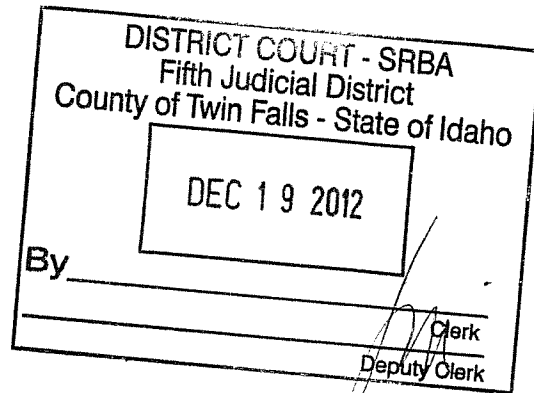


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DEPARTMENT OF
WATER RESOURCES



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

Case No. 39576

) Subcase No.: 00-92021-29
) (Interim Administration)
)
) ORDER GRANTING MOTIONS FOR
) ORDER OF INTERIM ADMINISTRATION
) OF WATER RIGHTS IN A PORTION OF
) BASIN 29 (BANNOCK CREEK DRAINAGE)
)
) ORDER DENYING REQUEST TO COMPEL
) DIRECTOR TO ACT
)
)
)

I.

PROCEDURAL BACKGROUND

1. On July 11, 2003, the Director of the Idaho Department of Water Resources ("IDWR") filed his *Director's Report for Irrigation and Other Uses, IDWR Basin 29* ("*Director's Report*") with the SRBA District Court.

2. On October 25, 2012, Barry Williams ("Williams") filed a *Motion for Order of Interim Administration* requesting that this Court authorize interim administration of water rights in the Bannock Creek Drainage in Basin 29, a *Memorandum in Support of Motion for Order of Interim Administration*, a *Notice of Hearing on Motion for Order of Interim Administration*, and the *Affidavit of Barry Williams in Support of Motion for Order of Interim Administration*. In addition to seeking interim administration, Williams' *Motion* also requests that this Court order IDWR to either establish a new water district or enlarge existing water districts by February 15,

2013, for purposes of water right administration during the 2013 irrigation season in the Bannock Creek Drainage.

3. On October 26, 2012, the State of Idaho filed a *Motion for Interim Administration of Water Rights in a Portion of Basin 29 (Bannock Creek Drainage)*, a *Brief in Support of Motion for Interim Administration for Water Rights in Portion of Basin 29 (Bannock Creek Drainage)*, and the *Affidavit of Timothy J. Luke in Support of Motion for Interim Administration in Portion of Basin 29 (Bannock Creek Drainage)*. The State's *Motion* does not seek authorization for interim administration of ground water domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11), but does seek authorization for interim administration of surface domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

4. On November 5, 2012, the State of Idaho filed a *Certificate of Service* evidencing service of the State's *Motion* and related documents on those claimants in IDWR Basin 29 reasonably determined to be adversely affected by the entry of the requested order.

5. A hearing was held on the two *Motions for Interim Administration* on November 28, 2012. No objections were filed in response to either request for interim administration. However, the State of Idaho did object to Williams' request that this Court order IDWR to either establish a new water district or enlarge existing water districts by February 15, 2013.

II.

LEGAL STANDARDS FOR INTERIM ADMINISTRATION

1. Idaho Code § 42-1417 permits the district court to authorize interim administration of water rights and provides, in part, as follows:

- (1) The district court may permit the distribution of water pursuant to chapter 6, title 42, Idaho Code:
 - (a) in accordance with the director's report or as modified by the court's order;
 - (b) in accordance with applicable partial decree(s) for water rights acquired under state law;
 - (c) in accordance with applicable partial decree(s) for water right established under federal law.
- (2) The district court may enter the order only:
 - (a) upon motion by a party;
 - (b) **after notice by the moving party** by mail to the director and **each**

claimant from the water system or portion thereof that could reasonably be determined be adversely affected by entry of the order; and
(c) upon a determination by the court, after hearing , that the interim administration of water rights in accordance with the report, or as the report is modified by the court's order, and in accordance with any partial decree(s), is reasonably necessary to protect senior water rights.

Idaho Code § 42-1417(1) & (2) (emphasis added).

2. Idaho Code § 42-1417 therefore requires the district court to make the following determination: (1) a party filed a motion for interim administration, (2) the moving party served by mail each claimant that could reasonably be determined to be adversely affected, (3) interim administration is reasonably necessary to protect senior water rights, and (4) the water rights should be administered in accordance with the *Director's Report*, as modified by the district court, or in accordance with partial decrees that supersede the *Director's Report*.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REQUESTS FOR ORDER OF INTERIM ADMINISTRATION

The Court having heard the two *Motions for Interim Administration* and having reviewed the pleadings, makes the following findings of fact and conclusions of law:

1. The State of Idaho and Williams satisfied the notice and service requirements of Idaho Code § 42-1417(2)(b) by serving the *Motions* and related documents on those claimants in IDWR Basin 29 reasonably determined to be adversely affected by the entry of the requested order.

2. Interim administration of water rights in the Bannock Creek Drainage in IDWR Basin 29 in accordance with the most current *Director's Reports* or the *Partial Decrees* that have superseded the *Director's Reports* for those water rights is reasonably necessary to efficiently administer water rights and to protect senior water rights.

3. Basin 29 is a nearly completed basin, and is closed to the taking of late claims except for *de minimis* domestic and stockwater claims and late claims required to resolve pending litigation. SRBA *Director's Reports* or the *Partial Decrees* that supersede the *Director's Reports* for those water rights located in the Bannock Creek Drainage in Basin 29

reflect the most accurate and up-to-date records of water rights in Basin 29. Therefore the Court finds it appropriate for such rights located in the Bannock Creek Drainage in Basin 29 to be distributed according to the *Director's Reports* or the *Partial Decrees* that supersede the *Director's Reports* for those water rights.

IV.

REQUEST THAT THE COURT ORDER IDWR TO EITHER ESTABLISH A NEW WATER DISTRICT OR ENLARGE EXISTING WATER DISTRICTS

Williams' *Motion* requests that this Court order IDWR to either establish a new water district or enlarge existing water districts by February 15, 2013, for purposes of water right administration during the 2013 irrigation season in the Bannock Creek Drainage. Although he has not styled it as such, Williams' request is akin to a request for a writ of mandate, as he is asking this Court to compel the performance of an act that is vested in the Director. The decision to grant or deny a request for a writ of mandate is left to the sound discretion of the court. *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 44, 794 P.2d 632, 633 (1990). Williams argues that by authorizing interim administration, the Court can further order the Department to create or expand an existing water district for purposes of carrying out the interim administration. The Court disagrees. There is a separate administrative process with right of judicial review for creating or expanding a water district. A request for interim administration during the pendency of the adjudication pursuant to Idaho Code § 42-1417 is not a substitute for a delivery call.

Chapter 6, Title 42, Idaho Code governs the distribution of water among appropriators in and through an instrumentality of the State of Idaho referred to as a water district. Idaho Code § 42-604, which governs the creation of water districts in Idaho, provides that the Director "shall divide the state into water districts . . . ,” and also sets forth the procedures the Director must follow to create, modify, abolish or combine a water district. However, the Legislature has directed that Idaho Code § 42-604 “shall not apply to streams or water supplies whose priorities of appropriation have not been adjudicated by the courts having jurisdiction thereof.” I.C. § 42-604. The Snake River Basin, and the water supplies therein, have not been fully adjudicated but rather are in the process of being adjudicated. Therefore, as a general rule, Idaho Code § 42-604, and the statutory procedures set forth therein for creating, revising, abolishing, or combining a water district, do not apply to water sources within the Snake River Basin.

Idaho Code § 42-1417 provides for the interim administration of water rights in a general adjudication. It permits the court to authorize the distribution of water pursuant to Chapter 6, Title 42, Idaho Code, even though the subject water source has not been adjudicated, but rather is in the process of being adjudicated. I.C. § 42-1417(1). As such, it acts as an exception to the general rule that Idaho Code § 42-604 cannot be utilized by the Director to create and distribute water through a water district on a source that is in the process of being adjudicated.

Once the court authorizes the distribution of water pursuant to Chapter 6, Title 42, Idaho Code in response to a request for interim administration, Idaho Code § 42-1417 provides as follows:

(3) Immediately upon entry of the court's order of interim administration of water rights, the clerk of the district court shall mail a certified copy of the order to the director, and the director shall immediately give notice of the order to the watermaster of the water districts affected by the order.

(4) After entry of the district court's order for interim administration, the director may form a water district pursuant to chapter 6, title 42, Idaho Code.

I.C. § 42-1417(3) & (4) (emphasis added). The language of the statute is clear and unambiguous. If the court's order is going to affect an existing water district (whether it was created following the completion of a previous adjudication in Idaho, or whether it was created following a previous order of interim administration in the SRBA) then the Director must notify the watermaster of the affected district of the order. However, if no water district exists then the director *may* form a water district pursuant to Chapter 6, Title 42, Idaho Code. The statutory language is discretionary, not mandatory. *See e.g., State v. Mosqueda*, 150 Idaho 830, 835, 252 P.3d 563, 568 (Ct. App. 2010) (providing that the Legislature's use of the term "may" in a statute is permissive, and denotes the right to exercise discretion).

In this case it is undisputed that no water district presently exists for either surface or ground water in the Bannock Creek Drainage. Therefore, following the Court's issuance of this *Order* authorizing the distribution of water pursuant to Chapter 6, Title 42, Idaho Code in the Bannock Creek Drainage, the Director *may* form a water district for the Bannock Creek Drainage pursuant to the procedures set forth in Chapter 6, Title 42, Idaho Code, but is not required to. I.C. § 42-1417(4). Under Idaho law, a party seeking a writ of mandate must establish "a clear legal right to the relief sought," and a writ of mandate cannot be issued to "compel the performance of a discretionary act." *Brady v. City of Homedale*, 130 Idaho 569, 571, 944 P.2d

704, 706 (1997). Williams has failed to establish that he has a clear legal right to the relief he seeks this Court to compel. Therefore, the Court finds that Williams is not entitled to an order from this Court compelling the Director to either establish a new water district or enlarge existing water districts by a date certain.

This Court's holding in this respect does not mean that Williams is not entitled to have his water right(s) administered according to priority if he is being materially injured by junior use. However, his remedy is found in Rule 30 of the *Rules for Conjunctive Management of Surface and ground Water Resources*, IDAPA 37.03.11, which permits the holder of a senior right to file a petition, pursuant to the procedures set forth therein, seeking conjunctive administration of that senior right in areas of the state in which no water district has been established. In conjunction with such a petition, Williams may further seek the modification of an existing water district, or the creation of a new water district. IDAPA 37.03.11.030.04 & .05. There is nothing in the record before this Court establishing that Williams has availed himself of this remedy, as the record contains no *Petition* to the Director that complies with the procedures and requirements set forth in Rule 30. Now that the Court has authorized interim administration there is no legal impediment to creating or expanding an existing water district under Idaho Code § 42-604. In this regard, Williams has failed to pursue and exhaust available administrative remedies.

For those reasons, the Court in an exercise of its discretion denies Mr. Williams' request that this Court order IDWR to either establish a new water district or enlarge existing water districts by February 15, 2013, for purposes of water right administration during the 2013 irrigation season in the Bannock Creek Drainage

V.

ORDER

THEREFORE, THE FOLLOWING ARE HEREBY ORDERED:

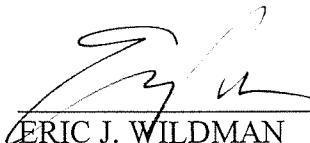
1. Pursuant to Idaho Code § 42-1417, the *Motions for Order of Interim Administration* filed by the State of Idaho and Williams are hereby **granted**. The Court authorizes the distribution of water in the Bannock Creek Drainage in Basin 29 pursuant to Chapter 6, Title 42, Idaho Code in accordance with the *Director's Reports* and the *Partial Decrees* that supersede the *Director's Reports* for those water rights located in the Bannock

Creek Drainage in Basin 29, except for ground water domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

2. Williams' request that this Court order IDWR to either establish a new water district or enlarge existing water districts by February 15, 2013, **is hereby denied.**

IT IS SO ORDERED.

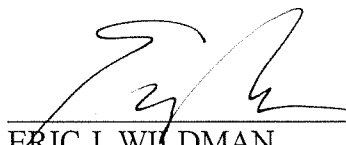
Dated: Dec. 19, 2012.


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: Dec. 19, 2012


ERIC J. WILDMAN
Presiding Judge
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING
MOTIONS FOR ORDER INTERIM ADMINISTRATION OF WATER RIGHTS IN
A PORTION OF BASIN 29 was mailed on December 19, 2012, with
sufficient first-class postage to the following:

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER DENYING REQUEST TO COMPEL DIRECTOR TO ACT was mailed on December 19, 2012, with sufficient first-class postage to the following:

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