

# FAX COVER SHEET

DATE: Wednesday, December 13, 2000

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RE: Eureka Water Company Issues

OUR FILE: 5528-7

TO: Barry Semple  
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From:

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**SEND TO FAX PHONE: (208) 323-2399**

MESSAGE:

Barry—

Per our conversation, please see the attached.

Thank you.

— Mike Creamer

If this fax does not transmit fully or is difficult to read, please contact Carrine Wilson at (208) 388-1250.

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LAW OFFICES  
**GIVENS PURSLEY LLP**  
A Limited Liability Partnership

**MEMORANDUM**

TO: Barry Semple

FROM: Michael C. Creamer

RE: Eureka Water Company Issues

DATE: December 13, 2000

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1. Ownership/Right-of-Way Issues:

As we discussed, typically irrigation districts and canal companies' responsibility and authority over ditches and laterals ends at the headgate or tap that serves the individual water users. From the irrigation entity's standpoint, it is not responsible for maintenance of the lateral below the tap, and in some instances, they take the position that they are not responsible for maintaining the headgate itself, that again being the responsibility of the water users themselves.

If the water company does assert ownership, and has operated and maintained the ditches or the Phyllis Slough historically, it most likely has a statutorily created right of way. Idaho Code 42-1102 (attached), by statute confirms a right-of-way for operation and maintenance of existing ditches and laterals, and persons purchasing property with existing ditches are on notice of the existence of the right-of-way (and an associated right of prior approval of works affecting the ditch or the right-of-way).

Under the facts on the Shideler property, it seems most likely that the water company's responsibility stops somewhere "upstream" and that the ownership, operation and maintenance has been assumed by the water users themselves, either informally, or as a Lateral Association. Under Idaho Code, Title 42, Chapter 13, where three or more persons take water from a common ditch or lateral, they are by statute a Lateral Water Users Association with the authority to levy assessments on the lands served, to appoint a lateral manager to deliver the water along the lateral. The Association's remedies if a user doesn't pay his assessments to the Association for O&M is to direct the Lateral Manager not to deliver the water. It is not clear that there is an Association here, since they don't exist in reality unless the users actually meet. Most lateral users simply share the work and get things done informally (see Idaho Code 42-1202 attached). But either as an Association, or simply as individual water users taking delivery from a common

ditch or lateral, these water users would have an individual right-of-way (again by way of 42-1102) for operation and maintenance, whether it is recorded or not.

2. Prior Approval of Ditch Work or Relocations.

Unless the water company or an Association can demonstrate it has owned, operated and maintained any of the ditches, or the Phyllis Slough through the Shideler property, they should not be able to require their prior approval of changes in the ditch location or structures. In no event would the water company or an Association be able to require their prior review and/or approval of the on-site distribution system (i.e., pressurized irrigation system) that is going to be constructed. The statutes in Title 43, Idaho Code that give certain water delivery organizations authority over pressurized irrigation systems do not apply to water companies or Lateral Associations.

Idaho Code 42-1207 (attached) permits persons with a ditch crossing their property to change its course or bury it so long as it doesn't impede the water delivery to others. The one who changes the ditch or lateral must bear any increased maintenance costs and must meet applicable city or county construction standards. My view is that if the water company does have any right of prior approval of changes to the ditch, it must be exercised reasonably, and if we build to the required standard, and don't impede delivery to other water users, we should be able to proceed even if the water company refuses to approve.

Of course, cooperation goes a long way. I think it almost always is appropriate to keep water users and delivery entities informed of plans. The Eureka Water Company does have the right to approve any changes to the use of the water rights it delivers, and is entitled to assurances that whatever the developer is proposing does not jeopardize the water rights in any way.

purpose or purposes from any ditch, canal or conduit, the whole or any part of which shall be in such county, which application shall be supported by such affidavit as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a maximum rate of compensation for water thereafter delivered from such ditch, canal or conduit within such county: provided, that when any ditch, canal or conduit shall extend into two (2) or more counties, the county commissioners of each of such counties shall fix the maximum rate for water used in that county. (1899)

#### 42-1002. Setting date for hearing.

Every such board of county commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal, or conduit, enter an order fixing a day not sooner than ten (10) days thereafter, nor later than twenty (20) days (a special meeting may be called for that purpose), when they will hear all parties interested in such water-works aforesaid, or in procuring water therefrom, for any of the said purposes as well as all documentary or oral evidence or depositions taken according to law, touching said ditch or other water-works aforesaid, and the cost of furnishing water therefrom. (1889)

#### 42-1003. Service of notice of hearing - Depositions.

At the time so fixed all persons interested as aforesaid, on either side of the controversy, in lands which may be irrigated by such ditch or other water-works aforesaid, may appear by themselves or by their agents or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water: provided, the applicant or applicants, if the application be made by a party or parties as aforesaid desirous of procuring water, shall, within ten (10) days from the time of entering the said order fixing the hearing, cause a copy of such order, duly certified, to be delivered to the owner or owners of such ditch, canal or conduit or to the president, secretary, or agent of the company, if it be owned by a corporation or association having such officers; if any such owner cannot be found, a copy shall be left at the usual place of business of the company of which he is such officer, or at his residence if such company have no place of business. And if such ditch or water-works aforesaid shall be owned by several owners, not being an incorporated company, it shall be sufficient to serve such notice by delivering a copy to a majority of them. If the applicant be the owner or party controlling such ditch, canal or conduit, such notice shall be given by causing printed copies of such order in handbill form, in conspicuous type, to be posted securely in ten (10) or more places throughout the county and section watered by such ditch or other water-works aforesaid, if the water be used for irrigation. The person or persons making such services or posting such printed copies shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the board of county commissioners. Depositions mentioned in the preceding section to be used before said commissioners shall be taken by any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same. (1899)

#### 42-1004. Conduct of hearing - Order - Appeal.

Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary; but when in session they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well as concerning the original cost and present value of the works and structure of such ditch, canal or conduit, as well as the cost and expense of maintaining and operating the same, and all matters which may affect the establishment of reasonable maximum rates for water to be furnished and delivered therefrom, and they may issue subpoenas for witnesses, which subpoenas shall be served in the same manner in which subpoenas are served in civil cases; and said board may also issue subpoenas for the production of all books and papers required before them. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to

obey the subpoenas of the board of county commissioners, compel obedience thereto, or punish for refusal to obey after hearing as in cases of attachment for contempt of such district court. Upon hearing and considering all the evidence and facts and matters involved in the case, said board of county commissioners shall enter an order describing the ditch, canal or conduit, or other water-works in question, with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water thereafter delivered from such ditch or other water-works as last aforesaid; within the county in which such commissioners act; and such rate shall not be changed within one (1) year from the time when such rate shall be so fixed: provided, that an appeal may be taken to the district court from any act, order or proceeding of the board by any person or corporation aggrieved thereby, as in other cases under the general statute of the state of Idaho, governing appeals from an order or proceeding of the board of county commissioners. (1905)

#### 42-1005. Matters considered in fixing rate.

In fixing the rates at which water shall be furnished, the board of commissioners shall take into consideration the cost of the works, the expense of keeping the same in repair, and all other conditions that affect the cost of delivering the same. Whenever it shall appear to the board of county commissioners from competent evidence that any consumer or consumers of water distributed through any ditch or canal, is entitled to the distribution or use of any water therefrom, at not to exceed a proportionate amount of the actual cost of maintenance and operation of said ditch or canal, they shall, upon request of such person or persons so entitled, fix the rate per cubic foot per second to be charged to such consumer or consumers for the current year. (1899)

### Chapter 11. Rights of Way

- 42-1101. Rights of landowners to water.
- 42-1102. Owners of land - Right to right-of-way.
- 42-1103. Owners of springs and streams - Right to right of way.
- 42-1104. Right of way over state lands.
- 42-1105. Right of way for riparian proprietors.
- 42-1106. Right of eminent domain.
- 42-1107. Right of way for drains.
- 42-1108. Right to cross ditches.

#### 42-1101. Rights of landowners to water.

All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed. (1881)

#### 42-1102. Owners of land - Right to right-of-way.

When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch, canal or other conduit on their own premises for the proper irrigation thereof, or where the land proposed to be irrigated is back from the banks of such stream, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation. The right-of-way shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. Provided, that in the making, constructing, keeping up and maintenance of such ditch, canal or conduit, through the lands of others, the person, company or corporation, proceeding under this section, and those succeeding to the interest of such person, company or corporation, must keep such ditch, canal or other conduit in good repair, and are liable to the owners or claimants of the lands crossed

by such work or aqueduct for all damages occasioned by the overflow thereof, or resulting from any neglect or accident (unless the same be unavoidable) to such ditch or aqueduct.

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights confirmed or granted by this section.

This section shall apply to ditches, canals or other conduits existing on the effective date of this act, as well as to ditches, canals or other conduits constructed after such effective date. (1996)

#### 42-1103. Owners of springs and streams - Right to right of way.

Where the owners of any spring, or the appropriators thereof, or of any stream, desire to conduct the waters thereof to any lands for the purposes of irrigation, or to any city or town for the use of the inhabitants thereof, or to any factory, or to any distant place, with the intent to apply the same to a beneficial use, and to accomplish such object it is necessary to cross with ditches, flumes or other conduit, the lands owned or occupied by others than the owners or appropriators of such spring or stream, the right of way over and across the lands of others for conducting said water may be acquired in the manner above provided. (1881)

#### 42-1104. Right of way over state lands.

The right of way over and upon any and all lands owned or controlled by the state of Idaho is hereby granted to any and all persons for the purpose of constructing and maintaining any ditch, canal, conduit or other works for the diversion or carrying of water for any beneficial use; provided, that no property shall be taken under the provisions of this section until a just compensation shall be paid therefor, to be ascertained in the manner prescribed by law for the taking of private property for a public use. (1899)

#### 42-1105. Right of way for riparian proprietors.

All persons, companies and corporations owning or having the possessory title or right to lands adjacent to any stream, have the right to place in the channel or upon the banks or margin of the same, dams or other machines for the purpose of raising the waters thereof to a level above the banks, requisite for the flow thereof to and upon such adjacent lands; and the right of way over and across the lands of others, for conducting said waters, may be acquired in the manner prescribed in the following section. (1881)

#### 42-1106. Right of eminent domain.

In case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain. (1899)

#### 42-1107. Right of way for drains.

Whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, and they cannot agree among themselves or with the parties who own land below through which it is expedient to carry the drain in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigating works of diversion, and the right of way for such drains shall be regarded as equal to that of irrigation canals. (1911)

#### 42-1108. Right to cross ditches.

Any person, company or corporation, owners of any ditch, flume or other conduit, cannot lawfully deny to any other person, company or corporation the right to cross their right of way with another ditch, flume or conduit either upon a higher or lower level, where the same can be done in a convenient and safe manner: provided, that such second person, company or corporation shall be liable for all damages that may accrue from the construction of such ditch, flume or other conduit across the conduit of another. (1899)

## Chapter 12. Maintenance and Repair of Ditches

42-1201. Ditches to be kept full.

42-1202. Maintenance of ditch.

42-1203. Maintenance of embankments.

42-1204. Prevention of damage to others.

42-1205. Bridges over ditches.

42-1206. Repair of community ditches.

42-1207. Change of lateral ditch or buried irrigation conduit.

42-1208. Rights-of-way not subject to adverse possession.

#### 42-1201. Ditches to be kept full.

Every person, company or corporation owning or controlling any ditch, canal, or conduit for the purpose of irrigation shall, during the time from April first to the first day of November of each year, keep a flow of water therein sufficient to the requirements of such persons as are properly entitled to the use of water therefrom: provided, however, that when the public streams or other natural water sources from which the water is obtained is to low and inadequate for that purpose, or when the board of directors or governing body of an organization or entity furnishing water deem it in the best interests of that organization or entity to adjust the dates of availability and provide for termination of irrigation water, then such ditch, canal or conduit shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priority from the streams or other natural sources as provided by law. (1899)

#### 42-1202. Maintenance of ditch.

The owners or persons in control of any ditch, canal or conduit used for irrigating purposes shall maintain the same in good order and repair, ready to deliver water by the first of April in each year, and shall construct the necessary outlets in the banks of the ditches, canals or conduits for a proper delivery of water to persons having rights to the use of the water. (1899)

#### 42-1203. Maintenance of embankments.

The owner or owners of any irrigating ditch, canal or conduit shall carefully keep and maintain the embankments thereof in good repair, in order to prevent the water from wasting during the irrigation season, and shall not at any time permit a greater quantity of water to be turned into said ditch, canal or conduit than the banks thereof will easily contain or than can be used for beneficial or useful purposes; it being the meaning of this section to prevent the wasting and useless discharge and running away of water. (1899)

#### 42-1204. Prevention of damage to others.

The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others. The owners or constructors have the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work. The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter. (1996)

#### 42-1205. Bridges over ditches.

All owners of any ditch, canal or conduit, or any other means for conveying water, shall build substantial bridges not less than sixteen (16) feet wide, and with boards not less than two (2) inches in thickness (unless the same shall be on a county or state road, when such boards shall not be less than three (3) inches thick), at all places where any county or state

road crosses the same, or any road kept open and used by any neighborhood of people for their benefit and convenience. In case of neglect or refusal of such owners to build such bridges as above required, after a notice of ten (10) days being given by the said board of county commissioners of the proper county, said board shall proceed to the construction of the same, and shall collect the cost thereof together with the costs of suit; provided, that after any bridge shall have been constructed across any ditch, canal or conduit on any county or state road in accordance with the provisions of this section, it shall thereafter be maintained at the public expense. (1899)

#### 42-1206. Repair of community ditches.

Where a ditch is common property, or there is a common right to the use of the water of a ditch without payment therefor, and any labor or materials are necessary for the repair or cleaning of the ditch, or any gate or flume thereon or thereunto belonging, the watermaster of the district may make a fair pro rata assessment of labor or materials against the inhabitants of the district claiming the use of such water, according to the benefits received by each; and if any person so assessed neglects or refuses, for the period of three (3) days after notice so to do from the watermaster or his deputy, to furnish his just proportion of the necessary labor or materials, according to such assessment, he must pay his pro rata in cash, to be recovered, with costs, in an action by the watermaster in his own name. (1881)

#### 42-1207. Change of lateral ditch or buried irrigation conduit.

Where any lateral ditch or buried irrigation conduit has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling said land shall have the right at their own expense to change said lateral ditch or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such lateral ditch or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A landowner shall also have the right to bury the ditch of another in pipe on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibility for operation and maintenance shall remain with the ditch owner, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the ditch owner.

In the event that the ditch, lateral, buried irrigation conduit, or canal is owned by an organized irrigation district, canal company, ditch association, or other irrigation entity, the written permission of the entity must first be obtained before a ditch, lateral, buried irrigation conduit, or canal is changed or placed in buried pipe by the landowner.

While a ditch owner shall have no right to relocate his ditch on the property of another without permission, a ditch owner shall have the right to place his ditch in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but not to exceed five (5) days after the start of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the ditch owner.

No more than five (5) days after the start of construction, a landowner or ditch owner who buries a ditch in pipe shall record the location and specifications of the buried irrigation conduit, including primary and secondary easements, in the

county in which the burying is done, and shall provide the irrigation entity that supplies water to the ditch, with a copy of such location and specifications and the construction plans utilized. The irrigation entity shall keep and maintain such records and have them available for the public. (1994)

#### 42-1208. Rights-of-way not subject to adverse possession.

Rights-of-way of irrigation districts, Carey act operating companies, non-profit irrigation entities, and lateral ditch associations, are not subject to adverse possession, and no person shall prevent free access of authorized personnel on rights-of-way or construct any obstruction on rights-of-way in an effort to adversely possess said right-of-way. (1981)

### Chapter 13. Lateral Ditch Water Users' Associations

#### 42-1301. Organization - Officers - Rules.

#### 42-1302. Lateral manager - Election - Duties.

#### 42-1303. Lateral ditches - Repairs, improvements, and maintenance - Assessment of costs.

#### 42-1304. Assessments - Notice - Penalties for delinquency.

#### 42-1305. Delinquent users not entitled to water.

#### 42-1306. Collection and disbursement of funds.

#### 42-1307. Action for assessment - Attorney's fees.

#### 42-1308. Appointment of lateral manager by director of department of water resources.

#### 42-1309. Association authorized to borrow money, mortgage or pledge assets.

#### 42-1301. Organization - Officers - Rules.

Where three (3) or more parties take water from same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users' association known as "Water Users' Association of Lateral or Laterals." Such water users' association may meet and organize at any time after thirty (30) days after this chapter shall take effect, and shall meet annually thereafter between January first and the last Monday in March of each year, at the call of the secretary of such association, said secretary to give ten (10) days' notice by mail of such annual meeting; provided that if for any reason the secretary should fail to call a meeting, then the annual meeting of such association shall be held on the last Monday in March of each year. At such annual meetings each water user shall be entitled to one vote in person, for each inch and a fractional vote for each fraction of an inch of water which such water user is entitled to receive from such laterals, and a corporation shall vote by one (1) of its officers designated by it. Such association shall organize by the election of a chairman, vice-chairman and a secretary-treasurer, which officers shall also constitute the board of directors of such association, and shall hold office for one (1) year and until their successors are elected. Such association at the annual meeting shall also elect a manager of said lateral or laterals to be known as "lateral manager" for the succeeding season and shall fix the compensation of said manager, and of all officers. Such association may adopt such rules and regulations for the management of said lateral or laterals or distributing ditch or ditches and the delivery of water therefrom as they deem best, and may, by majority vote, if it be deemed for the best interests of the association, combine one or more laterals and abandon laterals not in use, and do any and all things not in conflict with the provisions of this chapter or the laws of this state wherein the best interests of the association will be furthered. (1947)

#### 42-1302. Lateral manager - Election - Duties.

Should any water users' association at its annual meeting fail to elect a lateral manager or fix his compensation such lateral manager may be elected by the board of directors of such association, who may also fix his compensation. The manager of any lateral shall, in addition to the duties prescribed by the association, perform all duties fixed for such lateral manager under the provisions of sections 42-907 and 42-910, except as modified by this chapter. (1927)

#### 42-1303. Lateral ditches - Repairs, improvements, and maintenance - Assessment of costs.

Immediately after the annual meeting of any such association the directors thereof and the lateral manager shall make an

examination of the lateral or distributing ditch or ditches, and make an estimate as to the cost of the necessary repairs and improvements thereon, and the maintenance thereof for the succeeding season, including the compensation of officers and lateral manager and such total cost and charges shall be assessed pro rata to each water user from said lateral, in the following manner, if agricultural land in proportion to the water which the owner is entitled to receive from such lateral or ditch, and if lots within any city or village, then the assessment may be made upon the basis of each lot, the same to be uniform upon lots of the same size. The improvement, repair and maintenance of any such lateral or distributing ditch shall be under the direction of the directors of the association. (1927)

#### 42-1304. Assessments - Notice - Penalties for delinquency.

On or before the fifteenth day of April in each year the secretary of the association shall notify each water user of the amount assessed against him for that year as herein authorized, and the same shall be due and payable on the first day of May of each year and if not so paid on or before the fifteenth day of June of such year, a penalty of ten per cent (10%) shall be added thereto, and the total amount due shall then draw interest at the rate of ten per cent (10%) per annum from said fifteenth day of June of such year until paid. (1977)

#### 42-1305. Delinquent users not entitled to water.

No water user shall be entitled to demand or receive water from said lateral whenever any such assessment is due and unpaid, and the lateral manager shall not distribute any water to such water user while delinquent in such payment except upon order of the board of directors of the association who shall have authority to cause such water to be delivered; provided, the water user shall give such security for the payment of such assessment against him as shall be required by the board of directors. (1927)

#### 42-1306. Collection and disbursement of funds.

The lateral manager shall collect all assessments so made and pay the same to the secretary-treasurer taking his receipt therefor. The secretary-treasurer of the association shall keep the funds of the association in the name of the association and shall draw warrants or checks thereon to pay the costs and expenses of the management of said lateral as herein provided for upon the order of the board of directors, and shall perform such other duties as the association may prescribe. (1927)

#### 42-1307. Action for assessment - Attorney's fees.

In case any assessment, as herein provided for is due and unpaid the association may sue to collect the same, in the name of its secretary-treasurer as such, in any court of competent jurisdiction, and in addition to the amount due including all penalties and interest, and all costs incurred in said action, may collect a reasonable attorney's fee in such action to be fixed by the court. (1927)

#### 42-1308. Appointment of lateral manager by director of department of water resources.

(1) In the event that the water users or the board of directors of any lateral or ditch association do not meet and elect a lateral manager as provided for in this chapter or a lateral manager is not selected as otherwise provided by law, then, the director of the department of water resources may appoint and fix the compensation of a lateral manager, upon the written petition of a water user alleging that water is not being apportioned and distributed properly among the users from the ditch or lateral and that the rights of the water user are being injured thereby.

(2) If the water users also have failed to elect association officers, the lateral manager appointed by the director may exercise the duties of the association officers, including the making and collection of assessments, but not the borrowing of money, as is necessary to achieve the proper allocation and distribution of water from the ditch or lateral and without regard to the statutory dates for the performance of these duties.

(3) The lateral manager appointed by the director shall hold office only for the period of time fixed by the order of appointment and in no event beyond the remainder of the year in which appointed.

(4) If the lateral is located within a water district established pursuant to chapter 6, title 42, Idaho Code, the director shall advise the district watermaster of the receipt of the petition and invite the watermaster to make recommendations concerning the need for appointment of a lateral manager and the person to be appointed.

(5) Upon receipt of a petition filed pursuant to subsection (1) of this section, the director shall make a reasonable effort to provide written notice of the petition to any irrigation district, canal company, or other water distribution entity that supplies water to the lateral, and to all persons having rights to the use of water from the lateral. Except in the case of serious threat of imminent injury to person or property, the director shall allow fourteen (14) days for written response to the petition.

(6) Based upon a review of the petition, the responses thereto, the recommendations of the watermaster, if any, and any investigation by the department of water resources, the director shall issue an order with findings either appointing a lateral manager or declining to appoint a lateral manager. Any person aggrieved by the order of the director shall be entitled to request a hearing before the director pursuant to section 42-1701A, Idaho Code. (1999)

#### 42-1309. Association authorized to borrow money, mortgage or pledge assets.

Lateral ditch water users' associations are expressly authorized to borrow money from any private or governmental source, to be repaid over a period of years, and to levy assessments over such period of years for the purpose of repaying said loan, and they are also authorized and empowered to mortgage and/or pledge any of the assets of said associations as security for said loan; providing, however, that before any money can be borrowed or any mortgage or pledge can be made and entered into, all members of said association shall be notified of an election by two (2) weekly publications in a legally authorized newspaper, as defined in section 60-106, Idaho Code, within the county in which the association is located, said notice to provide that an election is being called to determine whether or not the association shall be authorized to borrow money and mortgage and/or pledge its assets, and shall also state the date, time and place of said election, which shall be held within ten days after the date of the last publication of said notice.

If a majority of the total outstanding shares shall vote at said election in favor of borrowing said money and mortgaging and/or pledging said assets, then said association, through its president and secretary, shall be authorized to borrow said money and mortgage and/or pledge its assets. (1957)

### Chapter 14. Adjudication of Water Rights

#### 42-1401. Legislative intent.

##### 42-1401A. Definitions.

##### 42-1401B. Role of the director in an adjudication.

##### 42-1401C. Role of state agencies other than the Idaho department of water resources in an adjudication.

#### 42-1402. Decreed rights appurtenant to land - Water rights established under federal law excepted.

#### 42-1403. Certified copies of allotments.

#### 42-1404. Private actions for adjudication of water rights.

#### 42-1405. General adjudication - Public interest.

#### 42-1406. General adjudication - Contents of petition.

#### 42-1407. General adjudication - Venue - Notice of filing - Commencement order.

#### 42-1408. Service of notice of order commencing a general adjudication.

#### 42-1409. Notice of claim.

#### 42-1409A. Amendment of notice of claims - Late notice of claims.

#### 42-1410. Examination of water system and of claims.

#### 42-1411. Report of the director.

#### 42-1411A. Service of notice of and determination of water rights established under federal law.

#### 42-1412. Objections - Responses to objections - Hearing before district judge - Entry of final decree.

#### 42-1413. Filing of final decree.

#### 42-1414. Fees for filing notice of claims with the director.

#### 42-1415. Enforcement of filing fees.

#### 42-1416B. Claim for expanded use in critical ground water area - Determination of water availability.

#### 42-1417. General adjudication - Interim administration of water rights.

#### 42-1418. Appeals.