

4253 Antelope Road
Moore, Idaho 83255

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July 10, 2006

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DEPARTMENT OF
WATER RESOURCES

Nick Miller
Water Distribution Section
322 East Front Street
PO Box 85720
Boise, Idaho 85720

Dear Nick Miller:

This letter is in response to your recommendations for operations of Water District No. 34, Big Lost River, dated May 19, 2006. Many water right holders that did not sign the March 17th letter have concerns about water distribution in District 34 and would certainly support a system that is fair, equitable, and when applied is consistent and conforms to Idaho Water Laws and the IDWR Administrative Rules.

I am relieved that the removal of the water master will not be based entirely on signatories as his job in District 34 is extremely difficult and would become more so if threatened by small groups when actions do not satisfy their positions. I do not understand why the reference to Antelope Creek as being administered in priority with the Big Lost River when the complaint is against the water master. The unknown reasons for this reference has initiated this response.

Many of your recommendations would certainly improve the operation of WD34. Conforming to the Idaho Open Meeting Laws is necessary to apprise concerned water users of meetings that may affect their interest. If recommending the Advisory Committee to have a more active role in the District means more authority, then it may not be in the best interest of all water users in WD34. Committees, at times, tend to usurp their authority and act outside the scope of their authority. This was evident at a night meeting in May of 2005 when the WD34 Advisory Committee moved "we use Antelope Creek water presently reaching the Moore diversion to be allowed for the first 1/3 mitigation requirement". The motion was passed with one abstention and in the absence of the Antelope Creek representative. It is my understanding that many members of the Advisory Committee are also the ones that signed the March 17th letter registering concerns about the operation of WD34 including the 2006 election of the water master.

You are correct in stating, "The rules governing distribution of water in WD34 are complex and it appears that knowledge of rules and interpretation of the rules, both by the water master and water users is often inaccurate or incomplete." It is also difficult to understand how the rules governing surface and ground water administration are applied in WD34 and why the Prior Appropriation Doctrine is not applied to both surface and ground water rights as required by Idaho law, IDWR water rules, orders, etc. In reviewing the following items it would seem that requests for delivery of water to senior surface water rights similar to the Jensens' call in the spring of 2004 would be executed

by applying priority rights of surface and ground water. The points of interest that were made in responding to this call are given below.

1. WD34 procedures manual 8.3 states "Rule 50 established that all ground water rights within the Big Lost Basin are subject to conjunctive administration, except as follows:" The exceptions are listed under 8.3.1.1, 8.3.1.2, and 8.3.1.3 and does not include Antelope Creek water rights.
2. IDAPA 37.03.12.01 (Rule 50) Conjunctive Administration of Ground and Surface Water Rights states "All ground water rights shall be administered conjunctively as part of the Big Lost River and tributaries unless the ground water users can show to the satisfaction of the director, that due to well construction or location, the diversion of ground water from a particular point of diversion does not reduce the flow of the Big Lost River above the last (most downstream) diversion from the Big Lost River."
3. Hydraulic connection is established by Basin Wide 5 Order which states "all water-ground and surface- is deemed to be hydraulically connected unless it is specifically exempted"
4. General provisions 5 and 6 lists water rights exempted from administration of all other surface water rights in Basin 34.
5. General Provision 7 states "Except as otherwise specified above, all other water rights within Basin 34 will be administered as connected sources of water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law." This statement includes Antelope Creek.
6. IDAPA 37.03.11.020.02, Rule 20 states "These rules acknowledge all elements of the prior appropriation doctrine as established by Idaho law"
7. Several facts were given in response to the Jensens' delivery call that illustrates how conjunctive management rules were applied in WD34.
 - a. Finding of Fact 20 providing data that the development of ground water rights is the reason for insufficient surface water to satisfy the Jensens' water right.
 - b. Finding of Fact 32 supports the contention that senior surface water rights were administered prior to junior ground water rights in administering priority water rights. Applying the prior appropriation doctrine in reverse order (curtailing senior surface water rights before curtailing junior ground water rights) has the effect of curtailing Antelope Creek senior water rights while allowing out-of-priority diversions by junior ground water rights and at the same time satisfying the call of the senior surface water users. Applying priority rights in this order will result in Antelope Creek water users suffering most of the material damage that is caused by junior ground water diversions. This application of the prior appropriation doctrine is extremely difficult to understand.
8. You noted that Antelope Creek is administered on the same priority as the Big Lost River, unless a futile call determination has been made. You failed to

mention all other tributaries that are also subject to administrative in priority with the Big Lost and that ground water rights should be administrated in priority with surface and ground water rights. The prior appropriation doctrine and futile calls also apply to ground water rights.

9. In a letter dated May 17, 2004, to Mr. Duke responding to his request "Requesting Futile Call Determination" it was stated, "until a futile call determination has been issued by the Director, all water deliveries must continue to be made based on prior appropriation" This letter does not appear to deal with the prior appropriation doctrine as required by the Idaho Law or the rules of administrating surface and ground water rights.

10. The response to water administration in WD34 is much different than the response in Water Districts 120 and 130 where the Director ordered ground water holders of junior priority ground water rights to provide replacement water pursuant to a plan of curtailment based on the priorities of the rights would be required to the extent mitigation for out-of-priority depletions was not provided.

It is understandable that the issues addressed in this letter are of little concern to the group signing the March 17th letter as most have wells to supplement their surface water rights and benefit by applying priority water rights to surface water users only.

I would appreciate your addressing my concerns, which are summarized below

1. Will the prior appropriation doctrine be applied in District 34 as in District 120 and 130?
2. Suggestions for oversight of the WD34 Advisory Committee.
3. Why isn't the Advisory Committee selected on a weighted vote (based on water usage) as required in selecting the water master?
4. How is the recharge committee selected? There was no recharge effort in the Antelope Valley during 2006. This spring a water user requesting to recharge a gravel reach of Antelope Creek was refused by a member of the recharge committee.
5. Who provides oversight to the BLRID when their decisions affect water distribution throughout WD34? An example is when responding to the Jensens' call in the spring of 2004 the BLRID refused to allow storage water for mitigation which was listed as the second order of preference for mitigation water under the WD34 Mitigation Plan. There was little or no attempt to require storage water as replacement water as there was in WD120.
6. Is there documented evidence that Bob Duke's management of WD34 is contrary to previous water masters? The complex changes taking place in the administration of surface and groundwater is a challenge to any water master and the IDWR. I believe a transition period to adjust to these changes is more appropriate than a call for Mr. Duke's dismissal. Aren't the real problems facing WD34 the fact that far too many wells were granted and the expansion of too many irrigated acres resulting in many water users scrambling for survival?

I would appreciate your addressing my concerns, which are also the concerns of many water users throughout WD34.

Sincerely,


Tom C. Waddoups

Upper Antelope Creek water user

Cc: IDWR Director

Bob Duke, WD34 Water Master