

John A. Rosholt
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
Twin Falls, Idaho 83301
Telephone: (208) 733-0700
Fax: (208) 735-2444
ISB #1037

RECEIVED
JUL 23 2004
DEPARTMENT OF
WATER RESOURCES

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF)	
DISTRIBUTION OF WATER)	
WATER RIGHT NOS 34-3724A,)	
34-372B AND 34-690B)	PETITION FOR
)	RECONSIDERATION
_____)	

COMES NOW Norman K. Sowards (Petitioner), and through his attorneys Barker, Rosholt and Simpson LLP, and states:

I.

He is the holder of surface water rights and groundwater rights in the Lost River Basin of Idaho, as shown-on Exhibit A hereto.

II.

On May 11, 2004, Petitioner in writing timely requested mitigation (Exhibit B hereto) in accordance with Rule 50, of the Water Distribution Rules of Water District 34 (Exhibit C hereto) for his 1887 natural flow rights in the Big Lost right appurtenant to lands below the Mackay Reservoir.

III.

Petitioner has not had his Lost River flow entitlements mitigated during the irrigation season of 2004. By letter dated June 25, 2004, (Exhibit D) Petitioner was advised by Idaho Department of Water Resources (IDWR) that his 1887 right “would have been delivered a maximum of nine days;” that no mitigation plan as included at rule 50.04 c. (Exhibit E) had been forthcoming; and the Petitioner could present a call against junior groundwater acres pursuant to Rule 40 of the Conjunctive Management Rules (IDAPA 37.03.11.40). Petitioner has made no such call.

IV.

A July 12, 2004, letter from the IDWR was received by Petitioner (Exhibit F) together with an “Order” (Exhibit G) announcing a curtailment of all groundwater well pumping as of July 22, 2004 if a sufficient mitigation plan had not been approved. Petitioner had previously advised the Director of IDWR by letter (Exhibit H) of his concern that the calculation of the quantity of mitigation required in Rule 50 of the Basin 34 Administration Rules had not been conducted, and of his disappointment that the Department had not prioritized Basin 34 water issues.

WHEREFORE Petitioner prays as follows:

1. That the Director reconsider Petitioner’s entitlement of nine days of water pursuant to his request in accordance with the Basin 34 Administrative Rules, and if not such lack of action appears arbitrary and capricious and a taking of Petitioners 1887 entitlement without due process of law.
2. Whether the Director was required to revisit the estimate of depletion as set out in Rule 50.04c. as stated in the Basin 34 Administrative Rules.

3. That the Director be required to calculate the appropriate amount of the 6,110 afy mitigation water required to be mitigated by each of the junior ground water rights.
4. That the Director reevaluate the circumstances since the July 12, 2004 Order since rains have increased the Lost River Flows and the holders of rights 34-372A, 34-372B and 34-690B are presently receiving their entitlements.
5. For such other relief as appears appropriate.

DATED this 22nd day of July, 2004.

Attorney for Petitioner

BARKER ROSHOLT & SIMPSON LLP

By: John A. Rosholt
John A. Rosholt

Exhibit
A

Sowards Water Rights

<u>Right No.</u>	<u>Source</u>	<u>Priority</u>	<u>Amount CFS</u>
34-10868A	Champagne Creek	08/28/1916	0.04
34-10868B	Hammond Spring Creek	08/28/1916	0.04
34-10867	Groundwater	04/01/1984	0.04
34-621B	Big Lost River	01/01/1892	0.80
34-666	Big Lost River	06/01/1887	3.20
34-10872	Big Lost River	06/01/1896	2.40
34-2302	Groundwater	02/28/1953	3.14
34-7228	Groundwater	05/03/1979	0.98
34-2450	East Fork Big Lost River	03/11/1963	0.80
34-10869	Groundwater	03/01/1989	0.04
34-2422	Groundwater	06/09/1961	2.40
34-10871	Groundwater	06/15/1980	0.20

Exhibit
B

Watermaster, District 34
Big Lost River Irrigation District
Mackay, Idaho
83251

This letter is to confirm that, in conjunction with the
ordering of my irrigation water on this date, May 11, 2004,
I hereby call for mitigation in accordance with Rule
50, CONJUNCTIVE ADMINISTRATION OF GROUND
AND SURFACE WATER RIGHTS, of the Water
Distribution Rules-Water District 34.

A handwritten signature in black ink, appearing to read 'N. K. Sowards', with a long horizontal flourish extending to the right.

N. K. Sowards
3212 W., 3000 N.
Moore, Id. 83255

Exhibit
C

07. **Mackay Dam Minimum By-Pass.** Mackay Dam and Reservoir shall be operated to maintain a minimum flow of fifty (50) CFS at the 2-B gage. (10-26-94)

08. **Canal Or Lateral Delivery.** In the event a water user feels inappropriate delivery of natural flow water is occurring on any lateral or canal, the water user can request the watermaster to investigate. In the event the watermaster determines that delivery of natural flow water rights within a lateral or canal is being improperly conducted he shall: (10-26-94)

a. Notify the ditch rider and the water delivery entity of the results of his investigation and coordinate efforts to make proper delivery of the natural flow. (10-26-94)

b. If the situation has not been sufficiently resolved within twenty-four (24) hours the watermaster will notify the director who may take all actions authorized by law to remedy the situation. (10-26-94)

041. -- 044. (RESERVED).

045. **ADMINISTRATION OF GROUND WATER RIGHTS (Rule 45).**

Administration of ground 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. Should curtailment of ground water rights become necessary to protect a senior ground water right(s), administration will be based upon reasonable pumping levels and the prior appropriation doctrine as required by law. (10-26-94)

046. -- 049. (RESERVED).

050. **CONJUNCTIVE ADMINISTRATION OF GROUND AND SURFACE WATER RIGHTS (Rule 50).**

01. **Conjunctive Administration - Exceptions.** All ground water rights shall be administered conjunctively as part of the Big Lost River and tributaries unless the ground water user 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. An exception to conjunctive administration in Water District 34 exists for those ground water rights in the list of water rights containing a remark noting that the right will be administered as separate from the Big Lost River and its tributaries. (10-26-94)

02. **Water Rights Not Subject To Administration.** Small domestic and stock water rights from ground water are not subject to administration at this time; however, these rights may be made subject to administration in the future to provide water to senior water rights from the water system. (10-26-94)

03. **General Rule.** Data currently available to IDWR shows ground water rights that are to be administered conjunctively with surface water deplete the flows of the Big Lost River downstream from Mackay Dam. Surface water users with water rights from the Big Lost River with points of diversion downstream from Mackay Dam are not required to seek curtailment of or mitigation by junior ground water rights and may develop water rights to supplement their Big Lost River water rights as provided by law. (10-26-94)

04. **Mitigation/Augmentation.** Water users with water rights whose source is Big Lost River with their point of diversion downstream from Mackay Dam who seek to have the water supply for their water right augmented to provide for their water right the water supply that would have been available for diversion absent the diversion of ground water under junior water rights shall request mitigation pursuant to this rule. Water users who seek such mitigation from ground water users must notify the watermaster at the time those water users make their initial request to the watermaster for delivery of their water right of their desire for mitigation. Mitigation of the effects of ground water diversion, when requested, will occur as more fully described below. (10-26-94)

a. Mitigation will not occur prior to May 1 or after October 15 of any year. (10-26-94)

b. Mitigation will be available to water rights with 1905 and earlier priority dates. (10-26-94)

c. Water rights will be eligible to receive mitigation through augmented natural flow water supply

based upon a river depletion due to ground water diversions currently estimated to be thirteen percent (13%) of the average annual diversion from wells subject to conjunctive administration currently estimated to be forty-seven thousand (47,000) AFY or a depletion of six thousand one hundred ten (6,110) AFY. The estimated percentage of depletion and annual volume of diversion from wells will be reviewed annually by the director and modified as data becomes available to refine these estimates. Any revised estimate of depletion or annual diversion shall be presented to the water users at the annual meeting of Water District 34 prior to adoption of the values by order of the director.

(10-26-94)

i. Natural flow will be assumed to be augmented by one-third (1/3) of the depletion during the first one-half (1/2) of the period of time that any 1905 or earlier water right being called for can not be filled by the natural flow through October 15 of each year. Natural flow will be assumed to be augmented by two-thirds (2/3) of the depletion during the second one half (1/2) of this period each year.

(10-26-94)

ii. Water users who have requested mitigation and who have water rights being called for that could be filled by augmentation described in Rule Subsection 050.04.c.i shall be provided with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule Subsection 050.04.c.i., whichever is less.

(10-26-94)

iii. Augmentation of natural flow for purposes of mitigation may be accomplished by making additional water available for diversion from the Big Lost River, including increased river flows resulting from recharge efforts approved by the director, or by adding water to canals or laterals.

(10-26-94)

iv. In any year in which the ground water users believe the annual diversion from ground water for the year will be significantly less than the estimated annual diversion from ground water described above, the ground water users may present their evidence of the anticipated diversions to the director by May 1 of the year along with a request to modify the estimated annual diversion for the year. Upon a determination by the director, based upon the information presented by the ground water users, that the annual diversion from ground water for the year being considered will be less than the annual average, the director will set an estimated ground water diversion for the year to be used for conjunctive administration as described in this rule.

(10-26-94)

d. Water District 34 is authorized to acquire, through the watermaster, water supplies necessary to augment natural flow for mitigation purposes as described in this rule. The watermaster will add the cost of acquiring the mitigation water to the annual assessment of ground water users subject to conjunctive administration, who do not provide separate augmentation pursuant to Rule Subsection 050.04.c.iii. or separate mitigation pursuant to a plan approved as provided by Rule Subsection 050.04.e., in the same proportion as each ground water user is assessed for the costs of the water district relative to all other ground water users. Ground water users who fail to pay the assessed costs for acquiring mitigation water shall be penalized in the same manner as any other water user failing to pay any water district assessment.

(10-26-94)

e. Junior ground water users may submit an alternative mitigation plan(s), which identifies actions and measures to prevent or compensate for impacts of diversions by the junior ground water users, to the director for consideration pursuant to Rule 43 of the "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37, Title 03, Chapter 11.

(10-26-94)

05. Direct Interference. This rule does not prevent a senior surface water user from seeking curtailment and/or damages from a junior ground water user when the senior surface water user can show direct identifiable impact on the water supply for the senior water right as a result of the diversion of water pursuant to the junior ground water right.

(10-26-94)

051. -- 054. (RESERVED).

055. WATER USAGE (Rule 55).

01. Firefighting Purposes.

(10-26-94)

a. Firefighting purposes is an alternate use to which any water right may be put, and firefighting is recognized as a lawful use of water with or without a water right.

(10-26-94)

Exhibit
D



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

June 25, 2004

N K Sowards
3212 W 300 N
Moore, ID 83255

Re: Mitigation Request for Water Rights 34-621B, 34-666, and 34-10872

Dear Mr. Sowards,

On June 1, 2004, the Water District 34 advisory committee voted to support a plan for providing mitigation to senior priority water rights whose source is the Big Lost River and whose owners had requested mitigation pursuant to the Water District 34 Water Distribution Rules (IDAPA 37.03.12.050). You had submitted a mitigation request for the above referenced water rights pursuant to these rules. The advisory committee minutes that IDWR received for the June 1st meeting are not specific as to which water rights the committee voted to provide mitigation, but a summary of the meeting submitted to IDWR on June 2, 2004 by the water district watermaster clearly indicates that the committee discussion and vote was limited to the 1883 priority water rights owned by Jack A Jensen, L Vaughn Jensen, and Jay V Jensen ("Jensen"). A second advisory committee meeting was held on June 3, 2004 that confirmed the committee's vote of June 1st. IDWR did not receive minutes of this latter meeting but it is our understanding that the discussion and vote was again limited to the 1883 priority rights owned by Jensen. Your rights were not considered for direct mitigation because the priority date of your rights are relatively junior, and because little or no water would have been delivered to these more junior priority rights given present drought conditions and absent ground water development. IDWR reviewed some historical water district delivery records from drought years similar to 2004 and prior to significant ground water development, and estimated that your 1887 priority right would have been delivered a maximum of nine days. This estimate may be liberal given that 2004 is the fifth consecutive year of drought in the Big Lost River area.

On June 23, 2004, the Idaho Department of Water Resources ("IDWR") received a written request from the Watermaster of Water District 34 to schedule a special meeting of the water district pursuant to Section 42-605(11), Idaho Code. The watermaster stated that the purpose of the meeting is to "address the concerns of the water users in opposition of the mitigation request for water rights 34-372A, 34-372B, and 34-690B, owned by Jack A Jensen, L Vaughn Jensen, and Jay V Jensen." The watermaster's letter advised that a meeting was held by water users on June 22, 2004, and that a majority of the users present at that meeting voted to rescind the water district advisory committee decision of June 1, 2004 to provide mitigation for the above referenced water rights. The letter further advised that a majority of the users present voted to support a request that the watermaster call for a special water district meeting.

The purpose of this letter is to formally advise you that IDWR has received the request from the watermaster calling for a special water district meeting to vote on mitigation. We also wish to advise you that as of this date, IDWR has not received any mitigation plan from the watermaster on behalf of

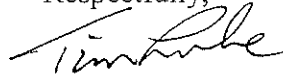
the water district. Given the request for the special meeting, IDWR does not anticipate that the water district will submit a mitigation plan, which is an option available under the Water District 34 Water Distribution Rules.

IDWR will provide notice of a special meeting in accordance with Section 42-605(11), Idaho Code. The meeting cannot be held until 30 days after the notice is sent. IDWR is waiting on information from the water district regarding the time and location of the meeting.

The Water District 34 Water Distribution Rules allow several options of mitigation for holders of junior ground water rights when a mitigation request is made, but the rules do not require that junior ground water rights be curtailed if the water district or junior priority ground water users do not provide mitigation. Regulatory relief however may be provided pursuant to the statewide Rules for Conjunctive Management of Surface and Ground Water Resources (IDAPA 37.03.11). Specifically, a senior surface water right holder can file a delivery call against holders of junior priority ground water rights in accordance with Rule 40 of the Conjunctive Management Rules (IDAPA 37.03.11.40).

Please contact me directly at (208) 327-7864 if you have questions concerning this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Tim Luke", written over a horizontal line.

Tim Luke

Manager, Water Distribution Section

Cc: Bob Duke, Watermaster, Water District 34
IDWR Eastern Region
Seth Beal, Chairman, Water District 34 Advisory Committee

Exhibit
E

based upon a river depletion due to ground water diversions currently estimated to be thirteen percent (13%) of the average annual diversion from wells subject to conjunctive administration currently estimated to be forty-seven thousand (47,000) AFY or a depletion of six thousand one hundred ten (6,110) AFY. The estimated percentage of depletion and annual volume of diversion from wells will be reviewed annually by the director and modified as data becomes available to refine these estimates. Any revised estimate of depletion or annual diversion shall be presented to the water users at the annual meeting of Water District 34 prior to adoption of the values by order of the director.

(10-26-94)

i. Natural flow will be assumed to be augmented by one-third (1/3) of the depletion during the first one-half (1/2) of the period of time that any 1905 or earlier water right being called for can not be filled by the natural flow through October 15 of each year. Natural flow will be assumed to be augmented by two-thirds (2/3) of the depletion during the second one half (1/2) of this period each year.

(10-26-94)

ii. Water users who have requested mitigation and who have water rights being called for that could be filled by augmentation described in Rule Subsection 050.04.c.i shall be provided with water by augmenting the natural flow to the extent of their water right or the amount of water described in Rule Subsection 050.04.c.i., whichever is less.

(10-26-94)

iii. Augmentation of natural flow for purposes of mitigation may be accomplished by making additional water available for diversion from the Big Lost River, including increased river flows resulting from recharge efforts approved by the director, or by adding water to canals or laterals.

(10-26-94)

iv. In any year in which the ground water users believe the annual diversion from ground water for the year will be significantly less than the estimated annual diversion from ground water described above, the ground water users may present their evidence of the anticipated diversions to the director by May 1 of the year along with a request to modify the estimated annual diversion for the year. Upon a determination by the director, based upon the information presented by the ground water users, that the annual diversion from ground water for the year being considered will be less than the annual average, the director will set an estimated ground water diversion for the year to be used for conjunctive administration as described in this rule.

(10-26-94)

d. Water District 34 is authorized to acquire, through the watermaster, water supplies necessary to augment natural flow for mitigation purposes as described in this rule. The watermaster will add the cost of acquiring the mitigation water to the annual assessment of ground water users subject to conjunctive administration, who do not provide separate augmentation pursuant to Rule Subsection 050.04.c.iii. or separate mitigation pursuant to a plan approved as provided by Rule Subsection 050.04.e., in the same proportion as each ground water user is assessed for the costs of the water district relative to all other ground water users. Ground water users who fail to pay the assessed costs for acquiring mitigation water shall be penalized in the same manner as any other water user failing to pay any water district assessment.

(10-26-94)

e. Junior ground water users may submit an alternative mitigation plan(s), which identifies actions and measures to prevent or compensate for impacts of diversions by the junior ground water users, to the director for consideration pursuant to Rule 43 of the "Rules for Conjunctive Management of Surface and Ground Water Resources," IDAPA 37, Title 03, Chapter 11.

(10-26-94)

05. Direct Interference. This rule does not prevent a senior surface water user from seeking curtailment and/or damages from a junior ground water user when the senior surface water user can show direct identifiable impact on the water supply for the senior water right as a result of the diversion of water pursuant to the junior ground water right.

(10-26-94)

051. -- 054. (RESERVED).

055. WATER USAGE (Rule 55).

01. Firefighting Purposes.

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a. Firefighting purposes is an alternate use to which any water right may be put, and firefighting is recognized as a lawful use of water with or without a water right.

(10-26-94)

Exhibit

F



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

July 12, 2004

**Re: Mitigation for/Curtailment of Diversion of Ground Water Rights with Priority Dates
Junior to July 30, 1883, Located in Water District 34, Big Lost River**

Dear Water Right Holder:

The records of the Idaho Department of Water Resources ("IDWR") and Water District No. 34 indicate that you are the holder of one or more consumptive ground water rights with a priority date that is junior to June 30, 1883. On May 13, 2004, the Director of IDWR notified you that you were required to provide mitigation to senior priority ground water right holders in Water District No. 34 according to the Water Distribution Rules – Water District 34. The notice stated that an acceptable mitigation plan had to be submitted to IDWR prior to June 4, 2004. An acceptable plan was not submitted.

Enclosed is an order requiring that you provide mitigation on or before July 22, 2004 or cease and desist diversion of ground water under your ground water right. The order also directs the watermaster of Water District No. 34 to prevent the diversion of ground water from wells described as points of diversion by junior priority ground water rights. This order affects consumptive ground water rights bearing priority dates junior to June 30, 1883 for irrigation, commercial, industrial, municipal and other uses, including the irrigation of non-agricultural lands in excess of one-half acre. Small domestic and stockwater uses satisfying the criteria of Idaho Code § 42-111 and Idaho Code § 42-1401A(11) are not required to mitigate or cease and desist.

The above referenced order was issued in response to a call for delivery of water rights held by Jay V. Jensen, Jack A. Jensen, and L. Vaughn Jensen ("Jensens"). Jensens own water rights describing the Big Lost River as a source and bearing priority dates of June 1 and June 30, 1883. The Director of IDWR determined that the Water Distribution Rules – Water District 34 and the Snake River Basin Adjudication established that ground water in the Big Lost River Basin must be administered conjunctively with the flows of the Big Lost River and its tributaries. The Director also determined that previous studies establishing a hydraulic relationship were incorporated into the Water Distribution Rules – Basin 34 and that the water distribution rules establish that pumping by junior ground water right holders establishes material injury to surface water users. Finally, the Director determined that the water distribution rules adopted a mitigation plan as described in the Rules for Conjunctive Management of Surface and Ground Water Resources, and that the water right holders of junior priority water rights must adhere to the provisions of the plan or have their diversions of water curtailed.

Water District No. 34 Water Right Holder
July 12, 2004
Page 2

Holders of consumptive ground water rights in Water District No. 34 that are junior in priority to June 30, 1883 must add 6,110 acre feet of water to the flow of the Big Lost River to make up, or mitigate, for depletions to the Big Lost River caused by their ground water diversions. Alternative mitigation plans can also be submitted by Water District No. 34 or by individual water users. A conceptual plan submitted by the Advisory Committee of Water District No. 34. Any mitigation plan must be approved by IDWR and operational on or before July 22, 2004.

Unless you are a participant in a mitigation plan implemented by a larger group or unless you have sought and implemented a mitigation plan approved by IDWR, on July 23, 2004, you must cease and desist diverting water from your well described as a point of diversion by your junior priority water right. The water master of water district 34 will insure that you cannot divert water during the 2004 irrigation season until a mitigation plan is in place.

If you have questions concerning the order and this correspondence, please contact the Water District No.34 office, the IDWR Eastern Regional office in Idaho Falls at 208-525-7161, or contact the IDWR state office at 208-327-7900.

Sincerely,



Gary Spackman
Water Allocations Bureau Chief

Exhibit
G

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF DISTRIBUTION OF)
WATER TO WATER RIGHT NOS. 34-372A,)
34-372B, AND 34-690B)
_____)

ORDER

This matter comes before the Director of the Department of Water Resources ("Director" or "Department") as a result of a Petition for Delivery Call received by the Department on June 28, 2004. The petition was filed by Jay V. Jensen, Jack A. Jensen, and L. Vaughn Jensen ("Jensens"). The petition seeks administration of ground water rights and surface water rights within Basin 34 (more precisely within Water District No. 34, Big Lost River). In particular, the petition seeks the distribution of water under the Department's Conjunctive Management Rules to the early priority surface water rights held by Jensens.

At the time Jensens initially requested that the watermaster distribute water to their water rights in the spring of 2004, Jensens also requested augmentation of flows in the Big Lost River to mitigate for the depletions to flows in the river caused by ground water pumping. The rules for administration and distribution of water rights within Water District No. 34, Big Lost River (IDAPA 37.03.12), require that the request for mitigation be made to the watermaster at the time delivery of the water rights is requested. The request for mitigation has not been satisfied, prompting the Petition for Delivery Call.

FINDINGS OF FACT

Relationship Between Ground Water Pumping and Big Lost River Flows

1. On May 27, 1992, the Director submitted a report to the Snake River Basin Adjudication (SRBA) District Court recommending the water rights having points of diversion located in the Big Lost River Basin ("Basin 34"). The report recommended a general provision that ground water and surface water in Basin 34 should be managed as hydraulically connected sources. Based on the Department's recommendations, almost all of the water rights have been decreed by the SRBA Court. On December 18, 1992, the SRBA Court issued a one-year order of interim administration for the 1993 irrigation season requiring that the water rights be administered based on recommendations of the Director and partial decrees issued by the court. The SRBA Court renewed the one-year order for the 1994 and 1995 irrigation seasons. On December 20, 1995, the SRBA Court issued a Permanent Order for Interim Administration in Reporting Area 1 (Basin 34).

2. In furtherance of the order of interim administration, on February 23, 1993, the Department ordered that Water District No. 34, Big Lost River, should be expanded to include

senior priority surface water right is prevented from making a delivery call for curtailment of pumping of any well under a junior priority ground water right if the ground water right is covered by an approved and **effectively operating** mitigation plan. (Emphasis added). IDAPA 37.03.11.042.02.

21. Rule 40.02.b of the Conjunctive Management Rules requires the watermaster of Water District No. 34 to "regulate the diversions and use of ground water in accordance with the rights thereto, approved mitigation plans and orders issued by the Director." IDAPA 37.03.11.040.02.b.

22. The Water Distribution Rules for Water District No. 34 establish an approved mitigation plan. The plan requires that, upon request to the watermaster for mitigation by a senior water right holder, the junior water right holders must provide 6,110 acre feet of water to augment the flows of the Big Lost River. The junior water right holders did not provide the mitigation water as required by the mitigation plan. Although there is an approved mitigation plan, the mitigation plan is not "effectively operating."

23. Rule 40.05 of the Conjunctive Management Rules states that the Director shall immediately issue cease and desist orders to junior water right holders and direct the watermaster to shut off diversions of ground water to the junior water right holders who are not following the provisions of an approved mitigation plan. Rule 40.05 also states that the Director may order other actions according to the mitigation plan.

ORDER

In response to the water delivery call made by Jensens, and for the reasons stated in the foregoing Findings of Fact and Conclusions of Law, the Director orders as follows:

IT IS HEREBY ORDERED that the holders of ground water rights bearing priority dates later than June 30, 1883, in Water District No. 34 must immediately provide a collective total of 6,110 acre-feet of storage water to augment the flow of the Big Lost River or implement an alternative mitigation plan that provides an equal amount of replacement water to the Jensen water rights. The conceptual mitigation plan previously adopted by the advisory committee for Water District No. 34 will mitigate for the depletions caused by ground water diversions under junior priority rights if the plan is implemented and executed.

IT IS FURTHER ORDERED that, if an effective mitigation plan is not operating on or before July 22, 2004, all holders of consumptive ground water rights in Water District No. 34 that are junior in priority to June 30, 1883, including consumptive ground water rights for agricultural, commercial, industrial, and municipal or other uses, other than small domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11), shall immediately cease and desist diverting ground water until a mitigation plan is approved by the Director and is fully operational.

IT IS FURTHER ORDERED that an individual junior ground water right holder may propose its own mitigation plan and if after review, approval, and full implementation, an individual water right holder mitigates fully for depletions caused by its individual diversion of ground water under a junior priority right, the individual water right holder may continue to divert ground water out of priority.

IT IS FURTHER ORDERED that beginning July 23, 2004, the watermaster shall curtail diversions of ground water under all junior priority ground water rights that are not covered by an approved and effectively operating mitigation plan, other than small domestic and stockwater rights as defined in Idaho Code §§ 42-111 and 42-1401A(11).

IT IS FURTHER ORDERED that any person aggrieved by this decision shall be entitled to a hearing before the Director to contest the action taken provided the person files with the Director, within fifteen (15) days after receipt of written notice of this order or receipt of actual notice, a written petition stating the grounds for contesting the action and requesting a hearing. Any hearing conducted shall be in accordance with the provisions of chapter 52, title 67, Idaho Code, and the Rules of Procedure of the Department, IDAPA 37.01.01. Judicial review of any final order of the Director issued following the hearing may be had pursuant to Section 42-1701A(4), Idaho Code.

DATED this 12th day of July, 2004.



KARL J. DREHER
Director

Exhibit
H

Karl Dreher, Director
IDWR
1301 N. Orchard
Boise, Idaho 83706

Dear Mr. Dreher,

The Big Lost River Coalition for water wishes to thank you for the time you spent meeting with us and listening to our concerns about the water situation in the Big Lost River Basin. We also wish to thank your staff for the hospitality which they afforded us.

In the meeting I mentioned that the data showing the relationship between the snow water equivalent and the flow into the Mackay reservoir has changed in that the last several years the flow into the reservoir has no longer kept pace with the snow water equivalent. In fact the flow into the reservoir has deteriorated to only about half the snow water equivalent (expressed in percent of average) whereas the last 45 years it tracked very closely the SWE.

Obviously the water is going somewhere. We feel your explanation that it is going "into the ground" is not a satisfactory one. The only reasonable explanation is that there has been a change in the amount of water being intercepted before it reaches the dam. We therefore request that you investigate the situation and determine when and where the water is going.

With the irrigation season just ended we are concerned about the amount of water that may be wasted in attempting to fill the small stock water allotments. With respect to your rules or practices, is there any limit applied to this? Might it be better to invoke a "futile call" and leave the water in the reservoir-river system. You have been willing to invoke a "futile call" when difficulty is encountered in delivering water rights on the lower river.

During our meeting we discussed briefly article 50 of the District 34 rules concerning CONJUNCTIVE ADMINISTRATION OF GROUND AND SURFACE WATER RIGHTS. I am not clear as to the technical or scientific basis for the 13 percent of the average annual diversion from wells. The article also requires an annual review of these numbers. Has an annual review been made and if so, what is the current number of AFY that would apply?

At the meeting we also discussed the need for an audit or oversight function in the basin to assure that water allotments are being strictly adhered to. You stated that you didn't have the funding to perform such a function. Resource allocation always reflects established priorities. We urge you to reconsider the priority which is being given to District 34 water matters.

Sincerely,

N. K. Sowards
Big Lost River Coalition For Water