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DEPARTMENT OF
WATER RESOURCES

Law Offices

***RIGBY, THATCHER, ANDRUS
RIGBY, & MOELLER, Chartered***

*Ray W. Rigby
Gordon S. Thatcher
G. Rich Andrus
Jerry R. Rigby
Michael S. Kam (1954-2001)
Gregory W. Moeller
Reed E. Andrus*

*P.O. Box 250
25 North Second East
Rexburg, ID 83440*

*Telephone: (208) 356-3633
Fax: (208) 356-0768
E-Mail: gmoeller@rigby-thatcher.com*

July 20, 2004

**SENT VIA FACSIMILE TRANSMISSION: 327-7866
AND EXPRESS OVERNIGHT MAIL**

Karl J. Dreher, Director
Idaho Department of Water Resources
1301 North Orchard Street
P.O. Box 83720
Boise, Idaho 83720-0098

**Re: In the Matter of Distribution of Water to Water Right Nos. 34-372A, 34-372B, and
34-609B**

Dear Director Dreher:

We are writing to you on a most urgent matter. Our firm represents many ground water users and water right holders located in Water District 34. A partial list of the water right holders we are representing is set forth in the four sheets attached as Exhibit "A."¹

This letter concerns your Order of July 12, 2004, whereby you ordered certain water right holders in the District 34 to cease and desist diverting ground water unless an effective mitigation plan was operating by July 22, 2004. You also ordered the parties to provide 6,110 acre feet of storage or implement an acceptable alternative mitigation plan to provide the Jensens with water. **Please consider this letter as our written petition, pursuant to the last paragraph of your July 12, 2004, letter, for a hearing before the Director.**

¹ The following names on Exhibit "A" signed in agreement but are not represented by our firm: Representative Lenore Barrett; Representative JoAn Wood; Senator Don Burtenshaw; Bob Shaffer; Manny Guerrero; Steve Smith; and Lewene Clark. We anticipate that there are additional water right holders within District 34 whom we will also represent, but have not yet been ascertained.

Karl J. Dreher, Director
Idaho Department of Water Resources
July 20, 2004

Page - 2

For the reasons we have set forth below, we believe that your Order is inappropriate and should be stayed pending further hearings and/or meetings on this matter. Those reasons are, in part, as follows:

1. There Is No Factual Basis for the Order's Conclusion That Curtailing Well Owners in District 34 Will Provide Any Additional Water to Jensens.

The Order, and the findings of fact upon which it was based, appear to rely upon very sketchy and incomplete data. A review of the scientific and factual problems and the information relied upon by the Department in issuing the Order, are set forth in the attached document (Exhibit "B") entitled Technical Review of "Ground Water Pumping Impacts on the Surface Water Irrigation Diversions from the Big Lost River," prepared by Brian D. Higgs, Hydrogeologist from Water Well Consultants, Inc., of 6330 West 33rd South, Idaho Falls, Idaho. A review of Mr. Higg's technical review reveals that the call that has been made by Jensens appears to fit within the legal definition of a futile call. Based upon his well founded conclusions, we believe that the Department's Order was issued without sufficient facts.

2. Failure to Hold a Hearing or Meeting on the Issue.

It is the understanding of many who were present during earlier meetings with the Department, in which Gary Spackman and Tim Luke were present, that the Department had agreed to do nothing until a meeting had been held. There were promises made that there would be an opportunity for discussion and the meeting was actually scheduled, with appropriate advertisement in the news paper, for August 2, 2004. Such a meeting did not take place before your action. We hereby request that the aggrieved parties have an opportunity to meet with the Department in a meeting or hearing format before any extreme action is taken.

The result of the Order is that more than 120 water rights will be shut off, without giving the owners due process. Certainly, in any civil court proceeding, such an extreme temporary restraining order would require a hearing and some form of bond. Without even giving the parties an opportunity to discuss the matter, drastic action has been taken. This drastic action should be stayed pending an opportunity for an acceptable resolution.

3. The Parties and Water Rights Which Are Intended To Be Benefitted By This Order, Are Still Receiving Their Full Water Right.

Based upon in information currently available to us, Jensens are still receiving their full water right, to the detriment of many other water right holders. We believe that, under the circumstances, it would be inappropriate to take such drastic action to parties that have not

Karl J. Dreher, Director
Idaho Department of Water Resources
July 20, 2004

Page - 3

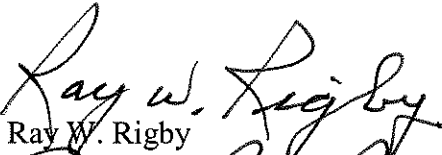
actually been aggrieved or damaged.

We are also including with our petition the attached "Statement of Robert E. Duke," as Exhibit "C." He is the Watermaster of District 34 and is familiar with the history and issues involved in this dispute.

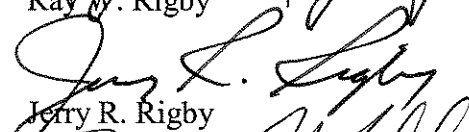
Based upon these reasons, we urge the Department to stay imposition of its Order of July 12, 2004, and grant us a hearing. If the Department refuses to do so, we will have no option but to pursue this matter in District Court and seek a temporary restraining order staying execution of the Department's decision. Rather than work **against** the Department, our clients would much prefer to work **with** the Department and feel that an additional meeting or hearing would be constructive in working out a mutually beneficial resolution to this dispute.

We look forward to hearing from you as soon as possible. If any action is taken to curtail water rights as outlined in your Order, we will have no choice but to respond more formally in Court. We hope that will not be necessary.

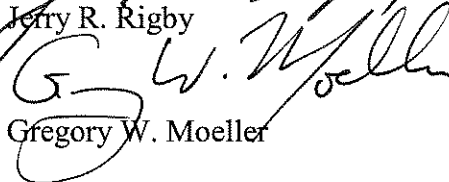
Sincerely yours,



Ray W. Rigby



Jerry R. Rigby

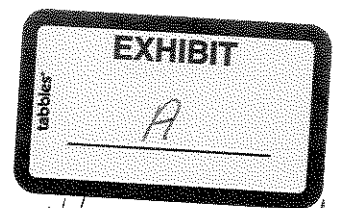


Gregory W. Moeller

GWM:jt

Enclosures Exhibit "A" - Client List
 Exhibit "B" - Report by Brian D. Higgs
 Exhibit "C" - Statement of Robert E. Duke,
 Watermaster District 34

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Please give your ~~name~~

Name	Address	Phone #	e-mail
Mike Marime	P.O. 252 Mackay	588-3397	
Shane Rosenkranz	Mackay Id	588-3086	
Doug Rankham	Mackay Id	588-2551	
Les Rosenkranz	Mackay Id.	588-2012	
Scott Johnson	Mackay Id.	588-3072	
Oscar Wornick	Mackay ID-	588-2506	
John Powers	" "	588-3358	
Wiane Nielson	Mackay Id	588-3093	
Barbara Hulsman	Moore, Id	554-4321	
Linda Scott	Moore, Id	554-2706	
Phil Scott	Moore, Id	554-2706	
Marx Hintze	Mackay, Id	588-2270	
Margery Fulton	Mackay, Id	588-2267	
Brona Seyer	Leetie, Id.	588-2241	
May Seyer	Leetie, ID	588-2241	
Geri Cabrean	Mackay Id	588-2582	
Ron Cabrean	Mackay, Id	588-2582	
Thyl & Smith	Mackay, Id.	588-2529	
Frances Kimball	Mackay Id.	588-2890	
Sig Hintze	Mackay Id	588-2849	linhutz@B.C.C.
Linda Seyer	Rt 1 Box 32 Darlington	83255 588-2532	
Thyl Seyer	4/29 4/00 W MACKAY	83251-588-3332	
Dyn Seyer	Darlington Id	588-3101	
Don Bunterson	1603 N 1000 E Terreton	663-4493	
Joan Wood	3778 East 500 N. Rigby, Idaho	745-7846 83442	
Barbara Barrett	PO Box 347	Challis 83226	
Wendell Tees	3939 215 Hwy 93	Leetie 83255	

Name	address	Phone #	e-mail
Jim Gregory	5306 Zedinger Rd ^{Mackay}	588-2447	Fishchief@ ^{yahoo.} com
PETE BIRRE	Ketchikan Bx Po Box 44 Mackay	588 2789	
BET ZOLLINGER	FISH WATCHER RD	588-2670	
Maxine Anderson	P.O. Box 131, Arco	527-3900	
Rexa Walker	P.O. Box 32 Arco ID 83213	527-3229	
DAVE WOLIECHOWSKI	4744 OLD LOOP RD MACKAY, ID	83251 588-2718	
SCOTT McAFEE	4748 old loop rd MACKAY, ID		
Remove BOB SHAFFER	4660 OLD LOOP Rd. MACKAY ID	588-2637	
Linda			
Mel + Linda Ellwein	Box 329, Mackay	588 2636	lindaellwein@ ^{hotmail.} com
Johnny King	4343 Antelope Rd	554 2201	
L. Kaufman	P.O. Box 382 Mackay	588-2913	
B. Day	P.O. Box 213 Mackay	588-2275	
Jim Day	3526 Antelope Moore	552 3003	
Bob Zvalon	ARCO ID	527-3357	
Doug Schureman	Arco. ID	527-3147	
Josephus Quake	2652 N 3300 W ARCO	527-3288	
Scott S. Taggart	3981 W. 4100 N. Mackay	588-2278	
Anna L. Taggart	3981 W. 4100 N. Mackay	588-2278	
Evan Sayer	4221 N Hwy 93 Mackay	588-2259	
Joe + Carmela Leavitt	Box 221 Mackay	221-2794	
Manny GUERRERO	P.O. Box 82 MACKAY	588-2376	
STEVE MARINAC	P.O. Box 119 MACKAY	588-2666	
Nyle Felton	POB 779 Ketchikan	988-2105	
Mary Lou Felton	POB 835 Arco	527-3609	
Don Spengler	4412 Franklin Ln ⁸³²⁵¹	588-2468	
Randy Dains	4120 N 4100 W Mackay	588-2515	
Debbie Porter	P.O. Box 622 Arco	554-2244	

Name	address	Phone	e-mail
Danese Magnard for ^{Curt} Fullmer	PO Box 192 Mackay	588-2291	
Charles Wilkins	GX Ranch P.O. Box 596 Mackay	588-2443	
Terrence Donohue	Donohue Ranches 5448 East Hatchery, Mackay	588-2298	
Walt Johnson	6134 TRAVA Creek RD	17ACKAY 588 3387	
James Hill	4965 N 5600 W	Mackay 588-3020	
Keith Hill	4965 N 5600 W	mackay 588-3020	
Dwight Simmons	HC63 Box 1552	CHALLIS ID 879-2538	
RANDY DAMIANA	3477 No King Mtn Rd	MOORE ID	DAMIANA@AT&T.NET
Y (Becky) Siddoway	3312 W 3400 N	Moore, ID 554-2225	(554-3104) JEE
Randy Pinner	3560 W 3600 N	Moore, ID 554-3031	(PHONE J)
STEVEN BLKING	3312 W 3300 N	MOORE 554-3062	554-3062
Frank Burt	3193 Hwy 93	Moore 554-3662	
Lynia Thorsgren	3373 W 3150 N	MOORE 554-3682	
Arnold E. Marz	P.O. Box 2360, Sun Valley, ID 83353	726-9261	
Clyde Beverland	3279 - 3300	Moore ID 554-3073	
LARRY Rasmussen	2360 Idaho Dr. Arco	527-4779	
TERRY MONSON	4050 N 3624 W MOORE Idaho	588-2393	
Albert Fullmer	3960 N 3650 W Moore Id.	588-3383	
Lynn Rothwell	RT #1 Box 45 Darlington	588-2283	
Leon L Williams	RT 1 Box 20 Darlington	588-2239	
Kim K. Burwell	4249 465 HWY 93 Mackay	588-2871	
Logan & Linda Williams	P.O. Box 96 Mackay Id.	588-2257	
Sandie L. Smith	3595 W 3600 N Moore, Id 83255	554-2504	
Bob Pittman	Box 595 MACKAY	588-3132	
Bob Bowman	Rt 1 Box 113 Moore	554-3171	
^{sub only} Tony Potter	P.O. Box 69 Arco	527-8268	Tony.Potter@id.usda.gov
Duane Haney	Rt 1 Box 116 Moore	554-4011	
Keith D. Lewis	4157 N 3600 W Darlington 83255	588-2433	

Name	Address	Phone #	e-mail
F. Scott Colson	Box 173 Mackay Id.	588-2547	N/A
Holly Sayer	4050W 4200N Mackay	588-2207	
Theresa London	4165W 4200N Mackay Id.	588-2317	
Kary Crawford	3384W 3800N Darlington Id.	588-3326	
Ryan McAffel	4108N 3900W Moore Id	588-3041	
Carolyn Smith	45872 Hwy 93 Mackay ID	588-2218	
Wiley Smith	5872 Hwy 93, Mackay ID	588-2218	
Steve V. Smith	5914 Highway 93, Mackay Idaho	588-2628	
Jewene Clark	3886W 3200N Moore	588-2705	
Jenni Marie Smith	3897W 3700N Moore	588-2552	
Dennis Woodby	Rt 1 Mackay, Idaho	588-2227	
Madhuri Bradford	3776W 3700N Darlington 83255	588-2957	
Mike Dotzenrod	3776W 3200N " 83255	588-2957	
GREG J. MITCHELL	4306 W. HOUSTON RD.	588-2201	
Dusty Williams	Box 361 Mackay ID	588-2528	
Gary Kimball	P.O. Box 273 Mackay ID	588-3080	
Kenton L. Harwood	P.O. Box 463 Moore, Id.	554-2043	khawood@ida.net
Tip Harwood	P.O. Box 135 Arco, Id.	554-2109	
Jay A. Andersen	3482W 2900N, Moore, Id.	527-3341	
WADE WADDONPS	Rt 1 Box 20 Moore Id.	554-3000	
Robert W. Waddoups	Box 42 Moore, Idaho	527-3490	
Dean Andersen	Rt 1 Box 40 Moore Idaho	527-3650	
Keith Waddoups	2778N 3520W Moore, Id.	83255	
Joshua Peterson	Rt 1 Box 32 Darlington		
Richard Cole	Darlington		
Lynn Reno	California		
Patsy Gosow	Moore		
Elaine Nelson	Mackay Id	83251	

July 19, 2004

Karl Dreher, Director
Idaho Department of Water Resources
1301 Orchard, Suite 200
Boise, Idaho 83340

Dear Karl,

I was asked, as an independent groundwater hydrologist, to review the Cease and Desist Order from your office to the Big Lost River groundwater pumpers above the Moore Diversion. Your order determines the basis for the curtailment from the report *Groundwater Pumping Impacts on the Surface Water Irrigation Diversions from the Big Lost River*, authored by Gary Johnson, Dale Ralston, and LeLand Mink of the IWRRI, of the University of Idaho.

My comments are attached for your perusal. The conclusion of my review is that the methodology employed by the IWRRI was not adequate to determine the impacts of groundwater pumping on the flow in the Big Lost River. It is impossible to discover that hypothesis without groundwater elevations, water table maps, flow nets, seepage runs, pumping tests to determine aquifer characteristics, and a myriad of other available data collection and analyses. None of which is even referenced in the report. The report should be dismissed as a guide or reference of the groundwater/surface water interconnectivity of the Big Lost River Basin.

This letter and report rebuttal The surface area serves as an objection to the employment of the cease and desist order due to the fact that the resources of the State of Idaho will not be used and preserved in the most efficient manner and in fact will hurt the economy of the state.

Regards,

Brian Higgs, P.G.

Brian Higgs, P.G.

Technical Review
Of
Groundwater Pumping Impacts on the Surface Water Irrigation Diversions
from the Big Lost River

The following sections describe comments from a technical review of the above mentioned report. The format is to list the page, paragraph, and reference the statement in question followed by comments describing the disagreement.

Page 1; 1st paragraph; 2nd sentence; “groundwater pumpers are often accused of depleting the already deficient supplies of surface water irrigators.”

Comment: There should be a period after surface water. The sentence does not make sense as written.

Page 1; 1st sentence 2nd paragraph.

Comment: The factors clouding the issue of groundwater pumping lowering the river flow are greater than the 70% assurance in the conclusions of this report (page 31).

Page 1; item #3, 1st sentence.

Comment: This comment must be in reference to the Eastside Canal. The canal was built to deliver water below the Moore diversion to lessen the leakance. From there the water is conveyed through laterals and ditches for distribution. During this time of year the canal is the river. Below this point the water is conveyed through canals rather than the river channel to deliver the water to the water right holder NOT to reduce seepage losses. In fact, the diversion of surface water through canals increases the leakance exponentially due to the increased area of possible leakance. The second sentence relates to the authors assumption that the canal leakage is related to groundwater pumping directly. The second sentence in Item #2 states that in drought times there is very little relationship in the lower portions of the valley. There is no groundwater level information referenced in the report proving this statement.

Page 2; item #4, 2nd sentence.

Comment: The amount of precipitation determines the available water resources. The amount of water used for irrigation is small compared with the total volume of water.

Page 3; 1st sentence and item #5.

Comment: These 2 sentences illustrate the biased opinion of the authors prior to presenting the facts of the water resources of the valley. The fact has yet to be established that there is surface water effect from the groundwater pumpers.

The Cease and Desist order details that the "...Idaho Legislature appropriated \$50,000 for a study of the ground and surface water sources of the Big Lost River Basin." The report produced is NOT a study on the water resources of the Big Lost River Basin nor is there any information concerning a water budget. This is a misappropriation of funds.

Science is objective and no conclusions should be drawn prior to the collection and analyses of the data.

Page 4; 1st paragraph.

This paragraph describes the methodology used to determine the effects of groundwater pumping on surface water. This methodology is wholly unsuitable to reach the specified conclusions. It is impossible to determine the resources of groundwater within a basin without water level measurements, water table maps, flow nets, pumping tests to determine the aquifer(s) parameters, and all available surface water and precipitation data. If in fact, every well were to be curtailed 100% there is no information referenced in this report concerning groundwater velocity and direction. The senior water right holders may not receive the water for decades, if ever. In fact, according to the water master of Basin 34 it is not possible to deliver the water to the lower basin senior water right holders without the storage water rights conveying the water. It is all lost in seepage. Therefore, this report is invalid as a reference for any orders issued from the IDWR or the water master of the district.

Page 6; last paragraph, 1st sentence.

Comment: Three streams of data were used to draw the conclusions of this report. As listed on page 4, 1st paragraph, last sentence, one of the 3 is "irrigation diversions". The page 5 reference causing this comment states that the "validity of the irrigation records is uncertain." The conclusion of this statement is that 1/3 of the total data is "uncertain". Other groundwater data was available and the authors should have abandoned this methodology of discovery for a more applicable one. If 1/3 of the data is questionable there is the possibility that 1/3 or more of the curtailment will have been completed with loss only to the families being curtailed.

Page 7; 1st paragraph, "Monthly values..."

Comment: This list should include all available groundwater data.

Page 8; 2nd paragraph, 3rd sentence, Crosthwaite and others determined that 8,500 acres were irrigated by groundwater.

Comment: Since this statement is not repeated or justified anywhere else in the report it is assumed that the groundwater irrigated acres is 8,500. This study determined "... estimated pumpage as 47,000 acre feet during a normal water year." (Page ii, 2nd paragraph, last sentence, and page 38, second to the last sentence.) Therefore, the conclusion is that the groundwater irrigators applied 5.529 feet or 66.35 inches per acre.

The southeast Idaho average is approximately 21.6", determined by actual measurement of diversions in the Magic Valley Ground Water District, which invalidates the conclusions of this report.

Page 18; Paragraph 1.

Comment: The high water year in 1984 and the Borah Peak earthquake caused unusually high water flows through the middle 1980's. All the surface water rights were delivered because irrigators had more water than they needed. Water was standing in the fields because the ground was totally saturated. The point missed by the authors is that the diversions drop off drastically in the late 1980's while surface water is plentiful because surface water irrigators are using groundwater to irrigate. There are 120 groundwater rights, post 1980, for a total of 339.164 cfs which is 1/3 of the total groundwater rights of the basin. The conclusion of the authors that the "watermaster records are in error" is wrong. The demand for surface water in the late 1980's declined.

Page 23; 1st paragraph, 4th sentence.

Comment: Inspection of the graph illustrates that the "flattening of the slope" is not evident until 1980. The flattening of the slope is caused by the 120 ground water rights (339 cfs) obtained, post 1980, as described in the previous comment. The graph is invalid and therefore the entire section is void of substance. The double mass balance should be followed by voluminous statistical analysis because viewing a line graph does not substantiate a curtailment of water. The authors continue to bring up the point that all or some of this discrepancy is due to the watermaster and his record keeping. The water master is the first one to know if someone does not receive their water entitlement. He cannot make make errors in delivery or records without serious repercussions.

Page 26: 1st paragraph, 3rd sentence.

Comment: This sentence cannot be made without a footnote and reference, particularly since NO water level references are included in this report.

Page 26: 1st paragraph, 4th sentence.

Comment: Once separation of the river and groundwater table is established the leakance does not change.

Page 27: 1st paragraph.

Comment: Where is table 1?

Page 27: 2nd paragraph, last sentence.

Comment: Every year is a different water supply and therefore this method applies only to the year it was calculated for.

Page 31; last sentence, "It is acknowledged..."

Comment: Different regressions not only "can be" developed but "must be" because no two periods of record will be alike.

Page 52; #6.

Comment: This statement was not proved and was the thesis of this \$50,000 report.

Page 52; #8.

Comment: The 1st sentence is very true. However, the second sentence is absolutely false. As detailed earlier no groundwater information was used for this report on groundwater.

Page 6; #9, 2nd sentence.

Comment: Pumping is not necessarily reduced in years of high precipitation. Refer to figure 6.

CONCLUSIONS

The report referenced by the director of the IDWR in the order of cease and desist does not cover the information directed by the Idaho Legislature to determine. In fact even the title describes a deviation of the directive. The methodology used in this report to "determine the surface and ground water resources of the Big Lost River Basin" cannot come to the conclusions as directed by the Idaho Legislature. The order to curtail approximately 300 groundwater wells on the basis of a ratio between the water flowing in the river below the Mackay Dam and the water at the diversions is not an appropriate methodology.

A comprehensive report on the ground and surface water is desperately needed in the Big Lost River Valley. Much work has been done in the basin during several different time frames. For this reason the groundwater data is not consistent. A seepage run on the Big Lost River was completed in 1985 during the highest water years on record which render it useful only during high water years.

I was asked by the groundwater pumpers of the Big Lost River Basin to review the report. In response to this request I reviewed the report listed in the order. I determined that the missing information is the elevation of the water table in relation to the river. I then collected all the water level data and plotted it with the elevation of the river on the same hydrograph. It is my professional opinion that during draught years there is a divergence of the groundwater table away from the river. The further down the valley the further the divergence.

I visited with more than 100 members of basin 34 concerning this matter between July 18, 2004 and July 20, 2004. I also visited with the watermaster in order to understand the delivery and mechanism of the water district. It is my professional opinion that in drought years with the low surface water flows and the divergence of the groundwater table from the river that this call is without doubt a futile call.

This statement report is my response as a licensed Geologist in the State of Idaho and as an expert witness in this case.



Statement of Robert E. Duke
Watermaster of District 34
P.O. Box 53
Mackay, Idaho 83251

At the beginning of the 2004 irrigation season, the natural flow was not of sufficient quantity to reach the lower area of the District. Priority dates were established and water rights that were considered to be undeliverable were rotated into storage for accumulation (for flushing the river). There were also individuals who contributed up to fifteen percent of their allocated storage water for flushing the river and lateral canals. That amount was approximately 43,000 inches to be released over a three day period. In order for the river to be sustained, storage water holders would have to continue to call for their water. The only decreed water being delivered for approximately three to four weeks was the 1883 water rights in the lower part of District 34. The only way this delivery was made to the Moore and Eastside Canals was by co-mingling the natural flow with the storage water. The mitigated 1883 water right again was only deliverable through the Moore Canal system with the support of the storage water holders.

If according to the delivery records addressed by IDWR that stated that the 1883 mitigated water was always deliverable, why then was a supplemental ground water permit issued? By setting a precedence and employing a well for mitigation purposes, the effect on the water users of District 34 could be a long term effect.

In the past 3 years, senior Decrees to the 1883 rights have been undeliverable in certain areas of District 34. Specifically, the Antelope Creek drainage, the Parsons Creek area above the reservoir and the Big Lost River above the reservoir, with 1879-1882 and 1875 water rights respectively. No ground water diversions have an affect on these surface water rights.

Time frames issued by the Idaho Department of Water Resources from the beginning of the filing of the Mitigation and the impact it could have on the future of Water District 34 should have been brought to the vote of the water users. It was first put to the advisory board for consideration. The proposal to employ a well to supply the water for the mitigation was accepted by the advisory board, but later rescinded by the Watermaster after considerable input from additional water users. A special meeting was requested by the Watermaster. The indication from IDWR was that no curtailment of ground water users would occur until this meeting took place on August 2, 2004.

A cease and desist order was issued by IDWR to take effect on July 22, 2004. As a note, any mitigation plan submitted by individuals or mentioned by groups, as far as storage water, being accepted as mitigation that made the 1883 mitigated water rights deliverable, would not be taken into consideration.

During the 2004 irrigation season, a portion of the 1883 water right in mitigation has been rotated in a canal irrigation system, that may indicate that the mitigation request for this water right was not a critical call. In other words, the 1883 water right in question has been used on another farm located in the immediate area.

Robert E. Duke
7-20-04