



State of Idaho

DEPARTMENT OF WATER RESOURCES

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November 28, 2006

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1000 RIVERWALK DR STE 200
IDAHO FALLS, ID 83402-3304

RE: LETTER OF NOVEMBER 14, 2006

Dear Mr. Foster:

IDWR received your letter dated November 14, 2006, which is attached for reference. In that letter, you raised several issues related to voting and assessments, withdrew the March 17, 2006 petition for watermaster removal, and recommended a number of additional tasks intended to further improve Water District 34 (WD34). IDWR issued an order on November 22, 2006 dismissing the contested case involving the petition for watermaster removal, and this letter is a response to the remaining issues discussed in the November 14, 2006 letter.

In the third paragraph of your letter, you raised a concern regarding how the voting is to be conducted at the 2007 Water District 34 Annual Meeting if one or more users requests voting by the second method described in Idaho Code §42-605(4), commonly called "voting by dollars." Specifically, you question whether there is a change in IDWR's position regarding the use of a five-year average for calculating an individual's number of votes for the 2007 WD34 meeting.

Based on discussions with legal staff, the recommendation that voting be based on less than a five-year average until 2011, as discussed during a May 4, 2006 meeting and presented in a May 19, 2006 letter from IDWR, is not consistent with Idaho Code §42-605(4) and should not be implemented unless it is adopted unanimously by resolution of WD34 users.

Idaho Code §42-605(4) states that each person entitled to vote, "shall be entitled to a number of votes equal to the average annual dollar amount and any fraction thereof assessed for that person's qualifying water right for the previous (5) years, or such lesser number of years as the right has been assessed." The statute clearly states that the number of votes is based on an average dollar amount of assessment. Although the amount of assessment is based on delivery volumes, and although the historical record keeping issues identified in WD34 indicate that the volumes delivered are uncertain, the actual dollar amount assessed for those years is certain. As such, to be consistent with Idaho Code §42-605(4), each user's number of votes must be based on a five-year average of the assessed dollar amount.

In paragraph four of your letter, you state, "The Water District has not historically levied an assessment against the Big Lost River Irrigation District (BLRID) for delivery of water stored pursuant to its storage water rights as required in Idaho Code §42-801."

Idaho Code §42-801 states that, "The owner of any reservoir... shall... pay to the water district, if there is one, a sum based upon the cost of delivering a unit of water. Said charge by the water district will be determined and collected in the same manner as prescribed in chapter 6, title 42, Idaho Code, for compensating the watermaster for delivery of natural flow water."

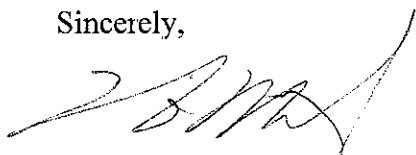
Water District 34 assesses the water users for delivery of BLRID storage water, rather than assessing the BLRID directly. Storage water and natural flow deliveries are assessed in exactly the same way by WD34. A similar approach is taken by Water District 01 where the storage deliveries are assessed to the canal companies at the canal heading, rather than the storage right holder (US Bureau of Reclamation). The current manner of collecting payment by WD34 for delivery of BLRID storage water is acceptable to IDWR and is consistent with other water districts in Idaho.

The fourth paragraph of your letter also refers to voting by the irrigation district. Idaho Code §42-605(7) provides for an irrigation company to designate a person to cast a vote on its behalf. The BLRID has not historically designated a person to vote in WD34 elections, but the users that pay the assessments for delivery of BLRID storage water are effectively voting for the BLRID, since their votes are based on total assessments that include assessment for their portion of storage water deliveries.

The remaining paragraphs of your letter, and the attached list of six "Improvement Tasks Relating to Water Regulation and Accounting from Water District 34" emphasize that continued effort to improve WD34 is needed and expected by the users. IDWR agrees and will continue to work with WD34 to implement needed improvements.

Please feel free to contact me or other IDWR staff if you have any questions.

Sincerely,



Nick Miller
Water Distribution Section

Enclosures: Letter from Kent Foster to Gary Spackman dated November 14, 2006, *RE Water User Meeting Scheduled for November 1, 2006*

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November 14, 2006

Gary Spackman
Idaho Department of Water Resources
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RE: Water User Meeting Scheduled for November 1, 2006.

Dear Mr. Spackman:

We are again writing on behalf of the individuals named in our letter of March 17, 2006. They, and we, attended the meeting held in Mackay, Idaho, on November 1, 2006, where we were able to hear from Mr. Nick Miller of IDWR and Bob Duke, Watermaster of Water District #34. We were able to ask questions and obtained a good deal of information regarding the measuring, record keeping and accounting work of the Watermaster, as verified and assisted by Mr. Miller, during this past irrigation season.

It appears to our clients that much progress has been made in correcting the administration of the Watermaster's duties. Although there are improvements still needed, it seems that, for the first time in many years, there will be adequate information available upon which to base a reasonably proper assessment to all to whom water was delivered in 2006 and hence provide for proper voting at the coming annual meeting.

We have recently been advised that a change from the position articulated by Mr. Miller in paragraph 5 of his "Recommendations for the WD34 Advisory Committee" of May 19, 2006, is possibly being considered. If it is proposed to use the average from the existing records for 2002, 2003, 2004, 2005 and 2006, then we strongly object. There is no legal obligation to use data known to be inaccurate and insufficient, and to do so would clearly defy the statutory requirements and plain good sense. The data from 2002, 2003, 2004 and 2005 were incorrect and much was even missing. Mr. Miller's recommendation is the only proper way to get on the right track.

We have also been informed that the Water District has not historically levied any assessment against the Big Lost River Irrigation District (BLRID) for delivery of water stored pursuant to its storage water rights as required in Idaho Code § 42-801. We point out further that Idaho Code § 42-605 contemplates that such assessments must be levied and that there is even a specific provision in Idaho Code § 42-605(7) for voting by an irrigation district as the holder of a water right or rights

From a review of District 34 delivery records for 2006, it appears there is arguably adequate data to levy assessments for delivery of water under natural flow rights, including any rotation credit water, storage water rights (to the BLRID) and even recharge rights. There may still be a dispute over whether some of the water delivered was "excess water" delivered pursuant to permission of the Director, or should have been delivered as "recharge" under one or more recharge rights

But, based on a review of the data available from deliveries in 2006, and the work done by IDWR as reported by Mr. Nick Miller, to correct the measuring of water deliveries and properly accounting therefore, the individuals named in our March 17, 2006, letter have instructed us to withdraw their request for a hearing on removal of the Watermaster. One more time we reiterate that the main objective of our clients has been to have IDWR make the investigation provided under Idaho Code § 42-605(9) and correct the measuring, recording and accounting procedures of Water District 34, to provide for proper assessment and hence voting as required by the applicable statute and rules

We also hasten to add that we do so with the understanding that the improvements implemented in 2006, as reported by Mr. Miller at the November 1 meeting, will continue, and that the conclusions and recommendations presented by him at that meeting will also be implemented by WD34 through appropriate resolutions and budgeting. Specifically, those conclusions and recommendations are as follows:

Conclusion #1:

- Improved Measurement devices and techniques are necessary

Recommendation:

- Maintain and/or improve devices where necessary
- Install staff gages at each measuring device prior to start of next season

Conclusion #2:

- Additional records would help reduce errors and aid oversight efforts

Recommendation:

- Ditch rider logs should indicate gage height.

Gary Spackman
Idaho Department of Water Resources
November 14, 2006
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- WD34 staff should enter gage height data into IDWR internet app. and should use bulk loading to indicate measured vs estimated vs interpolated data.

We are also enclosing a sheet containing "Improvement Tasks Relating to Water Regulation and Accounting from Water District 34" prepared by our clients pursuant to Mr. Tuthill's letter of August 3, 2005. Substantial effort has gone into its preparation and we hope it will be helpful.

Finally, we again express thanks to the Department and especially Mr. Miller for the time and effort devoted to this matter since March of this year. We look forward to continued effort by IDWR to accomplish the additional improvements and refinement and to ensure the proper operation of the Water District 34 functions.

Yours very truly,



Kent W. Foster

Enclosures

C: David R. Tuthill, Jr., P.E. Water Management Division Administrator Tim Luke Nick Miller Eastern Region Bob Duke, Watermaster Loy Pehrson Lin Hintze Logan Williams Keith Hill Preston Bell Alvin Crawford Jay Jensen	Bob Waddoups Eric Aikele Young Harvey Walker Seth Beal Keith Waddoups Darrell McDonald Mitchell Sorensen Charlie Huggins Richard Reynolds Dean Anderson Joel Anderson Kent Harwood Big Lost River Irrigation Dist
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for Water District 34

Nov. 13, 2006

After reviewing the 2006 WATER RIGHTS ACCOUNTING FOR THE BIG LOST RIVER summaries and making a comparative analysis to other data gathered by an independent observer, the petitioners recommend the request for a hearing to determine the need to remove the Watermaster for Water District 34 be withdrawn conditioned upon IDWR and Water District 34 staff's commitment to the continual efforts and implementation of the following tasks. These specific tasks and concepts are outlined below as requested and referenced in David R. Tuthill, Jr.'s letter, dated Aug. 3, 2006.

TASK 1

Commencing with the 2007 year, each and every reading of a point of diversion from the public water resource requiring a measuring device which is used for gathering data relating to the regulation of water supplies will also include the actual staff gauge reading at such sites. The watermaster, assistants, and deputies gathering field notes, data, and logs will regularly and accurately record both the staff reading and flow computation at each reading site.

TASK 2

Each daily summary log for diversion (canal) headings will show the aggregated rate of flow and the portions of that flow rate attributed to natural flows, rotation credits, storage allocations, recharge flows, additional flows (sometimes called "free or excess water"), and ground water injections whenever such flows are being diverted and commingled.

TASK 3

IDWR staff administrators will continue to conduct random verification monitoring of diversion sites with enough frequency to ensure accurate measurement records, as well as instruct and assist the watermaster, conveyance entity, or private party in making any needed corrections to diversion sites, reading calibrations, and reporting methodology. In the absence of IDWR staff conducting such monitoring, IDWR will authorize independent observers access to all needed diversion sites upon request from concerned water users.

TASK 4

IDWR will schedule an end of season public meeting for purposes of reviewing regulatory and measuring reports for Water District 34, and any corrective improvements taken in the current year and/or any recommendations to be taken in the ensuing season.

TASK 5

IDWR will provide additional guidelines and instructions to Water District 34 as needed to ensure reporting transparency and proper compliance with partial decrees and administrative rules.

Example: IDWR will add to the water rights accounting format column(s) accounting for the cumulative annual volume accrual limits regarding storage rights of the Mackay Reservoir consistent with IDWR's memorandum, Appendix to *Water District 34 Guidelines for Operation* Document, dated Aug. 3, 2006.

Example: IDWR will add guidelines, instructions and accounting format describing the operation of Rule 40.03.b following the resolution of pending litigation.

TASK 6

IDWR will provide sufficient guidance and oversight to Water District 34 elections to ensure that proper assessments and subsequent voting credentials are established prior to the March 2007 annual meeting. These assessments and credentials will accurately reflect the amount of water diverted from the public resource and used at the permissible place of use for every water type or class (natural flows, rotation credits, storage water supplies held by BLRID, additional flows as described in Rule 40.06, and ground water). Voting procedures will be in compliance with statutory requirements.