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RE: Water Administration Concerns in Basin 34

Dear Legislators;

Thank you again for allowing us to meet with you on Feb. 16, 2012, in Boise, to discuss issues involving water management and regulation in the Big Lost River Basin. At that meeting we were asked to provide you with a letter listing four to six items we feel IDWR and Water District 34 should initially focus on to improve the administration and distribution of water resources within the basin. We will try to do that in a constructive manner below.

1.) Provide for the required measuring facilities needed to properly regulate and account for surface water diversions of the Big Lost River.

Idaho Administrative Code Rule 37.03.12. 025.03. Gage Station or Other Flow Measuring Facility. A gage station or other flow measuring facility, as approved by the director, shall be located at the Howell Gage, Chilly Bridge, 2-B Gage, Leslie Gage, Moore diversion, Arco diversion and Arco Gage. The Howell, 2-B and Arco gages shall be maintained as part of the USGS Cooperative Program, or equivalent measurement program, and operated continuously. Water District 34 shall continue to contribute to the maintenance and operation of these gage sites in the same proportion as is currently contributed. All other gages shall be operated when water diversions, other than solely storage in Mackay Reservoir, are being made from the river. The cost of installation, operation and maintenance of these other measuring facilities is the responsibility of Water District 34. (10-26-94) (emphasis added)

Water administration can be no better than the tools that are given to those who are responsible for that administration. There are currently gaging stations at the Howell Gage, 2-B Gage, Leslie Bridge, and Arco Gage as the rule requires, but none at the Moore or Arco diversions. Some administrators and water users would argue there are alternative methods available for measuring water flows at these two diversions, but they are problematic and often lead to violations of other rules and injury to other water rights. It is quite clear in the rule what is required and who is to pay for it. The water district needs to accept its responsibility and begin immediately to perform this critical function of accounting for and measuring the flows of the Big Lost River at every reach of the river.

2.) Require water users to comply with the Rules by notifying the watermaster when they intend to use water so as to avoid confusion, inefficiencies, and conflict of interest issues.

37.03.12.040. ALLOCATION OF NATURAL FLOW (RULE 40).

01. Administration of Surface Water Rights. Administration of surface water rights is based upon the list of water rights approved for interim administration by the court or as subsequently decreed by the court in the SRBA. Water not diverted or rotated for credit is available for the next in time water right. Natural flow rights are delivered to the point of diversion with no conveyance loss assessment. 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. (10-26-94)

a. All natural flow will be allocated based upon a four (4) day moving average of the natural flow computed by the watermaster. (10-26-94)

b. All water deliveries must be called for by the water user at least forty-eight (48) hours in advance of the actual water delivery. Water which can be delivered by the watermaster in less than forty-eight (48) hours may be used by the water user. (10-26-94)

c. The water user must notify the watermaster of the water users intent to use water as required by Rule Subsection 040.05. (emphasis added)

05. Notice to Initiate Delivery. Water users must initiate delivery of their water right(s) by notifying the watermaster that they are ready to put water to beneficial use. (10-26-94) (emphasis added)

Currently water users are allowed to call for their water in a number of ways. The most common is to contact the ditchrider of the lateral or canal which is operated by the largest water right holder in the basin (Big Lost River Irrigation District) which arguably has a conflict of interest with other water right holders. These irrigation district ditchriders are also employed as deputy watermasters for "purposes of convenience" because they are working on the laterals and canals, and the water district advisory committee and watermaster (who are elected by the majority of the irrigation district patrons) are trying to save budget dollars. The problem is that the ditchriders are more loyal to their major employer (the irrigation district) than to their role as deputies.

The second half of this problem is the method of accounting for water deliveries used by the irrigation district. This method is based on "reverse math" and relies on ditchrider field notes showing water delivered to the field head gate subtracted from lateral and canal headings they also control. The watermaster then in turn relies on these reports to determine how much water is at the headings and what "color it is" (natural flow, rotation credit, storage allocation, or ground water). The real problem stated simply is the watermaster is relying on the irrigation district to do his/her job.

Water users should be required to notify the watermaster or impartial deputies, who do not have a "conflict of interest", as per the rule when they ready to put water to beneficial use. The watermaster should then be required to account for the diversions of water from the public resources (both surface and ground) independent of the irrigation district and/or canal companies.

3.) The proper and equitable delivery of water supplies from Canals and Laterals.

Rule 37.03.12.040.08. Canal or Lateral Delivery. In the event a water user feels inappropriate delivery of natural flow water is occurring on any lateral or canal, the water user can request the watermaster to investigate. In the event the watermaster determines that delivery of natural flow water rights within a lateral or canal is being improperly conducted he shall: (10-26-94)

a. Notify the ditch rider and the water delivery entity of the results of his investigation and coordinate efforts to make proper delivery of the natural flow. (10-26-94)

b. If the situation has not been sufficiently resolved within twenty-four (24) hours the watermaster will notify the director who may take all actions authorized by law to remedy the situation. (10-26-94)

The proper regulation of water supplies at the points of diversion from the public resource is a prerequisite to the subsequent regulation of water supplies once they are introduced into the canal or lateral conveyance system. The Director of IDWR has been very reluctant to venture into these conveyance systems where most of the abuse and mismanagement has occurred in the past. If the point(s) of re-diversions at field head gates are mis-measured or not measured at all in a co-mingled water supply system the injury to water users is obvious. This type of mismanagement was explained in a recent response to an IDWR query:

Feb. 14, 2012, letter to IDWR, RE: Response to Letter Dated February 6, 2012 Regarding Water Supply Bank Applications to Lease and Rent Water Right Nos. 34-7052 and 34-7110.

As we understand it, BLRID historically utilized (and still utilizes, although now much better monitored) a measurement methodology we have referred to as "reverse math." The idea is that BLRID first measures the amount of water diverted into the system. They then rely on ditch riders to measure diversions from the system. They then subtract the measured diversions from the system from the amount of water in the system, and the difference is determined to be conveyance loss, or "shrink." For example, if there are 10,000 inches of water going into the system, and the ditch riders determine that there are 4,000 inches being diverted, the resulting 6,000 inches is presumed to be conveyance loss, and therefore, there is 60% shrink. The problematic part of this methodology is that this calculation is that it does not account for stolen water, mis-measured water, inadequate measuring devices, or those diversions that have no measuring device. Using my above example, there could be 3,000 inches stolen in the system, and it would simply be accounted as shrink. Thus, where the actual conveyance loss (lost in the ground and evaporated) is 30%, BLRID would calculate shrink as 60%.

A further description of this problematic methodology and its' effect on water users was provided by the District Court in a recent civil lawsuit (Case No. CV-10-64). We quote from that MEMORANDUM DECISION AND ORDER, at page 8:

> While use of the Moore Canal has occurred historically, the record reflects a number of potential problems with the continued use of the Canal. There is no dispute that Plaintiffs have suffered and would continue to suffer a significant amount of water loss through the Canal. While some loss would arise from typical shrinkage, more troubling is the evidence that Plaintiffs also would bear the brunt of stolen water as well as unmeasured or improperly measured water diversions. The evidence is undisputed that there have been large fluctuations in delivered water and the Plaintiffs, when using the Moore Canal, have not consistently received their proportionate share of water when considering the volume of water put into the Canal. The evidence establishes that use of the Canal has been very inefficient in delivering water to Plaintiffs such that they have been unable to irrigate the full amount of acreage authorized by the water rights.
>
> Additionally, use of the Canal as a delivery system would be permissive only. While the evidence establishes that it is likely the District would agree to transport water to Plaintiffs, there would be no assurance or certainty that the District would continuously transport via the Canal. The record also reflects that certain conditions imposed by the District in its transport agreements would be undesirable if not unconscionable. Anyone intending to expend significant resources in

reclaiming the arid lands would certainly have to question the wisdom in doing so if the only way to irrigate the land was through the District's Moore Canal.

4.) It is unlikely that water users will elect a watermaster that is committed to enforcing the water distribution rules on an impartial basis, and that is willing to comply with the rules himself.

Virtually every distribution rule or regulatory requirement involves the local watermaster in some manner. Water users understand how the rules can be misinterpreted and applied so as to have a significant impact on how much water they will receive. Similarly, water users also have learned how to use those rules to their benefit and/or to the harassment of others. The only way to avoid these abusive practices is to enforce the rules in a uniform and universal manner. From a political or practical perspective, water users are unlikely to elect or re-elect a watermaster they believe will not allow the system to continually be gamed to their advantage.

Listed below are some recent examples how the rules were not properly enforced and/or complied with. In some instances it was a matter of not knowing the rule, and in some instances it was a matter of willful noncompliance.

a.) During the 2011 irrigation season the watermaster allowed or conducted the unauthorized diversion of water into managed recharge sites in non-compliance with the plan of operation rules. Those rules require a minimum of 60 cfs of flow at the Arco Gage prior to any recharge diversion from the Big Lost River and connected tributaries. At the time these unlawful diversions were occurring, the flow at the USGS monitored Arco Gage was transparently recorded to be less than 60 cfs. When the watermaster was questioned by the chairman of the recharge committee as to why he was not complying with the plan of operation provisions, the watermaster said "he knew what was better for the valley than the rule".

b.) During the 2011 irrigation season the watermaster allowed or conducted the unauthorized diversion into an alternative river channel pursuant to Rule 030.01 causing the Moore Diversion to Arco Diversion reach of the river to be de-watered. Concurrently, the lower canals (Arco and Munsey) were used to carry the excess portion of those same water supplies into the Arco Desert. Those water supplies which were lost to the basin should have been left in the river channel so they could have been added to the river measurements and calculations used to determine the priorities available to satisfy other surface water rights. This practice is a gross misuse of the rule.

c.) Further up the basin, canals (Darlington, Burnett, and Hanrahan) were also filled with more water supplies than what was needed to satisfy deliver calls. The results were again extended periods of time when excessive "tail or waste" water flowed onto adjacent lands causing flood damage. The watermaster should have been accounting for this water independently of the canal owner, and not allowed any more water to be diverted into the canal(s) than what was needed to satisfy the actual delivery calls.

d.) Towards the end of the 2011 irrigation season, water users were allowed to "rotate into credit" natural flows they did not immediately need to apply to their lands pursuant to Rule 040.02. The abuse of this rule was the rotation into credit of natural flows so late in the season (September 15 – October 15) it violated the sub-provision (d.ii.) of the same rule. *"The water user must have operable delivery and use facilities and an actual need for the water on the land in the year rotation is sought."* (emphasis added) Those water supplies that were never really needed by the water user, were ultimately forfeited to the irrigation district at the end of the season, and subsequently were never made available for the next surface water user in priority during the same irrigation season.

e.) During 2011 some diversions on the tributary to the Big Lost River (Antelope Creek) were controlled and regulated by the water user(s) themselves. Why the watermaster or his deputy would abrogate his duty so blatantly is beyond our understanding.

We hope this listing of the above examples is not too lengthy or monotonous for you to understand the myriad concerns that really do exist in the Big Lost River Basin. The short version is water users must be willing to comply with all of the rules, IDWR must be willing to continue providing guidance and instruction to those water users, the Director must insist and require the watermaster enforce the rules uniformly and universally throughout the basin and then defend the watermaster when water users fail to comply with that uniform and universal regulation, and lastly the watermaster must be willing to comply with the rules himself and then be willing to enforce those rules without regard as to whether or not he will be re-elected.

Again we thank you for your time and attention to these most important matters. If you have any questions we would be happy to answer them by phone, or we are more than willing to travel to Boise this week to answer those questions.

Our Best Regards,

Loy Pehrson

Jay Jensen

Mitchell Sorensen