



February 12, 2018

RECEIVED
FEB 12 2018
Department of Water Resources
Eastern Region

James Cefalo
Idaho Department of Water Resources
900 N. Skyline Dr., Suite A
Idaho falls, ID 83402-1718

Re: *Statement of Public Witnesses Pursuant to IDAPA 37.01.01.355; In the Matter of the Proposed Expansion of Water District 170, the Proposed Modification of all Water Districts Within Basin 74 to Include Ground Water Diversions and Their Proposed Combination of Water District 74, 74K, 74U, and 74Y.*

Dear Hearing Officer Cefalo:

Enclosed are documents relating to the above-entitled matter involving Water District 170. There are two different documents entitled *Statement of Public Witnesses* that are identical, but have separate signature pages as this Statement was circulated to water users in Basin 74. I have been asked by James Whittaker to insure the submission of these documents to the Department of Water Resources on or before February 12, 2018, as provided in the *Notice of Public Hearing* previously issued in this matter. These statements are similar to a statement provided to you at the February 1st hearing on this matter, read by James Whittaker, which was signed by a number of water users. A copy of his signed statement, along with other signatures, is also included.

We appreciate your careful consideration of these comments as the Hearing Officer in the above-entitled matter.

Best regards,

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

RLH/rew
Enclosures

g:\wpdata\rlh\14100 whittaker, james\03 water district 170\2018-02-12, cefalo.docx

ORIGINAL

STATEMENT OF PUBLIC WITNESSES

IDAPA 37.01.01.355

In the Matter of the Proposed Expansion of Water District 170, the Proposed Modification of All Water Districts Within Basin 74 To Include Ground Water Diversions and the Proposed Combination of Water Districts 74, 74K, 74U and 74Y

I, James Whittaker, ^{Tr,bs} make the following statements as a party to this action. In addition, others who have signed this statement have requested that I provide this statement on their behalf as public witnesses in this action pursuant to Rule 355 of the Department's Rules of Procedure.

We, the undersigned, submit the following statement concerning the Proposed Expansion of Water District 170, the Proposed Modification of All Water Districts Within Basin 74 To Include Ground Water Diversions and the Proposed Combination of Water Districts 74, 74K, 74U and 74Y

1. We are water users who possess water rights that are authorized to divert surface water and/or ground water within the boundaries of Basin 74.
2. The Basin 74 General Provisions issued in the Snake River Basin Adjudication provide that certain tributary streams to the Lemhi River "shall be administered separately from all other water rights in Basin 74." These same general provisions also allow for diversion and use of so-called "high flows" provided that the water is diverted to a beneficial use and existing decreed rights are satisfied.
3. As a result of the historic separate stream administration of water in the Lemhi River basin, individual water districts for individual tributary streams have been organized and functioned appropriately on nearly all tributary streams to the Lemhi River. The proposed administrative action that is the subject of this proceeding will relegate these well-functioning districts to "subdistricts."
4. We are opposed to the expansion of Water District 170 to include the functioning existing surface water districts within Basin 74 (74A, B, C, F, G, J, M Q, W, and Z) for the following legal reasons:
 - a. The expansion of Water District 170 violates the separate streams general provision decreed in the Snake River Basin Adjudication. That general provision expressly provides that "water rights from the following sources of water in Basin 74 **shall be** administered separately from all other water rights in Basin 74." Shall means shall. Creation of an IDWR instrumentality that will jointly administer water rights with existing water districts on the tributary streams to the Lemhi River and the main stem Lemhi River is contrary to the plain language of this general provision.

There must be separation in administration, and that cannot occur with what is being pursued by the Department. The hearing officer is urged to review this Basin 74 general provision and apply the correct principles of interpretation of water right partial decrees described in the *City of Blackfoot v. Spackman*, 162 Idaho 302, ____, 396 P.3d 1184, 1188 (2017) (“When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. If a decree’s terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words.”).

- b. The expansion of Water District 170 negatively implicates the high flows general provision decreed in the Snake River Basin Adjudication. This is because high flows are allowed if existing decreed rights are first satisfied, and where the administration of existing decreed rights on tributary streams is governed by the appropriate water district, an expanded Water District 170 may demand curtailment or implement additional restrictions of such high flows to satisfy or otherwise benefit other main stem Lemhi River water rights.
- c. The explanation of Water District 170 creates a possible conflict of interest with the watermaster for Water District 170, as the watermaster will be obligated to oversee the administration of tributary stream water rights and water rights on the main stem of the Lemhi River where the main stem water rights could benefit from curtailment or restriction of tributary diversions.
- d. There is no evidence of which we are aware to suggest that the functioning water districts within Basin 74 are not performing their duties in compliance with Idaho law to account for and measure the diversions of water from their respective water sources.
- e. To the extent the Water District 170 expansion is driven by the inactive water districts of 74U, 74K, and 74Y, this minority group of non-functioning water districts should not dictate IDWR action as against the functioning water districts.
- f. *In the Stipulation and Joint Motion for Order Approving Stipulation in Consolidated Subcase No. 75-13316—the Wild & Scenic Rivers Act Claims*—it provides that Basins 73, 74, and 75 “will be” incorporated into the Upper Salmon Water District, but that “existing water districts within the basins will be converted to subdistricts within the Upper Salmon Water District **as appropriate** to facilitate management.” Our reading of this provision is that areas not previously covered by a water district in Basin 74 may be brought into the Upper Salmon Water District, this should have no effect on existing water districts. This is because it is “not appropriate” nor is it necessary to “facilitate management” in Basin 74 to relegate existing water districts that are lawfully functioning to “subdistricts” for all of the above reasons discussed herein. Paragraph 2.b.(2).

- g. Additionally, in the same stipulation, it also provides that "IDWR will establish a water district for the basin if IDWR determines that a water district is necessary to properly administer water rights in the basin." There is no evidence that an additional water district is "necessary to administer water rights in the basin." Paragraph 2.b.(3).
5. ~~we are~~ opposed to the inclusion of the inactive water districts of 74U, 74K, and 74Y into Water District 74 because of infringement of such actions on the general provision previously discussed. Instead, individual action should be taken to activate these water districts.
6. We are opposed to the creation of a water district that combines measurement and accounting of ground water and surface water diversions. The need to measure ground water diversions appears to be an excuse to combine measurement and accounting of surface water diversions. In other areas of the State of Idaho, there are overlapping water districts that focus on measurement and accounting of different water sources, presumably because different expertise is required for measuring ground water well diversions as opposed to surface water diversions. For example, Water District 31 covers the Mud Lake area surface water diversions, whereas Water District 110 also covers the Mud Lake area and measures and accounts for ground water diversions.
7. We take no position on the creation of a ground water district independent of existing surface water districts to measure and account for ground water diversions.
8. Finally, Idaho stands for the principle of efficient and limited government. It has been our sad experience in this basin that additional governmental involvement in our lives leads to erosion of our rights and liberties. There is no reason to have duplicate water districts with overlapping jurisdiction and responsibility to measure and account for surface water.

Attachment IN Re SRBA CASE No. 39526

SIGNATURE: *James Whittaker* DATE: *1/30/2018*
 PRINT: JAMES WHITTAKER

SIGNATURE: *Von L. Bean* DATE: *1/30/2018*
 PRINT: Von L. Bean

SIGNATURE: *Kurt Bird* DATE: *1-30/2018*
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SIGNATURE: *Shanna L Foster* DATE: *1/31/2018*
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SIGNATURE: David L Udy DATE: 1/31/18
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SIGNATURE: Ed Peterson DATE: 1-31-18
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SIGNATURE: Scott Tyler DATE: 1-31-18
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SIGNATURE: Michael P Walker DATE: 1-31-18
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SIGNATURE: Marguerite J Walker DATE: 1-31-18
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SIGNATURE: Viniv Strupp DATE: 1-31-18
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SIGNATURE: John Amonson DATE: 1-31-18
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SIGNATURE: Tex J Kauer DATE: 1-31-18
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SIGNATURE: Jim Lockes DATE: 1-31-18
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SIGNATURE: Bonnie Lockes DATE: 1-31-18
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SIGNATURE: Robert Amonson DATE: 1/31/18
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SIGNATURE: Steven Johnson DATE: 1-31-2018
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SIGNATURE: Ch Whitaker DATE: 1-31-2018
PRINT: CHASE WHITTAKER

SIGNATURE: Tom Carlson DATE: 1-31-2018
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SIGNATURE: Stephen Shiner DATE: 1/31/2018
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SIGNATURE: Drew Herbst DATE: 1/31/2018
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SIGNATURE: Emil Herbst DATE: 1/31/18
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SIGNATURE: Lynn A. Herbst DATE: 1/31/18
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SIGNATURE: V. Don Olson DATE: 1/31/18
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SIGNATURE: Lamar Cockrell DATE: 1-31-18
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SIGNATURE: Boyd Stokes DATE: 1-31-18
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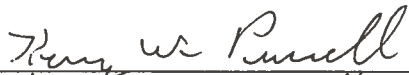
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SIGNATURE: Wes Mackay DATE: 1/13/18
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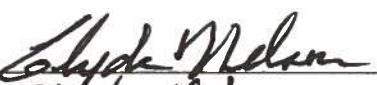
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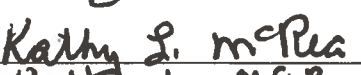
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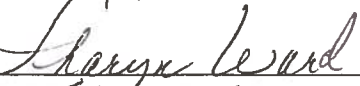
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PRINT: Shayne Kauer For McFarland Livestock

SIGNATURE:  DATE: 2-1-18
PRINT: Clyde Nelson

SIGNATURE:  DATE: 2-1-2018
PRINT: Steve Herbst

SIGNATURE:  DATE: 2-1-2018
PRINT: Penny Edwards

SIGNATURE:  DATE: 2-1-2018
PRINT: Kathy L. McRea

SIGNATURE:  DATE: 2-1-2018
PRINT: SHAELYN WARD

SIGNATURE: Lois Bowman DATE: 2/1/18
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SIGNATURE: Brian Everts DATE: 2/1/18
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SIGNATURE: Betty Stokes DATE: 1/21/18
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SIGNATURE: Barbara Sprinkle DATE: 1-21-18
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Department of Water Resources
Eastern Region

STATEMENT OF PUBLIC WITNESSES

IDAPA 37.01.01.355

In the Matter of the Proposed Expansion of Water District 170, the Proposed Modification of All Water Districts Within Basin 74 To Include Ground Water Diversions and the Proposed Combination of Water Districts 74, 74K, 74U and 74Y

We, the undersigned, submit the following statement concerning the Proposed Expansion of Water District 170, the Proposed Modification of All Water Districts Within Basin 74 To Include Ground Water Diversions and the Proposed Combination of Water Districts 74, 74K, 74U and 74Y.

1. We are water users who possess water rights that are authorized to divert surface water and/or ground water within the boundaries of Basin 74.
2. The Basin 74 General Provisions issued in the Snake River Basin Adjudication provide that certain tributary streams to the Lemhi River “shall be administered separately from all other water rights in Basin 74.” These same general provisions also allow for diversion and use of so-called “high flows” provided that the water is diverted to a beneficial use and existing decreed rights are satisfied.
3. As a result of the historic separate stream administration of water in the Lemhi River basin, individual water districts for individual tributary streams have been organized and functioned appropriately on nearly all tributary streams to the Lemhi River. The proposed administrative action that is the subject of this proceeding will relegate these well-functioning districts to “subdistricts.”
4. We are opposed to the expansion of Water District 170 to include the functioning existing surface water districts within Basin 74 (74A, B, C, F, G, J, M Q, W, and Z) for the following legal reasons:
 - a. The expansion of Water District 170 violates the separate streams general provision decreed in the Snake River Basin Adjudication. That general provision expressly provides that “water rights from the following sources of water in Basin 74 **shall be** administered separately from all other water rights in Basin 74.” **Shall** means shall. Creation of an IDWR instrumentality that will jointly administer water rights with existing water districts on the tributary streams to the Lemhi River and the main stem Lemhi River is contrary to the plain language of this general provision. There must be separation in administration, and that cannot occur with what is being pursued by the Department. The hearing officer is urged to review this Basin 74 general provision and apply the correct principles of interpretation of water right partial decrees described in the *City of Blackfoot v. Spackman*, 162 Idaho 302, _____,

396 P.3d 1184, 1188 (2017) (“When interpreting a water decree this Court utilizes the same rules of interpretation applicable to contracts. If a decree’s terms are unambiguous, this Court will determine the meaning and legal effect of the decree from the plain and ordinary meaning of its words.”).

- b. The expansion of Water District 170 negatively implicates the high flows general provision decreed in the Snake River Basin Adjudication. This is because high flows are allowed if existing decreed rights are first satisfied, and where the administration of existing decreed rights on tributary streams is governed by the appropriate water district, an expanded Water District 170 may demand curtailment or implement additional restrictions to the diversion of such high flows to satisfy or otherwise benefit other main stem Lemhi River water rights.
- c. The expansion of Water District 170 creates a possible conflict of interest with the watermaster for Water District 170, as the watermaster will be obligated to oversee the administration of tributary stream water rights and water rights on the main stem of the Lemhi River where the main stem water rights could benefit from curtailment or restriction of tributary diversions.
- d. There is no evidence of which we are aware to suggest that the functioning water districts within Basin 74 are not performing their duties in compliance with Idaho law to account for and measure the diversions of water from their respective water sources.
- e. To the extent the Water District 170 expansion is driven by the inactive water districts of 74U, 74K, and 74Y, this minority group of non-functioning water districts should not dictate Department action as against the functioning water districts.
- f. *In the Stipulation and Joint Motion for Order Approving Stipulation in Consolidated Subcase No. 75-13316—the Wild & Scenic Rivers Act Claims*—it provides that Basins 73, 74, and 75 “will be” incorporated into the Upper Salmon Water District, but that “existing water districts within the basins will be converted to subdistricts within the Upper Salmon Water District **as appropriate to facilitate management.**” Paragraph 2.b.(2). Our reading of this provision is that areas not previously covered by a water district in Basin 74 may be brought into the Upper Salmon Water District, this should have no effect on existing water districts. This is because it is “not appropriate” nor is it necessary to “facilitate management” in Basin 74 to relegate existing water districts that are lawfully functioning to “subdistricts” for all of the reasons discussed herein.
- g. Additionally, in the same stipulation, it also provides that “IDWR will establish a water district for the basin if IDWR determines that a water district is necessary to

properly administer water rights in the basin.” Paragraph 2.b.(3). There is no evidence that an additional water district is “necessary to administer water rights in the basin.”

- h. Idaho Code § 42-604 has been referenced in support of the Department’s action in this matter. We disagree that the provisions of Idaho Code § 42-604 supports this action. This code section provides “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 use of the water of the main stream.” Idaho Code § 42-604 further provides that the Director “may create, revise the boundaries of, or abolish a water district or combine two (2) or more water districts by entry of an order if such action is required in order to properly administer uses of the water resource.” As described above, because of the Basin 74 separate streams provision, water use on the tributaries cannot “affect or conflict with the rights to use of the water on the main stream.” Additionally, expansion of Water District 170 to include existing and functioning water districts is not required or necessary in this instance to properly administer uses of the water resource because the current surface water districts are functioning appropriately.
5. We are opposed to the inclusion of the inactive water districts of 74U, 74K, and 74Y into Water District 74 because of infringement of such actions on the general provision previously discussed. Instead, individual action should be taken to activate these water districts.
6. We are opposed to the expansion of Water District 170 that proposes to combine measurement and accounting of ground water and surface water diversions where there are existing surface water districts. There is no need for Water District 170 to perform this function because the current surface water districts should perform the responsibility of measuring and accounting for ground water diversions within its boundaries.
7. Finally, Idaho stands for the principle of efficient and limited government. It has been our sad experience in this basin that additional governmental involvement in our lives leads to erosion of our rights and liberties.

[SIGNATURES ON FOLLOWING PAGES]

SIGNATURE: Kevin Hoffman DATE: 2/3/2018
PRINT: Kevin Hoffman

SIGNATURE: Ray Hoffman Jr. DATE: 2-3-2018
PRINT: Ray Hoffman Jr.

SIGNATURE: F. Dan French DATE: 2-3-2018
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SIGNATURE: Curtis R. Kayle DATE: 2-4-2018
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SIGNATURE: Patrick McConraghy DATE: 4 Feb 2018
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SIGNATURE: Charles Lynn Thomas DATE: FEB 4/2018
PRINT: CHARLES LYNN THOMAS

SIGNATURE: James O. Weiss DATE: 4 Feb 18
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SIGNATURE: Rodger Swanson DATE: 2-4-18
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SIGNATURE: Andy Knight DATE: 2-4-18
PRINT: ANDY KNIGHT

SIGNATURE: Phil Moulton DATE: 2-7-18
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SIGNATURE: Paul Fisher Jr. DATE: 2-7-18
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SIGNATURE: Bin Slavin DATE: 2-7-18
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SIGNATURE: Jordan Whittaker DATE: 2/7/18
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SIGNATURE: Kyle Bird DATE: 2-7-18
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SIGNATURE: Clyde Nelson DATE: 2-3-18
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SIGNATURE: Ruby Nelson DATE: 2-3-18
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SIGNATURE: Clarice Holanson DATE: 2-6-18
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SIGNATURE: Shirley DeCora DATE: 2-6-18
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SIGNATURE: Sande Gebe DATE: 2-6-18
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SIGNATURE: Raymond Cochrane DATE: 2/6/18
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SIGNATURE: John B. Tracy DATE: 2/6/18
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SIGNATURE: Paula K Pharis DATE: 2-7-18
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SIGNATURE: A Kent Pharis DATE: 2-7-18
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SIGNATURE: Kris Bird DATE: 2-7-18
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SIGNATURE: Linda Heaton DATE: 2/7/18
PRINT: LINDA HEATON

SIGNATURE: T.C. Heaton DATE: 2/17/18
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SIGNATURE: Lisa Tingle DATE: 2/7/18
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SIGNATURE: [Signature] DATE: 2-7-18
PRINT: Darlene Judith Skinner

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PRINT: Gordon Stephenson

SIGNATURE: [Signature] DATE: 2-8-18
PRINT: Dorothy J. Peterson PR Jerry Banta

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PRINT: Bert W. Jeffries

SIGNATURE: [Signature] DATE: 2-8-18
PRINT: R MARLENE SANTOS

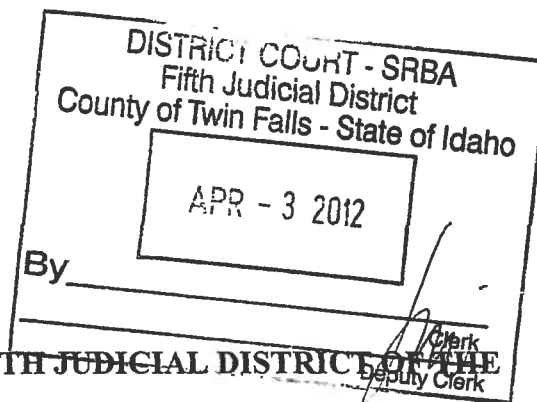
SIGNATURE: [Signature] DATE: 2/8/18
PRINT: Randy Lambeth

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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA) **PARTIAL DECREE PURSUANT TO**
) **I.R.C.P. 54(b) FOR GENERAL**
Case No. 39576) **PROVISIONS IN BASIN 74**
)
)
)

The following general provisions are hereby decreed to be applicable to water rights in Basin 74:

The following water rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in Basin 74 in accordance with the prior appropriation doctrine as established by Idaho law:

1. Agency Creek and tributaries;
2. Alder Creek and tributaries;
3. Basin Creek (including McNutt & Schwartz) and tributaries;
4. Bohannon Creek and tributaries;
5. Bull Creek and tributaries;
6. Canyon Creek (Junction Creek) and tributaries;
7. Eightmile Creek (Big & Little) and tributaries;
8. Geertson Creek and tributaries;
9. Hawley Creek and tributaries;
10. Haynes Creek and tributaries;
11. Jake Canyon Creek and tributaries;
12. Kirtley Creek and tributaries;
13. Lee Creek and tributaries;
14. Mill Creek and tributaries;
15. Pattee Creek and tributaries;
16. Peterson Creek and tributaries;
17. Pratt Creek and tributaries;
18. Sandy Creek and tributaries;
19. Sawmill Creek (Little) and tributaries;
20. Texas Creek and tributaries;

21. Timber Creek (Big & Little) and tributaries;
22. Walter Creek and tributaries;
23. Warm Springs Creek (near Pratt Creek) and tributaries;
24. Wimpey Creek and tributaries;
25. Withington Creek and tributaries;
26. Yearian Creek and tributaries; and
27. Zeph and Swartz Creeks and tributaries.

Future appropriations of water on the above streams are not considered to be subject to prior downstream rights on the Lemhi River proper. Future appropriations of water on any other water source or stream in the Lemhi River Basin, however, are considered to be tributary to the Lemhi River for purposes of distribution.

The following water rights from the following sources of water in Basin 74 shall be administered separately from all other water rights in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law:

Water Right No.	Source
None	None

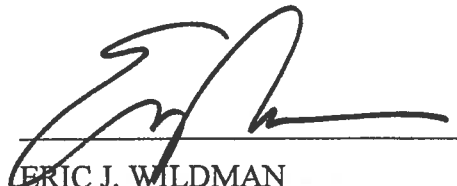
Except as otherwise specified above, all water rights within Basin 74 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.

The following general provision shall govern the use of "High Flow" surface water for irrigation use within the Lemhi Basin:

The practice of diverting high flows in the Lemhi Basin, in addition to diverting decreed and future water rights that may be established pursuant to statutory procedures of the State of Idaho, is allowed provided:

- (a) the waters so diverted are applied to beneficial use.
- (b) existing decreed rights and future appropriations of water are first satisfied.

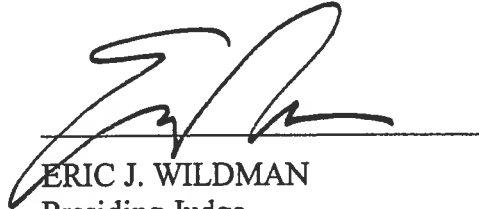
Dated: April 3, 2012


 ERIC J. WILDMAN
 Presiding Judge
 Snake River Basin Adjudication

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated: April 3, 2012


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication