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May 25, 2006

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IDAHO FALLS ID 83402-3304

BOB DUKE
WATERMASTER
WATER DISTRICT 34
PO BOX 53
MACKAY ID 83251-0053

Re: Request to Remove Watermaster of Water District no. 34, Big Lost River

Gentlemen:

In response to the March 17, 2006 request for removal of the Watermaster of Water District no. 34, staff of the Idaho Department of Water Resources ("IDWR") reviewed information about water deliveries within the water district. In a letter dated March 30, 2006, I requested that IDWR staff prepare a memorandum summarizing the results of the investigation. Enclosed is the memorandum I requested, written by Nick Miller. I invite you to read the memorandum and a letter included as an attachment to the memorandum.

Idaho Code § 42-605 requires that IDWR hold a hearing for a request to remove the watermaster. In my March 30, 2006 letter, I asked the parties to identify unavailable dates for a hearing during the first two weeks of June. I did not receive any responses.

Because of the information contained in the staff memorandum and other ongoing discussions, I will not immediately schedule a hearing, but will wait approximately two weeks to allow the larger water user community to digest the contents of the enclosed documents. The parties may request the scheduling of a hearing, or to inform me of some other resolution. If I have not heard anything from the parties within fourteen (14) days of the date of this letter, I will schedule the hearing.

Respectfully,

Gary Spackman

Enclosures
c. Water District 34 Advisory Committee Members
Big Lost River Irrigation District
IDWR – Eastern Region
Nick Miller, IDWR – Water Distribution

Memorandum

To: File – Water District 34

From: Nick Miller

Date: May 2006

Re: Water District 34 Operations Review

This memorandum was requested by Gary Spackman in a March 30, 2006 letter written to Kent Foster and Bob Duke. This document is intended to support an investigation contemplated by Idaho Code 42-601(9) in response to a petition by several water users to remove the Water District 34 Watermaster (Bob Duke). The purpose of the memorandum is to document the procedures by which Water District 34, hereafter referred to as WD34, delivers water, keeps records of deliveries, and uses those records to produce reports, determine voting rights, and calculate assessments. This document presents a general overview of district operations and identifies a number of issues that may relate to present disputes. The information presented here is based on conversations with water district personnel and records obtained from WD34 during a visit to the district office on April 4, 2006, and discussions during a May 4, 2006 meeting with the WD34 Advisory Committee and water users, as well as phone conversations on other dates and additional records submitted to the department.

Part I of this memorandum documents personnel involved in water district operations. Part II documents the process whereby WD34 collects and manages delivery data, as well as how those data are used to produce reports and generate assessments. Part III of this memorandum documents the process whereby the watermaster determines delivery priority and delivers water. Part IV is a review of issues found relative to allegations in the request for removal followed by a summary and conclusions section.

Part I – Relevant Personnel

2005 Water District Employees Include:

Bob Duke – Watermaster
Cindy Smyer – Secretary and Treasurer
Roger Totten – Ditch Rider
Evan Sayer – Well Hydrographer
Christian Hartmann – Well Hydrographer (also employed by BLRID as a ditch rider)

Big Lost River Irrigation District (BLRID) Employees Include:

Bob Schaffer – General Manager BLRID
Linda Hocking – Office Manager
Note that BLRID employs a number of ditch riders as well.

Part II – WD34 Record Keeping

WD34 maintains an access database that stores individual annual usage information. This "assessment database" is used to calculate assessments, generate annual watermaster and budget reports, and track usage information. The end of year usage information is the basis for usage statistics such as total district deliveries and 5-year averages. These statistics are the basis for budgeting and voting. The database is maintained and used by Cindy Smyer, the water district secretary. This database is comprised of two main working tables and several tables of archival and supplemental information. A number of queries are performed on these tables to generate delivery statistics and perform budget and assessment calculations. The two main tables are the "cust_info" table and the "working_table". These tables are described below.

The "cust_info" table contains a listing of each water user assessed by the district. Each water user has a unique user id that is used to link the user to the appropriate usage data in other tables. The table currently contains about 512 records. Some users have multiple records in the table, and some do not have usage associated with them, so the total number of assessed users is about 509.

The "working_table" contains records that list a user id, a diversion ID, an annual usage total, and a date indicating what year the total refers to. The diversion ID is a numerical code indicating whether the diversion is a BLRID commingled canal, a private canal, groundwater, etc. There are 12 diversion descriptions as shown in Figure 1.

DiversionID#	DiverName
1	Alder Creek
2	Antelope
3	BLRID
4	Chilly
5	Nielson & Private
6	Other Ditches
7	Pass Creek
8	Timberdome
9	Warm Springs
10	Wells
11	Non-Use
12	Wells Rediverted

Figure 1. The twelve diversion types used in the WD34 assessment database.

Each record in the "working_table" describes a total annual diversion amount in CFS-days[1] for a user/diversion/year combination. This table is the central repository for annual usage data that is used to generate assessments and calculate usage statistics such as 5-year totals, and total deliveries.

[1] Note that WD34 records annual usage information in cfs-days, which they typically refer to as "cfs". Both units of measurement are volumes and represent the sum total of the daily flow rates. As an example, if a user diverted for 7 days at 5 cfs, then for another 3 days at 4 cfs, their usage would be (7*5)+(3*4) = 47cfs-days. A cfs-day is also referred to as a 24-hr second-foot, and is equal to approximately 1.983 acre-feet. Note also that BLRID sometimes refers to people having an account balance in terms of inches. This is also a volume reference, referring to miners-inches-days, and is calculated similar to the cfs-day. A miners inch is 1/50 cfs or 0.02 cfs.

Note that the usage information is tied to a water user name and a diversion ID only and does not refer to specific lands or water rights. When a property is sold, the water district simply replaces the old owner's name with that of the new owner in the "cust_info" table. Therefore, the new owner becomes associated with the historical usage information that was diverted by the previous owner. However, in cases where only a portion of the property is sold, the original owner maintains the entire usage history for the unsold lands and the new owner begins without any usage history, the new owner is simply added as a new user and initially has no records for water usage in the working table. Calculation of 5-year averages and establishment of voting rights in those cases where a user has not established 5 years of history is discussed in the section on "Reporting, Assessments, and Voting".

Water delivered by WD34 can be grouped into four categories: Ground water, Exchange Pumps, Surface water commingled with storage water from the Big Lost River Irrigation District (BLRID), and surface water not commingled with BLRID administered water. Deliveries of the four categories of water are handled and documented in their own way by the district and, as such, are described separately below.

Ground Water Records& Assessment

Every groundwater well that is assessed by WD34 is assessed based on annual volume usage information provided by IDWR in an annual report that lists the total annual diversion from WD34 wells. The annual volumes provided in the IDWR report are estimates made using the power consumption coefficient (PCC) method. The PCC method involves measuring the electrical power usage under normal operating conditions and using that power usage and flow rate to extrapolate the annual volume pumped given the total power consumed during the irrigation season.

Power records for irrigation accounts are provided to IDWR by Lost River Electric (LRE) in January of each year. The power consumption coefficients are measured by WD34 staff and recorded by WD34 in a local copy of IDWR's Water Measurement Information System (WMIS). Each year WD34 submits their copy of the WMIS database to IDWR and IDWR uploads the PCC information from the copy to the main WMIS database. The Lost River Electric usage data for each well is then uploaded to the WMIS database by IDWR and a total annual usage volume is calculated using the WD34 PCC measurement and the LRE data. A report is prepared by IDWR using the WMIS database that lists each well and the calculated estimate of annual usage. This report is used by WD34 to assess the groundwater wells.

The physical measurement of each well to determine a PCC is conducted by WD34 well hydrographers. In 2005, the WD34 well hydrographers were Evan Sayer and Christian Hartmann. The position of well hydrographer has been filled by Ron Sorensen for the 2006 irrigation year. Ron Sorenesen filled the same position in previous years. Bob Duke indicated that the WD34 well hydrographers attempt to measure a PCC on each active well each irrigation season. IDWR records indicate that 171 wells were measured in 2003, 148 in 2004, and 80 in 2005.

The WD34 records for groundwater withdrawals in their assessment database should be consistent with the WMIS annual usage report submitted to WD34 by IDWR. A comparison was made between the total groundwater delivered in 2005 based on records in the IDWR WMIS database and that listed in the WD34 assessment database. The records were found to be consistent with the following considerations:

- Removal from consideration of six water users' groundwater wells from the IDWR report. These wells are exchange wells that are commingled with BLRID canal water and are assessed by WD 34 separately from other groundwater wells as described later in this memorandum. Total usage from these wells is 2,587 cfs-days. While this adjustment is necessary to account for differences in IDWR and WD34 records, omission of all of the 2,587 cfs-days appears to have been an error on the part of WD34, as some of these wells are not actually exchange wells.
- Adjustment of the annual total for POD 124 in the IDWR report to read 200 cfs-days to correct an error that initially listed the usage as 818 cfs-days; a difference of 618 cfs-days. This was an error resulting from an incorrect PCC value in the IDWR database.
- Addition to the WD34 database of a 13 cfs usage for water user 26. This record was inadvertently not entered by the district secretary.
- Correcting a diversion ID in the working table for water user 6. The usage was 246 cfs-days that was not being counted as a groundwater diversion.
- Rounding. The IDWR report listed cfs-day usage to several digits when the report was sent to WD34. The WD34 database lists usage in whole numbers. For purposes of this comparison, the IDWR values were rounded to integer values. Additionally, during the review, 8 records were noted to have been rounded up to the nearest whole integer, even though the values should have been rounded down. This appears to have occurred because the values were rounded by the computer program to one decimal, and then manually rounded to whole numbers. The 8 records all had decimal values between .45 and .49, so the first rounding brought the number up to X.5, and the manual rounding to the next whole integer up. This rounding resulted in an 8 cfs net increase in the WD34 totals.

Given the adjustments as listed above, the totals are:

IDWR Report (Rounded to nearest whole cfs-day)
= 29,577 – 2,857 – 618 = **26,102 cfs-days**
WD343 Assessment Rpt
= 25,851 + 246 + 13 – 8 = **26,102 cfs-days**
Difference
= **0 cfs-days**

In other words, the WD34 records appear to be consistent with those of the department. Additionally, the total groundwater usage reported at the annual water district meeting of 26,469 cfs-days differs from the total above because the errors described in the last four bulleted items had not been corrected at that time. The calculation is as follows: 26,469 – 618 + 13 + 246 – 8 = **26,102 cfs-days**.

Exchange Pump Records & Assessment
There are a number of users that operate exchange wells in the basin. These users pump groundwater and inject that groundwater into canals or stream channels and re-divert it elsewhere. The exchange wells are of two types depending on whether or not the pumped groundwater becomes commingled with BLRID water. Users that inject groundwater into surface water that is not commingled with BLRID are assessed as a normal groundwater diversion, using the PCC method described earlier. These users include those wells that inject to the Timberdome Canal. There are a number of users that operate groundwater wells as exchange

wells that inject into BLRID canals. In these cases, the diverted water is commingled with BLRID storage water, rotation credit storage water, and natural flow water prior to re-diversion. This water is tracked by BLRID and is included with the surface water delivery records provided to WD34 by BLRID.

The groundwater diversion from the exchange wells is, in addition to being measured by BLRID, also estimated using the PCC method, and these wells are included in the annual PCC diversion report submitted to WD34 by IDWR, as discussed in the section on Groundwater Records. WD34 does not assess using the annual volume estimates based on the PCC for BLRID commingled exchange wells because the ground water diversions are also being reported to WD34 from BLRID as a lump total with other surface water delivery. These exchange well ground water diversions are therefore already being assessed as surface water so the PCC estimate is not entered into the WD34 assessment database in order to prevent a double assessment for these groundwater diversions.

The Timberdome exchange wells are assessed by WD34 as groundwater diversions. Although the wells have measuring devices, the District does not record measurements using the devices and is not provided the measurements made by the Timberdome Canal Ditch Rider. WD34 bases it's assessment of these wells on annual diversion estimates calculated using the PCC method.

Exchange wells that are incorporated in the Big Lost River Water Rights Accounting program are entered into the IDWR database by WD34 from records of measurements provided by BLRID. Note that these measurements were not entered in the IDWR database for 2005, with the exception of the Neilson Injection pump. The WD34 secretary indicated this was an oversight.

Records & Assessment of Diversions Not Commingled With BLRID Storage Water (Generally Above Res.)

Assessed surface water diversions that are not commingled with BLRID administered water include diversions above the reservoir, diversions from Antelope Creek, and other tributaries administered in priority with the Big Lost River. This section describes record keeping practices for these diversions.

These diversions are physically regulated by the WD34 ditch rider. The ditch rider spends about 3 days of every week above the reservoir and 3 days, on average up Antelope Creek. According to the Watermaster, all the diversions above the reservoir have measuring devices, as do many of those on Antelope Creek. However, he indicated that a number of the measuring devices on Antelope Creek have a tendency to wash out during spring floods[2] so some diversions on Antelope Creek do not have measuring devices. Diversions from Antelope Creek that lack measuring devices are visually estimated and recorded by the WD34 ditch rider. Records of the canal heading diversions above Mackay Reservoir are entered by WD34 into the IDWR database via an Internet application. It was not previously possible to enter canal-heading diversions from Antelope Creek in to the IDWR database and IDWR had not required it. However, this is now possible and will be required beginning in 2006.

[2] An order was issued by IDWR in 2004 requiring headgates and measuring devices on all Antelope Creek Diversions. IDWR is in the process of evaluating the level of compliance with this order and whether any of the diversions can be exempted from the order.

While the total canal heading is recorded and entered into the IDWR database, the individual end of year assessed usage is entered into the WD34 assessment database and becomes part of the individual's usage history for assessment and voting. This individual usage is calculated differently for different situations. The Watermaster indicated that the ditch rider records the diversion at the canal heading and, in some cases, at measurement points down the canal. He also indicated that he does not keep records of the calculation of each individual user's daily usage or end of year total usage, but he indicated that on those canals where there is only one or two users, the canals are generally short and so the individual assessed usage amounts to the total canal heading apportioned to each user based on their relative water right amounts and priority. On longer canals where there are a number of users, the same principle is applied, but the calculation includes some consideration for canal losses. The Watermaster indicated he does this to try to more closely match the process below the reservoir. The Watermaster indicated he does not keep records of the calculations to determine the end of year total usage for users on these canals.

Also, the Watermaster indicated that on the longer canals (the Neilson and the Chilly), he typically sends a user's full water right down the canal (as long as it is in priority or as discussed in Part III) and that user can either take the water at their field headgate or allow the water to pass through the canal and either sink or flow out the end of the ditch. The Watermaster indicated that the users on these canals can choose to close their field headgates and allow the water to bypass their properties, but the user is still assessed as if the water was diverted and used.

Records & Assessments of Diversions Commingled With BLRID Storage Water (Generally Below Res.)

The majority of surface water deliveries that occur below Mackay Reservoir are commingled with storage water controlled by BLRID. These deliveries are measured and reported to WD34 by BLRID. This category of surface water delivery includes all diversions from the Big Lost River below Mackay Reservoir, and portions of Pass Creek and Alder Creek where delivery of natural flow water rights commingles with BLRID storage water. Diversions administered by WD34 below the reservoir that are not commingled with BLRID water are limited to those on Antelope Creek and portions of Pass Creek and Alder Creek.

The commingled diversions are generally administered by BLRID personnel, under the direction of the WD34 watermaster. BLRID personnel are paid by WD34 for their role in water delivery and are considered deputized by WD34, although they typically have not taken an oath and been sworn in to be formally deputized.

The general procedure for delivery of commingled water is complex. Decisions by BLRID to release more or less storage water are made by relying on past experience to predict future demands and accommodate canal and river losses, since there is as much as a two day lag time between releases at Mackay Dam, and delivery at the field headgate. Such decisions are not within the scope of this review. However, an understanding of delivery practices for natural flow below the reservoir must include an understanding of delivery of storage water since they are commingled.

In general, the procedure for delivering water to a user on these canals is as follows:

1. A water user tells the BLRID ditch rider how much water they want at their field headgate.
2. BLRID calculates how much water is required at the canal heading to deliver the requested amount to the field headgate. This calculation involves an estimation of canal losses between the canal heading and the field headgate as well as knowledge of the location of wells pumping into the canal, their flow rate, and estimates of losses between the injection points and the field headgates. The amount of water turned down the canal heading is approximately the sum of all the deliveries being called for on the canal, adjusted for seepage losses and exchange pump flows and losses.
3. BLRID ditch riders set field headgates to deliver the amount of water requested by the user. It is a policy of BLRID to not deliver water to a diversion that does not have a measuring device. Bob Schaffer indicated that these measuring devices vary considerably in type and condition, and that there is no set schedule for calibrating or maintaining these devices, other than a cursory inspection by the ditch rider.
4. On a weekly basis, the water delivered to each user on each day during the previous week is allocated to natural flow decree, natural flow rotation, and reservoir storage water based on priority dates provided by the Watermaster for those days. At the time the water is delivered, neither the BLRID nor WD34 has calculated what proportion of the delivery is natural flow decree, natural flow rotation, or reservoir storage water. The allocation of the delivered water occurs after the fact using a computer program maintained by BLRID. The program allocates the delivered water as shown in the following simplified example:

   User calls for 300 inches of water at his field.
   User has 400 inches of natural flow that is in priority that day.
   Canal loses 50% so, 600 inches are sent down the canal.
   Program allocates the 300 inches at the field headgate as follows:

   - 200 inches of natural flow (400 at canal heading shrinks 50%)
   - 100 inches of storage water (200 at canal heading shrinks 50%)

5. Records of the water delivered to individual field headgates (the 300 inches in the example above) are provided to WD34 by BLRID. The total annual usage for each individual is entered into the WD34 assessment database and is the basis for assessment and as part of the user's 5-year average. Note that the program does not allow more than the in-priority decreed amount of natural flow to be diverted from the source. Note also that this total represents a field headgate delivery for the individual and not the total amount diverted at the canal heading. Diverted water lost to canal seepage (shrink) is not charged by WD34[3], but BLRID does charge canal and river losses against a user's storage water account. In other words, using the example above, the usage in the WD34 assessment database would be based on 300 inches on that day, but the storage account at BLRID would be reduced on that day by 200 inches plus some amount to reflect losses in the river between the reservoir outlet and the canal heading.

Note that this process apportions the delivered water to natural flow decree first, then to rotation, and then the balance of the delivery is charged to reservoir storage water. Because of this, it is not possible for a user to be charged more natural flow decree than what is in priority because

[3] Note that this is not consistent with Rule 40.01of the WD34 Distribution Rules (IDAPA 37.03.12).

any additional water delivered is accounted for as storage water. While the additional deliveries reduce the actual flow in the river, they do not reduce the available natural flow. The available natural flow in the river is a proportion of the actual flow, with the balance being rotated storage and BLRID storage. Because the natural flow deliveries are credited after the fact, and any delivery made to an individual that exceeds the calculated available natural flow to his decree is automatically credited to storage water, out of priority diversion of natural flow cannot occur. The exception to this is if BLRID releases too little storage water so that the downstream diversions physically have no water to divert even though there should have been natural flow available at those locations.

Reporting, Assessments, and Voting

The WD34 assessment database is the main repository for end of year individual water usage totals. The sections above describe the process whereby those totals are measured, calculated or estimated prior to entry to the assessment database. This section describes the calculations involved in generating total annual delivery statistics, individual 5-year average usage statistics, assessments, yearly cost factors, and voting rights. Each of these is generated using individual yearly totals recorded in the assessment database. I include some detail about specific delivery totals for 2005 because users have specifically questioned the Watermaster's reports of these totals at meetings including the 2006 WD34 Annual Meeting.

End of Year Basin-Wide Total Delivery Statistics

End of year total delivery statistics for the basin are generated by querying the "working_table" and summing the individual usage amounts for three categories; total surface water delivered, total groundwater delivered, and total deliveries. These totals are reported at the WD34 annual meeting and periodically at advisory board meetings. Note that these statistics represent the total assessed delivery and not the total volume diverted from the natural resource. The calculation of each total for the 2005 season is outlined below:

- *Total Surface Water Deliveries*. The total assessed surface water delivered in WD34 is calculated by summing the individual annual usage for records in the working_table with divID#s referring to surface water diversions. These are DivID#s less than 10 (See Figure 1). For 2005 this value is 76,207 cfs-days. This value is consistent with the value reported at the annual meeting. The watermaster had reported different values at meetings prior to the annual meeting, such as 44,236 and 66,513 cfs-days. These early values appear to be the result of operator errors in the database query. For example, the 44,236 value is the sum of only the BLRID surface water deliveries. The value of 66,513 cfs-days is the total of the WD34 surface water deliveries leaving out Pass Creek, Alder Creek, and Antelope Creek.
- *Total Groundwater Deliveries.* This value is calculated by querying the "working_table" to sum all diversions listed with a DivID# of "10", which represents wells. This query returns 26,110 cfs-days. This value is consistent with department records as described earlier in this memorandum. Note that I have instructed the district secretary to correct the 8 cfs-day rounding error described earlier, so the total is 26,102 cfs-days.
- *Total Deliveries.* The total delivery is calculated as the sum of all the 2005 individual diversion amounts. For 2005, this value works out to 102,317 cfs-days, or 102,309 cfs-days after the 8 cfs-day rounding correction. This value differs from that presented at the annual meeting due to the 367 cfs-day difference in groundwater usage described in the section on Ground Water Records& Assessment.

Note that the watermaster generally provides two different sets of surface water delivery statistics. The first is the annual total as described above, which is provided at district meetings and listed in the water master report. The second surface water delivery statistic is not presented directly by the watermaster, but can be calculated from data presented in the watermaster annual hydrography report, which is a summary of daily canal heading deliveries as entered in the IDWR Enterprise database by WD34 throughout the year. It is important to note that the two surface water totals are not directly comparable. The surface water delivery total from the WD34 assessment database represent assessed deliveries to individuals; these individual values represent field head gate deliveries for diversions commingled with BLRID storage water, and a mixture of canal headings and estimated deliveries for other surface water diversions, as described in earlier sections. However, the totals from the IDWR database simply represent total canal diversions. These canal totals represent the measured quantity of water physically diverted from the stream or river. The difference between the two surface water totals represents canal losses, return flows, and recharge diversions. As an example of the discrepancy, the total surface water diverted, based on the IDWR database, between May 1, 2005 and October 15, 2005, was 95,343 cfs-days, as compared to the individual value from the WD34 database of 76,207 cfs-days, or a difference of 19,227 cfs-days[4]. Note that WD34 assessments, usage history, and voting rights are based only on the individual usage as recorded in the WD34 assessment database.

Individual and total 5-year average delivery statistics

Individual and total 5-year average usage are important statistics as they form the basis for cost factor calculations, assessments, and as a basis for voting. The calculation of the individual 5-year average is straightforward when the user has at least 5 years of usage history. In that case it is simply the arithmetic average of a user's annual total for the previous 5 years. The situation is less straight forward (and further complicated by historical record keeping practices) when a user does not have a complete 5-year history. This happens when someone purchases a portion of an existing user's property, for example. In that case, the existing user retains records of previous usage and the new user has no history until the end of the next irrigation season. At that time, the new user will have one annual usage record on which assessments for that and the next year are based.

It appears that there is some inconsistency in the manner in which the 5-year average is calculated for users with an incomplete 5-year history. The current WD34 secretary indicated that she creates records for the previous 4 years with a zero usage, while the previous secretary created records for the previous 4 years with a usage equal to the current annual usage. In both cases, the 5-year average is then calculated as the arithmetic average of the records for the last 5 years. This creates an inconsistency because in the first case, the user would have a 5-year average equal to one-fifth of their actual usage for the one year for which there is a record while the second case results in the user having a 5-year average equal to the total usage for that year.

Budget Calculations, Cost Factor, and Individual Assessments

The water district budget is funded by assessments on water users. At the annual water district meeting, the users vote and adopt a budget for the district for the ensuing year. The annual assessments are prepayment to provide the district with money for the upcoming irrigation year,

[4] As a comparison, 19,227 cfs-days is about 38,454 acre-feet. Note that IDWR recognized approximately 28,676 acre-feet (14,338 cfs-days) of recharge in 2005.

and are based on the average amount of water used by each user over the last five years. Essentially, each user's bill is payment for estimated use during the upcoming season +/- adjustments if the actual use the previous year was more or less than the estimated use used the previous year. The process involved in calculating each user's assessment for 2005, as an example is as follows:

1. The 2005 adopted budget is divided by the total 5-year average total delivery for the district (2000-2004) to generate a cost per cfs-day estimated to be delivered in 2005. This value is referred to as the "end of year cost factor" or simply the "cost factor". A cost factor calculated from the proposed budget is provided at the 2005 annual meeting.
2. A table is generated from the working table that lists each user's individual 5-year average usage (2000-2004), as well as their actual 2004 end of year usage.
3. Actual 2004 end of year usage is multiplied by the 2004 cost factor to derive actual end of year cost for each user. An assessment debit or credit is calculated as the difference between the budgeted cost and the actual cost. This debit/credit represents any over or underpayment a user was charged because the actual usage was more or less than the 5-year average used for billing at the start of the 2004 year.
4. Each user's assessment for 2005 is calculated as shown below:
   ([Individual 5-yr ave. use]*[cost factor])+[debit/credit] = [assessment]
5. The district charges a minimum assessment of $35 to those users where the 5-year average usage would result in an assessment of less than $35.

Voting Rights

Voting Rights are based on each user's 5-year average assessed usage, which is calculated as described above. While the BLRID holds water rights in the district, it does not have a vote in the district elections. The water delivered by BLRID is included in the individual user's annual totals.

It appears that there is some inconsistency as to whether the users vote on the straight 5-year average usage, or on that average multiplied by the yearly cost factor. The WD34 Secretary indicated that the normal practice is to vote based on the individual water user's 5-year average multiplied by the proposed cost factor for the ensuing year.

I reviewed a copy of the credential sheet from the 2006 annual meeting. The credentials list indicated (by signatures) votes were available to be cast on behalf of 182 water users. A comparison of the "5 Yr Avg. Votes" listed on the credentials sheet with the calculated 5-year average usage from the WD34 assessment database indicated that the voting shares were based on a 5-year average usage that was consistent with the WD34 assessment database with the following exceptions:

- Randy Purser was given 772 votes in the election, but only indicated a 5-year average usage of 649 cfs-days in the assessment database. The difference reflects a correction to groundwater usage for POD#124 as discussed in the *Ground Water Records* section.
- Uresti, Bolen/Huggins, Charles was given 59 votes, but records in the assessment database indicate a 5-year average usage of 118 cfs-days.
- 34 other users were given voting shares of 35 cfs-days, which was not consistent with their 5-year average usage. It appears that the 35 cfs-day voting share represents a dollar amount equal to the minimum assessment. This presents an inconsistency as the other

votes were based on actual cfs-day usage and these 34 users votes were based on a dollar assessment.

The votes cast for each of the two watermaster candidates is listed in the WD34 annual meeting minutes as 50,067 for Bob Duke, and 26,816 for Jim Rindfleish. This gives a total of 76,883 votes cast and a margin of 23,251 votes in favor of Mr. Duke. The total votes available to be cast based on the credentials sheet totals 77,108 votes. The difference in totals may reflect users that signed in but did not vote, or it may reflect a counting error. The total votes cast (based on the credentials sheet) when the $35 votes are replaced with their calculated 5-year average usage is 76,148, or a difference of 735 votes.

A credentials committee is elected by WD34 for the purpose of authorizing individuals to vote by shares when it is requested. The committee is given a list by the watermaster's office that indicates each assessed user's name and their individual 5-year average usage. This list is used to print ballots. One ballot is printed for each user on the list. As the users arrive at the annual meeting, the credentials committee gives the ballots to the users or their representatives. In some cases, an individual that attends a meeting may vote using the ballots for a number of users, because that user either works for the water right users, or otherwise has the right to the use of the users' water rights, and claims the right to vote that right. The credentials committee does not have formal requirements regarding proof that an individual has the right to vote as a representative of another user. In some cases, an assessed user will sign a letter authorizing another individual to vote on the user's behalf, but in other cases, only a verbal claim is made.

Watermaster Reports

The Watermaster provides two reports to the IDWR annually. The first is an annual Water Distribution Report of WD34. This report provides a summary of the water diverted from each point of diversion, including surface water diversions and groundwater diversions. The report also includes stream gaging data, priority date curtailment dates, and a brief narrative describing the irrigation season and any notable events. This report presents diversion data that was entered in the IDWR database or, in the case of groundwater diversions, annual volumes estimated using the PCC method.

The second report submitted by WD34 to IDWR each year is an annual watermaster and budget report. This report lists the proposed budget for the ensuing season. The report details each assessed user's usage and assessment information. The report as submitted to the Department is acceptable and is generally of a quality similar to reports submitted by other water districts with the following observations:

1. WD34 has indicated on some annual reports that the report describes the ensuing year, rather than the previous year. For example, the 2005 Watermaster's Report indicated March 1, 2006 through March 1, 2007 on the cover page.
2. The 2005 Watermaster's Report as originally submitted contained errors and was not accepted by IDWR. The WD34 secretary indicated that the report was generated before certain improvements and corrections had been made to their assessment database. At the request of IDWR, WD34 is not going to submit a corrected report or send out assessments pending the resolution of issues identified in this memorandum and associated meetings.

Both of these reports are submitted to IDWR Eastern Regional Office annually.

Part III – Priority Date Calculations and Delivery Decisions

One of the sources of complexity in WD34 involves administration of the Big Lost River and tributaries as connected sources (on a common priority date) or as disconnected (on separate priority dates), depending on various conditions. The sections below describe the general practices of the Watermaster to determine priority dates and make decisions regarding water delivery under various circumstances.

Delivery from Sources not Connected to the Big Lost River

The General Provisions for WD34 provide a list of surface water rights from the following sources that are to be administered separately from all other surface water rights in Basin 34. This list, labeled "Attachment A" in the General Provisions, includes Bady Creek, Cedar Creek, Lower Cedar Creek, Upper Cedar Creek, Elkhorn Creek, Grant Creek, Lehman Creek, Pinto Creek, Rock Creek, Rock Springs Creek, Sage Creek, and Willow Creek. In most cases, there is only one or two water users on each of these creeks. Where there is only one user, WD34 does not obtain delivery records from that user and does not assess that user. On those streams where there is more than one user, the users submit delivery records to WD34 and those users are assessed based on the submitted records. The Watermaster indicated that he generally does not regulate these streams, but he does maintain some contact with the users and will regulate a stream if there is a dispute.

Connected River

The General Provisions specify that the Big Lost River and tributaries (excepting those listed in Attachment A of the General Provisions) is to be administered as a connected river during the time period between when the flow of the Big Lost River at the Howell Gage is reaches 750 cfs for three consecutive days and the time the flow at the Howell drops below 450 cfs[5] for three consecutive days. During this time period, with certain exceptions as described below, or unless there is a futile call, the river (both above and below the reservoir) and applicable tributaries are on the same priority date.

During this period, the entire river is administered on the same priority date except, as specified in the General Provisions of the SRBA decree for Basin 34, if users are rotating natural flow water rights into storage, those rights become subordinate to water rights above the reservoir that are senior to October 1, 1936 (General Provision 3G). The Watermaster indicated that he interprets this to mean that users above Mackay Reservoir are not curtailed until users below the reservoir have called for their water and called for curtailment of water rights senior to October 1, 1936 above the reservoir.

The priority date for the connected river is calculated by the Watermaster based on the natural flow at the upstream end of Mackay Reservoir. As there is no gage at this location, the natural flow is calculated by using reservoir storage records from BLRID, delivery to the Sharp Diversion, and the flow at the 2B gage. The natural flow into the reservoir is calculated by converting the 4-day change in reservoir contents to an average flow rate and adding that flow

[5] Note that the administrative rules for WD34 (IDAPA 37.03.12) indicate that the river should be administered as connected until the flow drops below 300 cfs, rather than 450 cfs. It appears that the Watermaster delivers based on the 450 cfs as specified in the SRBA Decree.

rate to the outflow of the reservoir each day. The Watermaster uses the calculated natural flow to select a priority date from a list of decreed right diversion rates summed in order or increasing priority. The calculation of natural flow is presented below.

$\Delta STOR = (S_{DAY-4} - S_{TODAY})/4$
INFLOW = ΔSTOR + 2B+SHARP
TOTAL WATER = Σ EXCH + 2B + SHARP
HEADING TOTAL = Σ DIVERSIONS
SHRINK = HEADING TOTAL/TOTAL WATER
Q_{NAT} = SHRINK * INFLOW

Where:
S_{DAY-4} = storage from 4 days ago
S_{TODAY} = storage today
ΣEXCH = sum of exchange well flows for current day
2B = flow rate for current day at 2B Gage
SHARP = flow rate for current day at Sharp diversion
ΔSTOR = 4 day average of change in storage
INFLOW = total inflow to the river reach below Mackay Dam
TOTAL WATER = total water in the river from all sources
HEADING TOTAL = sum of all diversions below Mackay Dam for current day

Disconnected River – Delivery Below the Reservoir
When the flow at the Howell gage drops below 450 cfs for three consecutive days the river below the reservoir is to be administered separately from non-storage water rights above the reservoir. During this period the priority date is calculated as described for the connected condition and water below the reservoir is delivered as described in Part II.

Disconnected River – Delivery Above the Reservoir
When the flow at the Howell gage drops below 450 cfs for three consecutive days the river above Mackay reservoir is to be administered separately from the river below the reservoir. The watermaster described administration of the river during this disconnected period as follows:

- Just after the river disconnects there is generally enough water to fill all the rights above the reservoir.
- As the flow begins to drop off, junior rights are curtailed. Records submitted to IDWR seem to show that this occurs, but the Watermaster does not keep records of priority date calculations above the reservoir.
- At some point the flow drops to a point where the natural flow does not make it past approximately the Chilly Bridge. According to the watermaster he then puts the available water in the Neilson and Chilly Canals and delivers more junior water rights on those canals. In effect, the Watermaster is making a futile call determination for delivery of senior water rights below the Chilly Bridge. The Watermaster indicated that this procedure is an attempt to put the water to beneficial use rather than simply allow it to sink at the Chilly Bridge.

Delivery on Antelope Creek
The watermaster indicated that deliveries on Antelope Creek are in priority with the Big Lost River as long as Antelope Creek is connected to the Big Lost River. According to the Watermaster, Antelope Creek is disconnected from the Big Lost River when the flow from Antelope Creek no longer physically "makes it" to the river. When Antelope Creek disconnects, the Watermaster indicates that he then turns on more junior rights as long as the water holds out. It is unclear if he calculates a priority date for Antelope Creek during the disconnected period as no records to that effect are kept. Note that there is not a stream gage on Antelope Creek.

The Watermaster indicated that, during periods of high flow on Antelope Creek, many of the diversions are uncontrollable due to the physical location of the headgates relative to the stream. IDWR is in the process of evaluating the diversions on Antelope Creek and is working with the Watermaster to improve delivery issues on Antelope Creek.

Part IV – Issues, errors and inconsistencies
The first three sections of this memorandum describe WD34 operations & procedures. This section discusses how those procedures have resulted in inaccurate or inconsistent water delivery, record keeping, and/or reporting.

Record Keeping Related Issues

- *General.* There is inconsistency in the individual annual usage recorded by WD34. In some cases, users' (primarily BLRID commingled canals) individual annual usage reflects a volume of water delivered to the field headgate. In other cases, users are assessed based on the volume of water diverted from the resource (primarily groundwater users and sole users of canals above the reservoir). In the first case, the user does not pay for canal shrink, but they also do not obtain voting shares for that water lost to shrink. In the second case, the user pays for more water than is actually delivered to his field, but does get voting shares for that water. There are users between the two extremes, primarily on larger canals above the reservoir. These users tend to be assessed something closer to their field headgate delivery since the Watermaster does incorporate some canal loses when he apportions each user's share of a daily canal heading diversion amount, but records of these calculations are not kept. However, users on the Neilson and Chilly canals also are assessed for their water rights every day they are deliverable, whether they take the water or let it pass out the end of the canal. The implications of this inconsistency in assessed usage include inequity in voting rights, inequity in assessments, and issues with budget calculations and delivery statistics. Additionally, this process is not consistent with Rule 40.01 of the WD34 distribution rules, which states, "A natural flow water right delivered through a lateral or canal of a water conveyance entity shall be assessed the conveyance loss for the canal through which the water right is delivered.".

- *General.* The water district assessments and reports are generated using a Microsoft Access database. This database replaced a computer program that was developed by IDWR and was in use by the district from 1992 to at least 1997. The current Access database was created some time ago by staff that are no longer with the District, and it has been modified over the years by district staff and outside help. The current water district secretary had little experience with Microsoft Access prior to working for the District. Because of her inexperience with the program, her use of the database was limited to a fairly superficial level until recently. She has recently taught herself how to

use the program and has become relatively proficient with aspects of the program related to her duties, allowing her to update the database and perform queries with better understanding. It appears that the limited knowledge of the computer program until recently may have contributed to errors in the reports submitted to IDWR, and to misleading delivery statistics being provided to water users from time to time.

- *IDWR Records Vs. WD34 Records.* IDWR records of surface water deliveries reflect total diversions from the natural resource (usually the canal heading at the river). As noted in the first bullet above, the individual delivery records recorded in the WD34 assessment database represent assessed usage, which is significantly different from the canal heading in many cases. As such, delivery statistics derived from WD34 assessment records (such as those found in the watermaster and proposed budget report) are not directly comparable to delivery statistics based on diversion records submitted to IDWR (this includes the annual Water Distribution Report of WD34 and diversion records used in the IDWR accounting program). The individual usage information recorded in the WD34 assessment database is the basis for annual delivery statistics provided by WD34 to the water users at district meetings and whenever the district is asked to provide such statistics. Diversion records submitted to IDWR are the basis for the weekly accounting and are part of the annual Water Distribution Report of WD34. It appears that this distinction between statistics based on water diverted vs. those based on assessed water delivered has not been generally understood.

- *Groundwater and Exchange Wells*. WD34 receives an annual report from IDWR of PCC groundwater diversion estimates for wells in WD34. The report includes PCC usage for exchange wells for which the district also receives diversion estimates from BLRID. WD34 prevents double assessment of those wells by not entering into the WD34 assessment database any usage information from the PCC report for owners of those wells. There are six such owners. The assumption by the WD34 secretary is that all wells owned by those six people are exchange wells. However, some of the owners of these wells also operate non-exchange wells for which usage information is also included in the PCC report. WD34 is in error in not assessing these user's non-exchange wells. As an example, only one of the two Quist wells listed in the IDWR usage report is an exchange well. Isom and Parkinson also operate wells that are not exchange wells. Omission of all the wells from the WD34 database results in non-assessment of the non-exchange wells owned by these users. Leaving these wells out also results in an underestimation of individual and total annual diversions and inaccuracies in those users' 5-year average usage. This error is relatively small, resulting in around 100 cfs-days of usage not being accounted for in the groundwater usage totals and assessments each year.

- *Groundwater and Exchange Wells*. While there appears to be a dispute between users on the Timberdome Canal and WD34 regarding whether the ditch rider records of individual field headgate deliveries should be provided to the Watermaster, the watermaster has the authority and the responsibility to measure and record diversions from the natural resource, which in this case is the wellhead. WD34 currently uses diversion estimates based on the PCC method to assess the groundwater wells that pump into the Timberdome Canal. The Department feels that the PCC method is not appropriate for these wells and prefers that WD34 either measures these wells using measuring devices at the wellhead, or obtains measurement records from Timberdome Canal Co.

- *Groundwater and Exchange Wells.* The IDWR database contains records for exchange pump diversions for 14 exchange pumps. Diversion data for these pumps is used in the Big Lost River Water Rights Accounting. In 2005, data was entered to the IDWR database for only one exchange pump (Nielson Injection to Warm Springs Creek). Additionally, ownership changes have occurred with many of the wells that have not been reflected by the diversion names in the IDWR BLWRA program. The diversion names in the program are no longer meaningful to water users. This has caused some users to believe that some of the exchange wells are not being recorded or regulated.

- *Delivery of BLRID Commingled Water.* BLRID personnel indicated that rotation of water rights is practiced among users on the canals below Mackay Reservoir. When users rotate water rights, a user with a water right that is in priority can instruct the ditch rider to deliver water to another user rather than his own field headgate. IDWR does recognize rotation among users on canals in some situations. However, this practice should be further investigated and reviewed. Regardless of whether rotation is being practiced correctly, it appears that when a water right is rotated, the BLRID delivery records do not indicate the rotation. The delivery records indicate that water was delivered to the in-priority user, when in fact; it was delivered to another user's headgate.

- *Property Transactions and Calculation of 5-Year Averages.* The method of calculating 5-year average usage values for users is inconsistent with practices associated with creating new users and processing property transactions. The present method of calculating individual 5-year average usage is to sum the last 5 years of usage and divide the total by 5. It has been the practice of the water district to create usage records for previous years for new users that have not established a full 5-year usage history. Two methods have been used, either create zero use records (the practice of the current Secretary) or create usage records equal to the first year of reported usage (the practice of the previous secretary). In both cases the intent is to simulate a complete 5 year history so the 5-year average can be calculate for all the users with a consistent formula. The result is that new users with as many as 4 years of (false) zero usage are given as little as one-fifth of the usage they would have had under the other system. This is illustrated in the example below. In the first case, the user is shorted on his voting rights and in the second case the correct average usage was calculated, but false records of additional usage have been created for previous years. This alters the district delivery totals and total 5-year averages for the district and makes the database inconsistent with the values calculated for the previous years.

  Example:

	Year 1	Year 2	Year 3	Year 4	Year 5	5-yr ave.
Case 1	0	0	0	0	100	20
Case 2	100	100	100	100	100	100

- *Assessments & Budget Calculations.* The assessment and budget calculations will be in error if the 5-year average usage information is incorrect. While errors in the 5-year average will result in an over- or under-estimate of the future use, the individual payment will be corrected the following year through the debit/credit calculation. However, all the users are affected to some degree because incorrect 5-year averages (both on the individual and district-wide scales) result in an incorrect cost factor. When the cost factor

is not correct, users are assessed more or less than they should, with larger users' costs being affected to a greater degree than smaller users.

- *Assessments & Budget Calculations.* The procedure for calculating assessments, simply stated, is to allocate a fraction of the adopted budget to each user based on their estimated water use. However, the District also utilizes a minimum charge of $35. Because of this, users that have less than $35 of actual usage pay their fraction of the adopted budget plus the balance to make $35. Therefore the total amount of assessments exceeds the adopted budget by the total of the amount each minimum charge user pays as the balance of $35 beyond their usage. The Cust_info table in the assessment database lists over 200 users with a comment indicating they typically are assessed the minimum charge. This may translate into several thousand dollars of assessments above the adopted budget. WD34 has the opportunity to apply the "excess" fees collected via the minimum charge to reduce the cost factor for all the users.

- *Voting Credits.* Voting is based on 5-year average usage that is calculated in a somewhat inconsistent way and is based on usage totals that are inconsistent representations of water delivered and is often not representative of a user's present level of interest. For example, if a user sells off half of their property they may retain voting power, at least for the first year, that represents a larger interest in water than he actually presently owns, while the buyer of half of his property will have less voting power than he is entitled to.

- *Voting Credits.* The 2006 voting was conducted in an inconsistent fashion because minimum assessment users were voting on a dollar basis while the remaining users voted on a cfs-day basis. All users should vote on average assessed dollar amount, as per Idaho Code 42-605.

- *Voting Credits.* The votes cast for each of the two watermaster candidates is listed in the WD34 annual meeting minutes as 50,067 for Bob Duke, and 26,816 for Jim Rindfleish. This gives a total of 76,883 votes cast. The total votes available to be cast based on signatures on the credentials sheet is 77,108 votes. The total votes available to be cast when the $35 votes are replaced with the calculated 5-year average usage is 76,148. The difference between the totals available to be cast and the cast votes recorded in the meeting minutes may reflect users that signed in to the meeting but did not vote, or it may reflect an error in counting. Since the total votes reported in the minutes is not consistent with the totals calculated from the credentials sheet, it may be worthwhile to verify the totals presented in the meeting minutes by tallying the original voting ballots, which WD34 retains in their files.

- *Voting Credits.* The discrepancy between the voting credential and the assessment records for Uresti, Bolen/Huggins, Charles should be explained.

- *Voting Credits.* Idaho Code allows votes to be cast by either the owner of the water right or any person having the use of the water right for the ensuing season. However, WD34 does not have a clear policy on voting by representatives. The 2006 Watermaster election may have included votes that were cast for water rights by individuals that were not legally authorized to vote on those rights.

Priority Date Calculations and Delivery Decision Related Issues

- *Differences Between IDWR Accounting and WD34 Priority Date.* A summary of the 2005 priority dates is provided in the annual Water Distribution Report for WD34. These are the deliverable water right priority date calculated by WD34 and used to deliver water. IDWR runs a weekly accounting program that uses reservoir storage data and canal heading diversion data provided by WD34 and flow gage data from the USGS to perform an after the fact accounting of water delivery. A review of the 2005 priority dates in the accounting compared with those provided in the distribution report indicates that the WD34 priority dates are not consistent with those calculated using the accounting program. Water delivery in Basin 34 is complex and utilizes procedures that the IDWR accounting program is presently not setup to represent. These procedures include rotation of natural flow to storage, delivery of junior rights above the reservoir before senior users call for water, and the switch between the use of the main channel and the Eastside Canal as the river channel. The IDWR accounting program should be thoroughly reviewed and verified to understand how these practices affect the accounting results. Conversely, the accounting program is set up to calculate river losses on a reach by reach basis, as required in the WD34 Distribution Rules, which is something the Watermaster's calculation does not do.

- *The Watermaster's Procedure for Calculating Priority Dates.* Calculation of priority dates above the reservoir and on Antelope Creek is not documented. It is unclear how the Watermaster determines which rights are deliverable when these sources are administered separately from the main river.

- *Delivery Above the Reservoir and on Antelope Creek.* The Watermaster described two practices that imply he makes futile call determinations without the approval of the Director of IDWR. Mr. Duke indicated that he begins delivering junior water rights to users on the Chilly and Neilson canals when the Big Lost River sinks at Chilly Bridge. Also, he indicated that he begins administering Antelope Creek separately from the Big Lost River when the creek disconnects. In both cases, the futile call determination must be approved by the Director of IDWR.

- *Delivery Above the Reservoir.* The IDWR accounting program indicated that diversions above and beyond those in priority had occurred in 2005. The IDWR accounting program currently does not include the recharge permits and does not include a way to consider the effects of general provision 3G. The overdiversion reported in the accounting report, in some cases, resulted from recharge deliveries, and in other cases may have resulted from delivery of October 1, 1936 and senior water rights, under General Provision 3G. The Watermaster does not keep records of the priority date above the reservoir when the river is disconnected, and does not keep sufficiently detailed records of recharge deliveries to determine the daily recharge component of each diversion. Additionally, the Watermaster indicated that the ditch rider made some reporting errors that suggested some water rights were being delivered to each authorized point of diversion in full. It is unclear what the actual diversions for these water rights were.

  It is difficult to derive a meaningful estimate of how much or even if illegal overdiversions occurred above the reservoir given that the delivery records have been called into question, recharge deliveries are not well known, there is no record of the

daily priority date delivered, and there are additional complexities such as General Provision 3G and the Watermaster's stated practice of intentionally delivering junior rights when the river sinks at Chilly Bridge. Nevertheless, this issue is sufficient to make that point that record keeping and accounting need improvement and that guidance on delivery practices is warranted.

- *Watermaster's Interpretation and implementation of General Provision 3G.* The Watermaster interprets General Provision 3G, which states "*When the river is connected as specified in General Provision No. 6 while a right is rotated into storage, it is subordinate to all rights diverted above Mackay Reservoir with a priority date earlier than October 1, 1936.*" The Watermaster indicated that his interpretation of this provision is that he delivers October 1, 1936 and senior rights to users above the reservoir unless holders of rights that can be rotated into storage call for the curtailment of rights senior to October 1, 1936. If they call for such curtailment, they give up the right to rotate into storage. He argued that no user specifically called for that curtailment, and that is why deliveries above the reservoir were not curtailed to the same priority as the rest of the river during the connected period. This interpretation is questionable and IDWR should provide more specific guidance on this issue to WD34. However, this issue also raises questions about the administration of rotation storage credit because, while the users argue he should have curtailed above the reservoir, BLRID indicated that users did continue to accrue rotation storage credit during the last week of the connected period. This indicates that there is a lack of communication between users, BLRID and WD34, since WD34 and BLRID appeared to believe rotation was still in effect, but users appeared to believe that rotation was no longer occurring, claiming that the Watermaster should have curtailed, implying that those users had forgone their right to rotation storage.

Summary and Conclusions

During a May 4, 2006 meeting with concerned water users and the WD34 Advisory Committee, users were provided much of the information presented in this memorandum and were asked to clarify and discuss the issues raised in the March 17th letter. The discussions during that meeting indicated that the main concerns of the water users stem from a lack of confidence and trust in the Watermaster, and that this lack of confidence has been exacerbated by inconsistencies in WD34 operations, and by an inability of the Watermaster to adequately answer to users' complaints and inquiries. During the May 4th meeting, users indicated that they are willing to entertain suggestions by IDWR to improve accountability of the Watermaster and correct many of the inconsistent or incorrect practices presently in use. A copy of a letter sent to the Watermaster, WD34 Advisory Committee, and the signatories of the March 17th letter, containing these recommendations, is attached for reference. The attached letter may supplement the following discussion, and provide a summary of changes that I feel will help resolve some of the issues.

The information I gathered to write this memo has indicated mostly minor, but some important errors and inconsistencies exist with WD34 operations that affect nearly all aspects of district functions. While I suspect that this would be true for many water districts if subjected to the same level of scrutiny, the fact that users called for an investigation indicates that the problems that exist are impairing effective water district operations. The attached letter contains recommendations intended to address many of the issues, without respect to who is Watermaster.

However, another purpose of this investigation is to gather information that may be used by the hearing officer to determine whether Bob Duke should be removed as Watermaster of WD34.

The errors and issues outlined in this memorandum generally result from practices that were established by previous watermasters. However, additional oversight by the Watermaster may have addressed or prevented inconsistencies and errors in reporting and record keeping that exacerbated underlying issues and resulted in a large number of user complaints. Many of the minor errors that caused so much consternation among water users could have been prevented had the Watermaster thoroughly reviewed assessment reports, was familiar enough with the duties of the District Secretary to crosscheck her work, or if he reviewed his ditchriders' records to verify that recorded measurements are consistent with intended water deliveries.

While increased effort, involvement, and oversight on the part of the Watermaster may have prevented some of the user's complaints, several of the problematic practices that affect delivery and accounting of water appear to have originated prior to the current Watermaster and his staff taking office. This includes many of the WD34 procedures that form the basis of voting, such as calculation of assessed usage, average usage history, and budget calculations. Additionally, the lack of records of priority date calculations above the reservoir and on Antelope Creek, and many of the decisions regarding water delivery, appear to be carryovers of practices used by past Watermasters. That the current Watermaster did not question or revise these practices is a reflection of his knowledge and interpretation of the WD34 Rules and General Provisions, and of his initiative to improve on these practices. That the WD34 Advisory Committee, and water users did not specifically identify these issues as problematic or request additional records of the Watermaster indicates a lack of understanding of WD34 operations by the water users.

While the lack of sufficiently detailed records has limited the ability to determine the actual impact of any errors or inappropriate deliveries, the lack of such records and the inability of the Watermaster to show, to the satisfaction of IDWR and water users, who actually received water on a given day, and why, lends some support to the users' complaints.

The apparent non-recharge overdiversion above the reservoir (in excess of 8,000 acre-feet) indicated in the IDWR accounting report is difficult to verify. This volume may reflect reporting errors, delivery of October 1, 1936 and senior rights above the reservoir, delivery of junior rights above Chilly Bridge when the river sinks at that location, as well as other out of priority deliveries. However, data from the IDWR accounting report indicates that approximately 5,000 acre-feet of excess diversion occurred after the river disconnected. This was found by subtracting the cumulative excess diversion above the reservoir from the for the period after the river disconnected, from the end of season total cumulative excess diversion above the reservoir. During this period, no recharge is occurring, and the river above the reservoir is administered on it's own priority date (almost always 1978 in the accounting), so General Provision 3G should not play a role. That there is 5,000 acre-feet of over diversion during this period indicates that either the Watermaster did in fact over divert, or he made significant reporting errors.

It appears that some of the Watermaster's practices and interpretations of the rules are not based on or contradict guidance provided by IDWR. An example is the delivery of junior rights above Chilly Bridge when the river sinks there. While this may have been an historical practice and it may in fact be a beneficial practice, it is essentially a futile call, and the Watermaster has been given guidance on administration of a futile call. Additionally, his interpretation of General

Provision 3G does not appear to be based entirely on IDWR guidance, and also appears to be not widely understood by the water users.

Whether or not the Watermaster's practices prove an intentional bias in his behavior toward a group of users is debatable. Certainly, some of the questionable practices benefited users above Mackay Reservoir (e.g. his implementation of 3G and his futile calls at the Chilly Bridge and on Antelope Creek), and there isn't much indication of questionable delivery below the reservoir (with the possible exception of out of priority rotation on BLRID canals). Yet, this apparent bias toward users above the reservoir may reflect the fact that delivery below the reservoir is better staffed, has a more established history of regulation, has an established method of calculating priority date, and has the benefit of after the fact programmatic allocation between natural flow and storage. The better record keeping below the reservoir vs. above may speak more to the efforts and abilities of BLRID and to a system that was already established when Mr. Duke became watermaster, than to any bias on Mr. Duke's part. This is not meant to minimize or ignore any inappropriate deliveries or to ignore the problems with record keeping above the reservoir. Rather, the point is that these practices do not necessarily prove he had a bias toward users above the reservoir. It is possible he is simply continuing the practices that were in place before he started, both above and below the reservoir, and that he has not been motivated to revise the procedures.

It appears the users in WD34 demand a higher level of accountability than what currently exists. The Watermaster appears to have known this, but had not implemented adequate changes before now. Whether this is due to a lack of initiative or is intentional is uncertain. Regardless of whether Mr. Duke continues as the Watermaster or a replacement is appointed, water users will continue to question the actions and motivations of the Watermaster. I believe that improved record keeping is a priority and will provide a means for improving accounting, and will improve the ability to verify that deliveries are consistent with applicable laws and rules. Increased transparency in WD34 operations and some amount of field verification may help regain trust in the Watermaster's records. Additional guidance to the Watermaster regarding rotation storage and other issues as they arise is also warranted.

I recommend that WD34 and IDWR implement the recommendations in the attached letter regardless of who ultimately is appointed as watermaster for 2006. Implementation of the recommendations will improve accountability and revise many of the problematic practices. Although the ultimate decision is in the hands of the Director, I recommend that Bob Duke remain the appointed Watermaster of WD34 for 2006. However, IDWR should work closely with WD34 this season and in the future to ensure that the recommendations are implemented, adequately funded by the district, and are effective.

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Re: IDWR Recommendations for Operation of Water District No. 34, Big Lost River

Mr. Foster and Mr. Duke,

The purpose of this letter is to provide recommendations to Water District 34 ("WD34") that IDWR feels will address issues and complaints that have arisen in the district and provide a means for preventing or resolving similar disputes in the future. As discussed in the meeting with the WD34 Advisory Committee and other water users on May 4, 2006, the list of recommendations in this letter is an attempt to resolve many of the issues raised in Mr. Foster's March 17, 2006 letter that called for a hearing and removal of the Watermaster.

Some of the signatories of the March 17th letter have indicated to IDWR that their motive for signing the March 17th letter was to improve water distribution in WD34 and resolve disputes, rather than a specific interest in removing the current Watermaster. As such, the signatories of the March 17th letter should view the recommendations in this letter as an approach to addressing many of the issues of concern. After reviewing these recommendations, IDWR asks that the signatories of the March 17th letter provide a response indicating whether or not they feel the recommendations, when implemented, will address their concerns and whether they wish to maintain the request for a hearing to remove the Watermaster. Please note, however, that, as indicated during the May 4th meeting, the Director's decision to hold a hearing on the removal of the Watermaster will not be based entirely on the signatories desire for or against such a hearing. That being said, IDWR asks that the signatories of the March 17th letter, members of the WD34 Advisory Committee, WD34 staff, and other concerned water users consider implementing these recommendations to improve the administration of water in WD34.

Although this letter is written as part of a response to the March 17th request to remove the Watermaster, water users in WD34 have engaged in frequent correspondence with IDWR concerning water delivery and administration issues and concerns for several years. It is apparent from the issues raised in the March 17th letter, discussions during the May 4th meeting, and from past correspondence with IDWR, that disputes, complaints, and concerns in WD34 arise from several general sources:

- Lack of knowledge regarding rules for water delivery in WD34. – The rules governing distribution of water in WD34 are complex and it appears that knowledge of the rules and interpretation of the rules – both by the Watermaster and water users – is often inaccurate or incomplete.

- Lack of knowledge of how WD34 operates: The day to day operations of WD34 including how water is called for, how priority dates are determined, who physically regulates the water, and the inter-relationship between WD34 and the Big Lost River Irrigation District (BLRID), what records are kept and what measurements are made are often either unknown or misunderstood by water users. Additionally, the annual procedures such as how assessments are calculated, voting rights established, and how changes in ownership occur are not clearly understood, and in some cases, not clearly defined. A clear understanding of how the district presently operates would improve the ability of water users to interpret WD34 records appropriately, identify problems, and allow users and the Advisory Committee to verify whether or not the district is operating consistent with Idaho law, WD34 rules, and adopted resolutions. Improved knowledge of operations may provide an opportunity to make the procedures more streamlined, consistent, and equitable to the satisfaction of the users.

- Measurement and record keeping issues: After water has been delivered, the only tool available to resolve disputes are records that document measurements of water delivered, and which water rights that water was intended to fill. It appears that records kept by WD34 are often either misunderstood or have not been sufficiently detailed to resolve disputes and answer questions. Additionally, record keeping and reporting errors have been made that, coupled with the other issues in the district, have contributed to existing frustration and have fueled mistrust.

- Mistrust. In any water district, the Watermaster and his deputies and assistants must be trustworthy and be trusted by the water users. Ultimately, any delivery the Watermaster makes can be challenged by simply asserting that his records do not accurately reflect his actions. It appears that some water users in WD34 do not trust the Watermaster to deliver water objectively and in a manner consistent with the rules and Idaho law. This lack of trust has resulted in the water users demanding a high level of oversight in the form of detailed accounting, measurement and record keeping. The demand for the high level of oversight has not been satisfied given the complexities of administration in WD34, the level of detail currently provided in WD34 records and the level of water management provided for by existing WD34 staff. When the Watermaster has not provided the level of service required, some users have become frustrated and continue to lose confidence and trust in the Watermaster.

The following recommendations are an attempt to address the broad issues listed above, with the belief that these issues are at the root of the vast majority of specific issues raised by water users. Recognize that identification of the above issues and the formulation of the recommendations are not intended as a judgment regarding the performance of the current or past watermaster. Such a judgment is not within the scope of this letter. Rather, this letter is an attempt to put practices in place that will improve water delivery and reduce disputes. These recommendations reflect information gathered by IDWR during it's recent investigation, experience with past user correspondence, and recommendations submitted by water users during and following the May 4th meeting.

Recommendations for WD34 Staff and the Watermaster

1. WD34 staff should be cross-trained and knowledgeable of the duties and practices of other staff. This is particularly important for the Watermaster and the District Secretary. Such cross training will provide for continuity if either person leaves the district, and will help in quality control of reporting since multiple people will be equipped to identify reporting and data entry errors. Specifically, the Watermaster should be knowledgeable of how annual budgets, assessments, and watermaster reports are compiled and should thoroughly review such reports and produce them in a timely fashion. Note that a resolution was passed at the 2006 meeting that the proposed budget and watermaster report be submitted 30 days in advance of the annual meeting, consistent with Idaho Code.
2. The Watermaster should increase the level of oversight and review of the work of his staff. This should include more thorough review of records, and reports. IDWR also recommends that the Watermaster begin a regular routine of periodically crosschecking measurements made by BLRID and watermaster assistants. Routine crosschecking may help identify problems early on, rather than at the end of the season.
3. It is in the best interest of everyone that the Watermaster keeps records of sufficient detail such that users can be readily shown that the quantity of water sent down a canal is consistent with the water rights being called for, and that any discrepancy that exists (such as due to flooding, recharge, etc.) can be explained as either a lawful diversion, or an uncontrolled flood flow. Although the diversion rate should never exceed that allowed by water rights in priority (including water rights for recharge purposes), uncontrolled flood flows have occurred and must be documented as such in the future. WD34 currently reports total daily canal diversions to IDWR on an approximately weekly basis. The Watermaster should maintain records of sufficient detail such that IDWR, or a water user, can be shown what fraction of the total canal heading is recharge, storage, natural flow and any uncontrolled flow due to flooding. Daily records should also be kept of what priority date is in effect above the reservoir, below the reservoir, and on Antelope Creek so that the irrigation delivery fraction of the canal heading can be compared to the water rights list. Note that Antelope Creek is administered on the same priority as the Big Lost River, unless a futile call determination has been made. Ultimately, IDWR's Big Lost Water Rights Accounting (BLWRA) program may serve this purpose, but the Watermaster should be able to provide this information on demand in order to resolve disputes and inform water users.
4. Keep daily records of priority dates and priority date calculations for the Big Lost River (both above and below the reservoir) and Antelope Creek. Such records should note the latest priority date that can be filled based on the natural flow, and the latest date delivered, based on the demand for water.
5. The Watermaster must deliver water only as prescribed by the applicable laws and rules. To the extent that the rules are not clear, or his interpretation is challenged by users, he must seek guidance from IDWR. Examples of the basis for this recommendation include implementation of General Provision 3G, rotation of water rights on BLRID canals, and delivery of junior rights above Chilly Bridge when the river sinks at that location. The last example amounts to a futile call by the Watermaster. Such a determination must be made as prescribed by the WD34 rules and with the approval of the Director.

6. The Watermaster and WD34 staff should consider whether the recommendations in this letter will require additional staff, equipment, training, or other costs and be prepared to discuss the economic implications of these recommendations with users, the Advisory Committee, and BLRID.
7. WD34 should review the listed diversions on the IDWR internet data entry application and provide IDWR with any new exchange wells, note any abandoned diversions, and provide updated diversion names where changes of ownership have occurred and the existing name is no longer meaningful to water users.
8. The Watermaster should review the IDWR BLWRA reports weekly and notify IDWR when there is a discrepancy between the Watermaster's records and the output of the accounting program. This cross-checking and feedback will help identify improvements to be made to the BLWRA program and will ultimately result in the watermaster being able to use the accounting as a tool to aid in delivery decisions.

Recommendations for the WD34 Advisory Committee

1. Begin taking a more active role in the District. Although the WD34 Advisory Committee has become more active in the last few years, WD34 can benefit from ongoing input from the Advisory Committee. Schedule regular meetings monthly, or more frequently, as appropriate to address ongoing issues. Users have requested that these meetings be advertised and open to the public. Users have requested also that the location of the Advisory Committee meetings be rotated between Arco and Mackay.
2. Develop a policy on voting issues. The Advisory Committee should develop written policies stating exactly how voting shares should be calculated, what credentials should be provided in order to vote, who can vote in place of another, how voting should occur for water rights held by multiple people or business entities and form a plan for implementing the policy. Such a policy should address how historical usage is handled when property transactions occur and should detail voting during the transition to a new assessment basis, as discussed in #5 below. A number of the recommendations submitted by users following the May 4th meeting referred to specific aspects of such a plan. IDWR recommends that the Advisory Committee should develop the specific policy and the users should adopt it by resolution at each annual meeting. The policy should be consistent with guidance offered by Phillip J. Rassier, Deputy Attorney General, in a November 20, 1992 letter to Kent Foster and a January 15, 2001 memorandum from Mr. Rassier to Allen Merrit of IDWR. Both documents are attached for reference. IDWR will answer questions and provide guidance to the Advisory Committee, and offers to review the voting policy and provide suggestions, if necessary.
3. Given the recommendations in this letter and the level of service expected, the Advisory Committee should evaluate whether additional funding is necessary for additional personnel and/or capital improvements such as additional measuring devices or equipment.
4. IDWR recommends the WD34 Advisory Committee discuss the need for, and possibly develop, a plan to hire an employee that will randomly and independently verify canal heading measurements. Such a plan will have to address the conflicting goals that the individual be objective and independent of the Watermaster, yet be deputized by the Watermaster in order to have the authority to access canal headings on private property. Alternatively, or in addition to this, IDWR may conduct some independent verification of measurements.

5. IDWR recognizes that WD34 has resolved to alter existing assessment policies and adopt a consistent policy of assessing all users based on the diversion from the natural resource. This approach will provide consistency, equitable voting representation, and will simplify accounting and record keeping. However, voting shares and budgeting are based on historical 5-year averages. Until a 5-year history is developed under the new procedure, WD34 must develop an alternate system for voting and budgeting that is not based on 5-year averages. At the May 4th meeting a concept was discussed whereby averaging would be phased back in over the next 5 years. Under such a plan, at the 2007 WD34 annual meeting, all users would be assessed and would vote based on their 2006 usage, and at the 2008 WD34 meeting, voting and assessments would be based on an average of the 2006 and 2007 usage. A full 5-year average would be in effect at the 2011 annual meeting, when users would have a full 5-year usage history. This approach is allowed for budget calculations under Idaho Code 42-612(3), and can be adopted by resolution for voting. While this plan was discussed briefly at the May 4th meeting, WD34 staff and the Advisory Committee should develop this plan with respect to budget calculations and with respect to voting, as these two issues are interrelated. Note also, that development of this plan may provide an opportunity for WD34 to alter their budgeting and assessments so that debits and credits are no longer necessary. The decision to abandon debits and credits is entirely up to WD34, but IDWR feels that elimination of debits and credits can simplify assessment procedures.
6. The relationship between WD34 and BLRID is fairly complex and appears to be poorly understood by water users in WD34. The role of BLRID employees in delivering natural flow water and in providing measurement data to the Watermaster has been viewed by some users as a situation where BLRID can usurp the authority of the Watermaster and deliver natural flow water according to it's own interests. While employees of BLRID receive some payment from WD34 and are considered deputized assistant watermasters, it is apparent from comments made at the May 4th meeting and comments submitted subsequent to that meeting, that many users do not trust the employees of BLRID to operate in the interests of the water district rather than the irrigation district. Some users have expressed a desire that the situation be changed such that the ditch riders for BLRID do not work for WD34 and that WD34 operates separate from, rather than with, BLRID. However, given the information obtained to date, the current situation appears acceptable to the Department and that the sharing of employees provides an economic benefit to the water users as a whole. However, the Department recognizes that the users ultimately must decide if the situation can or should be improved, and that the users should make an informed decision. As such, the Department recommends that the Advisory committee hold a meeting that is open to the public in which the Watermaster and representatives of BLRID present to the Advisory Committee and water users, the role of BLRID personnel in delivery of natural flow decree water and the role of the Watermaster in delivery of the same. Following such a presentation, the WD34 Advisory Committee and water users may choose to develop a more acceptable plan for division of WD34 and BLRID duties.

Recommendations for the Watermaster, Water Users, and the WD34 Advisory Committee

1. Many of the applicable rules and laws governing distribution of water in WD34 have been summarized and interpreted by IDWR in the document entitled *"Water District 34 Guidelines for Operation"*. This document is provided on the IDWR website and is intended to provide guidance to the Watermaster and water users on the administration of

water in WD34. IDWR recommends that concerned water users, the Watermaster, and the WD34 Advisory Committee become familiar with that document and recommends that the document serve as a common reference when questions or disputes arise. If the Watermaster, the Advisory Committee, or water users find that the document does not provide adequate guidance on an issue, or is unclear, conflicting, or incomplete, IDWR should be contacted by either the WD34 Advisory Committee or the Watermaster and IDWR will update the document to address the concern.

2. IDWR recommends that water users become familiar with the IDWR website. In addition to the *"Water District 34 Guidelines for Operation"*, IDWR's website contains additional information that may be of interest to users, such as stream gaging information, IDWR water rights accounting output, WD34 reports, and general information about water rights administration.
3. Bob Duke was appointed Watermaster based on the election held at the 2006 WD34 Annual Meeting. He should continue as the Watermaster unless the Director determines a hearing for his removal is warranted and issues a decision stating otherwise. The validity of the 2006 Watermaster election was questioned by the signatories of the March 17th letter. A review of the issues surrounding the election revealed inconsistencies in how voting shares were calculated, and that votes may have been cast by representatives, rather than water right owners. Other recommendations in this letter are aimed at preventing such issues in the future, but do not address the 2006 election. Given that the policies for voting by representatives have not been developed, and that the 5-year average usage has been called into question, it is not reasonable to attempt to determine the outcome of the election in the absence of the identified problems. Also, for the same reasons, it is unlikely that a valid second election could be held at a special meeting called by the water users. Idaho Code 42-605(8) authorizes the Director of IDWR to appoint a watermaster in the event a watermaster is not elected in the manner provided in Idaho Code 42-605(4) and 42-605(7). However, unless the Director holds a hearing and determines otherwise, Bob Duke is the elected 2006 watermaster for WD34. To the extent that there is concern that the votes should be recounted, IDWR encourages users to initiate the process of conducting a recount of the cast votes, which are on file at the WD34 office.
4. IDWR requires users to maintain functional headgates and measuring devices at each diversion from the river or creek. Exceptions may be provided by the WD34 Rules for some floodplain locations above Mackay Reservoir.
5. The recommendations provided by users following the May 4th meeting included recommending specific locations and frequency of measurements. As Director Dreher noted in the May 4th meeting, water users and the Advisory Committee must determine a level of service and fund the district appropriately to achieve that level of service. IDWR recommends that users and the Advisory Committee establish a measurement schedule that meets the needs of the district and for which the district is willing to adequately fund.

IDWR Will Perform the Following:

1. Provide an updated listing of currently active water rights and permits and sort the list by priority and point of diversion. This list will be provided to the Watermaster, and members of the WD34 Advisory Committee. Copies of the list will be available to water users at the WD34 office. Additionally, this information will be available from our Internet site as described in #2.

2. IDWR will investigate the feasibility of developing an Internet page to make water delivery information available to the public in a more convenient format. IDWR recognizes the desire by users to have delivery data available on a near real-time basis. In concept, the page would be updated daily or every few days, would include the list of water rights by diversion, show stream gage data, canal heading data, the priority dates in effect, etc. Although some of this information is already available from the IDWR website, a WD34-specific page may be more effective. Recognize that this level of service may require additional clerical staff for WD34 and may require a long time (years) for development. At a minimum, the updated water rights list will be posted on the IDWR website.
3. IDWR will review the Big Lost River Water Rights Accounting Program and, to the extent necessary, make the accounting more accurate and usable, make changes to bring it up to date, and incorporate some of the complexities of WD34. Note that this may take quite some time and will not likely be accomplished this season. The practice of rotation into storage provides a particular challenge from an accounting standpoint, and IDWR will have to work with WD34 and BLRID to understand exactly how the practice is implemented for accurate accounting and to ensure such practice is consistent with Idaho law, WD34 Rules, and the General Provisions decreed in the SRBA.
4. IDWR is conducting a watermaster workshop this summer and will invite the WD34 watermaster, his assistants and deputies, and will provide any additional, specialized training with respect to WD34.
5. IDWR will conduct random verification of reported diversion measurements this season as necessary.
6. IDWR will review policies and procedures developed by WD34 staff and the WD34 Advisory Committee regarding voting and budgeting and will suggest changes, if necessary, to ensure the voting and budgeting will be conducted in accordance with the law and in an appropriate manner.
7. IDWR will work with WD34 staff to revise record keeping and reporting and attempt to increase transparency, and provide for increased quality control. This includes ensuring that the records of WD34 are sufficient to provide a confident accounting of water deliveries.

The recommendations above are intended to increase the transparency of WD34 operations, provide information and accountability through improved record keeping, provide the opportunity to clarify and provide guidance on the complexities of water administration in WD34, and to establish policies and practices that are consistent, legal, and protective of the interests of the water users and WD34.

Implementation of many of these recommendations may take some time and may require that they be adopted by resolution. IDWR will immediately begin working with WD34 to institute some of the recommendations in this letter, such as those regarding reporting and record keeping, clarifying procedures in the *"Water District 34 Guidelines for Operation"*, and the distribution of an updated water rights list.

Please call if you have questions.

Sincerely,

Nick Miller
Water Distribution Section

Enclosures:
November 20, 1992 letter from Phillip J. Rassier, Deputy Attorney General, to Kent Foster (3 pages).
January 15, 2001 memorandum from Phillip J. Rassier, Deputy Attorney General to Allen Merrit of IDWR. RE: Water District Elections under I.C. § 42-605. (1 page).

cc: IDWR Eastern Region, Idaho Falls
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Lin Hintze – PO Box 125, Mackay, ID, 83251
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Big Lost River Irrigation District, 101 S Main Ave Mackay, ID 83251

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MEMORANDUM

TO: Allen Merritt, Southern Regional Manager, IDWR
FROM: Phillip J. Rassier, Deputy A.G., IDWR PJR
RE: Water District Elections under I.C. § 42-605
DATE: January 15, 2001

You have requested guidance on the issue of whether a person, through a power of attorney, may be allowed to vote at a water district election on behalf of another person. Section 42-605, Idaho Code, provides in relevant part:

> (4) Voting shall be by majority vote of the water users present at the meeting unless one (1) or more water users requests voting using the procedure which follows in this subsection. In such case the meeting chairman shall appoint a credentials committee to determine the number of votes each water user present is authorized to cast. If requested, each person present, owning or having the use for the ensuing season of any water right in the stream or water supply comprising such water district . . . shall be entitled to a number of votes equal to the average annual dollar amount and any fraction thereof assessed for that person's qualifying water right . . . .

In previous correspondence, I have related IDWR's position to be that "a proxy vote should not be allowed in water district elections in the absence of the owner of a water right, except that in the absence of the owner a right may be voted by another person present who has the use of the right for the ensuing irrigation season such as a contract purchaser, tenant, renter or lessor." *See* Letter to Kent W. Foster, dated November 20, 1992.

Your question in essence asks whether the requirement of the statute that a water user be present at the meeting in order to vote may be avoided if the document authorizing a person to vote for another not present at the meeting is characterized as a "power of attorney" as opposed to a "proxy." The answer is that, for purposes of authorizing a person to vote at a water district election, a power of attorney should be treated, in most cases, the same as a proxy. A "power of attorney" is defined as "a legal instrument authorizing one to act as the attorney or agent of the grantor." The term "proxy" is similarly defined as "authority or power to act for another; a power of attorney authorizing a specified person to vote corporate stock." *See* Webster's New Collegiate Dictionary (1977 ed.). Therefore, a power of attorney authorizing another person to cast a vote in one's place is really just another term for a proxy.

There is a circumstance in which a power of attorney would entitle a person to vote for another. That is where the power of attorney extends to the person seeking to vote full authority over the use of the water right for the ensuing irrigation season. Such a power of attorney should be acknowledged before a notary public and filed for record with the county recorder before being accepted as authorization to vote at a water district election.

The guidance provided in this memorandum is based solely upon IDWR's interpretation of the statutory provision and is not an opinion of the Office of the Attorney General.

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

November 20, 1992

Kent W. Foster, Esq.
HOLDEN,KIDWELL,HAHN & CRAPO
West One Bank
P.O. Box 50130
Idaho Falls, ID 83405

Dear Kent:

This letter responds to your request of October 27, 1992 asking for my thoughts and comments or reference to prior decision or opinion on several questions relating to voting in water districts under I.C. § 42-605 and § 42-605A. My response to your questions is based solely upon IDWR's interpretation of these statutory provisions and should not be construed to represent an expression of the views of the Office of the Attorney General unless reference is made to a prior Attorney General opinion.

Question 1: How, pending the ultimate court decree in the Snake River Basin Adjudication Proceeding, is it determined, for voting purposes under § 42-605 (and § 42-605A), whether a particular claimed right is sufficiently valid? What criteria is a credentials committee to use?

Response: The list of water rights entitled to be voted under I.C. § 42-605 and § 42-605A is comprised of and limited to those water rights which have previously been "adjudicated or decreed by the court" or are "represented by valid permit or license issued by the department of water resources." I.C. § 42-605.

Question 2: Idaho Code § 42-605(4) speaks of voting by "water users present," "each person present," and "a person present." Section 42-605A(6) has similar language, "each person present," and "a person present." We wonder if this means present either in person or by proxy? In other words, can someone such as a contract purchaser or a tenant, vote, if duly authorized by a written proxy or power of attorney from the owner? Since the language discusses "owning or having the use for the ensuing season" it seems like a contract purchaser or tenant might have been anticipated in the statutory language. It appears clear that a corporation can designate someone on its behalf to cast a vote (§ 42-605(7)).

Response: The Department in the past has advised that a proxy vote should not be allowed in water district elections in the absence of the owner of a water right, except that in the absence of the owner a right may be voted by another person present who has the use of the right for the ensuing irrigation season such as a contract purchaser, tenant, renter or lessor. The Department concurs with your reading of I.C. § 42-605(7) which authorizes a water delivery organization to designate someone to cast a vote on its behalf.

The Department's interpretation rejecting the use of proxies under § 42-605(4) as described above is supported by a comparison of the language in the statute with the language in I.C. § 42-2401(3) which specifically provides for the use of proxies in irrigation or canal company elections for the election of directors and to transact any other business of the corporation. I.C. § 42-2401(3) authorizes those "stockholders who are represented in person or by proxy" to vote at the regular annual meetings of the corporation.

Question 3: If not by written proxy or power of attorney, how does one satisfactorily demonstrate he has "the use for the ensuing season" of a particular right? Is a copy of the sale contract or lease agreement adequate?

Response: A contract, lease agreement or similar written document is considered adequate to demonstrate that a person is entitled to the use of a water right for the ensuing season.

Question 4: What specific documents does a credentials committee consult to determine the list of the rights entitled to vote? For instance, assuming the district officials desire to have a list of valid rights prepared before the annual meeting so that when the people come it is possible to check any claims of "having the use for the ensuing season" against the list of valid rights, how would the Department suggest they go about such preparations?

Response: Idaho Code § 42-606 requires watermasters to make an annual report to the Department prior to the expiration of the watermasters's appointment for the current year. This report is to show the total amount of water delivered by the watermaster during the year, the amount delivered to each water user, the total expense of delivery and the apportionment of expenses among users and all debits and credits to be carried over to the following year. The watermaster report together with a list of the water rights in the district should provide the credentials committee with the information necessary to determine the list of

rights entitled to vote. The Department will made available an updated list of the water rights in the district prior to the annual water district meeting if requested.

Question 5: And, under either § 42-605 or § 42-605A, if the right has not previously been assessed, how does the district go about determining the "dollar amount and any fraction thereof which the right would have been assessed had it existed and been reasonably used when water was available under the priority of the right during the previous season"?

Response: The method of determining the vote to which a right not previously assessed is entitled requires a good faith estimate of the amount of water which would have been delivered under the right had it been used during the previous season. The process for making this estimate requires a review of the water delivery records of the district to determine the number of days that the right would have been allowed to divert water during the previous season given the available water supply and the priority date of the right in question.

Once an estimate of the amount of water that would have been delivered is made it is necessary to multiply this number times the dollar amount per unit of water delivered used to determine water user assessments in the district. The total dollar amount that would have been assessed had the right been delivered in the previous season equals the number of votes that the owner of the right is entitled to cast for that right.

I hope that these responses to your questions are adequate for your needs. Please let me know if I may provide further assistance.

Sincerely,

Phillip J. Rassier

PHILLIP J. RASSIER
Deputy Attorney General
Department of Water Resources

cc: Skip Jones - Eastern Region