural recharge."
 - a. In 1987, the legislature amended § 42-237a(g) to allow diversions beyond the rate of future natural recharge if the director determines that it is in the public interest and
 - (1) a program exists or is proposed to bring withdrawals into balance with recharge, and
 - (2) holders of prior rights will not be required to pump from below the established reasonable pumping level.

B. Mandatory Permit System

In 1963, the legislature amended a portion of the Ground Water Act, I.C. § 42-229, to make the application, permit and license procedure mandatory for the appropriation of new rights to the use of ground water. See 1963 Sess. Laws, ch. 216, §1, p. 623. The Idaho Court upheld the constitutionality of the amendment in

State ex rel. Tappan v. Smith, 92 Idaho 451, 444 P.2d 412 (1968).

C. Critical Ground Water Areas

A critical ground water area is any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonable safe supply for irrigation, or other uses at the then current rates of withdrawal, or rates of withdrawal projected under current applications and permits. See I.C. § 42-233a (Supp. 1988).

1. Between 1962 and 1982 the department designated eight critical ground water areas. Seven are located in the eastern portion of the Snake River Plain and south of the Snake River. One is located north of the Snake River in the Mountain Home area. See Attachment A.

D. Ground Water Management Areas

In 1982, the legislature added I.C. § 42-233b providing for the designation of ground water management areas defined "as any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area."

1. Since the enactment of § 42-233b, the department has designated five ground water management areas and only one critical ground water area. See Attachment A.
2. The ground water management statute provides the director with more administrative flexibility than does the critical ground water area statute.
 - a. Additional permits may be approved in a management area if water is available and prior rights will not be injured.
 - b. All water right holders in the management area may be required to report withdrawals and other necessary information for determining available supplies and usage.
 - c. Upon a determination that ground water supplies are inadequate to meet present demands, the director may order right holders on a priority basis to cease or reduce withdrawals. Such orders must be given prior

to September 1 to be effective for the following growing season.

E. Drilling Permits

A new requirement added in 1987 is that a drilling permit must be obtained prior to drilling any well. I.C. § 42-235 (Supp. 1988).

1. The legislative purpose is to help protect the public health and the environment by assuring that wells are drilled by qualified drillers.
2. A practical effect of the statute is to make the department aware of proposed new wells for which a water right permit has not yet been obtained.

F. Conjunctive Management

I.C. § 42-237a(g) gives the director authority to determine areas of the state in which the diversion of ground water has an effect upon surface water flows.

1. In such areas, the director is authorized to incorporate the ground water rights into an existing water district established for the delivery of surface water.
2. The watermaster of the district is then empowered to limit or prohibit the withdrawal of ground water from a well if necessary to prevent its affect upon a senior ground water or surface water right.

III. CURRENT ISSUES

A. Ground Water Mining

Department administrators take seriously the prohibition against mining of ground water contained in I.C. § 42-237a(g) and as applied in Baker v. Ore-Ida, Inc., supra. State policy, however, recognizes that "If existing laws were strictly enforced many wells would have to be abandoned." Idaho State Water Plan, p. 22 (1986). The plan suggests that these existing imbalances should be corrected in an orderly fashion so as to minimize negative impacts on the citizenry.

1. Temporary Mining - The 1987 amendment to § 42-237a(g) provides helpful flexibility to the director by allowing a temporary mining condition to exist above the reasonable pumping level, if

the director determines it is in the public interest and if a program exists which will within an acceptable time period bring withdrawals into balance with recharge. The director has not yet been requested to apply this provision.

2. **Adjudication Claims for Expanded Use in Critical Ground Water Areas** - The 1989 legislature added I.C. § 42-1416B which incorporates the "management program" concept of § 42-237a(g). See 1989 Sess. Laws, ch. 212, p. 521. The new statute authorizes claims for expanded use of ground water within critical ground water areas to be filed in the Snake River Adjudication. Water to fill such rights if decreed shall be deemed unavailable unless the director finds that a management program exists which will limit average annual withdrawals to no more than average annual recharge to the aquifer.

- a. **"Management Program" Defined** - The expanded use statute defines management program to mean "a program to recharge the aquifer, limit withdrawals from the aquifer or provide surface water supplies for all, or a portion, of the land irrigated with water withdrawn from the aquifer, including any actions designed to bring withdrawals into balance with the average annual recharge to the aquifer." I.C. § 42-1416B(5)(b) (Supp. 1989).
- b. **Implementation** - The statute provides that the director shall make a determination as to the adequacy of the management plan within 2 years after the decree of the water rights within the critical area becomes final.
- c. **Means of Implementation** - The means for implementing a sound management program does not presently exist under Idaho law. Further legislation is, therefore, recommended. One possibility is to amend the Ground Water Management Districts Act of 1987 to add to its scope of coverage. See Chapter 51, Title 42, Idaho Code. This legislation was enacted as a means of providing financing for the repair or abandonment of wells in aquifers which are experiencing declines in water level or water pressures because of poorly constructed or maintained wells.

B. Preventing Waste of Ground Water

I.C. § 42-237a empowers the director "to require both flowing and nonflowing wells to be so constructed and maintained as to prevent the waste of ground waters through leaky wells, casings, pipes, fittings, valves or pumps either above or below the land surface."

1. **Well Inventory Program** - Beginning in 1988 the legislature has funded a program through the department to carry out a field inventory and inspection of artesian wells throughout the state. The purpose of the inventory is to identify those wells that need repair or proper abandonment. The department has contracted with Morrison-Knudsen Engineers, Inc. to do the inventory. The program is being funded at the rate of about \$200,000 per year. The area to be inventoried contains over 3,500 square miles.

C. Low Temperature Geothermal Water

1. **Local Public Interest** - The five criteria of I.C. § 42-203A required to be satisfied before the director may grant a water right permit apply to the appropriation of both surface and ground water. Included among the criteria is that of determining the local public interest. See Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985); Hidden Springs Trout Ranch, Inc. v. Allred, 102 Idaho 623, 636 P.2d 745 (1981).
2. **Recent Case** - The recent case of Collins Bros. Corp. v. Dunn, 114 Idaho 600, 759 P.2d 891 (1988) upheld the decision of the director that "The use of water solely for irrigation from this geothermal aquifer is not in the public interest and, therefore, only the water used for another purpose, that requires the heat from the water, can be disposed of by using it for irrigation."
3. **Legislative Action** - Subsequent to the facts which gave rise to the Collins Bros. case, the legislature in 1987 added I.C. § 42-233 (Supp. 1988) which provides that "low temperature geothermal water shall be utilized primarily for heat value and secondarily for the value as water." The director may grant an exemption if: "(i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available;

(iii) the exemption is in the public interest."

4. Boise Geothermal Aquifer - On June 10, 1988, the director entered an order pursuant to his authority under I.C. § 42-1805(7) establishing a five-year moratorium on further water development within the Boise Front Low Temperature Geothermal Resource Ground Water Management Area (Boise Front). The director entered the order in response to reported declines in aquifer water levels and pressure at the rate of 6 to 7 feet per year. The department has entered into a contract with a hydrologic research firm to define the interrelationship of the existing wells in the aquifer; evaluate the effects of current and proposed development; estimate the longevity of the geothermal resource; and make recommendations for an on-going monitoring program.
5. Twin Falls Ground Water Management Area - The department established the Twin Falls Ground Water Management Area on January 11, 1984. In response to falling water pressure within a low temperature geothermal aquifer located in the management area, the College of Southern Idaho brought suit in 1985 against the department and the other water users from the aquifer. College of Southern Idaho v. IDWR, et al., (5th Jud. Dist., Twin Falls Co., Idaho, Case No. 37298).
 - a. The department dismissed its cross-claim against Professional Investors Life Insurance Company in July, 1986, after the company successfully completed extensive repairs to bring its artesian warm water well into compliance with department standards.
 - b. The entire litigation was dismissed by College of Southern Idaho in July, 1988, based upon an agreement entered into by most of the parties to the action and upon the entry of a department moratorium limiting the amount of development which may occur from the warm water aquifer over the next 5 years.

D. Conjunctive Management Issues

Policy 1F of the state water plan provides that "IT IS THE POLICY OF IDAHO THAT WHERE EVIDENCE OF HYDROLOGIC CONNECTION EXISTS BETWEEN GROUND AND SURFACE WATER, THEY BE MANAGED AS A SINGLE RESOURCE." Idaho State Water Plan, p. 22 (1986). The plan further states that "The

relationship between ground and surface water is extremely complex. The Water Board regards this policy as a first step in more effective management of the state's water resources. Legislation and Water Board resolutions will provide direction for the implementation of this policy." Id.

1. Swan Falls (Trust Water) Area - On November 3, 1988, the department issued a document entitled Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area." The policy document describes how the department proposes to process the backlog of filings which seek the right to use water in the Snake River Basin upstream from Swan Falls Dam.

a. The backlog of filings was created by the department's de facto moratorium on approval of new consumptive uses of water in the Snake River Basin upstream from Swan Falls Dam (See Attachment B) following the two decisions of the Idaho Supreme Court reported as Idaho Power Company v. State of Idaho, 104 Idaho 570, 661 P.2d 736 and 104 Idaho 575, 661 P.2d 741 (1983).

b. Following issuance of the Idaho Power Company decisions, the Swan Falls controversy was resolved by negotiations between the state of Idaho and the Idaho Power Company. The negotiations culminated in the signing of the Swan Falls Agreement on October 25, 1984, and the enactment or amendment of several statutes during the 1985 legislative session codified at I.C. §§ 42-203A, -203B, -203C, and -203D.

c. Generally, the Swans Falls Agreement requires the establishment and protection of minimum stream flows of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season at the Murphy, Idaho U.S.G.S. gauging station located just downstream of the Swan Falls Dam site.

(1) Water in excess of the established minimum flows was placed in trust with the state for future re-allocation to other beneficial uses determined to be in the public interest. See I.C. §§ 42-203B and -203C (Supp. 1988).

(2) Surface and ground water flows tributary

to the Snake River upstream from Milner Dam are not considered to be subject to the trust water provisions. See I.C. § 42-203B.

d. The department announced in its policy statement that it would be guided by the following policies in allocating trust water:

- (1) Protection of all existing water rights;
- (2) Protect the value of the trust water asset under the Swan Falls Agreement;
- (3) Authorize additional water development in the public interest;
- (4) Encourage efficient use of trust water supplies;
- (5) Orderly processing of the backlog of applications and permits;
- (6) Seek to require those benefiting from the use of trust water to support the costs necessary to meet the minimum flow requirements; and
- (7) Provide for public participation in water management decisions.

e. In order to ensure that the minimum flow requirements of the Swan Falls Agreement are met, the department's policy statement proposes imposition of a fee on the use of trust water to be used for obtaining a replacement water supply through lease or purchase of existing storage or construction of new storage.

2. **Non-trust Water Area** - I.C. § 42-203B(2) provides that "For the purposes of the determination and administration of rights to the use of the waters of the Snake river or its tributaries downstream from Milner dam, no portion of the waters of the Snake river or surface or ground water tributary to the Snake river upstream from Milner dam shall be considered."

a. In response to the prospect of the department processing the backlog of water right applications for development above Milner Dam,

the Twin Falls Canal Company, the Northside Canal Company and the American Falls Reservoir District filed petitions with the department in January and March, 1988, requesting an enlargement of Water District 01 to incorporate ground water supply into the district, or in the alternative a moratorium on the issuance of further permits or further development under existing permits. The petitions were withdrawn in January, 1989.

b. Although the petitions were withdrawn, the department has responded to the issue raised by the petitions, which is the effect of new ground water development upon existing surface water rights on the Snake River above Milner.

(1) Department records indicate there are pending applications for the development of approximately 47,000 acres of new irrigation land above Milner.

(2) Using the Snake Plain Ground Water Model, the department estimates that the annual discharge to the Snake River in the Blackfoot to Minidoka reach would decrease 6,000 acre feet (8 cfs) after 15 years, and 16,000 acre feet (22 cfs) after 60 years. These figures compare with a summertime discharge from the Snake Plain aquifer in this reach of the river of about 3,000 cfs. The decrease after 60 years of the new development would be 0.7 percent.

(3) The department concluded that it should proceed with the processing of pending permits and applications. The department has indicated that for large projects it may reserve jurisdiction to incorporate the appropriation into a water district, or to require stream flow augmentation or other action needed to protect prior surface water and ground water rights.

3. **Snake River Basin Adjudication** - On November 19, 1987, the Fifth Judicial District for Twin Falls County entered an order commencing an adjudication of the entire Snake River Basin in Idaho. In Re the General Adjudication of Rights to the Use of Water from the Snake River Basin Water System, Civil No. 39576. The scope of the adjudication was

affirmed in Boise-Kuna Irrigation District v. State of Idaho, Idaho, 764 P.2d 78 (1988). See generally Title 42, chapter 14, Idaho Code (statutes governing a general water rights adjudication).

- a. Based upon the department's claims-taking experience to date, one of the conjunctive use issues which will arise in the adjudication is the validity of transfers of surface water rights to ground water sources.
- b. The addition of I.C. § 42-1416A by the 1989 legislative session authorizes the director to recommend and the district court to decree changes in water rights made prior to entry of the order commencing the general adjudication in which the water right is being adjudicated. 1989 Sess. Laws, ch. 97, p. 226.

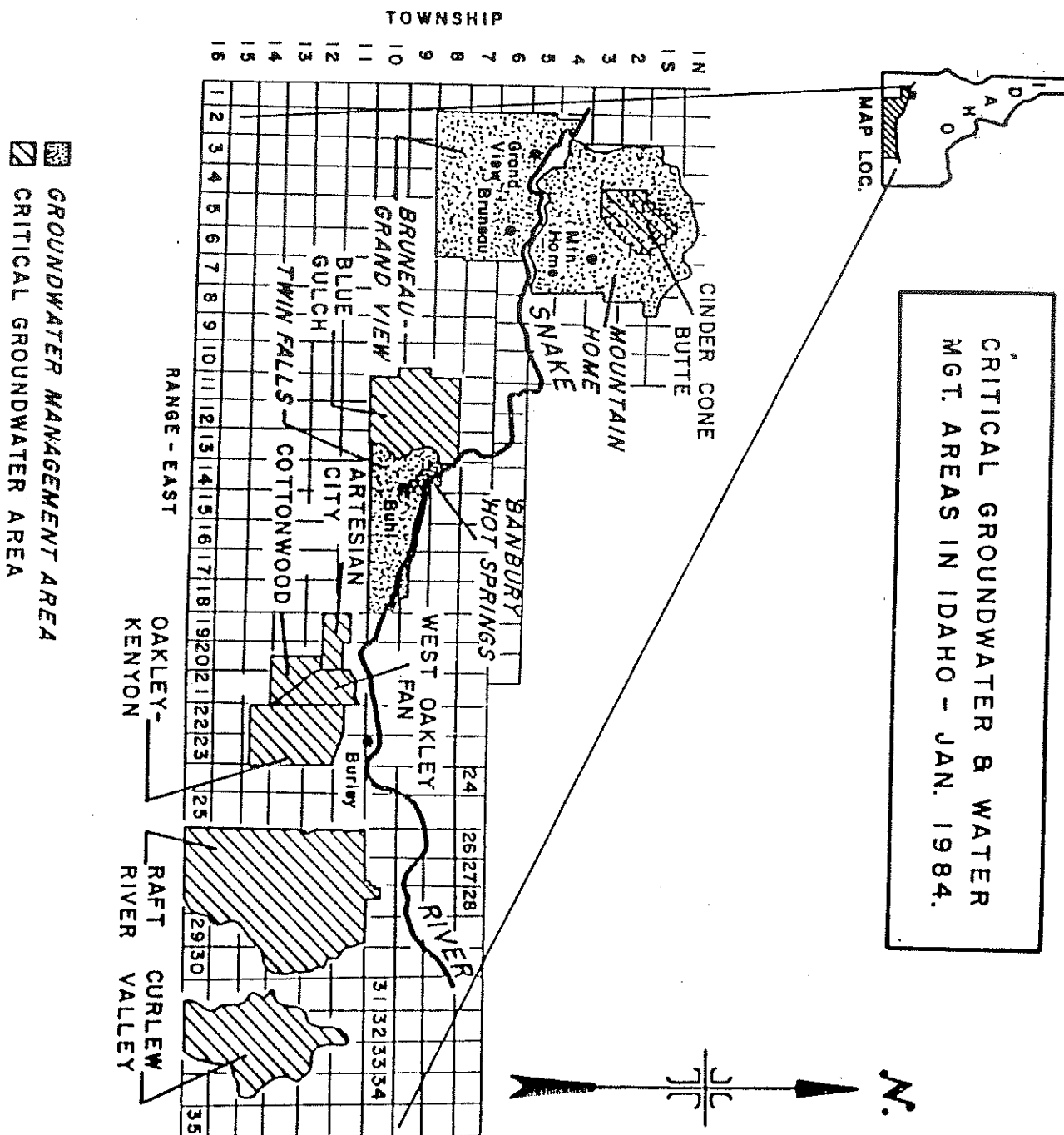
CRITICAL GROUNDWATER AREAS
AND
GROUNDWATER MANAGEMENT AREAS
IN IDAHO

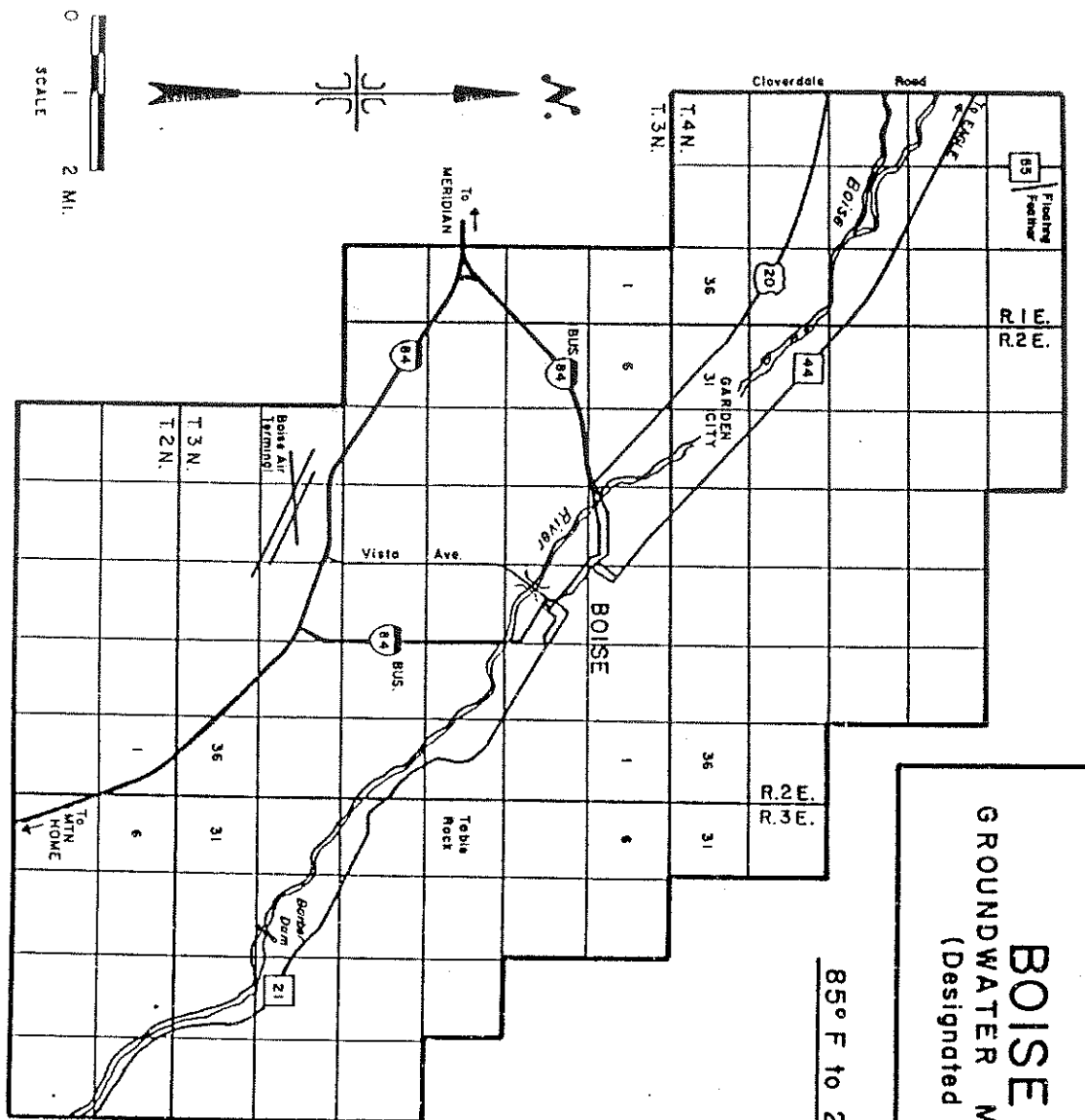
CRITICAL GROUNDWATER AREAS

Name	Designated
1. Artesian City	01-19-1962
2. Blue Gulch	12-09-1970
3. Cindercone Butte	05-07-1981
4. Cottonwood	01-19-1962
5. Curlew Valley	03-15-1976
6. Oakley-Kenyon	01-19-1962
7. Raft River	07-23-1963
8. West Oakley Fan	01-19-1982

GROUNDWATER MANAGEMENT AREAS

Name	Designated
1. Banbury Hot Springs	04-12-1983
2. Bruneau - Grand View	10-29-1982
3. Boise Front	06-15-1987
4. Mountain Home	11-09-1982
5. Twin Falls	01-11-1984





BOISE FRONT GROUNDWATER MANAGEMENT AREA (Designated June 15, 1987)

85° F to 212° F Water



