



State of Idaho

DEPARTMENT OF WATER RESOURCES

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BRAD LITTLE
Governor

GARY SPACKMAN
Director

January 18, 2019

RE: Preliminary Order Revising Water District No. 33 to Include Ground Water Rights

Dear Water Right Holder,

Enclosed please find a copy of the Preliminary Order regarding the above referenced matter. This order revises the boundaries of Water District No. 33, Little Lost River and tributaries ("WD33"), to include ground water rights within WD33 as shown on the map in Attachment A of the Preliminary Order. The records of the Idaho Department of Water Resources ("Department") show that you own or have an interest in one or more water rights within the revised WD33.

Also enclosed is an informational sheet that explains options for responding to preliminary orders. Please note that any party subject to the order may file a petition for reconsideration within fourteen (14) days of the service date of the order, which is the date of this letter. The Department will act upon petitions within twenty-one (21) days of their receipt.

Please contact this office or the Department's regional office in Idaho Falls (208-525-7161) if you have any questions concerning the attached order.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Luke", is written over a horizontal line.

Tim Luke
Water Compliance Bureau

Encl: *Preliminary Order Revising Water District No. 33*
Explanatory Information to Accompany a Preliminary Order

cc: IDWR Eastern Region, Idaho Falls

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE PROPOSED)	
REVISION OF BOUNDARIES OF WATER)	
DISTRICT NO. 33, LITTLE LOST RIVER)	PRELIMINARY ORDER REVISING
AND TRIBUTARIES, TO INCLUDE)	WATER DISTRICT BOUNDARIES
GROUND WATER RIGHTS WITHIN)	
<u>WATER DISTRICT NO. 33</u>)	

PROCEDURAL HISTORY

On November 19, 2018, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued a Notice of Public Hearing (“Notice”) describing specific changes proposed for Water District 33 (“WD33”). The Notice proposed revising WD33 to include ground water rights located within the current boundaries of WD33. The Notice was sent by regular U.S. Mail to all current owners of record for surface water rights administered by WD33 and all current owners of record for ground water rights within the boundaries of WD33, except for domestic and stockwater uses, as defined in Idaho Code §§ 42-111 and 42-1401(11), and instream stockwater uses, as defined in Idaho Code § 42-113.

The Department conducted the public hearing on December 12, 2018, at the Community Center in Howe, Idaho. Approximately thirty people attended the hearing. The Department presented information about the proposed changes. Participants were encouraged to testify regarding the proposal, but no testimony was offered. In addition, water users were encouraged to provide written comments to the Department on or before December 24, 2018. Written comments were provided by Rob Harris, an attorney representing Pancheri Inc. and Pancheri Brothers LLC (“Pancheri”), and Wade T. Williams, owner of W.T. Williams Inc. (“Williams”). After carefully considering all of the evidence in the administrative record, the Department finds, concludes and orders as follows:

FINDINGS OF FACT

The Department’s Administrative Basin 33 (“Basin 33”) includes the Little Lost River and its tributaries, from the headwaters of the Little Lost River to the Snake River Plain south of Howe, Idaho, where the river sinks to the Eastern Snake River Plain Aquifer (“ESPA”)¹. The boundaries of Basin 33

¹ The ESPA is:

[T]he aquifer underlying the Eastern Snake River Plain as the aquifer is defined in the report, Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho, USGS Professional Paper 1408-F, 1992 excluding areas south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian.

and WD33 are identical (see Attachment A). WD33 is the only water district located within Basin 33. WD33 currently administers and delivers surface water rights from the Little Lost River and its tributaries. Ground water rights within Basin 33 are not administered by any water district.

Basin 33 was included in the Snake River Basin Adjudication (“SRBA”). A final unified decree was issued by the SRBA District Court on August 26, 2014.

The Notice explained that the Department proposed revising WD33 to include ground water rights in Basin 33 for the following reasons:

- The SRBA was finalized on August 26, 2014. Idaho law specifies that the Department shall create or revise water districts for the administration of water rights where the water supplies of such rights have been adjudicated. A revised water district is necessary to properly administer ground water uses and rights within Basin 33;
- A portion of Basin 33 is included within the Department’s ESPA Ground Water Model (“ESPA Model”) boundary. Ground water in Basin 33 within the ESPA Model Boundary is hydraulically connected to the ESPA and the Snake River;
- On November 2, 2016, the Director issued an *Order Designating the Eastern Snake Plain Aquifer Ground Water Management Area* (“ESPA GWMA”), which includes that portion of Basin 33 within the ESPA Model boundary. The potential adoption of a management plan for the ESPA GWMA will affect those ground water rights in Basin 33 overlapping the ESPA GWMA. Nearly all the ground water rights in the ESPA GWMA are already included in a water district. Inclusion of Basin 33 ground water rights in a water district will assure that the rights are administered and managed in accordance with any future ESPA GWMA management plan; and
- An expanded water district is needed to facilitate the measurement and reporting of ground water diversions in Basin 33.

There are approximately 233 ground water rights and 157 surface water rights in Basin 33, not including rights for domestic and stockwater uses as defined in Idaho Code §§ 42-111 and 42-1401(11), and instream stockwater uses as defined in Idaho Code § 42-113. These 233 ground water rights and 157 surface water rights are owned by roughly 70 individuals or entities. Nearly all of the water users present at the public hearing acknowledged, by a show of hands, that they owned both surface water and ground water rights. Many water users own ground water rights that supplement their surface water sources and rights. Some ground water rights authorize the injection and re-diversion of ground water to and from the Little Lost River and are already administered by WD33.

Because many water users within Basin 33 have both surface water and ground water rights, it is more efficient to include ground water rights in WD33, rather than create a separate water district to administer ground water rights. Having a single water district that administers surface water rights and ground water rights will reduce duplication of measurement efforts and travel costs.

Although the ESPA GWMA extends into just a portion of Basin 33, about 75% of all the ground water right points of diversions or wells in Basin 33 are located within the ESPA GWMA. The portion of Basin 33 within the ESPA GWMA is one of the few remaining areas in the ESPA GWMA

where ground water rights are not currently administered by a water district, and where the ground water diversions are not measured and reported by a water district.

RELEVANT LEGAL PROVISIONS

Idaho law declares that all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho are “the property of the state, whose duty it shall be to supervise” the “appropriation and allotment” of the water “to those diverting the same therefrom for any beneficial purpose[.]” Idaho Code §§ 42-101, 42-226.

The Director, acting on behalf of the state of Idaho, is authorized to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a.g., 42-351, and 42-602 et seq.

Idaho Code § 42-604 requires the Director to form water districts to properly administer uses of water from “public streams and tributaries, or independent sources of water supply,” for which a court having jurisdiction thereof has adjudicated the water rights.

The Director has “direction and control of the distribution of water from all natural water sources within a water district . . .” Idaho Code § 42-602. The Director must “distribute water in water districts in accordance with the prior appropriation doctrine.” *Id.*

The Director is required to “divide the state into water districts” to perform “the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.” Idaho Code § 42-604.

The Director has discretion to determine how the “mandatory water districts shall be structured” and may “create new districts, revise existing districts, or even abolish districts, as the Director finds necessary for the efficient distribution of water resources.” *In re Idaho Dep’t of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho at 211, 220 P.3d at 329. “[E]fficient distribution of water . . . requires that [the Department] implement sufficient administrative oversight to prevent conflicts from arising, where possible, and to furnish a framework of evenhanded oversight which allows for consistent planning by water users.” *Id.*

Idaho Code § 42-233b authorizes the Director to require the holders of ground water rights within a designated ground water management area “to report withdrawals of ground water . . . for the purpose of assisting him in determining available ground water supplies and their usage.”

“When a ground water management area is designated by the [Director], or at any time thereafter during existence of the designation, the director may approve a ground water management plan for the area.” Idaho Code § 42-233b.

ANALYSIS

Designating a single water district to administer both surface water and ground water rights in Basin 33 instead of multiple water districts is a more efficient use of time and resources since so many water users in Basin 33 own both types of rights. Further, some ground water wells, which inject water into the Little Lost River, are already regulated by the watermaster for WD33.

Most of the ground water development in Basin 33 is included within the proposed ESPA GWMA. The portion of the ESPA GWMA in Basin 33 is one of the few small remaining areas within the ESPA GWMA where ground water rights are not administered by an existing water district, and where ground water uses are not measured and reported by a water district. The potential adoption of a management plan for the ESPA GWMA necessitates the inclusion of ground water rights in a water district, including those ground water rights in Basin 33 that overlap the ESPA GWMA.

Following the Department's presentation at the December 12, 2018, public hearing, Department staff addressed hearing participants' questions regarding the proposed water district revision. Most of the questions pertained to the timing of installing measuring devices on ground water points of diversion. No testimony was offered at the public hearing and just two written comments were submitted to the Department on or before December 24, 2018.

Review of Written Comments

Written comments submitted by Pancheri and Williams are either neutral or supportive of the Department's proposal to include ground water rights in WD33 and any potential Department requirements to measure ground water diversions. However, both Pancheri and Williams expressed concerns regarding deadlines for installing measuring devices on ground water wells. Pancheri specifically requests that the Department not issue a ground water measurement order until 2020 and that such order include "a time frame of at least eighteen (18) months from the issuance date of the order to have the measuring devices installed." Williams suggested that the Department provide adequate time for installing measuring devices in order "to spread the cost of the devices over another year or two."

The Department's proposal to revise WD33 did not include any timeframe for the issuance of a ground water measurement order or specific deadlines for installing measuring devices on ground water wells. At the public hearing, Department staff offered the following suggestions about the timing of any ground water measurement order and deadlines for installation of ground water measuring devices:

- The Department will issue an order or decision concerning the proposed revision of WD33 by February 2019;
- If the Department revises WD33 to include ground water rights, the Department will work with the WD33 advisory committee and water users in the district regarding the details of any ground water measurement order before issuing such order; and
- The Department will likely issue a ground water measurement order by April 2019, but the earliest deadlines for installing ground water measuring devices may be January 1, 2020, for qualifying non-irrigation diversions and April 1, 2020, for qualifying irrigation diversions.

CONCLUSIONS OF LAW

The revision of WD33 to include delivery and administration of ground water rights in Basin 33 is necessary for the reasons set forth above.

Given that most of the water users in Basin 33 own both surface water rights and ground water rights, and given that the WD33 watermaster already administers some ground water rights, extending WD33 administration to all ground water rights in Basin 33, as opposed to the creation of a separate water district for ground water rights, creates a more efficient administration and regulatory scheme.

To facilitate the efficient distribution of water rights in Basin 33, the Department should approve the proposed changes.

ORDER

IT IS HEREBY ORDERED that:

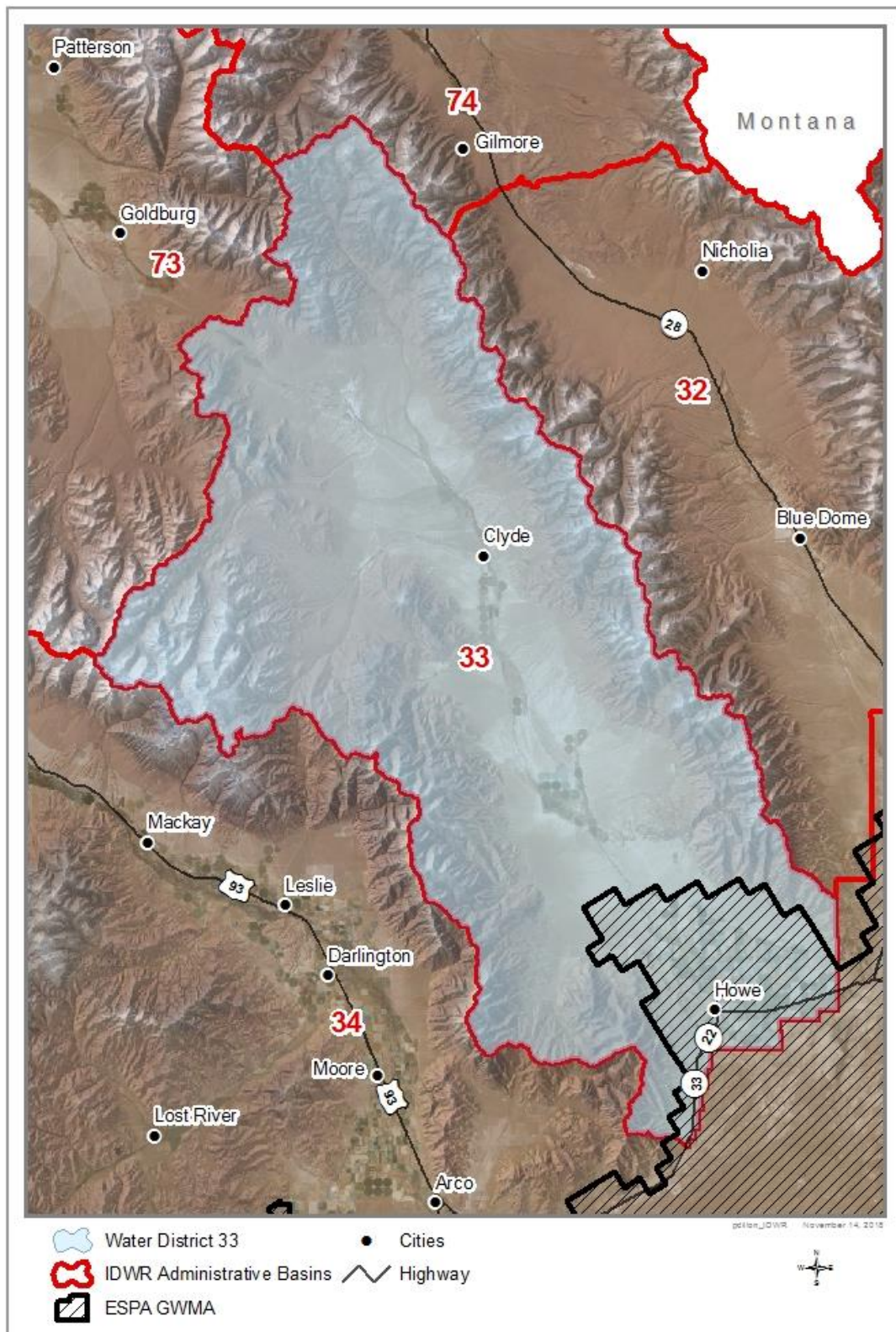
1. WD33 is revised to include all surface water and ground water rights in Basin 33 as shown on the map attached hereto, labeled Attachment A, except ground water rights used for domestic and stock water purposes as defined by Idaho Code §§ 42-111 and 42-1401A(11), and instream stockwater uses as defined in Idaho Code § 42-113; and
2. The Director shall issue a separate order requiring the installation of measuring devices for ground water diversions within WD33. The measuring device order shall be issued at least sixty days after the issuance of this Preliminary Order Revising WD33 to provide time for area water users to work with the Department toward developing a reasonable water measurement implementation plan; and
3. The holders of ground water rights within WD33 pursuant to this order shall not be subject to administrative assessments from WD33 in 2019. The WD33 annual meeting is held on the first Monday in March. At the annual meeting, the holders of surface water rights and ground water rights within WD33 shall elect a watermaster, select an advisory committee to include representatives from WD33 that includes holders of both surface water and ground water rights, and set a budget for operating the district.

DATED this 18th day of January 2018.



James Cefalo
Hearing Officer


Attachment A
Water District 33 Revision, Including Surface Water and Ground Water Rights



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of January 2019, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.

**In the Matter of the Proposed Revision of Boundaries of Water District No. 33, Little Lost River and Tributaries, to Include Ground Water Rights within Water District No. 33:
Preliminary Order Revising Water District Boundaries**



Sarah Shaul
Technical Records Specialist
Idaho Department of Water Resources

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. 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, request 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 Department 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.

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