

NELSON, ROSHOLT, ROBERTSON, TOLMAN & TUCKER

Chartered

ATTORNEYS AT LAW

142 3rd AVENUE NORTH

P.O. BOX 1906

TWIN FALLS, IDAHO 83303-1906

TELEPHONE (208) 734-0700

FAX (208) 736-0041

THOMAS G. NELSON  
JOHN A. ROSHOLT  
J. EVAN ROBERTSON  
STEVEN K. TOLMAN  
JAMES C. TUCKER  
TERRY R. McDANIEL  
GARY D. SLETTE  
F. BRUCE COVINGTON  
JERRY JENSEN  
CAROLYN M. MINDER  
BRUCE M. SMITH  
G. RICHARD BEVAN  
BRAD M. PURDY  
GARY L. QUIGLEY  
TIM J. WILLIAMS  
SHARON F. DUNKIN

Boise Office  
1020 MAIN ST., SUITE 400  
P.O. BOX 2139  
BOISE, IDAHO 83701-2139  
TELEPHONE (208) 336-0700  
FAX (208) 344-6034

December 1, 1989

RECEIVED  
DEC 4 1989

CERTIFIED MAIL

Big Lost River Irrigation District  
Attn: Board of Directors  
101 S. Main Avenue  
Mackay, ID 83251

Department of Water Resources

Dear Board Members:

Our law firm represents the interests of a group of individuals who have affiliated under the name of the Big Lost River Water Users Association. Given the nature of the recent IDWR conference conducted in Arco, as well as the recent newspaper articles, I am led to believe that you are aware of the group's existence. During the time of my involvement with the group, I have become aware of practices engaged in by your district which: (a) directly contravene Idaho state law, and (b) affect the amount of water available to fill the Association's members' water rights. On their behalf, I would like to raise those issues, and discuss herein the particular aspects of the law which pertain to them. It is my fervent hope that this letter will serve as an educational tool without having it perceived as a threat.

From information I have received, it is apparent that the district is engaging in the transport of water to lands other than those to which the water right is appurtenant. Transport agreements have been executed on an annual basis whereby water is wheeled to different land, both inside and outside the district, despite the fact that no application for transfer has been approved by the Idaho Department of Water Resources. This practice is directly contrary to Idaho law. Specifically, Idaho Code §42-222 provides that before such water may be delivered, an applicant must submit an application to the IDWR to change the place of use of such water. Notwithstanding the fact that an individual may be required by the department to first show that he has received district approval prior to IDWR approval, the district is still precluded from delivering that water to lands other than that to which it is appurtenant until such time as the IDWR has approved the requested transfer. Past and future deliveries of

water to land other than that to which it is appurtenant is violative of Idaho law. The statute envisions that notice of any such proposed transfer be published so that there is an opportunity for protest to the application. Since "local public interest" is one of the criteria to be considered by the department in such applications, that opportunity for notice and hearing must be afforded to interested individuals.

Another practice that has occurred with the district's consent is the delivery of surface and storage water to lands outside of the irrigation district. Such conduct has previously been the subject of a number of Idaho cases, all of which have uniformly held that contracts for delivery of water outside the district are ultra vires, i.e., beyond the authority of the directors of an irrigation district. Whether the district does or does not hold legal title to the water is immaterial; the district is precluded from changing a place of use of water on its own initiative. I am certain that your attorney can explain to you how Idaho's water law, particularly as it pertains to irrigation districts, is applied in this respect. Whether water is being supplied outside the district by virtue of "pumping for credit" or credited on the district office books as "pump water" does not render the district's practice legal. The statutes have apparently been ignored for a number of years, and a declining aquifer coupled with a drought has rekindled action on the part of the Big Lost River Water Users Association. On their behalf, I am respectfully asserting their demand that these illegal practices cease immediately, and that these practices be abandoned for the future.

The Big Lost River Irrigation District is a quasi-municipal entity, and its directors subject themselves to liability for operating outside of the parameters established by state law. It is our firm desire that this matter be resolved without the necessity of resort to judicial intervention. The law, as currently interpreted, should be sufficient to preclude the continuation of such practices. In the event the district, under the direction of its board of directors, continues its former course of action, we will have no choice but to seek injunctive relief in the courts. I urge you to consult with your legal counsel to determine the propriety of the past actions. The board's legal duty is to serve all the landowners who own land within the district, and not the interests of those individuals who wish to receive district benefits on lands not included in the district. A board member's duty is a fiduciary duty to all those who own land within the district.

Page 3  
December 1, 1989

Once again, I would ask that you strongly consider the contents of this letter in your decisions to guide the district within the framework of Idaho law. Should you or your attorney desire to discuss this matter at greater length, I would be pleased to make myself available for that purpose.

Yours truly



Gary D. Slette

GDS/mw  
39781

cc: Governor Cecil Andrus  
Keith Higginson  
Norm Young  
Larry Reynolds  
Dale Smith  
Lew Rothwell  
Lawrence Babcock  
Charles Brockway