

# 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

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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.