



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

July 21, 2015

Mike Telford
1450 W Highway 24
Paul, ID 83347

Re: Delivery of Big Lost River Natural Flow Water Rights

Dear Mike:

You sent several emails to me, Tim Luke, and perhaps Cindy Yenter asking questions about delivery of Big Lost River natural flow water rights. The main question is stated in an attachment to an email you sent to me on July 6, 2015:

If the Water Master delivers the flow at the heading and his responsibility or the rules oversight of the natural flow ends what is to prohibit abuse of that right that may make it impossible for the right holder to receive the benefit of the right? . . . [A]lleged unfair treatment of the natural flow right occurs due to the way the shrink is calculated.

Chapter 6, title 42 of the Idaho Code authorizes the watermaster to administer the water rights in a water district. The watermaster administers water rights according to the instructions of the director of the Department of Water Resources. Idaho Code § 42-607 states, in part:

It shall be the duty of said watermaster to **distribute the waters of the public stream, streams or water supply, comprising a water district**, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water **from such stream, streams or water supply**, when in times of scarcity it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . . (Emphasis added).

In other words, chapter 6, title 42 of the Idaho Code vests authority for distribution of water flowing in streams or residing in other public water sources into private ditches taking water from the public water source. It does not create authority for the watermaster to assert authority to determine how delivery losses are assessed with a common canal or ditch delivering water rights held by multiple water right holders.

The Water District 34 Water Distribution Rules are promulgated to interpret and establish how statutory authorizations are to be implemented. By definition, rules derive interpretative authority from laws enacted by the legislature. The rules cannot create authority where none is given by the legislature.

In addition, guidelines or procedures issued by IDWR are just what the label portends – they are guidelines without the force of law. If a guidance provision conflicts with the legislative language, the guidance has no interpretive value.

Rule 40.01 of the Water District 34 Water Distribution Rules states:

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. . . . 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.** (Emphasis added).

The last sentence, if standing alone, can be interpreted in two ways. First, if there were no authorizing statute, one could interpret the sentence to mean that individual water rights delivered through the private canals owned by the Big Lost River Irrigation District must each be “assessed the conveyance loss for the canal through which the water right is delivered,” and that the watermaster for the water district must oversee the loss assessment to each water right holder.

By consulting previously quoted portion of Idaho Code § 42-607, it is clear that the watermaster’s authority (and the director’s) does not extend down the private ditch or canal to determine and enforce loss assessment against the water right holders who receive water from the private canal.

This interpretation might lead one to determine that Rule 40.01 conflicts with Idaho Code § 42-607, and cannot be enforced. Alternatively, there is one example of delivery of Big Lost River water where a canal is deemed to be the river channel, and the watermaster delivers water from the canal. The canal is the Eastside Canal. The Big Lost River flows have historically been placed in the Eastside Canal during certain times of the irrigation season. Rule 30.01 discusses when “the Eastside Canal is considered to be the river channel for water delivery accounting purposes.” The pertinent portions of Rule 30 state:

01. Eastside Canal. The watermaster, with the approval of the director and after consultation with the Big Lost River Irrigation District, may\ elect to deliver the natural flow of the river through the Eastside Canal when the following conditions are met:

a. The full flow of the river, including impounded water, to be delivered downstream of the Moore diversion is not greater than the capacity of the Eastside Canal.

b. More natural flow water can be delivered to calls for natural flow than could be delivered by using the natural river channel.

c. No water right is injured.

d. Measuring devices of a type acceptable to the director are installed maintained where the flow leaves the river channel and where it returns to the river channel.

f. Conveyance losses in the Eastside Canal, when considered to be the river channel, shall be proportioned between the river flow, the diversion from the Eastside and pumps that inject ground water into the Eastside Canal. The proportioning will be based upon the ratio of total Eastside diversion and injected ground water to the total inflow to the canal.

The operation of the Eastside Canal, when it is deemed to be the river channel, gives force and effect to the provisions of Rule 40.01. When water delivered through the Eastside Canal as the river channel, water "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."

Guideline 3.2.1.1 states the watermaster shall "perform immediate oversight/supervision of the Big Lost Irrigation District personnel also deputized by the Water District to be certain of proper delivery of natural flow water rights within irrigation district canals." This passage directs the watermaster to ensure that water is being diverted from the Big Lost River to satisfy water rights that are entitled to delivery according to priority and that the holders of the water rights in priority are receiving the water diverted after assessment of losses by the BLRID.

Guideline 3.2.9.1 states that the watermaster must "regulate water rights by both point of diversion and place of use." The instruction is found under the heading of "Curtail illegal diversions". The guideline establishes that the watermaster should prevent diversion of water when there is no water right and should prevent use of water on a place of use when the use is not authorized. The language does not create authority for the watermaster to assess losses in a private canal or ditch.

I hope this letter has answered your inquiries. I look forward to visiting with you on July 28.

Sincerely,

A handwritten signature in black ink that reads "Gary Spackman". The signature is fluid and cursive, with the first name "Gary" and last name "Spackman" clearly legible.

Gary Spackman
Director