

Memorandum

To: Clive Strong, Phil Rassier
Cc: Dave Tuthill, Gary Spackman
From: Nick Miller, Jeff Peppersack, and Tim Luke
Date: December 27, 2007
Re: Discussion/guidance on structure of Water District No. 170

The formation of the Upper Salmon Water District (Water District No. 170) is progressing to the point where a specific plan for the district organization and operation must be developed. While a general sense of the intended organization of the district is found in the language of both the order creating water district 170, and the Wild & Scenic agreement, implementation of that structure has raised some difficult questions. This memorandum presents the current vision for the organization and structure of the Upper Salmon Water District based on discussions between Dave Tuthill, Gary Spackman, Jeff Peppersack, Tim Luke, and Nick Miller, as well as recollections of previous discussions with Karl Dreher. The description is followed by a number of questions and concerns regarding whether the proposed structure is consistent with the provisions of the Idaho Statutes. We ask that you consider these questions and provide some guidance as to whether our proposed structure is consistent with the statutes. We also ask that you provide suggestions to bring the proposed structure into compliance if you find that any aspect of the proposed structure is not consistent with the statutes.

PROPOSED STRUCTURE

The following description is a vision of WD170 at a time when IDWR is no longer providing watermaster services free of charge. Although the description below only mentions pre-existing water districts in Basin 72, the structure will not change when Basins 73-75 are incorporated.

The elements of the proposed WD170 structure are as follows:

1. All non-de minimis surface and ground water rights in Basins 71 and 72 are included in WD170. Our use of the term "de minimis right" refers to a surface or ground water right that describes a beneficial use, flow rate, and diversion volume consistent with the descriptions given in Idaho Code §42-111(a), §42-111(b), §42-1401A(4) or §42-1401A(11). De minimis rights are not included in WD170 insofar as the holders of such rights would not be required to report or pay an assessment to WD170. The WD170 watermaster would not deliver or regulate these water rights unless specifically called upon to do so. Non-de minimis rights, including surface water rights currently in the two pre-existing water districts, 72-A (Challis and Garden Creeks), and 72-F (Morgan Creek), would be administered by WD170 through the subdistrict watermasters, as described below.

2. The two pre-existing districts (WD72-A and WD72-F in Basin 72) are designated as subdistricts within WD170. These districts continue to operate as semi-independent districts (holding annual meetings, adopting and collecting a budget, and electing a watermaster). The elected subdistrict watermaster is appointed by the Director as a watermaster of the subdistrict. However, since these districts are within 170 and designated as subdistricts, the subdistrict watermaster is under the supervision and direction of the WD170 watermaster, so is also appointed as a deputy watermaster of WD170. As these subdistricts collect their own budgets, the users in these districts will not share in the cost of delivering non-subdistrict surface water in WD170, but a user holding non-de minimis ground water rights will share in the pro-rata cost of WD170 based on the volume of ground water delivered. The subdistrict watermaster will be required to deliver water rights in priority, measure and report diversion data to the WD170 watermaster, and identify and curtail unauthorized water uses. The WD170 watermaster's role in the subdistricts would be to provide oversight and assistance to the subdistrict watermaster to the extent necessary to ensure an adequate level of quality and consistency is maintained within all of WD170.
3. Non-de minimis surface water rights within Basins 71 and 72 that are not administered by either WD72-A or WD72-F, and all non-de minimis ground water rights throughout Basins 71 and 72, will be administered and assessed by WD170. To the extent any area desires to form a subdistrict, they may petition the Director of IDWR to do so. Such subdistricts would be formed under 42-604 and would then become a subdistrict as described for 72-A and 72-F. Additionally, any subdistrict could be formed to administer ground water, surface water, or both.
4. Water rights not included in a subdistrict formed under 42-604 will be within WD170 proper. The WD170 watermaster will be responsible for delivery of these rights in priority, identifying and curtailing unauthorized uses, and measuring and reporting these diversions. Given the large geographic area, a number of deputy watermasters would be hired and appointed by the Director. The budget for WD170 would be collected from non-de minimis surface water users not already being assessed by a subdistrict and non-de minimis ground water users not already being assessed by a subdistrict. These users would vote in the WD170 elections.
5. If IDWR is not elected to provide watermaster services, IDWR will continue to provide assistance to WD170 to ensure the district is providing a level of service consistent with the terms of the Wild & Scenic Agreement. This would consist of aerial imagery review, assistance in resolution of water user disputes, pursuit of enforcement actions, review quality assurance for data reporting, etc... As these are mostly tasks IDWR is or should be performing with all active water districts, IDWR would not charge the district for these services.

QUESTIONS/CONCERNS

Many questions have arisen with regard to pre-existing water districts within WD170 and the concept of "subdistricts". Surface water rights in pre-existing water districts were brought into WD170 and these water districts were designated as subdistricts within WD170. However, the pre-existing water districts do not appear to have been formally abolished. As such, it appears that some rights, at least the non-de minimis surface water rights from the main streams and tributaries to Challis Creek, Garden Creek, Morgan Creek, are currently within both WD170 and WD72-A or WD72-F. The questions then, are as follows:

1. **Water District No. 170 was created to administer all non-de minimis water rights in a specific geographic area. Does 42-604 (or any statute) allow the exclusion of the de minimis water rights?**

2. **Are WD72-A and WD72-F “water districts” or not?**

- **If they are not water districts**, then this implies each of these districts is just a group of rights within WD170 that sets its own budget and elects its own watermaster. In other words, water rights (at least certain rights) within WD72-A and WD72-F are part of WD170, but are not assessed the same pro-rata charge as the remaining water rights in WD170. If they are not “water districts” within, or in addition to WD170, several questions arise.
 - a. Does 42-610, 42-612, or any statute, allow a water district to set different budgets for different groups of users? Or, is it required that all users in a district pay a pro-rata share in the cost of the district as a whole?
 - b. Can users in these subdistricts vote by either the standard or alternative method (42-605(4)) at WD170 annual meetings if they have not been assessed by WD170?
 - c. The pre-existing water districts have been delivering water to, and assessing the owners of, de minimis surface water rights. If these districts are now a part of WD170, are the de minimis rights in these districts also in WD170?

- **If they are water districts**, then a number of other similar questions arise.
 - a. Can 72-A and 72-F be separate water districts from the Upper Salmon given that some of the water rights in these tributaries may affect the Federal Reserve rights? Idaho Code 42-604 reads, “...provided, that any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream.”
 - b. Do the statutes support the concept that a water right can be administered by multiple water districts or by a hierarchy of water districts as we are proposing?
 - c. The non-de minimis surface water rights within WD72-A and WD72-F are also included in WD170. However, we are proposing that these users are not assessed a share in the cost of WD170. If the users in WD72-A and WD72-F do not pay an assessment to WD170, can these users vote in WD170 elections? If they can vote, how would their credentials be established for voting under the alternative method of 42-605(4)? Would they be allowed to vote on resolutions or to adopt the budget?
 - d. In the event that all the rights within WD170 are organized into subdistricts, what mechanism exists to elect the WD170 watermaster and collect the budget (if any) to fund the activities of the district?