

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE CREATION OF)
WATER DISTRICT NO. 2, SNAKE RIVER)
FROM MILNER DAM TO THE MURPHY)
GAGE BELOW SWAN FALLS DAM)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

This matter comes before the Idaho Department of Water Resources (“Department”, or “IDWR”) as petitions for reconsideration of a preliminary order *In the Matter of Creation of Water District No. 2, Snake River from Milner Dam to the Murphy Gage Below Swan Falls Dam* (“order creating Water District No. 2”). The preliminary order, served by mail on May 4, 2012, created Water District No. 2 and further instructed water users to hold an annual meeting to elect a watermaster, select an advisory committee and conduct other business to begin operation of the water district. A petition for reconsideration was filed on May 18, 2012 by John Marshall, attorney, on behalf of Grindstone Butte Mutual Canal Company, MAN Farms, LLC and ATN Holdings, LLC. Petitions for reconsideration were also filed on May 18, 2012 by 24 other parties adopting the positions and arguments made by Grindstone Butte Mutual Canal Company, MAN Farms, LLC and ATN Holdings, LLC. The parties filing petitions for reconsideration will be collectively referred to as “the petitioners” in this order.

The petitioners ask the Department to rescind the order creating Water District No. 2 and request a delay in the decision to create a water district for the following reasons:

- The Department does not need to create a water district to achieve its stated administrative objectives on the affected reach of the Snake River.
- The water users in the district will have to shoulder a substantial burden.

A petition for reconsideration of the order creating Water District No. 2 was also filed on May 18, 2012 by Dana Hofstetter, attorney, on behalf of Flying H Farms Partnership and Jeff C. and Jackie Harper. The petition requested the Department reconsider whether establishment of the water district is necessary at this time, but did not provide any reasons for the request.

Need for a Water District

The petitioners believe that the Department can achieve its stated objectives for the affected reach of the Snake River using existing tools without the need for creating a water district. The State of Idaho has an obligation to ensure water rights can be properly administered and to protect minimum stream flow water rights established on the Snake River as part of the Swan Falls Agreement between the State of Idaho and Idaho Power Company. Snake River

flows measured at the Murphy Gaging Station have diminished over time and have approached the minimums in recent years. A water district is necessary to administer water rights in times of shortage of water. Under existing conditions, a shortage of water is not likely every year, or for lengthy periods during a dry year. However, if a shortage of water does occur, water rights cannot be properly administered without measurement of water, enforcement of water right limitations, and control of diversions – all functions of a watermaster in a water district. If the Department does not have a water district in place at the time of need, then water rights cannot be properly administered during those times, including protection of minimum stream flows.

The petitioners suggest that the Department should undertake a concentrated review of river flow data from numerous existing river gages. The petitioners argue that the Department should only consider creation of a water district in the event that data from existing gages is demonstrated to be insufficient for assessing whether the minimum stream flow rights are being met.

The petitioner's suggested approach would leave out an important component of water administration. River gages measure water in the river, but do not provide information regarding appropriate diversions from the river. Measurement of each diversion is critical to ensure all water rights are diverting authorized amounts. Measurement of diversions, along with measurement of flow in the river, is also necessary to assess the impacts of fluctuations caused by operation of power generating facilities upstream of the Murphy gage. Creation of a water district provides an opportunity for water users to work with the Department, through an advisory committee, to coordinate activities in the district. It is the Department's intent to work with an advisory committee to assess the need for additional river gages and to develop a water measurement implementation plan for existing diversions.

The petitioners question the need for a stepped up compliance program because the Department has not identified any chronic compliance problem in the reach. The petitioners suggest that the Department has existing tools such as satellite imagery and other means to assess water user compliance. Water user compliance has not been historically assessed in the reach under any concerted effort. Completion of the Snake River Basin Adjudication, interim administration, and creation of a water district will provide a means to identify if any chronic compliance problems exist. A water district is necessary to ensure that authorized water uses are not prematurely curtailed in times of water shortage. The Department will work with an advisory committee to assess the level of compliance efforts that are necessary in the district. The Department will also assist the watermaster in compliance efforts using available resources.

Financial Burden

The petitioners argue that costs to install measuring devices and undertake routine monitoring and reporting of their water use will require initial capital investment of tens of thousands of dollars and many thousands more in ongoing costs for operation and maintenance. In addition, water users will have to devote time and effort to participate in governance of the district. The petitioners suggest that these burdens may be acceptable and justified in a situation where a water supply problem exists, but the Department is asking water users to assume these burdens in the absence of any identified problem.

As discussed above, a water district is necessary to ensure water rights can be properly administered in times of water shortage and to protect minimum stream flows in the reach. Water measurement is a critical component in administration of water rights. The burdens of operating a water district are not insignificant, but they are necessary for orderly administration of water rights. Similar burdens have been carried by water users in many other areas of the state, for many years. The Department will work with an advisory committee of the water district to ensure that any burdens imposed on water users can be minimized while still providing for proper administration.

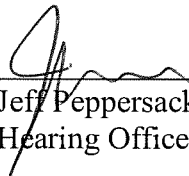
Request to Provide for Additional Briefing

The petitioners request that, in the event the Department is not inclined to rescind the order creating Water District No. 2, they be provided an opportunity for further briefing on this matter after they have had an opportunity to review public records concerning the rationale for creating the district. The petitioners have an opportunity to file exceptions and briefs with the Director pursuant to Procedure Rule 730.

ORDER

Based upon the foregoing, it is hereby ORDERED that the petitions for reconsideration filed in this matter on May 18, 2012 are DENIED.

DATED this 7th day of June, 2012.



Jeff Peppersack
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of June, 2012, I mailed a true and correct copy of the foregoing ORDER DENYING PETITION FOR RECONSIDERATION to the persons listed below:

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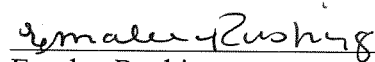
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Emalee Rushing
Administrative Assistant II
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The

department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.