

**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)
_____)

**FINAL ORDER CREATING
WATER DISTRICT NO. 2**

On May 1, 2012, the Idaho Department of Water Resources (“Department”) issued a *Preliminary Order* creating Water District No. 2 (“Water District No. 2”).¹ A *Petition for Reconsideration* was filed with the Department on May 18, 2012, by Grindstone Butte Mutual Canal Company, MAN Farms, LLC and ATN Holdings, LLC (collectively referred to as “Grindstone Butte”). Petitions for reconsideration were also filed on May 18, 2012, by 24 other parties adopting the positions and arguments made by Grindstone Butte. A petition for reconsideration was also filed on May 18, 2012 on behalf of Flying H Farms Partnership and Jeff C. and Jackie Harper.

On June 7, 2012, the Department issued an *Order Denying Petition for Reconsideration*. On June 21, 2012, *Exceptions to Preliminary Order* (“Exceptions”) were filed by Grindstone Butte with the Director of the Department (the “Director”). This final order addresses the exceptions.

EXCEPTIONS

Grindstone does not argue the Department is legally prohibited from creating Water District No. 2. Instead, Grindstone Butte argues that a water district is not needed at this time and requests that the Director exercise his discretion and delay implementation of the water district. *Exceptions* at 4.

First, Grindstone Butte suggests that before the Department creates the water district, the Department should gather data on how Idaho Power Company’s (“Idaho Power”) operational fluctuations impact minimum flows. *Exceptions* at 2-3. The Director agrees that it is important to be able to accurately measure the effects of Idaho Power’s operations at its storage facilities. In fact, the Department is currently participating in scoping activities with Idaho Power on how best to measure the fluctuations in the Snake River due to Idaho Power’s operations. However, the Director disagrees with Grindstone Butte that this activity should be completed prior to creation of the water district. Measurement of Idaho Power’s operations is only a component of the water use in this reach. The Department must also be able to measure and administer other water rights in this reach. Creating the water district establishes the legal organizational

¹ The Preliminary Order was served on the parties to this proceeding on May 4, 2012.

structure to administer water rights in the reach. The related action of requiring installation of measuring devices establishes the necessary physical facilities to measure water diversions for proper administration of water rights.

Second, Grindstone Butte suggests the Department could effectively administer water rights in the reach “without creating a district” through voluntary measurement and reporting programs and by “estimat[ing] diversion rates.” *Exceptions* at 2-4. The Director disagrees. Water districts are the legislatively authorized mechanism for water rights administration. Idaho Code § 42-602. As recognized by the hearing officer, “If a shortage of water occurs, 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.” *Order Denying Petition for Reconsideration* at 2. There cannot be effective administration of water rights along this river reach without the creation of Water District No. 2. Voluntary measurement and estimations are not sufficient for ensuring compliance with state water law. The Director recognizes that there has not yet been a water distribution crisis in this river reach, but the potential for significant water administration is real. The Department should not wait until a water administration crisis to establish the necessary structure of a water district and to require installation of the physical tools to administer the water rights.

Grindstone Butte also complains about the costs of a water district. *Exceptions* at 2. While the Director understands Grindstone Butte’s concerns about cost, the Department will work with the water users to minimize costs while still providing for proper administration. The advisory committee discussed in the *Preliminary Order* is intended to serve as a forum to involve water users and can be used to explore ways to minimize costs.

As the hearing officer stated, the Director is required to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. *In re Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). For the reasons described by the hearing officer in his *Preliminary Order* and *Order Denying Petition for Reconsideration*, and for the reasons described above, the Director concludes that it is appropriate to create Water District No. 2.

ORDER

Based upon the foregoing, it is hereby ORDERED that the hearing officer’s Preliminary Order dated May 1, 2012, is adopted in its entirety, and becomes the Final Order of the Director.

DATED this 10th day of July, 2012.



Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2012, true and correct copies of the documents described below was served on the following by U.S. Mail, postage prepaid and properly addressed to the foregoing:

Document(s) Served: FINAL ORDER CREATING WATER DISTRICT NO. 2 and Explanatory Information to Accompany a Final Order

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BLANKSMA LAND & STORAGE LLC
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ANN T WILSON
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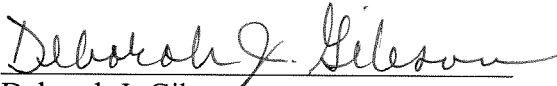
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Deborah J. Gibson

Administrative Assistant to the Director
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EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.