

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

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 34-372A,)
34-372B, AND 34-690B)
_____)

**AMENDED ORDER,
ORDER TO SHOW CAUSE, and
NOTICE OF STATUS CONFERENCE**

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of a Petition for Delivery Call received by the Department on June 28, 2004. The petition was filed by Jay V. Jensen, Jack A. Jensen, and L. Vaughn Jensen ("Jensens"). The petition seeks administration of ground water rights and surface water rights within Basin 34 (more precisely within Water District No. 34, Big Lost River). In particular, the petition seeks the distribution of water under the Department's Conjunctive Management Rules to the early priority surface water rights held by Jensens.

At the time Jensens initially requested that the watermaster distribute water to their surface water rights in the spring of 2004, Jensens also requested augmentation of flows in the Big Lost River to mitigate for the depletions to flows in the river caused by ground water pumping. The rules for administration and distribution of water rights within Water District No. 34, Big Lost River (IDAPA 37.03.12), require that the request for mitigation be made to the watermaster at the time delivery of the water rights is requested. The request for mitigation has not been satisfied, prompting the Petition for Delivery Call.

FINDINGS OF FACT

Relationship Between Ground Water Pumping and Big Lost River Flows

1. On May 27, 1992, the Director submitted a report to the Snake River Basin Adjudication (SRBA) District Court recommending the water rights having points of diversion located in the Big Lost River Basin ("Basin 34"). The report recommended a general provision that ground water and surface water in Basin 34 should be managed as hydraulically connected sources. Based on the Department's recommendations, almost all of the water rights have been decreed by the SRBA Court. On December 18, 1992, the SRBA Court issued a one-year order of interim administration for the 1993 irrigation season requiring that the water rights be administered based on recommendations of the Director and partial decrees issued by the court. The SRBA Court renewed the one-year order for the 1994 and 1995 irrigation seasons. On December 20, 1995, the SRBA Court issued a Permanent Order for Interim Administration in Reporting Area 1 (Basin 34).

2. In furtherance of the order of interim administration, on February 23, 1993, the Department ordered that Water District No. 34, Big Lost River, should be expanded to include both ground water and surface water rights in the Big Lost River Basin. The Department began negotiating the promulgation of rules for the administration of water rights within Water District No. 34.

3. One of the purposes of rule promulgation was to establish how the water rights would be conjunctively administered. The Idaho Legislature appropriated \$50,000 for a study of the ground and surface water sources of the Big Lost River Basin. The Idaho Water Resource Research Institute ("IWRRI") was retained to conduct the study. Gary Johnson, Dale Ralston, and Leland Mink of IWRRI prepared a report titled *Ground-Water Pumping Impacts On Surface Water Irrigation Diversions From Big Lost River*, December 1991 (hereafter referred to as the "Big Lost River Report"). Analysis of data for the Big Lost River Report established a regression equation relating depletions of flows in the Big Lost River to the volume of ground water annually diverted. Based on the results of analyses described in the Big Lost River Report, the authors of the report estimated that the average annual diversion of ground water was 47,000 acre-feet. The estimated depletion to the Big Lost River determined using the regression equation was 13,000 acre-feet of surface water, or approximately 28 percent of the estimated annual volume of ground water diverted. The report acknowledged that depletions to the Big Lost River from both ground water diversions and increases in the consumptive use of surface water due to the development of more efficient irrigation practices accompanied by expansion of the acreage irrigated using surface water. The report did not specifically quantify the portion of the depletion caused solely by ground water diversions.

4. Holders of ground water rights in Water District No. 34 challenged the initial Big Lost River Report. The ground water right holders argued, among other things, that the Big Lost River Report did not quantify the portion of the depletion caused solely by ground water diversions.

5. The Department considered the arguments of the ground water right holders and based on further evaluation, assigned more than half of the depletions to an increase in the consumptive use of surface water due to development of more efficient irrigation practices and expansion of the acreage irrigated with surface water. The Department quantified the portion of the depletion caused solely by ground water diversions to be 13 percent of the volume of ground water diverted during an average year.

6. The Water Distribution Rules for Water District 34 were promulgated after determination of the depletion estimates caused by ground water diversions. The rules are identified as IDAPA 37.03.12.

7. IDAPA Rule 37.03.12.050.04 (referred to hereafter as "Rule 50.04") of the Water Distribution Rules states:

Mitigation/Augmentation. Water users with water rights whose source is Big Lost River with their point of diversion downstream from Mackay Dam who seek to have the water supply for their water right augmented to provide for their water right the water supply that would have

been available for diversion absent the diversion of ground water under junior water rights shall request mitigation pursuant to this rule. Water users who seek such mitigation from ground water users must notify the watermaster at the time those water users make their initial request to the watermaster for delivery of their water right of their desire for mitigation. Mitigation of the effects of ground water diversion, when requested, will occur as more fully described below. (10-26-94)

- a. Mitigation will not occur prior to May 1 or after October 15 of any year. (10-26-94)
- b. Mitigation will be available to water rights with 1905 and earlier priority dates. (10-26-94)
- c. Water rights will be eligible to receive mitigation through augmented natural flow water supply based upon a river depletion due to ground water diversions currently estimated to be thirteen percent (13%) of the average annual diversion from wells subject to conjunctive administration currently estimated to be forty-seven thousand (47,000) AFY or a depletion of six thousand one hundred ten (6,110) AFY. The estimated percentage of depletion and annual volume of diversion from wells will be reviewed annually by the director and modified as data becomes available to refine these estimates. Any revised estimate of depletion or annual diversion shall be presented to the water users at the annual meeting of Water District 34 prior to adoption of the values by order of the director. (10-26-94)
 - i. Natural flow will be assumed to be augmented by one-third (1/3) of the depletion during the first one-half (1/2) of the period of time that any 1905 or earlier water right being called for can not be filled by the natural flow through October 15 of each year. Natural flow will be assumed to be augmented by two-thirds (2/3) of the depletion during the second one half (1/2) of this period each year. (10-26-94)
 - ii. Water users who have requested mitigation and who have water rights being called for that could be filled by augmentation described in Rule Subsection 050.04.c.i shall be provided with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule Subsection 050.04.c.i., whichever is less. (10-26-94)
 - iii. Augmentation of natural flow for purposes of mitigation may be accomplished by making additional water available for diversion from the Big Lost River, including increased river flows resulting from recharge efforts approved by the director, or by adding water to canals or laterals. (10-26-94)

8. Rule 50.04 adopted the conclusions of the Big Lost River Report as amended by the Department. The conclusions were adopted to establish the factual basis for administration and to eliminate the need for additional proceedings to conjunctively administer the surface water and ground water rights within Water District No. 34.

Activities in Water District No. 34 Related to Water Distribution Rules

9. On April 21, 2004, Jay V. Jensen, Jack A. Jensen, and L. Vaughn Jensen ("Jensens") requested that the watermaster of Water District No. 34 distribute water to water rights nos. 34-372B, 34-00690B, and 34-00372A (hereafter referred to as the "Jensen water rights") to each of them respectively. The water rights are described as follows:

Water right No. 34-372A

Current Owner: Jack A. and Diana Jensen Priority Date: June 1, 1883
Source: Big Lost River Purpose of Use: Irrigation
Flow Rate: 3.2 cfs Period of Use: May 1 – October 31
Point of Diversion: NW1/4SE1/4SE1/4, Section 4, Township 5N, Range 26E, B.M.
Place of Use: Section 4, Township 4N, Range 26E, B.M.

	<u>Acres</u>
NE1/4SE1/4	39.0
NW1/4SE1/4	39.0
SW1/4SE1/4	38.0
SE1/4SE1/4	<u>36.0</u>
Total Acres	152.0

Water Right No. 34-372B

Current Owner: L. Vaughn Jensen and Darlene B. Jensen Priority Date: June 1, 1883
Source: Big Lost River Purpose of Use: Irrigation
Flow Rate: 1.6 cfs Period of Use: May 1 – October 31
Point of Diversion: NW1/4SE1/4SE1/4, Section 4, Township 5N, Range 26E, B.M.
Place of Use: Section 9, Township 4N, Range 26E, B.M.

	<u>Acres</u>
NW1/4NE1/4	27.0
SW1/4NE1/4	<u>29.0</u>
Total Acres	56.0

Water Right No. 34-690B

Current Owner: Jay V. Jensen and DeAnn N. Jensen Priority Date: June 30, 1883
Source: Big Lost River Purpose of Use: Irrigation
Flow Rate: 1.73 cfs Period of Use: May 1 – October 31
Point of Diversion: NW1/4SE1/4SE1/4, Section 4, Township 5N, Range 26E, B.M.
Place of Use: Section 9, Township 4N, Range 26E, B.M.

	<u>Acres</u>
NE1/4SE1/4	37.0
NW1/4SE1/4	10.0
SW1/4SE1/4	10.0
SE1/4SE1/4	<u>29.5</u>
Total Acres	86.5

Simultaneous with the request for delivery, Jensens requested of the watermaster that junior ground water users mitigate for depletions pursuant to Rule 50.04.

10. In response to the request for mitigation, on May 13, 2004, the Department sent notice to all holders of ground water rights having priority dates later than the Jensen water rights notifying them of the request for mitigation and also informing them that they must mitigate for depletions caused by their ground water diversions. The letter also explained that holders of junior priority ground water rights could collectively mitigate for the depletions through Water District No. 34. The notice required that all proposed mitigation plans must be submitted on or before June 4, 2004. Portions of previously quoted Rule 50.04.c describe specific mitigation quantities and times for augmentation of stream flow. Rules 50.04.d and 50.03.e discuss the mitigation plans that can be submitted by the water district and alternative plans that can be submitted by individual right holders:

d. Water District 34 is authorized to acquire, through the watermaster, water supplies necessary to augment natural flow for mitigation purposes as described in this rule. The watermaster will add the cost of acquiring the mitigation water to the annual assessment of ground water users subject to conjunctive administration, who do not provide separate augmentation pursuant to Rule Subsection 050.04.c.iii. or separate mitigation pursuant to a plan approved as provided by Rule Subsection 050.04.e., in the same proportion as each ground water user is assessed for the costs of the water district relative to all other ground water users. Ground water users who fail to pay the assessed costs for acquiring mitigation water shall be penalized in the same manner as any other water user failing to pay any water district assessment. (10-26-94)

e. Junior ground water users may submit an alternative mitigation plan(s), which identifies actions and measures to prevent or compensate for impacts of diversions by the junior ground water users, to the director for consideration pursuant to Rule 43 of the "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37, Title 03, Chapter 11. (10-26-94)

11. In response to the letters sent to the holders of junior priority ground water rights, the advisory committee for Water District No. 34 met to discuss possible acquisition of mitigation water by the watermaster. On June 1, 2004, and again on June 4, 2004, the advisory committee adopted a conceptual mitigation plan. The conceptual mitigation plan proposed pumping water from an existing well that was not being used and delivering the water pumped to Jensens through a ditch. Jensens and the Department concluded the conceptual mitigation plan was feasible. The advisory committee recommended to the watermaster that he acquire the mitigation water on behalf of Water District No. 34.

12. Some of the holders of junior priority ground water rights in Water District No. 34 submitted individual plans of mitigation. The Department rejected all of the proposed individual mitigation plans because the proposed plans did not adequately compensate for depletions caused by the diversions of ground water by the holders of rights proposing individual mitigation.

13. Despite adoption by the advisory committee of the conceptual mitigation plan, the watermaster declined to acquire the mitigation water, maintaining that the mitigation water could only be acquired with the consensus of all the water right holders at a full water district meeting, and requested a special meeting of Water District No. 34.

14. On June 24, 2004, the Department sent letters to Jensens notifying them that the conceptual mitigation plan would likely not be implemented and that mitigation water would probably not be provided under the Water Distribution Rules for Water District 34.

15. In response, Jensens filed their petition for delivery call pursuant to the conjunctive management rules.

16. On July 12, 2004, the Director issued an order requiring mitigation as required by the Water Distribution Rules – Water District No. 34. The order stated that holders of ground water rights must provide mitigation on or before July 22, 2004. If mitigation was not provided, the holders of ground water rights were ordered to cease and desist diversions of ground water on July 23, 2004.

17. On July 20, 2004, the law firm of Rigby, Thatcher, Andrus, Rigby, and Moeller (hereafter referred to as “Rigby”) petitioned the Director for a hearing and requested a stay of the order.

18. On July 21, 2004, the Department approved a mitigation plan filed by a group of ground water right holders in Water District No. 34. The approved mitigation plan will provide water for mitigation to Jensens from a well idled in 2004. Participants in the mitigation plan will be responsible for payment of the costs of pumping and delivering their proportionate share of the mitigation water.

19. As a provision of the approved mitigation plan, the Department agreed to evaluate the amount of water Jensens would be entitled to receive for mitigation after the Jensen water rights are no longer deliverable.

Reasonableness of Moore Diversion

20. Jensens receive water authorized by the Jensen water rights from the Moore Canal. Water is diverted into the Moore Canal from the Big Lost River along the west bank in the SE¼ of Section 4, Township 5N, Range 26E, approximately opposite the Eastside Canal diversion on the east river bank. The diversion structure is constructed of concrete with three wooden, screw-operated, slide gates. All of the water in the Big Lost River can be diverted into the Moore Canal or the Eastside Canal.

21. A measuring device is located in the Moore Canal several hundred feet downstream of the diversion. The measuring device is a concrete, ramped, broad-crested weir with a 20-foot bottom width channel. The weir was designed by the USDA ARS in Kimberly, Idaho. The Big Lost Irrigation District ditch rider reads a staff gage on the weir side slope daily, and daily flows are reported weekly to the Department by the watermaster for Water District No. 34.

22. Department staff have inspected the diverting works and determined that the diversion works are adequate for diverting and regulating flows into the Moore canal. Staff have also inspected the ramped, broad-crested weir and verified the structure is sized adequately for measuring the range of flows that occur during the irrigation season. The rating table used by the Big Lost Irrigation District for the measurement device is also accurate and in compliance with Department standards.

23. Water diverted by Jensens under their water rights is monitored by the watermaster of Water District No. 34 and by the Big Lost River Irrigation District to insure Jensens' diversions do not exceed the limits of their water rights.

Use of Water by Jensens

24. In the petition for stay and for a hearing, Rigby attached a statement by Bob Duke, Watermaster of Water District No. 34. The last paragraph of the document states:

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.

25. The Department received additional information that water diverted under water right no. 34-372A, held by Jack and Diana Jensen, was delivered to a place of use that is not authorized as a place of use under the water right. The information asserts that Travis Smith, who leases the place of use for water right no. 34-372A from Jack and Diana Smith, has irrigated land that is not within the place of use by water right no. 34-372A.

Availability of Water to Satisfy Jensens' Water Rights

26. The Big Lost River loses significant quantities of surface water because of percolation into the ground between Leslie and Moore. Nonetheless, historic diversion data from 1959 to 1971 and from 1975 to 1983 indicate that prior to and during the development of ground water rights, water was delivered to the Moore diversion throughout the entire irrigation season, including the months of August, September, and October, even during the low water years of 1959, 1960, 1961, 1966, 1977, and 1979.

27. During recent years of low surface water runoff, depletions to surface water flows in the Big Lost River caused by ground water diversions have contributed to reduce the natural flow in the Big Lost River causing premature water shortages at Jensens' point of diversion. The following are dates during the last three years of low surface water runoff when water was no longer physically flowing in the Big Lost River for distribution to the Jensen water rights.

July 27, 2001 through October 15, 2001
July 30, 2002 through October 15, 2002
August 2, 2003 through October 15, 2003

28. Unavailability of water at the Moore diversion coincides nearly directly in time with the vacating of storage from Mackay Reservoir and the loss of the delivered storage that augments natural stream flows in the Big Lost River. The following are dates when storage water was no longer being delivered from Mackay Reservoir:

Year	Date When Storage Not Delivered	Date When Water Not Available at Moore Diversion
2001	July 16	July 27
2002	July 28	July 30
2003	August 4	August 2

29. The Department expects that storage in Mackay Reservoir will be depleted before August 1, 2004. The coincident unavailability of water to Jensens will follow shortly thereafter, and depletions to surface water flows resulting from the diversion of ground water under rights junior in priority to Jensens' will have reduced the quantity of water available to fill the Jensen water rights.

30. As of the date of this amended order, water is being fully distributed to Jensens as authorized by the Jensen water rights.

Conjunctive Management Rules

31. Idaho Code § 42-603 authorizes the Director "to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof." Promulgation of such rules and regulations must be in accordance with the procedures of chapter 52, title 67, Idaho Code.

32. On October 7, 1994, the Director issued *Order Adopting Final Rules; the Rules for Conjunctive Management of Surface and Ground Water Resources* (IDAPA 37.03.11) ("Conjunctive Management Rules"), promulgated pursuant to chapter 52, title 67, Idaho Code, and Idaho Code § 42-603.

33. The Conjunctive Management Rules "apply to all situations in the state where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply." IDAPA 37.03.11.020.01.

34. The Conjunctive Management Rules "acknowledge all elements of the prior appropriation doctrine as established by Idaho law." IDAPA 37.03.11.020.02.

35. The Conjunctive Management Rules "may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-

priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right ...” IDAPA 37.03.11.020.04.

36. Pursuant to Idaho Code § 67-5291, the Conjunctive Management Rules were submitted to the 1st Regular Session of the 53rd Idaho Legislature (1995 session). During no legislative session, beginning with the 1st Regular Session of the 53rd Idaho Legislature, have the Conjunctive Management Rules been rejected, amended, or modified by the Idaho Legislature. Therefore, the Conjunctive Management Rules are final and effective.

Petition Filed by Jensens Seeking Administration of Water Rights

37. Rule 10.04 of the Conjunctive Management Rules defines a “delivery call” as: “A request from the holder of a water right for administration of water rights under the prior appropriation doctrine.” The petition from Jensens seeking administration of water rights interfering with and impacting the Jensen water rights described in Finding of Fact No. 9 come within the definition of a delivery call.

38. Water District No. 34 contains ground water and surface water rights that are junior in priority to the Jensen water rights. Water diverted under these water rights is hydraulically connected to the source for the Jensen water rights. Such water rights interfere with and impact the Jensen water rights under certain conditions.

39. Junior priority surface water rights sought to be administered by the petition for delivery call are already being regulated by the watermaster of Water District No. 34.

40. Rule 40 of the Conjunctive Management Rules is titled “Responses to Calls for Water Delivery Made by the Holders of Senior-Priority Surface or Ground Water Rights Against the Holders of Junior-Priority Ground Water Rights from Areas Having a Common Ground Water Supply in an Organized Water District.” Rule 40 applies to the delivery calls made by Jensens against the holders of junior priority ground water rights in Water District No. 34.

41. Matters expressed herein as a Finding of Fact that are later deemed to be a Conclusion of Law are hereby made as a Conclusion of Law.

CONCLUSIONS OF LAW

1. Idaho Code § 42-602, addressing the authority of the Director over the supervision of water distribution within water districts, provides:

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director. The director of the department of water resources shall distribute water in water districts in accordance with the

prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

2. Idaho Code § 42-603, which grants the Director authority to adopt rules governing water distribution, provides as follows:

The director of the department of water resources is authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof. Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

In addition, Idaho Code § 42-1805(8) provides the Director with authority to “promulgate, adopt, modify, repeal and enforce rules implementing or effectuating the powers and duties of the department.”

3. It is the duty of a watermaster, acting under the supervision of the Director, to distribute water from the public water supplies within a water district among those holding rights to the use of the water in accordance with the respective priority of the rights subject to applicable Idaho law, including applicable rules promulgated pursuant to the Idaho Administrative Procedure Act. *See* Idaho Code § 42-607.

4. The Department adopted Conjunctive Management Rules, effective October 7, 1994. IDAPA 37.03.11. The Conjunctive Management Rules prescribe procedures for responding to a delivery call made by the holder of a senior priority surface or ground water right against junior priority ground water rights in an area having a common ground water supply. IDAPA 37.03.11.001.

5. Rule 10 of the Conjunctive Management Rules contains the following pertinent definitions:

01. Area Having a Common Ground Water Supply. A ground water source within which the diversion and use of ground water or changes in ground water recharge affect the flow of water in a surface water source or within which the diversion and use of water by a holder of a ground water right affects the ground water supply available to the holders of other ground water rights. IDAPA 37.03.11.010.01.

03. Conjunctive Management. Legal and hydrologic integration of administration of the diversion and use of water under water rights from surface and ground water sources, including areas having a common ground water supply. IDAPA 37.03.11.010.03.

04. Delivery Call. A request from the holder of a water right for administration of water rights under the prior appropriation doctrine. IDAPA 37.03.11.010.04.

6. Rule 20 of the Conjunctive Management Rules contains the following pertinent statements of purpose and policies for conjunctive management of surface and ground water resources:

01. Distribution of Water Among the Holders of Senior and Junior-Priority Rights. The rules apply to all situations in the State where the diversion and use of water under junior-priority ground water rights either individually or collectively causes material injury to uses of water under senior-priority water rights. The rules govern the distribution of water from ground water sources and areas having a common ground water supply. IDAPA 37.03.11.020.01.

02. Prior Appropriation Doctrine. These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law. IDAPA 37.03.11.020.02.

04. Delivery Calls. These rules provide the basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. The principle of the futile call applies to the distribution of water under these rules. Although a call may be denied under the futile call doctrine, these rules may require mitigation or staged or phased curtailment of a junior-priority use if diversion and use of water by the holder of the junior-priority water right causes material injury, even though not immediately measurable, to the holder of a senior-priority surface or ground water right in instances where the hydrologic connection may be remote, the resource is large and no direct immediate relief would be achieved if the junior-priority water use was discontinued. IDAPA 37.03.11.020.04.

7. Rule 40 of the Conjunctive Management Rules sets forth the following procedures to be followed for responses to calls for water delivery made by the holders of senior priority surface or ground water rights against the holders of junior priority ground water rights from areas having a common ground water supply in an organized water district. IDAPA 37.03.11.040.

01. Responding to a Delivery Call. When a delivery call is made by the holder of a senior-priority water right (petitioner) alleging that by reason of diversion of water by the holders of one or more junior-priority ground water rights (respondents) from an area having a common ground water supply in an organized water district the petitioner is suffering material injury, and upon a finding by the Director as provided in Rule 42 that material injury is occurring, the Director, through the watermaster, shall:

a. Regulate the diversion and use of water in accordance with the priorities of rights of the various surface or ground water users whose rights are included within the district, provided, that regulation of junior-priority ground water diversion and use where the material injury is delayed or long range may, by order of the Director, be phased-in over not more than a five-year period to lessen the economic impact of immediate and complete curtailment; or

b. Allow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director.

02. Regulation of Uses of Water by Watermaster. The Director, through the watermaster, shall regulate use of water within the water district pursuant to Idaho law and the priorities of water rights as provided in section 42-604, Idaho Code, and under the following procedures:

a. The watermaster shall determine the quantity of surface water of any stream included within the water district which is available for diversion and shall shut the headgates

of the holders of junior-priority surface water rights as necessary to assure that water is being diverted and used in accordance with the priorities of the respective water rights from the surface water source.

b. The watermaster shall regulate the diversion and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director.

c. Where a call is made by the holder of a senior-priority water right against the holder of a junior-priority ground water right in the water district the watermaster shall first determine whether a mitigation plan has been approved by the Director whereby diversion of ground water may be allowed to continue out of priority order. If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority.

d. The watermaster shall maintain records of the diversions of water by surface and ground water users within the water district and records of water provided and other compensation supplied under the approved mitigation plan which shall be compiled into the annual report which is required by section 42-606, Idaho Code.

e. Under the direction of the Department, watermasters of separate water districts shall cooperate and reciprocate in assisting each other in assuring that diversion and use of water under water rights is administered in a manner to assure protection of senior-priority water rights provided the relative priorities of the water rights within the separate water districts have been adjudicated.

03. Reasonable Exercise of Rights. In determining whether diversion and use of water under rights will be regulated under Rules 40.01.a., or 40.01.b., the Director shall consider whether the petitioner making the delivery call is suffering material injury to a senior-priority water right and is diverting and using water efficiently and without waste, and in a manner consistent with the goal of reasonable use of surface and ground waters as described in Rule 42. The Director will also consider whether the respondent junior-priority water right holder is using water efficiently and without waste.

04. Actions of the Watermaster under a Mitigation Plan. Where a mitigation plan has been approved as provided in Rule 42, the watermaster may permit the diversion and use of ground water to continue out of priority order within the water district provided the holder of the junior-priority ground water right operates in accordance with such approved mitigation plan.

8. Rule 40.05. describes actions of the department if a plan of mitigation is approved by the Director and the water users do not comply with the provisions of the mitigation plan:

05. Curtailment Of Use Where Diversions Not In Accord With Mitigation Plan Or Mitigation Plan Is Not Effective. Where a mitigation plan has been approved and the junior-priority ground water user fails to operate in accordance with such approved plan or the plan fails to mitigate the material injury resulting from diversion and use of water by holders of junior-priority water rights, the watermaster will notify the Director who will immediately issue cease and desist orders and direct the watermaster to terminate the out-of-priority use of

ground water rights otherwise benefiting from such plan or take such other actions as provided in the mitigation plan to ensure protection of senior-priority water rights.

9. Rule 42 of the Conjunctive Management Rules sets forth the factors the Director may consider in determining material injury and the reasonableness of water diversions:

01. Factors the Director may consider in determining whether the holders of water rights are suffering material injury and using water efficiently and without waste include, but are not limited to, the following:

- a. The amount of water available in the source from which the water right is diverted.
- b. The effort or expense of the holder of the water right to divert water from the source.
- c. Whether the exercise of junior-priority ground water rights individually or collectively affects the quantity and timing of when water is available to, and the cost of exercising, a senior-priority surface or ground water right. This may include the seasonal as well as the multi-year and cumulative impacts of all ground water withdrawals from the area having a common ground water supply.
- d. If for irrigation, the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.
- e. The amount of water being diverted and used compared to the water rights.
- f. The existence of water measuring and recording devices.
- g. The extent to which the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies by employing reasonable diversion and conveyance efficiency and conservation practices; provided, however, the holder of a surface water storage right shall be entitled to maintain a reasonable amount of carry-over storage to assure water supplies for future dry years. In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system.
- h. The extent to which the requirements of the senior-priority surface water right could be met using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells or the use of existing wells to divert and use water from the area having a common ground water supply under the petitioner's surface water right priority.

02. The holder of a senior-priority surface or ground water right will be prevented from making a delivery call for curtailment of pumping of any well used by the holder of a junior-priority ground water right where use of water under the junior-priority right is covered by an approved and effectively operating mitigation plan.

10. Idaho Code § 42-351 states:

(1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.

(2) It is unlawful for any person to divert or use water in substantial violation of any provision of this title, or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water.

(3) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

(4) Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

11. The Director expanded the boundaries of Water District No. 34 to provide for the administration of ground water rights in Basin 34 pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of earlier priority surface and ground water rights.

12. Water right holders diverting water from points of diversion located within Water District No. 34 elected a watermaster at the annual water district meeting to perform the statutory duties of a watermaster in accordance with guidelines, direction, and supervision provided by the Director.

13. The petition for delivery call received from Jensens is a delivery call as defined by Rule 10.04 of the Conjunctive Management Rules against junior priority ground water rights.

14. Rule 40 of the Conjunctive Management Rules applies to the delivery calls made by Jensens against the holders of junior priority ground water rights in Water District No. 34.

15. Rules 40 and 42 of the Conjunctive Management Rules require the Director to make determinations regarding "material injury" and the "reasonableness of water diversions" in responding to a delivery call against junior priority ground water rights in Water District No. 34.

16. At present, water is being delivered to the Jensen water rights. The Department must determine material injury by determining whether diversion of ground water that is hydraulically connected to the Big Lost River, under rights junior in priority to Jensens', will deplete surface water that would otherwise be available when needed under the Jensen water rights for the entire irrigation season, that is whether the Jensen water rights would have been filled and beneficially used but for the depletions caused by ground water diversions.

17. Based on analysis of historical delivery records, the Jensen water rights would have been deliverable for the entire 2004 irrigation season but for the depletions to the Big Lost River resulting from ground water diversions under junior priority rights.

18. Ground water diversions during 2004 under junior priority rights will contribute to depletions to the Big Lost River causing water to be unavailable to divert under the senior priority Jensen water rights from approximately August 1, 2004, through October 15, 2004.

19. Continued diversion of ground water under junior priority rights and the associated depletions will cause shortages in the flows of the Big Lost River that will deprive Jensens of water they are entitled to divert under the priority of the Jensen water rights. Continued ground water diversions in 2004 under junior priority rights causes material injury to the Jensen water rights.

20. The Moore Canal diversion is reasonably constructed to divert water under the Jensen water rights. The measuring device associated with the diversion structure distributing water to Jensens complies with the Department's measurement standards. The Jensen water rights authorize standard diversion and use quantities for irrigation established by the Department. Diversion of water by Jensens is adequately monitored to assure adherence to their water right limitations. Jensens' diversion and use of water is reasonable.

21. Rule 42.02 of the Conjunctive Management Rules provides that the holder of a senior priority surface water right is prevented from making a delivery call for curtailment of pumping of any well under a junior priority ground water right if the ground water right is covered by an approved and **effectively operating** mitigation plan. (Emphasis added). IDAPA 37.03.11.042.02.

22. Rule 40.02.b of the Conjunctive Management Rules requires the watermaster of Water District No. 34 to "regulate the diversions and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director." IDAPA 37.03.11.040.02.b.

23. The Water Distribution Rules for Water District No. 34 establish an approved mitigation plan. The plan requires that, upon request to the watermaster for mitigation by a senior water right holder, the junior water right holders must provide 6,110 acre feet of water to augment the flows of the Big Lost River. The junior water right holders did not provide the mitigation water as required by the mitigation plan. Although there is an approved mitigation plan, the mitigation plan is not "effectively operating."

24. Rule 40.05 of the Conjunctive Management Rules states that the Director shall immediately issue cease and desist orders to junior water right holders and direct the watermaster to shut off diversions of ground water to the junior water right holders who are not following the provisions of an approved mitigation plan. Rule 40.05 also states that the Director may order other actions according to the mitigation plan.

25. Rule 005.07. of the Department's Rules of Procedure defines a contested case as a "proceeding" which results in the issuance of an order. A formal proceeding can be initiated by the filing of a petition. See Rule 104 and Rule 230 pf the Departments Rules of Procedure. The petition for hearing and request for a stay filed by Rigby creates a contested case before the Department.

26. Under the Conjunctive Management Rules, the Director must determine that a water right holder is being materially injured by another user's diversion who holds a junior priority ground water right. If the holder of a senior water right who petitions for delivery call diverts and uses water on a place of use not authorized by the senior water right under which the right holder is making the call, the Department cannot determine the extent of injury. As a result, the senior water right holder petitioning for delivery call is not entitled to relief under the Conjunctive Management Rules if the right holder irrigates lands not described as a place of use by his water right.

27. Irrigation of lands not described as a place of use by a water right is an illegal use of water prohibited by Idaho Code § 42-351.

ORDER

Petition for Delivery Call

IT IS HEREBY ORDERED that the holders of ground water rights bearing priority dates later than June 30, 1883, in Water District No. 34 must immediately provide a collective total of 6,110 acre-feet of storage water to augment the flow of the Big Lost River or implement an alternative mitigation plan that provides the required amount of replacement water to fill the Jensen water rights. The conceptual mitigation plan previously adopted by the advisory committee for Water District No. 34 will mitigate for the depletions caused by ground water diversions under junior priority rights if the plan is implemented and executed.

IT IS FURTHER ORDERED that an effective mitigation plan must be operating by the earlier of: (a) the date that the Jensen water rights are no longer deliverable; or (b) before August 3, 2004.

IT IS FURTHER ORDERED that holders of consumptive ground water rights in Water District No. 34 that are junior in priority to June 30, 1883 whose water rights are not covered by an effective mitigation plan shall immediately cease and desist diverting ground water on the later of: (a) the date the Jensen water rights are no longer deliverable; or (b) August 3, 2004. The holders of such rights shall discontinue diversions of water until a mitigation plan is approved by the Director and is fully operational. Consumptive ground water rights include agricultural, commercial, industrial, and municipal or other uses, other than small domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11).

IT IS FURTHER ORDERED that an individual junior ground water right holder may propose its own mitigation plan and if after review, approval, and full implementation, an individual water right holder mitigates fully for depletions caused by its individual diversion of ground water under a junior priority right, the individual water right holder may continue to divert ground water out of priority.

IT IS FURTHER ORDERED that on the later of August 3, 2004, or the date water is no longer deliverable under the Jensen water rights, the watermaster shall curtail diversions of ground water under all junior priority ground water rights that are not covered by an approved and effectively operating mitigation plan, other than small domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11).

Illegal Use of Water

IT IS FURTHER ORDERED that, on August 2, 2004, at the hour of 9:00 a.m., Jack and Diana Jensen and their lessee, Travis Smith, shall show cause why the Department should not issue a notice of violation against them for illegal use of water and why the Department should not order them to cease and desist the illegal use of water. The show cause hearing will be conducted in the Mackay High School Auditorium, 411 Rose Ave., Mackay, ID 83251.

IT IS FURTHER ORDERED that, should the Department find that Jack and Diana

Jensen or their lessee have been irrigating lands with water diverted under water right no. 34-372A without a valid water right, Jack and Diana Jensen are not entitled to relief under the conjunctive management rules.

Status Conference

IT IS FURTHER ORDERED that a status conference for the contested case created by the petition for a hearing and request for a stay will be conducted on August 2, 2004, at 10:00 a.m. The status conference will be conducted in the Mackay High School Auditorium, 411 Rose Ave., Mackay, ID 83251. The conference will be held in accordance with provisions of Chapters 2 and 17, Title 42, and Chapter 52, Title 67, of the Idaho Code, the adopted Rules of Procedure of the Department of Water Resources, and Rules 40 and 45 of the adopted Rules of Water Appropriation of the Department of Water Resources.

The status conference will be conducted in a facility that satisfies the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the department five (5) days prior to the conference.

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of this order or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Section 42-1701A(4), Idaho Code.

DATED this 23rd day of July, 2004.



KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2004, the above Order in the Matter of Distribution of Water in Water District No. 34, was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Jay V. Jensen
PO Box 112A
Moore ID 83255

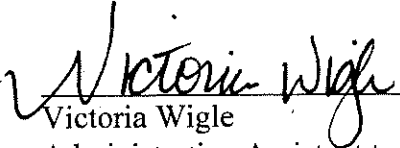
Jack A. Jensen
PO Box 32
Moore ID 83255

L. Vaughn Jensen
PO Box 35
Moore ID 83255

Rigby, Thatcher, Andrus, Rigby, & Moeller
P.O. Box 250
Rexburg, ID 83440

Travis Smith
4103 N 3600 W
Moore, ID 83255

And to all holders of record of affected ground water rights within Water District No. 34 on file with the Idaho Department of Water Resources.


Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department 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 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

