



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

May 19, 2014

Patrick D. Brown
516 Hansen Street East
P.O. Box 125
Twin Falls, ID 83303

Re: Your correspondence dated May 5, 2014 regarding delivery of water above Mackay Reservoir in Water District 34

Dear Mr. Brown:

I have reviewed your correspondence of May 5, 2014 seeking clarification concerning delivery of water above Mackay Reservoir in accordance with the Snake River Basin Adjudication (“SRBA”) General Provisions for Basin 34. Your letter specifically asks whether the Idaho Department of Water Resources (“IDWR” or “Director”) and the Water District 34 watermaster will comply with General Provision (“GP”) 6.c., concerning futile call determinations above Mackay Reservoir. You also ask that I provide my “position” on this matter.

The language in GP 6.c. is unambiguous. The provision states that flows of the Big Lost River will be measured at the Pense Bridge, and on Parsons Creek at the Donahue Bridge “for purposes of determining the amount of water being supplied to Mackay Reservoir from curtailment of diversions upstream from the reservoir.” The provision further states that “These measurements will be used by the watermaster to make futile call determinations.”

Your letter, implies that GP 6.c authorizes the watermaster to solely determine a futile call. This interpretation ignores Idaho Code § 42-602, which requires the Director of IDWR to supervise the distribution of water by water district watermasters. General Provision 6.c. does not authorize the watermaster to unilaterally determine a futile call and cannot be interpreted to vitiate the Director’s statutory duty to supervise the distribution of water by the Water District 34 watermaster. Allowing a watermaster to unilaterally determine a futile call also conflicts with Rule 20.04 of the Water District 34 Water Distribution Rules (IDAPA 37.03.12.020.04), which establishes a process for a determination of futile call by the Director. IDWR’s interpretation of GP 6.c. does not conflict with Rule 20.04.

I am not aware that IDWR or the Water District 34 watermaster has intentionally “ignored” or “circumvented” GP 6.c. since it has been in effect. I am also not aware of any formal requests to IDWR from the watermaster or water users above the reservoir for a futile call determination. I am aware that the former watermaster may have attempted to determine a futile call last year without consulting IDWR in accordance with Rule 20.04 and IDWR watermaster instructions. Rule 20.04 clearly requires a determination by the Director of a futile call for delivery of surface water. The rule provides that the “Director may consult the Water District 34 advisory board, the Big Lost Irrigation District, and other impacted water users when determining whether attempting to deliver senior downstream surface water rights would be futile.”

Contrary to your assertion that IDWR has “ignored” and “circumvented” GP 6.c., IDWR recognizes the provision in its’ *Water District 34 Procedures Manual - Water District 34 Guidelines for Operation*.¹ Section 7.6 of this document provides specific guidance to the water district and watermaster regarding futile call determinations, including implementation of GP 6.c. Consistent with Section 7.6.3.3 of this guidance document, “the watermaster should make a written request for a futile call determination to the Director.” The guidance directs the watermaster to provide relevant information so that the Director can “quickly” determine whether a call for water from senior priority water right holders is futile.

Pursuant to GP 6.c., current water law, Rule 20.04 and standing IDWR watermaster guidance, the watermaster and IDWR will consider whether curtailment of junior priority surface water rights above Mackay Reservoir results in a futile effort to deliver senior rights. Before any determination, the watermaster should forward a written request to IDWR and report all diversions of water from the Big Lost River and Parsons Creek above the Pense and Donahue bridges and, measured flows of water at the two bridges so that the futile call requests can be evaluated (diversions are already reported during the irrigation season). IDWR will evaluate the information and coordinate with the watermaster as quickly as possible to determine if any continued curtailment of junior priority rights is futile.

In a footnote to your letter, you raised an issue about whether rotation to storage of natural flow water rights from the Big Lost River below the reservoir would be allowed during the period of time the river is above and below the reservoir is connected (or when rights above the reservoir are regulated in priority with rights below the reservoir). IDWR previously advised the watermaster and the water district that rotation of natural flow into Mackay Reservoir can be implemented when the river above and below the reservoir are administered separately as per the conditions of General Provision 6.a. and 6.b., but rotation cannot be implemented during the administratively connected period unless all rights senior to 10/1/1936 are satisfied.

Finally, your letter suggests that the Water District 34 Water Distribution Rules should be amended to reflect the requirement of GP 6.c. and presumably the other SRBA general provisions. To the extent there is a conflict between the rules and the General Provisions, the General Provisions supersede the rules. Although IDWR is not opposed to amending the rules, IDWR does not believe it is currently necessary to amend the rules unless there is broad support for amendment.

Respectfully,



Gary Spackman
Director

cc: Todd Perkes, WD34 Watermaster
Seth Beal, WD34 Advisory Committee Chairman
IDWR Eastern Region

¹ The Water District 34 Procedures Manual is available on IDWR’s website using the following link:
http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/PDF/BL/WD34ProceduresManual2006_B.pdf